

ARTICLE 15 COMMUNICATION

Preconditions to the exercise of jurisdiction under Article 12 of the Rome Statute

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I. Introduction

1. The so-called *Situation in Palestine* (the “Situation”) is at Phase 3 of the OTP’s preliminary examination. We understand that no final determinations with respect to jurisdiction, admissibility or the interests of justice have been made. This communication is made further to our communication of 1 March 2019. In that communication, we suggested that a qualified deference should be paid to decisions of Israel’s High Court of Justice during complementarity and interests of justice analysis in a potential settlements case. In this communication, we return to consider jurisdictional issues.
2. Palestine’s status and capacities are ambiguous. On the one hand, Palestine is struggling for independence and to emerge from “occupation”.¹ On the other, the State of Palestine claims functional capacities including the following rights: to accept ICC jurisdiction, to accede to the Rome Statute, and to refer a situation to the Court. Palestine further claims title to territory upon which criminal conduct has allegedly occurred.² The legal implications which flow from the inconsistencies arising from these positions, as well as the contested nature of Palestine’s claims, are material to the preconditions to the exercise of ICC jurisdiction which must be satisfied if the OTP – and the Court – are to proceed lawfully under Article 12 of the Rome Statute.
3. This communication argues that Palestine’s objective legal status as a non-State entity under international law restricts her capacity to make a valid declaration pursuant to Article 12(3) of the Statute. The indeterminacy of her territorial claim means that in potential cases the precondition contained in Article 12(2)(a) cannot be satisfied with any degree of certainty. Both issues serve to preclude the exercise of ICC jurisdiction over potential cases. They accordingly impact upon the progression of the preliminary examination to the investigation phase with respect to those cases.

¹ See, e.g. GA Res 67/19 of 4 December 2012, UN Doc A/RES/67/19, para. 6 (urging States and the UN to “continue to support and assist the Palestinian people in the early realization of their right to self-determination, independence and freedom”).

² Declaration recognizing the Jurisdiction of the International Criminal Court, Palestinian Authority Ministry of Justice (Ali Khashan), 21 January 2009; ICC, ICC-CPI-20150105-PR1080, Palestine declares acceptance of ICC jurisdiction since 13 June 2014, 5 January 2015; Referral by the State of Palestine Pursuant to Articles 13(a) and 14 of the Rome Statute, 15 May 2018, PAL-180515-Ref. Palestine has acceded to at least 15 international treaties. See Palestine’s Accession to International Treaties Q&A, 2 April 2014 available at <https://www.nad.ps/en/publication-resources/faqs/palestine%E2%80%99s-accession-international-treaties-qa> (last visited 4 June 2019). See also A. Pellet, *The Palestinian Declaration and the Jurisdiction of the International Criminal Court*, 8 JICJ (2010), 981-999 (hereinafter “Pellet”), at 992. (The “fact is that only the Palestinian authority possesses, under international law, an exclusive territorial title over the Palestinian territory and the population established therein”).

4. The OTP is required to afford weight to the objective criteria of statehood articulated by the Montevideo Convention when considering States' capacity to satisfy the preconditions to the exercise of ICC jurisdiction and make an Article 12(3) declaration. If a State, as a matter of objective fact and law, does not exist it cannot delegate sovereign jurisdictional competencies which it does not possess to the ICC.³ Article 12 therefore provides a safeguard which seeks to prevent the Court from proceeding in a manner which violates States' sovereignty through ensuring that States Parties to the Rome Statute do not trigger jurisdiction over conduct of nationals of non-States Parties which occurs outside State Party territory.⁴ As a result, Article 12 protects the Court and arguably States Parties from responsibility for exercising an exorbitant jurisdiction as well as from acts of retorsion and countermeasures that affected non-States Parties might lawfully take in response.

I. Background

5. On 22 January 2009, the Palestinian National Authority, through its Minister of Justice, lodged a declaration pursuant to Article 12(3) of the Rome Statute purporting, as a "State" which was not a Party to the Rome Statute, to accept the exercise of jurisdiction of the Court for "*acts committed on the territory of Palestine since 1 July 2002.*"⁵
6. On 3 April 2012, the former Prosecutor rendered a decision on the Palestinian declaration of January 2009, stating that the word "State" for the purpose of Article 12 of the Statute is to be interpreted in accordance with Article 125.⁶ The Rome Statute is open to "*all States*" – a specific formula – 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.⁷ The former Prosecutor noted that in instances "*where it is controversial or unclear whether an applicant constitutes a 'State', it is the practice of the Secretary-General*

³ This is reflected by the general principle of *nemo dat quod non habet*. See also C. Bynkershoek, *De Foro Legatorum Liber Singularis: a Monograph on the Jurisdiction over Ambassadors in both Civil and Criminal Cases* (1744) [Gordon J Laing translation, 1946], at pp.12-13 ("*All jurisdiction, in both civil and criminal cases, belongs to the prince alone, and this he can either exercise himself, or delegate to another. Whichever of these alternatives he adopts, he can never extend his jurisdiction beyond the persons or things that are subject to his power*"). See *Prosecutor v Omar Hassan Ahmad Al Bashir*, Judgment in the Jordan Referral re Al-Bashir Appeal (Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa), Appeals Chamber, ICC-02/05-01/09-397-Anx1, para 43. See also, e.g. M. Newton, 'How the International Criminal Court Threatens Treaty Norms,' 49 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 371 (2016), at 374, 398.

⁴ The consequence of Article 12(2)(a) of the Rome Statute does not, therefore, permit a "*universal field of application*". *Contra* Pellet, 995.

⁵ Declaration recognizing the Jurisdiction of the International Criminal Court, Palestinian Authority Ministry of Justice (Ali Khashan), 21 January 2009.

⁶ OTP, Update in the Situation in Palestine, 3 April 2012, para. 5.

⁷ *Id.*, para. 5.

to follow or to seek the General Assembly's directives on the matter."⁸ According to the former Prosecutor, the Assembly of States Parties could also decide to address the matter in accordance with Article 112(2)(g) of the Statute.⁹ Given that the UN General Assembly had, at that date, granted Palestine "observer" (and not "Non-member State" status), and the Security Council had not made a recommendation to admit Palestine as a Member State of the UN,¹⁰ the OTP would not proceed to exercise jurisdiction pursuant to the Palestinian declaration.

7. On 29 November 2012, the UN General Assembly, by 138 votes to 9 against, with 41 abstentions, decided to accord to Palestine "non-member observer State" status within the UN.¹¹
8. On 2 September 2014, the Prosecutor stated that the "Office of the Prosecutor of the ICC has never been in a position to open an investigation [pursuant to Palestinian declarations] for lack of jurisdiction." Indeed, the Court's jurisdiction at that stage had not been

⁸ *Id.* citing the position set out in the understandings adopted by the General Assembly at its 2202nd plenary meeting on 14 December 1973 and Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, ST/LEG/7/Rev.1, paras. 81-83.

⁹ *Id.*, para. 5. Article 112(2) provides that the Assembly of States Parties "shall [p]rovide management oversight to the Presidency, the Prosecutor and the Registrar regarding the administration of the Court" and "[p]erform any other function consistent with this Statute or the Rules of Procedure and Evidence."

¹⁰ *Id.*, para. 7.

¹¹ GA Res 67/19 of 4 December 2012, UN Doc A/RES/67/19, para. 2. See also UN Press Release, General Assembly Votes Overwhelmingly to Accord Palestine 'Non-Member Observer State' Status in United Nations, 29 November 2012, GA/11317. As to States' positions, Switzerland stated: "Bilateral recognition, however, depended on future negotiations". Belgium: "The resolution was not recognition of a State in full terms". Denmark: "Denmark's vote today was not formal bilateral recognition of a sovereign Palestinian State." New Zealand: "the question of recognition of a Palestinian State was a separate issue." Finland: "the Assembly's vote did not entail a formal recognition of a Palestinian State." France: "This vision of two States for two peoples remains to be translated into reality. The international recognition granted today by this Assembly for the project of a Palestinian state can become a reality only within the framework of a just and comprehensive peace, a peace settlement that fulfils the legitimate aspirations of Israel and Palestine." Bulgaria: "It is our firm understanding that peace in the region and the establishment of a sovereign and democratic Palestinian state, co-existing in peace and security with Israel, is possible only through the resumption of direct negotiations between the two parties." Romania: "the adopted resolution is not facilitating the recognition of Palestine as a state nor its accession to international organisations and treaties." Greece: "Greece believes that the inalienable and non-negotiable right of the Palestinian people to statehood can be fulfilled through a result-oriented Peace Process and direct negotiations between the two parties on all final status issues." Australia: "The resolution does not confer statehood – it grants non-member Observer State status to the Palestinian Authority in the United Nations... But our support for a future Palestinian state, achieved through negotiations remains steadfast, as does our support for Israel's legitimacy and right to security." UK: "Palestine will be a non-member Observer State in the United Nations from this date onwards. But this does not change the situation on the ground. The only way to give the Palestinian people the state that they need and deserve, and to give the Israeli people the security and peace that they are entitled to, is through a negotiated two-state solution." New Zealand: "This Resolution is a political symbol of the United Nations' commitment to a two-state solution." Germany: "Yet it must be clear to everybody: a Palestinian state can only be achieved through direct negotiations between Israelis and Palestinians". US: "This resolution does not establish that Palestine is a state."

triggered.¹² This suggests that the Prosecutor has confirmed the invalidity of the Palestinian declaration dated 22 January 2009.¹³

9. On 31 December 2014, Palestine lodged a further *ad hoc* declaration pursuant to Article 12(3) of the Rome Statute backdating the Court's jurisdiction to crimes which had taken place in (what it describes) as "*the occupied Palestinian territory, including East Jerusalem*" since 13 June 2014. This declaration made no reference to the 2009 declaration.¹⁴ The Registry made it clear that acceptance of the ICC's jurisdiction does not automatically trigger an investigation: "*It is for the ICC Prosecutor to establish whether the Rome Statute criteria for opening an investigation are met and, where required, to request authorisation from ICC Judges.*"¹⁵
10. On 1 January 2015, Palestine deposited instruments of accession to the Rome Statute with the UN Secretary-General.¹⁶
11. On 6 January 2015, the UN Secretary-General, acting in his capacity as depositary of the Rome Statute, communicated that Palestine's action was "*effected on 2 January 2015.*" The Secretary-General asserted that the Rome Statute would "*enter into force for the State of Palestine on 1 April 2015 in accordance with its article 126 (2).*"¹⁷
12. On 7 January 2015, the Registrar wrote to President Mahmoud Abbas confirming receipt of the declaration of 31 December 2014 and transmitted it to the Prosecutor for her consideration. The Registrar's acceptance of the Palestinian declaration was "*without prejudice to any prosecutorial or judicial determinations on this matter.*"¹⁸ The same day, the President of the Assembly of States Parties, Minister Sidiki Kaba, welcomed Palestine's deposit of instruments of accession.¹⁹

¹² See OTP Press Release, 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.

