



STATE OF ISRAEL
OFFICE OF THE ATTORNEY GENERAL

THE INTERNATIONAL CRIMINAL COURT’S LACK OF JURISDICTION OVER THE SO-CALLED “SITUATION IN PALESTINE”

20 December, 2019

EXECUTIVE SUMMARY

1. The State of Israel has been committed to the cause of international criminal justice from the outset. Established in the aftermath of the catastrophic events of the twentieth century, including the Holocaust perpetrated against the Jewish people, Israel was an early and passionate advocate for the establishment of an international criminal court that would hold accountable the perpetrators of heinous crimes that deeply shock the conscience of humanity. It took an active part in the negotiations leading up to the adoption of the Rome Statute in 1998, and continues to consider that a diligent permanent international criminal tribunal can serve a constructive role in deterring and punishing for mass atrocities.
2. While extending its support to the values that motivated the establishment of the International Criminal Court (ICC), Israel has early on expressed deep concerns, also shared by other States, that the Court could be exposed to political manipulation that might lead it to stray from its mandate. Israel thus decided not to become a party to the Rome Statute at this stage, but has continued to play an active role in various international efforts to put an end to impunity for the gravest international crimes.
3. The Palestinian attempts to draw the ICC into core political aspects of the Israeli-Palestinian conflict have brought into a sharp focus precisely the risk that the Court might be exploited for illegitimate political gain. This is chiefly because – as the following memorandum establishes – the Court manifestly lacks jurisdiction over the so-called “situation in Palestine”. Jurisdiction is, of course, not a mere formality: it plays a critical role in defining judicial competence in order to prevent abuse of the judicial process, guarantee that courts do not stray from the mandates carefully entrusted to them, and insulate the law from both power and populism. Any court departing from such essential rules guiding its activity would be unfaithful to the requirements of its judicial character, and would gravely undermine its judicial integrity.
4. In the case of the “situation in Palestine”, the fundamental precondition to jurisdiction enshrined in the Rome Statute – namely, that a State having criminal jurisdiction over its territory and nationals has delegated such jurisdiction to the Court – is clearly not met. As demonstrated in the memorandum, a substantive legal inquiry into this matter cannot be sidestepped; and any such inquiry must lead to the conclusion that the precondition is indeed not satisfied.
5. A substantive legal inquiry into the precondition of the Court’s jurisdiction cannot be averted primarily because the events surrounding the purported accession of “Palestine” to the Rome Statute in 2015 did not settle the highly controversial question of Palestinian statehood. In fact, the administrative act of circulating the Palestinian purported instrument of accession was accompanied by an explicit clarification that it was carried out without prejudice to the legal



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question of whether a Palestinian State existed. UN General Assembly resolution 67/19, on which the circulation of the Palestinian instrument of accession relied, had concerned a procedural matter of Palestinian representation within the UN alone, and had anyhow referred to Palestinian statehood as a future aspiration. By the same token, the subsequent participation of “Palestine” in the ICC Assembly of States Parties was facilitated on the understanding that the legal question as to whether a Palestinian State existed would be left for others. Against this background, the ICC Prosecutor’s decision of January 2015 to open a preliminary examination into what she termed the “situation in Palestine” was said to be without prejudice to the question of the Court’s jurisdiction, which still remains pending.

6. If a sound assessment of the legal and factual record is undertaken, its inevitable conclusion must be that a sovereign Palestinian State does not exist, and that the precondition to the Court’s jurisdiction thus cannot be fulfilled. This is because sovereignty over the West Bank and the Gaza Strip remains in abeyance, and the Palestinian entity manifestly fails to meet the criteria for statehood under general international law. In particular, the Palestinian Authority lacks effective control over the territory concerned (and in claiming that the territory is occupied by Israel, essentially concedes that that is so). The alleged recognition of “Palestine” by some States cannot compensate for the absence of the established criteria for statehood; and the right of the Palestinians to self-determination must not be conflated with any claim to statehood. The Palestinian claim to existing statehood is indeed fraught with significant contradictions, as senior Palestinian officials themselves acknowledge by continuing to refer to a Palestinian State in future terms.
7. The absence of a sovereign Palestinian State further means that there is clearly no sovereign ability to prosecute that could be delegated to the Court, and that there is no “territory of” a State (within the meaning of the Rome Statute) over which the Court may exercise its jurisdiction. Any delimitation by the Court of the territory concerned would anyhow require it to act in contravention of binding Israeli-Palestinian agreements that expressly leave such matters to direct negotiation between the parties, and to make determinations that are wholly unsuitable for an international criminal tribunal. No reliance can be made in this context on such strictly political terms as “the occupied Palestinian territories”, reference to which is consistently made without prejudice to the fundamentally legal question of sovereign title.
8. Finally, even if the Rome Statute were to be misinterpreted so as to allow non-sovereign entities to confer jurisdiction upon the Court, existing Israeli-Palestinian agreements make it clear that the Palestinians have no criminal jurisdiction either in law or in fact over Area C, Jerusalem and Israeli nationals – and thus cannot validly delegate such jurisdiction to the Court. Here, too, any conclusion that the precondition to the Court’s jurisdiction is fulfilled would not withstand any serious legal and factual scrutiny, and would inevitably run up against the terms of the Rome Statute itself as well as the rules of general international law more broadly.
9. Israel acknowledges that the lack of jurisdiction on the part of international tribunals in respect of any particular disputes does not relieve States of their duty to fulfil their international legal obligations. In the present context, Israel remains willing and able to address any Palestinian



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grievance through various remedial avenues (including multi-layered review mechanisms already in place), and by direct bilateral negotiations. Cynical attempts to manipulate the ICC into acting where its jurisdiction is manifestly lacking threaten to undermine not only the Court's legitimacy and credibility, but also the prospects for achieving the just and lasting settlement long awaited by Israelis and Palestinians alike.



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A. INTRODUCTION

1. On 16 January 2015 the Office of the Prosecutor (“OTP”) of the International Criminal Court (“ICC”) opened a preliminary examination into what it termed the “situation in Palestine” concerning “alleged crimes committed in the occupied Palestinian territory, including East Jerusalem, since 13 June 2014”.¹ This followed a submission by the Palestinians of an *ad hoc* declaration purporting to accept the ICC’s jurisdiction under Article 12(3) of the Rome Statute (the Court’s founding treaty²) as well as a purported instrument of accession thereto. The OTP acknowledged that the decision to open a preliminary examination was without prejudice to the question of the Court’s jurisdiction (which remains pending to this day), and has moreover recognized that this question is not free from difficulties.³
2. As will be explained in the present memorandum, the ICC lacks jurisdiction over the “situation in Palestine”. This is because 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. As the Prosecutor has herself observed, for the ICC to intervene “where clear jurisdictional parameters have not been met ... is neither good law nor makes for responsible judicial action”.⁴
3. Israel, among other States, objected from the outset to the Palestinian purported accession to the Rome Statute, for the principled reason that only States may accede to the Statute and confer jurisdiction upon the ICC.⁵ Yet the OTP took a different position considering that determining

¹ Office of the Prosecutor, *The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine*, ICC-OTP-20150116-PR1083, 16 Jan. 2015, available at <https://www.icc-cpi.int/Pages/item.aspx?name=pr1083> (last accessed: 19 Dec. 2019).

² Rome Statute of the International Criminal Court, *opened for signature* 17 July 1998, 2187 U.N.T.S. 3 (hereinafter: “Rome Statute”).

³ Office of the Prosecutor, *Report on Preliminary Examination Activities 2015*, 12 Nov. 2015, para. 54, available at <https://www.icc-cpi.int/iccdocs/otp/OTP-PE-rep-2015-Eng.pdf> (last accessed: 19 Dec. 2019); Office of the Prosecutor, *Report on Preliminary Examination Activities 2016*, 12 Nov. 2016, para. 119, available at https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf (last accessed: 19 Dec. 2019); Office of the Prosecutor, *Report on Preliminary Examination Activities 2017*, 4 Dec. 2017, paras. 58, 67-68, available at https://www.icc-cpi.int/itemsDocuments/2017-PE-rep/2017-otp-rep-PE_ENG.pdf (last accessed: 19 Dec. 2019); Office of the Prosecutor, *Report on Preliminary Examination Activities 2018*, 5 Dec. 2018, para. 268, available at <https://www.icc-cpi.int/itemsDocuments/181205-rep-otp-PE-ENG.pdf> (last accessed: 19 Dec. 2019).

⁴ Office of the Prosecutor, *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 Sep. 2014, available at <https://www.icc-cpi.int/Pages/item.aspx?name=otp-st-14-09-02> (last accessed: 19 Dec. 2019).

⁵ Depositary notification C.N.63.2015.TREATIES-XVIII.10 (Israel: Communication) (23 Jan. 2015): “‘Palestine’ does not satisfy the criteria for statehood under international law and lacks the legal capacity to join the aforesaid Statute under general international law, as well as under the terms of the Rome Statute and of bilateral Israeli-Palestinian agreements”. See also, for example, Depositary notification C.N.64.2015.TREATIES-XVIII.10 (United States of America: Communication) (23 Jan. 2015) (“Accession to the Rome Statute is limited to sovereign States. Therefore, the Government of the United States of America believes that the ‘State of Palestine’ is not qualified to accede to the Rome Statute”); Depositary notification C.N.57.2015.TREATIES-XVIII.10 (Canada: Communication) (23 Jan. 2015) (“‘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 ... ‘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’”). Australia has



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the validity of an act of accession did not require an inquiry into the highly controversial question of Palestinian statehood when it opened the preliminary examination into the “situation in Palestine”, having considered instead that since “Palestine” was granted by the United Nations General Assembly the status of “non-member observer State” in the United Nations, it should be viewed as a “State” solely for the purposes of acceding to the Rome Statute and lodging an Article 12(3) declaration.⁶ The OTP therefore took the view that accession could not be equated with substantive statehood and distinguished the “status” needed to accede to the Statute, and statehood *per se* under international law – an issue unresolved in the OTP’s view by the act of accession.

4. In light of the position taken by the OTP with respect to accession, when considering the Court’s jurisdiction concerning the “situation in Palestine” and given the jurisdictional requirements prescribed by the Rome Statute, a substantive determination as to the contentious question of Palestinian statehood cannot be averted: jurisdiction is not a mere formal or procedural matter, but lies at the heart of international law and any exercise of judicial competence so as to prevent abuse of the judicial process and insulate the law from both power and populism. More specifically, the question whether there is a State that has criminal jurisdiction over its territory and nationals that may be (and indeed has been) delegated to the Court, must be addressed. As this memorandum will establish, any credible legal analysis will inevitably lead to the conclusion that the reply to this question in the present case must be in the negative.
5. Additional conditions for the exercise of the Court’s jurisdiction, including complementarity, gravity and interests of justice,⁷ are not met either. These significant issues fall outside the scope of the present memorandum, which similarly does not address temporal and subject-matter

similarly written to the Secretary-General of the United Nations to express its concern over the Palestinian Authority’s lodgment of the purported instrument of accession to the Rome Statute, stressing that “[t]he Australian Government does not recognize the ‘State of Palestine’. As such, Australia does not recognize the right of the Palestinian Authority to lodge instruments of accession under the entry into force provisions of [a range of multilateral treaties, particularly the Rome Statute of the International Criminal Court]. ... Australia’s long-standing position is that a negotiated settlement is the only way to ensure the creation of a future Palestinian state ...”: Letter from Permanent Representative of Australia to the United Nations dated 6 Feb. 2015, enclosed with a letter from the Australian Ambassador to Israel to Israel’s National Security Advisor, 11 Feb. 2015 (on file with the Israeli Government). The Dutch Minister of Foreign Affairs has likewise stated before the Dutch parliament in August 2014, with reference to Palestinian intentions to accede to the Rome Statute, that “... only States can accept the jurisdiction of the ICC by becoming parties to the Rome Statute or by making a statement to that effect in accordance with the provisions of the Rome Statute. The Netherlands does not recognize the Palestinian state”: TWEDE KAMER [Dutch Parliament Website] (22 Aug. 2014), available at <https://www.tweedekamer.nl/kamerstukken/kamervragen/detail?id=2014Z13910&did=2014D28652> (translated from Dutch) (last accessed: 19 Dec. 2019). The lack of such explicit statements on behalf of any other State should not be taken to imply that they consider the accession as valid: see also *infra* note 109.

⁶ *Report on Preliminary Examination Activities 2015*, *supra* note 3, at para. 53. See also para. 18 below.

⁷ Rome Statute, *supra* note 2, art. 53.



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jurisdiction, the question whether the Court may exercise jurisdiction over nationals of States not parties to the Rome Statute,⁸ and any other questions that might be implicated.

6. The memorandum proceeds as follows. Following this introduction, Section B explains that the ICC's jurisdiction under Article 12 of the Rome Statute is based on the delegation of criminal jurisdiction over territory and nationals by sovereign States. Section C explains that nothing in the events surrounding the purported accession of "Palestine" to the Rome Statute (much like the purported Palestinian acceptance of the Court's jurisdiction under Article 12(3)) satisfies this essential precondition. Section D then demonstrates that "Palestine" does not meet this precondition for the reasons that no sovereign Palestinian State exists as a matter of international law, and the scope of the territory concerned is anyway undefined. Finally, section E explains that even if the Rome Statute is misinterpreted to allow for non-sovereign entities to confer jurisdiction upon the Court, the Palestinians lack the capacity to validly delegate any jurisdiction over Area C and Jerusalem as well as over Israeli nationals.

B. THE COURT'S JURISDICTION IS BASED ON THE DELEGATION BY SOVEREIGN STATES OF CRIMINAL JURISDICTION OVER THEIR TERRITORY AND NATIONALS

7. It is widely accepted that the jurisdiction of the ICC "is not based on the principle of universal jurisdiction: it requires [under the Rome Statute] that the United Nations Security Council (article 13(b)) or a 'State' (article 12) provide jurisdiction".⁹ Article 12, in particular, is indeed the expression of a hard-fought compromise reached among those States who participated in the negotiations leading up to the adoption of the Rome Statute, and who ultimately rejected proposals for all-encompassing jurisdiction in favor of a more limited jurisdictional regime.¹⁰ Article 12(2) provides that:

"... 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:

(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;

(b) The State of which the person accused of the crime is a national."¹¹

8. Article 12(2) thus enshrines a jurisdictional regime expressly founded on the traditional jurisdictional bases of territoriality and nationality, which establish, in turn, that the jurisdiction of the Court relies on sovereign States delegating to it their criminal jurisdiction over their

⁸ Israel is not a party to the Rome Statute. On 31 December 2000, Israel signed the Rome Statute as an expression of moral support for the basic idea underlying the establishment of the Court, while expressing its concerns over the risk of politicization and rejecting any attempt to interpret provisions of the Statute in a politically motivated manner against Israel and its citizens. On 28 August 2002, Israel informed the UN Secretary-General that "Israel does not intend to become a party to the treaty. Accordingly, Israel has no legal obligations arising from its signature on 31 December 2000": Depositary notification C.N.894.2002.TREATIES-35 (Israel: Communication) (28 Aug. 2002).



