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INTRODUCTORY NOTE TO "SITUATION IN PALESTINE" (INT'L CRIM. CT. PRE-TRIAL CHAMBER)

BY ANNE BAYEFSKY*

[May 7, 2021]

Introduction

On February 5, 2021, the Pre-Trial Chamber (PTC) of the International Criminal Court (ICC) delivered its decision on territorial jurisdiction in the "Situation in Palestine."[1] The result reflects the controversy surrounding the process and the merits: a divided bench, with a Minority decision three times the length of that of the Majority. The outcome marked the culmination of sustained attempts by Palestinians and their supporters over more than two decades to engage the ICC, beginning with contentious negotiations preceding the vote on the Rome Statute at the Rome Conference and including three preliminary examinations, the third of which concluded with this decision. The Rome Statute, adopted by vote on July 17, 1998, included elements that negotiators acknowledged had never appeared before in international law,[2] and were directed at an Israeli target.[3] For this reason, in large part Israel, which had long supported the principle of an international criminal court,[4] chose not to become a state party to the Statute[5] or to participate in the proceedings.

The Prosecutor did not require the Court's approval to open an investigation in light of the Palestinian referral,[6] but requested a ruling on the Court's territorial jurisdiction in order to "ensure certainty on an issue likely to arise at a later stage of the proceedings."[7] The proceedings attracted the unusual participation of other states parties and a total of 54 briefs.[8] On February 5, 2021, the PTC Majority ruled in favor of the Court's territorial jurisdiction and, further, delineated the territory. On March 3, 2021, the Prosecutor opened an investigation.[9]

Background

The first ICC situation initiated by the Palestinians spanned from 2009 to 2012 and concerned acts alleged to have been committed by Israel from July 1, 2002, the date the Rome Statute came into force.[10] The second Palestinian-related situation engaged the ICC for seven years from 2013 to 2020 and concerned the death of ten persons in the Gaza "flotilla" incident of May 31, 2010.[11] The third, and the subject of this decision, began in January 2015 and relates to crimes said to have been committed from June 13, 2014. The date was selected by the "State of Palestine." Three Israeli teens were kidnapped and murdered by Palestinians on June 12, 2014.[12]

In January 2015, the "State of Palestine" filed a Declaration under Article 12(3) of the Rome Statute "for the purpose of identifying, prosecuting and judging authors and accomplices of crimes within the jurisdiction of the Court committed in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014."[13] It conveyed an instrument of accession which the UN Secretary-General deposited and in turn notified to states,[14] following which several formally objected.[15] The Prosecutor opened a preliminary examination into "the situation in Palestine."[16] In May 2018, the "State of Palestine" submitted a referral to the Court under Articles 13(a) and 14 of the Rome Statute, intended to cover "crimes falling within the jurisdiction of the International Criminal Court committed since 13 June 2014,[17] with no end date" and "in all parts of the territory of the State of Palestine."

On December 20, 2019, the Prosecutor declared that, as a result of her preliminary examination, she had a reasonable basis to believe war crimes had been committed by members of the Israel Defense Forces, by members of Hamas and Palestinian armed groups, and by members of the Israeli authorities.[18] Although the Prosecutor was in possession of multiple communications alleging war crimes by members of Palestinian authorities,[19] her "basis" to proceed made no mention of allegations of war crimes against members of, or officials from, the Palestinian Authority or the "State of Palestine."

The Pre-Trial Chamber's Decision

The Majority

The Majority reasoned that since the UN General Assembly had decided that Palestine was a "non-member observer state," it had the capacity to accede to the Rome Statute.[20] As it had done so, it was a state party.[21] And as a state

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party, it was *ipso facto* a state for the purposes of satisfying the territorial pre-condition to the exercise of the Court's jurisdiction.[22]

On the validity of Palestine's accession, as well as the nexus between accession and statehood, the General Assembly (and the Secretary-General as depositary simply relying thereon) had spoken.[23] Whether or not Palestine was a state under general international law was not relevant.[24] The Majority interpreted the Statute's text[25] and its object and purpose to require that territorial jurisdiction must follow from mere accession—that is, from becoming a state party.[26] It said that accession would otherwise be ineffective.[27]

According to the Majority, the territory over which the Court had criminal jurisdiction was defined by the General Assembly, in accord with the United Nations' understanding of the Palestinian right of self-determination.[28] This followed from the position that the Rome Statute must be interpreted in conformity with international human rights law, and self-determination is a human right.[29] The detailed content and meaning of the right of self-determination, including the range of impediments to its realization in this context and the responsible actors, were not examined. The right of self-determination in relation to other human rights and freedoms was not discussed. The right to self-determination of the Jewish people was not mentioned.

The Majority expressly refused to have recourse to the principles and rules of international law,[30] and concluded that legal commitments between the parties had no bearing on the Court's territorial jurisdiction.[31] Hence, there was no need to examine the delineation of Palestinian criminal jurisdiction in the Oslo Accords[32] in the context of an initiation of an investigation.[33]

THE MINORITY

The Minority agreed that the "State of Palestine" had acceded to the Rome Statute and was a state party but dissented on whether it was a state for the purposes of territorial jurisdiction, as well as the situation's territorial scope (if statehood were presumed). The Minority disagreed with the Majority's view that the Chamber had no competence to separate the question of accession from that of statehood for the purpose of territorial jurisdiction;[34] it had the "competence to decide its own competence."[35]

The Minority pointed to the Majority's misquotation of the Statute's text on preconditions to the exercise of jurisdiction and, hence, dissented from the Majority's leap from accession to statehood for the purposes of territorial jurisdiction that relied on that textual misstep.[36] The Minority also dissented on the question of whether accession would be ineffective if it did not confer territorial jurisdiction.[37]

The Minority undertook its own assessment of the elements of statehood under general international law and in the practice of international organizations, and found Palestinian statehood to be aspirational or emerging;[38] this was not affected by the fact that the United Nations adopted the nomenclature of the "State of Palestine," upon its request, following the adoption of General Assembly resolution 67/19.[39] The Minority produced two detailed annexes,[40] analyzing statements of leading Palestinians and resolutions and reports of the United Nations, including resolution 67/19,[41] to refute the Majority's "legal fiction, particularly as it relates to Palestine's statehood and territory."[42]

Questioning the legal value that the Majority had accorded to UN practice and sources,[43] the Minority also found that General Assembly pronouncements about people's rights did not constitute a state's proof of ownership of a specified territory.[44] The Rome Statute referred to the "State on the territory of which" the conduct occurred,[45] which meant the "territory of the State,"[46] and required state sovereignty.[47]

The Minority found that commitments made between the parties, such as the Oslo Accords, were not irrelevant, nor was their application inconsistent with the Statute.[48] The "State of Palestine" did not have the requisite criminal jurisdiction under the Oslo Accords[49] and the repartition of competences as between the (variably termed) Palestinian Authority/Palestine/State of Palestine and Israel are "settled in the Oslo Accords."[50]

Conclusion

Although the Prosecutor sought "certainty" on the issue of jurisdiction, the Majority failed to deliver it in several ways.[51] It emphasized that its conclusions related only to the initiation of an investigation phase, and jurisdictional objections could be raised at subsequent stages,[52] as could all the issues related to the Oslo Accords.[53]

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The Majority was cognizant of the likely criticism that the decision was driven by, and relied upon, political considerations that diminished the legal foundation of the Court's work and its stature. Hoping to preempt that charge, the Majority began by dismissing a justiciability dispute and artfully portrayed their reasoning as dealing with "legal issues … framed by the contours of the relevant law" and as avoiding "facts that are politically based or motivated."[54]

The Minority agreed that the Prosecutor's Request for a ruling on territorial jurisdiction had a legal answer but criticized the Majority for not providing one. The Minority said: "I find neither the Majority's approach nor its reasoning appropriate in answering the question before this Chamber, and in my view, they have no legal basis in the Rome Statute, and even less so, in public international law."[55] The strongly worded language suggests the legal legitimacy challenge arising from the "Situation in Palestine", affecting both the situation and the Court, has not been averted.

ENDNOTES

1 Situation in the State of Palestine, ICC-01/18-143 (Majority), ICC-01/18-143-Anx1 (Partly Dissenting Opinion of Judge Péter Kovács), ICC-01/18-143-Anx2 (Partly Separate Opinion of Judge Perrin de Brichambau), Decision on 'the Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine,' Pre-Trial Chamber I, International Criminal Court, (Feb. 5, 2021) [hereinafter Majority or Kovács].

2 Mahnoush H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AM. J. INT'L L. 22, 36 (1999); Philippe Kirsch & John T. Holmes, *The Rome Conference on an International Criminal Court: The Negotiating Process*, 93 AM. J. INT'L L. 2, 10, 11 n. 34 (1999). Arsanjani was the Secretary of the Committee of the Whole of the Rome Conference, and a Senior Legal Officer in the UN's Office of Legal Affairs.

3 DAVID SCHEFFER, ALL THE MISSING SOULS: A PERSONAL HISTORY OF THE WAR CRIMES TRIBUNALS 205 (2011); Herman von Hebel, *Article 8(2)(b)(viii)*, *in* THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 159 (Roy S. Lee ed., 2001); Herman von Hebel & Darryl Robinson, *Crimes Within the Jurisdiction of the Court*, *in* THE MAKING OF THE ROME STATUTE 113 (Roy S. Lee ed., 1999).

4 G.A. Res. 489(V), International Criminal Jurisdiction (Dec.12, 1950).

5 Statement by Judge Eli Nathan Head of the Delegation of Israel, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 9th Plenary Meeting (July 17, 1998), https://mfa.gov.il/MFA/AboutIsrael/State/Law/Pages/Judge%20Eli%20Nathan%20at%20UN%20Diplomatic%20Conference%20of%20Pl.aspx.

6 Rome Statute of the International Criminal Court, 2187 U.N.T. S. 90, Art. 53(1) [hereinafter Rome Statute].

7 Situation in the State of Palestine, ICC-01/18-12, Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine, [For procedural reasons, the original request dated Dec. 20, 2019 was refiled], (Jan. 22, 2020), ¶ 36 [hereinafter Prosecutor's Request].

8 Thirty-three from individuals and organizations granted permission to file (including the present author on behalf of the Touro Institute on Human Rights and the Holocaust), one from the ICC's Office of Public Counsel for Victims, one from the ICC's Office of Public Counsel for the Defence, seven from states (Australia, Austria, Brazil, Czech Republic, Germany, Hungary, Uganda), one from the Organization of Islamic Cooperation (OIC), one from the Arab League, nine from the representatives of victims, and one from the "State of Palestine." Subsequently, the PTC also requested and received additional information from the "State of Palestine" concerning the Oslo Accords; The "State of Palestine's" response to the Pre-Trial Chamber's Order requesting additional information, (June 4, 2020), https://www.icc-cpi.int/CourtRecords/CR2020_02277.PDF.

9 Statement of ICC Prosecutor, Fatou Bensouda, respecting an investigation of the Situation in Palestine, International Criminal Court (Mar. 3, 2021), https://www.icc-cpi.int/Pages/item.aspx?name=210303-prosecutor-statement-investigation-palestine.

10 ICC jurisdiction for "acts committed on the territory of Palestine since 1 July 2002" – ICC Prosecutor declaration, Office of the Prosecutor of the International Criminal Court (Apr. 3, 2012), https://www.icc-cpi.int/nr/rdonlyres/c6162bbf-feb9-4faf-afa9-836106d2694a/284387/situationinpalestine030412eng.pdf.

11 Referral of "the Union of the Comoros" under Articles 14 and 12(2)(a) of the Rome Statute arising from the May 31, 2010, Gaza Freedom Flotilla situation (May 14, 2013), https://www.icc-cpi.int/iccdocs/otp/Referral-from-Comoros.pdf; Decision on the Request for Leave to Appeal the "Decision on the 'Application for Judicial Review by the Government of the Comoros'," Decision by the Pre-Trial Chamber of the International Criminal Court, (Dec. 21, 2020), https://www.icc-cpi.int/CourtRecords/CR2020_07650.PDF.

12 Report of the detailed findings of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1, A/HRC/29/CRP.4 (June 23, 2015), ¶ 503, http://www.ohchr.org/Documents/HRBodies/HRCouncil/CoIGaza/A_HRC_CRP_4.doc; Noah Browning, *Senior Hamas official says group abducted Israeli teens*, REUTERS (Aug. 21, 2014), https://www.reuters.com/article/us-mideast-gaza-kidnapping/senior-hamas-official-says-group-abducted-israeli-teens-idUSKBN0GL0YQ20140821.

13 Palestine Article 12(3) Declaration Accepting the Jurisdiction of the International Criminal Court (Dec. 31, 2014), http://www.icc-cpi.int/iccdocs/PIDS/press/Palestine_A_12-3.pdf (filed Jan. 1, 2015).

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14 C.N.13.2015.TREATIES-XVIII.10 (Depositary Notification), Rome Statute of the International Criminal Court, Accession of State of Palestine, https://treaties.un.org/doc/Publication/CN/2015/CN.13.2015-Eng.pdf. The "State of Palestine" was said to have acceded to the Rome Statute on January 2, 2015, and the depositary notification was deposited and transmitted on January 6, 2015.

15 C.N.63.2015.TREATIES-XVIII.10 (Depositary Notification), Rome Statute of the International Criminal Court, Communication (Jan. 23, 2015), Israel, https://treaties.un.org/doc/Publication/CN/2015/CN.63.2015-Eng.pdf; C.N.64.2015.TREATIES-XVIII.10 (Depositary Notification), Rome Statute of the International Criminal Court, Communication (Jan. 23, 2015), United States, https://treaties.un.org/doc/Publication/CN/2015/CN.64.2015-Eng.pdf; C.N.57.2015.TREATIES-XVIII.10 (Depositary Notification), Rome Statute of the International Criminal Court, Communication (Jan. 23, 2015), Canada, https://treaties.un.org/doc/Publication/CN/2015/CN.57.2015-Eng.pdf.

16 The Prosecutor of the International Criminal Court, Fatou Bensouda, Opens a Preliminary Examination of the Situation in Palestine, International Criminal Court, (Jan. 16, 2015), https://www.icc-cpi.int/Pages/item.aspx?name=pr1083&ln=en.

17 Referral from the State of Palestine pursuant to articles 13(a) and 14 of the Rome Statute (May 22, 2018), https://www.icc-cpi.int/RelatedRecords/CR2018_02690.PDF.

18 Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine (Jan 22, 2020), ICC-01/18-12, https://www.icc-cpi.int/CourtRecords/CR2020_00161.PDF, together with Public Annex A, ICC-01/18-12-AnxA, https://www.icc-cpi.int/RelatedRecords/CR2020_00162.PDF, ¶¶ 94, 95. For procedural reasons, the original request dated December 20, 2019, was refiled on January 22, 2020.

19 From September 2014 to September 2018, the Israeli-based NGO, Shurat Hadin, filed ten communications with the OTP relating to, amongst others, Mahmoud Abbas (President of the Palestinian Authority), Majid Faraj (head of the Palestinian General Intelligence Agency), Jibril Rajoub (deputy secretary on the Central Committee of FATAH), and Rami Hamdallah (who served as Prime Minister and Minister of the Interior of the Palestinian Authority). Letter from Shurat Hadin to Head of the Independent Oversight Mechanism, International Criminal Court (Jan. 18, 2021), https://israellawcenter.org/wp-content/uploads/2021/05/letter-to-the-oversight-mechanism-final.pdf.

20 Majority, ¶ 98.

21 *Id.* ¶¶ 99–100.

22 *Id.* ¶¶ 102, 103, 109, 112.

23 *Id.* ¶ 108.

24 *Id.* ¶ 102, 103, 106, 111.

25 *Id.* ¶ 193.

26 *Id.* ¶ 111.

27 *Id.* ¶ 102, 106.

28 *Id.* ¶¶ 116–118.

29 *Id.* ¶¶ 119, 122, 123.

30 *Id.* ¶¶ 88, 110.

31 *Id.* ¶¶ 128–129.

32 The primary agreements included the following: the 1993 Declaration of Principles on Interim Self-Government Arrangements (DOP or Oslo I), the 1994 Gaza-Jericho Agreement, the 1995 Interim Agreement (Oslo II), the 1997 Hebron Protocol, the 1998 Wye River Memorandum and the 1999 Sharm el-Sheikh Memorandum, YORAM DINSTEIN, THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION 20 (2d ed. 2019) ¶ 54.

33 Majority, ¶ 129.

34 Kovács, ¶¶ 34, 36, 37, 49 ff.

35 *Id.* ¶¶ 48, 49, 50, 53.

36 *Id.* ¶ 61; *see also* ¶¶ 55–58.

37 *Id.* ¶¶ 67-71.

38 "a State *in statu nascendi,*" *Id.* ¶¶ 11,15, 267, 323.

39 Patricia O'Brien, Under-Secretary-General for Legal Affairs, Legal Counsel, Interoffice Memorandum, "Issues related to General Assembly resolution 67/19 on the status of Palestine to the United Nations," (Dec. 21, 2012), https://palestineun.org/wp-content/uploads/2013/08/012-UN-Memo-regarding-67-19.pdf.

40 Kovács, Annexes 1 and 2, pp. 155–163.

41 *Id.* ¶ 224ff.

42 *Id.* ¶ 261.

43 *Id.* ¶¶ 6–11, 93, 270.

44 *Id.* ¶¶ 279, 322.

45 Rome Statute, Art. 12(2)(a).

46 Kovács, ¶ 278.

47 *Id.* ¶¶ 271, 277–279.

48 *Id.* ¶¶ 348, 366.

49 *Id.* ¶¶ 370–371.

50 *Id.* ¶¶ 330, 372.

51 *Id.* ¶¶ 88, 91.

52 Majority, ¶ 131.

53 *Id.* ¶ 129.

54 *Id.* ¶ 56.

55 Kovács, ¶ 3.

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"SITUATION IN PALESTINE" (INT'L CRIM. CT. PRE-TRIAL CHAMBER)*

[May 7, 2021]

Cour Pénale Internationale

International Criminal Court

Original: English

No. **ICC-01/18**

Date: **5 February 2021**

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

URGENT

Public

Decision on the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine'

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

The Office of the Prosecutor

Fatou Bensouda

James Stewart

Counsel for the Defence

Legal Representatives of Victims

- Liesbeth Zegveld
- Fergal Gaynor and Nada Kiswanson van Hooydonk
- Bradley Parker and Khaled Quzmar
- Nitsana Darshan-Leitner
- Katherine Gallagher
- Raji Sourani, Chantal Meloni and Triestino Mariniello
- Dominique Cochain Assi
- Gilles Devers
- Steven Powles QC and Sahar Francis

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparations

The Office of Public Counsel for Victims

Paolina Massidda

Sarah Pellet

The Office of Public Counsel for the Defence

States Representatives

The competent authorities of the State of Palestine

Amici Curiae

- Professor John Quigley
- Guernica 37 International Justice Chambers
- The European Centre for Law and Justice
- Professor Hatem Bazian
- The Touro Institute on Human Rights and the Holocaust
- The Czech Republic
- The Israel Bar Association
- Professor Richard Falk
- The Organization of Islamic Cooperation
- The Lawfare Project et al.
- MyAQSA Foundation

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- Professor Eyal Benvenisti
- The Federal Republic of Germany
- Australia
- UK Lawyers for Israel et al.
- The Palestinian Bar Association
- Prof. Laurie Blank et al.
- The International Association of Jewish Lawyers and Jurists
- Professor Asem Khalil and Assistant Professor Halla Shoaibi
- Shurat Hadin – Israel Law Center
- Todd F. Buchwald and Stephen J. Rapp
- Intellectum Scientific Society
- The International Commission of Jurists
- Dr. Robert Heinsch and Dr. Giulia Pinzauti
- The Republic of Austria
- The International Association of Democratic Lawyers
- The Office of Public Counsel for the Defence
- The Honourable Professor Robert Badinter et al.
- The Palestinian Center for Human Rights et al.
- The Federative Republic of Brazil
- Professor Malcolm N Shaw
- Hungary
- Ambassador Dennis Ross
- The International Federation for Human Rights et al.
- Professor William Schabas
- International-Lawyers.org
- The League of Arab States
- Me Yael Vias Gvirsman
- The Popular Conference for Palestinians Abroad
- The Israel Forever Foundation
- Dr. Frank Romano
- Dr. Uri Weiss
- The Republic of Uganda

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PRE-TRIAL CHAMBER I of the International Criminal Court issues this Decision on the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine'.

I. PROCEDURAL HISTORY

1. On 1 January 2015, the State of Palestine ('Palestine') lodged a declaration under article 12(3) of the Rome Statute (the 'Rome Statute' or the 'Statute'), thereby accepting the jurisdiction of the Court over alleged crimes 'committed in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014'.[1]

2. On 2 January 2015, Palestine deposited its instrument of accession to the Statute with the Secretary-General of the United Nations (the 'United Nations Secretary-General') pursuant to article 125(2) of the Statute.[2]

3. On 22 May 2018, Palestine referred the *Situation in the State of Palestine* to the Prosecutor pursuant to articles 13(a) and 14 of the Statute.[3]

4. On 24 May 2018, the Presidency assigned the *Situation in the State of Palestine* to the Chamber (the '*Situation in Palestine*').[4]

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5. On 13 July 2018, the Chamber issued its 'Decision on Information and Outreach for the Victims of the Situation'.[5] The Registry subsequently submitted seven reports on its information and outreach activities in the Situation of Palestine.[6]

6. On 21 January 2020, the Chamber issued the 'Decision on the Prosecutor's Application for an extension of the page limit', thereby: (i) granting the Prosecutor's 'Application for extension of pages for request under article 19(3) of the Statute'; (ii) rejecting *in limine* the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine' (the 'Prosecutor's Initial Request'); (iii) inviting the Prosecutor to file a new request of no more than 110 pages, including any references to the 'Supplementary information to the Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine', together with two annexes containing two legal memoranda issued by the State of Israel on 20 December 2019 ('Israel' and the 'Supplementary Information'); and (iv) instructing the Registrar to strike from the record of the *Situation in Palestine* and withdraw from the Court's website the Prosecutor's Initial Request, the annex to this Request and the Supplementary Information (the '21 January 2020 Decision').[7]

7. On 22 January 2020, the Chamber received the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine' (the 'Prosecutor's Request').[8]

8. On 28 January 2020, the Chamber issued the 'Order setting the procedure and the schedule for the submission of observations',[9] thereby *inter alia* inviting: (i) Palestine, victims, and Israel to submit written observations on the question of jurisdiction set forth in paragraph 220 of the Prosecutor's Request by no later than 16 March 2020; and (ii) other States, organisations and/or persons to submit applications for leave to file such written observations by no later than 14 February 2020.[10]

9. On 20 February 2020, the Chamber issued the 'Decision on Applications for Leave to File Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence' (the '20 February 2020 Decision'),[11] thereby *inter alia*: (i) rejecting the 'Request for Leave to File a Submission Pursuant to Rule 103 of the Rules of Procedure and Evidence' on behalf of Ralph Wilde and Ata Hindi and the 'Request for Leave to File Submissions Pursuant to Rule 103' on behalf of Azril Mohd Amin; (ii) granting leave to file observations on the Prosecutor's Request to the remaining States, organisations and individuals having submitted applications to this effect and further ordering that such observations shall not exceed 30 pages and shall be submitted by no later than 16 March 2020; (iii) ordering the Prosecutor to submit a consolidated response to any observations on the Prosecutor's Request, which shall not exceed 75 pages and shall be submitted by no later than 30 March 2020; and (iv) finding that, having regard to the significant number of submissions to be submitted in the context of the present proceedings, it is not necessary to receive any further responses to the observations to be submitted by the *amici curiae* or any replies to the Prosecutor's consolidated response.[12]

10. On 11 March 2020, the Chamber issued the 'Decision on the "Appeal to the 'Decision on Applications for Leave to File Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence'"', thereby rejecting the appeal from the 20 February 2020 Decision on behalf of Ralph Wilde and Ata Hindi.[13]

11. On 16 March 2020, the Chamber received '[t]he State of Palestine's observations in relation to the request for a ruling on the Court's territorial jurisdiction in Palestine' (the 'Observations on behalf of Palestine').[14]

12. From 3 until 19 March 2020, the Chamber received observations on the Prosecutor's Request on behalf of the *amici curiae* authorised to participate in the proceedings by the 20 February 2020 Decision, namely: (i) Professor John Quigley;[15] (ii) the Czech Republic;[16] (iii) the European Centre for Law and Justice;[17] (iv) Professor William Schabas;[18] (v) the Palestinian Bar Association;[19] (vi) Professor Asem Khalil and Assistant Professor Halla Shoaibi;[20] (vii) Professor Hatem Bazian;[21] (viii) Professor Malcolm N Shaw;[22] (ix) the Republic of Austria;[23] (x) Professor Richard Falk;[24] (xi) MyAQSA Foundation;[25] (xii) Shurat Hadin – Israel Law Center;[26] (xiii) the Israel Bar Association;[27] (xiv) the Lawfare Project, the Institute for NGO Research, Palestinian Media Watch, and the Jerusalem Center for Public Affairs;[28] (xv) Todd F. Buchwald and Stephen J. Rapp;[29] (xvi) the Organization of Islamic Cooperation;[30] (xvii) the International Federation for Human Rights, No Peace Without Justice, Women's Initiatives for Gender Justice and REDRESS;[31] (xviii) Australia;[32] (xix) Me Yael Vias Gvirsman;[33] (xx) Hungary;[34] (xxi) the Office of Public Counsel for the Defence;[35] (xxii) Guernica 37 International Justice

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Chambers;[36] (xxiii) UK Lawyers for Israel, B'nai B'rith UK, the International Legal Forum, the Jerusalem Initiative and the Simon Wiesenthal Centre;[37] (xxiv) 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;[38] (xxv) Ambassador Dennis Ross;[39] (xxvi) Professor Eyal Benvenisti;[40] (xxvii) the Palestinian Center for Human Rights, Al-Haq Law in the Service of Mankind, Al-Mezan Center for Human Rights and Aldameer Association for Human Rights;[41] (xxviii) the Honourable Professor Robert Badinter, the Honourable Professor Irwin Cotler, Professor David Crane, Professor Jean-François Gaudreault-DesBiens, Lord David Pannick and Professor Guglielmo Verdirame;[42] (xxix) the International Association of Jewish Lawyers and Jurists;[43] (xxx) the Popular Conference for Palestinians Abroad;[44] (xxxi) the Touro Institute on Human Rights and the Holocaust;[45] (xxxii) the Federal Republic of Germany;[46] (xxxiii) International-Lawyers.org;[47] (xxxiv) the Federative Republic of Brazil;[48] (xxxv) Dr. Robert Heinsch and Dr. Giulia Pinzauti;[49] (xxxvi) the Israel Forever Foundation;[50] (xxxvii) Intellectum Scientific Society;[51] (xxxviii) Dr. Uri Weiss;[52] (xxxix) Dr. Frank Romano;[53] (xl) the International Commission of Jurists;[54] (xli) the International Association of Democratic Lawyers;[55] (xlii) the Republic of Uganda;[56] and (xliii) the League of Arab States.[57]

13. From 12 until 25 March 2020, the Chamber received the following observations on the Prosecutor's Request on behalf of various (groups of) victims: (i) 'The Khan al-Ahmar Victims' Observations';[58] (ii) 'Victims' observations on the Prosecutor's request for a ruling on the Court's territorial jurisdiction in Palestine';[59] (iii) 'Submissions on behalf of child victims and their families pursuant to article 19(3) of the statute';[60] (iv) 'Observations on the "Prosecutor request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine" on behalf of unrepresented victims';[61] (v) 'Observation of Victims of Palestinian Terror in respect to the Court's Territorial Jurisdiction in Palestine';[62] (vi) 'Persecution Victims' Observations';[63] (vii) 'Submission on Behalf of Palestinian Victims Residents of the Gaza Strip';[64] (viii) 'Observations écrites sur la question de compétence énoncée au paragraphe 220 de la Demande du Procureur';[65] (ix) 'Observations au nom des victimes palestiniennes sur la Demande du Procureur';[66] (x) 'Observations on behalf of Victims';[67] and (xi) 'Submission pursuant to article 19(3) of the Rome Statute in accordance with paragraph 220 of the Prosecution Request for a ruling on the Court's territorial jurisdiction in Palestine'.[68]

14. On 23 March 2020, the Chamber issued the 'Decision on the "Prosecution's Urgent Request for Extension of Time"', thereby granting the Prosecutor's request for an extension of the time limit to submit her response to any observations on the Prosecutor's Request until 30 April 2020.[69]

15. On 31 March 2020, the Chamber issued the 'Decision on Requests for Variation of the Time Limit for Submitting Observations and Issues Arising out of *Amici Curiae* Observations', thereby: (i) rejecting the corrected version of the observations on behalf of the Touro Institute on Human Rights and the Holocaust; (ii) finding that Mr Fouad Baker does not have standing to submit observations on the Prosecutor's Request and declining to accept the documents transmitted by the Registry on his behalf; and (iii) rejecting the 'Amicus Curiae Request for Extension of Time' on behalf of Intellectum Scientific Society and the 'Request for an extension of time to submit written observations' on behalf of Ms Jennifer Robinson.[70]

16. On 30 April 2020, the Chamber received the 'Prosecution Response to the Observations of *Amici Curiae*, Legal Representatives of Victims, and States'.[71]

17. From 9 April until 11 May 2020, the Chamber received three transmissions by the Registry with the powers of attorney of the legal representatives having submitted observations on the Prosecutor's Request on behalf of victims.[72]

18. On 26 May 2020, the Chamber issued the 'Order requesting additional information', thereby: (i) requesting Palestine to provide additional information by no later than 10 June 2020; and (ii) ordering the Prosecutor and inviting Israel to respond to any additional information provided by Palestine by no later than 24 June 2020.[73]

19. On 5 June 2020, the Chamber received '[t]he State of Palestine's response to the Pre-Trial Chamber's Order requesting additional information' (the 'Additional Information by Palestine').[74]

20. On 8 June 2020, the Chamber received the 'Prosecution Response to "The State of Palestine's response to the Pre-Trial Chamber's Order requesting additional information"'.[75]

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21. On 17 June 2020, the Chamber issued the 'Decision on the "Motion for Leave to File Supplemental Observations with respect to the Situation in the State of Palestine on behalf of the European Centre for Law and Justice"', thereby: (i) rejecting the 'Motion for Leave to File Supplemental Observations with respect to the Situation in the State of Palestine on behalf of the European Centre for Law and Justice'; and (ii) ordering the Registry to strike this Motion from the record of the *Situation in Palestine* and to withdraw it from the Court's website.[76]

II. SUBMISSIONS AND OBSERVATIONS

A. THE PROSECUTOR'S REQUEST

22. The Prosecutor is of the view 'that the Court's territorial jurisdiction extends to the Palestinian territory occupied by Israel during the Six-Day War in June 1967, namely the West Bank, including East Jerusalem, and Gaza'.[77] However, the Prosecutor is 'mindful of the unique history and circumstances of the Occupied Palestinian Territory' and the fact that the question of Palestine's statehood under international law does not appear to have been definitively resolved.[78] Consequently, in order to facilitate and ensure a 'cost-effective and expeditious conduct of the [...] investigations', the Prosecutor 'seeks confirmation' of this conclusion by the Chamber pursuant to article 19(3) of the Statute.[79] The Prosecutor submits that in light of the broad scope of article 19(3) and in accordance with a contextual reading of the Rome Statute, 'she may request a juridictionnal ruling under this provision even before a "case" exists'.[80] The Prosecutor further asserts that such a ruling by the Chamber at this stage would be 'consistent with the delicate and carefully crafted system of checks and balances regulating the exercise of the Court's jurisdiction' and would 'assist and guide the Prosecution in the performance of its functions and give effect to a statutorily provided right'.[81]

23. The Prosecutor submits that article 19(3) of the Statute 'allows the Prosecution to pose a jurisdictional question to the Chamber, and obliges the Chamber to resolve such a question'.[82] She argues that the present Situation is different from the *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, essentially because Palestine has referred the *Situation in Palestine* to the Prosecutor under articles 13(a) and 14 of the Statute.[83] It is also the view of the Prosecutor that article 19(3) of the Statute 'is broad in its scope [...] and does not impose any temporal limitation on the Prosecution's ability to exercise this right or on the Court's ability to rule on the Prosecution's request'.[84] The Prosecutor further submits that this interpretation is supported by a contextual reading of article 19(3) of the Statute as: (i) the use of the word 'or' in the heading of article 19 of the Statute suggests that the word 'case' applies only to admissibility proceedings and not to jurisdiction proceedings;[85] and (ii) it accords with the Court's jurisdictional design.[86] The Prosecutor adds that issuing a ruling pursuant to article 19(3) of the Statute at this stage of the proceedings is consistent with the Statute's object and purpose, primarily because restricting the Prosecutor's ability to request such a ruling would hinder the efficient fulfilment of the Court's mandate.[87] Lastly, the Prosecutor avers that it is necessary to issue a ruling pursuant to article 19(3) of the Statute in the present Situation as it would: (i) ensure certainty on an issue likely to arise at a later stage of the proceedings;[88] and (ii) would promote judicial economy and efficiency.[89]

24. With regard to her aforementioned conclusion regarding the scope of the Court's territorial jurisdiction, the Prosecutor indicates that she 'has been guided by Palestine's status as a State Party to the Rome Statute since 2 January 2015 following the deposit of its instruments of accession with the United Nations [...] Secretary General pursuant to article 125(3)'.[90] The Prosecutor recalls that 'in order to exercise its jurisdiction in the territory of Palestine under 12(2), the Court need not conduct a separate assessment of Palestine's status (nor of its Statehood) from that which was conducted when Palestine joined the Court'.[91] Consequently, the Prosecutor avers that Palestine's accession to the Statute has the following two consequences. First, 'under the ordinary operation of the Rome Statute, a State that becomes a Party to the Statute pursuant to article 125(3) "thereby accepts the jurisdiction of the Court" according to article 12(1)'.[92] Second, '[a]rticle 12(2) in turn specifies the bases on which the Court may exercise its jurisdiction as a consequence of a State becoming a Party to the Statute under article 12(1) or having lodged a declaration under article 12(3)'.[93] Accordingly, 'a state under article 12(1) and article 125(3) should also be considered a State under article 12(2)'.[94] The Prosecutor contends that this logic should also apply to Palestine.[95] In the alternative, the Prosecutor submits that the Chamber could likewise conclude— for the strict purposes of the Statute only—that Palestine is a State under relevant principles and rules of international law'.[96] In this regard,

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the Prosecutor argues that Palestine's restrictions in the practical exercise of its authority over the entirety of the Occupied Palestinian Territory have 'to be assessed against the backdrop of the Palestinian people's right to self-determination [. . .] the exercise of which has been severely impaired by, *inter alia*, the imposition of certain unlawful measures'.[97]

25. With regard to the argument that 'Palestine's ability to delegate its jurisdiction to the Court is limited because it does not have criminal jurisdiction with respect to Israelis or with respect to crimes committed in Area C (*nemo dat quod non habet*)',[98] the Prosecutor 'does not consider these limitations in the Oslo Accords to be obstacles to the Court's exercise of jurisdiction'.[99] First, the Prosecutor advances that the Oslo Accords 'have not precluded Palestine from acceding to numerous multilateral treaties, many of them under the auspices of the United Nations, and others with national governments as depositaries'[100] and that, as a consequence of the United Nations General Assembly Resolution 67/19, 'the UN OLA expressly recognised Palestine's capacity to accede to treaties bearing the "all States" or "any State" formula'.[101] Accordingly, the Oslo Accords 'appear not to have affected Palestine's ability to act internationally'.[102] According to the Prosecutor, this means that 'the resolution of the State's potential conflicting obligations is not a question that affects the Court's jurisdiction' upon accession to the Statute, although this 'may become an issue of cooperation or complementarity during the investigation and prosecution stages'.[103] Second, the Prosecutor argues that the Oslo Accords, as a 'special agreement' within the terms of Geneva Convention IV, 'cannot violate peremptory rights nor can they derogate from or deny the rights of "protected persons" under occupation'.[104]

26. In addition, in accordance with the 21 January 2020 Decision, the Prosecutor's Request incorporates references to the legal memoranda issued by Israel on 20 December 2019.[105] It is the view of Israel that 'the ICC lacks jurisdiction over the "situation in Palestine"' as 'the fundamental precondition to the exercise of the Court's jurisdiction – that a State having criminal jurisdiction over its territory and nationals had delegated such jurisdiction to the Court – is clearly not met'.[106]

27. According to Israel, '[t]he purported accession by "Palestine" cannot [. . .] itself provide a basis for the ICCs jurisdiction as it did not settle the question of whether a sovereign Palestinian State exists'.[107] Israel avers that this conclusion is based on the following reasons: '(1) General Assembly resolution 67/19 did not purport to make a legal determination as to whether "Palestine" qualifies as a State, and was explicitly limited in its effect to the UN; (2) the actions of the UN Secretary-General as depositary of multilateral treaties, as he himself has made clear, are not determinative of a "highly political and controversial" question such as that of Palestinian statehood; and (3) the Palestinian participation in the Court's Assembly of States Parties cannot be taken to constitute or demonstrate such statehood either'.[108]

28. Israel adds that 'a sound substantive assessment of the legal and factual records would inevitably lead to the conclusion that no jurisdiction exists'.[109] In this regard, Israel contends that 'it is clear that the Palestinian entity does not now hold, nor has it ever held, sovereign title over the West Bank and the Gaza Strip, a territory that in fact has always been under the effective control of others'.[110] Israel also takes the view that '[t]he Palestinian entity [. . .] has never possessed – and does not now possess, either in law or in fact – key elements of [. . .] effective territorial control'.[111]

29. According to Israel, '[t]he right of the Palestinians to self-determination, or the alleged recognition of "Palestine" by some States, do not alter this reality, which finds expression in the Palestinians' own statements on the matter'.[112] Moreover, Israel asserts that 'Israeli–Palestinian agreements explicitly [enumerate] "borders" among those issues to be settled through bilateral permanent status negotiations' and 'any exercise of territorial jurisdiction by the Court would not only require it to make a determination wholly unsuitable for an international criminal tribunal, but would also contravene the agreements reached between the parties and jeopardize efforts towards reconciliation'.[113] It is also the view of Israel that no 'reliance [can] be made on such terms as "the occupied Palestinian territory", reference to which, even if frequent in international discourse, is made in strictly political terms and without prejudice to the fundamentally legal question of sovereign title'.[114]

30. Lastly, Israel professes that, 'even if the Rome Statute were to be misinterpreted so as to allow for non-sovereign entities to confer jurisdiction upon the Court, the latter would still be constitutionally constrained by the limits of delegation and unable to exercise jurisdiction where the delegating entity has no jurisdiction to the

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extent required'.[115] In this regard, Israel adds that, '[a]s the Palestinian entity has no criminal jurisdiction over either Israeli nationals or over Area C and Jerusalem [pursuant to the Israeli-Palestinian Interim Agreement of 1995], it is therefore legally impossible for it to delegate any such jurisdiction to the Court'.[116]

B. Observations on behalf of Palestine

31. Palestine submits that, as a State Party to the Statute, it 'has fulfilled all of its obligations under the Statute',[117] it has 'cooperated fully and effectively with the Office of the Prosecutor; has helped coordinate the efforts of the Court's organs; and has systematically enabled the Court to fulfil its mandate',[118] and it is, for those reasons, 'entitled to expect all the rights acquired by a State Party under the Statute'.[119]

32. According to Palestine, '[i]t is unclear whether [article 19(3) of the Statute] would apply to this stage of the proceedings and the Prosecution was in any case fully permitted to proceed to an investigation without seeking additional guidance from the Pre-Trial Chamber'.[120] Palestine adds that 'the Statute gives no competence to the Court to determine issues of statehood of a State Party'.[121]

33. Palestine takes the view that '[t]he Court was intended to help close the gap of accountability that regrettably still benefits perpetrators of international crimes' and '[t]he criminality concerned in the present case unquestionably involves such a gap'.[122] It, therefore, considers that it is 'critical that the Court enforce its jurisdiction in this case to the greatest extent permitted by its Statute'.[123]

34. Palestine further avers that it 'joined the Rome Statute as a State within its internationally recognized borders, as defined by the 1949 Armistice Line'.[124] It adds that '[t]he West Bank, including East Jerusalem, and the Gaza Strip, have been consistently referred to by the international community, including the UN General Assembly and the UN Security Council, as the Occupied Palestinian Territory, leaving no doubt over who is entitled to that particular territory'.[125] Palestine submits that this 'reflects an objective legal state of affairs, which has been acknowledged by a variety of legal and judicial bodies, not least [. . .] the International Court of Justice'.[126] Palestine also argues that this 'is also apparent from the process of assignment of the situation of the State of Palestine to the present Chamber'.[127]

35. Palestine further asserts that '[t]he occupation of Palestine has not affected its territorial integrity'.[128] It contends that '[t]he inability of a State to exercise the full extent of its sovereignty over parts of its territory [. . .] does not result in a loss of sovereignty, nor does it affect the Court's jurisdiction over any such territory', as '[i]t is a direct emanation of the principle of complementarity'.[129] In addition, Palestine avers that '[t]he Court's assertion of jurisdiction in relation to the crimes committed under occupation and by the occupying Power is consistent with the recognized right to self-determination of the Palestinian people'.[130] Palestine also submits that '[a] claim by a non-State Party over parts of a State Party's territory cannot therefore deprive the Court of its competence over any part of a State Party's territory'.[131]

36. Lastly, Palestine is of the view that '[i]t is beyond dispute that special agreements between an occupied State and an occupying Power cannot diminish or prejudice the rights of those under occupation'.[132] In this regard, Palestine adds that 'an agreement that would purportedly qualify or diminish the obligations under the Statute of a State Party to investigate and prosecute crimes within the jurisdiction of the Court would be null and void as the Statute reflects *jus cogens* prohibitions that would prevail over any competing legal obligations not of the same rank'.[133]

C. Observations on behalf of Victims

37. The Chamber recalls that it has received a number of observations on the Prosecutor's Request on behalf of various (groups of) victims. In the ensuing paragraphs, the Chamber will set out these observations separately, with each paragraph commencing with the title of the observations received by the Chamber.