¹³ M. M. El Zeidy, 'The Palestinian Situation under Scrutiny' in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (Oxford 2016) (hereinafter "El Zeidy"), at 201.

¹⁴ Palestine, Declaration Accepting the Jurisdiction of the International Criminal Court, 31 December 2014; ICC, ICC-CPI-20150105-PR1080, Palestine declares acceptance of ICC jurisdiction since 13 June 2014, 5 January 2015; ASP, ICC-ASP-20150107-PR1082, The State of Palestine accedes to the Rome Statute, 7 January 2015.

¹⁵ ICC, ICC-CPI-20150105-PR1080, Palestine declares acceptance of ICC jurisdiction since 13 June 2014, 5 January 2015.

¹⁶ State of Palestine accedes to Rome Statute – ICC press release/Non-UN document, Press Release, ICC-ASP-20150107-PR1082, 8 January 2015.

¹⁷ Rome Statute of the International Criminal Court, Rome, 17 July 1998, State of Palestine: Accession, UN Doc. C.N.13.2015.TREATIES-XVIII.10 (Depositary Notification), 6 January 2015.

¹⁸ Letter from Herman von Hebel to Mahmoud Abbas, Ref: 2015/IOR/3496/HvH, 7 January 2015.

¹⁹ State of Palestine accedes to Rome Statute – ICC press release/Non-UN document, Press Release, ICC-ASP-20150107-PR1082, 8 January 2015.

13. On 16 January 2015, the OTP opened its preliminary examination of the *Situation in Palestine*. Since the Rome Statute can only have entered into force for Palestine on 1 April 2015, this decision must have relied on the declaration lodged pursuant to Article 12(3) on 31 December 2014.²⁰
14. On 8 April 2018, the Prosecutor made a statement expressing concern at the deteriorating situation in the Gaza Strip in the context of mass demonstrations in the territory. The Prosecutor noted both that violence against civilians as well as the use of civilian presence for the purpose of shielding military activities could constitute crimes under the Rome Statute.²¹
15. On 15 May 2018, Palestine submitted a referral to the OTP pursuant to Articles 13(a) and 14 of the Rome Statute.²² The Referral addresses *inter alia* the allegedly “unlawful occupation of the territory of the State of Palestine and the establishment and maintenance of settlements by Israel in the Occupied Palestinian Territory (‘OPT’), including East Jerusalem.”²³ It presumes a definable territory, referring to alleged “ongoing and future crimes within the court’s jurisdiction, committed in all parts of the territory of the State of Palestine”. A footnote states that the “State of Palestine comprises the Palestinian Territory occupied in 1967 by Israel, as defined by the 1949 Armistice Line, and includes the West Bank, including East Jerusalem, and the Gaza Strip.”²⁴ Elsewhere, the Referral contemplates the “the territory of the Occupied Palestinian State.”²⁵
16. On 24 May 2018, the Presidency of the Court assigned the *Situation in Palestine* to Pre-Trial Chamber I (“PTC I”).²⁶
17. On 13 July 2018, PTC I issued a decision in which it ordered the Registry to establish unique public information and outreach activities for the “benefit of the victims in the situation in Palestine” as well as to report on its situation activities on an ongoing basis.²⁷

²⁰ W. Schabas and G. Pecorella, ‘Article 12’, in O. Triffterer and K. Ambos (eds), *The Rome Statute of the International Criminal Court, A Commentary* (C.H. Beck/Hart/Nomos, 3rd ed., 2016) (hereinafter ‘Schabas and Pecorella’), mn-21.

²¹ Statement of the Prosecutor of the ICC, Fatou Bensouda, Regarding the Situation in Palestine, 8 April 2018.

²² Referral by the State of Palestine Pursuant to Articles 13(a) and 14 of the Rome Statute, 15 May 2018, Ref: PAL-180515-Ref (hereinafter “Referral”). The Referral was received by the OTP on 22 May.

²³ *Id.*, para. 3.

²⁴ *Id.*, para. 9 and n.4.

²⁵ *Id.*, para. 16(b).

²⁶ Decision assigning the situation in the State of Palestine to Pre-Trial Chamber I, ICC-01/18-1, 24 May 2018.

²⁷ *Situation in Palestine*, Decision on Information and Outreach for the Victims of the Situation, ICC-01/18, 13 July 2018.

18. On 16 October 2018, the Prosecutor made a statement expressing concern with respect to the planned eviction of the Bedouin community of Khan al-Ahmar in the West Bank. The Prosecutor noted that extensive destruction of property without military necessity and population transfers in an occupied territory constitute war crimes under the Rome Statute. The Prosecutor did not qualify her statement with respect to whether the impugned conduct was in her view occurring on the territory of a State Party to the Rome Statute.²⁸
19. In its annual reports on preliminary examinations, the OTP has to date endeavoured not to predetermine the jurisdictional issues with which it is seized. In its most recent Report on Preliminary Examinations, published in December 2018, the OTP stated that its summary was “*without prejudice to any future determinations by the Office regarding the exercise of territorial or personal jurisdiction by the Court.*”²⁹ The OTP however set out the parameters of a potential settlements case and disclosed that the Office has been examining “*alleged war crimes committed in the West Bank, including East Jerusalem, since 13 June 2014.*”³⁰

II. Preconditions to the exercise of ICC jurisdiction

20. Article 12 of the Rome Statute prescribes preconditions to the exercise of ICC jurisdiction. It protects State sovereignty and its corollary, the principle of non-intervention. Under the Rome Statute, these preconditions are predicated on territoriality (Article 12(2)(a)) or nationality (Article 12(2)(b)).³¹ The fact of jurisdiction is not to be confused with its exercise.³² Jurisdiction simply denotes the Court’s competence to deal with a cause or a matter.³³ The exercise of jurisdiction relates to acts performed by the Court pursuant to its judicial functions of adjudication and

²⁸ Statement of the Prosecutor of the ICC, Fatou Bensouda, Regarding the Situation in Palestine, 16 October 2018.

²⁹ OTP, Report on Preliminary Examination Activities 2018, 5 December 2018 (hereinafter (“2018 Report on Preliminary Examinations”), para. 268.

³⁰ 2018 Report on Preliminary Examinations, paras. 269-270.

³¹ The words “*State*”, “*territory*” or “*national*” in Article 12 are *prima facie* to be interpreted in accordance with their ordinary meaning. Article 31(1) of the Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, United Nations, UN Treaty Series, Vol. 1155, p. 331 (hereinafter “VCLT”).

³² See R. O’Keefe, Response: “*Quid*,” Not “*Quantum*”: A Comment on “How the International Criminal Court Threatens Treaty Norms”, 49 VAND. J. TRANSNAT’L L. 433 (hereinafter “*Quid*”), 434 et seq.

³³ *Prosecutor v Thomas Lubanga Dyilo*, Judgement on Appeal against Decision on Defence Challenge to Jurisdiction of the Court pursuant to Article 19(2)(a) of the Statute of 3 October 2006, ICC-01/04-01/06-772 (14 December 2006), para. 24. See also *Prosecutor v Omar Hassan Ahmad Al Bashir*, Judgment in the Jordan Referral re Al-Bashir Appeal (Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa), Appeals Chamber, ICC-02/05-01/09-397-Anx1, para. 41 (stating that a basic understanding of the term “*jurisdiction*” connotes the prerogative of control over things, places and persons (and their conducts). For functional purposes, such prerogative of control may be expressed in the manner of legislative, judicial or executive power).

enforcement. Whereas a State's title to jurisdiction rests in its sovereignty,³⁴ the ICC's jurisdiction is grounded in the (universal) orientation of the Rome Statute towards the interests of the international community as a whole and, with respect to horizontal relations with non-States Parties, the customary international law of jurisdiction.³⁵

21. It follows that both under the Statute (as well as under customary international law in its relations with non-States Parties) the Court has an inherent duty to satisfy itself that it has personal, subject matter, territorial and temporal jurisdiction, which (under the Rome Statute) includes satisfaction of one of the preconditions to jurisdiction prescribed by Article 12 in situations not referred by the Security Council.³⁶ This "*is a necessary component in the exercise of the judicial function and does not need to be expressly provided for in the constitutive documents of those tribunals.*"³⁷ The Chambers have explicitly recognised that the Court possesses an inherent *Kompetenz-Kompetenz*,³⁸

³⁴ In *Lotus*, the PCIJ stated that "*all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty.*" *The SS Lotus* PCIJ Rep Ser A Non 10 (1927) (hereinafter "*Lotus*"). See also R. O'Keefe, *International Criminal Law* 2015 (Oxford), 1.21 (commenting that this "*simple statement is unimpeachable*").