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territory and nationals. There are, therefore, three key requirements: first, that the entity constitutes a State under general international law; second, that such a State possesses the jurisdiction that is in the circumstances intended to be delegated; and, third, that such delegation has in fact taken place. These requirements serve to guarantee that the Court would only operate on a firm jurisdictional basis.

9. While the term “State” is not defined in the Rome Statute, there can be no doubt that its meaning is indeed the one commonly accepted and recognized in general international law: a sovereign State.¹² This becomes readily clear when interpreting Article 12(2) in accordance with the customary rules of treaty interpretation reflected in the Vienna Convention on the Law of Treaties, which require that “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose”.¹³

⁹ Office of the Prosecutor, *Situation in Palestine*, 3 Apr. 2012, para. 4, available at <https://www.icc-cpi.int/nr/rdonlyres/c6162bbf-feb9-4faf-afa9-836106d2694a/284387/situationinpalestine030412eng.pdf> (last accessed: 19 Dec. 2019).

¹⁰ The regime that was ultimately incorporated into Article 12 of the Rome Statute was based on a proposal put forward by the Republic of Korea to break an impasse that had developed in the course of the negotiations. That proposal was important for two reasons. First, the Koreans were explicit that their proposal was based on the principle of delegation and said that, under their proposal, “jurisdiction is conferred upon the Court based on State consent”. Second, the Korean proposal shows that the jurisdiction to be delegated to the Court is limited to territorial jurisdiction and active personality jurisdiction. To be sure, as originally submitted, the Korean proposal included language that would have also delegated passive personality jurisdiction (jurisdiction in cases where the victim was a national of the delegating State), or custodial jurisdiction (jurisdiction on the basis that the delegating State had custody of the defendant), but this additional language was deleted and, as a result, the jurisdiction that States delegate under the Rome Statute is limited to territorial and active personality jurisdiction: see Proposal submitted by the Republic of Korea for articles 6 [9],* 7 [6] and 8 [7], A/CONF.183/C.1/L.6 (18 Jun. 1998), available at <https://legal-tools.org/doc/2fba4e> (last accessed: 19 Dec. 2019)). This is depicted in several commentaries on the Rome Statute: see Elizabeth Wilmshurst, *Jurisdiction of the Court*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE – ISSUES, NEGOTIATIONS, RESULTS* 127, 127 (Roy S. Lee ed., 1999); Philippe Kirsch and Darryl Robinson, *Reaching Agreement at the Rome Conference*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 67, 83 (Antonio Cassese et al. eds., 2009) (hereinafter: “Cassese et al. Commentary”); Olympia Bekou and Robert Cryer, *The International Criminal Court and Universal Jurisdiction: A Close Encounter?*, 56 *INT’L & COMP. L.Q.* 49, 50 (2007); WILLIAM A. SCHABAS, *THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE* 345-350 (2nd ed., 2016).

¹¹ Article 12 further establishes that a “State” can confer jurisdiction to the Court by becoming a Party to the Rome Statute (art. 12(1)) or by making an *ad hoc* declaration accepting the Court’s jurisdiction (art. 12(3)).

¹² That the meaning assigned to the terms used in art. 12(2)(a) of the Rome Statute should be consistent with international law has recently been acknowledged by the OTP: see Office of the Prosecutor, *Report on Preliminary Examination Activities 2019*, 5 Dec. 2019, para. 47, available at <https://www.icc-cpi.int/itemsDocuments/191205-rep-otp-PE.pdf> (last accessed: 19 Dec. 2019). See also Harmen van der Wilt, *The Rome Statute: Only States are Invited to Tune In*, 20 *QUEST. INT’L L.* 5, 7-8 (2015) (observing that Article 12 of the Rome Statute alludes to the criteria of statehood accepted under international law).

¹³ Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, art. 31(1). The Court has had occasion to state that “[t]he interpretation of treaties, and the Rome Statute is no exception, is governed by the Vienna Convention on the Law of Treaties (23 May 1969)”: *Situation in the Democratic Republic of the Congo*, ICC-01/04-168, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 Mar. 2006 Decision Denying Leave to Appeal, para. 33 (13 July 2006). See also *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, ICC-01/05-01/13, Judgment pursuant to Article 74 of the Statute, para. 17 (19 Oct. 2016).



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10. International law attaches great importance to distinguishing between States and other entities. It consistently reserves the fundamental legal status of statehood only to those entities that meet certain objective criteria prescribed by it and thus attain sovereignty, which is indeed a consequence of statehood. States are, therefore, sovereign by definition. Sovereignty in its turn means that “the State has over it no other authority than that of international law”.¹⁴
11. There is no evidence that the drafters of the Rome Statute intended to give the term “State” any other, special, meaning,¹⁵ as was done, for example, in the case of the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia.¹⁶ On the contrary, non-States or sub-State entities were not contemplated by the drafters of the Rome Statute in the negotiation of Article 12.
12. The reference in Article 12(2) of the Statute to “territory of” a State further reinforces that the term “State” means a sovereign State, as it is widely accepted that “territory of [a State]” comprises, under international law, all the land, internal waters and territorial sea, and the airspace above them, over which a State has sovereignty.¹⁷ In the same vein, “... sovereignty in relation to a portion of the surface of the globe is the legal condition necessary for the inclusion of such portion in the territory of any particular State”.¹⁸ The OTP has itself acknowledged as recently as in 2019 that the term “territory” of a State, “as used in article 12(2)(a), includes those areas under the sovereignty of the State”.¹⁹

¹⁴ Customs Regime between Germany and Austria, Advisory Opinion, 1931 P.C.I.J. (Ser. A/B) No. 41, at 55, 57 (5 Sep. 1931) (Individual Opinion by M. Anzilotti).

¹⁵ See also Vienna Convention on the Law of Treaties, *supra* note 13, art. 31(4).

¹⁶ The Rules of Procedure and Evidence of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 took care to define the term “State” more expansively in order to bring entities other than sovereign States within the scope of the Tribunal’s activity: Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, IT/32/Rev.50, 8 Jul. 2015, Rule 2. Other international instruments likewise make an explicit reference to such entities where their participation in the treaty regime is sought: see, for example, United Nations Convention on the Law of the Sea, 1982, 1833 U.N.T.S. 397, arts. 305(1) and 307.

¹⁷ ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 178 (3rd ed., 2013). Other provisions in multilateral treaties referring to “territory of [a State]”, such as Article 29 of the Vienna Convention on the Law of Treaties and Article 2 of the International Covenant on Civil and Political Rights (ICCPR), attach this meaning to the term as well: see, respectively, Anthony Aust, *Treaties, Territorial Application*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, para. 2 (Rüdiger Wolfrum ed., 2006); MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 43 (2nd ed., 2005). Needless to add, the debate concerning the ICCPR’s extraterritorial application turns on the interpretation of the phrase “and subject to its jurisdiction”, not the phrase “within its territory”.

¹⁸ *Island of Palmas (Netherlands v. U.S.A)*, R.I.A.A. Vol II 829, 838 (Perm. Ct. Arb. 1928). The Grand Chamber of the European Court of Justice similarly determined that the term “territory of the Kingdom of Morocco” means “the geographical space over which [the Kingdom of Morocco] exercises the fullness of the powers granted to sovereign entities by international law”: Case C-104/16 P, *Council v. Front Polisario*, 2016 EU:C:2016:973, paras. 16 and 95 (21 Dec. 2016).

¹⁹ *Report on Preliminary Examination Activities 2019*, *supra* note 12 (adding that “[s]uch interpretation of the notion of territory is consistent with the meaning of the term under international law”). See also William A. Schabas and Giulia Pecorella, *Article 12: Preconditions to the exercise of jurisdiction*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT – A COMMENTARY 672, 681-682 (Otto Triffterer and Kai Ambos eds., 3rd ed., 2016) (observing, in



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13. Parts 9 and 10 of the Rome Statute, which deal respectively with international cooperation and judicial assistance and with enforcement, similarly assume (if not require) the existence of sovereign competence.²⁰ So do other provisions of the Statute,²¹ including those referring to the complementarity of the Court to national criminal jurisdiction, which mandates that “the primary jurisdiction belongs to the State with the closest *sovereign connection* to the locus of the crime or the alleged suspect”.²² The reference to national criminal jurisdiction once again indicates that it is only sovereign States that those drafting the Rome Statute had in mind.

reference to art. 12(2)(a), that “territorial jurisdiction is a manifestation of State sovereignty”). Reference in Article 12(2)(b) of the Rome Statute to the term “nationality”, too, indicates that the term “State” means a sovereign State.

²⁰ The decision by the ICC’s Pre-Trial Chamber I with respect to the proceedings against Saif Al-Islam Gaddafi is instructive in this regard, as the Court ordered the Registrar to communicate with the Libyan Government, and not with the militia holding Mr. Gaddafi, for purposes of addressing a request for surrender to that militia: *The Prosecutor v. Saif Al-Islam Gaddafi*, ICC-01/11-01/11, 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”, paras. 8-9 (2 Jun. 2016). See also Jackson N. Maogoto, *A Giant without Limbs: The International Criminal Court’s State-Centric Cooperation Regime*, 23 U QUEENSLAND LJ 102, 109, 115 (2004) (“The extent to which states, by becoming parties to the *Rome Statute*, take on obligations to assist the ICC in activities on their own territory is very much an issue of sovereignty. As with other areas defining the relationship between the ICC and states, the *Rome Statute’s* final text balances the states’ willingness to make commitments necessary for the ICC to function, with a recognition that the ICC will operate in a world of sovereign states. ... Criminal prosecution is inherently linked to notions of national sovereignty and control over persons and territory”); van der Wilt, *supra* note 12, at pp. 6, 12 (“the acceptance of non-State entities is difficult to reconcile with the system of international criminal law enforcement as envisaged in the Rome Statute. That conclusion is reached on the basis of a teleological interpretation of the concept of ‘state’, in the light of the objectives of the Rome Statute. In view of the principle of complementarity, the International Criminal Court is meant as default option, an instance of last resort, whenever states are unwilling or unable to genuinely investigate or prosecute a case. It is highly questionable whether quasi-states would ever be capable to undertake these commitments. In a similar vein, it is doubtful whether non-state entities would be able to cooperate with the Court, an obligation that is expressly stipulated in Article 12(3) Rome Statute. ... According to Part 9 of the Rome Statute, the duty to cooperate ... requires an institutional and legal framework that is hardly less demanding than the one that would be necessary to conduct a full criminal trial. It is hardly imaginable that a non-state entity that does not exercise ‘effective control’ would be capable of rendering the level of assistance required. For the assessment of the question whether an entity would be qualified to lodge a declaration ex Article 12(3), I would therefore argue that it should meet all the criteria, mentioned in the Montevideo Convention”).

²¹ See, for example, Article 8(3), which refers to “the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State”; and Article 21, which allows the Court to apply, under certain circumstances, the “national laws of States”.

²² Chile Eboe-Osuji, President of the International Criminal Court, Keynote Address at the Annual Meeting of the American Society of International Law (29 Mar. 2019), available at <https://www.icc-cpi.int/itemsDocuments/190329-stat-pres.pdf> (emphasis added) (last accessed: 19 Dec. 2019). In the Situation in Georgia, the OTP (when examining the issue of complementarity as part of its request to open an investigation) thus considered that because South Ossetia was part of the territory of Georgia and not a State within the meaning of the Statute, the South Ossetian *de facto* authorities did not have standing before the Court to lodge an admissibility challenge: Office of the Prosecutor, Situation in Georgia - Corrected Version of “Request for authorisation of an investigation pursuant to article 15”, ICC-01/15-4-Corr, para. 322 (16 Oct. 2015). Pre-Trial Chamber I agreed that “any proceedings undertaken by the *de facto* authorities of South Ossetia are not capable of meeting the requirements of article 17 of the Statute, due to South Ossetia not being a recognized State”: Situation in Georgia, ICC-01/15-12, Decision on the Prosecutor’s Request for Authorization of an Investigation, para. 40 (27 Jan. 2016).



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14. The OTP has recognized that the Court’s jurisdiction is indeed derived from the existence of a “sovereign ability to prosecute”;²³ and the President of the Court has recently confirmed that “[t]he nature of the ICC’s jurisdiction ... actually prides and underscores national sovereignty”.²⁴ A commentary to the Rome Statute similarly observes that “Article 12 of the Rome Statute is a manifestation of the principle of state sovereignty, one of the most important principles of public international law governing the international community and the relations between States”.²⁵ For purposes of the ICC’s jurisdiction, therefore, the term ‘State’ must be read to mean a sovereign State according to general international law. Attaching to it any other meaning would be incompatible with the generally accepted rules of treaty interpretation, and would do violence to the terms of the Rome Statute altogether.
15. As noted above, Article 12(2) further reflects the foundational principle that the Court operates on the basis of delegated jurisdiction: it does not have unfettered jurisdiction, but rather “exercises its jurisdiction on the basis of competence delegated to it by States Parties” and is only competent to do so “in the same way that the State Party’s own domestic courts could”.²⁶

²³ Office of the Prosecutor, Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, ICC-RoC46(3)-01/18-1, para. 49 (9 Apr. 2018) (emphasis added, citing Schabas and Pecorella).

²⁴ Eboe-Osuji, *supra* note 22.