38. *The Khan al-Ahmar Victims' Observations (ICC-01/18-68)*. The victims aver that 'Palestine is a State for the purposes of article 12(2)(a) and that the Court has territorial jurisdiction over Palestine'.[134] In this regard, the victims raise three arguments. First, Palestine's 'status as an ICC State Party must be read in the context of the relevant proceedings before this Court and not in *abstract* or based on political considerations'.[135] Second, the Chamber 'is bound to interpret Article 12(2)(a) consistent with prevention, effective prosecution and punishment of grave

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crimes arising out of the hostilities and Israel's illegal settlement activities' in view of the object and purpose of the Statute.[136] Third, pursuant to article 21(3) of the Statute, article 12(2)(a) of the Statute must be interpreted in accordance with the victims' rights to *inter alia* access to justice, effective remedies, and redress.[137]

39. *Victims' observations on the Prosecutor's request for a ruling on the Court's territorial jurisdiction in Palestine (ICC-01/18-99).* The victims are of the view that '[t]he Chamber can validly decline to rule on the Request, and invite the Prosecutor to commence the investigation'.[138] In addition, the victims submit that, '[s]hould the Chamber decide to rule on the Request, it should find that Palestine validly acceded to the Statute' and '[i]t is entitled, as is every State Party, to refer crimes on its territory for investigation by the Court'.[139] The victims add that, alternatively, the Chamber 'ought to apply a treaty-specific definition of the term "State"'.[140] Furthermore, according to the victims, '[t]he scope of the territory of Palestine has been recognized [. . .] as encompassing the West Bank, including East Jerusalem, and the Gaza Strip'.[141] Lastly, the victims aver that '[a]ny interpretation of the Oslo Accords which reduces the protections available to the Victims under the Fourth Geneva Convention, or breaches peremptory norms of customary international law, is invalid'.[142]

40. *Submissions on behalf of child victims and their families pursuant to article 19(3) of the statute (ICC-01/18-102)*. The victims 'reaffirm the Prosecution's legal conclusion that the "territory" over which the Court may exercise its jurisdiction under article 12(2)(a) comprises the Occupied Palestinian Territory, or the occupied West Bank, including East Jerusalem, and Gaza'.[143] The victims provide three arguments in support of this submission. First, 'any finding by the Court on territorial jurisdiction must be in accordance with the full recognition of the Palestinian people's right to self- determination'.[144] Second, 'Israel's status as the "Occupying Power" under international law does not preclude the Court from exercising territorial jurisdiction'.[145] Lastly, 'failing to find [. . .] that the Court may exercise its jurisdiction under article 12(2)(a) [. . .] is counter to the Statute's object and purpose'.[146]

41. *Observations on the "Prosecutor request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine" on behalf of unrepresented victims* (*ICC-01/18-105*). The victims contend that 'the Chamber is empowered to rule on the scope of the Court's territorial jurisdiction in the situation in Palestine on the basis of both Article 19(3) and the principle of "Kompetenz-Kompetenz" or "compétence de la compétence"', while it could alternatively rely on article 119(1) of the Statute.[147] The victims further add that, '[i]rrespective of the legal basis chosen by the Chamber, it would be opportune for the Chamber to rule on the issue at the present stage of the proceedings in the interests of judicial economy, as well as to enable victims to meaningfully contribute to the Prosecution's investigation'.[148] Furthermore, in the submission of the victims, '[t]he Secretary-General's acceptance of [Palestine's instrument of accession] based on General Assembly Resolution 67/19 settled the question of Palestine's statehood for the purposes of accession to the Statute'.[149] The victims add that Palestine 'qualifies as a "State" for the purposes of Article 12(2)(a) on the same basis'.[150] Lastly, according to the victims, '[a]pplicable international law rules confirm that the "territory of" Palestine covered by the Court's jurisdiction extends to [. . .] the West Bank (including East Jerusalem) and the Gaza Strip'.[151]

42. *Observation of Victims of Palestinian Terror in respect to the Court's Territorial Jurisdiction in Palestine (ICC-01/18-109-Red).* The victims 'contend, that for the reasons brought in the Attorney General's of the State of Israel Memorandum, the Court has no Territorial Jurisdiction over the situation in "Palestine"'.[152] However, the victims are of the view that, should the Chamber find that the Court has jurisdiction, it should also find that it has temporal jurisdiction from 1 July 2002, because 'Palestinians in the West Bank [. . .] are also nationals of Jordan – a member state of the Rome Statute from its first day'.[153] The victims further add that 'once the Chamber recognizes the Territorial Jurisdiction over the situation in Palestine, it will lower any policy barrier [. . .], especially for *recurring* and *continues* [sic] crimes'.[154]

43. *Persecution Victims' Observations (ICC-01/18-110-Red).* In the view of the victims, the Chamber 'should dismiss the Request as unnecessary and premature, thereby permitting the Prosecution to commence an investigation into the Situation in Palestine without any further delay'.[155] The victims aver that, in the alternative, the Chamber 'should confirm that [. . .] the ICC has jurisdiction over the territory of the State of Palestine, as a Member State of the Court since 1 April 2015 and which has vested the ICC with jurisdiction over crimes committed on its territory or by its nationals since 13 June 2014, and that such territory is recognized by the international community to comprise the Gaza Strip and West Bank, including East Jerusalem'.[156] According to the victims, '[s]uch a conclusion is

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mandated by a plain reading of the Rome Statute and Rules of the Court as well as the legislative history of relevant provisions, supported by Court precedent, and aligns fully with the object and purpose of the ICC'.[157] The victims add that 'such a conclusion accords with the obligation of the State of Palestine to provide a remedy for serious violations of international law that occur on its territory and/or are committed by or against its nationals'.[158]

44. *Submission on Behalf of Palestinian Victims Residents of the Gaza Strip (ICC-01/18-112)*. The victims submit that 'Palestine is a "State" for the purpose of article 12(2)(a) because of its status as an ICC State Party'.[159] The victims add that 'the Court need not deliberate on Palestine's statehood for any other purpose beyond the Request put to it by the Prosecutor on the issue of territorial jurisdiction'.[160] According to the victims, 'the Court's territorial jurisdiction in Palestine comprises the West Bank, including East Jerusalem, and the Gaza Strip', seeing as 'State practice has consistently recognised the demarcation of the 1949 Palestine boundaries'.[161] The victims further assert that 'the assessment of the Court's territorial jurisdiction at this early stage of the proceedings was not procedurally necessary'.[162]

45. *Observations écrites sur la question de compétence énoncée au paragraphe 220 de la Demande du Procureur (ICC-01/18-113).* The victims submit that the Chamber '*ne pourra que se déclarer incompétente à remettre en cause l'adhésion de la Palestine au Statut et en conséquence, se déclarer compétente à connaître de la situation en Palestine*'.[163] The victims add that, '*s'il suffisait à une puissance occupante d'annexer un territoire pour exclure celui-ci et sa population du champ d'application des normes protectrices et du bénéfice de la justice pénale internationale, celle-ci n'aurait plus aucun intérêt*'.[164] In addition, according to the victims, '*[i]l convient [de] conclure à la souveraineté palestinienne sur les territoires occupés depuis 1967, dans la partie Est de Jérusalem*'.[165] Lastly, it is the view of the victims that '*le statut de la Palestine sous mandat a eu pour effet de conserver, au minimum aux Territoires occupés depuis 1967, y compris Jérusalem-Est, la capacité juridique d'un Etat*'.[166]

46. *Observations au nom des victimes palestiniennes sur la Demande du Procureur (ICC-01/18-120).* The victims argue that '*plusieurs participants ont annoncé l'intention de faire dévier les débats cherchant à amener la Chambre à se prononcer sur des points qui excèdent, manifestement, l'objet et le cadre de la présente procédure*' and '*[l]eurs arguments seront rejetés*' or, in the alternative, '*il suffit à la Chambre de constater [. . .] que la Palestine est un État partie du statut*'.[167] The victims add that '*le territoire désigné par la Palestine, comme relevant de sa souveraineté, n'empiète pas, selon le droit international, sur le territoire d'Israël, tandis que le « territoire palestinien occupé » auquel il est référé, inclut la Cisjordanie, y compris Jérusalem Est, et la bande de Gaza, ainsi que la mer territoriale s'y rapportant*'.[168]

47. *Observations on behalf of Victims (ICC-01/18-123).* The victims take the view that 'the State of Palestine, as a State Party, is a "State" for the purposes of Article 12(2) of the Rome Statute because its Statehood has been determined by its accession to the Statute and, in any event, it is a "State" under customary international law'.[169] The victims also contend that 'the territory of the State of Palestine [. . .] comprises the whole of the West Bank, including East Jerusalem, and Gaza'.[170]

48. *Submission pursuant to article 19(3) of the Rome Statute in accordance with paragraph 220 of the Prosecution Request for a ruling on the Court's territorial jurisdiction in Palestine* (*ICC-01/18-126-Red*). The victims aver that 'the exercise of effective control under the peculiar circumstances of the occupation is not an adequate criterion for examining Palestinian statehood'.[171] In addition, according to the victims, 'a multitude of UN Resolutions and relevant documents carrying international legal weight have identified the territory in question as the "Occupied Palestinian Territory" which includes Gaza, the West Bank and East Jerusalem, in agreement with the pre-1967 lines'.[172] In any event, the victims are of the view that 'the ongoing occupation should not prejudice Palestine from eventual statehood claims and does not interfere with the Court's ability to consider Palestine a state for the purposes of the Rome Statute'.[173] Lastly, the victims add that, 'as a "member state" for the purposes of the Rome Statute, Palestine can delegate criminal jurisdiction over the territories identified as the Occupied Palestinian Territory'.[174]

D. OBSERVATIONS ON BEHALF OF *AMICI CURIAE*

49. The Chamber has carefully studied the numerous observations submitted by the *amici curiae.* However, the Chamber has refrained from summarising these observations in full for reasons of efficiency and judicial economy.

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The Chamber will, nevertheless, address particular arguments raised by certain *amici curiae* in so far as it considers it necessary to do so for its determination.

50. The Office of the Public Counsel for the Defence does not provide observations on the question of jurisdiction set forth in the Prosecutor's Request but submits that a judicial ruling on this question is improper at the current stage of the proceedings.[175]

51. The following *amici curiae* take the view that, for the reasons specified in their observations, the conditions for the exercise of the Court's jurisdiction in the present Situation have not been fulfilled: (i) the Czech Republic;[176] (ii) the European Centre for Law and Justice;[177] (iii) Professor Malcolm N Shaw;[178] (iv) the Republic of Austria;[179] (v) Shurat Hadin – Israel Law Center;[180] (vi) the Israel Bar Association;[181] (vii) the Lawfare Project, the Institute for NGO Research, Palestinian Media Watch, and the Jerusalem Center for Public Affairs;[182] (viii) Todd F. Buchwald and Stephen J. Rapp;[183] (ix) Australia;[184] (x) Me Yael Vias Gvirsman;[185] (xi) Hungary;[186] (xii) UK Lawyers for Israel, B'nai B'rith UK, the International Legal Forum, the Jerusalem Initiative and the Simon Wiesenthal Centre;[187] (xiii) 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;[188] (xiv) Ambassador Dennis Ross;[189] (xv) Professor Eyal Benvenisti;[190] (xvi) the Honourable Professor Robert Badinter, the Honourable Professor Irwin Cotler, Professor David Crane, Professor Jean-François Gaudreault-DesBiens, Lord David Pannick and Professor Guglielmo Verdirame;[191] (xvii) the International Association of Jewish Lawyers and Jurists;[192] (xviii) the Touro Institute on Human Rights and the Holocaust;[193] (xix) the Federal Republic of Germany;[194] (xx) the Federative Republic of Brazil;[195] (xxi) the Israel Forever Foundation;[196] and (xxii) the Republic of Uganda.[197]

52. The following *amici curiae* take the view that, for the reasons specified in their observations, the conditions for the exercise of the Court's jurisdiction in the present Situation have been fulfilled: (i) Professor John Quigley;[198] (ii) Professor William Schabas;[199] (iii) the Palestinian Bar Association;[200] (iv) Professor Asem Khalil and Assistant Professor Halla Shoaibi;[201] (v) Professor Hatem Bazian;[202] (vi) Professor Richard Falk;[203] (vii) MyAQSA Foundation;[204] (viii) the Organization of Islamic Cooperation;[205] (ix) the International Federation for Human Rights, No Peace Without Justice, Women's Initiatives for Gender Justice and REDRESS;[206] (x) Guernica 37 International Justice Chambers;[207] (xi) the Palestinian Center for Human Rights, Al- Haq Law in the Service of Mankind, Al-Mezan Center for Human Rights and Aldameer Association for Human Rights;[208] (xii) the Popular Conference for Palestinians Abroad;[209] (xiii) International-Lawyers.org;[210] (xiv) Dr. Robert Heinsch and Dr. Giulia Pinzauti;[211] (xv) Intellectum Scientific Society;[212] (xvi) Dr. Uri Weiss;[213] (xvii) Dr. Frank Romano;[214] (xviii) the International Commission of Jurists;[215] (xix) the International Association of Democratic Lawyers;[216] and (xx) the League of Arab States.[217]

III. DETERMINATION BY THE CHAMBER

A. PRELIMINARY ISSUES

1. Is the issue at hand political and as such non-justiciable?

53. Some participants, including certain *amici curiae*,[218] State Parties,[219] and representatives of victims,[220] have raised the argument that the Prosecutor's Request is of a political nature rather than a legal one. On this basis, some have argued that a ruling on the Court's jurisdiction over the territory of Palestine, with the political consequences it would entail, would constitute a political decision and potentially affect the Court's legitimacy. Others have stated that the territorial scope of the Court's jurisdiction is a legal question and falls within the Court's competence to determine, notwithstanding any political ramifications.[221] It is necessary to address those arguments since they not only encompass the case and its developments but also the Court's work and its very mandate.

54. The issues raised by the Prosecutor, as set out in its Request, clearly raise legal questions regarding the Court's jurisdiction. Arguments to the effect that the aim or consequence of the Prosecutor's Request would be the creation of a 'new State' reflect a misunderstanding of the actual subject-matter of the Request. Indeed, the creation of a new state pursuant to international law, as stated by numerous *amici curiae*, is a political process of high complexity far detached from this Court's mission.

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55. Further, some participants have stated that because of the highly political aspect of the *Situation in Palestine*, it should not be examined by this Court. It should however be noted that, by the very nature of the core crimes under the Rome Statute, the facts and situations that are brought before the Court arise from controversial contexts where political issues are sensitive and latent. Accordingly, the judiciary cannot retreat when it is confronted with facts which might have arisen from political situations and/or disputes, but which also trigger legal and juridical issues.

56. The judges can and must examine the emerging legal issues, as long as they are framed by the contours of the relevant law. This is a central part of the jurisdictional activity, as stated by the International Court of Justice in its Advisory Opinion on *Western Sahara*: 'It is true that, in order to reply to the questions, the Court will have to determine certain facts, before being able to assess their legal significance'.[222] This does not mean that the Chamber will address facts that are politically based or motivated, but merely that it will need to look at a range of facts, practices, and documents which, while sometimes based on political decisions, form part of the legal contours of the situation and whose legal consequences might need to be addressed for the purpose of the jurisdictional activity. In the situation at hand, the Prosecutor addressed a legal issue to the Chamber, namely whether 'the "territory" over which the Court may exercise its jurisdiction under article 12(2)(a) comprises the West Bank, including East Jerusalem, and Gaza',[223] that is capable of a legal answer based on the provisions of the Statute.

57. Similarly, the fact that the present decision on the Prosecutor's Request might entail political consequences shall not prevent the Chamber from exercising its mandate. In this regard, some participants have questioned whether it would be appropriate for the Chamber to decide on the Prosecutor's Request, arguing that a potential decision could hinder the developments of future political agreements between Palestine and Israel.[224] However, potential political outcomes alone should not pose any restrictions on the exercise of the jurisdictional activity.[225] As stated above, the Chamber's mandate is limited to analysing the relevant facts of which the Chamber is seized, in accordance with the Court's applicable legal framework. In the present case, the Chamber shall only assess the question of the Court's jurisdiction over the *Situation in Palestine* and its extent. Potential consequences that might arise from the present decision are outside the scope of the Chamber's mandate.

2. Israel's participation in the proceedings

58. Some participants have argued that the subject-matter of the Prosecutor's Request cannot be examined by this Chamber as this assessment would take place without the participation of one of the main stakeholders – Israel – and directly impact its territorial sovereignty, referring to the principle of Monetary Gold to support their argument.[226] The International Court of Justice consecrated this principle in the *Monetary Gold Removed from Rome in 1943* case, in which it declared that it could not decide on a matter when the legal interest of third parties 'would not only be affected by the decision, but would form the very subject matter of the decision'.[227]

59. However, unlike the International Court of Justice, the Court cannot rule on inter-states disputes as it does not have jurisdiction over States, but exercises its jurisdiction solely over natural persons.[228] In any event, the Chamber notes that Israel was invited in the 'Order setting the procedure and the schedule for the submission of observations' of 28 January 2020 to submit observations,[229] but chose not to avail itself of that opportunity.

60. As such, it must be emphasised that the present decision is strictly limited to the question of jurisdiction set forth in the Prosecutor's Request and does not entail any determination on the border disputes between Palestine and Israel. The present decision shall thus not be construed as determining, prejudicing, impacting on, or otherwise affecting any other legal matter arising from the events in the *Situation in Palestine* either under the Statute or any other field of international law.

3. Criminal jurisdiction v. territory of States

61. It should be noted that national criminal courts sometimes have to determine the extent of the territory of States in order to identify the extent of their territorial jurisdiction, without constituting a determination on the actual scope of that State's territory.[230]

62. More importantly, as recognised by the Permanent Court of International Justice[231] and explicitly affirmed by this Chamber in the 'Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the

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Statute"' of 6 September 2018, '[t]he territoriality of criminal law [. . .] is not an absolute principle of international law and by no means coincides with territorial sovereignty'.[232] Therefore, any territorial determination by the Chamber for the purpose of defining its territorial jurisdiction for criminal purposes has no bearing on the scope of Palestine's territory.

B. THE LEGAL BASIS

63. At the outset, the Chamber recalls that, in relation to the 'Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute' of 9 April 2018 (the '9 April 2018 Request'),[233] it did 'not see the need to enter a definite ruling on' the applicability of article 19(3) of the Statute in the context of those proceedings as it considered that it could rule on the question set forth in that request pursuant to an alternative legal basis.[234] Thus, the Chamber did not reject the possibility of applying article 19(3) of the Statute with regard to the 9 April 2018 Request.

64. In any event, the present proceedings are distinguishable from those pertaining to the 9 April 2018 Request. The latter request arose out of a preliminary examination by the Prosecutor and was assigned to the Chamber under regulation 46(3) of the Regulations of the Court as a 'matter, request or information not arising out of a situation' in the absence of either a referral by a State Party or the Security Council, or a request for authorisation of a *proprio motu* investigation.[235] Conversely, with regard to the present request for a ruling on a question of jurisdiction, the Prosecutor has indicated that she 'is satisfied that there is a reasonable basis to initiate an investigation into the situation in Palestine, pursuant to article 53(1) of the Statute'.[236] In this regard, she has specified that '[t]here is a reasonable basis to believe that war crimes have been or are being committed in the West Bank, including East Jerusalem, and the Gaza Strip', 'potential cases arising from the situation which would be admissible' have been identified, and '[t]here are no substantial reasons to believe that an investigation would not serve the interests of justice'.[237]

65. The legal consequence is that, as clarified by the Appeals Chamber, the Prosecutor is, in principle, obliged to initiate an investigation.[238] The reason is that article 53(1)(a) of the Statute stipulates that '[t]he Prosecutor *shall* [. . .] initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute'.[239] The Prosecutor has similarly acknowledged that she 'has a legal duty to open an investigation into [a] situation' if she is satisfied that the relevant criteria established by the Statute are fulfilled.[240] This means that, although the Prosecutor has not officially announced that she has opened an investigation into the present Situation, such an investigation has, in principle, already been opened as a matter of law, subject to the application of article 18 of the Statute.

66. Accordingly, the principal difference is that the Chamber had to rule on the 9 April 2018 Request in the context of the initial stages of a preliminary examination, while the present request arises out of an investigation that has, in principle, already been initiated. In addition, the Prosecutor has identified potential cases in the present Situation for the purposes of determining whether such cases are or would be admissible.[241]

67. In these circumstances, the Chamber considers it appropriate to determine whether article 19(3) of the Statute is applicable. Specifically, the Chamber must determine whether, in relation to an investigation that has, in principle, already been initiated by the Prosecutor, a ruling on a question of jurisdiction may be sought and issued on the basis of article 19(3) of the Statute either in the *situation* or once a *case* arises from that situation. In this regard, the Chamber recalls that the legal texts of the Court draw the following distinction between a situation and a case:

> Situations, which are generally defined in terms of temporal, territorial and in some cases personal parameters, [. . .] entail the proceedings envisaged in the Statute to determine whether a particular situation should give rise to a criminal investigation as well as the investigation as such. Cases, which comprise specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects, entail proceedings that take place after the issuance of a warrant of arrest or a summons to appear.[242]

68. The Chamber considers that a ruling on a question of jurisdiction pursuant to article 19(3) of the Statute may be sought and issued before a case emanates from a situation. As specified below, it has arrived at this conclusion on the basis of an interpretation of this provision in accordance with the ordinary meaning to be given to its terms in their context and in the light of the Statute's object and purpose.

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1. The ordinary meaning of article 19(3) of the Statute

69. The first sentence of article 19(3) of the Statute reads as follows in the relevant part: '[t]he Prosecutor may seek a ruling from the Court regarding a question of jurisdiction'. This sentence generically defines the subject-matter of a ruling as 'a question of jurisdiction' without imposing further restrictions. In addition, it omits any temporal parameter for requesting or issuing such a ruling.

70. The Chamber is of the view that the provision's broad and general wording, in conjunction with the absence of temporal parameters, indicates that its scope of application is not restricted to a case emanating from a situation.

2. The context of article 19(3) of the Statute

71. The context of article 19(3) of the Statute further supports the Chamber's interpretation of the ordinary meaning to be given to its terms.

72. First, the structure of article 19 of the Statute, which distinguishes between three distinct procedural mechanisms, establishes that the scope of application of the third paragraph of article 19 of the Statute is not restricted to a case on account of references to 'case' appearing throughout this provision.

73. Article 19(1) of the Statute provides that '[t]he Court shall satisfy itself that it has jurisdiction in any case brought before it'.[243] Article 19(2) of the Statute stipulates that 'challenges to the jurisdiction of the Court may be made by' an accused, a person for whom a warrant of arrest or a summons to appear has been issued, or certain States. As mentioned, article 19(3) of the Statute accords a specific right exclusively to the Prosecutor.[244] These three mechanisms regulate different situations and, therefore, have independent functions. This structure entails that the references to 'case' specifically restrict the scope of application of the mechanisms set forth in article 19(1)-(2) of the Statute. The absence of such references in article 19(3) of the Statute confirms, *a contrario,* that this mechanism extends beyond a case.[245]

74. The Chamber observes that several other paragraphs of article 19 of the Statute also contain references to 'case'.[246] However, paragraphs 4 to 11 of this provision merely specify other aspects of this provision. Therefore, the references to 'case' in these paragraphs do not detract from the conclusion that article 19 of the Statute sets forth three mechanisms regulating different situations.

75. Similarly, the reference to '[c]hallenges' in the heading of article 19 of the Statute does not restrict its entire scope of application but merely denotes the main purpose of this provision.[247] The obligation of a chamber to satisfy itself that it has jurisdiction arising from article 19(1) of the Statute omits a reference to 'challenge' and, thus, also applies in the absence of a challenge. This is comparable to the mechanism contained in article 19(3) of the Statute. It, namely, acknowledges that the Prosecutor's mandate regarding the initiation of investigations and prosecutions may give rise to the need to resolve a question of jurisdiction or admissibility at an early stage of the proceedings by way of a ruling by the Pre-Trial Chamber without a challenge to the Court's jurisdiction having been lodged.[248] Moreover, it is well-known that various other headings in the Statute also do not entirely encapsulate the contents of the articles they pertain to,[249] which lends further support to the finding that the heading of article 19 of the Statute is not determinative of its scope of application.

76. The drafting history of article 19 of the Statute is also instructive in interpreting its structure. Whereas article 19(1) of the Statute originated in article 24 of the 1994 Draft Statute for an International Criminal Court by the International Law Commission, the second paragraph of article 19 of the Statute resulted from articles 34 to 36 of that Draft.[250] The mechanism laid down in article 19(3) of the Statute was not contained in this Draft but only appeared in a 1997 document by the Preparatory Committee.[251] It is noteworthy that the latter document did not refer to either 'challenge' or 'case', but broadly stipulated that '[t]he Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility'. Therefore, although the final version of article 19 of the Statute grouped these three mechanisms together, they were developed independently for different purposes.

77. The Chamber is not persuaded by the argument that '[r]ulings on territorial jurisdiction necessarily impair a suspect/accused's right to challenge jurisdiction under Article 19(2)(a) of the Statute'.[252] A Chamber of this Court has previously held that an 'accused will always be entitled to raise a challenge under article 19(2) of the Statute,

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whether or not the Chamber has exercised its powers under article 19(1)'.[253] By the same token, a ruling pursuant to article 19(3) of the Statute does not impair the right of a suspect or accused (or the relevant States) to subsequently challenge the jurisdiction of the Court under article 19(2) of the Statute.

78. Second, the rationale reflected in article 15 of the Statute, according to which it must be ensured that an investigation proceeds on a sound jurisdictional basis as early as possible, similarly finds application in relation to an investigation resulting from a referral by a State Party under articles 13(a) and 14 of the Statute.

79. Under article 53(1) of the Statute, the Prosecutor must consider the same factors, including whether there is 'a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed', in deciding whether to initiate a *proprio motu* investigation or an investigation resulting from a referral by a State Party. In the event the Prosecutor initiates a *proprio motu* investigation, her jurisdictional assessment is reviewed by a Pre-Trial Chamber under article 15(4) of the Statute. If article 19(3) of the Statute is interpreted to extend beyond a case, the Prosecutor would be similarly enabled to request, if deemed necessary, judicial review of a question of jurisdiction in relation to an investigation resulting from a referral by a State Party. Conversely, a restrictive reading of article 19(3) of the Statute would create an untenable distinction. On the one hand, a *proprio motu* investigation would proceed on a sound jurisdictional basis from the outset. On the other hand, an investigation resulting from a referral by a State Party would have to be conducted on an uncertain basis if it gives rise to doubts regarding the Court's jurisdiction. These questions would eventually have to be assessed by a Pre-Trial Chamber in relation to an application under article 58 of the Statute, which could lead to the dismissal of a case following a lengthy and costly investigation.

80. The importance of an early judicial assessment of the Court's jurisdiction has also arisen in other circumstances. Pre-Trial Chamber I (in a different composition) has considered that it 'has *prima facie* jurisdiction to entertain' a request by the Prosecutor to preserve evidence under article 56 of the Statute.[254] It is noteworthy that the Chamber made this determination prior to any cases emanating from the investigation by the Prosecutor, which was triggered by a State Party referral.

81. Third, on the basis of the '*principe de l'effet utile*', the interpretation of article 19(3) of the Statute must avoid rendering it devoid of practical effect.[255]

82. A Pre-Trial Chamber is mandated to address questions of jurisdiction in the context of a case pursuant to a number of legal bases, namely articles 19(1), 19(2) and 58(1)(a) of the Statute. In light of these provisions, article 19(3) of the Statute would have no practical effect if it would apply solely in the context of a case. Conversely, article 19(3) of the Statute would have a distinct effect if it were understood to apply outside of a case. Specifically, it would permit the Prosecutor to request a ruling on a question of jurisdiction for the purposes of determining the scope of the investigation to be conducted following a referral by a State Party, as opposed to unnecessarily delaying judicial scrutiny of matters of jurisdiction until an application under article 58 of the Statute is submitted.

3. The object and purpose of the Statute

83. As enshrined in the preamble and article 1 of the Statute, the Court was established to hold individuals to account for some of the most serious crimes of international concern. However, the mandate of the Court is circumscribed by the jurisdictional parameters defined by the Statute. The Court may not take any action in the exercise of its mandate unless these conditions are met. An interpretation of article 19(3) of the Statute according to which a ruling on a question of jurisdiction may be requested and issued before a case arises is most conducive to the exercise of the Court's mandate within its jurisdictional limitations.

84. In general, if it would appear that the Court has acted in the absence of a jurisdictional basis, its mandate would be adversely affected due to the implications such acts would have for those affected by the Court's operations, in particular suspects, witnesses and victims.

85. With regard to the present request, the Chamber notes that the Prosecutor considers that there is a reasonable basis to believe that members of the Israeli Defense Forces,[256] Israeli authorities,[257] Hamas and Palestinian armed groups[258] have committed a number of crimes falling within the jurisdiction of the Court.[259] In addition, the Prosecutor has concluded that the potential cases concerning crimes allegedly committed by members of the Israeli authorities, Hamas and Palestinian armed groups would currently be admissible,[260] while her assessment of the

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admissibility of potential cases regarding crimes allegedly committed by members of the Israeli Defense Forces is ongoing and will be kept under review.[261]

86. The identification of potential cases by the Prosecutor and her evolving investigation, which is likely to be protracted and resource-intensive, entails that the question of jurisdiction under consideration has concrete ramifications for the further conduct of the proceedings. The initiation of an investigation by the Prosecutor also means that States Parties are under the obligation to cooperate with the Court pursuant to part 9 of the Statute. It is, therefore, all the more necessary to place the present proceedings on a sound jurisdictional footing as early as possible.

C. THE MERITS

87. Having determined that article 19(3) of the Rome Statute is applicable in the present proceedings, the Chamber will now turn to the merits of the Prosecutor's Request. More specifically, the Chamber will first determine whether Palestine can be considered '[t]he State on the territory of which the conduct in question occurred' within the meaning of article 12(2)(a) of the Statute (the 'First Issue'). Thereafter, the Chamber will delineate the territorial jurisdiction of the Court in the present Situation (the 'Second Issue').

88. As will be explained below, the Chamber is satisfied, in keeping with article 21(1)(a) of the Statute, which stipulates that the Court shall apply '[i]n the first place, [the] Statute', that the issues under consideration primarily rest on, and are resolved by, a proper construction of the relevant provisions of the Statute, including in particular articles 12(2)(a), 125(3) and 126(2) of the Statute. In the view of the Chamber, it is not necessary to have recourse to subsidiary sources of law under article 21(1)(b) and (c) of the Statute. Furthermore, the Chamber considers that recourse to article 31(3)(c) of the Vienna Convention on the Law of Treaties (the 'Vienna Convention'), being a rule of interpretation, cannot in any way set aside the hierarchy of sources of law as established by article 21 of the Statute, which is binding on the Chamber.

1. The First Issue

89. With regard to the First Issue arising from the Prosecutor's Request, the Prosecutor's primary position is that 'Palestine is a "State" for the purpose of article 12(2)(a) because of its status as an ICC State Party'.[262] The Prosecutor further indicates that, '[a]gainst this position, it has been argued that the term "State" should be defined in the Rome Statute in accordance with its ordinary meaning and general rules of international law governing Statehood'.[263]

90. Article 12 of the Statute contains the alternative preconditions under which the Court may exercise jurisdiction: the Court's *ratione loci* jurisdiction under article 12(2)(a) or its *ratione personae* jurisdiction under article 12(2)(b). Regarding the former, the Court may exercise its jurisdiction in relation to '[t]he State on the territory of which the conduct in question occurred'.