³⁵ See *Prosecutor v Omar Hassan Ahmad Al Bashir*, Judgment in the Jordan Referral re Al-Bashir Appeal (Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa), Appeals Chamber, ICC-02/05-01/09-397-Anx1, para. 53 and 447. See also S. Kay QC and J. Kern, *Method to the Madness? John Bolton and US Objections to ICC Jurisdiction*, *Opinio Juris*, 12 September 2018; *Lotus*; Quid, n.2 citing Article 34 VCLT and Draft Articles on the Law of Treaties with Commentaries, 1966 Yearbook of the International Law Commission 187, 226, para. 2 ("*not modify in any way their legal rights without their consent*"). This communication is limited to matters concerning the internal order of the Rome Statute, specifically Article 12.

³⁶ *Situation in the Republic of Kenya*, Decision Pursuant to Art 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19, 31 March 2010, paras. 38-39. *Prosecutor v Bemba*, ICC-01/05-01/08-14-tENG, Decision on the Prosecutor's Application for a Warrant of Arrest Against Jean-Pierre Bemba Gombo, Pre-Trial Chamber III, 10 June 2008, para. 12. See also *Prosecutor v L. Gbagbo*, ICC-02/11-01/11-9-Red, Decision on the Prosecutor's Application Pursuant to Article 58 for a Warrant of Arrest Against Laurent Koudou Gbagbo, Pre-Trial Chamber III, 30 November 2011, para. 9; *Prosecutor v Blé Goudé*, ICC-02/11-02/11-3, Decision on the Prosecutor's Application Pursuant to Article 58 for a Warrant of Arrest Against Charles Blé Goudé, Pre-Trial Chamber III, 6 January 2012, para. 8; *Prosecutor v S. Gbagbo*, ICC-02/11-01/12-2-Red, Decision on the Prosecutor's Application Pursuant to Article 58 for a Warrant of Arrest Against Simone Gbagbo, Pre-Trial Chamber III, 2 March 2012, para. 8; *Prosecutor v Ntaganda*, ICC-01/04-02/06-36-Red, Decision on the Prosecutor's Application under Article 58, Pre-Trial Chamber II, 13 July 2012, para. 8; *Prosecutor v Mudacumura*, ICC-01/04-01/12-1-Red, Decision on the Prosecutor's Application under Article 58, Pre-Trial Chamber II, 13 July 2012, para. 10.

³⁷ *Prosecutor v Tadić*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, para. 18. See also *In re El Sayed*, CH/AC/2010/02, Decision on Appeal of Pre-Trial Judge's Order Regarding Jurisdiction and Standing, STL, Appeals Chamber, 10 November 2010, para. 43.

³⁸ *Situation in Bangladesh*, Decision on the 'Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, ICC-RoC46(3)-01/18, 6 September 2018 (hereinafter "*PTC I Decision in the Situation in Bangladesh*"), paras. 30-33. See also *Situation in Uganda*, ICC-02/04-01/05-147, Decision on the

which extends to consideration of whether the statutory (and, where relevant, customary) preconditions to the exercise of jurisdiction are satisfied whenever jurisdiction is, in fact, exercised.³⁹

22. A matrix of relationships operates between the ICC (an international legal person),⁴⁰ the ICC's own organs, States Parties, Non-States Parties, and individuals (victims and suspects) on each occasion that the Court exercises jurisdiction. When the Prosecutor exercises adjudicative jurisdiction (and judicial authority) by selecting situations to investigate she is acting vertically. When prosecuting a case during trial, the Prosecutor stands in horizontal opposition to the Accused, while the Chamber exercises (vertical) adjudicatory and enforcement jurisdiction. The *Inter-national Criminal Court* is not a wholly *supra-national* international organisation.⁴¹ It is an international organisation that, through its organs, engages in a matrix of relationships with legal persons (which operate both horizontally and vertically) and with natural persons (i.e. suspects, accused and victims), which operate vertically.
23. At the preliminary examination phase, Article 12 requires that any action performed by the Court through which it exercises its jurisdiction must satisfy its preconditions. It follows that preconditions must be satisfied prior to any decision (or authorisation by a Pre-Trial Chamber) to open an investigation. The Court must also act consistently with its (horizontal) obligations to other international legal persons, including non-States Parties, which arise either under the Rome Statute or under customary international law. In honouring such obligations, however, the Court is not necessarily exercising its jurisdiction as there is no vertical exercise of authority.
24. In practice, then, when it comes to the ICC's territorial and personal jurisdiction, the existence of jurisdiction is inseparable from the circumstances of its exercise.⁴² The fact (or circumstance) of the ICC's *territorial* jurisdiction becomes irrelevant if jurisdiction's exercise is not permitted by Article 12 or by customary international law. In situations

Prosecutor's Application that the Pre-Trial Chamber Disregard as Irrelevant the Submission Filed by the Registry on 5 December 2005, Pre-Trial Chamber II, 9 March 2006, paras. 22-23.

³⁹ See El Zeidy, at 197 (arguing that the scope of the judicial functions referred to in Article 119(1) includes questions of jurisdiction together with its preconditions). See also C. K. Hall, D. D. Nsereko and M. J. Ventura, 'Article 19', in O. Triffterer and K. Ambos (eds), *The Rome Statute of the International Criminal Court, A Commentary* (C.H. Beck/Hart/Nomos, 3rd ed., 2016) (hereinafter "Hall, Nsereko and Ventura"), mn-4.

⁴⁰ Article 4 of the Rome Statute. See also PTC I Decision in the *Situation in Bangladesh*, paras. 34-49.

⁴¹ See, e.g. C. Kreß and Kimberly Prost, 'Part 9 – International Cooperation and Judicial Assistance – Preliminary Remarks', in O. Triffterer and K. Ambos (eds), *The Rome Statute of the International Criminal Court, A Commentary* (C.H. Beck/Hart/Nomos, 3rd ed., 2016), mn-5, mn-6 ("Part 9 does not establish a genuinely *supranational* cooperation regime"). Cf. *Prosecutor v Omar Hassan Ahmad Al Bashir*, Judgment in the Jordan Referral re Al-Bashir Appeal (Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa), Appeals Chamber, ICC-02/05-01/09-397-Anx1, para. 445 (finding that States Parties executing surrender requests "are merely acting as jurisdictional surrogates of the ICC").

⁴² See R. O'Keefe, *International Criminal Law* (Oxford 2015), 14.32. Cf *supra* n.32.

which, pursuant to Article 13 (a) or (c), are referred to the Prosecutor by a State Party, or where the Prosecutor has initiated an investigation *proprio motu*, State acceptance is a necessary precondition to the exercise of jurisdiction under Article 12(3). Where the legal status of the “State” in question is unclear or ambiguous this has legal implications with respect to satisfaction of Article 12’s preconditions. Sovereign legal title to territory on which crimes allegedly occur is a precondition to the Court’s exercise of jurisdiction for the purposes of Article 12(2)(a). The objective existence of a State is a precondition to the Court’s exercise of jurisdiction for the purposes of Article 12(3) and Article 12(2).

III. Different conceptions of Statehood under the Rome Statute

25. In the former Prosecutor’s view, the word “State” for the purpose of Article 12 is to be interpreted in accordance with Article 125 of the Statute. The former Prosecutor concluded that “it is for the relevant bodies at the United Nations or the Assembly of States Parties to make the legal determinations 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)”,⁴³ adding that the Rome Statute provides no authority for the OTP to adopt a method to define the word “State” under Article 12(3) which would be at variance with that established for the purpose of Article 12(1).⁴⁴ The first proposition must be considered in order to establish whether it is an accurate assessment of the relevant provisions of the Rome Statute.
26. There is no definition of the word “State” in the Statute. As a matter of treaty law, if any “special meaning” is to be given to a treaty provision, it must be shown to have been so intended by the parties.⁴⁵ *Prima facie* this means that the term “State” as it appears in the Rome Statute, unless otherwise specifically intended, is to have the same meaning as it has in general (i.e. customary) international law.⁴⁶ The reference to “all

⁴³ OTP, Update in the Situation in Palestine, 3 April 2012, para. 6.

⁴⁴ *Id.*

⁴⁵ Article 31(4) of the VCLT applied pursuant to Article 21(1)(b) of the Rome Statute. See also M. N. Shaw QC, The Article 12(3) Declaration of the Palestinian Authority, the International Criminal Court and International Law, JICJ, 9 (2011), 301–324 (hereinafter “Article 12(3) Declaration of the Palestinian Authority”), 305 (noting, for example, that Additional Protocol I to the Geneva Conventions of 12 August 1949 of 8 June 1977 makes express provision for the possibility of a non-state entity lodging a declaration with the depositary in Article 96(3), and that the Agreement on the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks makes such provision in Article 1(3). See also Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects of 10 October 1980, Art 7(4); United Nations Convention on the Law of the Sea of 1982, Arts 305(1)(c) and 307).

⁴⁶ Professor Shaw notes that this is to be contrasted, for example, with the situation pertaining at the ICTY, where the Rules of Procedure and Evidence expressly define a “State”. The very fact that Rule 2 of the ICTY RPE was introduced demonstrates that a “special meaning” of the term “State” was intended and that without that provision it could not have been applied as such by the ICTY. Article 12(3)

States” in Article 125 of the Rome Statute may have a special meaning in the context of that provision;⁴⁷ yet it does not follow that the word “*State*” elsewhere in the Rome Statute possesses the same meaning.⁴⁸ For the reasons given here, “*State*” for the purpose of Article 12 of the Statute is not to be interpreted in accordance with Article 125.⁴⁹

a. *The effect of Article 125 and an “all States” clause*

27. Article 125 provides that the Rome Statute is open to “*all States*” and that their instruments of accession “*shall be deposited with the Secretary-General of the United Nations.*”⁵⁰ It is a mere “*standard-form final clause that requires little discussion.*”⁵¹ Its legal effect within the internal order of the ICC is limited to the formal act of accession to the Rome Statute. This relative simplicity, however, belies more complex questions which arise with respect to preconditions to the exercise of the Court’s jurisdiction in cases where States neither meet objective criteria of statehood nor can establish title to territory on which it is suspected that crimes within the jurisdiction of the Court have occurred.