²⁵ Stephane Bourgon, *Jurisdiction Ratione Loci*, in Cassese et al. Commentary, *supra* note 10, at pp. 559, 562. See also Marko Milanovic, *Is the Rome Statute Binding on Individuals (And Why We Should Care)*, 9 J. INT’L CRIM. JUST. 25, 47-48 (2011): “In true international law spirit, the Statute’s main concern are sovereign states, who must voluntarily accept the Court’s jurisdiction ...”; Yaël Ronen, *ICC Jurisdiction over Acts Committed in the Gaza Strip: Art. 12(3) of the ICC Statute and Non-state Entities*, 8 J. INT’L CRIM. JUST. 3, 26-27 (2010): “Interpreting Article 12(3) more widely to include entities effectively governing non-sovereign territory also seems unwarranted, as such interpretation flies in the face of the ICC Statute’s wording and the intention of its drafters. Any involvement in issues of recognition risks exposing the Prosecutor and the Court to accusations of politicization and subjectivity. The ICC’s goal of ending impunity is channeled through a state-centred mechanism”.

²⁶ Rod Rastan, *Jurisdiction*, in THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 141, 155 (Carsten Stahn ed., 2015) (referring to delegation in the context of personal jurisdiction; on delegation in the context of territorial jurisdiction, see pp. 163-164). See also Mahmoud Cherif Bassiouni, *The Permanent International Criminal Court*, in JUSTICE FOR CRIMES AGAINST HUMANITY 173, 181 (Lattimer and Sands eds., 2003) (“[the ICC] is not a supra-national body, but an international body similar to existing ones ... The ICC does no more than what each and every state can do under existing international law ... The ICC is therefore an extension of national criminal jurisdiction ...”); The Board of Editors, *The Rome Statute: A Tentative Assessment*, in Cassese et al. Commentary, *supra* note 10, at pp. 1901, 1911 (“Territorial jurisdiction is the primary basis for jurisdiction under international law; indeed, it is an essential attribute of State sovereignty. ... if the State wishes to delegate this jurisdiction to an international criminal court ... this is something it is clearly entitled to do ... The ICC is not premised on universal jurisdiction, but on conventional bases of jurisdiction – territoriality and/or nationality”); Michael A. Newton, *How the International Criminal Court Threatens Treaty Norms*, 49 VAND. J. TRANSNAT’L L. 371, 374-375 (2016) (“the Court’s authority is not independent or omnipotent. Treaty-based ICC jurisdiction flows exclusively from the delegation of a State Party’s sovereign jurisdictional power. Except for the overarching authority of the United Nations Security Council to convey jurisdiction to the Court through binding resolutions under Chapter VII of the UN Charter, the jurisdiction of the ICC, as embodied in Article 12 of the Rome Statute, is based only on derivative jurisdiction granted by states at the time they ratify the multilateral treaty”); Roger O’Keefe, *Response: “Quid” Not “Quantum”: A Comment on “How the International Criminal Court Threatens Treaty Norms”*, 49 VAND. J. TRANSNAT’L L. 433, 439 (2016) (“by way of Article 12(2)(a) of the Rome Statute, a receiving State Party to the Statute delegates to the ICC the exercise of its customary right to entertain criminal proceedings in respect of the crimes specified in Article 5 of the Statute when these crimes are committed in its territory”); Kevin Jon Heller, *What Is an International Crime? (A Revisionist History)*, 58 HARV. INT’L L.J. 353, 375 (2017) (“the Court is based on the delegated jurisdiction of its member states”); Schabas and Pecorella, *supra* note 19, at p. 682 (referring to the jurisdiction of the ICC as being delegated by a territorial State); Yuval Shany,



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In the words of the OTP, Article 12(2)(a) “functions to delegate to the Court the States Parties’ own ‘sovereign ability to prosecute’” the relevant crimes.²⁷ Significantly, the act of delegating criminal jurisdiction to the Court is itself an “exercise of national sovereignty”.²⁸

16. The jurisdictional regime of the ICC is thus founded, by careful and deliberate design, upon the basic notion that there exists a sovereign State that has delegated to the Court its criminal jurisdiction on the basis of territoriality or nationality; and the Court must satisfy itself, in each case, that this fundamental precondition is indeed met as a matter of law. Such an inquiry is no mere formalism: it is essential in order to guarantee that the Court remains loyal both to the terms of the Rome Statute and to basic principles of the broader international legal order within which it operates. For a body seeking to actually assert the criminal jurisdiction of sovereign States that has been delegated to it, a substantive legal inquiry as to whether there is such a sovereign state is thus unavoidable. It cannot be sidestepped or grounded in artificial constructions. Clearly, if the precondition is not satisfied, the Court must conclude that it does not have jurisdiction.

C. THE PURPORTED ACCESSION BY “PALESTINE” TO THE ROME STATUTE (MUCH LIKE ITS PURPORTED ACCEPTANCE OF THE COURT’S JURISDICTION UNDER ARTICLE 12(3)) DOES NOT FULFILL THE SUBSTANTIVE REQUIREMENT FOR THE COURT’S JURISDICTION

17. The Palestinians first attempted to confer jurisdiction upon the ICC in January 2009, when the “Palestinian National Authority” purported to submit a declaration under Article 12(3) of the Rome Statute. The OTP initiated a preliminary examination, but ultimately closed it in April 2012 on the ground that the legal status of “Palestine” within the United Nations was not that of a State.²⁹
18. In opening the preliminary examination into the “situation in Palestine” in January 2015, the OTP sidestepped any substantive inquiry into the logically preliminary question of whether a sovereign Palestinian State exists by relying on UN General Assembly resolution 67/19 of 29 November 2012, which accorded “Palestine” the status of “non-member observer State” in the United Nations. In so doing it adopted the position that “the focus of the inquiry into Palestine’s ability to accede to the Rome Statute has consistently been the question of Palestine’s *status* in

In Defence of Functional Interpretation of Article 12(3) of the Rome Statute: A Response to Yaël Ronen, 8 J. INT’L CRIM. JUST. 329, 331-333 (2010) (“Article 12 referrals, which are conditioned on membership in the Statute or ad hoc consent to ICC jurisdiction by the ‘territorial’ state or the state whose nationality the alleged perpetrator holds, are reflective of the delegation-based approach”).

²⁷ *Supra* note 23. This Request by the Prosecution itself recognizes that only territorial- and nationality-based jurisdiction, as opposed to universal jurisdiction, may be delegated to the Court.

²⁸ MAHMOUD CHERIF BASSIOUNI, *THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT: INTRODUCTION, ANALYSIS, AND INTEGRATED TEXT OF THE STATUTE, ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE* 136 (2005).

²⁹ *Supra* note 9, at para. 7.



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the UN, given the UNSG’s role as treaty depositary of the Statute”.³⁰ At the same time, the OTP has made it known that “[t]he preliminary examination of the situation in Palestine raises specific challenges relating to both factual and legal determinations. In the latter respect, the Office has in particular to consider the possible challenges to the Court’s jurisdiction, and/or to the scope of any such jurisdiction”.³¹ By that, the OTP has itself recognized that the purported accession of “Palestine” to the Rome Statute is distinct from – and does not settle – the question of the Court’s jurisdiction over the “situation in Palestine”. By the same token, the Court’s registrar has emphasized, in a letter sent to Palestinian President Mahmoud Abbas following receipt of the Palestinian declaration purportedly made under Article 12(3) of the Rome Statute, that “[t]his acceptance is without prejudice to any prosecutorial or judicial determinations on this matter”.³²

19. The purported accession by “Palestine” cannot therefore itself provide a basis for the ICCs jurisdiction as it did not settle the question of whether a sovereign Palestinian State exists. As will be seen, this is so for at least three 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;³³ and (3) the Palestinian participation in the Court’s Assembly of States Parties cannot be taken to constitute or demonstrate such statehood either.
20. In these circumstances, even if the Palestinian entity is (erroneously) regarded as a State Party to the Rome Statute by virtue of the technical act of accession under Article 125 thereof, this cannot, of itself, satisfy the substantive precondition that underlies the Court’s jurisdictional regime. This has been further acknowledged by the OTP itself when it recently determined that in each case it must be confirmed that the “territory” concerned (within the meaning of art. 12(2)(a) of the Rome Statute) is an area under the sovereignty of a State.³⁴ For the Prosecutor herself, then, the test for the Court’s jurisdiction must not be based on mere accession or on the status of “State Party” alone, but on the substantive test of whether the entity concerned is a sovereign State.

³⁰ *Supra* note 1 (emphasis in original). The Prosecutor has clarified that “... the issue of statehood has never been something that my office was using as a determination to intervene or not. It’s not been the reason why we have decided to open preliminary examination or not ... we have been very consistent in saying that Palestine, the status of Palestine at the United Nations, is what has determined, for us, whether we should open preliminary examination or not”, video available at *Fatou Bensouda: S Africa ‘had to arrest Omar al-Bashir’*, ALJAZEERA, 27 Jan. 2015 12:45 GMT), <http://www.aljazeera.com/programmes/talktojazeera/2015/06/fatou-bensouda-africa-arrest-omar-al-bashir-150626132631885.html> (minutes 4:39-5:20) (last accessed: 19 Dec. 2019).

³¹ Office of the Prosecutor, *Report on Preliminary Examination Activities 2017*, *supra* note 3, at para. 67.

³² Letter from the Registrar of the International Criminal Court to H.E. Mr. Mahmoud Abbas (7 Jan. 2015), available at <https://www.icc-cpi.int/iccdocs/PIDS/press/150107-Registrar-Letter-to-HE-President-Abbas-regarding-Palestine-Art-12-3--Declaration.pdf> (last accessed: 19 Dec. 2019).

³³ UN Office of Legal Affairs – Treaty Section, *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*, U.N. Doc. ST/LEG/7/Rev.1 (1999), para. 81.

³⁴ *Report on Preliminary Examination Activities 2019*, *supra* note 12.



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21. *UN General Assembly resolution 67/19 did not determine the substantive legal question of whether a sovereign Palestinian State exists under international law.* By its own terms, resolution 67/19 was limited to a procedural upgrade of the Palestinian representation within the UN alone.³⁵ The UN Secretary-General underscored precisely this point by stating that the status accorded to the Palestinians by the resolution “does not apply to organizations or bodies outside the United Nations”,³⁶ the ICC clearly being such a body. Furthermore, the status of “non-member observer State” (much like the name chosen for the entity concerned³⁷) is anyway not determinative of the question whether the relevant entity has the international legal status of a State: inherently political organs are not equipped, nor are they competent, to render definitive decisions on controversial questions of international law that lie outside their own competence.³⁸ In any case, resolution 67/19 itself refers to Palestinian statehood as a future aspiration rather than a current legal reality, and calls for negotiations within the Middle East peace process in order to advance a two-State solution.³⁹ Many States, including those voting in favor of the resolution, took care to explain that their vote was without prejudice to the question of Palestinian statehood under international law.⁴⁰ This is again consistent with the position

³⁵ G.A. Res. 67/19, U.N. Doc. A/RES/67/19 (4 Dec. 2012). The wording “in the United Nations” appearing in the second operative paragraph of the resolution (as well as in its title) was not part of the original text, but was added precisely to highlight this distinction. It may be noted, moreover, that the status of “non-member observer State” is not envisaged under the UN Charter, and has developed merely to facilitate greater participation in the work of the UN: see also Ulrich Fastenrath, *Membership, Article 4*, in *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 341, 355-357 (Bruno Simma et al. eds., 3rd ed., 2012) (hereinafter: “Simma et al. Commentary”).

³⁶ Status of Palestine in the United Nations: Report of the Secretary-General, A/67/738, para. 1 (8 Mar. 2013).

³⁷ The name “State of Palestine” as used within the UN (and beyond) was chosen by the Palestinians themselves as a procedural matter under UN protocol and thus does not – indeed cannot – of itself be determinative of statehood or reflective of any such recognition.

³⁸ See also Jure Vidmar, *Palestine and the Conceptual Problem of Implicit Statehood*, 12 *CHINESE J. INT’L LAW* 19, 37, para. 60 (2013): “the label ‘non-member State’ in the General Assembly does not necessarily mean that an entity is a State simply because the term ‘State’ is used”.

³⁹ See G.A. Res. 67/19, *supra* note 35, at preambular para. 9 and operative paras. 4, 5, 6: “Reaffirming ... *the need for... the realization* of the inalienable rights of the Palestinian people, primarily the right to self-determination and the right to their independent State”; “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 ... *fulfils the vision of two States*”; “Expresses the urgent need for the resumption and acceleration of negotiations within the Middle East peace process based on ... the Quartet road map to a permanent two-State solution to the Israeli-Palestinian conflict”; “Urges all States and 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, independence and freedom” (emphasis added).

⁴⁰ See the statements recorded in U.N. GAOR, 67th Sess., 44th plen. mtg., U.N. Doc. A/67/PV.44 (29 Nov. 2012) and U.N. GAOR, 67th Sess., 45th plen. mtg., U.N. Doc. A/67/PV.45 (29 Nov. 2012) (hereinafter: “Official Records of the General Assembly”). New Zealand, for example, stated that “[t]his 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 ...*” (A/67/PV.44, at p. 20, emphasis added); Belgium stated that “the resolution adopted today by the General Assembly *does not yet constitute recognition of a State in the full sense*” (*ibid.*, at p. 16, emphasis added); Italy stated that “Italy stresses that today’s vote in no way prejudices its commitment to a comprehensive negotiated peace settlement, which remains *the only possible path to Palestinian Statehood and full United Nations membership*” (*ibid.*, at p. 19, emphasis added); Norway stated that “[o]ur 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” (*ibid.*, at p. 21, emphasis added); Serbia stated that “we ... have an interest in promoting such a solution, which would bring about



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under international law according to which General Assembly resolutions cannot have an effect which is binding or constitutive or definitive, still less universally determinative, of statehood.⁴¹

22. *As the UN Secretary-General himself made clear, his actions as depositary of the Rome Statute are not determinative of “highly political and controversial” questions such as that of Palestinian statehood.* Under the law of treaties, the functions assigned to a treaty depositary are purely administrative.⁴² Precisely in cases in which the question arises whether a certain entity wishing to accede to a treaty is a State, the Secretary-General as depositary does not purport to make a determination to that effect: as the UN Office of Legal Affairs has explained, “[the Secretary-General] would not wish to determine, on his own initiative, the highly political and controversial question of whether or not the areas whose status was unclear were States. Such a determination, he believed, would fall outside his competence”.⁴³
23. It was thus solely in an administrative capacity that, after receiving the Palestinian purported instrument of accession to the Rome Statute, the Secretary-General circulated on 6 January 2015 a standard depositary notification to the Rome Statute signatories, soon clarifying that “[t]his is an administrative function performed by the Secretariat” and emphasizing that “it is for States to make their own determination with respect to any legal issues raised by instruments circulated

statehood for Palestine ... *a nation still in quest for its statehood*” (*ibid.*, at p.17, emphasis added); see also the positions expressed by France (*ibid.*, at p. 14); Greece (*ibid.*, at p. 19); Denmark (*ibid.*, at p. 18); Switzerland (*ibid.*, at p. 16); Finland (*ibid.*, at p. 20); South Sudan (A/67/PV.45, at p. 2); Georgia (*ibid.*, at pp. 4-5); Malaysia (*ibid.*, at p. 21); Mauritius (*ibid.*, at p. 7); and Tunisia (*ibid.*, at p. 24). Other States, which did not vote in favor of the resolution, expressed similar positions, among them Germany (A/67/PV.44, at p. 15, stating that “it must be clear to everybody that a Palestinian State can be achieved only through direct negotiations between Israelis and Palestinians”); Hungary (*ibid.*, at p. 19); the Czech Republic (*ibid.*, at pp. 19-20); Australia (*ibid.*, at p. 20); the United Kingdom (*ibid.*, at p. 15); the United States (*ibid.*, at p. 13); Bulgaria (*ibid.*, at p. 16); the Netherlands (A/67/PV.45, at p. 2); and Romania (*ibid.*, at p. 6).