91. The Chamber must therefore assess whether Palestine can be considered 'the State on the territory of which the conduct in question occurred' within the meaning of article 12(2)(a) of the Statute. To answer this question, the Chamber shall, pursuant to article 31(1) of the Vienna Convention,[264] interpret article 12(2)(a) in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of the object and purpose of the Statute.

a) The ordinary meaning of article 12(2)(a) of the Statute

92. The Chamber notes that the Statute, the Rules of Procedure and Evidence, and the Regulations of the Court do not provide a definition of 'State'.

93. The Chamber notes however that the chapeau of article 12(2) of the Statute stipulates in the relevant part[265] that 'the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute'. The word 'following' connects the reference to 'States Parties to this Statute' contained in the chapeau of article 12(2) of the Statute with *inter alia* the reference to '[t]he State on the territory of which the conduct in question occurred' in article 12(2)(a) of the Statute. In more specific terms, this provision establishes that the reference to '[t]he State on the territory of which the conduct in question occurred' in article 12(2)(a) of the Statute must, in conformity

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with the chapeau of article 12(2) of the Statute, be interpreted as referring to a State Party to the Statute. It does not, however, require a determination as to whether that entity fulfils the prerequisites of statehood under general international law.[266]

b) The context of article 12(2)(a) of the Statute

94. The Chamber notes that according to article 31(2) of the Vienna Convention, 'the context for the purpose of the interpretation of a treaty shall comprise [. . .] the text, including its preamble and annexes'. In this regard, the Chamber wishes to clarify that it understands this provision as referring both to the text of article 12 of the Statute and to the text of other provisions of the Statute. Having regard to the more general context of the Statute, an assessment as to whether the preconditions to the exercise of the Court's jurisdiction under article 12(2) of the Statute have been fulfilled must be conducted in keeping with the outcome of the accession procedure pursuant to articles 125(3) and 126(2) of the Statute, subject to the settlement of a dispute regarding the accession of an entity by the Assembly of States Parties under article 119(2) of the Statute.

95. The Chamber notes that article 125(3) of the Statute, which provides that '[t]his Statute shall be open to accession by all States' and that '[i]nstruments of accession shall be deposited with the Secretary-General of the United Nations', as well as article 126(2) of the Statute, which stipulates that, '[f]or each State [. . .] acceding to this Statute [. . .], the Statute shall enter into force on the first day of the month after the 60th day following the deposit by such State of its instrument of [. . .] accession'. Article 12(1) of the Statute specifically states that '[a] State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5'. The Chamber further notes that article 119(2) of the Statute states that '[a]ny other dispute between two or more States Parties relating to the interpretation or application of this Statute which is not settled through negotiations within three months of their commencement shall be referred to the Assembly of States Parties'.

96. With regards to the accession procedure, the Rome Statute follows the 'depositary system', under which instruments of accession shall be lodged with a 'depositary' – namely, under Article 125(3) of the Statute, the United Nations Secretary-General – who has responsibility over administrative matters linked to the concerned treaty. The Chamber considers it appropriate to clarify that the transmittal of a depositary notification by the United Nations Secretary-General does not, as such, render an entity a State Party to the Statute. The transmittal of a depositary notification is rather premised on the practice of the United Nations General Assembly which 'is to be found in unequivocal indications from the [United Nations General] Assembly that it considers a particular entity to be a State even though it does not fall within the "Vienna formula"' and '[s]uch indications are to be found in [United Nations] General Assembly resolutions'.[267] In other words, in discharging his functions as depositary of treaties, the United Nations Secretary-General is guided by the United Nations General Assembly's determination (as to whether it considers a particular entity to be a State).

97. With respect to the Rome Statute, article 125(3) of the Statute provides that the 'Statute shall be open to accession by all States' and neither this provision nor any other provision in the Court's legal texts imposes additional criteria on, or otherwise qualifies, the accession to the Statute. Therefore, a determination by the United Nations General Assembly renders an entity capable to accede to the Statute pursuant to article 125 of the Statute and the depositary notification by the United Nations Secretary- General merely gives effect to the United Nations General Assembly's determination.[268]

98. Accordingly, in determining whether Palestine can accede to treaties that have adopted the 'all States' formula, the United Nations Secretary-General currently follows the determination of the United Nations General Assembly, which adopted Resolution 67/19 on 4 December 2012, reaffirming therein 'the right of the Palestinian people to self-determination and to independence in their State' and according Palestine a '*non-member observer State status* in the United Nations'. As mentioned by some *amici curiae*, on 21 December 2012, the United Nations Office of Legal Affairs is reported to have indicated, by way of interoffice memorandum, that the Secretary-General, in discharging his functions as depositary of treaties containing an 'all States' clause, will be guided by the determination that the General Assembly has accepted Palestine as a non-Member observer State in the United Nations, and that, as a result, Palestine would be able to become party to any treaties that are open to 'any State' or 'all States' deposited with the Secretary-General'.[269] This Resolution drastically changed the practice of the

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United Nations Secretary-General as regards its acceptance of Palestine's terms of accession to different treaties, including the Rome Statute, as he concluded that Palestine would now be able to deposit instruments of accession and become a party to any treaties deposited with the Secretary-General that are open to 'all States' or 'any State'.[270]

99. In this regard, some *amici curiae* have questioned the role and authority of the United Nations Secretary-General, as depositary of the Rome Statute, to accept Palestine's accession thereto.[271] Pursuant to article 77 of the Vienna Convention, the depositary of a treaty is *inter alia* responsible for receiving instruments of accession to this treaty. However, under the same provision, 'in the event of any *difference* appearing between a State and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of the signatory State and the contracting States or, where appropriate, of the competent organ of the international organization concerned'. Such 'difference' could potentially include situations of uncertainty as regards the capability of an entity to become a State party to the treaty in question. As such, these *amici curiae* have argued that the judiciary of the Court, as the 'competent organ of the international organization concerned', should conduct an assessment of the validity of Palestine's accession to the Rome Statute, as a preliminary step before determining whether Palestine can be considered a State under article 12(2)(b) of the Statute.[272] However, it clearly appears that the Chamber may not review the outcome of the accession procedure.[273] Moreover, the Chamber is neither endowed with the authority to challenge the validity of Resolution 67/19 that admitted Palestine as a non-member observer State and granted its eligibility to accede to the Statute.[274] Since the only requirements to become an ICC State Party are indeed explicitly stated in article 125(3) of the Statute – the deposit of an instrument of accession accepted by the United Nations Secretary-General – the Chamber will now turn to the circumstances of Palestine's accession.

c) Palestine's accession to the Rome Statute

100. The Chamber notes that Palestine acceded to the Statute in accordance with the procedure defined in article 125(3) of the Statute. On 2 January 2015, Palestine submitted its instrument of accession to the Statute,[275] and became a State Party to the ICC on 1 April 2015, following the entry into force of the Statute in its territory. The United Nations Secretary-General circulated Palestine's instrument of accession among the States Parties before accepting it and no State Party, except for Canada, manifested any opposition at the time.[276] Palestine's accession was subsequently accepted by the United Nations Secretary-General on 6 January 2015 and, on 1 April 2015, the then President of the Assembly of States Parties to the Rome Statute (the 'Assembly of State Parties') greeted Palestine in a welcoming ceremony, which 'marked the entry into force of the Rome Statute for the State of Palestine [. . .] thereby becoming the 123rd State Party'.[277] Further, following its accession, Palestine developed an active role in the work of the Assembly of State Parties, as a State Party to the Statute. During the fourteenth session of the Assembly of States Parties, Palestine was included in the list of States Parties' delegations, as opposed to another category.[278] At its sixteenth session, the Assembly of States Parties 'elected the Bureau for the seventeenth to nineteenth sessions' and '[t]he members from the Asia-Pacific group elected to the Bureau, on the recommendation of the Bureau, were Japan and the State of Palestine'.[279] At the same session, Palestine's representatives participated in and made proposals at the discussions regarding the activation of the crime of aggression.[280] Palestine also requested items to be included in the provisional agenda of the seventeenth session of the Assembly of States Parties in 2018, a right held only by States Parties.[281] Moreover, since its accession, Palestine has contributed to the Court's budget[282] and has participated in the adoption of resolutions by the Assembly of State Parties.[283]

101. The Chamber notes that, in the context of the present proceedings, seven States Parties submitted observations on the Prosecutor's Request as *amici curiae* thereby arguing that Palestine cannot be considered a State for the purposes of article 12(2)(a) of the Statute, namely the Czech Republic, Austria, Australia, Hungary, Germany, Brazil and Uganda. However, it should be noted that these States remained silent during the accession process and that none of them challenged Palestine's accession before the Assembly of State Parties at that time or later. It is also noteworthy that a significant number of States Parties to the Statute are also States Parties to the League of Arab States and the Organization of Islamic Cooperation, which intervened in support of Palestine's full participation as a State Party and further argued that for the sole purpose of the determination of the scope of the Court's territorial jurisdiction, Palestine has legally transferred its criminal jurisdiction to the Court, allowing it to exercise its territorial jurisdiction on the Occupied Palestinian Territory as a whole (*i.e.* the West bank, including East Jerusalem, and the Gaza strip).[284]

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102. Consequently, regardless of Palestine's status under general international law, its accession to the Statute followed the correct and ordinary procedure, as provided under article 125(3) of the Statute. In this respect, in the view of the Chamber, once the conditions for accession pursuant to article 125 of the Statute have been fulfilled, the effect of articles 12(1), 125(3) and 126(2) of the Statute, taken together, is that the Statute automatically enters into force for a new State Party. By becoming a State Party, Palestine has agreed to subject itself to the terms of the Statute and, as such, all the provisions therein shall be applied to it in the same manner than to any other State Party. Based on the principle of the effectiveness,[285] it would indeed be contradictory to allow an entity to accede to the Statute and become a State Party, but to limit the Statute's inherent effects over it. This is further confirmed by the fact that, on the basis of article 124 of the Statute, the only exemption to the jurisdiction of the Court relates to a particular category of crimes, namely war crimes, for a limited period of time, which entails that the Statute is automatically activated in respect of all other matters. In addition, denying the automatic entry into force for a particular acceding State Party would be tantamount to a reservation in contravention of article 120 of the Statute. The Chamber also considers that the only manner of challenging the automatic entry into force of the Statute for an acceding State Party is through the settlement of a dispute by the Assembly of States Parties under article 119(2) of the Statute. This conclusion further entails that, in all other circumstances, the outcome of an accession procedure is binding. The Chamber has no jurisdiction to review that procedure and to pronounce itself on the validity of the accession of a particular State Party would be *ultra vires* as regards its authority under the Rome Statute.

103. It follows that the absence of such a power conferred upon the Chamber confirms the exclusion of an interpretation of '[t]he State on the territory of which the conduct in question occurred' in article 12(2)(a) of the Statute as referring to a State within the meaning of general international law. Such an interpretation would allow a chamber to review the outcome of an accession procedure through the backdoor on the basis of its view that an entity does not fulfil the requirements for statehood under general international law. The fact that the Statute automatically enters into force for a new State Party additionally confirms that article 12(2)(a) of the Statute is confined to determining whether or not 'the conduct in question' occurred on the territory of a State Party for the purpose of establishing individual criminal responsibility for the crimes within the jurisdiction of the Court.[286]

d) Article 12(2)(a) of the Statute in the light of the object and purpose of the Statute

104. As specified in article 1 of the Statute, the Court has been established to 'exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute'. The preamble further emphasises that the States Parties are 'determined to put an end to impunity for the perpetrators of these crimes and thus contribute to the prevention of such crimes'. The reference to '[t]he State on the territory of which the conduct in question occurred' in article 12(2)(a) of the Statute must, accordingly, be understood as defining the territorial parameters of the Court's jurisdiction for the sole purpose of establishing individual criminal responsibility.

105. Moreover, the Court, in line with other international tribunals,[287] has referred multiple times to the principle of effectiveness in rejecting any interpretation that would nullify or render inoperative a provision of the Statute.[288] In the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*, Pre-Trial Chamber III noted that:

> [A] teleological interpretation which is mirrored in the principle of effectiveness and based on the object and purpose of a treaty means that the provisions of the treaty are to be 'interpreted so as to give it its full meaning and to enable the system [. . .] to attain its appropriate effects', while preventing any restrictions of interpretation that would render the provisions of the treaty 'inoperative'.[289]

106. Therefore, the reference to '[t]he State on the territory of which the conduct in question occurred' in article 12(2)(a) of the Statute cannot be taken to mean a State fulfilling the criteria for statehood under general international law. Such a construction would exceed the object and purpose of the Statute and, more specifically, the judicial functions of the Chamber to rule on the individual criminal responsibility of the persons brought before it.[290] Moreover, this interpretation would also have the effect of rendering most of the provisions of the Statute, including article 12(1), inoperative for Palestine.

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107. The Chamber additionally notes that the International Court of Justice has held that it 'attaches the utmost importance to the factual and legal findings made by the [International Criminal Tribunal for the former Yugoslavia (the 'ICTY')] in ruling on the criminal liability of the accused before it', but '[t]he situation is not the same for positions adopted by the ICTY on issues of general international law which do not lie within the specific purview of its jurisdiction and [. . .] the resolution of which is not always necessary for deciding the criminal cases before it'.[291]

108. Indeed, given the complexity and political nature of statehood under general international law, the Rome Statute insulates the Court from making such a determination, relying instead on the accession procedure and the determination made by the United Nations General Assembly. The Court is not constitutionally competent to determine matters of statehood that would bind the international community.[292] In addition, such a determination is not required for the specific purposes of the present proceedings or the general exercise of the Court's mandate. As discussed, article 12(2)(a) of the Statute requires a determination as to whether or not the relevant conduct occurred on the territory of a *State Party*,[293] for the sole purpose of establishing individual criminal responsibility. Such an assessment enables the Prosecutor to discharge her obligation to initiate an investigation into the present Situation, which would eventually permit the Court to, in accordance with the Statute, exercise its jurisdiction over persons alleged to have committed crimes falling within its jurisdiction.

e) Conclusion

109. In light of the foregoing, the Chamber finds that, in accordance with the ordinary meaning given to its terms in their context and in the light of the object and purpose of the Statute, the reference to '[t]he State on the territory of which the conduct in question occurred' in article 12(2)(a) of the Statute must be interpreted as a reference to a State Party to the Statute.

110. The Appeals Chamber has held that, if 'a matter is exhaustively dealt with by [the Statute] or [. . .] the Rules of Procedure and Evidence, [. . .] no room is left for recourse to the second or third source of law [in article 21(1) of the Statute] to determine the presence or absence of a rule governing a given subject'.[294]

111. As set out above, the Chamber has found that the Statute mandates that the preconditions to the exercise of the Court's jurisdiction under article 12(2) of the Statute be assessed in keeping with the outcome of the accession procedure pursuant to articles 12(1), 125(3) and 126(2) of the Statute, subject to the settlement of a dispute regarding the accession of an entity by the Assembly of States Parties under article 119(2) of the Statute, and consistent with the purpose of the Court of ending impunity by establishing individual criminal responsibility for crimes. The Statute, thus, exhaustively deals with the issue under consideration and, as a consequence, a determination on the basis of article 21(1)(b) of the Statute as to whether an entity acceding to the Statute fulfils the requirements of statehood under general international law and related questions is not called for.

112. Accordingly, in the view of the Chamber, Palestine acceded to the Statute in accordance with the procedure defined by the Statute and, in addition, the Assembly of States Parties has acted in accordance with Palestine's accession.[295] In view of its accession, Palestine shall thus have the right to exercise its prerogatives under the Statute and be treated as any other State Party would. Moreover, Palestine's accession has not been challenged under article 119(2) of the Statute.[296] Palestine is therefore a State Party to the Statute, and, as a result, a 'State' for the purposes of article 12(2)(a) of the Statute. These issues have been settled by Palestine's accession to the Statute.

113. In order to avoid any misunderstanding, the Chamber wishes to underline that these findings are without prejudice to any matters of international law arising from the events in the *Situation in Palestine* that do not fall within the Court's jurisdiction. In particular, by ruling on the territorial scope of its jurisdiction, the Chamber is neither adjudicating a border dispute under international law nor prejudging the question of any future borders.

2. The Second Issue

114. The Chamber finds that the Second Issue arising from the Prosecutor's Request, namely the delimitation of the territory of Palestine for the sole purpose of defining the Court's territorial jurisdiction, is inextricably linked to the First Issue arising from the Prosecutor's Request. It is again the accession procedure which provides the relevant indications as to the extent of the Court's territorial jurisdiction in the situation *sub judice*.

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115. First, the Chamber wishes to reiterate that disputed borders have never prevented a State from becoming a State Party to the Statute and, as such, cannot prevent the Court from exercising its jurisdiction.

116. Second, with regard to the territory of Palestine for the sole purpose of defining the Court's territorial jurisdiction, the Chamber notes that in according 'non-member observer State status in the United Nations' to Palestine in Resolution 67/19, the United Nations General Assembly '[reaffirmed] the right of the Palestinian people to self-determination and to independence in their State of Palestine *on the Palestinian territory occupied since 1967*'.[297]

117. In the same Resolution, the United Nations General Assembly recalled other similarly-worded resolutions. On such occasions, it notably: (i) '[affirmed] the need to enable the Palestinian people to exercise their sovereignty over their territory occupied since 1967';[298] (ii) '[affirmed] that the status of the Palestinian territory occupied since 1967, including East Jerusalem, remains one of military occupation, and [. . .] that the Palestinian people have the right to self-determination and to sovereignty over their territory';[299] and (iii) '[stressed] the need for respect for and preservation of the territorial unity, contiguity and integrity of all of the Occupied Palestinian Territory, including East Jerusalem'.[300] The United Nations General Assembly also recalled relevant Security Council resolutions.[301]

118. On this basis, the Chamber finds that the Court's territorial jurisdiction in the *Situation in Palestine* extends to the territories occupied by Israel since 1967, namely Gaza and the West Bank, including East Jerusalem.

119. In addition, the Chamber notes that article 21(3) of the Statute provides that '[t]he application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights'. In this regard, the Chamber recalls that the Appeals Chamber held that '[h]uman rights underpin the Statute; *every aspect of it including the exercise of jurisdiction of the Court*' and that '*[i]ts provisions* must be interpreted and more importantly applied in accordance with internationally recognized human rights'.[302]

120. The right to self-determination is set forth in the Charter of the United Nations,[303] the International Covenant on Civil and Political Rights,[304] and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.[305] According to the International Court of Justice, the right to self-determination is owed *erga omnes*,[306] and 'as a fundamental human right, [this right] has a broad scope of application'.[307] Furthermore, the United Nations Human Rights Committee has specified that '[t]he right of self-determination is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights'.[308] However, the Chamber recognises that controversies arise as to the consequences attached to this right and the way in which it can be exercised.[309] While all 'people' have the right to self-determination – the right to freely determine their political status and freely pursue their economic, social and cultural development – only certain 'people' have been recognised as having a right to independence derived from the right to self-determination.[310]

121. In the present situation, the Chamber notes that the Palestinian right to self-determination within the Occupied Palestinian Territory has been explicitly recognised by different bodies.[311] The International Court of Justice observed that the 'legitimate rights' of the Palestinian people referred to in the Israeli-Palestinian Interim Agreement '*include the right to self-determination*, *as the General Assembly has moreover recognized on a number of occasions*' and that certain measures adopted by Israel in areas of the West Bank 'severely [impede] the exercise by the Palestinian people of its right to self-determination', while stressing the risk that 'further alterations to the demographic composition of the Occupied Palestinian Territory [would result] from the construction of the wall'.[312] The United Nations General Assembly has indeed adopted resolutions to this effect,[313] where it consistently associated the Palestinian People's right to self-determination with the Occupied Palestinian Territory demarcated with the Green Line,[314] and stressed the need for respect for and preservation of the territorial unity, contiguity and integrity of all of the Occupied Palestinian Territory.[315] More recently, this was further reaffirmed by the United Nation Security Council which called on States not to recognise acts in breach of international law in the Occupied Palestinian Territory by 'condemning all measures aimed at altering the demographic composition, character and status of the Palestinian Territory occupied since 1967, including East Jerusalem', and:

1. Reaffirm[ed] that the establishment by Israel of settlements in the Palestinian territory occupied since 1967, including East Jerusalem, has no legal validity and constitutes a flagrant violation under

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international law and a major obstacle to the achievement of the two-State solution and a just, lasting and comprehensive peace;

2. [. . .]

3. Underlin[ed] that it will not recognize any changes to the 4 June 1967 lines, including with regard to Jerusalem, other than those agreed by the parties through negotiations;

4. [. . .]

5. Call[ed] upon all States, bearing in mind paragraph 1 of this resolution, to distinguish, in their relevant dealings, between the territory of the State of Israel and the territories occupied since 1967.[316]

122. Therefore, in the view of the Chamber, the right to self-determination amounts to an 'internationally recognized human [right]' within the meaning of article 21(3) of the Statute. The Chamber notes that the United Nations General Assembly and the International Court of Justice have affirmed that this right finds application in relation to the Occupied Palestinian Territory.[317]

123. The Chamber considers that, in light of the broad remit of the Appeals Chamber's determination, it must also ensure that its interpretation of article 12(2)(a) of the Statute, in conjunction with articles 125(3) and 126(2) of the Statute, is consistent with internationally recognised human rights. More specifically, the Chamber is of the view that the aforementioned territorial parameters of the Prosecutor's investigation pursuant to articles 13(a), 14 and 53(1) of the Statute implicate the right to self-determination. Accordingly, it is the view of the Chamber that the above conclusion – namely that the Court's territorial jurisdiction in the *Situation in Palestine* extends to the territories occupied by Israel since 1967 on the basis of the relevant indications arising from Palestine's accession to the Statute – is consistent with the right to self-determination.

3. The Oslo Accords

124. For the sake of completeness, the Chamber will briefly address the issue of the Oslo Accords and examine whether the submissions advanced by the parties and participants in this regard are pertinent to the present proceedings.

125. The Chamber notes the Oslo process and the agreements arising from this process (the 'Oslo Agreements') and, in particular, the 'Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (Oslo II)' which was concluded on 28 September 1995.[318] The Chamber notes that this agreement contains a number of clauses limiting the scope of the jurisdiction of the 'Palestinian Interim Self-Government Authority'. Most noticeably, article XVII(2)(c) of this agreement stipulates *inter alia* that '[t]he territorial and functional jurisdiction of the [Palestinian Interim Self-Government Authority] will apply to all persons, *except for Israelis*, unless otherwise provided in this Agreement'. Article I(1)(a) of Annex IV to this agreement, the 'Protocol Concerning Legal Affairs', further provides that '[t]he criminal jurisdiction of the [Palestinian Interim Self-Government Authority] 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'.[319]

126. As briefly outlined above,[320] two lines of argument may be drawn from the observations submitted to the Chamber regarding the Oslo Agreements. On the one hand, certain victims[321] and *amici curiae*,[322] relying on the *nemo dat quod non habet* rule, have argued that, in accordance with the Oslo Agreements, Palestine could not have delegated part of its jurisdiction to the Court. On the other hand, the Prosecutor,[323] Palestine,[324] certain victims,[325] and certain *amici curiae* have argued that the Oslo Agreements did not affect the *jurisdiction* of the Court,[326] although, in the view of some, they could affect matters of *cooperation* with the Court.[327]

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127. The Chamber notes in this respect that article 97 of the Statute enjoins a State Party that identifies a problem possibly impeding or preventing the execution of a request pertaining to international cooperation or judicial assistance to consult with the Court, including in relation to '[t]he fact that execution of the request in its current form would require the requested State to breach a pre-existing treaty obligation undertaken with respect to another State'. Pursuant to article 98, the Court may not proceed with requests for surrender and/or assistance which would require a requested State to act inconsistently with its obligations under either 'international law with respect to the State or diplomatic immunity of a person or property of a third State' or 'international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court'. The inclusion of these provisions appear to indicate that the drafters expressly sought to accommodate any obligations of a State Party under international law that may conflict with its obligations under the Statute.

128. In any event, the Chamber recalls that the Appeals Chamber has recently held in its judgment in relation to the *Situation in the Islamic Republic of Afghanistan* that:

> [a]rguments were also advanced during the hearing that certain agreements entered into between the United States and Afghanistan affect the jurisdiction of the Court and should be a factor in assessing the authorisation of the investigation. The Appeals Chamber is of the view that the effect of these agreements is not a matter for consideration in relation to the authorisation of an investigation under the statutory scheme. As highlighted by the Prosecutor and LRV 1, article 19 allows States to raise challenges to the jurisdiction of the Court, while articles 97 and 98 include safeguards with respect to pre-existing treaty obligations and other international obligations that may affect the execution of requests under Part 9 of the Statute. Thus, these issues may be raised by interested States should the circumstances require, but the arguments are not pertinent to the issue of the authorisation of an investigation.[328]

129. Similarily, the Chamber finds that the arguments regarding the Oslo Agreements in the context of the present proceedings are not pertinent to the resolution of the issue under consideration, namely the scope of the Court's territorial jurisdiction in Palestine. The Chamber considers that these issues may be raised by interested States based on article 19 of the Statute, rather than in relation to a question of jurisdiction in connection with the initiation of an investigation by the Prosecutor arising from the referral of a situation by a State under articles 13(a) and 14 of the Statute. As a consequence, the Chamber will not address these arguments.

4. Final Considerations

130. As a final matter, the Chamber finds it appropriate to underline that its conclusions in this decision are limited to defining the territorial parameters of the Prosecutor's investigation in accordance with the Statute. The Court's ruling is, as noted above,[329] without prejudice to any matters of international law arising from the events in the *Situation in Palestine* that do not fall within the Court's jurisdiction. In particular, by ruling on the territorial scope of its jurisdiction, the Court is neither adjudicating a border dispute under international law nor prejudging the question of any future borders.

131. It is further opportune to emphasise that the Chamber's conclusions pertain to the current stage of the proceedings, namely the initiation of an investigation by the Prosecutor pursuant to articles 13(a), 14 and 53(1) of the Statute. When the Prosecutor submits an application for the issuance of a warrant of arrest or summons to appear under article 58 of the Statute, or if a State or a suspect submits a challenge under article 19(2) of the Statute, the Chamber will be in a position to examine further questions of jurisdiction which may arise at that point in time.

FOR THESE REASONS, THE CHAMBER HEREBY

> **FINDS** that Palestine is a State Party to the Statute;
>
> **FINDS**, by majority, Judge Kovács dissenting, that, as a consequence, Palestine qualifies as '[t]he State on the territory of which the conduct in question occurred' for the purposes of article 12(2)(a) of the Statute; and

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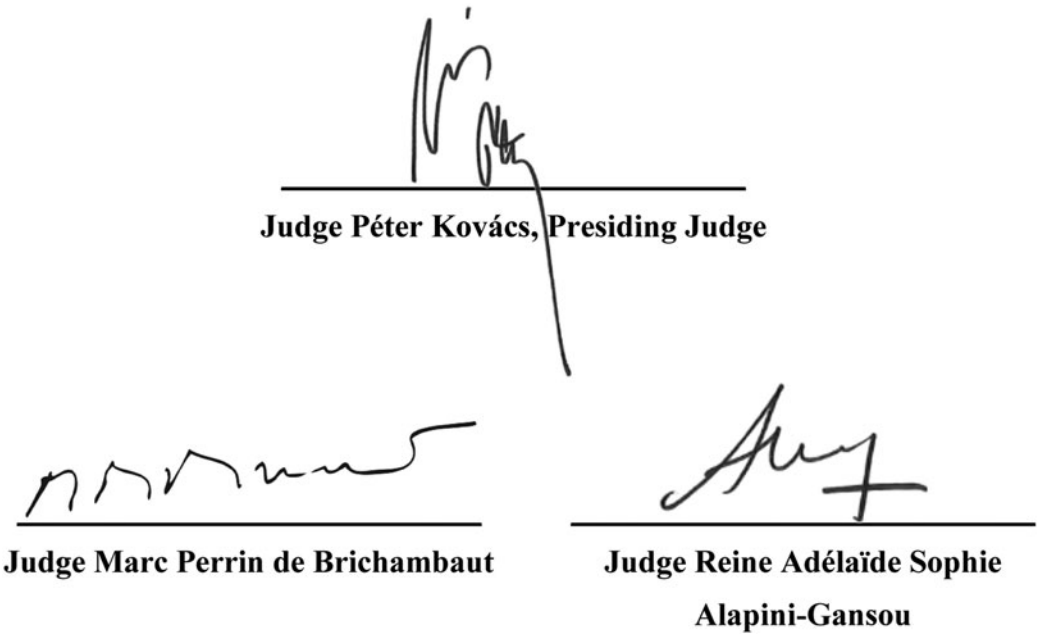
FINDS, by majority, Judge Kovács dissenting, that the Court's territorial jurisdiction in the *Situation in Palestine* extends to the territories occupied by Israel since 1967, namely Gaza and the West Bank, including East Jerusalem.

Done in both English and French, the English version being authoritative.
Judge Péter Kovács appends a partly dissenting opinion.

Judge Marc Perrin de Brichambaut appends a partly separate opinion.



Judge Péter Kovács, Presiding Judge

Judge Marc Perrin de Brichambaut

Judge Reine Adélaïde Sophie Alapini-Gansou

Dated this Friday, 5 February 2021

At The Hague, The Netherlands

ENDNOTES

1 Presidency, Decision assigning the situation in the State of Palestine to Pre-Trial Chamber I ('Presidency Decision'), Annex I, 24 May 2018, ICC-01/18-1-AnxI, p. 2.

2 Secretary-General of the United Nations, 'Rome Statute of the International Criminal Court, Rome, 17 July 1998, State of Palestine: Accession', 6 January 2015, C.N.13.2015. TreatiesXVIII.10 (Depositary Notification).

3 Presidency Decision, Annex I.

4 Presidency Decision, p. 3.

5 ICC-01/18-2.

6 Registry's Initial Report on Information and Outreach Activities Concerning Victims and Affected Communities in the Situation, 12 November 2018, ICC-01/18-3-Conf; a public redacted version is also available, *see* ICC-01/18-3-Red. Registry's Second Report on Information and Outreach Activities Concerning Victims and Affected Communities in the Situation, 12 February 2019, ICC-01/18-4-Conf; a public redacted version is also available, *see* ICC-01/18-4-Red. Registry's Third Report on Information and Outreach Activities Concerning Victims and Affected Communities in the Situation, 13 May 2019, ICC-01/18-5-Conf; a public redacted version is also available, *see* ICC-01/18-5-Red. Registry's Fourth Report on Information and Outreach Activities Concerning Victims and Affected Communities in the Situation, 9 August 2019, ICC-01/18-6-Conf; a public redacted version is also available, *see* ICC-01/18-6-Red. Registry's Fifth Report on Information and Outreach Activities Concerning Victims and Affected Communities in the Situation, 14 November 2019, ICC-01/18-7. Registry's Sixth Report on Information and Outreach Activities Concerning Victims

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and Affected Communities in the Situation, 12 February 2020, ICC-01/18-20-Conf; a public redacted version is also available, *see* ICC-01/18-20-Red. Registry's Seventh Report on Information and Outreach Activities Concerning Victims and Affected Communities in the Situation, 11 May 2020, ICC-01/18-132-Conf; a public redacted version is also available, *see* ICC- 01/18-132-Red.

7 ICC-01/18-11.

8 ICC-01/18-12, together with Public Annex A.

9 ICC-01/18-14.

10 ICC-01/18-14, paras 13, 17, 20.

11 ICC-01/18-63.

12 ICC-01/18-63, paras 51-56, 59, 60-61.

13 ICC-01/18-67.

14 ICC-01/18-82 (submitted and notified on 16 March 2020).

15 ICC-01/18-66, together with annex (submitted and notified on 3 March 2020).

16 ICC-01/18-69 (submitted and notified on 13 March 2020).

17 ICC-01/18-70 (submitted on 13 March 2020, notified on 16 March 2020).

18 ICC-01/18-71 (submitted on 15 March 2020, notified on 16 March 2020).

19 ICC-01/18-72 (submitted on 15 March 2020, notified on 16 March 2020).

20 ICC-01/18-73 (submitted and notified on 16 March 2020).

21 ICC-01/18-74 (submitted and notified on 16 March 2020).

22 ICC-01/18-75 (submitted and notified on 16 March 2020).

23 ICC-01/18-76 (submitted and notified on 16 March 2020).

24 ICC-01/18-77 (submitted and notified on 16 March 2020).

25 ICC-01/18-78 (submitted and notified on 16 March 2020).

26 ICC-01/18-79 (submitted and notified on 16 March 2020).

27 ICC-01/18-80 (submitted and notified on 16 March 2020).

28 ICC-01/18-81 (submitted and notified on 16 March 2020).

29 ICC-01/18-83 (submitted and notified on 16 March 2020).

30 ICC-01/18-84 (submitted and notified on 16 March 2020).

31 ICC-01/18-85 (submitted and notified on 16 March 2020).

32 ICC-01/18-86 (submitted and notified on 16 March 2020).

33 ICC-01/18-88 (submitted and notified on 16 March 2020).

34 ICC-01/18-89 (submitted and notified on 16 March 2020).

35 ICC-01/18-90 (submitted and notified on 16 March 2020).

36 ICC-01/18-91 (submitted on 16 March 2020, notified on 17 March 2020).

37 ICC-01/18-92, together with annex (submitted on 16 March 2020, notified on 17 March 2020).

38 ICC-01/18-93, together with annex (submitted on 16 March 2020, notified on 17 March 2020).

39 ICC-01/18-94 (submitted on 16 March 2020, notified on 17 March 2020).

40 ICC-01/18-95 (submitted on 16 March 2020, notified on 17 March 2020).

41 ICC-01/18-96, together with annexes 1 and 2 (submitted on 16 March 2020, notified on 17 March 2020).

42 ICC-01/18-97 (submitted on 16 March 2020, notified on 17 March 2020).

43 ICC-01/18-98-Corr (the original version was submitted on 16 March 2020 and notified on 17 March 2020; the corrected version was submitted on 17 March 2020 and notified on 18 March 2020).

44 ICC-01/18-100 (submitted on 16 March 2020, notified on 17 March 2020).

45 ICC-01/18-101, together with annexes 1 and 2 (submitted on 16 March 2020, notified on 17 March 2020). A corrected version was submitted on 18 March 2020 and notified on 19 March 2020 but, as specified below, the Chamber has rejected this version.

46 ICC-01/18-103 (submitted on 16 March 2020, notified on 17 March 2020).

47 ICC-01/18-104 (submitted on 16 March 2020, notified on 17 March 2020).

48 ICC-01/18-106 (submitted on 16 March 2020, notified on 17 March 2020).

49 ICC-01/18-107 (submitted on 16 March 2020, notified on 17 March 2020).

50 ICC-01/18-108-Corr, together with annexes A and B (the original version was submitted on 16 March 2020 and notified on 17 March 2020; the corrected version was submitted and notified on 20 March 2020).

51 ICC-01/18-111 (submitted on 16 March 2020, notified on 17 March 2020).

52 ICC-01/18-114 (submitted on 16 March 2020, notified on 17 March 2020).

53 ICC-01/18-115-Corr (the original version was submitted on 16 March 2020 and notified on 17 March 2020; the corrected version was submitted on 25 March 2020 and notified on 26 March 2020).

54 ICC-01/18-117 (the original version was submitted on 16 March 2020, an adjusted version was submitted on 17 March 2020 due to a technical issue and notified on 18 March 2020).

55 ICC-01/18-118 (submitted on 16 March 2020, notified on 18 March 2020).

56 ICC-01/18-119 (submitted on 16 March 2020, notified on 18 March 2020).

57 ICC-01/18-122 (submitted on 16 March 2020, notified on 19 March 2020).

58 ICC-01/18-68 (submitted by Liesbeth Zegveld and notified on 12 March 2020).

59 ICC-01/18-99 (submitted by Fergal Gaynor and Nada Kiswanson van Hooydonk on 16 March 2020, notified on 17 March 2020).

60 ICC-01/18-102 (submitted by Bradley Parker and Khaled Quzmar [on behalf of Defense for Children International – Palestine] on 16 March 2020, notified on 17 March 2020).

61 ICC-01/18-105, together with annexes 1 and 2 (the original version was submitted by the Office of Public Counsel for Victims on 16 March 2020, an adjusted version was submitted on 17 March 2020 due to technical issue and notified on 17 March 2020).

62 ICC-01/18-109-Conf (submitted by Nitsana Darshan-Leitner (Shurat HaDin – Israel Law Center [on behalf of Victims of

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Palestinian Terror] on 16 March 2020, notified on 17 March 2020); a public redacted version is also available; *see* ICC-01/18-109-Red.

63 ICC-01/18-110-Conf (submitted by Katherine Gallagher on 16 March 2020, notified 20 March 2020); a public redacted version is also available; *see* ICC-01/18-110-Red.

64 ICC-01/18-112, together with annex (submitted by Raji Sourani, Chantal Meloni and Triestino Mariniello on 16 March 2020, notified on 18 March 2020).