28. Without prejudice to any dispute which may arise from the legality or propriety of the UN Secretary-General’s act of accepting the deposit of Palestinian instruments of accession to the Rome Statute, this is not a dispute which is now pending before the

Declaration of the Palestinian Authority, 310-311. *See also* Convention on the Rights of Persons with Disabilities, Article 44(2) (specifically and expressly extending the definition of “*states parties*” beyond States); Convention on International Liability for Damage Caused by Space Objects, Article XXII (expressly incorporating international organisations within the definition of “*state*”).

⁴⁷ OTP, Update in the Situation in Palestine, 3 April 2012.

⁴⁸ The word “*State*” has a different meaning when applied in Article 98 of the Rome Statute. It does not follow that because the Secretary-General has responsibility for deciding on questions of accession to the Statute, he must also be the one that decides on declarations made by States under Article 12(3). The Secretary-General has to decide on question of statehood in order to perform his administrative function as a depositary but that does not give him overall competence on this question. No one would assert that if the question of statehood came up with regard to immunity of third States under Article 98, it is the Secretary-General that should decide that question. D. Akande, ICC Prosecutor Decides that He Can’t Decide on the Statehood of Palestine. Is He Right? EJIL Talk!, 5 April 2012. *See also* ICC, ICC-CPI-20150105-PR1080, Palestine declares acceptance of ICC jurisdiction since 13 June 2014, 5 January 2015 (“*Acceptance of the ICC’s jurisdiction differs from an act of accession to the Rome Statute, the Court’s founding treaty*”).

⁴⁹ *See also* El Zeidy (2015), p.190 (arguing that the interpretation of the law is an inherent and integral function of the Court). Although it is potentially arguable that an “*executive*” determination of Statehood for the purposes of Article 125 of the Rome Statute may be made by the Assembly of States Parties, the determination of jurisdiction under Article 12 is an inherent and integral judicial function of the Court which can only properly be determined by the Court’s judicial organs (Article 119(1) of the Rome Statute).

⁵⁰ Article 125(3) of the Rome Statute.

⁵¹ R. S. Clark, ‘Article 125’, in O. Triffterer and K. Ambos (eds), *The Rome Statute of the International Criminal Court, A Commentary* (C.H. Beck/Hart/Nomos, 3rd ed., 2016), mn-1.

OTP. It is simply noted here as a matter of fact that instruments of Palestinian accession have been accepted by the Secretary-General and they have not been withdrawn as at the date of this communication.

b. Distinguishing the interpretation of "State" in Article 125 and Article 12

29. Article 125, as noted above, is a formal provision in standard-form. Article 12, by contrast, was one of the most, if not the most, contested provision at the Rome Conference.⁵² If States had wanted the word "State" to possess a special meaning when Article 12 was negotiated at the Rome Conference we can assume that they would have indicated this either in the language of the treaty or the *travaux*. They did not, which would be for the entirely logical reason it was considered by them that the definition under international customary law would prevail.

30. Article 12(2)(a) prescribes that as a precondition to the exercise of jurisdiction pursuant to that subsection, the "State" through which jurisdiction is triggered must possess a "territory" on which conduct proscribed by Article 5 occurred. The "all States" formula contained in Article 125 of the Rome Statute is not repeated in Article 12(2)(a). Accordingly, it is not appropriate to import the special meaning conferred by an "all States" clause into Article 12(2)(a) unless that meaning can be shown to have been so intended by the provision's drafters.⁵³ The former Prosecutor's statement of 3 April 2012 that "competence for determining the term 'State' within the meaning of article 12 rests, in the first instance, with the United Nations Secretary General" is contested.

c. Article 12(3) mandates Statehood in accordance with general international law

31. There is no support in the Rome Statute for the suggestion that the drafters intended "State" to have the same meaning in Article 125 and Article 12(3). In the case of accession (under Article 125), the UN Secretary-General is the depositary of the Statute whereas the Registrar of the Court receives *ad hoc* declarations pursuant to Article 12(3).⁵⁴ The term "State" appears in a number of articles of the Rome Statute in circumstances that do not offer support to the possibility that non-state entities are to be included within their scope.⁵⁵ *Prima facie*, the necessary precondition for the exercise of jurisdiction under Article 12(3) is statehood.⁵⁶

⁵² The Rome Conference *travaux* record that these provisions were "among the most complex and most sensitive, and for that reason remained subject to many options as long as possible." Schabas and Pecorella, *mn.1*.

⁵³ Admission to the UN raises somewhat different issues from those simply of statehood. J. R. Crawford, *The Creation of States in International Law* (Oxford 2007) (hereinafter "Crawford"), p.49.

⁵⁴ Article 125(2) and Article 12(3) of the Rome Statute.

⁵⁵ E.g. Articles 4, 7, 8, 11, 14, 15, 17, 18, 19, 21, 25, 36, 50, 53, 57, 64, 69, 70, 72, 73, 75, 80, 82, 87, 89, 90, 91, 93, 98, 99, 101 of the Rome Statute.

⁵⁶ The Article 12(3) Declaration of the Palestinian Authority, 311.

32. There is nothing within the text of Article 12 to suggest that the term “State” was intended to include non-state entities or be given any “special” meaning in this context.⁵⁷ On the contrary, the argument that the term “State” as used in Article 12(3) includes, or might be interpreted to include, non-state entities is contrary to the ordinary meaning of the term.⁵⁸ Without the Statute providing an indication why a “functional” interpretation of the term “State” should be given to the word in Article 12 (as opposed to, for example, in Article 125), interpretation of the word under Article 12 must be by reference to how the word is understood under general international law.⁵⁹ It must be established by applying the relevant law to the objective facts that a State exists.

d. *The ordinary meaning of “State”*

33. The customary test of statehood, endorsed by much of the international community, holds that a state must consist of four elements: a defined territory, a permanent population, a government in total control of the territory, and the capacity to engage in foreign relations (the Montevideo Criteria).⁶⁰ The Arbitration Commission of the European Conference on Yugoslavia in Opinion No. 1 stated that the “state is commonly defined as a community which consists of a territory and a population subject to an organised political authority” and that “such a state is characterised by sovereignty.”⁶¹ The effects of recognition by other States are declaratory.⁶² Although recognition may be relevant evidence of practice (e.g. reflecting a State’s capacity to enter into relations with other States),⁶³ the applicable framework essentially revolves around territorial

⁵⁷ *Id.*, 312.

⁵⁸ Article 31 VCLT. Teleological arguments should only be relied upon only if a term lacks an ordinary meaning. *Cf. Situation in Palestine*, Summary of submissions on whether the declaration lodged by the Palestinian National Authority meets statutory requirements, 3 May 2010, paras. 3, 22-25. The term “State” does possess an ordinary meaning. *See* The Article 12(3) Declaration of the Palestinian Authority, 311. United Nations practice has attributed to the term “State” in Article 4(1) of the UN Charter the meaning it has under general international law. Crawford, p.179.

⁵⁹ Y. Ronen, ICC Jurisdiction over Acts Committed in the Gaza Strip: Article 12(3) of the ICC Statute and Non-state Entities, JICJ 8 (2010), 3-27 (hereinafter “Ronen”), p.11. *See also* The Article 12(3) Declaration of the Palestinian Authority, 303. *Cf Pellet*, 983 *et seq.*

⁶⁰ Convention on Rights and Duties of States adopted by the Seventh International Conference of American States, 26 December 1934, 165 LNTS 19 (hereinafter “Montevideo Convention”), Art I.

⁶¹ Opinion 1, Badinter Commission, 29 November 1991, 92 ILR 165. The Arbitration Commission of the European Conference on Yugoslavia was established pursuant to the Declaration of 27 August 1991 of the European Community: *see* M. Shaw, *International Law*, 8th ed., Cambridge (2017) (hereinafter ‘Shaw’), p.157.

⁶² Opinion 1, Badinter Commission, 29 November 1991, 92 ILR 165. *See also* Crawford, p.93 (“An entity is not a State because it is recognized; it is recognized because it is a State.”)

⁶³ Shaw, p.160, 163. Crawford, p.27 (“Collective recognition is ancillary and is not a substitute for action by the competent authorities”. The “status of an entity as a State is, in principle, independent of recognition”).

effectiveness.⁶⁴ There are exceptions,⁶⁵ but the requirement of effectiveness is likely to be more strictly applied when the statehood of an entity is opposed under international law and during the creation of a new State.⁶⁶

34. Government, or effective government, is central to a claim to statehood. The criterion has two aspects: the actual exercise of authority and the right or title to exercise that authority. To be a State an entity must possess a government or a system of government in general control of its territory to the exclusion of other entities not claiming through or under it. Occupation produces title neither for an occupant nor for any other party.⁶⁷ Statehood is not simply a factual situation: it “*is a legally circumscribed claim of right, specifically to the competence to govern a certain territory.*”⁶⁸
35. Independence is a further central criterion of statehood.⁶⁹ It denotes the “*exclusive competence of the State with regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations.*”⁷⁰ Two elements are involved: (a) the separate existence of an entity within reasonably coherent frontiers and (b) its not being “*subject to the authority of any other State or group of States*” which is to say that it has over it “*no other authority than that of international law.*”⁷¹
36. As to the authority which might operate to frustrate a putative State’s independence, it is necessary to distinguish between “*formal*” and “*actual*” independence. *Formal* independence exists where the powers of government of a territory (in internal and external affairs) are vested in the separate authorities of the putative State. A discretionary authority to intervene in or conduct the internal affairs of a territory (whether or not it arises from a treaty or other consensual arrangement) would appear to be inconsistent with formal independence. As to “*actual*” independence, entities formed under belligerent occupation might, if able to establish independence *vis-à-vis* the occupant, become a State, subject to cessation of hostilities or with recognition by the previous sovereign.⁷²

⁶⁴ Shaw, p.158.