⁴¹ Crawford has similarly remarked, with regard to the former “observer” status of “Palestine” within the United Nations, that arguments according to which that status was indicative of statehood “... stop far short of the proposition that the General Assembly can recognize Palestine as a state, and not merely for such ‘internal’ purposes of the United Nations as observer status, with an effect which is ‘constitutive, definitive, and universally determinative’”: James Crawford, *The Creation of the State of Palestine: too much too soon?*, 1 EJIL 307, 312 (1990). See also JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 441 (2nd ed., 2006) (hereinafter: “Crawford 2006”). Needless to add, the General Assembly does not have the power to adopt legally binding resolutions (except with respect to the internal management and procedural matters relating to the function of the UN), and cannot create legal obligations for UN Member States or for other international actors such as the Court: see, for example, Eckart Klein and Stefanie Schmahl, *The General Assembly, Functions and Powers, Article 10*, in Simma et al. Commentary, *supra* note 35, at pp. 461, 463, 480; Yaël Ronen, *Recognition of the State of Palestine: Still Too Much Too Soon?*, in SOVEREIGNTY, STATEHOOD AND STATE RESPONSIBILITY – ESSAYS IN HONOUR OF JAMES CRAWFORD 229, 231 (Christine Chinkin and Freya Baetens eds., 2015).

⁴² Vienna Convention on the Law of Treaties, *supra* note 13, art. 77. The commentary by the International Law Commission to the corresponding draft article proposed by it states that the depositary “is not invested with competence to make a final determination” on issues of substance: *Yearbook of the International Law Commission 1966*, Y.B. Int’l L. Comm’n Vol. II, U.N. Doc. A/CN.4/SER. A/1966/Add, at p. 270. See also Fatsah Ouguerouz et al., *Art. 77 1969 Vienna Convention*, in *THE VIENNA CONVENTIONS ON THE LAW OF TREATIES: A COMMENTARY* 1715, 1720-1722 (Olivier Corten and Pierre Klein eds., 2011).

⁴³ *Supra* note 33. It is noteworthy that in a report published in March 2019, the UN Secretary-General himself refers to “a future Palestinian State”: Implementation of Security Council resolution 2334 (2016) – Report of the Secretary-General, S/2019/251, para. 67 (20 Mar. 2019).



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by the Secretary-General”.⁴⁴ In these circumstances, the circulation of the Palestinian purported instrument of accession pursuant to a technical provision common to various international agreements (and the derivative status of being a “State Party”), clearly cannot be relied on as a determination that a sovereign Palestinian State is in existence.⁴⁵ To regard such a technical act as a valid test for the Court’s jurisdiction would be to subvert the intention of its founders and gravely undermine the jurisdictional regime they carefully agreed on.

24. ***The Palestinian participation in the work of the ICC Assembly of States Parties does not, and again cannot, constitute or evince statehood for the purpose of Article 12 of the Rome Statute.***

For its part, the Assembly of States Parties (“ASP”) has been careful to avoid taking any legal position on whether “Palestine” constitutes a sovereign State. Thus, as long ago as when the Palestinians were first invited to participate in the Assembly’s annual meeting as an “Invited State”, the President of the ASP explicitly clarified that “the Assembly takes such [procedural] decisions in accordance with the Rules of Procedure of the Assembly, independently of and without prejudice to decisions taken for any other purpose, including decisions of any other organization or organs of the Court regarding any legal issues that may come before them”.⁴⁶ This practice of the ASP is consistent with the provisions of the Rome Statute according to which questions concerning judicial functions of the Court, including those that relate to jurisdiction, are entrusted to the Court and not to the ASP.⁴⁷ Accordingly, mere participation in the work of a political body such as the ASP cannot by sleight of hand and, in disregard of the Court’s own Statute, be interpreted as determining complex and controversial legal questions, still less determine statehood.

25. Thus, to consider that the question of Palestinian statehood was determined by General Assembly resolution 67/19 or the ensuing purported accession to the Rome Statute that relied on it, or by the participation of “Palestine” in the work of the ASP, would be wholly unfounded. A critical legal issue such as that of the Court’s jurisdiction must not be decided on the basis of a vote on a resolution by a political organ; and State creation in international law surely cannot be

⁴⁴ *Note to correspondents – Accession of Palestine to multilateral treaties* (7 Jan. 2015), available at <https://www.un.org/sg/en/content/sg/note-correspondents/2015-01-07/note-correspondents-accession-palestine-multilateral> (last accessed: 19 Dec. 2019). Depositories of other treaties have dealt with the issue similarly. For example, after the “State of Palestine” submitted a purported instrument of accession to the Convention on the Physical Protection of Nuclear Material, the Director General of the International Atomic Energy Agency clarified that “[t]he designation employed [i.e. “State of Palestine”] does not imply the expression of any opinion whatsoever on the part of the depositary concerning the legal status of any country or territory or of its authorities, or concerning the delimitation of its frontiers”: Depositary notification 170-N5.92.21 Circ of 1 February 2018 (Convention on the Physical Protection of Nuclear Material: Accession by the State of Palestine).

⁴⁵ Nor does the fact that the word “State” in Article 125 of the Rome Statute was apparently interpreted to enable the purported accession by an entity that is not a sovereign State, have an impact on the meaning of the term “State” in other, substantive provisions of the Statute. The OTP itself has recently observed that a term used in the Rome Statute does not necessarily have the same meaning in every provision of the Statute: Office of the Prosecutor, *Situation in the Islamic Republic of Afghanistan - Consolidated Prosecution Response to the Appeals Briefs of the Victims*, ICC-02/17, para. 40 (22 Oct. 2019) (citing RICHARD GARDINER, *TREATY INTERPRETATION* (2nd ed., 2015)).

⁴⁶ Assembly of States Parties to the Rome Statute of the International Criminal Court, Thirteenth Session, Official Records, Vol. 1, ICC-ASP/13/20, p. 5 (8-17 Dec. 2014). See also *infra* note 109.

⁴⁷ Rome Statute, *supra* note 2, art. 119(1); see also art. 119(2).



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implicit or a mere side-effect of procedural provisions such as Article 125 of the Rome Statute.⁴⁸ Accession to the Rome Statute – even when valid – was never intended to serve such a purpose or to carry such weight in a jurisdictional regime explicitly based on the delegation of sovereign ability to prosecute. As noted above, the OTP itself, along with the UN Secretary-General, the Court’s Registrar, and the President of the ASP, have indeed all recognized that such normative shortcuts cannot suffice for purposes of the crucial exercise of establishing the Court’s jurisdiction. The Court, much like the OTP,⁴⁹ would thus be abdicating its duty to resolve the legal question of establishing jurisdiction under Article 12 if it failed to conduct a careful and independent assessment of the law and facts at issue.⁵⁰ Any such assessment, as will now be shown, cannot but lead to the conclusion that no sovereign Palestinian State – let alone one that has title to territory over which it has the requisite criminal jurisdiction that may be delegated to the Court – is in existence.

D. THE PALESTINIAN ENTITY MANIFESTLY FAILS TO SATISFY THE SUBSTANTIVE REQUIREMENT FOR JURISDICTION UNDER ARTICLE 12(2) OF THE ROME STATUTE

26. Having clarified that the purported accession of “Palestine” to the Rome Statute cannot of itself satisfy the jurisdictional requirement under Article 12, it will now be demonstrated that a sound substantive assessment of the legal and factual records would inevitably lead to the conclusion that no jurisdiction exists. This is chiefly because sovereignty over the West Bank and the Gaza Strip is currently in abeyance, and the Palestinian entity does not meet the established criteria for statehood under general international law. The 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. In these circumstances, it is clear that the precondition to the ICC’s jurisdiction, as enshrined in Article 12(2) of the Court’s Statute, is once again not met.

27. *No Palestinian State has ever been in existence, and sovereignty over the West Bank and the Gaza Strip is in abeyance.* The territory that in 1922 became known as “Mandatory Palestine” had formed part of the Ottoman Empire until Turkey (as successor to the Ottoman Empire) relinquished sovereignty over it when ceding various territories to the administration of the

⁴⁸ See also Vidmar, *supra* note 38, at para. 72 (adding, at para. 60, with reference to international treaties, that “[t]he object and purpose of these treaties is not State creation or clarification of legal status. It would be a misuse of international treaty law if they were interpreted in this way and the legal status of an entity established by a reverse reading of the term ‘State party’ in multi-lateral treaties”). Vidmar further explains that accession to treaties or international organizations is not constitutive of statehood given the fact that “[b]ecause of the political nature of voting, sometimes non-State entities are given a chance to participate in international forums that are intended to be reserved for States. Yet this does not automatically make them States under international law” (at para. 69).

⁴⁹ Rome Statute, *supra* note 2, art. 42.

⁵⁰ See, in the same vein, the examination by the ICTY of Croatian statehood in Prosecutor v. Slobodan Milošević, Case No. IT-02-54-T, Decision on Motion for Judgement of Acquittal, paras. 85-115 (Int’l Crim. Trib. for the Former Yugoslavia 16 Jun. 2004), http://www.icty.org/x/cases/slobodan_milosevic/tdec/en/040616.htm (last accessed: 19 Dec. 2019).



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Allied Powers following its defeat in the First World War.⁵¹ This disposition, as the arbitral tribunal in *Eritrea v. Yemen* put it, “created for the [territory in question] an objective legal status of indeterminacy pending a further decision of the interested parties”.⁵² Between the years 1917 and 1948, Great Britain administered the territory, first through military control and later as a mandatory power under the League of Nations system. Sovereignty over it remained in abeyance during the British Mandate,⁵³ which was endorsed by the League Council and constituted a binding international instrument.⁵⁴ Recognizing the “historical connection of the Jewish people with Palestine”, the Mandate explicitly entrusted Great Britain with putting into effect the 1917 Balfour Declaration that was made “in favour of the establishment in Palestine of a national home for the Jewish people”.⁵⁵ It further provided that “recognition has thereby been given to the historical connection of the Jewish people with Palestine and to the grounds for reconstituting their national home in that country”, thus acknowledging the indigenous rights of the Jewish people to the land as predating the Mandate.⁵⁶ The establishment of a Jewish national home was to be done without prejudice to “the *civil and religious* rights of existing

⁵¹ This was incorporated in the 1920 Treaty of Sèvres, which was superseded by the 1923 Treaty of Lausanne, wherein Turkey renounced all rights and title over its former territories situated outside its frontiers: Treaty of Peace with Turkey Signed at Lausanne, art. 16, 24 July 1923, 28 L.N.T.S 11. The name “Palestine” was adopted in the 2nd century AD by the Roman Empire ruler of the territory: see Encyclopaedia Britannica, *Palestine* (last updated: 3 October 2019), available at <https://www.britannica.com/place/Palestine> (last accessed: 19 Dec. 2019). This was done “[i]n an effort to wipe out all memory of the bond between the Jews and the land, Hadrian changed the name of the province from Iudaea to Syria-Palestina ...” (S. Safrai, *The Era of the Mishnah and Talmud* (70-640), in *A HISTORY OF THE JEWISH PEOPLE* 307, 334 (H.H. Ben-Sasson ed., 1976)).

⁵² Territorial Sovereignty and Scope of the Dispute (*Eritrea v. Yemen*), R.I.A.A. Vol XXII 209, para. 445 (Perm. Ct. Arb. 1996) (referring to Article 16 of the Treaty of Lausanne and, more specifically, to territories similarly renounced by Turkey).

⁵³ See also Malcolm N. Shaw, *The League of Nations Mandate System and the Palestine Mandate: What Did and Does it Say About International Law and What Did and Does it Say About Palestine?*, 49 *ISR. L. REV.* 287, 295 (2016). For the observation that “[s]overeignty over a Mandated Territory is in abeyance”, see *International Status of South-West Africa*, Advisory Opinion, 1950 I.C.J. 128, at 150 (11 Jul. 1950) (Separate Opinion of Judge McNair); JAMES CRAWFORD, *BROWNLIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 235 (9th ed., 2019).

⁵⁴ See also *South West Africa (Liberia v. South Africa)*, Preliminary Objections, 1962 I.C.J. Rep. 319, p. 330 (21 Dec. 1962).

⁵⁵ *Mandate for Palestine*, 3 *League of Nations Official Journal* 1007 (1922), preambular para. 2. The Balfour Declaration of 1917 stated that “His Majesty’s Government [of the United Kingdom of Great Britain and Northern Ireland] view with favour the establishment in Palestine of a national home for the Jewish people, and will use their best endeavours to facilitate the achievement of this object, it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country”: Letter from Arthur James Balfour, Secretary of State for Foreign Affairs to Lord Walter Rothschild (2 Nov. 1917). The incorporation of the Balfour Declaration into the Mandate for Palestine was expressly agreed in a resolution of the Principal Allied Powers at the San Remo Conference of 24-25 April 1920. Churchill, as Secretary of State for the Colonies, made it clear that British correspondence dating from 1915 that offered to the Arabs independence in parts of the territories that belonged to the Ottoman Empire (“the McMahon pledge”), had excluded “[t]he whole of Palestine west of the Jordan”: see the Report of the Palestine Royal Commission (the Peel Commission), which was appointed in 1936 by the British government to investigate the causes of unrest among Palestinian Arabs and Jews: *PALESTINE ROYAL COMMISSION REPORT, PRESENTED BY THE SECRETARY OF STATE FOR THE COLONIES TO PARLIAMENT BY COMMAND OF HIS MAJESTY*, 1937, Cms. 5479 pp. 19-20 (Gr. Brit.).