65 ICC-01/18-113 (submitted by Dominique Cochain Assi on 16 March 2020, notified on 17 March 2020).

66 ICC-01/18-120, together with annex A and annexes 1-3 (submitted by Gilles Devers and Liesbeth Zegveld on 16 March 2020, notified on 18 March 2020).

67 ICC-01/18-123, together with annexes 1.a and 1.b (submitted by Steven Powles and Sahar Francis [on behalf of Addameer Prisoner Support and Human Rights Association] on 16 March 2020, notified on 19 March 2020).

68 ICC-01/18-126-Conf (submitted on 15 March 2020, notified on 25 March 2020); a public redacted version is also available, *see* ICC-01/18-126-Red.

69 ICC-01/18-125.

70 ICC-01/18-128.

71 ICC-01/18-131, together with annex A.

72 Transmission of Powers of Attorney, 9 April 2020, ICC-01/18-129-Conf, together with 9 confidential *ex parte* annexes only available to the Registry; a public redacted version is also available, *see* ICC- 01/18-129-Red. Second Transmission of Powers of Attorney, 24 April 2020, ICC-01/18-130-Conf, together with 2 confidential *ex parte* annexes only available to the Registry; a public redacted version is also available, *see* ICC-01/18-130-Red. Third Transmission of Powers of Attorney, 11 May 2020, ICC- 01/18-133, together with 1 confidential *ex parte* annex only available to the Registry; a public redacted version is also available, *see* ICC-01/18-133-Red.

73 ICC-01/18-134.

74 ICC-01/18-135, together with public Annex A.

75 ICC-01/18-136.

76 ICC-01/18-138.

77 ICC-01/18-12, para. 3.

78 ICC-01/18-12, para. 5.

79 ICC-01/18-12, paras 5–6, 20.

80 ICC-01/18-12, paras 22–23.

81 ICC-01/18-12, para. 29.

82 ICC-01/18-12, para. 19.

83 ICC-01/18-12, para. 21.

84 ICC-01/18-12, para. 22.

85 ICC-01/18-12, para. 24.

86 ICC-01/18-12, paras 24–28.

87 ICC-01/18-12, para. 30.

88 ICC-01/18-12, para. 36.

89 ICC-01/18-12, para. 38.

90 ICC-01/18-12, para. 7.

91 ICC-01/18-12, para. 7.

92 ICC-01/18-12, para. 7.

93 ICC-01/18-12, para. 7.

94 ICC-01/18-12, para. 7.

95 ICC-01/18-12, para. 7.

96 ICC-01/18-12, para. 9.

97 ICC-01/18-12, para. 9.

98 ICC-01/18-12, para. 183.

99 ICC-01/18-12, para. 183.

100 ICC-01/18-12, para. 184 (footnotes omitted).

101 ICC-01/18-12, para. 184 (footnotes ommitted).

102 ICC-01/18-12, para. 184.

103 ICC-01/18-12, para. 185 (footnote omitted).

104 ICC-01/18-12, para. 186.

105 ICC-01/18-12; ICC-01/18-12-AnxA, p. 34.

106 Israel, Office of the Attorney General, The International Criminal Court's Lack of Jurisdiction over the So-Called "Situation in Palestine", 20 December 2019 (the 'Israel Attorney General Memorandum'), para. 2; *see also* paras 7–16; Israel, Ministry of Foreign Affairs, Office of the Legal Adviser, The International Criminal Court's Lack of Jurisdiction over the So-Called "Situation in Palestine", Synopsis, 20 December 2019 (the 'Israel Ministry of Foreign Affairs Memorandum'), para. 8.

107 Israel Attorney General Memorandum, para. 19; Israel Ministry of Foreign Affairs Memorandum, paras 14–15, 19–20.

108 Israel Attorney General Memorandum, para. 19; *see also* paras 21–25; Israel Ministry of Foreign Affairs Memorandum, paras 16–18.

109 Israel Attorney General Memorandum, para. 26; *see also* paras 27–39; Israel Ministry of Foreign Affairs Memorandum, paras 21–22, 29.

110 Israel Attorney General Memorandum, para. 32; *see also* paras 27–31; Israel Ministry of Foreign Affairs Memorandum, para. 23.

111 Israel Attorney General Memorandum, para. 33; *see also* paras 34–39; Israel Ministry of Foreign Affairs Memorandum, paras 4, 23–24.

112 Israel Attorney General Memorandum, para. 26; *see also* paras 40–48; Israel Ministry of Foreign Affairs Memorandum, paras 25–28.

113 Israel Attorney General Memorandum, para. 49; Israel Ministry of Foreign Affairs Memorandum, paras 31–32.

114 Israel Attorney General Memorandum, para. 50; *see also* paras 50–54; Israel Ministry of Foreign Affairs Memorandum, para. 32.

115 Israel Attorney General Memorandum, para. 55.

116 Israel Attorney General Memorandum, para. 60; *see also* paras 56–59; Israel Ministry of Foreign Affairs Memorandum, para. 30.

117 ICC-01/18-82, para. 6.

118 ICC-01/18-82, para. 7.

119 ICC-01/18-82, para. 8.

120 ICC-01/18-82, para. 9.

121 ICC-01/18-82, para. 10.

122 ICC-01/18-82, para. 21.

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123 ICC-01/18-82, para. 21.
124 ICC-01/18-82, para. 28.
125 ICC-01/18-82, para. 29.
126 ICC-01/18-82, para. 34.
127 ICC-01/18-82, para. 40.
128 ICC-01/18-82, para. 45.
129 ICC-01/18-82, para. 50.
130 ICC-01/18-82, para. 61.
131 ICC-01/18-82, para. 63.
132 ICC-01/18-82, para. 64.
133 ICC-01/18-82, para. 68.
134 ICC-01/18-68, para. 19.
135 ICC-01/18-68, para. 19 (emphasis in original).
136 ICC-01/18-68, para. 19.
137 ICC-01/18-68, para. 19.
138 ICC-01/18-99, para. 2. *See also* paras 16–32.
139 ICC-01/18-99, para. 3. *See also* paras 33–46.
140 ICC-01/18-99, para. 48. *See also* paras 47–86.
141 ICC-01/18-99, para. 4. *See also* paras 87–105.
142 ICC-01/18-99, para. 5. *See also* paras 106–118.
143 ICC-01/18-102, para. 55.
144 ICC-01/18-102, para. 61.
145 ICC-01/18-102, p. 17.
146 ICC-01/18-102, para. 73.
147 ICC-01/18-105, para. 1. *See also* paras 4–7.
148 ICC-01/18-105, para. 1. *See also* paras 8–11.
149 ICC-01/18-105, para. 2. *See also* paras 12–20, 27–29.
150 ICC-01/18-105, para. 2. *See also* paras 21–26.
151 ICC-01/18-105, para. 3. *See also* paras 30–56.
152 ICC-01/18-109-Red, para. 55.
153 ICC-01/18-109-Red, paras 56-57. *See also* paras 61–65, 72–73.
154 ICC-01/18-109-Red, para. 68. *See also* paras 69–71.
155 ICC-01/18-110-Red, para. 2. *See also* paras 29–35.
156 ICC-01/18-110-Red, para. 2. *See also* paras 53–55.
157 ICC-01/18-110-Red, para. 2. *See also* paras 37–52.
158 ICC-01/18-110-Red, para. 2. *See also* para. 56.
159 ICC-01/18-112, para. 29. *See also* paras 30–34.
160 ICC-01/18-112, para. 35. *See also* paras 36–37.
161 ICC-01/18-112, para. 38. *See also* paras 39–54.
162 ICC-01/18-112, para. 62. *See also* paras 63–65.
163 ICC-01/18-113, para. 16. *See also* paras 2–15.
164 ICC-01/18-113, para. 24. *See also* paras 16–23.
165 ICC-01/18-113, para. 44. *See also* paras 24–43.
166 ICC-01/18-113, para. 69. *See also* paras 44–68.
167 ICC-01/18-120, paras 10, 28. *See also* paras 11–27.
168 ICC-01/18-120, para. 37. *See also* paras 38–61.
169 ICC-01/18-123, para. 8. *See also* paras 10–27.
170 ICC-01/18-123, para. 8. *See also* paras 28–35.
171 ICC-01/18-126-Red, para. 20. *See also* paras 26–40.
172 ICC-01/18-126-Red, para. 21. *See also* paras 41–48.
173 ICC-01/18-126-Red, para. 23. *See also* paras 49–55.
174 ICC-01/18-126-Red, para. 24. *See also* paras 56–59.
175 ICC-01/18-90.
176 ICC-01/18-69.
177 ICC-01/18-70.
178 ICC-01/18-75.
179 ICC-01/18-76.
180 ICC-01/18-79.
181 ICC-01/18-80.
182 ICC-01/18-81.
183 ICC-01/18-83.
184 ICC-01/18-86.
185 ICC-01/18-88.
186 ICC-01/18-89.
187 ICC-01/18-92.
188 ICC-01/18-93.
189 ICC-01/18-94.
190 ICC-01/18-95.
191 ICC-01/18-97.
192 ICC-01/18-98-Corr.
193 ICC-01/18-101.
194 ICC-01/18-103.
195 ICC-01/18-106.
196 ICC-01/18-108-Corr.
197 ICC-01/18-119.
198 ICC-01/18-66.
199 ICC-01/18-71.
200 ICC-01/18-72.
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208 ICC-01/18-96.
209 ICC-01/18-100.
210 ICC-01/18-104.
211 ICC-01/18-107.
212 ICC-01/18-111.
213 ICC-01/18-114.
214 ICC-01/18-115-Corr.
215 ICC-01/18-117.
216 ICC-01/18-118.

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217 ICC-01/18-122.

218 *See* ICC-01/18-108, paras 62–64; ICC-01/18-81, paras 8, 21.

219 *See* ICC-01/18-106, paras 10, 33; ICC-01/18-119, para. 5.

220 *See* ICC-01/18-110, para. 30.

221 *See* ICC-01/18-107, para. 3; ICC-01/18-77, para. 41; ICC-01/18-66, para. 59; ICC-01/18-112, paras 66–67.

222 ICJ, *Western Sahara*, Advisory Opinion, 16 October 1975, I.C.J. Reports 1975, p. 19, para. 17.

223 ICC-01/18-12, para. 220.

224 *See* ICC-01/18-94, paras 16, 39, 41; ICC-01/18-106, paras 30–33; ICC-01/18-119, para. 6.

225 The Chamber shares the view stated by the International Court of Justice in its Advisory Opinion on the *Legal Consequences of the construction of a Wall in the Occupied Palestinian Territory* that '[. . .] a legal question also has political aspects' (p. 155, para. 41). *See also* ICJ, *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal*, Advisory Opinion, 12 July 1973, I.C.J. Reports 1973; *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, Advisory Opinion, 28 May 1948, I.C.J Reports 1957; and *Threat of or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, I.C.J Reports 1996, p. 234, para. 13: '[t]he fact that this question also has political aspects, as, in the nature of things, is the case with so many questions which arise in international life, does not suffice to deprive it of its character as a "legal question" [. . .] Whatever its political aspects, the Court cannot refuse to admit the legal character of a question which invites it to discharge an essentially judicial task [. . .]'.

226 *See* ICC-01/18-119, paras 8–9; ICC-01/18-108-Corr, para. 65; ICC-01/18-93, para. 30.

227 ICJ, *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America)*, Preliminary Question, Judgment, 15 June 1954, I.C.J. Reports 1954, p. 32.

228 The Chamber considers that the Monetary Gold principle does not apply to the ICC. Indeed, this principle emanates from, and is applicable to, the International Court of Justice, and has *de facto* been considered before the Permanent Court of Arbitration ('PCA') and the International Tribunal for the Law of the Sea ('ITLOS'), which are entities addressing disputes involving at least one State as a party (*See e.g.* ITLOS, *The M/V "Norstar" Case (Panama v. Italy)*, 10 April 2019, ITLOS Case No. 25; PCA, *South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, Award on Jurisdiction and Admissibility, 29 October 2015, 2013–19). By contrast, the ICC's mandate is to rule on the individual criminal responsibility of persons (*see* articles 1 and 25(1) of the Statute).

229 ICC-01/18-14.

230 *See* ICC-01/18-71, para. 27.

231 Permanent Court of International Justice, *The Case of the SS "Lotus" (France v. Turkey)*, Judgment, 7 September 1927, P.C.I.J. Series A. No. 10.

232 *Request under Regulation 46(3) of the Regulations of the Court*, Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", 6 September 2018, ICC- RoC46(3)-01/18-37 (the '*Regulation 46(3)* Decision'), para. 66. *See also* ICC-01/18-107, para. 75.

233 Prosecutor, *Request under Regulation 46(3) of the Regulations of the Court*, Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, 9 April 2018, ICC-RoC46 (3)-01/18-1.

234 *Regulation 46(3)* Decision, para. 28.

235 9 April 2018 Request, paras 3, 58, 61; President of the Pre-Trial Division, *Request under Regulation 46(3) of the Regulations of the Court*, Decision assigning the 'Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute' to Pre-Trial Chamber I, 11 April 2018, ICC-RoC46(3)- 01/18-2.

236 ICC-01/18-12, para. 2.

237 ICC-01/18-12, para. 2.

238 Appeals Chamber, *Situation in the Islamic Republic of Afghanistan*, Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan, 5 March 2020, ICC-02/17-138 ('*Situation in Afghanistan* Appeals Chamber Judgment'), para. 28.

239 Article 53(1)(a) of the Statute (emphasis added).

240 Prosecutor, Policy Paper on Preliminary Examinations, November 2013, para. 2.

241 *See* Pre-Trial Chamber II, *Situation in the Republic of Kenya,* Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, ICC-01/09-19-Corr, paras 40–48.

242 Pre-Trial Chamber I (in a different composition), *Situation in the Democratic Republic of the Congo*, Decision on the Application for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, 17 January 2006, ICC-01/04-101-tENG-Corr, para. 65.

243 Pre-Trial Chamber II (in a different composition) has previously held that this provision enshrines the principle of '*la compétence de la compétence*', which entails that 'any judicial body, including any international tribunal, retains the power and the duty to determine the boundaries of its own jurisdiction and competence'. *See* Pre-Trial Chamber II, *Situation in Uganda*, Decision on the Prosecutor's Application that the Pre-Trial Chamber Disregard as Irrelevant the Submission Filed by the Registry on 5 December 2005, 9 March 2006, ICC-02/04-01/05-147, paras 22–23.

244 In addition, this provision further permits the referring entity and victims to submit observations on a request for a ruling on a question of jurisdiction.

245 *See also* C. K. Hall, D. D. Ntanda Nsereko and M. J. Ventura, 'Article 19 Challenges to the jurisdiction of the Court or the admissibility of a case' in O. Triffterer and K. Ambos (eds.) *The Rome Statute of the International Criminal Court. A Commentary* (2016), p. 874 ('In contrast to the wording in paragraphs 1 and 2, the Prosecutor's ability under paragraph 3 to "seek a ruling regarding a question of jurisdiction or admissibility" is not limited to a "case". Therefore, in certain circumstances, the Prosecutor could attempt to seek a ruling that the Court has jurisdiction over an entire situation or that the situation was admissible, although this view is not universally accepted') (footnote omitted).

246 *See also* ICC-01/18-90, para. 11.

247 *See also* ICC-01/18-90, para. 7.

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248 *See also* L. Trigeaud, 'Article 19. Contestation de la Compétence de la Cour ou de la Recevabilité d'une Affaire' in J. Fernandez and X. Pacreau (eds.) *Statut de Rome de la Cour Pénale Internationale. Commentaire Article par Article* (2019), p. 930 ('*Le Procureur 'pourrait toutefois vouloir profiter du mécanisme pour demander à la Cour de régler des points où de grave incertitudes persisteraient. Cette démarche se révélerait fort utile dans des situations complexes, concernant par exemple la recevabilité d'une affaire au regard de l'article 17, ou lorsque la compétence de la Cour est véritablement sujette à caution. Inaugurant la procédure, le Procureur interrogea ainsi la Chambre préliminaire I sur la compétence territoriale de la Cour à égard à la déportation alléguée de la minorité Rohinqya du Myanmar au Bangladesh, sur laquelle il enquêtait. La demande s'imposait certainement au regard de la complexité de l'affaire et des controverses très fortes qui s'élevaient déjà à ce sujet. La procédure de l'article 19-3 n'en est pas pour autant une procédure abstraite d'avis consultatif, grâce à laquelle le Procureur vérifierait systématiquement la compétence de la Cour et la recevabilité des requêtes. La demande doit tout de même être emprunte d'une certaine gravité*') (footnote omitted).

249 *See for instance* the following articles: (i) article 15 of the Statute is entitled 'Prosecutor', while it also pertains to the power of the Pre-Trial Chamber to authorise the initiation of a *proprio motu* investigation by the Prosecutor; (ii) article 53 of the Statute is entitled '[i]nitiation of an investigation', while it also addresses the possibility of the Prosecutor concluding, upon investigation, that there is not a sufficient basis for a prosecution, as well as the power of the Pre-Trial Chamber to review a decision by the Prosecutor not to proceed with an investigation or prosecution in certain circumstances; (iii) article 60 of the Statute is entitled '[i]nitial proceedings before the Court', while it also concerns the right of the person subject to a warrant of arrest to apply for interim release pending trial and the obligations of the Pre-Trial Chamber to periodically review its ruling on the release or detention of such a person and to ensure that a person is not detained for an unreasonable period of time prior to trial due to inexcusable delay by the Prosecutor; and (iv) article 61 of the Statute is entitled '[c]onfirmation of the charges before trial', while it also sets forth the possibility of the Prosecutor withdrawing charges after the commencement of the trial with the permission of the Trial Chamber.

250 Yearbook of the International Law Commission 1994, Volume II, Part Two, Report of the Commission to the General Assembly on the Work of its Forty-Sixth Session, A/CN.4/SER.A/1994/Add.l (Part 2), pp. 45, 52–53.

251 Preparatory Committee on the Establishment of an International Criminal Court, Decisions Taken by the Preparatory Committee at its Session Held from 1 to 12 December 1997, 18 December 1997, A/AC.249/1997/L.9/Rev.1, p. 28.

252 ICC-01/18-90, paras 8, 24.

253 Pre-Trial Chamber II, *The Prosecutor v. Joseph Kony and Vincent Otti*, Decision on Admissibility of the Case under Article 19(1) of the Statute, 10 March 2009, ICC-02/04-01/05-377, para. 26.

254 Pre-Trial Chamber I (in a different composition), *Situation in the Democratic Republic of Congo*, Decision to Hold Consultation under Rule 114, 21 April 2005, ICC-01/04-19, p. 3.

255 *See* ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 21 June 1971, I.C.J. Reports 1971, para. 66.

256 ICC-01/18-12, paras 94, 96. The Prosecutor indicates that, in the context of the hostilities in the Gaza Strip in 2014, 'there is a reasonable basis to believe that members of the Israel Defense Forces [. . .] committed the war crimes of: intentionally launching disproportionate attacks in relation to at least three incidents which the Office has focussed on (article 8(2)(b)(iv)); wilful killing and wilfully causing serious injury to body or health (articles 8(2)(a)(i) and 8(2)(a)(iii), or article 8(2)(c)(i)); and intentionally directing an attack against objects or persons using the distinctive emblems of the Geneva Conventions (article 8(2)(b)(xxiv), or 8(2)(e)(ii))'. The Prosecutor further considers that 'the scope of the situation could encompass an investigation into crimes allegedly committed in relation to the use by members of the [Israel Defense Forces] of non-lethal and lethal means against persons participating in demonstrations beginning in March 2018 near the border fence between the Gaza Strip and Israel, which reportedly resulted in the killing of over 200 individuals, including over 40 children, and the wounding of thousands of others'.

257 ICC-01/18-12, para. 95. According to the Prosecutor, 'there is a reasonable basis to believe that in the context of Israel's occupation of the West Bank, including East Jerusalem, members of the Israeli authorities have committed war crimes under article 8(2)(b)(viii) in relation, *inter alia*, to the transfer of Israeli civilians into the West Bank since 13 June 2014'.

258 ICC-01/18-12, para. 94. The Prosecutor indicates that 'there is a reasonable basis to believe that members of Hamas and Palestinian armed groups [. . .] committed the war crimes of: intentionally directing attacks against civilians and civilian objects (articles 8(2)(b)(i)-(ii), or 8(2)(e)(i)); using protected persons as shields (article 8(2)(b)(xxiii)); wilfully depriving protected persons of the rights of fair and regular trial (articles 8(2)(a)(vi) or 8(2)(c)(iv)) and wilful killing (articles 8(2)(a)(i), or 8(2)(c)(i)); and torture or inhuman treatment (article 8(2)(a)(ii), or 8(2)(c)(i)) and/or outrages upon personal dignity (articles 8(2)(b)(xxi), or 8(2)(c)(ii))'.

259 ICC-01/18-12, para. 100. The Prosecutor further specifies that the alleged crimes enumerated in the Request 'are illustrative only' and that she 'will be able to expand or modify the investigation with respect to [these] acts or other alleged acts, incidents, groups or persons and/or to adopt different legal qualifications, so long as the cases identified for prosecution are sufficiently linked to the situation'.

260 ICC-01/18-12, paras 94–95.

261 ICC-01/18-12, para. 94.

262 ICC-01/18-12, p. 56.

263 ICC-01/18-12, para. 113.

264 *See* Appeals Chamber, *Situation in the Democratic Republic of the Congo,* Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, para. 33.

265 The following paragraphs do not take into account article 12(3) of the Statute, which provides that, '[i]f the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question [. . .]'. Consequently, this exception is not considered by the Chamber in the context of this decision.

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266 For example, in its advisory opinions on the *Kosovo Declaration of Independence* and the *Wall*, the International Court of Justice refrained from determining whether Kosovo or Palestine were 'States' under public international law. *See* ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, I.C.J. Reports 2004, p. 136; *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*, Advisory Opinion, 22 July 2010, I.C.J. Reports 2010, p. 403. Moreover, the Committee on the Elimination of Racial Discrimination did not analyse Palestine's fulfilment of the Montevideo Convention criteria, but rather relied on United Nations General Assembly Resolution 67/19, Palestine's membership to the UNESCO and its treatment within the ICERD reporting framework to find that it had jurisdiction to hear the inter-State communication lodged by Palestine. *See* Committee on Elimination of Racial Discrimination, Decision on 'Inter-State communication submitted by the State of Palestine against Israel', 12 December 2019, CERD/C/100/5, para. 3.9.

267 Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties (ST/LEG/7/Rev.1), paras 81–82.

268 *See* ICC-01/18-71, para. 10.

269 *See for instance* ICC-01/18-71, para. 9 and ICC-01/18-69, p. 8 referring to United Nations Office of Legal Affairs, Interoffice Memorandum, Issues related to General Assembly resolution 67/19 on the Status of Palestine in the United Nations, 21 December 2012, para. 15. *See also* ICC-01/18-12, paras 108–109.

270 The Chamber notes that on 9 April 2014, the United Nations Secretary-General circulated depository notifications regarding Palestine's accession to 13 treaties using the 'all States' formula (*See* C.N.176.2014.TREATIES-III.3, C.N.177.2014.TREATIES-III.6, C.N.178.2014.TREATIES-IV.1, C.N.179.2014.TREATIES-IV.2, C.N.180.2014.TREATIES-IV.3, C.N.181.2014.TREATIES-IV.4, C.N.182.2014.TREATIES-IV.7, C.N.183.2014.TREATIES-IV.8, C.N.184.2014.TREATIES-IV.9, C.N.185.2014.TREATIES-IV.11, C.N.186.2014.TREATIES-IV.15, C.N.187.2014.TREATIES-XVIII.14, C.N.188.2014.TREATIES-XXIII.1). The Chamber further notes that challenges to Palestine's accession to certain treaties were made: United Nations Convention on Contracts for the International Sale of Goods, C.N.363.2018.TREATIES-X.10 (Canada), 27 July 2018; Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, C.N.295.2018.TREATIES-XXVI.3 (United States of America), 18 June 2018.

271 *See* ICC-01/18-70, para. 8.

272 *See* ICC-01/18-83, pp. 10–11.

273 *See* ICC-01/18-113, para. 16.

274 *See* ICC-01/18-71, para. 14.

275 United Nations Secretary General, Depositary Notification, C.N.13.2015.TREATIES-XVIII.10, 6 January 2015.

276 Depositary notification C.N.57.2015.TREATIES-XVIII.10, which states that 'the Permanent Mission of Canada notes that "Palestine" does not meet the criteria of a state under international law and is not recognized by Canada as a state. Therefore, in order to avoid confusion, the Permanent Mission of Canada wishes to note its position that in the context of the purported Palestinian accession to the Rome Statute of the International Criminal Court, "Palestine" is not able to accede to this convention, and that the Rome Statute of the International Criminal Court does not enter into force, or have an effect on Canada's treaty relations, with respect to the "State of Palestine"'.

277 Assembly of States Parties, Welcoming ceremony for a new State Party State of Palestine, Speech by H. E. Minister Sidiki Kaba, President of the Assembly of States Parties, 1 April 2015.

278 Assembly of States Parties, Delegations to the fourteenth session of the Assembly of States Parties to the Rome Statute of the International Criminal Court, 26 November 2015, ICC-ASP/14/INF.1, pp. 1, 30.

279 Assembly of States Parties, Annotated List of Items included in the Provisional Agenda, 29 November 2018, ICC-ASP/17/1/Add.1, p. 3.

280 Assembly of States Parties, Report on the facilitation on the activation of the jurisdiction of the International Criminal Court over the crime of aggression, 27 November 2017, ICC-ASP/16/24, para. 25.

281 Assembly of States Parties, Request by the State of Palestine for the inclusion of an item on the provisional agenda of the seventeenth session of the Assembly, 5 October 2018, ICC-ASP/17/22.

282 Assembly of States Parties, Seventeenth Session, The Hague, 5–12 December 2018, Official Records Volume II, ICC-ASP/17/20, vol. II, p. 322.

283 *See for instance* resolutions adopted by of the Assembly of States Parties during the Eighteenth Session. These resolutions were adopted by consensus. In this regard, article 112(7) of the Statute provides that: '[e]ach State Party has one vote and every effort has to be made to reach decisions by consensus both in the Assembly and the Bureau. If consensus cannot be reached, decisions are taken by vote'.

284 *See* ICC-01/18-84, paras 8–11, 77–79. *See also* ICC-01/18-122, paras 8–9, 13, 61–65.

285 *See* ICC-01/18-68, para. 19; ICC-01/18-123, para. 13; ICC-01/18-77, para. 9. *See also* Trial Chamber II, *The Prosecutor v. Germain Katanga,* Judgment pursuant to article 74 of the Statute, 7 March 2014, ICC-01/04-01/07-3436-tENG ('*Katanga* Trial judgment'), para. 46: 'The principle of effectiveness of a provision also forms an integral part of the General Rule as that Rule mandates good faith in interpretation. Thus, in interpreting a provision of the founding texts, the bench must dismiss any solution that could result in the violation or nullity of any of its other provision'.

286 This conclusion is without prejudice to the need to determine the *localisation* of the criminal conduct. In this regard, *see Regulation 46(3) Decision,* paras 50–73; Pre-Trial Chamber III, *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, 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, ICC-01/19-27, 14 November 2019, paras 42–62.

287 *See e.g.* Permanent Court of International Justice*, The Case concerning the Factory at Chorzów (Germany v. Poland) (Claim for indemnity)(Jurisdiction)*, Judgment, 26 July 1927, P.C.I.J. Series A. No. 9, p. 24 ('For the interpretation of Article [. . .], account must be taken of [. . .] the function which, in the intention of the contracting Parties, is to be attributed to this provision'); ICTY, Appeals Chamber, *The Prosecutor v. Kordić & Čerkez*, *Decision on Appeal regarding the*

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admission into evidence of seven affidavits and one formal statement, 18 Spetember 2000, IT-95-14/2/2-AR73.6, para. 23 ('The Trial Chamber relied on the principle of effectiveness (*interpretation par la méthode de 1'effet utile* or *ut res magis valeat quam pereat*) in finding that "the Rules must be interpreted to give them useful effect"'); ECtHR, *Loizidou v. Turkey* (Preliminary objections), Application No. 15318/89, 23 March 1995, para. 72 ('The object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective').

288 *Katanga* Trial judgment, para. 46: 'The principle of effectiveness of a provision also forms an integral part of the General Rule as that Rule mandates good faith in interpretation. Thus, in interpreting a provision of the founding texts, *the bench must dismiss any solution that could result in the violation or nullity of any of its other provisions*' (emphasis added).

289 Pre-Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision adjourning the hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute, 3 March 2009, ICC-01/05-01/08-388, para. 36.

290 *See also* ICJ, *LaGrand (Germany v. United States of America)*, Judgment, 27 June 2001, I.C.J Reports 2001, p. 494, para. 77 ('The clarity of these provisions, viewed in their context, admits of no doubt. It follows, as has been held on a number of occasions, that the Court must apply these as they stand').

291 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 27 February 2007, I.C.J. Reports 2007, p. 170, para. 403.

292 *See* ICC-01/18-75, para. 8; ICC-01/18-77, para. 40.

293 *See* paragraph 93 above.

294 Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, 14 December 2006, ICC-01/04-01/06-772, para. 34. *See also* Appeals Chamber, *Situation in the Democratic Republic of the Congo,* Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, paras 33–39. *See also* Appeals Chamber, *The Prosecutor v. Omar Hassan Ahmad Al-Bashir*, Judgment in the Jordan Referral re Al-Bashir Appeal, 17 May 2019, ICC-02/05-01/09-397-Corr, para. 97.

295 On the practice of the Assembly of State Parties with regard to Palestine, *see* paragraph 100 above.

296 The Chamber notes that Canada's communication of 23 January 2015 was addressed to the United Nations Secretary-General but that it did not formally invoke article 119(2) of the Statute. The Chamber further notes that, on 15 November 2016, Canada, Germany, the Netherlands and the United Kingdom stated that they 'hold the view that the designation "State of Palestine" as used in some of [the draft reports of the Working Groups presented to the fifteenth session of the Assembly of States Parties] shall not be construed as recognition of a State of Palestine and is without prejudice to individual positions of States Parties on this issue'. *See* Bureau of the Assembly of States Parties, Seventh Meeting, Annex II, Statement by Canada, Germany, the Netherlands and the United Kingdom of Great Britain and Northern Ireland in explanation of their position concerning the use of the term "State of Palestine", 15 November 2016. In the view of the Chamber, whether or not Palestine has been recognised by individual States is not the issue under consideration.

297 United Nations, General Assembly, Status of Palestine in the United Nations, 29 November 2012, A/RES/67/19, para. 1 (emphasis added).

298 United Nations, General Assembly, Question of Palestine, 15 December 1988, A/RES/43/177, para. 2.

299 United Nations, General Assembly, Status of the Occupied Palestinian Territory, including East Jerusalem, 6 May 2004, A/RES/58/292, para. 1.

300 United Nations, General Assembly, The right of the Palestinian people to self-determination, 19 December 2011, A/RES/66/146, preamble.

301 *See e.g.* United Nations, Security Council, 22 November 1967, S/RES/242 (1967), para. 1 ('the fulfilment of Charter principles [. . .] should include the application of both the following principles: (i) [w]ithdrawal of Israel armed forces from territories occupied in the recent conflict; [and] (ii) [. . .] respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area'); United Nations, Security Council, 22 March 1979, S/RES/446 (1979), para. 3 ('*Calls once more upon* Israel [. . .] to desist from taking any action which would result in changing the legal status and geographical nature and materially affecting the demographic composition of the Arab territories occupied since 1967').

302 Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006, 14 December 2006, ICC-01/04-01/06-772, para. 37 (emphasis added). Regarding article 21(3), *see also Regulation 46(3) Decision,* paras 87–88.

303 United Nations, article 1(2) of the Charter of the United Nations, 26 June 1945 ('The Purposes of the United Nations are [. . .] [t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace').

304 United Nations, General Assembly, article 1(1) of the International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171 ('All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development').

305 United Nations, General Assembly, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, 24 October 1970, A/RES/2625 (XXV), Annex ('By virtue of the principle of equal rights and selfdetermination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter').

306 ICJ, *East Timor (Portugal v. Australia)*, Judgment, 30 June 1995, I.C.J. Reports 1995, p. 90, para. 29; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied*

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Palestinian Territory, Advisory Opinion, 9 July 2004, I.C.J. Reports 2004, p. 136, para. 155.

307 ICJ, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, 25 February 2019, I.C.J Reports 2019, para. 144.

308 United Nations Human Rights Committee, *General comment No. 12: Article 1 (Right to self- determination)*, *The Right to Self-determination of Peoples*, adopted at the Twenty-first Session, 13 March 1984, para. 1.

309 *See* ICC-01/18-92, paras 80–83; ICC-01/18-97, paras 43–45; ICC-01/18-93, para. 58; ICC-01/18-75, para. 21.

310 *See* ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 22 July 2010, I.C.J. Reports 2010, p. 436, para. 79: 'During the second half of the twentieth century, the international law of self-determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation (cf. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *Advisory Opinion, I.C.J. Reports 1971*, pp. 31–32, paras 52–53; *East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995*, p. 102, para. 29; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I),* pp. 171–172, para. 88)'. *See also* A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (1995), pp. 71–73, 90–91.

311 *See* ICC-01/18-12, paras 147–156, 193–215; ICC-01/18-99, para. 26; ICC-01/18-102, paras 56–61; ICC-01/18-105, paras 42–43; ICC-01/18-72, para. 27.

312 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, I.C.J. Reports 2004, p. 136, paras 118, 122 (emphasis added).

313 While the United Nations General Assembly may only make non-binding recommendations, according to article 10 of the Charter of the United Nations, the International Court of Justice underlined the specific responsibility of the United Nations towards the question of Palestine. *See* ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, I.C.J. Reports 2004, para. 49: 'The responsibility of the United Nations in this matter also has its origin in the Mandate and the Partition Resolution concerning Palestine [. . .]. This responsibility has been described by the General Assembly as "a permanent responsibility towards the question of Palestine until the question is resolved in all its aspects in a satisfactory manner in accordance with international legitimacy" (General Assembly resolution 57/107 of 3 December 2002). Within the institutional framework of the Organization, this responsibility has been manifested by the adoption of many Security Council and General Assembly resolutions, and by the creation of several subsidiary bodies specifically established to assist in the realization of the inalienable rights of the Palestinian people'. *See also* United Nations, General Assembly, Committee on the Exercise of the Inalienable Rights of the Palestinian People, Resolution 57/107, 14 February 2003, A/RES/57/107 ('*Reaffirming* that the United Nations has a permanent responsibility towards the question of Palestine until the question is resolved in all its aspects in a satisfactory manner in accordance with international legitimacy').

314 *See for instance*: United Nations, General Assembly, United Nations Relief and Works Agency for Palestine Refugees in the Near East, Resolution 2672 (XXV), 8 December 1970, A/RES/2672 (XXV), part C, para. 1 ('*Recognizes* that the people of Palestine are entitled to equal rights and self-determination, in accordance with the Charter of the United Nations'); United Nations, General Assembly, Question of Palestine, Resolution 3236 (XXIX), 22 November 1974, RES/RES/3236 (XXIX), para. 1 ('*Reaffirms* the inalienable rights of the Palestinian people in Palestine, including (a) The right to self-determination without external interference; (b) The right to national independence and sovereignty'), and adopted by 89 votes to 8, with 37 abstentions; United Nations, General Assembly, Resolution 3376, 10 November 1975, A/RES/3376 (XXX), para. 2 ('*Expresses its grave concern* that no progress has been achieved towards: (a) The exercise by the Palestinian people of its inalienable rights in Palestine, including the right to self-determination without external interference and the right to national independence and sovereignty'), and adopted by 94 votes to 18, with 26 abstentions; United Nations, General Assembly, Question of Palestine, Resolution 37/86, 10 December 1982, A/RES/37/86, Part E, para. 5 ('*Recommends* that, following the withdrawal of Israel from the occupied Palestinian territories, those territories should be subjected to a short transitional period under the supervision of the United Nations, during which period the Palestinian people would exercise its right to self-determination'); United Nations, General Assembly, Question of Palestine, Resolution 43/177, 15 December 1988, A/RES/43/177, para. 2 ('the need to enable the Palestinian people to exercise their sovereignty over their territory occupied since 1967'), and adopted by 104 votes to 2, with 36 abstentions; United Nations, General Assembly, Status of the Occupied Palestinian Territory, including East Jerusalem, Resolution 58/292, 6 May 2004, A/RES/58/292, para. 1 ('*Affirms* that the status of the Palestinian territory occupied since 1967, including East Jerusalem, remains one of military occupation, and affirms, in accordance with the rules and principles of international law and relevant resolutions of the United Nations, including Security Council resolutions, that the Palestinian people have the right to self-determination and to sovereignty over their territory'), and adopted by 140 votes to 6, with 11 abstentions; United Nations, General Assembly, The right of the Palestinian people to self-determination, Resolution 62/146, 4 March 2008, A/RES/62/146, paras 1–2 ('1. *Reaffirms* the right of the Palestinian people to self-determination, including the right to their independent State of Palestine; 2. Urges all States and the specialized agencies and organizations of the United Nations system to continue to support and assist the Palestinian people in the early realization of their right to self-determination'), and adopted by 176 votes to 5, with 4 abstentions; United Nations, General Assembly, Status of Palestine in the United Nations, Resolution 67/19, 29 November 2012, A/RES/67/19, para. 1 ('*Reaffirms* the right of the Palestinian people to self-determination and to independence in their State of Palestine on the Palestinian territory occupied since 1967'), and adopted by 138 votes to 9, with 41 abstentions. *See also* United Nations, General Assembly, Peaceful settlement of the question of Palestine, Resolution 71/23, 15 December 2016, A/RES/71/23, para. 22; United Nations, General Assembly, Peaceful settlement of the question of Palestine, Resolution 72/14, 7 December 217, A/RES/72/14, para. 24; United Nations, General Assembly, Peaceful settlement of the question of Palestine, Resolution 73/19, 5 December 2018, A/RES/73/19, para. 22; United Nations, General Assembly, Work of the Special

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Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories, Resolution 73/96, 18 December 2018, A/RES/73/96, preamble; United Nations, General Assembly, Peaceful settlement of the question of Palestine, Resolution 70/15, 4 December 2015, A/RES/70/15, para. 21.