⁶⁵ Non-effective territories have been regarded as continuing to be States: for example, the various entities unlawfully annexed in the period 1936 to 1940 (Ethiopia, Austria, Czechoslovakia, Poland, the Baltic States, Guinea-Bassau before Portuguese recognition, or Kuwait in the period 1990 to 1991. Thus, the proposition that statehood must necessarily be equated with effectiveness is not supported by practice). See Crawford, p.99.

⁶⁶ Crawford, p.59.

⁶⁷ A. Zemach, ‘Assessing the Scope of the Palestinian Territorial Entitlement,’ *FORDHAM INTERNATIONAL LAW JOURNAL* 42:4 (2019) 1203 (hereinafter “Zemach”), 1216. Crawford, p.34.

⁶⁸ Crawford, p.55-61.

⁶⁹ *Id.*, p.62.

⁷⁰ *Island of Palmas Case* (1928) 2 RIAA 829, 838.

⁷¹ Crawford, p.66.

⁷² *Id.*, p.66, 71, 72, 75, 89.

37. The Prosecutor has correctly stated (in relation to the situation in Egypt) that pursuant to the principle of effective control, “the entity which is in fact in control of a State’s territory, enjoys the habitual obedience of the bulk of the population, and has a reasonable expectancy of permanence, is recognized as the government of that State under international law.”⁷³ This approach should guide the OTP when determining the question of Palestine’s statehood for the purpose of Article 12. The Rome Statute does not permit a non-state entity of whatever kind to become a Party to the Statute or either directly or indirectly to accept the jurisdiction of the ICC.⁷⁴

e. *Article 12(2)(a) – States Parties on whose territory crimes occur*

38. This interpretation of “State” in Article 12(3) is supported both by the text of Article 12(2),⁷⁵ as well as by treaty law as reflected by Article 29 of the VCLT and the principle of non-intervention.⁷⁶ The preconditions to the exercise of jurisdiction prescribed by Article 12(2) recognise the principle that States must have a permanent population and a defined territory. Territorial jurisdiction is, after all, a manifestation of the State sovereignty which Article 12 was drafted in order to respect.⁷⁷ Article 12(2)(a) therefore permits the Court to exercise jurisdiction over the crimes proscribed by Article 5 if “the State on the territory of which the conduct in question occurred” is a Party to the Rome Statute (emphasis added).

39. Although there is no necessity in international law for a State to possess defined and settled boundaries,⁷⁸ in any situation where the OTP proceeds on the basis of a State referral under Article 13(a) or *proprio motu* pursuant to an Article 12(3) declaration, as a matter of the internal law of the ICC the precondition under Article 12(2)(a) must be satisfied in order for the Court to be permitted to exercise jurisdiction over nationals

⁷³ OTP, The determination of the Office of the Prosecutor on the communication received in relation to Egypt, 8 May 2014, ICC-OTP-20140508-PR1003, 8 May 2014.

⁷⁴ See e.g., *Prosecutor v Saif Al-Islam Gaddafi*, Order to the Registrar with respect to the “Request for an order directing the Registrar to transmit the request for arrest and surrender to Mr al-‘Ajami AL-‘ATIRI, Commander of the *Abu-bakr al-Siddiq* Battalion in Zintan, Libya”, PTC I, ICC-01/11-01/11, 2 June 2016.

⁷⁵ The text of the Rome Statute is the starting point for interpretation of the treaty. Article 21(1)(a) of the Rome Statute.

⁷⁶ Article 29 of the VCLT states: “Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.” It follows that the ICC does not recognise (local) municipal authorities’ capacity to cooperate with the Court pursuant to Part IX of the Rome Statute.

⁷⁷ “Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State.” *Island of Palmas Case (Netherlands v US)*, Permanent Court of Arbitration (1928), 2 UN Rep. International Arbitral Awards, 829, 838. See also Schabas and Pecorella, *mn-5. Schooner Exchange v McFadden* 11 US (7 Cranch) 116 (1812), p.136.

⁷⁸ Shaw, p.158.

of non-states parties.⁷⁹ The words “of which” (“*duquel*” in French) indicate that sovereign legal title to the territory must be *possessed* by a State.

IV. Jurisdiction is a question of law

40. Article 19(1) of the Rome Statute requires the Court to “*satisfy itself*” that it has jurisdiction.⁸⁰ This principle (reflected under customary law by the Court’s inherent *Komptenz-Kompetenz*),⁸¹ implies that the OTP must “*attain the degree of certainty*” that it is permitted to exercise jurisdiction before doing so.⁸²

41. As the determination of jurisdiction “*is of a legal nature*” (rather than “*whether a given fact can or cannot be properly established*”), the threshold of a “*degree of certainty*” which is required to satisfy the preconditions to the exercise of jurisdiction under Article 12 is separate and distinct from evidential standards of proof (e.g. “*reasonable basis to believe*”, “*reasonable grounds to believe*”, “*substantial grounds to believe*” and “*beyond reasonable doubt*”). There is, accordingly, “*no need for the Chamber to address the issue as to the nature of the ‘standard of proof’ to be satisfied by the party bringing a jurisdictional challenge.*”⁸³ The Court either has jurisdiction or it does not.⁸⁴ The question is one of

⁷⁹ This statement is without prejudice to the position under customary international law which governs the Court’s relations with non-States parties.

⁸⁰ Rome Statute, Article 19(1).

⁸¹ On the ICC’s legal personality, see Article 4 of the Rome Statute. See also PTC I Decision in the *Situation in Bangladesh*, paras. 34-49; *Prosecutor v Ruto, Kosgey and Sang*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-01/11-373, 23 January 2012, para. 24.

⁸² *Prosecutor v 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, ICC-01/05-01/08-424, 15 June 2009, para. 24. See also *Prosecutor v Muthaura et al*, ICC-01/09-02/11-01, Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Pre-Trial Chamber II, 8 March 2011, para 9 (also relying on its prior decision authorising an investigation at paras. 10-11).

⁸³ *Prosecutor v Mbarushimana*, ICC-01/04-01/10-1, Decision on the ‘Defence Challenge to the Jurisdiction of the Court’, Pre-Trial Chamber I, 26 October 2011, para. 5.

⁸⁴ *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-02/II-382-Red, 23 January 2012, Dissenting Opinion to the Muthaura Confirmation Decision, para. 33. The Court’s jurisprudence reveals fragmentation as to the evidentiary standard (if any) which the Prosecutor must meet with respect to jurisdiction and admissibility. Some decisions have held that on the basis of the evidence and information presented the case fell within the jurisdiction of the Court and appeared to be (or was) admissible. See e.g. *Prosecutor v Harun and Abd-Al-Rahman (Kushayb)*, ICC-02/05-01/07-1-Corr, Decision on the Prosecution Application under Article 58(7) of the Statute, Pre-Trial Chamber I, 27 April 2007, para. 25; *Prosecutor v Katanga*, ICC-01/04-01/07-4, Decision on the Evidence and Information Provided by the Prosecution for the Issuance of a Warrant of Arrest for Germain Katanga, Pre-Trial Chamber I, 6 July 2007, paras. 16, 21 (but “*reasonable grounds to believe*” standard with respect to the crimes at issue at para. 12); *Prosecutor v Bemba*, ICC-01/05-01/08-14-tENG, Decision on the Prosecutor’s Application for a Warrant of Arrest Against Jean-Pierre Bemba Gombo, Pre-Trial Chamber III, 10 June 2008, paras. 19 (utilising the “*reasonable grounds to believe*” standard with respect to the crimes

legality, and specifically whether the Court has or is permitted to exercise jurisdiction at any given moment. Although the “*degree of certainty*” formulation begs certain questions (e.g. what degree of certainty, slightly certain, more certain than not, absolute certainty?) these questions are misconceived as the issue, simply, is whether there is jurisdiction or not.⁸⁵ As a matter of policy, it may be prudent for the OTP not to proceed unless it is certain, or sure (which also means beyond reasonable doubt), that the territory on which it is alleged that crimes within the jurisdiction of the Court have been committed is the territory of a State Party to the Rome Statute, but being sure cannot guarantee that the Court will proceed lawfully. The Court either has jurisdiction or it does not.

V. Collective recognition and self-determination neither determine Palestine’s Statehood nor the scope of her territorial claim

42. The UN General Assembly cannot recognise Palestine as a “*State*” with a constitutive, definitive, and universally determinative effect.⁸⁶ State practice can operate as a law-establishing mechanism in the absence of any clear legal title to territory.⁸⁷ However, third states’ recognition of title has evidentiary value only if it can be linked to a rule of international law that pertains and can be applied to the territorial dispute in question.⁸⁸ International recognition may therefore facilitate the acquisition of territory through an (existing) possession,⁸⁹ but without the consent of an affected party it “*cannot be expected ... that collective recognition will play a major or predominant role in matters of territorial status.*”⁹⁰

at issue at para. 13); *Prosecutor v Al-Bashir*, ICC-02/05-01/09-3, Decision on the Prosecutor’s Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, 4 March 2009, para. 28(1) (using a “*reasonable grounds to believe*” test for crimes but also simply stating that the case “*falls within the jurisdiction of the Court*” at paras. 35, 40); *Situation in the Libyan Arab Jamahiriya*, ICC-01/11-01/11-1, Decision on the ‘Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi’, Pre-Trial Chamber I, 27 June 2011, para. 5; *Prosecutor v Hussein*, ICC-02/05-01/12-1-Red, Decision on the Prosecutor’s Application under Article 58 Relating to Abdel Muhammed Hussein, Pre-Trial Chamber I, 1 March 2012, para. 5 (stating that the case “*falls within the jurisdiction of the Court*” at para. 9).