⁵⁶ *Mandate for Palestine*, *ibid.*, at preambular para. 3.



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non-Jewish communities in Palestine”.⁵⁷ Article 5 of the Mandate, which provided that no part of the territory of Mandatory Palestine would be ceded or leased to any foreign power, and other terms in the Mandate as well as its extensive *travaux préparatoires*, attest to the understanding at the time that the right of the Jewish people to a national home extended to the entire territory of Mandatory Palestine.⁵⁸

28. The rights of the Jewish people under the Mandate were preserved by virtue of Article 80(1) of the UN Charter, the inclusion of which was advanced precisely by those supporting the establishment of a Jewish national home in Palestine⁵⁹ – and under strong opposition from the Arab States. On 29 November 1947, following the announcement of the British Government of its intention to withdraw from Mandatory Palestine, the UN General Assembly adopted resolution 181, recommending the partition of the land into a Jewish State and an Arab State.⁶⁰ This resolution was reluctantly accepted by the representatives of the Jewish community in Palestine, but was explicitly rejected by the Arab States and the Palestinian Arab representatives and thus fell into desuetude.⁶¹ On 14 May 1948 the British Mandate was officially terminated

⁵⁷ *Ibid.*, preambular para. 2 (emphasis added). It is not without significance that the Mandate does not refer to any *political* rights of those non-Jewish communities in Palestine.

⁵⁸ *Ibid.*, art. 5. This is also implicit in the resolution of the Council of the League of Nations approving the separation of Transjordan from the territory of Mandatory Palestine (as envisaged in art. 25 of the Mandate), in which it was made clear that the establishment of a national home for the Jewish people was “not applicable to the territory known as Transjordan”: see *Article 25 of the Mandate for Palestine*, Eighth Meeting (Public), 3 League of Nations O. J. 1188-9 (1922). In the same vein, the obligation under art. 6 of the Mandate to facilitate Jewish immigration and to encourage “close settlement by Jews on the land” applied to the entire Mandatory Palestine.

⁵⁹ Article 80(1) provides that “Except as may be agreed upon in individual trusteeship agreements, made under Articles 77, 79, and 81, placing each territory under the trusteeship system, and until such agreements have been concluded, nothing in this Chapter shall be construed in or of itself to alter in any manner the rights whatsoever of any states or any peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties”. See also Dietrich Rauschnig, *Article 77*, in Simma et al. Commentary, *supra* note 35, at pp. 1861-1862; Huntington Gilchrist, *Colonial Questions at the San Francisco Conference*, 39(5) AMER. POL. SCI. REV. 982, 990-991 (1945) (referring to Article 80 in saying that “[t]his clause resulted from the fears of mandatory powers lest their legal position in the mandated territories be taken away out of hand by the trusteeship system. There were also fears on the part of minority groups (such as the supporters of the Jewish people in relation to Palestine) lest their privileges under the League Covenant and the mandates should be taken away”); LELAND M. GOODRICH ET AL., CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS 495 (1969); Shaw, *supra* note 53, at p. 303; Eugene V. Rostow, *The Future of Palestine*, in 24 MCNAIR PAPER, INSTITUTE FOR NATIONAL STRATEGIC STUDIES, NATIONAL DEFENSE UNIVERSITY 10-11 (1993).

⁶⁰ G.A. Res. 181 (II), U.N. Doc. A/RES/181(II) (29 Nov. 1947), designating the City of Jerusalem to be placed under a special international regime. The United Nations Special Commission on Palestine had earlier concluded that the “Arabs of Palestine ... have not been in possession of it [Palestine Mandate territory] as a sovereign nation”, and that there were “no grounds for questioning the validity of the Mandate for the reason advanced by the Arab States”: U.N.S.C.O.P., *Question of Palestine/Majority plan (Partition), Minority plan (Federal State)*, paras. 163, 179, U.N. Doc. A/364 (3 Sep. 1947).

⁶¹ See also Crawford 2006, *supra* note 41, at pp. 424-425, 430-432. Needless to say, UN General Assembly resolutions such as resolution 181 are, in any event, without binding effect. Recent claims that Israel had subsequently accepted the territorial delimitation suggested by the UN partition plan through signing the 1949 Lausanne Protocol are misleading, as Israel merely agreed therein to regard the plan as a basis for future discussions on borders. This political willingness in no way indicated any waiver of legal rights or claims. For example, the Director General of the Israeli Ministry of Foreign Affairs, representing Israel in Lausanne, made it there clear that accepting the November 29th frontiers as a “*base de travail*” did not mean acquiescence in them: Letter from W. Eytan (the Director General of the Israeli Ministry of Foreign Affairs) to M. Sharett (Israel’s Minister for Foreign Affairs), 9 May 1949. That Israel did not waive any of



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and the State of Israel was established, only to be invaded on the following day by several Arab States.⁶²

29. The 1948 war, during which Jordan and Egypt took control over the West Bank and the Gaza Strip respectively, ended in 1949 in a series of armistice agreements between Israel and its neighbors. These laid down that the armistice lines (later to be referred to as the “Green Line”) were to be temporary, do not construe “in any sense ... a political or territorial boundary”, and were delineated “without prejudice to rights, claims and positions of either Party hereto in the ultimate peaceful settlement of the Palestine question”.⁶³ Sovereignty over the West Bank and the Gaza Strip thus remained in abeyance.⁶⁴
30. In June 1967, acting in self-defense, Israel gained control of the West Bank and the Gaza Strip and unified under its sovereignty the city of Jerusalem. Any argument that the West Bank and the Gaza Strip are since then occupied affects neither Israel’s longstanding claim to that territory nor the fact that sovereignty over it remains in abeyance, as belligerent occupation does not invalidate any pre-existing claims to the territory concerned. On 22 November 1967, the UN Security Council unanimously adopted resolution 242, affirming that the fulfillment of the principles of the UN Charter in achieving peace in the Middle East “should include the application of both the following principles”: Israel’s withdrawal from territories, and respect for the right of every State in the area to exist within secure and recognized borders.⁶⁵ This

its territorial rights or claims is further evident in, *inter alia*, the subsequent armistice agreements with Arab States and the agreements concluded between Israel and the Palestinians.

⁶² UN Secretary-General Trygve Lie later described the Arab invasion as “the first armed aggression the world has seen since the end of the [Second World] [W]ar”: TRYGVE LIE, *IN THE CAUSE OF PEACE: SEVEN YEARS WITH THE UNITED NATIONS* 174 (1954).

⁶³ General Armistice Agreement, Egypt-Isr., 24 Feb. 1949, 42 U.N.T.S. 251, arts. V(2), V(3) and XI; see also General Armistice Agreement, Isr.-Jordan, 3 Apr. 1949, 42 U.N.T.S. 303, arts. II(2), IV(2) and VI(9).

⁶⁴ Any argument that when Israel gained control over the West Bank in 1967, that territory had already belonged to a State, is therefore without any merit. In particular, on 15 May 1950, the Arab League agreed that Jordan’s purported annexation of the West Bank that year was illegal: see *Jordan’s annexation in Palestine is called illegal by Arab League*, THE NEW YORK TIMES (16 May 1950); U.S. DEPARTMENT OF STATE – OFFICE OF INTELLIGENCE RESEARCH, INTELLIGENCE REPORT, NO. 6565, *DISUNITY AMONG THE ARAB STATES: THE HASHEMITE CONTROVERSY AND ARAB PALESTINE*, p. 9 (1954), available at https://www.cia.gov/library/readingroom/docs/HUSSEINI%2C%20AMIN%20EL%20%20%20VOL.5_0204.pdf (last accessed: 19 Dec. 2019). Israel, for its part, maintained its claim to the territory, including through the 1949 armistice agreements and by asserting that it did not consider itself bound by the annexation unilaterally proclaimed by the Jordanian Parliament. The official Israeli position was indeed that “[t]his is a unilateral act that is in no way binding on Israel. We have concluded an armistice agreement with the Hashemite Jordan Kingdom and it is our firm intention fully to abide by it. This agreement, however, entails no final political settlement, and no such final settlement is possible without negotiations and the conclusion of a peace treaty between the two parties. It should therefore be clear that the status of the Arab areas west of the Jordan remains an open question as far as Israel is concerned”: *Two areas united by vote in Jordan*, THE NEW YORK TIMES (25 Apr. 1950); see also Letter from M. Sharett (Israel’s Minister for Foreign Affairs) to Sir Alexander Knox Helm (the United Kingdom Minister to Israel), 2 May 1950.

⁶⁵ S.C. Res. 242, U.N. Doc. S/RES/242, para. 1 (22 Nov. 1967). It is noteworthy that the text of the resolution deliberately refers to a withdrawal of Israeli forces “from territories occupied in the recent conflict”, not from “all the territories occupied”. Lord Caradon, who served as Permanent Representative of the United Kingdom to the United Nations between 1964 and 1970 and was the architect of resolution 242, later explained that “[w]e could have said: well, you go back to the 1967 line. But I know the 1967 line, and it’s a rotten line. You couldn’t have a worse line for a permanent international boundary. It’s where the troops happened to be on a certain night in 1948. It’s got no relation to



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resolution was later accepted by Israel, Egypt, and Jordan, as well as the Palestine Liberation Organization (PLO, as the representative of the Palestinian people), as the basis for permanent settlement of their respective disputes.⁶⁶ The 1979 Egypt-Israel Peace Treaty and the 1994 Jordan-Israel Peace Treaty were concluded without prejudice to the status of territories that came under Israeli control in 1967,⁶⁷ thus again leaving sovereignty over them in abeyance.

31. In 1993, Israel and the Palestinians agreed to settle their dispute – including their competing claims to the West Bank and the Gaza Strip – through bilateral negotiations leading to a just and lasting peace. The Interim Agreement concluded between the parties with the encouragement of the international community in 1995 stipulates that no side may “change the status of the West Bank and the Gaza Strip pending the outcome of permanent status negotiations”.⁶⁸ The Palestinians have systematically and repeatedly violated the agreements reached with Israel, including by supporting terrorism and by the very attempt to unilaterally assert statehood before the ICC, yet this does not absolve them from their obligations thereunder. Permanent status negotiations have not yet been concluded,⁶⁹ and sovereignty over the West Bank and the Gaza Strip thus remains in abeyance to the present day.
32. In these circumstances, 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. Recent revisionist attempts to argue otherwise simply cannot be sustained by the legal and historical record, including the Palestinians’ own narrative over the decades.⁷⁰

the needs of the situation. ... We meant that the occupied territories could not be held merely because they were occupied, but we deliberately did not say that the old line, where the troops happened to be on that particular night many years ago, was an ideal demarcation line”: *An Interview with Lord Caradon*, 5(3/4) J. Palestine Stud. 142, 144-145 (1976). The resolution itself acknowledges that borders have yet to be determined, and that any such determination ought to be made through “a peaceful and accepted settlement”.

⁶⁶ Peace Treaty between Israel and Egypt, Egypt-Isr., art. II, 26 Mar. 1979, 1138 U.N.T.S. 59, preambular para. 1; Treaty of Peace between the State of Israel and the Hashemite Kingdom of Jordan, Isr.-Jordan, art. 3(1)-(2), 26 Oct. 1994, 2042 U.N.T.S. 351, preambular para. 3; Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, 28 Sep. 1995, at preambular paras. 5 and 6.

⁶⁷ With the exception of the Sinai Peninsula. See Peace Treaty between Israel and Egypt, *ibid.*, art. II; Treaty of Peace between the State of Israel and the Hashemite Kingdom of Jordan, *ibid.*, arts. 3(1) and (2).

⁶⁸ Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, *supra* note 66, art. XXXI (7). Israel’s disengagement from the Gaza Strip in 2005 did not mark a renunciation of its claim to the territory, nor did it alter the legal situation by which sovereignty over the Gaza Strip remains in abeyance, and the Interim Agreement applies to it (*mutatis-mutandis*). As was stated by the Israeli Government, “[t]he process set forth in the [disengagement] plan is without prejudice to the relevant agreements between the State of Israel and the Palestinians. Relevant arrangements shall continue to apply”: *Israeli Cabinet Resolution regarding the Disengagement Plan, Government Decision No. 1996*, Revised Disengagement Plan, Addendum A, para. 1(7) (6 Jun. 2004).

⁶⁹ Israel’s willingness to resume permanent status negotiations without further delay has been repeatedly stated, including in recent years and by the highest levels of Government. On the Palestinian approach, see, for example, BILL CLINTON, MY LIFE 944-945 (2005) (“Arafat’s rejection of my proposal after Barak accepted it was an error of historic proportions”); the Palestinians have similarly rejected or refused to respond to other compromise proposals, including those made in the Proximity Talks process (May-September 2010); the Quartet’s 2011 proposal (September 2011); the Amman rounds (January 2012); and the Kerry Framework negotiations (July 2013-April 2014).

⁷⁰ See also *infra* note 106.