315 United Nations, General Assembly, The right of the Palestinian people to self-determination, Resolution 72/160, 23 January 2018, A/RES/72/160 ('*Stressing also* the need for respect for and preservation of the territorial unity, contiguity and integrity of all of the Occupied Palestinian Territory, including East Jerusalem'), and adopted by 176 votes to 7, with 4 abstentions; United Nations, General Assembly, The right of the Palestinian people to self-determination, Resolution 73/158, 9 January 2019, A/RES/73/158 ('*Stressing also* the need for respect for and preservation of the territorial unity, contiguity and integrity of all of the Occupied Palestinian Territory, including East Jerusalem'), and adopted by 172 votes to 6, with 11 abstentions.

316 United Nations, Security Council, Resolution 2334 (2016), 13 December 2016, S/RES/2334 (2016).

317 *See also* ICC-01/18-77, paras 9, 12, 30.

318 *See* on the United Nations website (document last accessed on 2 February 2021): https://www.un.org/unispal/document/auto-insert-185434/.

319 *See* on the United Nations website (document last accessed on 2 February 2021): https://unispal.un.org/DPA/DPR/unispal.nsf/eed216406b50bf6485256ce10072f637/bb2b59417609ec94 85256f1800663122?OpenDocument.

320 *See* II. Submissions and Observations.

321 ICC-01/18-109-Red, para. 55.

322 ICC-01/18-69, paras 10–13; ICC-01/18-70, paras 50–53, 55, 60; ICC-01/18-75, paras 43–46; ICC-01/18-80, paras 15–19; ICC-01/18-81, paras 83–103; ICC-01/18-83, p. 20–26; ICC-01/18-89, paras 46-54; ICC-01/18-92, paras 57–65; ICC-01/18-93, paras 75–82; ICC-01/18-94, paras 7–15, 22–33, 42–52; ICC-01/18-97, paras 49–58; ICC-01/18-98, paras 49–50, 62–68; ICC-01/18-103, paras 26–29; ICC-01/18-108, paras 26–37.

323 ICC-01/18-12, paras 183–186.

324 ICC-01/18-82, para. 64.

325 ICC-01/18-99,paras 106–118; ICC-01/18-112, paras 48–54; ICC-01/18-120, paras 10–28; ICC-01/18-123, paras 22–27.

326 ICC-01/18-72, paras 39–48; ICC-01/18-73, paras 6–29; ICC-01/18-84, paras 65–76; ICC-01/18-96, paras 49–50; ICC-01/18-71; ICC-01/18-100, paras 74–78; ICC-01/18-115, paras 17–20; ICC-01/18-118, para. 2; ICC-01/18-122, paras 56–57.

327 ICC-01/18-12, para. 185; ICC-01/18-73, paras 6–29.

328 *Situation in Afghanistan* Appeals Chamber Judgment, para. 44.

329 *See* paragraph 113 above.

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PARTLY SEPARATE OPINION OF JUDGE PERRIN DE BRICHAMBAUT

1. I am in agreement with the Decision on the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine'.[1] However, while I agree that article 19(3) of the Rome Statute (the 'Statute') is applicable in the present situation, I arrive at that conclusion for the reasons that follow.

(I) CONTEXTUAL INTERPRETATION OF ARTICLE 19(3) OF THE STATUTE

2. Article 19(3) of the Statute states that '[t]he Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility'.

3. In my partly dissenting opinion in relation to the Prosecutor's request under regulation 46(3) of the Regulations of the Court seeking a ruling from the Chamber on the question whether the Court may exercise jurisdiction pursuant to article 12(2)(a) of the Statute over the alleged deportation of members of the Rohingya people from the Republic of the Union of Myanmar to the People's Republic of Bangladesh (the '9 April 2018 Request'),[2] I noted that a contextual interpretation of article 19(3) of the Statute with reference to the entirety of article 19 and against its scope of application suggests that this article applies only once a case has been defined by a warrant of arrest or a summons to appear pursuant to article 58 of the Statute.[3] Indeed, taken as a whole, the article's title '*Challenges to the jurisdiction of the Court or the admissibility of a* case' infers that a 'case' must be present for the article to apply.[4] Hence, the article's heading itself makes clear that it only governs questions of jurisdiction and admissibility at the case stage.[5] An interpretation of the other paragraphs of article 19 of the Statute equally supports this view.[6] In fact, the first paragraph, in providing that the Court 'shall satisfy itself it has jurisdiction in any *case* brought before it' and that it 'may, on its own motion, determine the admissibility of a *case*', clearly suggests that article 19(1) can be applied only at the case stage.[7] Furthermore, the wording of the second paragraph of article 19 stresses this same point when providing that, for the identified parties to be able to challenge the jurisdiction of the Court or the admissibility of the case, the existence of the latter must be ascertained.[8]

4. I further noted that the wording of other regulatory legal texts governing the activity of the Court, and thus the application of article 19(3) of the Statute as well, equally make clear that the latter cannot be invoked unless a case is present.[9] In this regard, reference was made to rule 58(2) of the Rules of Procedure and Evidence establishing the procedure to be followed by Chambers when dealing with questions on jurisdiction or admissibility, which reads as follows:

> When a Chamber receives a request or application raising a challenge or question concerning its jurisdiction or the admissibility of a *case* in accordance with article 19, paragraph 2 or 3, or is acting on its own motion as provided for in article 19, paragraph 1, it shall [. . .].[10]

5. Accordingly, based on a contextual interpretation, I concluded that article 19(3) of the Statute can be applied only when the proceedings have reached the stage of a case identified by the Prosecutor.[11]

6. I thus determined in relation to the 9 April 2018 Request that although the questions of jurisdiction and admissibility are of crucial importance in the International Criminal Court's proceedings, the level of controversy present at such an early stage of the proceedings, *i.e.* at a 'pre-preliminary examination' stage, with no case present and prior to an indication that the Office of the Prosecutor intends to proceed with an investigation, prevents recourse to article 19(3) of the Statute to render a ruling on jurisdiction.[12] I also indicated that any decision by the Chamber (regardless of the legal basis used) at that juncture was tantamount to an advisory opinion, which was of no binding value to the parties, especially towards the Prosecutor.[13] As a consequence, I considered that article 19(3) of the Statute was inapplicable in that instance.[14]

7. The Prosecutor's request currently before the Chamber, however, is distinguishable from her 9 April 2018 Request, which gave rise to the majority decision and my partly dissenting opinion, in various ways.

(II) THE TIMING OF THE PROSECUTOR'S 9 APRIL 2018 REQUEST AND HER CURRENT REQUEST

8. Firstly, I note that the 9 April 2018 Request was assigned to the Chamber under regulation 46(3) of the Regulations of the Court as a 'matter, request or information not arising out of a situation'.[15] Following the Chamber's

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ruling on the question of jurisdiction set forth in the 9 April 2018 Request, the Prosecutor 'proceeded to the second phase of [her] preliminary examination process and formally communicated that [she] would carry out a full-fledged preliminary examination' of the *Situation in the People's Republic of Bangladesh/ Republic of the Union of Myanmar.*[16] This preliminary examination resulted in the 'Request for authorisation of an investigation pursuant to article 15' in that situation,[17] which was granted by Pre-Trial Chamber III.[18]

9. Accordingly, the 9 April 2018 Request was submitted in the context of the initial stages of the Prosecutor's preliminary examination in the *Situation in the People's Republic of Bangladesh/ Republic of the Union of Myanmar.* It is further noted that the Prosecutor had brought the 9 April 2018 Request even though the subject-matter of that request had, in the absence of a State Party referral of the situation pursuant to articles 13(a) and 14 of the Statute, to be decided by a Pre-Trial Chamber in the ordinary course of the procedure defined by article 15 of the Statute.[19]

10. Whereas the Chamber had to rule on the 9 April 2018 Request at the initial stages of the Prosecutor's preliminary examination, the jurisdictional question that is currently before the Chamber arises out of an investigation that the Prosecutor 'stands prepared to open [. . .] once the Court's jurisdiction scope is confirmed'.[20]

(III) THE PROSECUTOR HAS IDENTIFIED POTENTIAL CASES

11. Secondly, when seized of the 9 April 2018 Request, the Chamber was not furnished with any indication that the Prosecutor had identified any potential cases at that stage. In the present situation, however, the Prosecutor indicates that she has identified potential cases. More specifically, the Prosecutor asserts that there is a reasonable basis to believe that members of the Israeli Defense Forces,[21] Israeli authorities,[22] Hamas and Palestinian Armed Groups[23] have committed a number of crimes falling within the jurisdiction of the Court.[24] She has further concluded that the potential cases concerning crimes allegedly committed by members of the Israeli authorities, Hamas and Palestinian Armed Groups would currently be admissible,[25] while her assessment of the admissibility of potential cases regarding crimes allegedly committed by members of the Israeli Defense Forces is ongoing.[26]

12. In this context, I note that in its decision on the Prosecutor's request for authorization to commence an investigation into the *Situation in the Republic of Kenya* pursuant to article 15 of the Statute, Pre-Trial Chamber II held that the reference to 'case' in article 53(1)(b) of the Statute must be construed 'in the context in which it is applied'.[27] Pre-Trial Chamber II further held that 'since it is not possible to have a concrete case involving an identified suspect for the purpose of prosecution, prior to the commencement of an investigation', a 'case' must be interpreted as one or more potential cases arising from a situation.[28] I consider that the same reasoning applies, *mutatis mutandis,* to article 19(3) of the Statute. The references to 'case' in this provision must, thus, be interpreted in accordance with the relevant stage of the proceedings. Accordingly, as there are no cases identified by a warrant of arrest or summons to appear at this stage of the proceedings, the potential cases identified by the Prosecutor in its current request are sufficient to meet the criterion of a 'case' as required under article 19(3) of the Statute in the present circumstances.

(IV) THE CURRENT DECISION CONSTITUTES A LEGALLY BINDING DECISION

13. Thirdly, and most importantly, although the Prosecutor requested the Chamber to issue a 'ruling' regarding her 9 April 2018 Request,[29] she contended that a decision by the Chamber would only 'assist in her further deliberations concerning any preliminary examination she may independently undertake'.[30] As underlined in my partly dissenting opinion, in these circumstances, the Prosecutor's assertions seemingly excluded the binding character of the decision to be rendered,[31] which would thus be tantamount to an advisory opinion.

14. The Prosecutor did eventually proceed with her preliminary examination and, subsequently, submitted a request for authorization to commence an investigation pursuant to article 15 of the Statute.[32] However, although Pre-Trial Chamber III ultimately agreed with Pre-Trial Chamber I's conclusion that the Court may exercise jurisdiction over crimes when part of the criminal conduct takes place on the territory of a State Party,[33] it examined anew the question of jurisdiction,[34] as is indeed required under article 15(4) of the Statute.[35] This confirms the fact that the decision issued by Pre-Trial Chamber I was merely an advisory opinion which was neither binding on the Prosecutor nor on Pre-Trial Chamber III, which was subsequently seized of the Prosecutor's request under article 15.

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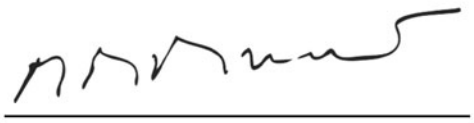
15. In contrast, in the present situation, the Prosecutor 'has a legal duty to open an investigation into [a] situation' if she is satisfied that the relevant criteria under article 53(1) of the Statute have been met'[36]. As she has submitted the present request for a ruling on the Court's territorial jurisdiction in Palestine, which, according to her, the Chamber is 'oblige[d] [. . .] to resolve',[37] she will be bound to follow the Chamber's determination at this stage of the proceedings,[38] subject to further determinations concerning the jurisdiction of the Court when the Prosecutor presents concrete cases to a pre-trial chamber.[39]

Furthermore, the Prosecutor's conclusion that the requirements set forth in article 53(1) of the Statute have been fulfilled in the present situation entails additional legal consequences. Most significantly, article 18(1) of the Statute provides that, following such a conclusion, 'the Prosecutor shall notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned' so as to allow such a State to potentially request the Prosecutor to defer to that State's investigation pursuant to article 18(2) of the Statute. Moreover, this conclusion places States Parties under an obligation to cooperate with the Court pursuant to part IX of the Statute.

(V) CONCLUSION ON THE APPLICABILITY OF ARTICLE 19(3) OF THE STATUTE IN THE PRESENT SITUATION

In light of these considerations, I conclude that a determination on a question of jurisdiction pursuant to article 19(3) of the Statute may be made in the specific circumstances of the present proceedings.



Judge Marc Perrin de Brichambaut

Dated this Friday, 5 February 2021
At The Hague, The Netherlands

ENDNOTES

1 *Situation in the State of Palestine*, Decision on the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine, 5 February 2021, ICC-01/18-143 (the 'Majority Decision'); Prosecutor, *Situation in the State of Palestine,* Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine, 22 January 2020, ICC-01/18-12, (the 'Prosecutor's Request').

2 Prosecutor, *Request under regulation 46(3) of the Regulations of the Court*, Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, 9 April 2018, ICC-RoC46(3)-01/18-1.

3 *Request under regulation 46(3) of the Regulations of the Court*, Partially Dissenting Opinion of Judge Marc Perrin de Brichambaut to Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", 6 September 2018, ICC-RoC46(3)-01/18-37-Anx, (the 'Partly Dissenting Opinion to *Regulation 46(3) Decision*'), para. 10.

4 Article 19(3) of the Statute (emphasis added). Partly Dissenting Opinion to *Regulation 46(3) Decision*, para. 10.

5 Partly Dissenting Opinion to *Regulation 46(3) Decision*, para. 10.

6 Partly Dissenting Opinion to *Regulation 46(3) Decision*, para. 10.

7 Article 19(1) of the Statute (emphasis added); Partly Dissenting Opinion to *Regulation 46(3) Decision*, para. 10.

8 Partly Dissenting Opinion to *Regulation 46(3) Decision*, para. 10.

9 Partly Dissenting Opinion to *Regulation 46(3) Decision*, para. 11.

10 Rule 58(2) of the Rules of Procedure and Evidence (emphasis added); *Partly Dissenting Opinion to Regulation 46(3) Decision,* para. 11.

11 Partly Dissenting Opinion to *Regulation 46(3) Decision*, para. 12.

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12 Partly Dissenting Opinion to *Regulation 46(3) Decision*, paras 8, 13.

13 Partly Dissenting Opinion to *Regulation 46(3) Decision*, paras 39–40.

14 Partly Dissenting Opinion to *Regulation 46(3) Decision*, paras 8, 43.

15 Presidency, *Request under Regulation 46(3) of the Regulations of the Court*, Decision assigning the 'Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute' to Pre-Trial Chamber I, 11 April 2018, ICC-RoC46(3)-01/18-2.

16 Prosecutor, *Situation in the People's Republic of Bangladesh/ Republic of the Union of Myanmar*, Request for authorisation of an investigation pursuant to article 15, 4 July 2019, ICC-01/19-7 (the '4 July 2019 Request'), para. 3.

17 4 July 2019 Request.

18 Pre-Trial Chamber III, *Situation in the People's Republic of Bangladesh/ Republic of the Union of Myanmar*, 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, 14 November 2019, ICC-01/19-27 (the '14 November 2019 Decision').

19 Article 15(4) of the Statute stipulates that, following a request for authorisation of an investigation, the Pre- Trial Chamber has to assess whether 'there is a reasonable basis to proceed with an investigation, and [whether] the case appears to fall within the jurisdiction of the Court'.

20 Prosecutor's Request, para. 21.

21 Prosecutor's Request, paras 94, 96. The Prosecutor indicates that, in the context of the hostilities in the Gaza Strip in 2014, 'there is a reasonable basis to believe that members of the Israel Defense Forces [. . .] committed the war crimes of: intentionally launching disproportionate attacks in relation to at least three incidents which the Office has focussed on (article 8(2)(b)(iv)); wilful killing and wilfully causing serious injury to body or health (articles 8(2)(a)(i) and 8(2)(a)(iii), or article 8(2)(c)(i)); and intentionally directing an attack against objects or persons using the distinctive emblems of the Geneva Conventions (article 8(2)(b)(xxiv), or 8(2)(e)(ii))'. The Prosecutor further considers that 'the scope of the situation could encompass an investigation into crimes allegedly committed in relation to the use by members of the [Israel Defense Forces] of non-lethal and lethal means against persons participating in demonstrations beginning in March 2018 near the border fence between the Gaza Strip and Israel, which reportedly resulted in the killing of over 200 individuals, including over 40 children, and the wounding of thousands of others'.

22 Prosecutor's Request, para. 95. According to the Prosecutor, 'there is a reasonable basis to believe that in the context of Israel's occupation of the West Bank, including East Jerusalem, members of the Israeli authorities have committed war crimes under article 8(2)(b)(viii) in relation, *inter alia*, to the transfer of Israeli civilians into the West Bank since 13 June 2014'.

23 Prosecutor's Request, para. 94. The Prosecutor indicates that 'there is a reasonable basis to believe that members of *Hamas* and Palestinian armed groups [. . .] committed the war crimes of: intentionally directing attacks against civilians and civilian objects (articles 8(2)(b)(i)-(ii), or 8(2)(e)(i)); using protected persons as shields (article 8(2)(b)(xxiii)); wilfully depriving protected persons of the rights of fair and regular trial (articles 8(2)(a)(vi) or 8(2)(c)(iv)) and wilful killing (articles 8(2)(a)(i), or 8(2)(c)(i)); and torture or inhuman treatment (article 8(2)(a)(ii), or 8(2)(c)(i)) and/or outrages upon personal dignity (articles 8(2)(b)(xxi), or 8(2)(c)(ii))'.

24 Prosecutor's Request, para. 100. The Prosecutor further specifies that the alleged crimes enumerated in the Request 'are illustrative only' and that she 'will be able to expand or modify the investigation with respect to [these] acts or other alleged acts, incidents, groups or persons and/or to adopt different legal qualifications, so long as the cases identified for prosecution are sufficiently linked to the situation'.

25 Prosecutor's Request, paras 94–95.

26 Prosecutor's Request, para. 94.

27 Pre-Trial Chamber II, *Situation in the Republic of Kenya*, Corrigendum of the Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010 (Date of corrected version: 1 April 2010), ICC-01/09-19-Corr (the 'Kenya Article 15 Decision'), para. 48.

28 *See also Kenya Article 15 Decision,* para. 48.

29 9 April 2018 Request, paras 1, 3; *see also* para. 63.

30 9 April 2018 Request, para. 3.

31 Partly Dissenting Opinion to *Regulation 46(3) Decision*, para. 39.

32 *See* paragraphs 8-9 above.

33 14 November 2019 Decision, para. 43.

34 14 November 2019 Decision, paras 42–62.

35 *See also* Appeals Chamber, *Situation in the Islamic Republic of Afghanistan*, Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan, 5 March 2020, ICC-02/17-138 ('*Situation in Afghanistan* Appeals Chamber Judgment'), para. 28.

36 The Office of the Prosecutor, Policy Paper on Preliminary Examinations, November 2013, para. 2. *See* article 53(1) of the Statute. The Appeals Chamber recently confirmed that upon referral by a State Party or the Security Council, the Prosecutor is obliged to open an investigation as soon as she is satisfied that: (i) there is a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed; (ii) the case is or would be admissible; and (iii) taking into account the gravity of the crime and the interests of victims, there are no substantial reasons to believe that an investigation would not serve the interests of justice (*Situation in Afghanistan Appeals Chamber Judgment,* para. 28). *See also* Pre-Trial Chamber I, Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia, Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation, 16 July 2015, ICC-01/13-34, para. 13.

37 Prosecutor's Request, para. 19.

38 The Prosecutor notes in this regard that '[a] jurisdictional ruling is necessary at this stage to facilitate a cost- effective and expeditious conduct of the Prosecution's investigation on the soundest legal foundation, including by ensuring State cooperation through the provision of an *authoritative*, clear and public *ruling* on the jurisdictional basis upon which the Prosecution may conduct the investigation in this

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situation' (*See* Prosecutor's Request, para. 20, emphasis added). *See also* Prosecutor's Request, para. 27: 'This right to seek a ruling is inextricably linked to (and correlates with) the Prosecution's fundamental *duty* to ensure that its activities lawfully fall within the Court's jurisdictional parameters at all times'.

39 *See* Majority Decision, para. 131.

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Judge Péter Kovács' Partly Dissenting Opinion

Public

Introduction

1. I share the Majority's finding that Pre-Trial Chamber I (the 'Chamber') is competent to answer the question raised in the Prosecutor's request[1] (the 'Request'). Together with Judge Alapini Gansou, I share the view that the Chamber's competence is grounded in article 19(3) of the Statute, as the Prosecutor rightly submitted. As it is evident in his partly separate opinion, Judge Brichambaut does not entirely share this view even if he agrees on the applicability of article 19(3) of the Statute.

2. Regarding the merits, I do not agree on the conclusion reached by the Majority regarding the First Issue ('whether Palestine can be considered "[t]he State on the territory of which the conduct in question occurred" within the meaning of article 12(2)(a) of the Statute'[2]). I note that the way the Majority Decision frames the First Issue is different from the way it was originally formulated in the Request.[3] In any case, I agree neither with the conclusion, nor with the Majority's reasoning and analysis in reaching such a conclusion. Regarding the Second Issue (the geographical scope of the Court's jurisdiction), again, I agree neither with the Majority's conclusion nor with its reasoning. Therefore, I hereby append a dissenting opinion to the Majority Decision, in which I develop my position on the merits of the questions at hand and the analysis which in my view should have been followed.

Methodology and reasoning

3. I find neither the Majority's approach nor its reasoning appropriate in answering the question before this Chamber, and in my view, they have no legal basis in the Rome Statute, and even less so, in public international law.

4. Abstraction is rightly made in the Majority Decision of the political sensitivity of the issue (which is certainly not up to the Chamber to evaluate) and of the complexity of the Palestinian-Israeli situation. However, in my opinion, the deep involvement of the United Nations Organization (the 'United Nations', 'UNO' or 'UN') in finding a proper solution for the realization of the so-called 'two-state vision', the contribution of the Quartet with the Road Map and the previous peace initiatives generally supported and promoted by the United Nations and reflected in the long line of resolutions adopted by the UN General Assembly (the 'General Assembly'), the UN Security Council (the 'Security Council') as well as other UN bodies, and the references in these resolutions to the Oslo I Accords[4] ('Oslo I' or 'Declaration of Principles') and Oslo II Accords[5] ('Oslo II' or 'Interim Agreement'), together form an important network of international law instruments. These instruments must not be swept behind the formal observation of the accession instrument of the State of Palestine ('Palestine'), and its interplay with resolution 67/19 of the General Assembly of the UNO (the 'General Assembly')[6] (the 'Resolution 67/19').

5. We shall first address the problem by examining the question of the legal value attributed by the Prosecutor to resolutions adopted by the United Nations.

A) WHAT IS THE LEGAL VALUE OF THE UNITED NATIONS RESOLUTIONS?

6. In her arguments, the Prosecutor does not rely on positive (existing and binding) international law applicable *vis-à-vis* the question of Palestine relating to statehood and borders *de lege lata,* which is likely due to the scarcity or absence of such type of instruments. Instead, the Prosecutor refers to statements from *soft law* documents which are certainly favourable to Palestinians but are nevertheless non-binding. The presented legal picture seems to belong largely to the realm of *de lege ferenda* and judges should not base their decision on rules of such a nature. Moreover, judges cannot ignore that the documents to which the Prosecutor refers (*i*. the resolutions adopted by the Security Council, which are all 'mere' Chapter VI type resolutions, as none of them contain the well-known formula 'Acting under Chapter VII' and *ii*. the resolutions of the General Assembly) are non-binding in nature.

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7. The current situation is vastly different from the formation of custom where repetitive practice could create a norm which was formerly only an 'emerging' norm (pending adequate proof of the existence of an *opinio juris*). However, with respect to borders, I am concerned that not a single 'precedent' can be shown for situations where a 'recommendation' would establish definitely and *per se* an international legal frontier.[7]

8. It should be noted that the approach is even more unusual given that in the issue *sub judice*, the arguments presented to the Chamber fail to mention, at a minimum, equally important excerpts of the same documents, which often note *expressis verbis* the necessity of establishing borders by way of internationally promoted negotiations.

9. Of course, the Prosecutor does not state that a recommendation is binding. However, in the Palestinian situation, she apparently does not deem it important to distinguish what is binding from what is only a recommendation, a suggestion, or an opinion. An analysis of the distinction between the auto-normative and hetero-normative competences[8] is missing and even the potential impact of article 25 of the United Nations Charter - as interpreted by the International Court of Justice (the "ICJ") in the Namibia case[9] - is not addressed as regards Resolution 67/19, from the point of view of auto-normativity and hetero-normativity. The Prosecutor's position is a bit more nuanced in the 'Prosecution Response to the Observations of *Amici Curiae*, Legal Representatives of Victims, and States'[10] (the 'Response') but, as will be elaborated in the following pages: *i.* she presents a simplified reading of the resolutions; *ii*. she does not attribute any importance to the fact that a non-binding resolution, adopted by majority voting, has very limited legal value in a judicial procedure; and *iii*. the resolutions adopted by the Security Council and the General Assembly subsequently to Resolution 67/19 far from prove a *fait accompli*, but rather present a reserved attitude *vis-à-vis* the actual status of Palestine's statehood, despite the General Assembly's undeniable sympathy towards the Palestinian situation.

10. I cannot accept and even less understand why a Chamber should accept as given, and *quasi* mandatory, a statement on the existence of 'the territory of the State' when, as it will be shown below, all the indicia show that it is premature to speak of a full-fledged 'State' and of 'the territory of the State'.

11. In my view, speaking about a State *in statu nascendi* would be closer to the current state of affairs and there is nothing pejorative or outdated therein. Peculiar circumstances (for example, State identity *vs.* State succession problems) were also presented before the ICJ.[11] To accept as determinative a unilateral statement[12] concerning the exact demarcation of a territory that is known to be the object of a very slowly progressing and frequently suspended series of negotiations, would have required at least an explanation.

12. When there exists a manifest discrepancy between the legal qualification of commonly known facts on the one hand and their presentation in the Request on the other, judges cannot decline the responsibility of examining the reliability and adequacy of the legal constructions. A ruling should be based on positive law. In the present ruling, I am unable to identify the actual rules of international law and the actual legal approach of the UNO regarding Palestine's statehood and its territory and borders on which the Majority Decision is based. The given legal background is much closer to expectations, which advocate for a more generous approach than one based on positive law.

13. The 'State Party' qualification cannot change this fact. Acrobatics with provisions of the Statute cannot mask legal reality.

B) INTERLOCKING PRESUMPTIONS?

14. The Response suggests that: *i*. Palestine's statehood was clear prior to its accession; *ii.* the validity of the accession is at the center of the present question; *iii*. its validity could have been challenged at the time of the accession; and *iv.* since no challenge was made *de jure*, differentiated treatment at this point in time would violate the equal treatment rule.[13]

15. As it will be elaborated thereafter, the greatest problem with this line of reasoning is that: *i.* Palestine's statehood was not at all (and is still not) a settled issue within the United Nations, contrary to what the Prosecutor argues; *ii*. the focal point of the discussion is not the validity of the accession but rather the legal character of the *territory*

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falling (potentially) under the jurisdiction of the ICC; *iii*. it is highly questionable – and certainly not substantiated either in the Request or in the Response[14] – that article 119(2) of the Statute applies to the contestation of validity, given that the wording of the text[15] manifestly does not promise a final and legally binding settlement of the dispute;[16] and *iv*. the 'equality of States' rule, as applied by intergovernmental organizations, does not preclude consideration of particularities or special circumstances in situations following accession, if such consideration is required to resolve an actual problem.[17] There is no reason why the ICC should proceed differently and I do not see how such an approach would inevitably lead 'to consequences which are inconsistent with the object and purpose of the Statute.'[18] The assessment of a State's 'inability or unwillingness' to prosecute in the jurisprudence of the Court shows that certain circumstances and particularities specific to a State (such as the inability to prosecute due to the temporary collapse or stay of the proper functioning of State organs, a civil war, en epidemic, natural disasters etc.) can and should be the object of an examination without conflicting with the equal treatment rule.

. . .

26. While recognizing the Prosecutor's professionalism and the value of her analysis, my impression is that, in basing her arguments on presumptions, she aims to avoid answering the real question: can the West Bank, East Jerusalem and Gaza be considered *hic et nunc* (in 2020-2021) 'the territory of the State' according to well-established notions of public international law?

27. Alternatively, can *per analogiam*, the repetitive reference to the same few articles of the Statute, and arguments focused on the validity of the accession alone, support the position that the link between Palestine (in its current status) and these geographical, administrative and political units (in their current status) could equate to 'the territory of the State'?

. . .

C) COMPETENCE FOR AN *IN MERITO* ASSESSMENT OF THE NOTION OF 'THE TERRITORY OF THE STATE' IN THE SITUATION *SUB JUDICE*

. . .

34. This means that the Majority Decision seems to go beyond what is argued in the Response when it denies *ab ovo* its competence to conduct an examination, by assimilating the analysis of statehood specificities with that of the validity of a State's accession to the Statute.[39] In my view, however, the Chamber has the right to clarify what should be understood by 'State' in the formula 'State on the territory of which' with respect to Palestine. There is no reason to consider this clarification as an *a posteriori* review of Palestine's accession.

35. I think that the Majority's error originates in the incorrect formulation of some of its starting points, in particular when it denied having competence to assess 'matters of statehood'. As the Majority Decision states: 'The Court is not constitutionally competent to determine matters of statehood *that would bind the international community*. In addition, such *a determination is not required* for the specific purposes of the present proceedings or the general exercise of the Court's mandate.'[40]

36. In itself, I agree with the first sentence, even if the adverb 'constitutionally' is a bit misleading. However, the question is not at all about the existence or non-existence of an *erga omnes* competence in matters of statehood. The real question is whether the *Court is competent to determine matters of statehood* or rather is competent to determine matters of statehood *provided that* this is necessary to adjudicate a case or in other terms *if the determination is required for the specific purposes of the present proceedings.*

37. The Majority is thus dealing with something which is an uncontested issue (namely the lack of *erga omnes* competence/competence 'that would bind the international community' to determine matters of statehood). However, it does not pay attention to the most important legal issue, namely whether it is within the competence of the Chamber to assess 'matters of statehood' *hic et nunc, in concreto*, and within the limits of the case *sub judice*, and all of this considering that its decision and findings have no *erga omnes* character. This logical possibility is not examined at all by the Majority.

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38. Several decisions of the Court follow another path. It is worth remembering that Pre- Trial Chamber I, in its 'Decision on the Prosecutor's request for authorization of an investigation' taken in 2016 in the Situation in Georgia, found the following: 'the Chamber agrees [. . .] that South Ossetia is to be considered as part of Georgia, as it is generally not considered an independent State and is not a Member State of the United Nations.'[41] Some other decisions point to a more nuanced understanding of the notion of 'matters of statehood'.[42]

39. It goes without saying that the assessment of a State's 'inability' (from the formula 'unwillingness or inability') can hardly be done without entering into 'matters of statehood'. As it was stated by PTC I in the Decision on the admissibility of the case against Saif Al-Islam Gaddafi:

> The Chamber considers that the ability of a State genuinely to carry out an investigation or prosecution must be assessed in the context of the relevant national system and procedures. In other words, the Chamber must assess whether the Libyan authorities are capable of investigating or prosecuting Mr Gaddafi in accordance with the substantive and procedural law applicable in Libya.[43]

40. If the assessment of the judiciary's functioning (as one of the three branches of a state's power according to Montesquieu and as the sub-component of the 'government' within the Montevideo criterion of statehood) is undoubtedly within the competence of the Court (and in the given case, of a pre-trial chamber), it is even more difficult to understand the Majority's reluctance 'to determine matters of statehood' where needed.

41. From my perspective, the Majority uses the formula 'matters of statehood' as being equivalent to 'full-fledged State' and the formula 'to determine matters of statehood' *quasi* as State-recognition. However, this leads the Majority towards erroneous conclusions and conflicts with previous judicial decisions of the Court.

. . .

48. Moreover, such an assessment, which must be carried out within the strict limits of what is necessary to properly answer the question raised in the Request, may be substantiated by the principle of *Kompetenz/Kompetenz*. Even the Prosecutor recognizes that in some respect, the Chamber definitely enjoys a certain margin of appreciation in its interpretation of what constitutes a 'State'.[50]

49. All this is consistent with the jurisprudence of other ICC chambers, which recognizes the relevance of the *Kompetenz-Kompetenz* principle in the framework established by the Rome Statute. As stated in the Majority Decision of the Chamber (with the same composition) in its 'Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute"'[51] (the 'PTC I Rohingya Decision'): '[t]here is no question that this Court is equally endowed with the power to determine the limits of its own jurisdiction. Indeed, Chambers of this Court have consistently upheld the principle of *la compétence de la compétence*.'[52] Pre-Trial Chamber II held in the *Situation in Uganda* in 2006 that '[i]t is a well-known and fundamental principle that any judicial body, including any international tribunal, retains the power and the duty to determine the boundaries of its own jurisdiction and competence'.[53] Pre- Trial Chamber II later stressed – on different occasions and in different compositions – in the same line as the ICTY, that this power existed 'even in the absence of an explicit reference to that effect' as an 'essential element in the exercise by any judicial body of its functions'.[54] The same approach was followed by Pre-Trial Chamber III.[55]

50. The cited cases concerned *in concreto* the relationship of *Kompetenz-Kompetenz vis-à- vis* article 19(1) of the Statute, though they were formulated in rather broad, general terms.

51. That is why I am not persuaded by the Prosecutor's narrow position taken in the Response, which mostly relies on the arguments of some *amici curiae* and focuses on the validity of the accession. I am more persuaded by the standpoint articulated in the Request being that the assessment of specificities is not *ultra vires* even if not necessarily required.

52. However, it is up to the Chamber to determine what is and what is not necessary. The complexity of the issue, as evidenced by the opposing positions of dozens of *amici curiae,* supports that some examination is without a doubt necessary. This is especially so considering that such an assessment was performed by neither the Secretary-General of the United Nations (the 'Secretary-General') nor the other States Parties of the Assembly of States Parties (the 'ASP'), based on the assumption that such an examination was the other's prerogative.

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53. To conclude, the crucial issue raised in the Request relates to the existence or non- existence of the 'territory', or more precisely, the 'territory of the State' as understood under current international law. In my view, a Chamber has the competence to rule on this issue after an in-depth examination, and within the limits of what is necessary to answer the question raised in the Request. On this basis, I do not share the Majority's view, which *de facto* rejects the *Kompetenz-Kompetenz* principle and bases its reasoning on its purported lack of competence due to the Rome Statute's alleged silence as to a chamber's assessment of a State's accession.[56] The Majority follows more or less the Prosecutor's approach as expressed in her primary position which seems to accept that the validity of the accession is at the heart of the present question and that any *a posteriori* assessment of statehood would equate to challenging the validity of such accession. As I previously mentioned, I do not think that the validity of the accession is at stake and I do not share the Majority's view that an assessment of the elements of statehood would equate to challenging the validity of the accession. Rather, I think that these two issues can be separated and be treated independently.

54. In my view, the central issue relates to the existence or non-existence of the 'territory' or more precisely, the 'territory of the State' as understood under contemporary international law.