⁸⁵ Cf. M. Vagias and J. Ferencz, ‘Burden and Standard of Proof in Defence Challenges to the Jurisdiction of the International Criminal Court’, *LEIDEN JOURNAL OF INTERNATIONAL LAW* (2015), 28, pp.135-155 (“Vagias and Ferencz”), 142, 143 (arguing that the “*degree of certainty*” standard remains *obiter* with respect to interpretation of Article 19(1)) and 153 (arguing that a “*ruling by the Appeals Chamber is arguably necessary on this point*”).

⁸⁶ Crawford, p.441.

⁸⁷ Shaw, p.382.

⁸⁸ Zemach, 1254. See also M. Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge 2006) 287 (“*external recognition (acquiescence)... seems unacceptable alone... To escape politics, we must assume that the adequacy of general recognition or acquiescence can be checked against the actual effectiveness of possession. We must assume that the justification for territorial title lies both in facts as well as in an interpretation of those facts by States at large*”).

⁸⁹ Zemach, 1255-1256.

⁹⁰ Crawford, at 540.

43. UN Security Council resolutions which are not adopted under Chapter VII are recommendations and do not have binding effect,⁹¹ still less do they determine borders. Recognition may be declaratory of an existing statehood, but it is neither required for the creation of, nor does it constitute statehood. What is required is the fulfilment of objective criteria for statehood under the Montevideo Convention together with the criterion of independence.
44. General Assembly resolution 67/19, and the voting behaviour of States, neither altered nor clarified Palestine's objective status as a State nor any sovereign legal title to territory.⁹² The fact that the Referral asserts a Palestinian entitlement to the West Bank, Gaza and East Jerusalem does not itself mean that sovereign legal title to any or all of that territory is possessed by Palestine. Instead, it reflects Palestine's (current) territorial claim. Nor does the collective recognition afforded to the State of Palestine pursuant to General Assembly resolution 67/19 confer sovereign legal territorial title.⁹³ It is not unusual for General Assembly resolutions to go beyond the terms of the UN Charter, and their legal effect (if any) must be weighed accordingly.⁹⁴ Indeed, they may serve a merely political function.⁹⁵
45. In any event, General Assembly resolution 67/19 states that the Palestinian State and Israel will live side by side "*on the basis of the pre-1967 borders*" (emphasis added). This phrase does not foreclose land swaps (which nearly all agree are essential to any two-State solution). The resolution in its own terms leaves the exact path of the boundary line to be determined by political negotiations, not by international lawyers.⁹⁶
46. Similarly, State practice does not indicate that the right to self-determination extends to the actual achievement of statehood alone or the demarcation of international

⁹¹ See, e.g., Zemach, 1262.

⁹² See *supra* n.11. Palestine did not become a party to the UN Charter on 29 November 2012. Recognition as a non-member observer state cannot and does not have implicit effects analogous to those of full UN membership. Historically, non-member state status has been granted not only to clear cases of States (such as Switzerland prior to 2002) but also to entities whose legal status was – at the time – not settled (e.g. Austria in 1952, Bangladesh in 1973, South Vietnam). See, e.g., J. Vidmar, Does General Assembly resolution 67/19 have any implications for the legal status of Palestine, 4 December 2012, EJIL Talk!.

⁹³ "*Bilateral recognition is important as evidence of effective control and should be regarded as part of that principle. International recognition, however, involves not only a means of creating rules of international law in terms of practice and consent of states, but may validate situations of dubious origin. A series of recognitions may possibly validate an unlawful acquisition of territory and could similarly prevent effective control from ever hardening into title. The significance of UN recognition is self-evident, so that the UN Security Council itself could adopt a binding resolution ending a territorial dispute by determining the boundary in question*": Shaw, p.387.

⁹⁴ See, e.g. Crawford, p. 113.

⁹⁵ Crawford, p.159.

⁹⁶ See D. Luban, "Palestine and the ICC – Some Legal Questions", Just Security, 2 January 2015.

boundaries.⁹⁷ On the contrary, self-determination refers to the right of the majority within a generally accepted political unit to exercise power.⁹⁸ In other words, it is necessary to *start* with the boundaries of the self-determination unit following which political change can occur.⁹⁹ Self-determination does not determine statehood or boundaries in and of itself, and an entity claiming statehood but created during a period of foreign military occupation will be presumed not to be independent.¹⁰⁰ A Palestinian right to determination is not dispositive of claims to either statehood or territory.

VI. The Statehood of Palestine

47. Statehood is a precondition to the valid lodging of a declaration by a non-State Party pursuant to Article 12(3). The Montevideo Convention is the starting point for consideration of the meaning to be given to the term “*State*” in Article 12(3).¹⁰¹

48. The criterion of a permanent population is satisfied.¹⁰² Since the Oslo Accords, the Palestinian Authority has had a significant degree of control over territory in Areas A and B of the West Bank and a government in that territory. The Palestinian Authority had a significant degree of control over nearly all the Gaza Strip until its takeover by Hamas in 2007. However, the principle of effective control is dependent at least in the first instance upon the exercise of “*full governmental powers with respect to some area of territory.*”¹⁰³

49. Palestine does not fulfil the criterion of government with respect to issues that will be negotiated in the permanent status negotiations, namely Jerusalem, settlements, specified military locations, borders, foreign relations, Israelis, and refugees. Palestinian government stops short of these permanent status issues and Palestine

⁹⁷ Crawford, p.446. Zemach, 1237.

⁹⁸ Crawford, p.127.

⁹⁹ See Crawford, p.125 quoting R. Higgins, *The Development of International Law Through the Political Organs of the United Nations* (Oxford 1963), 104.

¹⁰⁰ Crawford, p.148 citing *Knox v Palestine Liberation Organization* 306 F Supp 2d 424, 437 (SDNY, 2004): “[under] international law, a state will maintain its statehood during a belligerent occupation... but it would be anomalous indeed to hold that a state may achieve sufficient independence and statehood in the first instance while subject to and labouring under the hostile military occupation of a separate sovereign”; *Efrat Ungar v Palestine Liberation Organization* 402 F 3d 274, 290 (1st Cir, Selya, CJ): “Nor does the fact that the Egyptians and Jordanians occupied and controlled a significant portion of the defined territory immediately following the end of the mandate aid the defendants’ cause. To the contrary, the fact is a stark reminder that no state of Palestine could have come into being at that time.”

¹⁰¹ See *supra* paras. 33-39.

¹⁰² Indeed, in the Interim Agreement Israel acknowledged that the PLO was the “*representative of the Palestinian people*”. See also G. R. Watson, *The Oslo Accords: International Law and the Israeli-Palestinian Peace Agreements* (Oxford 2000) (hereinafter “*Watson*”), p.61 citing Letter from Rabin to Arafat, 9 September 1993.

¹⁰³ Crawford, p.46.

neither exercises authority with respect to them nor has an uncontested right or sovereign title to exercise such authority. Palestine's governmental powers are not, and never have been, plenary with respect to these issues.¹⁰⁴ This is material to the Court's ability (or lack thereof) to exercise jurisdiction with respect to territory – such as in Jerusalem or over settlements – which it cannot be said with a degree of certainty is Palestinian.¹⁰⁵ Palestine does not possess exclusive competence to govern in this territory. Objectively, it does not comprise the territory of a Palestinian State.

50. The PLO has a plausible claim on the fourth element of statehood, the capacity to engage in foreign relations. However, under the Oslo Accords, the PLO lacks the capability to carry out any of the actual objects of diplomatic relations, namely to regulate the terms of its trade with other States, to make its armed forces available to aid an ally, or to maintain and police its borders with neighbouring States.¹⁰⁶

VII. The Oslo Accords and the limits of Palestinian self-determination pending a negotiated settlement

51. The Oslo Accords recognise the PLO as the representative of the Palestinian people.¹⁰⁷ However, when the Declaration of Principles was signed in 1993, the PLO was not a State.¹⁰⁸ Since the Interim Agreement, the Palestinian Authority is closer to statehood but has not attained it. The PA is not a government in “control” of the territory which it claims as Palestinian. Although it exercises a range of governmental and quasi-governmental functions in the West Bank, so does Israel. Israel retains residual powers not exercised by Hamas and the PA, and the PLO has agreed that “*Israel shall continue to exercise powers and responsibilities not ... transferred*” to the Palestinian Legislative Council.¹⁰⁹

52. In Area C of the West Bank, Israel retains complete territorial jurisdiction, although the Interim Agreement did provide that the Palestinian Council would have “*functional jurisdiction*” but only over Palestinians (and in matters “*not related to*”

¹⁰⁴ Interim Agreement, Art. XVII(1)(a).

¹⁰⁵ The “*essential point is that a process of negotiation towards identified and acceptable ends is still, however precariously, in place. That being so, it misrepresents the reality of the situation to claim that one party already has that for which it is striving.*” Crawford, p.446.

¹⁰⁶ Watson, p.63.

¹⁰⁷ Interim Agreement. See also Letter from Rabin to Arafat, 9 September 1993.

¹⁰⁸ The negotiations leading up to and the acceptance of Oslo by the Palestinian side demonstrates “*very clearly*” that these authorities did not maintain that Palestine already existed as a State prior to the Accords. Even if such a claim could be maintained as a matter of law, it was “*effectively withdrawn*” by the acceptance of the Oslo Accords. See The Article 12(3) Declaration of the Palestinian Authority, 307.

¹⁰⁹ Interim Agreement, Art. 1(1). See Joel Singer, ‘The West Bank and Gaza Strip: Phase Two’, in Justice, December 1995, at 3 (arguing that Israel retains ‘*residual*’ powers of government in the territories). R. Shehadeh, *From Occupation to Interim Accords: Israel and the Palestinian Territories* (Kluwer 1997) (hereinafter “*Shehadeh*”), 35 (“*all residual powers and responsibilities shall continue to be exercised by Israel*”).

territory").¹¹⁰ The PA has territorial jurisdiction over Areas A and B and some functional jurisdiction over Area C,¹¹¹ but permanent status issues (including the Israeli settlements in Area C) were specifically excluded from any functional jurisdiction transferred.¹¹² The Interim Agreement envisions that the jurisdiction of the Council would extend throughout the territory "*except for the issues*" to be negotiated in final status talks. This implies that not all of Area C – i.e. not all the West Bank – would be transferred to Palestinian control as part of the "*further redeployments*" contemplated by the Interim Agreement.¹¹³ Palestinian jurisdiction over the disputed territory is not complete.