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33. *The Palestinian entity does not meet the established criteria for statehood under international law, including effective control.* It is well established in international law that the creation of a State requires, *inter alia*, a government with full governmental powers over the territory that it claims.⁷¹ The Palestinian entity, however, has never possessed – and does not now possess, either in law or in fact – key elements of such effective territorial control.
34. The Palestinian Authority (“PA”) is a legal entity created by the bilateral agreements entered into by the PLO and Israel, and possesses only those powers specifically transferred to it under these agreements. The agreements explicitly state that Israel maintains all residual powers and responsibilities not transferred to the Palestinian Authority: “the jurisdiction of the [Palestinian Authority] will cover West Bank and Gaza Strip territory ... except for: ... powers and responsibilities not transferred to [it]”.⁷² Israel is thus “the fount of authority and the retainer of residual powers”,⁷³ which again indicates that the Palestinians do not have sovereignty.
35. More specifically, the bilateral Israeli-Palestinian agreements provide for the transfer to the Palestinians of only limited powers, which do not come close to effective control: the Palestinian Negotiations Support Unit has itself concluded that “[t]he administrative powers accorded to the PA by the Interim Agreements are much more limited than the powers of a government”.⁷⁴ Significantly, Israel retains control over external security, as the Interim

⁷¹ See the rules of international law enshrined in the Montevideo Convention on Rights and Duties of States, art. 1, 26 Dec. 1933, 165 L.N.T.S. 19. This has also been the approach of the International Criminal Tribunal for the former Yugoslavia in *Prosecutor v. Slobodan Milošević*, *supra* note 50, at para. 86: “These four criteria [enumerated in Article 1 of the Montevideo Convention] have been used time and again in questions relating to the creation and formation of states. In fact, reliance on them is so widespread that in some quarters they are seen as reflecting customary international law”. As *Oppenheim’s International Law* puts it, “[a] state proper is in existence when a people is settled in a territory under its own sovereign government. ... There must ... be a *sovereign* government. Sovereignty is supreme authority, which on the international plane means not legal authority over all other states but rather legal authority which is not in law dependent on any other earthly authority. Sovereignty in the strict and narrowest sense of the term implies, therefore, independence all round, within and without the borders of the country”: ROBERT JENNINGS & ARTHUR WATTS, *OPPENHEIM’S INTERNATIONAL LAW: PEACE*, vol. 1, pp. 120, 122 (9th ed., 2008) (emphasis in original). See also Crawford 2006, *supra* note 41, at p. 46 (“the right to be a State is dependent at least in the first instance upon the exercise of full governmental powers with respect to some area of territory”); MALCOLM N. SHAW, *INTERNATIONAL LAW* 157 (8th ed., 2017). Even if some suggest that a more flexible approach to this condition may be adopted when considering the situation of an existing State, it has been applied strictly when considering the possible creation of a new State: Crawford 2006, *supra* note 41, at p. 59; see also para. 41 below.

⁷² Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, *supra* note 66, art. XVII(1). See also art. I(1) (“Israel shall transfer powers and responsibilities as specified in this Agreement from the Israeli military government and its Civil Administration to the Council in accordance with this Agreement. Israel shall continue to exercise powers and responsibilities not so transferred”); art. I(5) (“... The withdrawal of the military government shall not prevent it from exercising the powers and responsibilities not transferred to the Council”); and art. XVII(4)(a) (“Israel, through its military government, has the authority over areas that are not under the territorial jurisdiction of the Council, powers and responsibilities not transferred to the Council and Israelis”).

⁷³ YORAM DINSTEIN, *THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION* 58 (2009). See also Joel Singer, *The Oslo Peace Process – A View from Within*, in *NEW POLITICAL ENTITIES IN PUBLIC AND PRIVATE INTERNATIONAL LAW WITH SPECIAL REFERENCE TO THE PALESTINIAN ENTITY* 17, 49 (A. Shapira and M. Tabory eds., 1999) (“It is noteworthy that the possession of residual powers is normally an *indicia* of being the source of authority”).

⁷⁴ Internal Memorandum from the Negotiations Support Unit to Dr. Saeb Erekat entitled “Implications of Change in *de facto* Control in Gaza” (19 Jun. 2007), available at <http://www.ajtransparency.com/en/projects/thepalestinepapers/20121822587187346.html> (last accessed: 19 Dec. 2019)



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Agreement specifies that “Israel shall continue to carry the responsibility for defense against external threats, including the responsibility for protecting the Egyptian and Jordanian borders, and for defense against external threats from the sea and from the air, as well as the responsibility for overall security of Israelis and Settlements, for the purpose of safeguarding their internal security and public order, and will have all the powers to take the steps necessary to meet this responsibility”.⁷⁵ The Palestinians also lack any control over other key attributes of sovereignty, such as airspace⁷⁶ and major aspects of tax collection;⁷⁷ and the Palestinian Authority’s criminal jurisdiction is very much limited.⁷⁸ Significantly, the exercise of some powers, such as the use of the electromagnetic sphere and the establishment of telecommunication networks, is subject to Israeli cooperation or consent.⁷⁹ The provision of certain monetary services is similarly dependent upon Israeli authorization.⁸⁰ All of this is certainly not “exclusive and complete authority”, which the OTP itself has found to be required for purposes of exercising the Court’s jurisdiction.⁸¹ Moreover, any limited powers that the Palestinian Authority does hold are anyway confined by the agreements both geographically (to certain designated areas) and *in personam* (only to Palestinians and non-Israelis).⁸²

36. Despite their repeated breaches by the Palestinians, the bilateral Israeli-Palestinian agreements continue to form the applicable legal framework governing the conduct of the parties. This has repeatedly been acknowledged by the parties, including most recently⁸³ and in writing,⁸⁴

(acknowledging also that “[t]he [Occupied Palestinian Territory] should not be treated as a state since it lacks the attributes of statehood”).

⁷⁵ Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, *supra* note 66, art. XII(1). Under the Agreement, Israel transferred to the Palestinian Authority certain powers relating only to internal security (arts. XII-XIII and arts. IV-VI of Annex I); it also transferred some powers pertaining to certain civil affairs such as education, municipal matters, and health (for example, Annex III, Appendix I, arts. 9, 17, 20, 36, 37).

⁷⁶ *Ibid.*, Annex I, art. XIII (4): “All aviation activity or use of the airspace by any aerial vehicle in the West Bank and the Gaza Strip shall require prior approval of Israel”.

⁷⁷ See, for example, 1994 Agreement on the Gaza Strip and the Jericho Area, Annex IV: Protocol on Economic Relation between the Government of the State of Israel and the P.L.O., representing the Palestinian people, art. III, VI, April 29, 1994.

⁷⁸ See paras. 56-60 below.

⁷⁹ *Id.*, at Annex III, arts. 28 and 36(A)(2)(a).

⁸⁰ Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, *supra* note 66, at Annex III, art. 29.

⁸¹ *Report on Preliminary Examination Activities 2019*, *supra* note 12, at para. 48. The OTP quotes in this context the well-known Award in the *Island of Palmas* case, in which it has also been stated, *inter alia*, that “[s]overeignty 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. ... Territorial sovereignty, as has already been said, involves the *exclusive right* to display the activities of a State”: *Island of Palmas*, *supra* note 18, at pp. 838-839 (emphasis added).

⁸² Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, *supra* note 66, art. XVII (2)(a) and Annex III. Israel transferred to the Palestinian Authority certain legislative powers that in any event “shall not derogate from Israel’s applicable legislation over Israelis in personam” (*ibid.*, arts. XVIII (4) and XVII(4)).

⁸³ See, for example, *President Abbas meets Palestinian community in US on sidelines of 74th session of UN General Assembly in New York*, Wafa (23 Sep. 2019), available at <http://english.wafa.ps/page.aspx?id=Crv2Xia113546988159aCrv2Xi> (last accessed: 19 Dec. 2019); *President Abbas: All agreements with Israel will end once it annexes any part of the Palestinian territory*, Wafa (9 Sep. 2019), available at <http://english.wafa.ps/page.aspx?id=hPcYhZa111508333233ahPcYhZ> (last accessed: 19 Dec. 2019); President Mahmoud Abbas’s address to foreign ministers of the Arab League on 21 April 2019, in which he said that



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despite isolated political statements to the contrary by some Palestinian officials.⁸⁵ Current ongoing engagement between Israeli and Palestinian officials is indeed based on the agreements, with bilateral discussions underway in recent months within the framework of joint committees established by the Interim Agreement to facilitate further implementation thereof in various fields such as security, water, and sewage management. Moreover, several agreements have been reached in these fields between the two sides in recent years, with explicit reliance on the terms of the Interim Agreement. The international community, too, has reiterated on numerous occasions its support for the existing bilateral agreements as an applicable legal framework for settling the Israeli-Palestinian conflict and determining the sovereign status of the territory in dispute.⁸⁶

37. Also of note is that the Palestinian Authority does not exercise control over the Gaza Strip,⁸⁷ where more than 40 percent of the Palestinian population resides.⁸⁸ Nor does it exercise control

“we [the PA] are committed to all the agreements” (video recording available at <https://www.youtube.com/watch?v=NsW3gPt9Tio> (minutes 7:45-8:30) (last accessed: 19 Dec. 2019)); *President says he is ready to sever all ties with Israel if it keeps ignoring agreements*, Wafa (3 July 2019), available at <http://english.wafa.ps/page.aspx?id=YKo1zda110829733344aYKo1zd> (last accessed: 19 Dec. 2019) (“If it continues in not honoring them, we will cancel all the agreements between us no matter what will happen”); President Mahmoud Abbas’s address to the UN Security Council: UN S.C. 8183rd meeting, U.N. Doc. S/PV.8183, 9 (20 Feb. 2018) (referring to existing obligations under the Oslo Accords of 1993). Palestinian statements from recent years, claiming that Israel has violated the Agreements, similarly indicate the Palestinians’ view that the Israeli-Palestinian agreements are indeed in force: see *Palestinian cabinet condemns Israel’s decision to cut tax revenues*, Wafa (19 Feb. 2019), available at <http://english.wafa.ps/page.aspx?id=c1pseca108483662199ac1psec> (last accessed: 19 Dec. 2019); *Abbas: Liberman Violated Oslo Accords by Naming PNF a Terror Organization*, THE JERUSALEM POST (17 Mar. 2017), available at <https://www.jpost.com/Arab-Israeli-Conflict/Abbas-Liberman-violated-Oslo-accords-by-naming-PNF-a-terror-organization-484448> (last accessed: 19 Dec. 2019).

⁸⁴ For example, several bilateral agreements signed in 2015, 2016 and 2017 in connection with electricity, water, telecommunications, and postal issues, all refer in explicit terms to the Interim Agreement and are said to be concluded pursuant to it. See also Adam Rasgon, Tovah Lazaroff and Sharon Udasin, *Israel gives Pal. Authority limited water autonomy in West Bank*, THE JERUSALEM POST (17 Jan. 2017), available at <http://www.jpost.com/Arab-Israeli-Conflict/Israel-gives-Pal-Authority-limited-water-autonomy-in-West-Bank-478672> (last accessed: 19 Dec. 2019); *Israel, Palestinians sign 3G mobile network agreement*, REUTERS (19 Nov. 2015), available at <https://www.reuters.com/article/us-israel-palestinians-3g-idUSKCN0T81MS20151119> (last accessed: 19 Dec. 2019); *Israel, PA sign deal on massive Palestinian electricity bill*, THE TIMES OF ISRAEL (13 Sep. 2016), available at <https://www.timesofisrael.com/israel-pa-sign-deal-on-massive-palestinian-electricity-bill/> (last accessed: 19 Dec. 2019).

⁸⁵ Such statements clearly do not amount to a notice of denunciation or withdrawal, and cannot have any such effect. In any event, Israel has never received any such notice.

⁸⁶ See, for example, G.A. Res. 73/19, U.N. Doc. A/RES/73/19, preambular para. 25 and operative paras. 16 and 19 (23 Jan. 2019); G.A. Res. 73/256, U.N. Doc. A/RES/73/256, preambular para. 2 (5 Dec. 2018); S.C. Res. 2334, U.N. Doc. S/RES/2334, para 8 (23 Dec. 2016); G.A. Res. 67/19, *supra* note 35, at para. 5.

⁸⁷ Despite several attempts at unity, the division between Hamas in the Gaza Strip and the Palestinian Authority in the West Bank persists, with different authorities administering those territories. See, for example, the Palestinian position recorded in the Report of the detailed findings of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1, U.N. Doc. A/HRC/29/CRP.4, para. 666 (24 Jun. 2015): “The Palestinian Authority claims that its failure to open investigations results from insufficient means to carry out investigations in a territory over which it has yet to re-establish unified control”.

⁸⁸ See also UN Security Council, Report of the Committee on the Admission of New Members Concerning the Application of Palestine for Admission to Membership in the United Nations, para. 12, U.N. Doc. S/2011/705 (11 Nov. 2011): “... it was stated that Hamas was in control of 40 per cent of the population of Palestine; therefore the Palestinian Authority could not be considered to have effective government control over the claimed territory”.



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in as much as 60 percent of the West Bank area claimed by the Palestinians to be theirs. This is quite apart from the fact that the Palestinians neither have nor exercise any powers over Jerusalem.

38. The Palestinians themselves claim that Israel is occupying the Gaza Strip, the West Bank and east Jerusalem,⁸⁹ thus suggesting that Israel has effective control over these territories to the exclusion of others.⁹⁰ Under such circumstances, occurring since 1967, the essential criterion of effective territorial control clearly cannot be met: if the territory is occupied, then the effective control over it must by definition rest with Israel, not with the Palestinians. The Palestinians' own Negotiations Support Unit has indeed recognized that "ending the occupation ... is a basic requirement for creation of a sovereign Palestinian state".⁹¹ In a legal memorandum dealing specifically with Palestinian strategy before the ICC, it thus concluded that the claim that Israel is occupying the West Bank and the Gaza Strip creates an insurmountable obstacle in establishing ICC jurisdiction over the "Situation in Palestine", as "a state will only emerge upon termination of Israeli occupation".⁹²
39. Needless to say, Israel's presence in the West Bank is fully in accordance with international law: Israel gained control over the territory in an act of lawful self-defense;⁹³ it applies the humanitarian provisions of the international law of occupation (despite its principled position that they do not apply *de jure*);⁹⁴ and it has repeatedly expressed its commitment to negotiate with the Palestinians this state of affairs. As recognized in the agreements already concluded between Israel and the Palestinians and Security Council resolution 242,⁹⁵ the withdrawal of Israeli armed forces and the determination of secure and recognized boundaries is a matter for

⁸⁹ See, for example, the official statement entitled *Borders*, found at the Palestinian Liberation Organization – Negotiation Affairs Department website, available at <https://www.nad.ps/en/our-position/borders> (last accessed: 19 Dec. 2019).

⁹⁰ That occupation of a territory requires the exercise of control to the exclusion of others is firmly established in international law and practice. See, for example, Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, art. 42, 18 Oct. 1907, 205 C.T.S. 277; *The Prosecutor v. Naletilic et al.*, IT-98-34-T, Judgement, para. 217 (31 Mar. 2003); *The United Kingdom Ministry of Defence, Joint Service Manual of the Law of Armed Conflict*, JSP 383, [11.3] (10 Feb. 2004); *United States Department of Defense, Law of War Manual*, [11.2.2.2] (June 2015). For the view of publicists, see, for example, Adam Roberts, *What is Military Occupation?*, 55(1) BRIT. Y.B INT'L L. 249, 300-1 (1985); Dinstein, *supra* note 73, at pp. 42-43.