D) THE MAJORITY DECISION AND THE RULES OF INTERPRETATION OF THE VIENNA CONVENTION

55. As to the first issue, the Majority begins its argumentation in a way which is already difficult to agree with. Indeed, in paragraph 93 of the Majority Decision,[57] only the first half of article 12(2) of the Statute is quoted ('the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute'). The whole text reads as follows in the Statute: 'In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3'.

56. To select only the wording 'if one or more of the following States are Parties to this Statute' and to wilfully disregard the portion 'or have accepted the jurisdiction of the Court in accordance with paragraph 3', is surprising. Moreover, the importance of the conjunction 'or' is obvious in this disposition of the Statute. We might thus speak of a construction based on two limbs: namely that the Court may exercise jurisdiction when States 'are Parties to this Statute', but also when States 'have accepted the jurisdiction of the Court in accordance with paragraph 3'.

57. Thus, it is clear that the interpretation of the word 'following' in paragraph 93 of the Majority Decision is flawed because, grammatically, the word 'following' is manifestly related to both limbs (*i*. States which 'are Parties to this Statute' and *ii*. States which 'have accepted the jurisdiction of the Court in accordance with paragraph 3'), and not only to the first one. To limit the applicability of the word 'following' only to the first limb would be grammatically incorrect and annihilate the legal value of the conclusion in paragraph 93 of the Majority Decision ('In more specific terms, this provision establishes that the reference to "[t]he State on the territory of which the conduct in question occurred" in article 12(2)(a) of the Statute must, in conformity with the chapeau of article 12(2) of the Statute, be interpreted as referring to a State Party to the Statute.').

58. If we take into account the importance of the conjunction 'or' and identify both limbs, we arrive at the conclusion that the word 'State' was probably understood by the drafters in its traditional, ordinary meaning.

59. However, a purely grammatical interpretation does not provide an answer to the question of what is to be done when a 'State Party' is not a State or its statehood is not yet fully fledged. Further, it cannot entirely answer the question of how to interpret the interplay between articles 12 and 13 in such an hypothesis. To answer this question, all methods of interpretation contained in the Vienna Convention on the Law of Treaties[58] (the 'VCLT' or the 'Vienna Convention') should be applied.

60. Although the Majority assumes that it follows the rules of interpretation of the Vienna Convention, I cannot say that its interpretation indeed conforms to articles 31 and 32 of the said convention.

61. The Majority satisfies itself with having recourse only to article 31 of the Vienna Convention, and by doing so, its interpretation is not *lege artis*. This is obvious when one reads paragraph 93 of the Majority Decision,[59] which suggests that the formula 'States Parties to this Statute' appears in the chapeau of article 12(2) of the Statute, when in reality, the formula worded as such, does not. Article 12(2) of the Statute rather reads: 'if one or more of the following States *are* Parties to this Statute'.[60] The arbitrary disappearance of the word 'are' in the phrase 'States are Parties

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to this Statute' is not explained at all, and paragraph 94 is worded in such a way as to suggest that the chapeau contains two similar expressions, namely 'States are Parties to this Statute' and 'States Parties to this Statute'. Of course, only the former is actually present in the chapeau, and the latter is not more than the Majority's creation.

62. Moreover, instead of using legal arguments, the Majority uses its own perception in order to prove its point.[61] In other words, the Majority's reasoning is flawed due to its circular logic whereby proper inferences are not made: point A proves point A. The formulation of the premises used in the Majority's syllogism is unconvincing to me.

63. At the end of paragraph 93, in stating that '[i]t does not, however, require a determination as to whether that entity fulfils the prerequisites of statehood under general international law', the Majority seems to pay no attention to article 31(3)(c) of the Vienna Convention.[62] I have to note, however, that the Chamber (under the same composition) adopted a very different view in the Rohingya Decision[63] when it referred to the applicability of international law in the contextual interpretation of article 12(2)(a) of the Statute *expressis verbis.* This was also the approach taken by Pre-Trial Chamber III in its decision in the same situation.[64]

. . .

67. Turning to the issue of the 'principle of effectiveness' as used in the Majority Decision (and in the Request),[71] I have the following remarks to make. Of course, I do not question the 'principle of effectiveness' as such (*effet utile, ut res magis valeat, quam pereat*), referred to in paragraph 105 of the Majority Decision, but I do not share the conclusion derived from it in paragraph 106,[72] nor do I think that this approach is compatible with the Vienna Convention or the Court's jurisprudence.

68. It is worth remembering that when referring to the 'principle of effectiveness', different chambers of the Court (Pre-Trial Chamber,[73] Trial Chamber[74] or Appeals Chamber[75]) took special care to use standardized wording and specified that they were making a general statement applicable to similar cases in the future. This jurisprudence - *grosso modo* similar to the *dicta* of other international courts and tribunals - underlines the importance of the criterion of 'meaningful content', to 'enable the treaty to have appropriate effects', to avoid 'rendering any other of its provisions void' and 'any solution that could result in the violation or nullity of any of its other provisions'. However, in paragraph 106 of the Majority Decision, after the sentence criticising the restrictive interpretation of article 12(2)(a) of the Statute and repeating that the assessment of the statehood criterion falls outside of the Chamber's scope of competence, the following statement suddenly appears: 'Moreover, this interpretation would also have the effect of rendering most of the provisions of the Statute, including article 12(1), *inoperative for Palestine*.'[76]

69. As explained above, the test for the recourse to the 'principle of effectiveness' was, until now, logically a *general* test of relevance. Should the well-established jurisprudence in regard to article 12(2)(a) of the Statute be considered erroneous for the reason that it does not fit a single (but certainly very complicated) case?

70. While I profoundly respect the Majority's standpoint, I have to emphasise that this reasoning is in contravention of both the law of the Vienna Convention and the Court's jurisprudence.

71. I do not contest the importance of jurisprudential innovation but, according to practice, those developments should be justified by a comprehensive reappraisal of the *travaux préparatoires*, the emergence of new rules of customary international law, the impacts of new conventions or jurisprudential interactions between international tribunals, etc. The 'principle of effectiveness' has been used rather as an additional argument, alongside others.

. . .

74. The argument in paragraph 88 of the Majority Decision stating that 'recourse to article 31(3)(c) of the Vienna Convention on the Law of Treaties [..] being a rule of interpretation, cannot in any way set aside the hierarchy of sources of law as established by article 21 of the Statute, which is binding on the Chamber' reflects the Majority's misunderstanding of the relationship between this disposition of the VCLT and article 21 of the Statute in the context of the issue *sub judice*. When strongly advocating for the *sacred character* of the hierarchy of norms of article 21(1) of the Statute, the Majority does not take notice of the fact that the legal problems are elsewhere, namely in: *i.* how to identify the real and full content of those UNO resolutions which are referred to by the Prosecutor; *ii.* how to measure the actual weight of these resolutions in conformity with international law; *iii.* how to identify the international agreements, the pertinence of which, is emphasized in these resolutions; *iv.* how to double-check the accuracy of some of

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the Majority's statements when it is *prima facie* evident that conflicts of norms may emerge not only with general international law but also with some recent *dicta* of the ICC and; *vi.* when and how to assess whether the norms of article 21(1)(a) of the Statute are in themselves sufficient or that recourse is required to other instruments under article 21(1)(b) of the Statute.[80]

. . .

85. Consequently, the comparative analysis of identical formulas within the Statute as well as the review of identical or similar formulas in other treaties, contradict the statement that the *ordinary meaning* of the formula 'the State on the territory of which' equates the formula 'a State Party to the Statute'.

E) DID THE MAJORITY PROVIDE A PRACTICAL ANSWER TO THE PROSECUTOR?

86. As indicated above, the Majority follows more or less the Prosecutor's primary approach as elaborated in her Response, with the notable difference that, in the end, it does not provide a clear answer to the Prosecutor's question. After the first finding, adopted by unanimity and stating that 'Palestine is a State Party to the Statute', the second finding, adopted by majority, stipulates that 'as a consequence, Palestine qualifies as "[t]he State on the territory of which the conduct in question occurred" for the purposes of article 12(2)(a) of the Statute'.[94]

87. The clear wording of this finding is, however, in conflict with the third finding, adopted again by majority, and stating that 'the Court's territorial jurisdiction in the *Situation in the State of Palestine* extends to the territories occupied by Israel since 1967, namely Gaza and the West Bank, including East Jerusalem'.[95]

88. In paragraph 131 the Chamber states: 'It is further opportune to emphasise that the Chamber's conclusions pertain to the current stage of the proceedings'. The reason for the presence of the phrase 'at this stage of the proceedings' is unclear. This reasoning[96] seems to suggest that, at a later stage of proceedings, the Court may arrive at a different conclusion. Of note, this lack of clarity is what the Prosecutor sought to avoid, as underlined in her Request[97] and in her Response.[98]

. . .

91. Moreover, the Majority finds that territorial jurisdiction may be further examined at a later time, in the context of a request for an arrest warrant.[103] I have to note that the Prosecutor wanted precisely to avoid such a decision, as underlined in her Request[104] and Response.[105]

92. The consequence is that the Majority Decision leaves the *in depth* examination for the future, at a stage when, in the context of the arrest warrant (or summons to appear) procedure, the *reasonable grounds to believe* standard should be applied. One may wonder if there is an actual difference between the '*reasonable basis*' standard to be applied now and the '*reasonable grounds to believe*' standard of the arrest warrant (or summons to appear) procedure.[106]

93. Why postpone the *in depth* assessment? What is supposed to happen in the meantime? Which important legal provisions will be different from those that are already identified and were abundantly analysed by the Prosecutor, the *amici curiae* and the victims' representatives? One cannot reasonably expect resolutions of the General Assembly – the main legal basis of the Request – to become binding. Moreover, and abstraction made of the legal nature of the resolutions, if one pays close attention to the text of the resolutions adopted in the last years (which will be examined below), one can hardly conclude that the Prosecutor's main starting point[107] – that, according to the General Assembly, Palestine *already* and *independently* possesses sufficient attributes of Statehood – is substantiated, even today.

94. I am convinced that all of the basic legal provisions to be applied will remain exactly the same when the Prosecutor potentially seizes the Chamber with a request for an arrest warrant. Why should we wait to enter into a plain legal analysis? Will this really help to meet the '[expected] full cooperation from all ICC States Parties'?[108]

95. The Chamber could have arrived, however, at a different conclusion, consistent with positive international law and the Rome Statute.

96. In the following pages, I present an alternative approach based on an *in extenso* reading of relevant international instruments, most of them referenced in the Request. This approach will also cover the issues, legal problems

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and legal aspects abundantly analysed by the Prosecutor (in the Request and Response) and by some *amici*, but which the Majority did not address at all or only superficially (such as the question of the Montevideo criteria and the impact of the Oslo Accords).

III. The legitimacy and importance of relying on international law when assessing the impact of international legal documents on the situation *sub judice*

. . .

98. I am convinced that article 21(1)(b)[112] and (c)[113] of the Statute should also be considered and I am not satisfied with the surprisingly rather short reasoning in the Majority Decision[114] that article 21(1)(a) of the Statute forms an adequate legal basis in itself. To the contrary, the numerous but one-sided references in the Request to different UN resolutions and other international rules and principles should provide the Chamber with an appropriate basis for proceeding under article 21(1)(b) and (c) of the Statute. If this had been the case, the outcome would have been considerably different from the current position of the Majority.

99. Even if it is plainly evident that article 21 of the Statute (relating to 'applicable law') contains a hierarchical structure (unlike article 38 of the Statute of the ICJ), judges must not end their analysis at article 21(1)(a) of the Statute simply because it begins with 'in the first place'. Rather, they have the obligation to refer to article 21(1)(b) of the Statute ('in the second place, where appropriate') and also to article 21(1)(c) of the Statute ('failing that') when the circumstances require.

100. According to jurisprudence and legal doctrine, judges can base their findings solely on article 21(1)(a) of the Statute only when the issue under scrutiny is so simple that the answer can evidently be found in the provisions of the Statute, the Elements of Crimes and the Rules of Procedure and Evidence (the 'Rules').

101. I am convinced that the issues before this Chamber are not at all simple, but rather involve complex questions of the proper interpretation of UNO practice, including the proper legal value of different types of resolutions and the importance of their counterbalanced and nuanced formulas, as well as consideration of the interactions between commitments provided in special agreements and in documents of international mediation and of the UNO.

102. From the onset, the Prosecutor's application for a leave for extension of pages stated that '[h]owever, mindful of the unique and complex factual and legal circumstances in this situation, and the significance of the requested ruling on the Court's exercise of jurisdiction, the Prosecution requests an extension of pages to a maximum of 110 pages.'[115] It further added that 'the Request addresses an issue which is not only highly significant to any exercise of jurisdiction over this situation by the Court, but touches upon matters which are perhaps uniquely controversial within the international community. As such, it is legally and factually complex.'[116]

103. In its decision related to the said application, the Chamber agreed 'with the Prosecutor that the nature, novelty and complexity of the issue, that is, the jurisdiction of the Court with respect to the situation in Palestine, both in terms of its legal and factual aspects, gives rise to "exceptional circumstances" within the meaning of regulation 37(2) of the Regulations.'[117]

104. The Request also emphasised the complexity[118] of the issues at hand, including the division of states,[119] historical[120] and political aspects,[121] among others. The Request also referred to the practice of the United Nations and several other international organizations.[122]

105. This complexity is perhaps what led the Prosecutor to suggest two options in the Request, a primary position and a secondary position: *i.* 'Palestine is a State'[123] and *ii.* 'Palestine is a State for the purpose of the Statute.'[124] According to the different logic of the primary and the secondary positions, the Prosecutor first suggested to refuse a special assessment for Palestine[125] and secondarily, she advocated for it: 'the Chamber should consider the particularities of the Palestinian situation.'[126]

106. Additionally, the other documents presented to the Chamber, namely the States' and victims' observations and *amici curiae* contributions as well as various cited legal publications, repeatedly emphasised this complexity.

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Most of them also emphasised the concurrent relevance of 'international criminal law' and classic 'public international law' concerning almost all the important issues at stake.

107. In support of its refusal to deal with international law, the Majority provides too simple of a justification, relying merely on two Appeals Chamber judgments[127] adopted in an entirely different context.

. . .

IV. The issue of the Montevideo criteria

. . .

G) Conclusions on the importance of the Montevideo criteria

184. It can be deduced from the above that all elements of the Montevideo criteria are arguable and can be nuanced, as there exist sub-rules and exceptions. Though, this is clear, it should be noted that it is well known that (either rightly or wrongly) several States did not always follow these rules, which were formulated in an abstract manner in 1933.It is worth noting that the Badinter Arbitration Committee (*Commission d'arbitrage de la conférence pour la paix en Yougoslavie*) used a definition similar to the Montevideo criteria, but which was simpler and did not contain the problematic adjectives referenced above. In the Opinion No. 1, it stated that 'the state is commonly defined as a community which consists of a territory and a population subject to an organized political authority; that such a state is characterized by sovereignty'.[238]

185. From this definition, which closely resembles the one given by the German-Polish Mixed Arbitral Commission,[239] we may see that the only real *differentia specifica* is the presence or lack of sovereignty. It is, however, another challenge to determine how an analysis of sovereignty should proceed in order to arrive at a generally acceptable definition that can be used as a practical tool.

186. In conclusion, the Montevideo criteria are neither erroneous nor universally followed as an imperative rule which does not tolerate any exception. When States had to decide about the recognition of another entity as a State, they used these criteria as a starting point before deciding, according to their own interests, international commitments, political sympathy and feelings of solidarity.

187. As Michael Reisman puts it: '[I]n practical application, Article 4(1) really says little more than that those applicants will be admitted which the Security Council and the General Assembly (or in more political terms, the effective elites of the world) think ought to be admitted, a conclusion which the International Court appears to have obliquely and perhaps reluctantly reached.'[240]

188. There is no convincing reason to assume that if an entity satisfies all four Montevideo criteria, it is absolutely certain that States will recognize and admit it as a State. Conversely, the admission of a new member into an interstate organization (such as the former League of Nations or the United Nations and its specialized agencies) does not necessarily guarantee that all four Montevideo criteria are fulfilled (or were fulfilled at the time of the admission) and especially does not guarantee that the member's territory is defined with absolute precision for all segments.

189. From my reading, the fact that an entity is a State (because it has a population, a territory and sovereignty) does not mean that its borders are absolutely settled. Something similar can also be said concerning Palestine's territory: at this time, Palestine's actual boundaries are uncertain and no one is in the position to say – despite resolutions suggesting what would be just or equitable – when they will be settled or finalized. Certainly, defining them is by no means the task of this Court.

190. There is, however, one statement that could be made regarding the current status of relevant international legal rules and UN documents: the decision on Palestine's borders (as understood under international law), based on negotiation and agreement, still has a long way to go.

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V. The issue of Resolution 67/19 of the General Assembly

A) OUTSOURCING OR *FAIT ACCOMPLI* IN THE RELATIONSHIP BETWEEN THE COURT AND THE GENERAL ASSEMBLY OF THE UNITED NATIONS?

191. The arguments in the Prosecutor's primary approach are based on the interplay of Resolution 67/19 with the accession instrument.

192. The Majority Decision lengthily describes the accession[241] and touches upon the respective roles of the Secretary-General and the General Assembly.[242] In this context, it conceives that Resolution 67/19 was determinative in the opening of the accession to the Rome Statute and other treaties, on the basis of the 'all States' formula.

193. Years ago, the then-Prosecutor refused to deal with the Palestinian declaration submitted in 2009 based on a particular reading of article 12(3) of the Statute, stating that he could not act until the relevant UN organs explicitly recognised Palestine as a State.[243] This position was criticized by legal academics, questioning why the Prosecutor considered himself dependent on the stocktaking of an institution external to the Rome Statute.[244]

194. If this position or policy was allegedly erroneous years ago, could it be correct today? The *only* difference is that due to changes in the UN's position, the result is different today. Is this enough when assessing the Prosecutor's new position? Or if this is not a form of outsourcing, is it a '*fait accompli*' automatically binding the Court?

195. The Majority Decision highlights that:

> On 21 December 2012, by way of interoffice memorandum, the United Nations Office of Legal Affairs indicated that, the General Assembly having accepted Palestine as a non-Member observer State in the United Nations, this determinination will guide the Secretary-General in discharging his functions as depositary of treaties containing an 'all States' clause and that, as a result, Palestine would be able to become party to any treaties that are open to 'any State' or 'all States' deposited with the Secretary-General'.[245]

196. It is worth pointing out, however, that at the top of the previously cited document of the United Nations Office of Legal Affairs, one can read the statement: '*Please be advised that the memorandum is for internal use and it is not for distribution to Member States or the media*.' It is not clear when this document became publicly accessible. However, it was seemingly originally prepared for approximately 20 high officials, such as under-secretary-generals, top leaders of specialized agencies and other UN institutions. While some academic papers published in 2014 may have summarized or cited to its content, it is not so evident that this document can be cited as evidence of a commonly held view by the UN and its members.

197. I believe, therefore, that the factual and legal situation before us is far more complicated and that it cannot be properly understood without reading the *whole* text of Resolution 67/19 and the States' oral statements, as preserved in the written minutes of the session of the General Assembly.

. . .

B) 'PRECEDENTS' IN UNITED NATIONS AND SPECIALIZED AGENCIES' PRACTICE OF PARTICIPATION BY 'PRE-SOVEREIGN' STATES AND SPECIAL SUBJECTS OF LAWS

219. To sum up, no conclusion can be drawn that the 'Non-Member Observer State' status in the United Nations should be construed *in abstracto* to mean that its holder is a sovereign State. This becomes even more obvious when one examines Resolution 67/19 *in concreto*, its adoption, language and interpretation in successive resolutions adopted by the General Assembly.

C) RESOLUTION 67/19 AND THE STATES' EXPLANATION OF VOTES AT THE TIME OF ADOPTION

. . .

224. Resolution 67/19 was adopted in a procedurally correct manner and the General Assembly as an institution is not required to address the eventual impact of its resolution upon another international institution. Of course,

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Resolution 67/19 did not and does not directly concern the ICC. However, the Request (in its primary position) relies on this resolution as its '*atout*' card.

225. Moreover, it should be emphasised that during the explanation of votes,[276] several countries voting 'in favour' felt it necessary to state that their positive vote did not have any effect on actual recognition either *erga omnes*, or even between them and Palestine. These countries include France,[277] Switzerland,[278] Belgium,[279] Denmark,[280] Finland,[281] New Zealand[282] and Norway.[283] Other countries voting 'in favour' emphasised that their vote should not be understood as a decision on borders and territory (Honduras)[284] and that they considered Palestine's statehood to be a legitimate claim which should be achieved in the future (Serbia[285] and Greece[286]).

226. Additionally, several non-recognizing States[287] (meaning States that do not recognize Palestine as a State under international law) can be found among the voters 'in favour' (for example, Austria, Finland, France, Greece, Italy, New Zealand and Norway) while a good number of States, qualified in the register of the Palestine Mission to the UN as recognizing States, abstained (for example, Hungary, Poland and Romania) or voted against (the Czech Republic). Some voters 'in favour' referred to guarantees promised by the Palestinian delegation (for example, Italy)[288] while other States did not find them satisfactory and for that reason decided to abstain (for example, the United Kingdom[289] and Germany[290]).

227. When reacting to the outcome of the vote, the Secretary-General gave a very diligently and diplomatically formulated and well-balanced speech describing Palestine's statehood as something that has yet to be achieved through negotiations.[291] A year later, in his report submitted to the General Assembly on the implementation of Resolution 67/19, he repeated the primarily political impetus and character of the resolution, alongside its necessary legal and procedural consequences to Palestine's position in the UN. Further, he warned again that the core issues such as '*territory*, security, *Jerusalem*, refugees, settlements, water' should be settled through negotiations.[292]

228. What can be deduced with absolute certainty from the text and the history of the adoption of Resolution 67/19 is that the great majority of States represented at the General Assembly wanted to upgrade Palestine's formal status in the UN and show political support for its endeavours by giving a political impetus, while waiting for the outcome of the initiated procedure of admission as a full member.

229. Under these circumstances, I find it even more important to be vigilant and not to be satisfied with the hypothesis that the reference to the General Assembly's vote is in itself sufficient in answering the question presented in the Request.

D) RESOLUTION 67/19 AND ITS BALANCED WORDING ON 'TERRITORY' AND 'BORDERS'

230. Even if one accepts the interplay of Resolution 67/19 with the accession instrument as a starting point, it would still be necessary to question the pertinence of Resolution 67/19 in defining borders and territories as they are understood in the Request.

231. A full reading of Resolution 67/19 reveals that the 'pre-1967 borders' type formulas[293] are counterbalanced with a continuous warning referring to previous UN resolutions and peace initiatives emphasising the necessity of negotiations on core issues, including borders.[294]

232. Resolution 67/19 cannot be referred to as proof as far as alleged perfect statehood, precise borders or territory are concerned. It is in fact just the contrary: the carefully chosen formulas counterbalancing each other and the statements made by States show that there was an understanding that these issues could be, should be and would be settled later.

E) THE ACTION – WELL BALANCED – CONTENT OF RESOLUTION 67/19

233. Above, I referred to the importance of the counterbalancing formulas in Resolution 67/19. In my view, and without entering again into the analysis of the legal value of General Assembly and Security Council resolutions, the same can be said of nearly all resolutions adopted since the 1990's.

234. Their 'pre-1967 borders' type formulas do not stand alone: they should be read alongside the references to Oslo I and Oslo II, the Road Map (which is very clear about when and how Palestine's borders will be established)[295]

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and the Quartet,[296] or even with direct reference to negotiations on borders and recalling the previously adopted resolutions containing the same elements, such as Security Council Resolution 1397 of 12 March 2002,[297] Resolution 1515 of 19 November 2003[298] and Resolution 1850 of 16 December 2008.[299] The same can be said regarding most of the statements pronounced in the Security Council on 11 February 2020.[300]

. . .

F) IMPACT OF RESOLUTION 67/19 ON THE SECRETARY-GENERAL AS A DEPOSITARY OF THE ACCESSION INSTRUMENT

238. The Prosecutor's primary position and the Majority Decision attribute a decisive effect to the interplay of Resolution 67/19 and the Palestine ICC accession instrument as transmitted by the Secretary-General acting as depositary of the Rome Statute.

239. The Secretary-General often faces a dilemma on how to proceed when the General Assembly is unable to take a clear direction,[306] such as when it is impossible to assume that the General Assembly has given 'unequivocal indications [. . .] that it considers a particular entity to be a State.'[307]

240. In my view, a thorough review of the text and the debate of Resolution 67/19 makes it clear that the condition of 'unequivocal indications' is hereby not fulfilled. I believe that we must not underestimate the value of the Secretary-General's perception of his task as depositary, as he underlined it in the administrative circular communicated on the day following the transmission of the Palestinian accession instrument. He stated: 'This is an administrative function performed by the Secretariat as part of the Secretary-General's responsibilities as depositary for these treaties. It is important to emphasize that it is for States to make their own determination with respect to any legal issues raised by instruments circulated by the Secretary-General.'[308]

. . .

245. The real and persisting problem in answering the question concerning the geographical scope of the Court's jurisdiction and the Prosecutor's investigation is linked to the fact that, currently, there are no precise settled borders either at the bilateral Israeli-Palestinian level or at any multilateral level. Instead, UN Resolutions merely allude to the necessity of engaging in bilateral negotiations on the issue of borders, using varying formulas of the pre-1967 borders. These formulas are similar but not identical as the emphasis placed on the 1967 borders in each of them is far from being the same.[315]

246. This leads to the conclusion that the Majority's reference to the interplay between Resolution 67/19 and the accession instrument, its ensuing sole reliance on article 125(3) of the Statute and its subsequent interpretation through article 21(1)(a) of the Statute alone, is insufficient and, in my view, not adequately substantiated.

G) THE ACTUAL CONTENT OF RESOLUTION 67/19 IN LIGHT OF SUBSEQUENTLY ADOPTED UN SECURITY COUNCIL AND GENERAL ASSEMBLY RESOLUTIONS

. . .

252. This means that, even years after the adoption of Resolution 67/19, the General Assembly still does not consider Palestine's statehood to be already existing and fully fledged, but rather as an aim to be achieved. As the President of the 75th General Assembly admitted on 1 December 2020, when touching upon the question of the partition and Resolution 181(II): '[I]n the seven decades that followed, we have failed to establish a State for the Palestinian people'.[323]

. . .

261. As a consequence of its refusal to take into consideration the relevant rules of international law, the Majority not only based its reasoning on irrefutable presumptions presented by the Prosecutor, but went even further by *proprio motu* creating a legal fiction, particularly as it relates to Palestine's statehood and territory. I am convinced that the Majority built its reasoning on a perception of Palestine's statehood and territory that is very far from the real, well-known and well-documented position of the United Nations.[392] The grammatical, contextual, systemic and practical interpretations of United Nations documents do not support the Majority's position. Moreover, it seems

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to me that the Majority goes considerably beyond the official position taken by the State of Palestine/Palestinian Authority, as it stands at the time of this Ruling.[393]

VI. Palestine in the ICC since 2015

. . .

267. I see no reason or legal procedure in the Rome Statute to nullify *ex post facto* the Palestinian accession. Palestine is a State Party, despite its current and perhaps peculiar international legal situation. As a State *in statu nascendi*, Palestine may also perform its rights and obligations.[406] However, this does not mean that its 'statehood' has been achieved, that the issue of its territory as 'territory of the State' has been settled, or that its 'borders' can be conceived as State boundaries.

VII. Why challenging the legality of the 'occupation' has no impact on how this issue will be politically resolved in the future (as shown by historical examples)

. . .

269. The Prosecutor[407] and the Majority Decision[408] attribute utmost importance to the qualification of 'occupation' in the long series of UN resolutions and concluded that if the UNO repeatedly urged Israel to return the Occupied Palestinian Territories, this would practically *ipso facto* recognize the State of Palestine's title on the occupied territory and the territory as a whole, as defined by the 1949 and 1967 armistice lines.

270. It should first and foremost be emphasised that references to UN resolutions are *ab ovo* weakened by the limited legal value of resolutions adopted by the General Assembly, as well as those adopted by the Security Council when it is not 'acting under Chapter VII' but under Chapter VI. It cannot be denied that the Security Council resolutions related to Palestine do not contain the well-known 'acting under Chapter VII' formula. Consequently, they do not have binding force. According to the Charter of the United Nations, General Assembly resolutions are only recommendations. The few exceptions[409] recognized by practice and by scholars are not pertinent to the issue under scrutiny.

271. But this is not the only problem. The Prosecutor also states that 'sovereignty over the occupied territory does not fall on the Occupying Power but on the "reversionary" sovereign.'[410] While this is certainly a general rule, it is worth acknowledging that this presupposes that *i*. the previous (or 'reversionary') possessor was a sovereign State and *ii*. its title over the territory was also sovereign. Are these conditions met in the situation before us? I do not think so.

. . .

277. That is why I find unpersuasive the Prosecutor's argument implicitly suggesting that the call for retreat and the condemnation of the occupation *automatically* and *ipso facto* mean the confirmation of Palestine's legal title over the occupied territory[425] and, moreover, the whole territory according to the 1967 lines. The reference to a general right to self-determination and to the right to self-determination of the Palestinian people,[426] also recognized by the ICJ in its advisory opinion on the Wall,[427] and which is uncontested, is not helpful in determining an *existing and recognized legal state-boundary* in 2021. It is even less helpful in light of the effective application of the right to self-determination in conjunction with territorial and boundary issues. Only a few weeks before the submission of the Request, the Prosecutor remained *rightly* convinced that article 12(2)(a) of the Statute was to be interpreted based on international law and that a State's 'territory' should be understood as 'areas under the sovereignty of the State'.[428] In the Response, after having mentioned the maritime law context of her statements,[429] the Prosecutor attempted to explain the manifest contradiction between the position she took in her 'Report on Preliminary Examination Activities 2019'[430] and the position in her Request. She stated in the Response (after repeating a statement of the Report that is legally correct)[431] that 'under the present circumstances sovereignty over the Occupied Palestinian Territory resides in the Palestinian people under occupation.'[432]

278. It cannot be reasonably argued that 'State's sovereignty' equates 'people's sovereignty', or that these are interchangeable notions, and no textbook of international law would state otherwise. The argument based on the

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interchangeable use of a state's sovereignty and of a people's sovereignty[433] is not persuasive especially when attempting to identify 'the territory of the State' as it stands in 2021.

279. I already stressed the importance of distinguishing between recommendations and binding resolutions. However, the Majority's deliberate refusal to take into consideration relevant rules of international law has another consequence: statements and resolutions regarding the legitimate rights of Palestinians, originally adopted in the context of the *people's sovereignty*, are now described in the Majority Decision[434] as elements of *State sovereignty* and are accepted as proof of ownership of a precise territory.

280. Elsewhere in the Response, the Prosecutor is a bit more nuanced in this respect[435] and defines the Court's jurisdiction on the basis of a *status quo* argument. However, taking into account the precise wording of article 12(2)(a) of the Statute ('on the territory of the State'), neither the reference to *status quo* nor the 'scope of territory attaching to'[436] language are sufficient to describe the current legal status as 'the territory of the State'. I also note that the wording 'the territory attaching to' contains interpretative uncertainties.[437]

281. The reference to the principle of *ex injuria jus non oritur*,[438] an undisputed general principle of law, does not really help either in answering the question of whether the geographical scope can be qualified *hic et nunc* as the territory of the State. The ICJ's eloquent wording in the closing paragraph of its advisory opinion on the Wall is therefore noteworthy.[439]

VIII. The importance of the Oslo Accords

A) The Oslo Accords in the Request

282. The Request devotes several pages to outlining the main elements, institutions, aims and commitments of the Oslo I and Oslo II Accord as well as the outcome of subsequent bilateral talks between Israel and Palestine.[440] I assume that this was necessary to, *inter alia*, substantiate the Prosecution's characterization of 'the unique and complex factual and legal circumstances in this situation' which is 'uniquely controversial within the international community [. . .] [and] legally and factually complex.'[441] It is certainly true that the current situation can hardly be explained without first understanding the functioning of the Palestinian institutions and the repartition of respective competences between Israel and the Palestinian Authority, otherwise known as the State of Palestine.

283. One must acknowledge the efforts put forth in the Request to display the basic institutional mechanisms (despite the omission of important sub-rules), even if its conclusion is ultimately that the Oslo Accords do not prevent the ICC from exercising its jurisdiction.[442] It is worth noting that in order to substantiate this position, the Prosecutor refers to a 'precedent' adopted in a case concerning states whose statehood, territory and borders were not contested (when a sovereign State entered into an agreement with another sovereign State relating to armed forces on its territory). Taking into account the original wording of the judgment, one may ask whether generalization of the *dictum* was justified.[443]

B) The importance of also relying on article 21(1)(b) of the Statute

284. All of the above warns us to exercise caution before concluding that there is no need to go beyond article 21(1)(a) of the Statute. Even the Request itself demands that article 21(1)(b) of the Statute be taken into account 'in the second place, where appropriate'. Indeed, the Request is full of references and cross-references to international legal instruments and discusses the role of the UN Secretary-General as depositary of treaties *in abstracto* and *in concreto*. Consequently, how can one say that this *imbroglio* can be understood without due consideration to the 'applicable treaties and the principles and rules of international law'?

285. What conclusion can be reached when taking into account 'applicable treaties and the principles and rules of international law' in the assessment of the issue under scrutiny? What are these treaties and rules in the question *sub judice*? In addition to the previously mentioned The Hague and Geneva Conventions and the Charter of the United Nations as background of the General Assembly and Security Council resolutions also referred to in the Request, the most important ones include the Oslo I and Oslo II Accords and all the subsequent agreements built thereon. First, it

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is necessary to analyse why these can be considered 'international treaties' or at least international treaties for the purposes of the Statute.

. . .

E) SIMILARITY BETWEEN REPARTITION OF COMPETENCES IN THE REGIME ESTABLISHED BY THE OSLO ACCORDS AND IN SOME SPECIAL REGIMES ESTABLISHED FOR THE PROTECTION AND SELF-ADMINISTRATION OF MINORITIES, ETHNIC GROUPS AND/OR CO-EXISTING PEOPLES

320. In my reading, the Oslo Accords could be the key to adequately answering the question presented by the Prosecutor concerning the geographical scope of the Court's jurisdiction.

321. Had we referred to the Oslo Accords based on article 21(1)(b) of the Statute, this would have provided us with a more nuanced and, in my view, far more solid basis for the decision.

322. Given that Palestine's borders are not yet settled under international law, and consequently one cannot say with certainty and authoritative value if a particular parcel of land belongs or not to Palestine, the situation and potential cases cannot be easily matched with the wording of article 12(2)(a) of the Statute, specifically 'the State on the territory of which'.

323. Consequently, we find ourselves in an ambiguous and delicate situation where a State (Israel) and a *nasciturus* State[530] (Palestine) – undisputedly recognized by a large number of States as a genuine, real State – exercise different legislative, administrative and judicial competences *ratione personae* and/or *ratione loci* over life in the given territory where – as the ICJ confirmed – the rules of the Geneva Convention IV and of the The Hague Convention IV are also to be applied. It is a truly extraordinary, unique and complex situation, as it was rightly qualified in the Request.

324. Those different rules might eventually overlap territorially but their scope of application may be separated *ratione personae*. Their logic may have *mutatis mutandis* a historical reminiscence to some approaches followed by the League of Nations' minority protection system in the 1920-1930's. Minority protection is understood with special regard to the respect for special territorial self-governments. It was realized mostly (although not exclusively) on different islands populated by historically or linguistically distinct people and was regarded as an important achievement in many states. The home rule principle is important and its respect often requires special measures when the State exercising international legal representation over the territory enters into a new international treaty law obligation.

325. For some time, in the context of the ICC, a similar reasoning motivated Denmark's use of the territorial clause in order to temporarily exclude Greenland and the Faroe Islands from the scope of application of the Rome Statute. This lasted until the territorial self-governments of these islands did consent to the Court's jurisdiction on their territory, which happened in 2004 and 2006 when Denmark withdrew its formerly submitted declaration *vis-à-vis* these islands.[531] The respect of autonomous competences is also behind New Zealand's still valid declaration *vis-à-vis* Tokalu.[532]

326. It may be argued that at first glance, the League of Nations' minority protection system and the position of Greenland, the Faroe Islands and Tokalu are not comparable with the issue before us, as the three islands have a well-defined autonomous territory within sovereign States, with uncontested boundaries. However, in my view, this does not exclude *per se* taking into account the local legal particularities. It is worth noting that the European Court of Human Rights is apparently ready to take into account the regional specificities of territorial autonomies.[533]

327. In the case *sub judice*, a legal step is under scrutiny which was taken by a *nasciturus* state, recognized already as a full State by a great number of States, but not recognized as such by another important number of States, and enjoying autonomous status within Israel, which is undoubtedly a sovereign state. While the Oslo Accords define with precision the geographical borders for the repartition of powers as a starting point towards the realization of the two-State vision, these borders are not those which Palestine would like to see. Moreover, legally speaking, these are currently *administrative* borders.