53. According to Article IV of the Interim Agreement, the "*jurisdiction of the Council will cover West Bank and Gaza Strip territory except for issues that will be negotiated in the permanent status negotiations.*" The definite article is dropped from "*West Bank and Gaza Strip territory*" to indicate that what was meant is not the whole of the West Bank and the Gaza Strip.¹¹⁴ Issues to be addressed in the permanent status negotiations include "*Jerusalem, refugees, settlements, security arrangements, borders, relations and cooperation with other neighbours and other issues of common interest.*"¹¹⁵ The Oslo Accords define the legal situation as between the parties until such time as a final agreed settlement has been concluded.¹¹⁶
54. Prior to the Oslo Accords, on 15 December 1988, the General Assembly in resolution 43/177 "*acknowledge[d] the proclamation of the State of Palestine by the Palestine National Council*". Yet in 1988, to an even greater extent than now, the PLO's authority failed to comply with the essential conditions of statehood.¹¹⁷ The whole of the West Bank and Gaza territory was (factually) occupied by Israel which functioned as a government and claimed the right to do so until further agreement. The PLO never functioned as a government in the territory and lacked the means to do so.¹¹⁸ Despite its Declaration of Independence, Palestine was not formally or actually independent.
55. Prior to late 1917, the territory was part of the Ottoman Empire. Following occupation by Britain, the territory was made subject to the Mandate for Palestine, which was

¹¹⁰ Interim Agreement, Art. XVII(2)(a) and (d); *Id.*, Annex III, Art. IV and Appendix I.

¹¹¹ Watson, p.244 *citing* Interim Agreement, Art. XVII(2)(a) and (d).

¹¹² Interim Agreement, Art. XVII(2)(d) and Annex III, Art. IV(3). Israelis were also excluded from any jurisdiction transferred (Art. XVII(1)(a) and (2)(c)), which raises additional issues requiring separate consideration to the issues of territorial jurisdiction addressed in this communication.

¹¹³ Watson, p.110.

¹¹⁴ Shehadeh, p.20.

¹¹⁵ Art V(3) of the Declaration of Principles on Interim Self-Government Arrangements (Oslo Accords), 13 September 1993.

¹¹⁶ See *Legal Consequences of the Building of a Wall in Palestinian Territory, Advisory Opinion of 9 July 2004*, ICJ Reports (2004), at 136, 137.

¹¹⁷ The Article 12(3) Declaration of the Palestinian Authority, 307.

¹¹⁸ Crawford, p.437.

entrusted to Britain and came to an end in 1948, subject to the reservation of rights in Article 80 of the UN Charter. Neither in this period nor during the period from 1948 to 1993 did Palestine emerge as a State.

56. The argument that Palestine as a mandatory territory existed as a state from 1922 does not hold water.¹¹⁹ As Professor Shaw notes, in no situation was a mandated territory regarded as a sovereign State prior to the termination of the mandate over the territory in question. No State which emerged from such territories or the succeeding trust territories traces the commencement of its legal independence as a State from the date of the establishment of the mandate.¹²⁰ The terms of the Palestinian Mandate (contemplating the establishment of the Jewish national home in Palestine) further preclude this argument.¹²¹ Nor was it Israel that prevented the establishment of a Palestinian State in the West Bank and Gaza between 1949 and 1967. The Gaza Strip remained under Egyptian occupation and the West Bank was occupied and then annexed by Jordan.¹²²

VIII. The indeterminacy of the Palestinian territorial claim

57. Article 12(2)(a) requires that “*the State on the territory of which the conduct in question occurred*” be a Party to the Rome Statute. The scope of the Palestinian territorial claim in the Referral is, however, disputed in good faith by Israel.¹²³
58. The scope of Palestinian sovereign title to territory cannot be determined with certainty. As noted above, the Mandate contemplated a Jewish national home in Palestine.¹²⁴ Israel’s Declaration of Independence made clear that the Jewish State

¹¹⁹ The Article 12(3) Declaration of the Palestinian Authority, 306. *Contra* J. Quigley, *The Statehood of Palestine* (Cambridge 2010).

¹²⁰ The Article 12(3) Declaration of the Palestinian Authority, 306-307.

¹²¹ League of Nations, Mandate for Palestine, December 1922, Preamble, Articles 2 and 4.

¹²² See R. W. Ash, Is Palestine a “State”? A Response to Professor John Quigley’s Article, “The Palestine Declaration the International Criminal Court: The Statehood Issue”, 36 Rutgers Law Record (2009) 186, at 198-199. *Contra* V. Kattan, ‘The False Premise Sustaining Israel’s West Bank Claim – Part II’, OPINIO JURIS, 8 April 2019 (hereinafter “Kattan”) (arguing that there was a fusion of sovereignty, but begging immediate questions with respect to satisfaction of the criteria of government and independence as a result of Jordanian effective control).

¹²³ See e.g. E. Said, “The Morning After” in *20 Years Since Oslo: Palestinian Perspectives*, Heinrich Böll Stiftung (2013), p.18: By “accepting that questions of land and sovereignty are being postponed until ‘final Status negotiations’, the Palestinians have in effect discounted their unilateral and internationally acknowledged claim to the West Bank and Gaza: these have now become ‘disputed territories.’ Thus with Palestinian assistance Israel has been awarded at least an equal claim to them.” A. Bell and E. Kontorovich, ‘Palestine, Uti Possidetis Juris and the Borders of Israel’, ARIZONA LAW REVIEW 58 (2016) 633-692; Zemach. Cf e.g. Pellet, 992-993.

¹²⁴ The territory subject to the Mandate for Palestine extended east of the Jordan, encompassing what is now the territory of the Hashemite Kingdom of Jordan. In accordance with its Article 25, the application of most of its provisions, including those directed to establishing a Jewish national home, could be, and were, withheld in the area east of the River Jordan. This arguably implies that the Mandate’s application could not be withheld in any of the area west of the Jordan (i.e. including what is now the

would be in *Eretz-Israel*, without fixing its territorial scope.¹²⁵ This was not unlawful. The 1947 General Assembly partition plan was not binding and did not determine the scope of any Palestinian sovereign title to territory.¹²⁶ When Israel declared independence, she was the only sovereign administrative unit in Palestine.¹²⁷ Professor O’Keefe notes that “*the Jewish population of the territory of the defunct Mandate was not prohibited by international law from seizing as much land as it could within its borders, in the same way that the Palestinian Arabs were at liberty to do.*”¹²⁸

59. In 1948, neither the Jewish nor the Arab community was constrained – nor, at any time, was either group considered even capable of being constrained – by any rule of international law preventing it from claiming any territory within the confines of the former Mandate. Any territory within the frontiers of the Mandate was not protected by the prohibition on the use of interstate force under Article 2(4) of the UN Charter or under customary international law (such territory not belonging to a State upon its termination).¹²⁹ Israel’s claim to a Jewish home in *Eretz Israel* was without territorial delimitation or demarcation and in 1948 Israel was not prohibited from asserting a claim to sovereignty throughout the territory of the former Mandate. Given that Israel’s Declaration of Independence was made on 14 May 1948,¹³⁰ and independent government assumed immediately pursuant to the exercise of the Jewish people’s right of self-determination, it is not correct to describe the establishment of the State of Israel as a situation of secession.¹³¹ There was no Palestinian State to secede from.
60. The terms of the 1949 armistice agreements between Israel and Jordan and between Israel and Egypt expressly stated that the armistice (“Green”) lines did not resolve the question of sovereignty over any part of the territory of the former Mandate.¹³² Moreover, the PLO expressly disclaimed sovereignty over the West Bank and Gaza in

West Bank and Gaza Strip). See Memorandum by the British Representative presented to and approved by the Council League of Nations, 23 September 1922.

¹²⁵ Declaration of Establishment of State of Israel, 14 May 1948 (re-establishing a Jewish State in *Eretz-Israel*. Rather than asserting a territorial claim to the whole of *Eretz-Israel* Israel’s Declaration of Independence states that the Jewish State was in *Eretz-Israel* and that the State of Israel would take steps to bring about the *economic* union of the whole of *Eretz-Israel*.)

¹²⁶ General Assembly resolution 181 (II) of 29 November 1947 “*was intended as no more than a recommendation.*” Crawford, at 431. See also Zemach, 1211. *Contra* Kattan.

¹²⁷ A. Bell and E. Kontorovich, Palestine, *Uti Possidetis Juris* and the Borders of Israel, *ARIZONA LAW REVIEW* 58 (2016) 633-692, at 685. Crawford, p.425.

¹²⁸ R. O’Keefe, ‘Israel/Palestine Sixty Years On’ in T. Giegerich and A. Proelb (eds), *Trouble Spots in the Focus of International Law* (Berlin: Dunker-Humblot, 2010) 13, 18.

¹²⁹ *Id.*, p.18-19. *And see Lotus.*

¹³⁰ Declaration of Establishment of State of Israel, 14 May 1948.

¹³¹ Cf Crawford, p.421 *et seq.*

¹³² See Hashemite Kingdom of Jordan and Israel: General Armistice Agreement, Isr.-Jordan, 3 April 1949, UN Doc S/1302 (hereinafter “Israel-Jordan Armistice Agreement”), Art. VI(9). Egypt and Israel: General Armistice Agreement, 24 February 1949, Art. V(2).