⁹¹ Memorandum from the Negotiations Support Unit to Palestinian Leadership entitled "Legal approaches to be advanced at the ICC in order to protect overall Palestinian strategy and realize rights and interests" (25 Mar. 2009), available at <http://www.ajtransparency.com/en/projects/thepalestinepapers/201218205613718519.html> (last accessed: 19 Dec. 2019).

⁹² *Ibid.* The memorandum explains that arguing that the "State of Palestine" came into existence during the occupation is "NOT RECOMMENDED" (emphasis in original), given that "[i]t will be very difficult to meet the Montevideo criteria for statehood (*i.e.*, permanent population, defined territory, effective government and capacity to enter into foreign relations) under current circumstances. This is because a state of occupation arguably negates the effective control required for the emergence of a state".

⁹³ See also YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 192 (4th ed., 2004).

⁹⁴ See also Meir Shamgar, *The Observance of International Law in the Administered Territories*, 1 ISRAEL Y.B HUM. RTS. 262 (1971), in which the Israeli Government's position was first presented by the then Attorney General of Israel.

⁹⁵ See para. 30 above.



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peace negotiations between the parties. The continued exercise of authority by Israel in this territory, pending such negotiations, is thus consistent with applicable international law and existing bilateral agreements. Any claim that Israel's presence in the West Bank amounts to "unlawful occupation" is thus without any merit.⁹⁶

40. ***A right of self-determination must not be conflated with statehood.*** International law clearly distinguishes between self-determination and the legal status of statehood: while the former concerns the right of peoples to determine their political condition and to pursue freely their economic, social and cultural development, the latter is merely one possible outcome of the realization of such a right.⁹⁷ Therefore, recognition of the right of the Palestinians to self-determination does not amount to recognition of an already existing sovereign Palestinian State, and cannot of itself establish one. Statements made on the international plane in reference to the right of the Palestinians to self-determination indeed describe Palestinian statehood as an aspiration, and not as an existing legal fact.⁹⁸ Cassese has thus opined, after indicating that "there is no agreement ... on the exact territory in which the [Palestinian] right to self-determination is to be exercised", that "[t]he only indications that can be drawn from the international legal rules and UN resolutions are to the effect that the right must be exercised peacefully, that is, through negotiations between all the parties concerned and on the basis of

⁹⁶ The Israeli presence in the West Bank is indeed markedly different from such situations where an occupation has resulted from a breach of the *jus ad bellum*, as was the case, for example, with the Iraqi occupation of Kuwait, or Uganda's occupation of the DRC (see *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 2005 I.C.J. Rep. 116, paras. 259, 345, (19 Dec. 2005)). In these cases, as with the occupation of Namibia by South Africa, the illegality of the occupation as a matter of international law was determined by the Security Council, the International Court of Justice, or both. It is noteworthy that even the finding that Namibia was unlawfully occupied did not – and indeed could not – of itself give rise to Namibian statehood: see *infra* note 98.

⁹⁷ See also *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, 2019 I.C.J. 169, paras. 156-157 (25 Feb. 2019); Crawford 2006, *supra* note 41, at p. 446 ("... international law has distinguished between the right to self-determination and the actual achievement of statehood, and for good reason"); DAVID RAIČ, *STATEHOOD AND THE LAW OF SELF-DETERMINATION* 444-445 (2002); Shaw, *supra* note 71, at p. 204; Christian Tomuschat, *Secession and Self-Determination*, in *SECESSION: INTERNATIONAL LAW PERSPECTIVES* 23, 24 (Marcelo G. Kohen ed., 2006). This distinction continues to be upheld in international practice: even in cases where a right of self-determination had garnered considerable international support as a foundation for the establishment of a State, that State only came into being once the legal requirements for statehood had been met. One important example is that of Namibia, the statehood of which was attained only following the end of South Africa's occupation. As may be recalled, South Africa's administration of the territory of South West Africa (that later became Namibia) was authorized by a League of Nations Mandate, which was terminated by the United Nations in 1966. After South Africa's subsequent refusal to withdraw from the territory, its occupation thereof was determined by the UN Security Council to be illegal and was met by international sanctions and by UN General Assembly support for the armed struggle of the Namibian people for independence. Even under these extreme and unprecedented circumstances, Namibia was only established as a State after the conclusion of an agreement between South Africa, Angola and Cuba, which provided that "[a]ll military forces of the Republic of South Africa shall depart Namibia in accordance with UNSCR 435/78", and that South Africa shall "co-operate with the Secretary-General to ensure the independence of Namibia through free and fair elections ..." (Agreement among the People's Republic of Angola, the Republic of Cuba, and the Republic of South Africa, arts. 2, 3, 22 Dec., 1988, A/43/989, S/20346). On this particular matter see also *Legal Consequences of 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, p. 16, paras. 90-103, 108-116 (21 Jun. 1970); Crawford 2006, *supra* note 41, at pp. 439-440, 595-596.

⁹⁸ See paras. 21 above and 43 below.



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the freely expressed wishes of the population of the territories”.⁹⁹ This is consistent with the approach of the international community, which repeatedly calls for a negotiated solution for purposes of realizing the Palestinian right to self-determination.

41. Any suggestion that the substantive requirement of effective government may be relaxed in favor of State creation in pursuance of self-determination is of no avail. Those advocating this controversial position refer to a handful of cases that do not sufficiently lend themselves to any such generalization. What is more, such cases that have been referred to have no bearing on the present circumstances, as they concern situations where the entity claiming statehood had, at the relevant time, an exclusive claim to the relevant territory (with previous conflicting claims having by then been withdrawn).¹⁰⁰ In the present case, however, Israel has a longstanding claim to the West Bank and the Gaza Strip, and Israel and the Palestinians have explicitly agreed under existing agreements to settle their conflicting claims peacefully through negotiation.¹⁰¹ Furthermore, the cases concerned were such in which the right to self-determination was forcibly prevented, including in the colonial context.¹⁰² This is certainly not the situation in the Israeli-Palestinian case, in which Israel has not only recognized the Palestinian right to self-determination and facilitated Palestinian self-governance through bilateral agreements that established the Palestinian Authority, but has also agreed to further promote Palestinian self-rule and has repeatedly engaged in negotiation efforts for this purpose, to which it remains committed. To argue that Palestinian self-determination has not yet been fully realized as a result of alleged Israeli wrongdoing, would be to ignore repeated international and Israeli offers over the decades to enable the emergence of a Palestinian State that were all rejected by the Palestinian side.¹⁰³ Seeking to label Israel as arbitrarily denying Palestinian self-determination would thus not only be fundamentally untrue, but would require the adoption of a particular political and partisan narrative in a manner clearly inappropriate for any court of law, let alone an international criminal court.
42. ***Palestinian claims regarding recognition are wholly misleading and, in any event, are not constitutive of statehood.*** Under international law, recognition is not constitutive of statehood and cannot supersede or replace the factual and legal requirements of statehood, nor indeed compensate for their absence.¹⁰⁴ A Palestinian claim to statehood based on alleged recognition

⁹⁹ CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 240-241 (1995).

¹⁰⁰ For example, both the Democratic Republic of Congo and Guinea-Bissau, and also Bangladesh, were only established as States, and admitted to the UN, following the express agreement of the State formerly claiming the territory. In the case of the Baltic States, the UN Security Council did not consider their applications for UN membership until after the Soviet Union (that annexed their territories in 1940) agreed to recognize them as States. See also Crawford 2006, *supra* note 41, at pp. 57-58, 140-142, 181, 394-395.

¹⁰¹ See also para. 31 above.

¹⁰² See, for example, the case of Namibia: *supra* note 97.

¹⁰³ *Supra* note 71.

¹⁰⁴ See, for example, Crawford 2006, *supra* note 41, at p. 93 (“[a]n entity is not a State because it is recognized; it is recognized because it is a State”). The Badinter Arbitration Commission on Yugoslavia similarly noted that “a state’s existence or non-existence had to be established on the basis of universally acknowledged principles of international law concerning the constituent elements of a state”, and that “recognition of a state by other states has only declarative



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of “Palestine” by any number of States is thus of no legal significance in the present context. What is more, the claim does not withstand any serious factual scrutiny.

43. First, over two-thirds of the alleged recognitions relied on by the Palestinians were made in connection with the so-called Palestinian Declaration of Independence of 1988, yet the Palestinians have themselves conceded that no Palestinian State had existed either then or decades thereafter.¹⁰⁵ Such recognitions cannot therefore be relied upon. Second, many States that are alleged to have recognized “Palestine” continue to refer to a sovereign Palestinian State as a future aspiration only, and others have made it clear that, in fact, they do not recognize a Palestinian State to be in existence.¹⁰⁶ Needless to say, this is also the position of a significant number of additional States, as the Palestinians would surely acknowledge.¹⁰⁷ All things

value”: Opinion No. 8 of *Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising From the Dissolution of Yugoslavia*, 31(6) I.L.M. 1488, 1522-1523 (Nov. 1992).

¹⁰⁵ In 1998, for example, Yasser Arafat, Chairman of the Palestinian Authority, stated that “The Palestinian people were determined to declare independence ...”: Press Release, General Assembly, Chairman Arafat Says Palestinians Need Worldwide Support More Than Ever to Make Independence a Reality, U.N. Press Release Ga/PAL/788 (30 Nov. 1998). In the same vein, Mahmoud Abbas, then Secretary-General of the PLO Executive Committee, stated in 2000 that “[a] declaration of an independent state is a right our people can execute at any time. In 1988, when we declared our state in exile, more than 100 countries recognized that declaration. But recognition of a state on the ground is different than that of a state in exile. And though many nations have said they are in favor of an independent state many hinted of the necessity to declare once prepared on the ground and or after an agreement between the sides is reached. And so we must now stop and think”: Abu Mazen’s Speech at the Meeting of the PLO’s Central Council, 9 September 2000, UN press release, available at <https://unispal.un.org/DPA/DPR/unispal.nsf/0/172D1A3302DC903B85256E37005BD90F> (last accessed: 19 Dec. 2019). In their submission to the International Court of Justice in 2004, in the course of the *Wall* advisory proceedings, the Palestinians also explicitly acknowledged that a Palestinian State has yet to emerge: Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, Written Statement submitted by Palestine, para. 375 (29 Jan. 2004) (“... the fact is that Israel remains in overall control of this territory and Israeli forces remain in occupation of the West Bank, including East Jerusalem, and the Gaza Strip. These areas are together referred to as the ‘Occupied Palestinian Territory’, because the territory is not part of the territory of the State of Israel; it is territory of the Palestinian people, *destined* for a Palestinian State ...” (emphasis added)).

¹⁰⁶ See, for example, *Official Records of the General Assembly*, *supra* note 40. For more recent views, see, for example, Narendra Modi, Prime Minister of India, Speech Delivered During a Joint Conference With President Mahmoud Abbas (10 Feb. 2018), available at <https://www.diplomaticsquare.com/india-hopes-that-palestine-will-soon-be-a-sovereign-country-achieved-in-a-peaceful-manner/> (last accessed: 19 Dec. 2019) (“India hopes that soon Palestine will become a sovereign and independent country in a peaceful manner”); *President Xi’s Speech at Arab League Headquarters: Full Text*, CHINA DAILY (22 Jan. 2016), available at http://www.chinadaily.com.cn/world/2016xivisitmiddleeast/2016-01/22/content_23191229.htm (last accessed: 19 Dec. 2019) (“China firmly supports the Middle East peace process and supports the establishment of a State of Palestine enjoying full sovereignty ...”); Adam Withnall, *Vladimir Putin says Russia will fight for right of Palestinians to their own State*, THE INDEPENDENT (29 Mar. 2015), available at <https://www.independent.co.uk/news/world/middle-east/vladimir-putin-says-russia-will-fight-for-the-right-of-palestinians-to-their-own-state-10141902.html> (last accessed: 19 Dec. 2019) (quoting the Russian President as saying that “Palestinians have the right to establish an independent and habitable state ...”).

¹⁰⁷ States not recognizing “Palestine” as a State include Australia, Austria, Belgium, Canada, Cameroon, Denmark, France, Germany, Japan, Mexico, Netherlands, New Zealand, Norway, Panama, Singapore, South Korea, Switzerland, the United Kingdom, and the United States. Such positions have sometimes been put on record, *inter alia*, in communications with the UN Secretary-General as depositary, and in the context of United Nations debates or international statements and instruments: see, for example, Depositary Notification, C.N.363.2018.TREATIES-X.10 (Canada: Communication) (27 Jul. 2018) available at <https://treaties.un.org/doc/Publication/CN/2018/CN.363.2018-Eng.pdf> (last accessed: 19 Dec. 2019); Depositary notification C.N.295.2018.TREATIES-XXVI.3 (United States of America: Communication) (18 Jun. 2018), available at <https://treaties.un.org/doc/Publication/CN/2018/CN.295.2018-Eng.pdf> (last accessed: 19 Dec. 2019); Diplomatic Note of the Federal Republic of Germany to the Implementation



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considered, it is clear that Palestinian statehood has not won even the quasi-unanimous support (even among States Parties to the Rome Statute) that may arguably be said to be indicative of the existence of a Palestinian State, and the claim concerning recognition of “Palestine” simply cannot stand.

44. In the same vein, any participation of “Palestine” in multilateral treaties neither implies nor constitutes recognition of Palestinian statehood by any or all of the other parties to those treaties: “it is generally accepted that participation in the same multilateral treaty does not signify mutual recognition, even implicit”.¹⁰⁸ This is because being a nominal “State Party” by virtue of a procedural or political act is not the same as being a State as a matter of international law. The same may be said of participation in international fora, and States have indeed noted expressly that Palestinian participation in the ASP is without prejudice to the question of Palestinian statehood.¹⁰⁹
45. *The Palestinian claim to statehood is legally incoherent and often self-contradictory.* The Palestinian claim to statehood is routinely exposed as untenable by the Palestinians themselves. Palestinian officials not only contradict themselves in claiming that the West Bank and the Gaza Strip are occupied by Israel and at the same time are under Palestinian effective control,¹¹⁰ but also frequently refer to Palestinian statehood as a future event. Three years after “Palestine’s” purported accession to the Rome Statute, for example, President Abbas stated in explicit terms that “[i]n due time there will be a Palestinian State but this will not happen soon. We are building the Palestinian State one step at a time, and this takes time”.¹¹¹ Palestinian

Support Unit for the Biological Weapons Convention within the Geneva Branch of the United Nations Office for Disarmament Affairs, No. 27/2018 (11 Dec. 2018); Meeting of the States Parties to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Explanation of Position on the “State of Palestine” Submitted by Australia, Canada, Germany and Netherlands, APLC/MSP.17/2018/MISC.2 (3 Dec. 2018), available at <https://undocs.org/APLC/MSP.17/2018/MISC.2> (last accessed: 19 Dec. 2019).