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328. However, as often mentioned in this Dissenting Opinion, the State borders will be decided on later, through negotiations and the 1967 'borders' duly born in mind. This is a position also emphasised in the resolutions of the UN Security Council and General Assembly referenced in the Request.

329. This '*provisorium*' toward the realization of the two-State vision provides the reason why the above mentioned examples should not be set aside in our reasoning. Their logic is similar: overlapping competences are exercised over a territory and these should be taken into account by the respective State and non-State entities. At this point, it is worth remembering Max Huber's warning that in 'exceptional circumstances',[534] the partition of sovereignty is imaginable.

330. As to Palestine and its repartition of competences with Israel, the rules are settled in the Oslo Accords, the full implementation of which is supported and expected by the United Nations and those States and actors forming the 'Quartet'.

F) ARE THERE ANY REASONS FOR NOT TAKING INTO ACCOUNT THE OSLO ACCORDS?

331. The Prosecutor's position is that 'the Oslo Accords do not bar the exercise of the Court's jurisdiction'.[535] Her reasoning is based firstly on the separation of the 'enforcement jurisdiction' and 'prescriptive jurisdiction.'[536] She states that the Oslo Accords could eventually limit the 'enforcement jurisdiction' but not the 'prescriptive jurisdiction', and according to practice, '[t]he Oslo Accords thus appear not to have affected Palestine's ability to act internationally.'[537]

332. Secondly, she states that because of Israel's status as an occupying power under international humanitarian law conventions, the Oslo Accords should be considered 'a "special agreement" within the terms of the Fourth Geneva Convention',[538] and such type of agreements may not 'derogate from or deny the rights of "protected persons" under occupation' according to the Geneva Convention IV.[539]

333. The Prosecutor suggests that because no agreement may run contrary to peremptory norms of international law (according to the Vienna Convention), because the peoples' right to self-determination belongs to such norms [540] and because '[t]he ability to engage in international relations with others is "one aspect" of the right to self-determination',[541] then the limitations relating to competences in the Oslo Accords would run contrary to peremptory norms of international law. '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.'[542]

334. However, this argument is not sufficiently persuasive. Even if it is a fact that Palestine could become a contracting party to a number of international treaties either on the basis of the Vienna Convention (due to Palestine's membership in UNESCO) or the 'all States' formula following the adoption of Resolution 67/19, Palestine's accession policy faced obstacles where the accession procedure required the approval of the other contracting parties (in particular in the context of 'half-closed treaties'). This is especially true with respect to the admission into international organizations belonging to the United Nations' family. Since Palestine's admission to UNESCO and the granting of 'non-member observer state' status under Resolution 67/19, the only real success in membership was its admission to INTERPOL.

335. It is well known that the restrictive character of competences under the Oslo Accords did not prevent all forms of cooperation between the different agencies/institutions and Palestine. Nevertheless, it is manifestly too categorical to state that '[t]he Oslo Accords thus appear not to have affected Palestine's ability to act internationally.'[543]

336. When the Prosecutor discusses the alleged conflict between the Oslo Accords and peremptory norms of international law in the Request, she apparently does not realize the slippery slope character of this approach.

337. The first question is whether the Vienna Convention is applicable to the Oslo Accords. While article 3 of the Vienna Convention[544] makes it clear that the VCLT does not cover treaties between a State and a non-State subject, its application *mutatis mutandis* may well be argued, as it has been done for example in the Corten-Klein Commentary.[545]

338. This argument is missing from the Request. Given that the Request focuses on the invalidity or only the 'unopposability' of the Oslo Accords, this omission is not easy to understand.

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339. The *erga omnes* nature of the right to self-determination and its judicial recognition with respect to Palestinians in the advisory opinion of the ICJ on the Wall[546] is not contested. However, one must not overlook the basic norms regarding the invalidity of treaties.

340. While *erga omnes* obligations and peremptory (or 'imperative', or '*jus cogens*') norms are of a similar character, they are not identical. The first category focuses on those subjects who are under a special obligation (namely all States and all subjects of international law) and the second category focuses on the consequence of a conflict between an ordinary treaty and a special norm (such as the invalidity of an ordinary treaty concluded in conflict with the terms of an already existing peremptory norm,[547] or the extinction of an ordinary treaty concluded prior to the emergence of a peremptory norm[548]).

341. Even assuming that the peoples' right to self-determination is both *erga omnes* and peremptory in character, we cannot forget that the Vienna Convention, while recognizing the very limited possibility of the partial invalidation of the treaty, excludes this *expressis verbis* with respect to *jus cogens* norms.[549]

342. The logical conclusion is that *i.* if the Prosecutor considers that the right to self- determination is not only *erga omnes*, but also peremptory,[550] the solution she suggests is clearly forbidden by the Vienna Convention (its partial invalidity) or *ii.* if the Prosecutor considers that the right to self-determination is only *erga omnes* and not peremptory, the finding she suggests (to conclude on its invalidity) has no basis in the Vienna Convention.

343. The Prosecutor's other argument focuses on an alleged conflict between the Oslo Accords and the 'special agreements rule'[551] of the Geneva Convention IV. However, insofar as the Oslo Accords deal with repartition of competences without granting or promising impunity to either Israeli or Palestinian perpetrators (under the jurisdiction of Israeli military or ordinary tribunals and authorities), it cannot be said that the Oslo Accords *per se* restrict the rights conferred under the Geneva Convention. According to the 1958 Commentary,[552] while different from typical special agreements[553] and other more common ones,[554] article 7 of the Geneva Convention IV can be understood to also cover the Oslo Accords.

344. As the International Committee of the Red Cross (the 'ICRC') Commentary (the 'ICRC Commentary') puts it:

> The term 'special agreements' should be understood in a very broad sense. No limits are placed either on the form they are to take or on the time when they are to be concluded. The only limits set by the Convention concern the subject of the agreements, and were included in the interests of the protected persons.[555]

345. The question is, however, whether the content of the Oslo Accords is compatible or not with the Geneva Law.[556] According to the ICRC Commentary, the test is the *derogation* criterion.[557]

346. In this context, it is not clear[558] whether the Prosecutor views the alleged conflict between the Oslo Accords and the Geneva Convention IV as a simple conflict of norms,[559] as a conflict with an *erga omnes* norm, or with a peremptory norm.[560]

347. Taking into account the wording of article 7 of the Geneva Convention IV, its historical antecedents during World War II and its commentary, one may say that it reflects the same legal approach as article 53 of the Vienna Convention, adopted twenty years later. In other words, the legal sanction for concluding an agreement in order to derogate from the rights conferred under the Geneva Conventions could be the invalidation of the instrument.

348. However, if we take into account the text, the purpose and the original five-year time frame of the Oslo Accords, it is not easy to state that an instrument aiming to set up a limited self-government for the purpose of developing and enlarging competences, and affecting about 90% of the population living in the given territory, could be considered as aiming to derogate from rights conferred under the Geneva Conventions and in particular the Geneva Convention IV.

349. As the ICJ stated, Israel is under the obligation to implement the Geneva Convention IV.[561] The victims' right to seek justice before a national tribunal and the State's obligation under the Convention[562] to sanction the offenders are binding obligations on Israel. However, the Geneva Convention does not prescribe the victims' individual right to seek justice before international judiciary bodies.

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350. Complaints by Palestinians regarding the outcome of military, judicial or disciplinary proceedings or the criminal proceedings before ordinary or military tribunals in Israel are well known and documented in submissions to different international fora. However, these complaints are to be considered within the context of evaluating Israel's implementation of its obligation under the Geneva Convention IV and not used as a basis for invalidating the Oslo Accords.

351. It is worth adding that the Israeli High Court of Justice emphasised the application of the necessity/proportionality test concerning the use of force in the context of the Geneva Conventions[563] and recently declared unconstitutional a law aiming at regularizing unlawful settlements. [564] Its reasoning was based on Parliament having exceeded its law-making authority[565] by enacting a law conflicting with the Geneva and The Hague Conventions[566] that violates the Palestinians' right to property[567] and is discriminatory in nature.[568]

352. Going back to the question of a potential conflict between the Oslo Accords and the Geneva Convention, it must be said that neither the material nor (and even less so) the procedural conditions of invalidity are met in the present situation. [569] Further, it can be presumed that a formal invalidation procedure before the ICC cannot be reconciled with the Rome Statute.

353. The Request[570] also alleges the incompatibility of the Oslo Accords with article 146 of the Geneva Convention IV and cites in support a sentence from the 1958 Commentary on the Convention.[571]

354. The quoted statement ('this paragraph does not exclude handing over the accused to an international criminal court') was regarded with considerable pessimism [572] by the Pictet Commentary, a view supported by the lengthy preparatory works, but that came to fruition with the establishment of the ICC decades later. It refers to the second paragraph of article 146 of the Geneva Convention IV, which addresses inter-State extradition and the related condition of a '*prima facie*' case.[573] However, considering the above references to the commentary, the second sentence of that second paragraph of article 146 of the Geneva Convention IV can hardly be deemed to contain a rule so evident that it could be considered *erga omnes* or *a fortiori* peremptory.

355. One might also ask if the *in personam* wording referring to an actual, well-specified crime and the '*prima facie case*' requirement of article 146 of the Geneva Convention IV reflect the same type of competence-transfer as that stipulated in the Rome Statute. The Rome Statute provides for a rather general, typically *pro futuro* competence, granting the Prosecutor a large amount of independence concerning the specification of the perpetrators under investigation and the preparation of a 'case' in a given 'situation'. If this is so, it would be even more difficult to conclude that a manifest conflict exists between article 146 of the Geneva Convention IV and the Oslo Accords. Consequently, it would also be problematic to justify invalidating the Oslo Accords or prioritising the Rome Statute over the Oslo Accords based on a certain degree of similarity between the Rome Statute and the Geneva Convention.

356. In the Response, the Prosecutor denies having claimed the invalidity of the Oslo Accords[574] as a whole. However, the suggested solution (not to take into account those articles of the Oslo Accords which allegedly contradict the Rome Statute) remains questionable and can definitely not be reached from applying the Vienna Convention.

357. At this point, the Request[575] and the Response[576] describe the conflict as a conflict of ordinary norms: 'if a State has conferred jurisdiction to the Court, notwithstanding a previous bilateral arrangement limiting the enforcement of that jurisdiction domestically, the resolution of the State's potential conflicting obligations is not a question that affects the Court's jurisdiction.'[577]

358. However, the Rome Statute does not contain any disposition on automatic priority such as can be found, for example, in the Charter of the United Nations.[578]

359. In order to substantiate this position, the Prosecutor refers to only three scholarly works in the Request. In her Response, she quotes the Appeals Chamber's judgment in the Afghanistan situation, stating: 'Notably, the Appeals Chamber in a different context has recently confirmed that agreements limiting the exercise of enforcement jurisdiction over certain nations are "not a matter for consideration in relation to the authorisation of an investigation under the statutory scheme".'[579] The Majority shares this opinion.[580]

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360. The transposition of this *dictum*[581] from this recent judgment should be done with utmost caution, because the footnotes in the cited judgment refer to the transcripts of the hearings, which themselves do not provide much more detail. [582] The agreements in question were contracted between two sovereign States, and their content – not revealed in the Appeals Chamber's judgment – is related to status of forces agreements and other agreements falling under article 98(2) of the Statute. It is therefore very different from the content of the Oslo Accords, which deal with the transfer and repartition of competences between a sovereign State and Palestine, a special entity (originally the Palestine Liberation Organization, as signatory party).

361. That is why this single *dictum* is insufficient to justify setting aside the rules of competence under the Oslo Accords.

362. It is true that neither the Request nor the Response speak about complete irrelevance: 'Rather, it may become an issue of cooperation or complementarity during the investigation and prosecution stages.'[583] This is repeated in the Response.[584] While in the Request,[585] the statement is based on one academic work with respect to complementarity, on three scholarly works with respect to cooperation and on the (since then reversed) decision of Pre-Trial Chamber II in the Afghanistan situation,[586] the Response refers only to the Appeals Chamber's judgment.[587]

363. However, as one may see in Pre-Trial Chamber II's decision, that Chamber based its reasoning only on article 98(2) of the Statute. Article 98(2) of the Statute [588] speaks of agreements between 'sending states' and 'receiving states'. Therefore, *prima facie,* the provision primarily concerns status of forces agreements, while not excluding other types of agreements (for example, on re-extradition or on special missions, according to the Triffterer Commentary[589] and the Fernandez and Pacreau Commentary).[590]

364. If the 'sending state' designates the State sending military troops and the 'receiving state' designates the State on the territory of which those troops are deployed pursuant to the agreement, and if the content of the 'other types of agreement' mentioned above is also very different from the content of the Oslo II Accords, the extrapolation of the *dicta* contained in Pre-Trial Chamber II's decision and in the Appeals Chamber's judgment regarding the Oslo Accords is problematic. Either way, these questions were not touched upon in either the Request, the Response or the Majority Decision.

365. It follows that I am not persuaded by the Prosecutor's argument that the Oslo Accords have no impact on the geographical scope of the Court's jurisdiction,[591] that they cannot be considered an obstacle to jurisdiction[592] and that their impact is only to be dealt with at the time when admissibility and cooperation are under scrutiny.[593] The position in the Majority Decision[594] is similar to that in the Request.

366. To conclude, the proper approach is, in my view, a harmonized interpretation which reflects the meaning of two treaties that are equally valid and in force, and which duly considers the rules to be implemented from each of them. In this way, both may be implemented at the same time.

IX. My answer to the main question raised in the Request: the geographical scope of the Prosecutor's investigative competence

. . .

372. Rewording these considerations into the form of a disposition, the answer to the Prosecutor's Request is, in my view, as follows:

The geographical scope of application of the Prosecutor's competence to investigate covers the territories of the West-Bank, East-Jerusalem and the Gaza strip but – under the actual legal coordinates and with the exception of the hypothesis of article 13(b) of the Rome Statute – subject to due consideration of the different legal regimes applied in areas A, B, C and East Jerusalem according to the Interim agreement (and in particular according to its article XVII), Annex IV attached thereto (and in particular according to the dispositions under rules 1(a),[600] 1 (c),[601] (2),[602] (4)[603] et (7)[604] of Article I) and other subsequent Israeli-Palestinian agreements adopted on this basis, which could eventually imply the duty to follow the rules of article 12(3) of the Rome Statute and the utility of profiting from the possibility stipulated in article 87(5) of the Rome Statute.

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373. Such a formula is certainly not easy to understand or to apply and admittedly, it could have several practical interpretations.

374. From a practical point of view, I may give the following additional explanations.

> When there is no Security Council referral in conformity with article 13(b) of the Rome Statute, the geographical scope of the ICC jurisdiction, according to the applicable legal provisions, is as follows:
>
> *i.* As to areas A and B, and taking into account rule 1(a) of article I of Annex IV to the Interim Agreement,[605] the Prosecutor may proceed to investigate. However, it would be useful to conclude in advance an agreement with Israel under article 87(5)(a) of the Statute in order to secure the optimal conditions for the missions and investigations. If and when the Prosecutor concludes that her investigations have been successful and she has identified specific individuals as alleged perpetrators who are not covered by the Israeli-Palestinian competence transfer pursuant to the Oslo Accords, the Prosecutor cannot pursue the investigations against these individuals until the conditions of article 12(3) of the Statute are met, as outlined above, in paragraph 371;
>
> *ii.* For cases falling under the scope of rules 1(c),[606] (2),[607] (4)[608] and (7)[609] of article I of Annex IV to the Interim Agreement, the following rules should be observed: if the agreement contracted under article 87(5) of the Statute does not provide a clear resolution to an actual dispute, the solution should be looked for in the application of conditions settled in article 12(3) of the Statute;
>
> *iii.* As far as area C and East-Jerusalem are concerned, and taking into account the Oslo Accords, the Prosecutor may proceed to investigate only if the conditions of article 12(3) of the Statute are met, except under the circumstances described in rule 1(b) of article of Annex IV to the Interim Agreement;[610]
>
> *iv.* All of the above references to the Interim Agreement should be understood in conformity with the subsequent Israeli-Palestinian agreements adopted on this basis.

375. I am convinced that this is the solution that can be drawn from the applicable legal provisions and that can be matched with the principles of *nemo plus iuris transferre potest quam ipse habet* and *pacta tertiis nec nocent, nec prosunt,* both of which are elementary rules of international law and at the same time form part of the general principles of law on which the complementary principle of article 21(1)(c) of the Statute is based.

376. If the famous and so often discussed *Monetary Gold principle*[611] is *at all* applicable to the present issue[612] – depending, for example, on the interpretation of what is the '*very subject- matter*' in the current proceedings and on the future relevance of exceptions recognized by international jurisprudence [613] – it would be compatible with the above answer. I do not consider, however, that a detailed analysis of the applicability of the *Monetary Gold principle* would be a *sine qua non* condition of issuing this ruling.

377. This also conforms to the *dicta* of Pre-Trial Chamber I (with the same composition) in the First Rohingya Decision on the objective legal personality of the Court,[614] which also noted that 'the objective legal personality of the Court does not imply either automatic or unconditional *erga omnes* jurisdiction. The conditions for the exercise of the Court's jurisdiction are set out, first and foremost, in articles 11, 12, 13, 14 and 15 of the Statute.'[615]

378. I am convinced that without the cooperation of the directly interested States in the present and truly complicated, over-politicized situation, the Prosecutor will have no real chance of preparing a trial-ready case or cases. This should go hand in hand with national prosecutions when needed and according to the rule on complementarity.

379. All this should be understood within the framework of the famous *Lac Lanoux* arbitration[616] rule: 'there is a general and well-established principle of law according to which bad faith is not presumed' or '*il est un principe général de droit bien établi selon lequel la mauvaise foi ne se présume pas.*'[617]

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M. le juge Péter Kovács

Dated this Friday, 5 February 2021

At The Hague, The Netherlands

ENDNOTES

1 Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine, 22 January 2020, ICC-01/18-12, together with Public Annex A, ICC-01/18-12-AnxA.

2 Majority Decision, para. 87.

3 Request, para. 41 ('The Prosecution thus considers Palestine, an ICC State Party within the meaning of articles 125 and 12(1), to be a "State" for the purposes of article 12(2).').

4 Declaration of Principles on Interim Self-Government Arrangements ('Oslo I'), 13 September 1993.

5 Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip ('Oslo II'), 28 September 1995.

6 United Nations, General Assembly, UNGA Resolution 67/19 Status of Palestine in the United Nations ('Resolution 67/19'), 29 November 2012, A/RES/67/19.

7 For example, without a special rule enshrined in Turkey's peace treaty conferring dispute settlement authority on the Council of the League of Nations, this organ could not have passed a binding decision in the Mossul case. *See* Permanent Court of International Justice (the 'PCIJ'), *Article 3, Paragraph 2, of the Treaty of Lausanne*, Advisory opinion of 21 November 1925, 21 November 1925, Series B, No. 12 ('Advisory Opinion of 21 November 1925') (addressing the interplay between the peace treaty and the competence of the Council of the League of Nations).

8 'Auto-normative' and 'hetero-normative' competences are understood, respectively, as the competences of an organization to regulate its own internal functioning, and the competences of an organization to regulate other issues with members states or other states.

9 ICJ, *Case Concerning Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory opinion of 21 June 1971, 21 June 1971, paras 108, 112–114.

10 Prosecution Response to the Observations of *Amici Curiae*, Legal Representatives of Victims, and States, 30 April 2020, ICC-01/18-131 (the 'Response'), para. 14 ('It has never been the position of the Prosecution that the administrative act of a treaty depositary in accepting an instrument of accession can, itself, endow the acceding entity with Statehood. *Nor indeed that a UN General Assembly resolution has the effect of endowing Statehood*. To the contrary, both these circumstances reflect no more than an appreciation by the depositary and/or the *UN General Assembly that the entity in question already and independently possesses sufficient attributes of Statehood*. Yet such appreciations of Statehood are important, for the purpose of the Statute, because article 125 conditions the acquisition of the rights and obligations of a State Party on such criteria. This is without prejudice to the principle—with which the Prosecution agrees—that Statehood is a condition precedent for accession to the Statute. One of the key questions implicit in the Request is simply which entity has the competence to determine that question—is it a matter for the Court, or for States Parties themselves (initially through their actions in the UN General Assembly, to which the depositary looks when considering whether to accept an instrument of accession, and then subsequently in exercising their rights under the Statute if the accession is accepted by the depositary)?') (emphasis added) (footnotes omitted).

11 ICJ, *Croatia v. Serbia and Montenegro (Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide)*, Judgment of 18 November

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2008, Preliminary Objections, 18 November 2008, paras 126–127; Judgment of 3 February 2015, 3 February 2015, paras 81, 103. *See also* Separate Opinion of Judge Owada, paras 9, 12, 20; Declaration of Judge Xue, paras 2, 4, 5.

12 Of course, I do not contest that unilateral statements in territorial disputes could produce such an effect, for example in the context of renunciation. *See* PCIJ, *Legal Status of Eastern Greenland*, Judgment of 5 April 1933, 5 April 1933, Series A/B, No. 53.

13 *See* Response, subsection B ('B. Primary argument: accession to the Statute is not dispositive of Statehood as a matter of general international law, but binds organs of the Court to treat all States Parties equally as States, for the purposes of the Statute. B.1. The Prosecution has always agreed that Statehood under public international law does not result from treaty accession. B.2. The validity of an entity's accession to the Statute is not a matter for review by the organs of the Court, but rather for States Parties through the mechanisms of the Statute. B.3. No State Party employed the mechanisms of the Statute to challenge Palestine's accession to the Statute. B.4. Interpreting the Statute to mean that organs of the Court are not bound to treat all States Parties equally as States, for the purposes of the Statute, leads to consequences which are inconsistent with the object and purpose of the Statute.').

14 Response, paras 19–23.

15 Article 119(2) of the Statute reads as follows: 'Any other dispute between two or more States Parties relating to the interpretation or application of this Statute which is not settled through negotiations within three months of their commencement shall be referred to the Assembly of States Parties. The Assembly may itself seek to settle the dispute or may make recommendations on further means of settlement of the dispute, including referral to the International Court of Justice in conformity with the Statute of that Court.'

16 *See* R. S. Clark, 'Article 119: Settlement of disputes' in K. Ambos and O. Triffterer (eds) *The Rome Statute of the International Criminal Court: A Commentary* (2016) ('*Ambos and Triffierer Commentary*'), pp. 2278–2280; E. Decaux, 'Article 119 - Règlement des différends' in J. Fernandez and X. Pacreau (eds) *Statut de Rome de la Cour pénale internationale, Commentaire article par article* (2019) ('*Fernandez and Pacreau Commentary*'), pp. 2528–2529 ('*De renvoi, en renvoi, l'obligation tourne à vide*.').

17 *See e.g.* Security Council, Resolution 1101, 8 March 1997, S/RES/1101. This resolution was adopted by the Security Council in the context of Albania's fall into a state of anarchy. *See also* Resolution 733, 23 January 1992. This resolution was followed by many other resolutions adopted by the Security Council aiming to restore stability in the State of Somalia. In the meantime, both Albania and Somalia enjoyed the same rights as other Member States of the UN.

18 Response, subsection B.4, p. 17.

. . .

39 *See* Majority Decision, para. 102 ('The Chamber has no jurisdiction to review that procedure and to pronounce itself on the validity of the accession of a particular State Party would be *ultra vires* as regards its authority under the Rome Statute,'), para. 103 ('It follows that the absence of such a power conferred upon the Chamber confirms the exclusion of an interpretation of "[t]he State on the territory of which the conduct in question occurred" in article 12(2)(a) of the Statute as referring to a State within the meaning of general international law. Such an interpretation would allow a chamber to review the outcome of an accession procedure through the backdoor on the basis of its view that an entity does not fulfil the requirements for statehood under general international law.').

40 Majority Decision, para. 108 (emphasis added).

41 Pre-Trial Chamber I, *Situation in Georgia*, Decision on the Prosecutor's request for authorization of an investigation, 27 January 2016, ICC-01/15-12, para. 6.

42 *See e.g.* Pre-Trial Chamber I, *Situation in the Republic of Kenya*, Corrigendum of the Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 1 April 2010, ICC-01/09-19-Corr, para. 89 ('With regard to the definition of the terms "State or organizational", the Chamber firstly notes that while, in the present case, the term "State" is selfexplanatory, it is worth mentioning that in the case of a State policy to commit an attack, this policy "does not necessarily need to have been conceived 'at the highest level of the State machinery.'"'), n. 81 *referring to* ICTY, *Prosecutor v. Blaškić*, Case No. IT-95-14-T, Judgment, 3 March 2000, para. 205.

43 Pre-Trial Chamber I, *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Decision on the admissibility of the case against Saif Al-Islam Gaddafi, 31 May 2013, ICC-01/11-01/11-344-Red, para. 200.

. . .

50 Request, para. 118 ('Moreover, this approach would not prevent the Court from defining "State" differently in other areas of the Statute to the extent needed. Specifically, although the Court should follow the General Assembly practice and resolutions on whether an entity is permitted to become a State Party (in accordance with the Secretary-General depository functions under article 125(3)), such determinations would be without prejudice to the Court's own judicial functions in interpreting and applying the term "State" in other parts of Statute, such as in the contextual element of war crimes, for the crime of aggression, or for complementarity purposes.') (footnotes omitted).

51 Pre-Trial Chamber I, Decision on the 'Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute', 6 September 2018, ICC-RoC46(3)-01/18-37.

52 PTC I Rohingya Decision, para. 32.

53 Pre-Trial Chamber II, *Situation in Uganda*, Decision on the Prosecutor's Application that the Pre-Trial Chamber Disregard as Irrelevant the Submission Filed by the Registry on 5 December 2005, 9 March 2006, ICC-02/04-01/05-147, paras 22-23; *The Prosecutor v. Joseph Kony et al.*, Decision on the admissibility of the case under article 19(1) of the Statute, 10 March 2009, ICC-02/04-01/05-377, para. 45.

54 Pre-Trial Chamber II, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, ICC- 01/05-01/08-424, para. 23; *The Prosecutor v. William Samoei Ruto et al.*, Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, 8 March 2011, ICC-01/09-01/11-1, para. 8; *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome

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Statute ('*Ruto et al*. Confirmation of Charges Decision'), 23 January 2012, ICC-01/09-01/11-373, para. 24.

55 Pre-Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, 10 June 2008, ICC-01/05-01/08-14-tENG, para.11.

56 Majority Decision, para. 102.

57 Majority Decision, para. 93 ('The Chamber notes however that the chapeau of article 12(2) of the Statute stipulates in the relevant part that "the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute". The word "following" connects the reference to "States Parties to this Statute" contained in the chapeau of article 12(2) of the Statute with inter alia the reference to '[t]he State on the territory of which the conduct in question occurred' in article 12(2)(a) of the Statute. In more specific terms, this provision establishes that the reference to "[t]he State on the territory of which the conduct in question occurred" in article 12(2)(a) of the Statute must, in conformity with the chapeau of article 12(2) of the Statute, be interpreted as referring to a State Party to the Statute. It does not, however, require a determination as to whether that entity fulfils the prerequisites of statehood under general international law.') (footnotes omitted).

58 Vienna Convention on the Law of Treaties, 23 May 1969, 1155 United Nations Treaty Series 18232.

59 Majority Decision, para. 93 ('The Chamber notes however that the chapeau of article 12(2) of the Statute stipulates in the relevant part that "the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute". *The word "following" connects the reference to "States Parties to this Statute"* ***contained in the chapeau of article 12(2)*** *of the Statute with inter alia the reference* to '[t]he State on the territory of which the conduct in question occurred' in article 12(2)(a) of the Statute.) (emphasis added).

60 Emphasis added.

61 Majority Decision, para. 93 ('In more specific terms, this provision establishes that the reference to "[t]he State on the territory of which the conduct in question occurred" in article 12(2)(a) of the Statute must, in conformity with the chapeau of article 12(2) of the Statute, be interpreted as referring to a State Party to the Statute. It does not, however, require a determination as to whether that entity fulfils the prerequisites of statehood under general international law.').

62 VCLT, article 31 (3) ('There shall be taken into account, together with the context: [. . .] (c) any relevant rules of international law applicable in the relations between the parties.').

63 *See* PTC I Rohingya Decision, para. 64 ('In this regard, the Chamber considers that the preconditions for the exercise of the Court's jurisdiction pursuant to article 12(2)(a) of the Statute are, as a minimum, fulfilled if at least one legal element of a crime within the jurisdiction of the Court or part of such a crime is committed on the territory of a State Party.'), 65 ('First, this finding is based on a contextual interpretation of article 12(2)(a) of the Statute, which takes relevant rules of international law into account.106 In this regard, the Chamber observes that public international law permits the exercise of criminal jurisdiction by a State pursuant to the aforementioned approaches.') and n. 106 *referring to* Article 31(3)(c) of the Vienna Convention on the Law of Treaties; Observations of Members of the Canadian Partnership for International Justice, ICC-RoC46(3)-01/18-25, para. 19.

64 Pre-Trial Chamber III, *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, 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, 14 November 2019, ICC-01/19-27, para. 55 ('As noted above, the wording of article 12(2)(a) is generally accepted to be a reference to the territoriality principle. In order to interpret the meaning of the words 'on the territory of which the conduct occurred', it is instructive to look at what territorial jurisdiction means under customary international law, as this would have been the legal framework that the drafters had in mind when they were negotiating the relevant provisions. It is particularly significant to look at the state of customary international law in relation to territorial jurisdiction, as this is the maximum the States Parties could have transferred to the Court.') (footnotes omitted).

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71 Request, para. 105 ('There is no indication that the term 'State' in article 12(2) should be interpreted in a different way from that term in article 12(1). Likewise, in the ICC context it would contradict the principle of effectiveness to permit an entity to agree to the terms of the Rome Statute and thereby join the Court, to then later negate the natural consequence of its membership - the exercise of the Court's jurisdiction in accordance with the Statute.') (footnotes omitted), para. 114 ('It would appear contrary to the principle of effectiveness and to allow an entity to join the ICC but then to deny the rights and obligations of accession - *i.e.* the Court's exercise of jurisdiction for crimes committed on its territory or by its nationals, whether prompted by the State Party or otherwise.') (footnotes omitted).

72 Majority Decision, para. 106 ('Therefore, the reference to "[t]he State on the territory of which the conduct in question occurred" in article 12(2)(a) of the Statute cannot be taken to mean a State fulfilling the criteria for statehood under general international law. Such a construction would exceed the object and purpose of the Statute and, more specifically, the judicial functions of the Chamber to rule on the individual criminal responsibility of the persons brought before it. Moreover, this interpretation would also have the effect of rendering most of the provisions of the Statute, including article 12(1), inoperative for Palestine.') (footnotes omitted).

73 Pre-Trial Chamber II, *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, Decision on the Prosecutor's Application that the Pre-Trial Chamber disregard as irrelevant the Submission filed by the Registry on 5 December 2005, 9 March 2006, ICC-02/04-01/05-147, para. 25 (A. 'The second necessary condition to be met for the Chamber to be able to actually exercise its powers, including the power to assess its own jurisdiction and competence, is that any information which might be relevant for the exercise of such powers be promptly submitted to it. With specific regard to the powers enshrined in article 57, paragraph 3(c), of the Statute, it is of essence for the Chamber to receive without undue delay relevant information to enable it to determine whether it is "necessary" to make provision for the protection of victims and witnesses. To state that the Chamber has a power to provide on its own motion for the security of victims and witnesses, without at the same time ensuring that the information required to do so actually flows to the Chamber, would be tantamount to depriving this power of any meaningful content. It is a general principle of international law that the provisions of a treaty must be interpreted

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not only in "good faith in accordance with the ordinary meaning" to be given to the relevant terms, but also "in their context" and "in the light of its object and purpose" (article 31, paragraph 1, of the 1969 Vienna Convention on the Law of the Treaties), i.e., in such a way as not to defeat that object and purpose. The method of interpretation aimed at achieving this result is usually referred to as "functional" or "teleological" interpretation. Equally inferred from article 31 of the 1969 Vienna Convention, and equally generally accepted, is the *principle (commonly referred to as "effet utile", "useful effect" or "principle of effectiveness") that a treaty as a whole, as well as its individual provisions, must be read in such a way so as not to devoid either the treaty as such or one or more of its provisions of any meaningful content*.') (emphasis added) (footnotes omitted) ; Pre-Trial Chamber I, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Decision on the 'Application for Judicial Review by the Government of the Union of the Comoros, 15 November 2018, ICC-01/13-68, para. 105 ('Third, even if arguendo a request under article 53(3)(a) of the Statute could potentially be interpreted as not imposing an obligation on the Prosecutor to comply with a decision of the Chamber, as the Prosecutor appears to believe, the *principle of effectiveness nonetheless requires that a request under article 53(3)(a) of the Statute be interpreted as entailing an obligation of compliance on the part of the Prosecutor.*') (emphasis added), para. 106 ('Indeed, according to this principle, "[w]hen a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted". The possibility of the Prosecutor simply disregarding a decision under article 53(3)(a) of the Statute would mean that the oversight function of the Pre-Trial Chamber is without effect and that a *State Party's opportunity to challenge the Prosecutor's decision not to proceed with an investigation is devoid of substance*. This interpretation must, therefore, yield to the interpretation giving effect to article 53(3)(a) of the Statute, namely that a decision under this provision compels the Prosecutor to comply with it.') (emphasis added).

74 Trial Chamber V, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Mr Ruto's Request for Excusai from Continuous Presence at Trial, 18 June 2013, ICC-01/09-01/11-777, para. 39 ('That particular debate is easily resolved against the proposition advanced by the Defence. To say that Article 63(1) expresses a right is to presume that the drafter had used words in vain. The law abjures such a presumption. *Ut res magis valeat quam pereat.* The drafter had clearly expressed a "right" of the accused specifically so described in Article 67(l)(d) "to be present at the trial". It is not then readily to be supposed that in also providing in Article 63(1) that the 'accused shall be present during the trial' the drafter had intended another instance of the same right. *Such a supposition would clearly have rendered Article 63(1) entirely redundant*.') (emphasis added); Trial Chamber II, Situation in the Democratic Republic of the Congo, Judgment pursuant to article 74 of the Statute, 7 March 2014, ICC-01/04-01/07-3436-tENG, para. 46 ('*The principle of effectiveness* of a provision also forms an integral part of the General Rule as that Rule mandates good faith in interpretation. *Thus, in interpreting a provision of the founding texts, the bench must dismiss any solution that could result in the violation or nullity of any of its other provisions*.') (emphasis added); Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment pursuant to Article 74 of the Statute, 21 March 2016, para. 77 ('As stressed by the Appeals Chamber, Article 31(1) of the VCLT sets out the principal rule of interpretation, or, as determined by Trial Chamber II, "*one* general rule of interpretation". In that sense, Trial Chamber II considered that the various elements referred to in this provision – i.e., ordinary meaning, context, object, and purpose – must be applied together and simultaneously, rather than individually and in a hierarchical or chronological order. It further stressed that, on the basis of the principle of good faith provided for in this provision, the general rule also comprises the principle of effectiveness, *requiring the Chamber to dismiss any interpretation of the applicable law that would result in disregarding or rendering any other of its provisions void*. The Chamber agrees with this approach.') (emphasis added) (footnotes omitted).

75 Appeals Chamber, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Judgment in the Jordan Referral re Al- Bashir Appeal, 6 May 2019, para. 124 ('As stated by Pre-Trial Chamber II in the *South Africa* Decision, if States Parties to the Statute were allowed to rely on immunities or special procedural rules to deny cooperation with the Court, this would create a situation which would 'clearly be incompatible with the object and purpose of article 27(2) of the Statute'. Indeed, as noted by Pre-Trial Chamber II 'the Court's jurisdiction with respect to persons enjoying official capacity would be reduced to a purely theoretical concept if States Parties could refuse cooperation with the Court by invoking immunities based on official capacity'. If article 27(2) were to be read narrowly only to encompass proceedings before the Court (i.e. the Court's adjudicatory jurisdiction), *it would be unclear, as noted by the Prosecutor, whether any Head of State – even of a State Party – could ever be effectively arrested and surrendered, absent an express waiver by the State concerned. To read the Statute in this way would be contrary to the principle of effectiveness*.') (emphasis added) (footnotes omitted).

76 Emphasis added.

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80 *See also* III. The legitimacy and importance of relying on international law when assessing the impact of international legal documents on the situation *sub judice*.

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94 Majority Decision, Disposition, p. 60.

95 Majority Decision, Disposition, p. 60.

96 Majority Decision, para. 131 ('It is further opportune to emphasise that the Chamber's conclusions pertain to the current stage of the proceedings, namely the initiation of an investigation by the Prosecutor pursuant to articles 13(a), 14 and 53(1) of the Statute. When the Prosecutor submits an application for the issuance of a warrant of arrest or summons to appear under article 58 of the Statute, or if a State or a suspect submits a challenge under article 19(2) of the Statute, the Chamber will be in a position to examine further questions of jurisdiction which may arise at that point in time. ').