1964.¹³³ UN Security Council and General Assembly resolutions, in particular Security Council resolutions 242 and 338, have not determined a Palestinian sovereign title to territory,¹³⁴ and UN Security Council resolution 2334 and General Assembly resolution 67/19 do not answer the question of the scope of Palestinian sovereign territorial title.¹³⁵ Palestine's own 1988 Declaration of Independence was made after twenty years of Israeli effective control.¹³⁶

61. The question of sovereign legal title to the disputed territories is a matter that can only be resolved by agreement between the relevant parties, including Israel. The Oslo Accords did not resolve the territorial dispute.¹³⁷ Indeed, in the Oslo Accords, Israel and the PLO specifically reserved their rights, claims and positions regarding, *inter alia*, borders pending the outcome of the permanent status negotiations.¹³⁸ The factual (or legal) status of the territory as occupied (or not occupied) is not material to the question of sovereign legal title. As noted above, occupation produces title neither for

¹³³ Palestinian National Charter of 1964, Article 24: "This Organization does not exercise any territorial sovereignty over the West Bank in the Hashemite Kingdom of Jordan, on the Gaza Strip or in the Himmah Area. Its activities will be on the national popular level in the liberational, organizational, political and financial fields." Contra Kattan (claiming that "when Israel occupied East Jerusalem, the West Bank, and the Gaza Strip, in June 1967, there was already a governmental organization that claimed title to these territories: the Palestinian National Council, which had established the PLO in East Jerusalem in May 1964.")

¹³⁴ On the contrary, UN Security Council resolution 242 (1967) does not stipulate withdrawal from "all of the territories" Israel captured in the Six-Day War but "territories" (English) or "des territoires" (French).

¹³⁵ See *Status of Palestine in the United Nations*, UN Doc. A/67/L.28, 12 November 2012, 2. UN Security Council Resolution 2334 (made under Chapter VI) expressly urged intensification and acceleration of international and regional diplomatic efforts and support aimed at achieving a just and lasting peace on the basis of *inter alia* the Quartet Roadmap and the principle of land for peace. See also E. Kontorovich, "Israel/Palestine – The ICC's Uncharted Territory", JICJ 11 (2013), 979-999 (hereinafter "Kontorovich"), 987: "One might say that the mere recognition of Palestine as a state presumes it having some borders. But this presumes that the Assembly's recognition was based on the objective, Montevideo Convention definition of statehood, instead of a constitutive, normative theory. In the latter context, no satisfaction of Montevideo criteria can be assumed from the vote."

¹³⁶ Letter dated 18 November 1988 from the Permanent Representative of Jordan to the United Nations addressed to the Secretary-General, 18 November 1988, A/43/827, S/20278, Annex III (Declaration of Independence) ("The Palestine National Council hereby declares, in the Name of God and on behalf of the Palestinian Arab people, the establishment of the State of Palestine in the land of Palestine with its capital at Jerusalem"). Political Communiqué and Declaration of Independence by Palestinian National Council, 15 Nov. 1988, 27 I.L.M. 1660 (1988). See also Watson, p.62.

¹³⁷ Crawford, at 443 (observing that "the agreements are remarkably unforthcoming on issues of status, no doubt because of fundamental disagreements between the parties").

¹³⁸ Interim Agreement, Art. XXXI.6: "Nothing in this Agreement shall prejudice or pre-empt the outcome of the negotiations on the permanent status to be conducted pursuant to the DOP. Neither Party shall be deemed, by virtue of having entered into this Agreement, to have renounced or waived any of its existing rights, claims or positions." See also J. Stone, *Of Law and Nations* (London 1974), p.79 and 90-95. The Interim Agreement reflects a position whereby the parties have expressly regulated facts in a negative manner which would preclude judicial determination of borders pending a political settlement. A further communication in this series will explore the legal effect of the Oslo Accords on the operation of ICC jurisdiction in more detail.

an occupant nor for any other party.¹³⁹ The relevant parties agree that questions of borders need to be resolved in peace process negotiations.¹⁴⁰

IX. Immediate effect on the exercise of jurisdiction

a. Risk of exercise of exorbitant jurisdiction

62. The exercise of ICC jurisdiction would necessarily require the OTP to demarcate a border for jurisdictional purposes.¹⁴¹ Politically, this will place the Prosecutor into the midst of one of the world's most flammable disputes.¹⁴² Legally, the indeterminacy of Palestinian sovereign legal title presents a fundamental and immutable jurisdictional obstacle with respect to (for example) a potential settlements case where the Prosecutor will be required to be satisfied that preconditions to the exercise of jurisdiction pursuant to Article 12(2)(a) and/or Article 12(3) have been met prior to any exercise of jurisdiction.
63. The scope and extent of Palestinian sovereign legal title is disputed such that the typology of alleged settlements related activities described in the OTP's December 2018 Report on Preliminary Examinations cannot be said to have occurred on Palestinian territory with any degree of certainty.¹⁴³ If it is territory over which Israel maintains a legitimate but disputed claim, the OTP should tread with caution so as to avoid interference in the internal affairs of a non-State Party absent a Security Council mandate.
64. In order lawfully to exercise jurisdiction in a potential case concerning a non-State Party (i.e. Israeli) national in the Situation, for example in any potential settlements case, the Court and its organs must have the degree of certainty that the territory on which alleged criminal conduct occurred is Palestinian territory. To proceed otherwise would be an exorbitant exercise of jurisdiction (i.e. *ultra vires* the Rome Statute as well as a potential violation of Israeli sovereignty). If the scope of any Palestinian sovereign legal title to territory cannot be established with certainty, Article 12's preconditions will not be satisfied on each occasion that the Court exercises jurisdiction with respect to conduct occurring in such territory in a potential case.
65. Different potential cases may call for a different analysis. Conduct allegedly occurring in the Gaza Strip may require separate consideration from conduct allegedly occurring in the West Bank. Conduct allegedly occurring in East Jerusalem may require a

¹³⁹ Zemach, 1216. Crawford, p.34.

¹⁴⁰ Interim Agreement, Art. XXXI(5).

¹⁴¹ The Article 12(3) Declaration of the Palestinian Authority, 317.

¹⁴² See D. Luban, "Palestine and the ICC – Some Legal Questions", Just Security, 2 January 2015.

¹⁴³ Unlike with admissibility challenges, circumstances relating to the Court's jurisdiction are not generally susceptible to change. Hall, Nsereko and Ventura, mn-18. See also n.30.

different analysis again.¹⁴⁴ However, if the Court were unlawfully to exercise jurisdiction in the Situation through any *ultra vires* action, it would render the ICC liable to retorsion and countermeasures resulting from the breach of the principle of non-intervention, and render the Court a violator of the rules based international order. It would legitimise the critique that the ICC is a “renegade” court exercising an exorbitant jurisdiction. It would also confer on Palestine a capacity to delegate an extraterritorial criminal jurisdiction which it otherwise would not possess, which in turn serves to demonstrate in part the political value served by the PLO’s instrumentalisation of the ICC in its efforts to win independence for the Palestinian people.¹⁴⁵

b. *The principle of effectiveness*

66. A determination that conduct contemplated by the Referral falls outwith preconditions for the exercise of jurisdiction enumerated by Article 12(2) and the conduct contemplated by the Declaration falls outwith Article 12(3) would not operate to create a “zone of impunity” in the territory concerned.¹⁴⁶ Firstly, the Security Council could refer the situation to the Court pursuant to Article 13(b) of the Rome Statute. Secondly, Israel’s military justice and High Court of Justice, possess and exercise jurisdiction.¹⁴⁷

67. Indeed, the indeterminate scope of Palestinian sovereign legal title to territory will itself create a further problem of *effectiveness* - in terms of ensuring the performance of criminal justice – should the Court exercise jurisdiction without lawful satisfaction of Article 12’s statutory preconditions. Recalling the matrix of relationships described at the outset, States Parties who have not recognised Palestine as a State (and, *a fortiori*, have not recognised its sovereignty over the territory it claims) would, if the Court exercises jurisdiction over conduct committed in that territory, *prima facie* be obliged to cooperate with the Court with respect to a territory which cannot with any degree of certainty be said to belong to a State Party of the ICC.¹⁴⁸ This matrix is a recipe for

¹⁴⁴ See Kontorovich, 993-999.

¹⁴⁵ See, further, Marc Schack, ‘Going to The Hague’ as Coercive Leverage: The Palestinian ICC Policy during the 2014 Operation Protective Edge, *Journal of International Criminal Justice*, Volume 15, Issue 2, May 2017, Pages 319–342.

¹⁴⁶ Cf. Pellet, 995.

¹⁴⁷ See S. Kay QC and J. Kern, Article 15 Communication: The principle of complementarity and the preliminary examination of a potential settlements case: A Response to the OTP’s Report on Preliminary Examination Activities 2018, 1 March 2019.

¹⁴⁸ The UK, for example, reportedly conditioned an affirmative vote on Palestine’s UN non-member observer status on a promise that the Palestinians would not use their new status as a route to the ICC. See Kontorovich, 980 citing M. Nichols, ‘Palestinians Say no Rush to Join International Court after UN Vote,’ Reuters, 27 November 2012; C. McGreal, “Palestinians Warn: Back UN Statehood Bid or Risk Boosting Hamas,” *The Guardian*, 27 November 2012. See also I. Black, “Britain Ready to Back Palestinian Statehood at UN,” *The Guardian*, 27 November 2012; C. McGreal, “International Criminal Court is a lever for Palestinians on Israeli settlements,” *The Guardian*, 15 December 2012

States' non-cooperation. Even were to the Court to exercise jurisdiction, in the absence of State cooperation it might in the end need to abandon potential cases for lack of evidence or of an accused in custody. To this extent, the principle of effectiveness does not unequivocally drive towards broadening the scope of Article 12 beyond its ordinary meaning.

X. Offer of assistance

68. The authors stand ready to assist the OTP and the Court through further dialogue and communications with respect to the legal and factual matters arising from this communication.

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