97 Request, para. 6 ('The resolution of this foundational issue is necessary now for several reasons. *First*, it will allow judicial consideration of an essential question *before* embarking on a course of action which might be contentious. The jurisdictional regime of the Court is a cornerstone of the Rome Statue, and it is therefore in the interests not only of the Court as a whole, but also of the States and communities involved, that any investigation

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proceeds on a solid jurisdictional basis. And it would be contrary to judicial economy to carry out an investigation in the judicially untested jurisdictional context of this situation only to find out subsequently that relevant legal bases were lacking. *Second*, an early ruling will facilitate the practical conduct of the Prosecutor's investigation by both demarcating the proper scope of her duties and powers with respect to the situation and pre-empting a potential dispute regarding the legality of her requests for cooperation. By ensuring that there is no doubt as to the proper scope of the Prosecutor's investigation, it will potentially save considerable time and effort for all parties concerned.') (emphasis in original).

98 Response, subtitle A, p. 8 ('There is no basis to require the Prosecutor to defer her request for a ruling on jurisdiction until she has made any application under article 58, and the Chamber should promptly rule on the merits.'). *See also* para. 7 ('[R]esolving the question of jurisdiction at the present time not only favours procedural economy but also ensures that the Court remains on the correct course. [....] Nothing in a prompt ruling causes unfair prejudice to the victims, who are fully able to participate, and will benefit either from a clear ruling on the scope of the Court's territorial jurisdiction (and consequently its entitlement to expect full cooperation from all ICC States Parties in conformity with Part 9 of the Statute), or that the Court cannot be the proper forum for them to have access to justice.') (footnotes omitted), para. 10 ('[The Chamber] should promptly issue the requested ruling on the merits.').

...

103 Majority Decision, para. 131 ('It is further opportune to emphasise that the Chamber's conclusions pertain to the current stage of the proceedings, namely the initiation of an investigation by the Prosecutor pursuant to articles 13(a), 14 and 53(1) of the Statute. When the Prosecutor submits an application for the issuance of a warrant of arrest or summons to appear under article 58 of the Statute, or if a State or a suspect submits a challenge under article 19(2) of the Statute, the Chamber will be in a position to examine further questions of jurisdiction which may arise at that point in time.').

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105 Response, para. 8 ('A. There is no basis to require the Prosecutor to defer her request for a ruling on jurisdiction until she has made any application under article 58, and the Chamber should promptly rule on the merits'). *See also* para. 7 ('resolving the question of jurisdiction at the present time not only favours procedural economy but also ensures that the Court remains on the correct course. [...] Nothing in a prompt ruling causes unfair prejudice to the victims, who are fully able to participate, and will benefit either from a clear ruling on the scope of the Court's territorial jurisdiction (and consequently its entitlement to expect full cooperation from all ICC States Parties in conformity with Part 9 of the Statute), or that the Court cannot be the proper forum for them to have access to justice.') (footnotes omitted), para. 10 ('the Chamber [...] should promptly issue the requested ruling on the merits.').

106 I note that the commentaries do not provide a clear answer to the question of what standard should be applied in the context of a challenge submitted by a State under article 19(2) of the Statute.

107 Response, para. 14 ('an appreciation by [...] the UN General Assembly that the entity in question *already* and independently possesses sufficient attributes of Statehood') (emphasis in original).

108 Response, para. 7.

...

112 Article 21(b) of the Statute reads: 'In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict'.

113 Article 21(c) of the Statute reads: 'Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards'.

114 *See* Majority Decision, para. 111 ('The Statute, thus, exhaustively deals with the issue under consideration and, as a consequence, a determination on the basis of article 21(1)(b) of the Statute as to whether an entity acceding to the Statute fulfils the requirements of statehood under general international law and related questions is not called for.').

115 Application for extension of pages for request under article 19(3) of the Statute, 20 December 2019, ICC- 01/18-8 ('Application for extension of pages'), para. 2.

116 Application for extension of pages, para. 5.

117 Decision on the Prosecutor's Application for an extension of the page limit, 21 January 2020, ICC-01/18-11, para. 12.

118 Request, para. 5.

119 Request, para. 5.

120 Request, paras 46–52.

121 Request, paras 65, 80, 116.

122 Request, paras 52–56, 78–79, 85–87, 108, 193–210 (on the UN), 211–215 (on other international organizations).

123 Request, paras 8, 115, 135.

124 Request, paras 9, 43, 101–103.

125 Request, para. 103 ('The Prosecution considers that a "State" for the purposes of articles 12(1) and 125(3) should also be considered a "State" under article 12(2) of the Statute. Following the deposit of its instrument of accession with the UN Secretary-General pursuant to article 125(3), Palestine qualified as a "State on the territory of which the conduct in question occurred" for the purposes of article 12(2)(a) of the Rome

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Statute. This means that once a State becomes party to the Statute, the ICC is automatically entitled to exercise jurisdiction over article 5 crimes committed on its territory. No additional consent or separate assessment is needed.'), para. 114.

126 Request, para. 101. *See also* paras 138, 144, 178; Majority Decision, para. 110 ('The Appeals Chamber has held that, if "a matter is exhaustively dealt with by [the Statute] or [. . .] the Rules of Procedure and Evidence, [. . .] no room is left for recourse to the second or third source of law [in article 21(1) of the Statute] to determine the presence or absence of a rule governing a given subject."') *referring to* Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, 14 December 2006, ICC-01/04-01/06-772, para. 34. *See also* Appeals Chamber, *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, paras 33–39.

127 Majority Decision, para. 112 *referring to* Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, 14 December 2006, ICC- 01/04-01/06-772, para. 34, *Situation in the Democratic Republic of the Congo,* Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, paras 33–39), *The Prosecutor v. Omar Hassan Ahmad Al-Bashir*, Judgment in the Jordan Referral re Al-Bashir Appeal, 17 May 2019, ICC-02/05-01/09-397-Corr, para. 97.

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238 A. Pellet, 'The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples' in *3 European Journal of International Law 178* (1992), p. 182.

239 *Deutsche Continental Gas*, p. 15.

240 W. M. Reisman, 'Puerto Rico and the International Process: New Roles in Association, A Report for the Conference on Puerto Rico and the Foreign Policy Process' (1973), p. 54 (cited by Tse-shyang Chen, p. 42).

241 Majority Decision, paras 95–99.

242 Majority Decision, para. 96.

243 *See* Office of the Prosecutor, *Situation of Palestine*, Statement, 3 April 2012, paras 5–6 ('The issue that arises, therefore, is who defines what is a "State" for the purpose of article 12 of the Statute? In accordance with article 125, the Rome Statute is open to accession by "all States", and any State seeking to become a Party to the Statute must deposit an instrument of accession with the Secretary-General of the United Nations. In instances where it is controversial or unclear whether an applicant constitutes a "State", it is the practice of the Secretary-General to follow or seek the General Assembly's directives on the matter. This is reflected in General Assembly resolutions which provide indications of whether an applicant is a "State". Thus, competence for determining the term "State" within the meaning of article 12 rests, in the first instance, with the United Nations Secretary-General who, in case of doubt, will defer to the guidance of General Assembly. The Assembly of States Parties of the Rome Statute could also in due course decide to address the matter in accordance with article 112(2)(g) of the Statute. In interpreting and applying article 12 of the Rome Statute, the Office has assessed that it is for the relevant bodies at the United Nations or the Assembly of States Parties to make the legal determination whether Palestine qualifies as a State for the purpose of acceding to the Rome Statute and thereby enabling the exercise of jurisdiction by the Court under article 12(1). The Rome Statute provides no authority for the Office of the Prosecutor to adopt a method to define the term "State" under article 12(3) which would be at variance with that established for the purpose of article 12(1).') *See also* Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda: 'The Public Deserves to know the Truth about the ICC's Jurisdiction over Palestine', 2 September 2014.

244 *See e.g.* G. Bitti, 'Droit international – Cour pénale internationale' in *3 Revue de Science Criminelle et de Droit Pénal Comparé 609* (2016), p. 610 ('*Une résolution de l'Assemblée générale des Nations unies n'est en aucune façon déterminante ou contraignante pour la CPI, dont le droit applicable est régi par l'article 21 de son Statut.* [. . .] *Il revient donc au Procureur de vérifier si ce critère de compétence, en l'espèce la "qualité" d'État, est rempli ou pas. Rien dans le Statut ne permet au Procureur de déléguer une telle tâche à une autre entité.*'); M. El Zeidy, 'Ad Hoc Declarations of Acceptance of Jurisdiction: The Palestinian Situation Under Scrutiny' in C. Stahn (ed.) *The Law and Practice of the International Criminal Court* (2015), pp. 189–190; H. Lee, 'Defining "State" for the Purpose of the International Criminal Court: The Problem ahead after the Palestine Decision' in *77 University of Pittsburg Law Review 345* (2016), pp. 362–366; S. H. Adem, *Palestine and the International Criminal Court* (2019), pp. 54–56, 60; Valentina Azarov and Chantal Meloni, 'Disentangling the Knots: A Comment on Ambos' "Palestine, 'Non-Member Observer' Status and ICC Jurisdiction"' on EJIL:Talk! (27 May 2014), https://www.ejiltalk.org/disentangling-the-knots-a-comment-on-ambos-palestine-non-member-observer- status-and-icc-jurisdiction; Dapo Akande, 'ICC Prosecutor Decides that He Can't Decide on the Statehood of Palestine. Is He Right?' on EJIL:Talk! (5 April 2012), https://www.ejiltalk.org/icc-prosecutor-decides-that-he- cant-decide-on-the-statehood-of-palestine-is-he-right; L. Yan, 'Non-States Parties and the Preliminary Examination of Article 12(3) Declarations' in M. Bergsmo and C. Stahn (eds) *Quality Control in Preliminary Examination: Volume 2* (2018), pp. 459–460.

245 Majority Decision, para. 98.

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276 General Assembly, 44th Plenary Meeting, Agenda Item 37: Question of Palestine, 29 November 2012, A/67/PV.44 (the 'UN, Question of Palestine').

277 UN, Question of Palestine, p. 14 ('The international recognition that the Assembly has today given the proposed Palestinian State can become fact only through an agreement based on negotiations between the two parties on all final status issues, within the framework of a fair and comprehensive peace settlement that responds to Israel and Palestine's legitimate aspirations.').

278 UN, Question of Palestine, pp. 15–16 ('This decision does not involve a bilateral recognition of a Palestinian State, which will depend on future peace negotiations.').

279 UN, Question of Palestine, p. 16 ('For Belgium, the resolution adopted today by the General Assembly does not yet

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constitute a recognition of a State in the full sense. The establishment of a fully legal State must result from negotiations between Israelis and Palestinians.').

280 UN, Question of Palestine, p. 18 ('Our vote, however, does not imply formal bilateral recognition of a sovereign Palestinian State. That is a separate question that we will continue to consider within a framework established by international law.').

281 UN, Question of Palestine, p. 20 ('Our vote today in favour of the resolution, which accords Palestine non- member observer State status in the United Nations, is a natural continuation of our firm support for a two-State solution and Palestinian state-building. However, Finland's vote does not imply formal recognition of a sovereign Palestinian State. That is a separate question and we will determine our national position on the matter in accordance with the procedures set out in the Constitution of Finland.').

282 UN, Question of Palestine, p. 20 ('This resolution is a political symbol of the commitment of the United Nations to a two-State solution. New Zealand has cast its vote accordingly based on the assumption that our vote is without prejudice to New Zealand's position on its recognition of Palestine.').

283 UN, Question of Palestine, p. 21 ('Our support of an upgraded status for Palestine in the United Nations does not prejudge the question of recognition. The national procedures to formally recognize the State of Palestine are still pending.').

284 UN, Question of Palestine, pp. 17–18 ('In voting for the resolution, Honduras 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. Such intervention not only exceeds our authority as third parties and our legitimate interest but makes it more difficult to resolve disputes and hardens positions.').

285 UN, Question of Palestine, p. 17 ('Neither a nation whose people was a victim of the Holocaust nor a nation still in quest for its statehood deserves to live in the same precarious state lasting for more than 60 years.').

286 UN, Question of Palestine, p. 19 ('Paragraph 5 of the resolution contains an important provision. Greece believes that the inalienable and non-negotiable right of the Palestinian people to statehood can be fulfilled through a results-oriented peace process and direct negotiations between the two parties on all final status issues.').

287 A list of States having recognized Palestine is available on the website of the Permanent Observer Mission of the State of Palestine to the United Nations, at: http://palestineun.org/about-palestine/diplomatic-relations/.

288 UN, Question of Palestine, pp. 18–19 ('Italy decided to vote in favour of resolution 67/19. We took that decision in the light of the information we received from President Abbas on the constructive approach he intends to take after this vote. I refer in particular to his readiness to resume direct negotiations without preconditions and to refrain from seeking membership in other specialized agencies in the current circumstances, or pursuing the possibility of the jurisdiction of the International Criminal Court.').

289 UN, Question of Palestine, pp. 14–15 ('In support of that objective, we sought a commitment from the Palestinian leadership to return immediately to negotiations, without preconditions. That was the single most important factor shaping our vote. We also sought an assurance from the Palestinians that they would not pursue immediate action in United Nations agencies and the International Criminal Court, since that would make a swift return to negotiations impossible. We are in no doubt that President Abbas is a courageous man of peace, and we have engaged intensively with the Palestinians ahead of today's voting to try to secure those assurances. But in their absence, we were not able to vote in favour of the resolution, and we therefore abstained.').

290 UN, Question of Palestine, p. 19 ('Yet it must be clear to everybody that a Palestinian State can be achieved only through direct negotiations between Israelis and Palestinians. We believe that there is reason to doubt whether the step taken today is helpful to the peace process at this point in time. We are concerned that it might lead to further hardening of positions instead of improving the chances of reaching a two-State solution through direct negotiations. It is our expectation that the Palestinian leadership will not take unilateral steps on the basis of today's resolution 67/19 that could deepen the conflict and move us further away from a peaceful settlement.').

291 UN, Question of Palestine, pp. 12–13. The statement reads in full: 'An important vote has taken place today in the General Assembly. The decision by the General Assembly to accord Palestine non-member State status in the United Nations was a prerogative of the Member States. I stand ready to fulfil my role and report to the Assembly as requested in resolution 67/19. My position has been consistent all along. I believe that the Palestinians have a legitimate right to their own independent State. I believe that Israel has the right to live in peace and security with its neighbours. There is no substitute for negotiations to that end. Today's vote underscores the urgency of a resumption of meaningful negotiations. We must give a new impetus to our collective efforts to ensure that an independent, sovereign, democratic, contiguous and viable State of Palestine lives side by side with a secure State of Israel. I urge the parties to renew their commitment to a negotiated peace. I count on all concerned to act responsibly, preserve the achievements in Palestinian State-building under the leadership of President Abbas and Prime Minister Fayyad, and intensify efforts towards reconciliation and the just and lasting peace that remains our shared goal and priority.'

292 General Assembly, Status of Palestine in the United Nations, Report of the Secretary-General, A/67/738, 8 March 2013, para. 31 (emphasis added). The statement reads, in relevant part: 'The adoption by the General Assembly of resolution 67/19 on 29 November 2012 by a majority of 138 votes in favour, following a period of prolonged stalemate in the political process, *symbolized the growing international impatience with the long- standing occupation and clearly endorsed Palestinian aspirations* to live in freedom and dignity in an independent State of their own, side by side with Israel in peace and security. The end to the occupation and to the conflict and the achievement of the two-State solution on the ground is long overdue. This can only be achieved, however, through *negotiations to solve all final status issues.* [. . .] As Secretary-General, I will continue to do my utmost to achieve a *negotiated* two-State solution, in accordance with Security Council resolutions 242 (1967), 338 (1973), 1397 (2002), 1515 (2003) and 1860 (2009), *that will resolve the core issues - territory*, security, *Jerusalem*, refugees, settlements, water - and constitute the end of the Israeli-Palestinian conflict and all claims related to it. I call on the parties and all stakeholders to act with determination, responsibility and vision. None of the steps to that end are easy, but we cannot

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afford another year without courageous action for the purpose of achieving the two-State solution reaffirmed by resolution 67/19.' (emphasis added).

293 Resolution 67/19. *See e.g.* p. 2 ('Reaffirming also its resolutions 43/176 of 15 December 1988 and 66/17 of 30 November 2011 and all relevant resolutions regarding the peaceful settlement of the question of Palestine, which, *inter alia*, stress the need for the withdrawal of Israel from the Palestinian territory *occupied since 1967*, including East Jerusalem, the realization of the inalienable rights of the Palestinian people, primarily the right to self- determination and the right to their independent State, a just resolution of the problem of the Palestine refugees in conformity with resolution 194 (III) of 11 December 1948 and the complete cessation of all Israeli settlement activities in the Occupied Palestinian Territory, including East Jerusalem.') (emphasis added). *See also* p. 2 ('Reaffirming its resolution 58/292 of 6 May 2004 affirming, *inter alia*, that the status of the Palestinian territory *occupied since 1967*, including East Jerusalem, remains one of military occupation and that, in accordance with international law and relevant United Nations resolutions, the Palestinian people have the right to self- determination and to sovereignty over their territory.') (emphasis added). *See also* pp. 2–3 ('Reaffirming its commitment, in accordance with international law, to the two-State solution of an independent, sovereign, democratic, viable and contiguous State of Palestine living side by side with Israel in peace and security *on the basis of the pre-1967 borders* [. . .] Reaffirms the right of the Palestinian people to self-determination and to independence in their State of Palestine on the Palestinian territory *occupied since 1967*; [. . .] Affirms its determination to contribute to the achievement of the inalienable rights of the Palestinian people and the attainment of a peaceful settlement in the Middle East that ends the occupation that began in 1967 and fulfils the vision of two States: an independent, sovereign, democratic, contiguous and viable State of Palestine living side by side in peace and security with Israel on the basis of the pre-1967 borders.') (emphasis added).

294 Resolution 67/19, Preamble ('Reaffirming also relevant Security Council resolutions, including resolutions 242 (1967) of 22 November 1967, 338 (1973) of 22 October 1973, 446 (1979) of 22 March 1979, 478 (1980) of 20 August 1980, 1397 (2002) of 12 March 2002, 1515 (2003) of 19 November 2003 and 1850 (2008) of 16 December 2008 [. . .] Bearing in mind the mutual recognition of *9 September 1993* between the Government of the State of Israel and the Palestine Liberation Organization, the representative of the Palestinian people, Affirming the right of all States in the region to live in peace *within secure and internationally recognized borders*') (emphasis added). *See also* para. 5 ('Expresses the urgent need for the *resumption and acceleration of negotiations* within the Middle East peace process based on the relevant United Nations resolutions, the terms of reference of the Madrid Conference, including the principle of land for peace, the Arab Peace Initiative and the *Quartet road map* to a permanent two-State solution to the Israeli-Palestinian conflict 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.') (emphasis added).

295 *See* Israel-Palestinian Peace Process: The Middle East Roadmap, 30 April 2003 ('Phase I: Ending Terror And Violence, Normalizing Palestinian Life, and Building Palestinian Institutions. [. . .] Phase II: Transition [. . .] Progress into Phase II will be based upon the consensus judgment of the Quartet of whether conditions are appropriate to proceed, taking into account performance of both parties. Furthering and sustaining efforts to normalize Palestinian lives and build Palestinian institutions, Phase II starts after Palestinian elections and ends with possible creation of an independent Palestinian state with provisional borders in 2003. Its primary goals are continued comprehensive security performance and effective security cooperation, continued normalization of Palestinian life and institution-building, further building on and sustaining of the goals outlined in Phase I, ratification of a democratic Palestinian constitution, formal establishment of office of prime minister, consolidation of political reform, and *the creation of a Palestinian state with provisional borders*. International Conference: Convened by the Quartet, in consultation with the parties, immediately after the successful conclusion of Palestinian elections, to support Palestinian economic recovery and launch a process, leading to establishment of an *independent Palestinian state with provisional borders.* [. . .] Creation of an *independent Palestinian state with provisional borders* through a process of Israeli-Palestinian engagement, launched by the international conference. As part of this process, implementation of prior agreements, to enhance maximum territorial contiguity, including further action on settlements *in conjunction with establishment of a Palestinian state with provisional borders*. Enhanced international role in monitoring transition, with the active, sustained, and operational support of the Quartet. Quartet members promote international recognition of Palestinian state, including possible UN membership. [. . .] Phase III: Permanent Status Agreement and End of the Israeli-Palestinian Conflict - 2004–2005 [. . .] Progress into Phase III, based on consensus judgment of Quartet, and taking into account actions of both parties and Quartet monitoring. Phase III objectives are consolidation of reform and stabilization of Palestinian institutions, sustained, effective Palestinian security performance, and Israeli- Palestinian negotiations aimed at a permanent status agreement in 2005. Second International Conference: Convened by Quartet, in consultation with the parties, at beginning of 2004 to endorse *agreement reached on an independent Palestinian state with provisional borders* and formally to launch a process with the active, sustained, and operational support of the Quartet, leading *to a final, permanent status resolution in 2005, including on borders, Jerusalem*, refugees, settlements; and, to support progress toward a comprehensive Middle East settlement between Israel and Lebanon and Israel and Syria, to be achieved as soon as possible. [. . .] Parties reach final and comprehensive permanent status agreement that ends the Israel-Palestinian conflict in 2005, through a settlement negotiated between the parties based on UNSCR 242, 338, and 1397, that ends the occupation that began in 1967, and includes an agreed, just, fair, and realistic solution to the refugee issue, and *a negotiated resolution on the status of Jerusalem* that takes into account the political and religious concerns of both sides, and protects the religious interests of Jews, Christians, and Muslims worldwide, and fulfills the vision of two states, Israel and sovereign, independent, democratic and viable Palestine, living side-by-side in peace and security.') (emphasis added).

296 United Nations System: The Quartet, https://www.un.org/unispal/un-system/un-system-partners/the-quartet ('The Quartet, comprised of the European Union, Russia, United Nations, and United States was established in 2002 to facilitate the Middle-East Peace Process negotiations. The Quartet was

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welcomed in United Nations Security Council resolution 1397 (2002) following the Second Intifada. The Quartet's principals, namely the EU High Representative for Common Foreign and Security Policy, the Foreign Minister of Russia, the UN Secretary- General, and the United States Secretary of State have met 54 times since 2002 in furtherance of their Performance-based Road Map to a Permanent Two-State Solution. The Road Map, endorsed in Security Council resolution 1515 (2003) called for a three-phased performance-based strategy to move the peace process towards a final resolution of the conflict. The Quartet is guided by three overarching Principles – nonviolence, recognition of Israel, and acceptance of previous agreements – in furthering the Middle East peace process. The Quartet's first report, addressing major threats to the peace process and providing recommendations for advancing the two-state solution, was released in July 2016.').

297 Security Council, Resolution 1397, 12 March 2002, S/RES/1397.

298 Security Council, Resolution 1515, 19 November 2003, S/RES/1515 (the 'Resolution 1515').

299 Security Council, Resolution 1850, 16 December 2008, S/RES/1850 (the 'Resolution 1850') .

300 *See e.g.*: (i) Mr. Mahmoud Abbas' references to the pre-1967 borders but also to Oslo, Resolution 1515, Security Council, Resolution 2334, 23 December 2016, S/RES/2334 (the 'Resolution 2334'), and the Quartet rules; (ii) the Israeli representative's statement on the Oslo committment to negotiations of borders; (iii) the United States representative's statement on President Trump's proposal as a starting point for negotiations; (iv) the French representative's reference to the importance of the Security Council resolutions and the United States proposal; (v) the Estonian delegate's statement on pre-1967 lines and the resumption of negotiations to resolve all permanent status issues related to borders and Jesusalem; (vi) the German delegate's speech on pre-1967 lines and statement that 'questions of borders, Jerusalem, security and refugees must be resolved through direct negotiations between Israelis and Palestinians'; (vii) the reference by Vietnam's representative to Security Council resolutions and particularly Resolution 2334; (viii) Belgium's statement on pre-1967 borders and Security Council resolutions; (ix) Russia's statement on pre-1967 borders and the Quartet principles; (x) Saint Vincent and Grenadines' statement on pre-1967 borders; (xi) China's statement on the relevant resolutions; (xii) South Africa's statement on the lack of progress; (xiii) the United Kingdom representative's statement supporting President Donald Trump's proposal; (xiv) Tunisia's remark on the role of the Security Council in the achievement of the 'two State' solution; (xv) Indonesia's statement on the 1955 Bandung principles and the observation of the internationally agreed parameters for the solution; (xvi) the League of Arab Nations' representative's statement criticizing the United States proposal and describing it as unilaterally favoring Israel. *See* https://www.un.org/press/en/2020/sc14103.doc.htm.

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306 United Nations, Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, ST/LEG/7/Rev.1 (1999) ('Secretary-General Summary of Practice'), para. 82 ('This practice of the Secretary- General became fully established and was clearly set out in the understanding adopted by the General Assembly without objection at its 2202nd plenary meeting, on 14 December 1973, whereby "the Secretary-General, in discharging his functions as a depositary of a convention with an 'all States' clause, will follow the practice of the Assembly in implementing such a clause and, whenever advisable, will request the opinion of the Assembly before receiving a signature or an instrument of ratification or accession."'), para. 83 ('The "practice of the General Assembly", referred to in the above-mentioned understanding is to be found in unequivocal indications from the Assembly that it considers a particular entity to be a State even though it does not fall within the "Vienna formula". Such indications are to be found in General Assembly resolutions, for example in resolutions 3067 (XXVIII) of 16 November 1973, in which the Assembly invited to the Third United Nations Conference on the Law of the Sea, in addition to States at that time coming within the long-established "Vienna formula", the "Republic of Guinea-Bissau" and the "Democratic Republic of Viet Nam", which were expressly designated in that resolution as "States".').

307 Secretary-General Summary of Practice, para. 83.

308 United Nations Secretary-General Statement, 'Note to correspondents – Accession of Palestine to multilateral treaties' (7 January 2015) ('Many reporters have been asking about the documents transmitted by the Permanent Observer of Palestine to the United Nations relating to the accession of Palestine to 16 multilateral treaties in respect of which the Secretary-General is the depository, including the Rome Statute of the International Criminal Court. In conformity with the relevant international rules and his practice as a depositary, the Secretary-General has ascertained that the instruments received were in due and proper form before accepting them for deposit, and has informed all States concerned accordingly through the circulation of depositary notifications. The information is public and posted on the website of the UN Treaty Section (https://treaties.un.org/pages/CNs.aspx). This is an administrative function performed by the Secretariat as part of the Secretary-General's responsibilities as depositary for these treaties. It is important to emphasize that it is for States to make their own determination with respect to any legal issues raised by instruments circulated by the Secretary-General.').

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315 *See e.g.* 'territories occupied since 1967' (Resolution 2334), 'Palestinian Territory occupied since 1967' (Resolution 67/19), 'two-State solution based on the 1967 lines' (General Assembly, Resolution 73/18, 30 November 2018, A/RES/73/18 (the 'Resolution 73/18')), 'not recognize any changes to the 4 June 1967 lines, including with regard to Jerusalem, other than those agreed by the parties through negotiations' (Resolution 2334), 'comprehensive negotiated peace settlement in the Middle East resulting in two viable, sovereign and independent States, Israel and Palestine, based on the pre-1967 borders' (General Assembly, Resolution 58/92, 30 November 2018, A/RES/58/92), 'on the basis of the pre-1967 borders' (Resolution 73/18), 'based on the 1967 lines and on the basis of relevant United Nations resolutions, the Madrid terms of reference, including the principle of land for peace, the Arab Peace Initiative and the Quartet road map.' (Resolution 2334).

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323 Observance of the International Day of Solidarity with the Palestinian People, Statement by H.E. Volkan Bozkir, President of the 75th session of the United Nations General Assembly, 1 December 2020.

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392 *See* Annex II to the present Dissenting Opinion.

393 *See* Annex I to the present Dissenting Opinion.

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406 See *mutatis mutandis* the experiences of the ICAO and ILO with Austria prior to 1955, as presented above.

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407 Request, paras 11–14, 195–207.

408 Majority Decision, paras 116–117.

409 'Auto-normative resolutions' belong to this category when: *i.* assigning tasks (for example on the Secretary-General or on the International law Commission); *ii.* dealing with elections to different bodies; or *iii.* dealing with the admission procedure for new members. 'Hetero-normative resolutions' may have a higher value than that of a simple resolution if they, for example: *i.* finalize the text of a convention and open it for signature; *ii.* under certain conditions, put an end to the evolution of an emerging custom; or *iii.* repeat existing customary norms or *jus cogens*; etc.

410 Response, para. 42.

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425 Response, para. 68 ('Because of the foregoing, and considering the fact that the Occupied Palestinian Territory must have a sovereign, sovereignty under these circumstances would seem to be best viewed as residing in the Palestinian people under occupation. As noted above, the Occupied Palestinian Territory cannot be *terra nullius*, nor does sovereignty appear to be in "abeyance", nor can Israel assert sovereignty over it, as Occupying Power, nor can any other State.') (footnotes omitted).

426 Request, paras 9, 13, 193–194; Response, para. 46.

427 ICJ Wall Advisory Opinion, para. 155.

428 Prosecutor, Report on Preliminary Examination Activities 2019, 5 December 2019 ('Report on Preliminary Examination Activities 2019'), para. 47 ('While the Statute does not provide a definition of the term, it can be concluded that the 'territory' of a State, as used in article 12(2)(a), includes those areas under the sovereignty of the State, namely its land mass, internal waters, territorial sea, and the airspace above such areas. Such interpretation of the notion of territory is consistent with the meaning of the term under international law.').

429 Namely the Exclusive Economic Zone ('EEZ') of the United Nations Convention on the Law of the Sea (1982, Montego Bay, UNCLOS). It is true that in her Report on Preliminary Examination Activities 2019, the Prosecutor declined the applicability of the Rome Statute on the EEZ of the Philippines (*see* paras 48–51). Contrary to the suggestion made by some *amici curiae*, she does the same *vis-à-vis* the alleged Palestinian EEZ (*see* Response, paras 97–98).

430 Prosecutor, Report on Preliminary Examination Activities 2019, 5 December 2019.

431 Report on Preliminary Examination Activities 2019, para. 50 ('the term "territory" of a State in this provision should be interpreted as being limited to the geographical space over which a State enjoys territorial sovereignty'). *See also* Response, para. 97.

432 Response, para. 99 ('Finally, the Prosecution's assertion in the context of another preliminary examination that 'territory' in article 12(2)(a), "includes those areas under the sovereignty of the State" is consistent with its position in this Request. As noted above, under the present circumstances sovereignty over the Occupied Palestinian Territory resides in the Palestinian people under occupation.') (footnotes omitted).

433 Response, para. 70 ('Sovereignty remained with the "reversionary" sovereign—held by the Palestinian people until such time as a State could exercise it—and plenary prescriptive jurisdiction with their representatives.').

434 Majority Decision, paras 116–117.

435 Response, para. 80 ('Further, that the Palestinian borders are disputed and the final borders are to be decided among the parties does not mean that the Court cannot rely on the current *status quo* to determine the scope of its territorial jurisdiction. The current circumstances as they exist give rise to legal rights and obligations. This forms the basis of all action and decisions by the UNGA, UNSC and ICJ on the question of Palestine.') (footnotes omitted).

436 Response, para. 81 ('In this respect, the Court must be guided by the scope of territory attaching to the relevant State Party at this time (West Bank, including East Jerusalem, and Gaza), and such an assessment in no way affects and is without prejudice to any potential final settlement, including land-swaps, as may be agreed upon by Israel and Palestine.').

437 Does the phrase 'attaching to the relevant State Party at this time' mean 'geographically' or 'ethnically'? If the term 'attaching' is to be understood as 'attaching *according to the United Nations*', this interpretation brings us back to the starting point, namely the legal value of non-binding resolutions and the interpretation of their references both to 1967 borders and to the necesssary negotiations on borders.

438 Response, para. 84.

439 ICJ Wall Advisory Opinion, para. 162 ('The Court has reached the conclusion that the construction of the wall by Israel in the Occupied Palestinian Territory is contrary to international law and has stated the legal consequences that are to be drawn from that illegality. The Court considers itself bound to add that this construction must be placed in a more general context. Since 1947, the year when General Assembly resolution 181 (II) was adopted and the Mandate for Palestine was terminated, there has been a succession of armed conflicts, acts of indiscriminate violence and repressive measures on the former mandated territory. The Court would emphasize that both Israel and Palestine are under an obligation scrupulously to observe the rules of international humanitarian law, one of the paramount purposes of which is to protect civilian life. Illegal actions and unilateral decisions have been taken on all sides, whereas, in the Court's view, this tragic situation can be brought to an end only through implementation in good faith of all relevant Security Council resolutions, in particular resolutions 242 (1967) and 338 (1973). The *"Roadmap" approved by Security Council resolution 1515 (2003) represents the most recent of efforts to initiate negotiations* to this end. The Court considers that it has a duty to draw the attention of the General Assembly, to which the present Opinion is addressed, to the need for these efforts to be encouraged with a view to achieving as soon as possible, on the basis of international law, *a negotiated solution to the outstanding problems and the establishment of a Palestinian State*, existing side by side with Israel and its other neighbours, with peace and security for all in the region.') (emphasis added).

440 Request, paras 63–77, 183–189.

441 Application for extension of pages, paras 2, 5.

442 Request, para. 183 ('Lastly, it has been argued that Palestine's ability to delegate its jurisdiction to the Court is limited because it does not have criminal jurisdiction with respect to Israelis or with respect to crimes committed in Area C (*nemo dat quod non habet*). Nonetheless, the Prosecution

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does not consider these limitations in the Oslo Accords to be obstacles to the Court's exercise of jurisdiction.') (footnotes omitted), para. 189 ('In conclusion, any limitations to the PA's jurisdiction agreed upon in the Oslo Accords cannot and should not bar the exercise of the Court's jurisdiction in Palestine pursuant to article 12(2)(a).'). *See also* Response, para. 73 ('Against this backdrop, the Oslo Accords are better characterised as a transfer or delegation of enforcement jurisdiction which does not displace the plenary jurisdiction of the representatives of the Palestinian people, and do not bar the exercise of the Court's jurisdiction. Notably, the Appeals Chamber in a different context has recently confirmed that agreements limiting the exercise of enforcement jurisdiction over certain nations are "not a matter for consideration in relation to the authorisation of an investigation under the statutory scheme". Likewise, any limitation to Palestine's enforcement jurisdiction arising from Oslo does not affect the exercise of the Court's jurisdiction; rather, it may become an issue of cooperation or complementarity during the investigation or prosecution stage.') (footnotes omitted).

443 Response, para. 73 (citing Appeals Chamber, *Situation in the Islamic Republic of Afghanistan*, Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan, Judgment, 5 March 2020, ICC-02/17-138, para. 44: 'Arguments were also advanced during the hearing that certain agreements entered into between the United States and Afghanistan affect the jurisdiction of the Court and should be a factor in assessing the authorisation of the investigation. The Appeals Chamber is of the view that the effect of these agreements is not a matter for consideration in relation to the authorisation of an investigation under the statutory scheme.').

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600 Oslo II, Annex IV: Protocol Concerning Legal Affairs, article I (Criminal Jurisdiction), at paragraph 1(a), reads as follows: '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.'

601 Oslo II, Annex IV, article I.1(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.').

602 Oslo II, Annex IV, article I.2 ('Israel has sole criminal jurisdiction over the following offenses: a. offenses committed outside the Territory, except for the offenses detailed in subparagraph 1. b above; and b. offenses committed in the Territory by Israelis.').

603 Oslo II, Annex IV, article I.4 ('In addition, and without derogating from the territorial jurisdiction of the Council, Israel has the power to arrest and to keep in custody individuals suspected of having committed offenses which fall within Israeli criminal jurisdiction as noted in paragraphs 1.c, 2 and 7 of this Article, who are present in the areas under the security responsibility of the Council, where: a. The individual is an Israeli, in accordance with Article II of this Annex; or b. (1) The individual is a non-Israeli suspected of having just committed an offense in a place where Israeli authorities exercise their security functions in accordance with Annex I, and is arrested in the vicinity in which the offense was committed. The arrest shall be with a view to transferring the suspect, together with all evidence, to the Palestinian Police at the earliest opportunity. (2) In the event that such an individual is suspected of having committed an offense against Israel or Israelis, and there is a need for further legal proceedings with respect to that individual, Israel may retain him or her in custody, and the question of the appropriate forum for prosecuting such a suspect shall be dealt with by the Legal Committee on a case by case basis.').

604 Oslo II, Annex IV, article I.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.').

605 *See* n. 600 for full text of rule 1(a) of Article I.

606 *See* n. 601 for full text of rule 1(c) of Article I.

607 *See* n. 602 for full text of rule 2 of Article I.

608 *See* n. 603 for full text of rule 4 of Article I.

609 *See* n. 604 for full text of rule 7 of Article I.

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