¹⁰⁸ Report of the International Law Commission, Sixty-third session (26 April-3 June and 4 July-12 August 2011), U.N. Doc. A/66/10/Add.1, pp. 95-96 (2011). See also ROBERT KOLB, *THE LAW OF TREATIES: AN INTRODUCTION* 34 (2016) (“... with regard to multilateral treaties ... ratification or accession does not imply a recognition of the other States parties. ... It is also possible to enter an understanding whereby the ratification or accession to that treaty does not imply recognition of a particular State. ... Even without the statement made in the understanding, recognition would not ensue under international law. The statement is thus merely of a political nature. It is made either on account of ignorance of the law or *ex abundante cautela*, or else to show political correctness”); Jean-François Marchi, *Art.15: 1969 Vienna Convention*, in *THE VIENNA CONVENTIONS ON THE LAW OF TREATIES: A COMMENTARY* 308, 320-321 (Olivier Corten and Pierre Klein eds., 2011) (“The principle is well established that the participation of a State in the treaty will not therefore result in the formal recognition of the aforementioned party as a State”); para. 24 above.

¹⁰⁹ See 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’, Bureau of the Assembly of States Parties, 7th meeting, Annex II (15 Nov. 2016), available at https://asp.icc-cpi.int/iccdocs/asp_docs/Bureau/ICC-ASP-2016-Bureau-07-15Nov2016.pdf (last accessed: 19 Dec. 2019): “... Consistent with our reiterated positions in other international fora we hold the view that the designation ‘State of Palestine’ as used in some of these reports shall not be construed as recognition of a State of Palestine and is without prejudice to individual positions of States Parties on this issue”.

¹¹⁰ See also para. 38 above.

¹¹¹ President Mahmoud Abbas’s interview to the Egyptian Channel CBC (3 Oct. 2017), available at <https://www.youtube.com/watch?v=huJVJK5FUf0> (translated from Arabic) (last accessed: 19 Dec. 2019).



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Prime Minister Hamdallah (as he then was) similarly stated as recently as in January 2019 that “the very inception of a sovereign Palestinian state” has yet to happen, and that “... the Palestinians have already prepared the institutional and legislative infrastructure that could be put in service as a basis for the future Palestinian State”.¹¹² Numerous other statements have been made to the same effect,¹¹³ with official Palestinian sources frequently referring to “national aspirations for statehood” and to a “future Palestinian state”.¹¹⁴

46. Similarly, in the Application submitted by the Palestinians to the International Court of Justice in September 2018 concerning the relocation of the United States Embassy to Jerusalem it is argued – in complete contradiction to the position expressed by the Palestinians before the ICC – that Jerusalem and certain parts of the West Bank are *corpus separatum* over which neither Israel nor the Palestinians have sovereignty.¹¹⁵ The former Palestinian Minister for Jerusalem Affairs, Mr. Ziad Abuzayyad, has similarly stated in June 2018 that “the status of Jerusalem under the international law is still defined ... as an area of non-sovereignty”.¹¹⁶
47. Such contradictory positions on the most basic aspects of statehood suggest more than legal confusion. They suggest that the Palestinians are attempting to gain the ICC’s recognition of a sovereign status that they themselves acknowledge cannot credibly be claimed, having turned to

¹¹² AL-HAYAT AL-JADIDA (20 Jan. 2019), available at http://www.alhayat-j.com/arch_page.php?nid=331747 (translated from Arabic) (last accessed: 19 Dec. 2019).

¹¹³ See, for example, the recent speech by Saeb Erakat, Secretary-General of the Palestine Liberation Organization Executive Committee, at the J Street National Conference (28 Oct. 2019), video available at <https://www.youtube.com/watch?v=7U6Wmmt9T4&feature=youtu.be> (minutes 11:48-11:50) (last accessed: 19 Dec. 2019) (“... a Palestinian State will be created”); *President Abbas Welcomes Britain’s Prince William to Palestine*, Wafa (27 Jun. 2018), available at <http://english.wafa.ps/page.aspx?id=TXHJYSa98232330636aTXHJYS> (last accessed: 19 Dec. 2019) (“I hope this will not be the last visit ... and that your next visit will be in the state of Palestine when we have our full independence”); President Mahmoud Abbas’s Statement Before the UN Human Rights Council (UNHRC) at the 34th Session held in Geneva (27 Feb. 2017), available at <https://www.nad.ps/en/media-room/speeches/he-president-mahmoud-abbas-statement-un-human-rights-council-unhrc-34th-session> (last accessed: 19 Dec. 2019) (“The creation of the State of Palestine will undermine the driving force of terror and extremism ...”); and President Mahmoud Abbas’s Statement to the UN General Assembly 72nd Session (20 Sep. 2017), available at <https://www.nad.ps/en/media-room/speeches/he-president-mahmoud-abbas-statement-un-general-assembly-72nd-session-2017> (last accessed: 19 Dec. 2019) (“Our choice is the two-State solution on the 1967 borders, and we will grant every chance for the efforts being undertaken by President Donald Trump and the Quartet and international community as a whole to achieve an historic agreement that brings the two-State solution to reality ...”).

¹¹⁴ See various webpages on the website of the Palestinian Liberation Organization – Negotiation Affairs Department: *Security*, available at <https://www.nad.ps/en/our-position/security> (last accessed: 19 Dec. 2019) (referring to a Palestinian interest “in establishing a Palestinian state that will be recognized, that acts as an independent state and is able to exercise its full rights and responsibilities as a sovereign nation”); *Refugees (position)*, available at <https://www.nad.ps/en/our-position/refugees> (last accessed: 19 Dec. 2019) (“The options for our refugees should be: return to Israel, *return/resettlement to a future Palestinian state*, integration in host states, or resettlement in third-party states” (emphasis added)); *Claims resolution*, available at <https://www.nad.ps/en/our-position/claims-resolution> (last accessed: 19 Dec. 2019) (referring to “our future state”).

¹¹⁵ Relocation of the United States Embassy to Jerusalem (Palestine v. United States of America), Application Instituting Proceedings (28 Sep. 2018), available at <https://www.icj-cij.org/files/case-related/176/176-20180928-APP-01-00-EN.pdf> (last accessed: 19 Dec. 2019).

¹¹⁶ “The Legal Status of Jerusalem Under International Law”, address delivered by Mr. Abuzayyad during an international conference entitled “International Conference on Question of Jerusalem: the Question of Jerusalem after 50 years of Occupation and 25 years of the Oslo Accords” (27 Jun. 2018).



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the Court in a calculated attempt to put to it questions that were explicitly agreed to be resolved through bilateral negotiations.

48. All of the above makes it abundantly clear that no Palestinian State has ever been in existence. Any other finding would strain the bounds of credulity and cannot be sustained either in fact or in law. Given that the Court's jurisdiction under Article 12(2) of the Rome Statute requires there to be a sovereign State, the unavoidable conclusion must be drawn that the Court manifestly lacks jurisdiction over the "situation in Palestine". Needless to say, if no sovereign State exists, there is no "territory of" that State within the meaning of Article 12(2) of the Statute over which the Court may exercise territorial jurisdiction; and there is anyhow no sovereign ability to prosecute that may be delegated to the Court either.
49. ***In any case, the scope of the territory concerned is undefined.*** As has already been noted,¹¹⁷ sovereignty over the West Bank and the Gaza Strip is presently in abeyance, with current Israeli-Palestinian agreements explicitly enumerating "borders" among those issues to be settled through bilateral permanent status negotiations.¹¹⁸ With delimitation of the territory yet to be agreed, any exercise of territorial jurisdiction by the Court would not only require it to make a determination wholly unsuitable for an international criminal tribunal,¹¹⁹ but would also contravene the agreements reached between the parties and jeopardize efforts towards reconciliation. This can be neither lawful nor legitimate.
50. Nor can any reliance 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. Indeed, such references are habitually accompanied by an explicit call for negotiations between the parties for purposes of reaching an agreement on territorial issues;¹²⁰ and the texts in which they are contained anyway

¹¹⁷ See above paras. 27-32.

¹¹⁸ Declaration of Principles on Interim Self-Government Arrangements, art. V(3) (13 Sep. 1993).

¹¹⁹ Clearly, the ICC is not the appropriate forum to resolve territorial disputes. For the more general principle that an international court ought not to rule on the rights, obligations and legal interests of a State which is not party to the proceedings in question, see *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, 2012 I.C.J. Rep. 99, para. 127 (3 Feb. 2012); *Monetary Gold Removed from Rome in 1943 (Italy v. France; United Kingdom and United States of America)*, Preliminary Question, 1954 I.C.J. Rep. 19, p. 32 (15 Jun. 1954); *East Timor (Portugal v. Australia)*, Judgment, 1995 I.C.J. Rep. 90, para. 34 (30 Jun. 1995); *M/V Norstar (Panama v. Italy)*, Case No. 25, Preliminary Objections – Judgement of Nov. 4, 2016, para. 172, available at https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.25/Preliminary_Objections/Judgment/C25_Judgment_04_11.16_orig.pdf (last accessed: 19 Dec. 2019); *Larsen v. Hawaiian Kingdom*, para. 11.22 (Perm. Ct. Arb. 2001) available at <https://pcacases.com/web/sendAttach/123> (last accessed: 19 Dec. 2019).

¹²⁰ See, for example, S.C. Res. 2334, *supra* note 86, at preambular para 10. G.A. Res. 67/19 that specifically mentions that the issue of borders remains an outstanding core issue pending a permanent agreement between the parties (*supra* note 35, at operative para. 5). See also, for example, *Letter Dated 7 May 2003 from the Secretary-General addressed to the Security Council*, Annex: A Performance-Based Road Map to a Permanent Two-State Solution to the Israeli-Palestinian Conflict, U.N. Doc. S/2003/529 (30 Apr. 2003), available at <https://undocs.org/S/2003/529> (last accessed: 19 Dec. 2019) (later adopted by S.C. Res. 1515, U.N. Doc. S/RES/1515 (19 Nov. 2003)); S.C. Res. 1850, preambular para. 4, U.N. Doc. S/RES/1850 (16 Dec. 2008); G.A. Res. 68/15, preambular paras. 21, 25, and operative para. 2, U.N. Doc. A/RES/68/15 (26 Nov. 2013). Israel has consistently made it clear that the term "occupied Palestinian territory" is without legal significance and cannot predetermine the outcome of a territorial dispute that the parties have agreed to



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lack any binding character. They cannot therefore be relied on for purposes of legal determinations such as territorial delimitation or allocation of sovereignty.

51. The International Court of Justice, too, employed the term “Occupied Palestinian Territories” in its *Wall* advisory opinion as it was included in the question put to the Court by the General Assembly, and without making any legal determination as to sovereignty over the territory concerned. Indeed, in briefly analyzing the status of the territory, the Court noted that the 1949 armistice demarcation lines between Israeli and Arab forces were explicitly agreed to be “without prejudice to future territorial settlements or boundary lines or to claims of either Party relating thereto” as well as to “an ultimate political settlement between the Parties”.¹²¹ It then observed that the boundary fixed in 1994 by the peace treaty between Israel and Jordan was “without prejudice to the status of any territories that came under Israeli military government control in 1967”¹²² (as has also been agreed in the 1979 peace treaty between Israel and Egypt¹²³). By focusing next on the international law applicable to territories situated between the Green Line and the former eastern boundary of Mandatory Palestine, the Court was able to refrain from making any determination as to sovereignty over them:¹²⁴ Judge Higgins made it clear that “[t]he Court, wisely and correctly, avoid[ed] what we may term ‘permanent status’ issues”.¹²⁵ Instead, the Court drew attention to the need for achieving “a negotiated solution to the outstanding problems and the establishment of a Palestinian State”.¹²⁶
52. Again, it should not go unnoticed that the Palestinians themselves have recently conceded that the term “occupied Palestinian territory” cannot legally be taken to refer to “Palestinian” territory, by submitting before the International Court of Justice that Jerusalem and significant parts of the West Bank rather have the status of *corpus separatum* under international law.¹²⁷
53. It may also be recalled that the OTP has clarified that any territory over which the Court may exercise territorial jurisdiction must be a geographic area “under the sovereign power of a State – i.e, the areas over which a State exercises exclusive and complete authority”.¹²⁸ In these circumstances, for the Court to arrogate to itself the right to make a finding of territory when the

resolve by negotiation: see, for example, U.N. GAOR 56th Sess., 87th plen. mtg., U.N. Doc A/56/PV.87 (14 Dec. 2001) (Israel’s representative emphasizing “... once again that our having joined the consensus on draft resolution A/56/L.59 should not be interpreted as implicit evidence of any position with respect to the present or future status of occupied Palestinian areas. We stress that a final decision on those areas will be reached through direct bilateral negotiations between the parties”).

¹²¹ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, para. 72 (29 Jan. 2004).

¹²² *Ibid.*, at para. 76.

¹²³ Peace Treaty between Israel and Egypt, *supra* note 66, art. II.

¹²⁴ *Supra* note 121, at para. 101.

¹²⁵ *Ibid.*, Separate opinion of Judge Higgins, at p. 211, para. 17.

¹²⁶ *Ibid.*, at p. 201, para. 162. Judge Owada referred in his Separate Opinion to “Palestine” as “an entity which is not recognized as a State for the purpose of the Statute of the Court”: *ibid.*, at p. 267, para. 19.

¹²⁷ Application Instituting Proceedings, *supra* note 115.

¹²⁸ See para. 35 above.



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parties themselves have not yet agreed on the matter, and have not consented to the Court playing that role, is legally untenable.

54. Under these conditions, it is clear that the existence and scope of a territory for purposes of Article 12(2) of the Rome Statute cannot be established, and thus a precondition to the exercise of the Court's jurisdiction once again cannot be met.

E. EVEN IF THE ROME STATUTE IS MISINTERPRETED TO ALLOW FOR NON-SOVEREIGN ENTITIES TO CONFER JURISDICTION UPON THE COURT, THE PALESTINIANS DO NOT HAVE JURISDICTION OVER AREA C AND JERUSALEM AS WELL AS OVER ISRAELI NATIONALS, AND THUS CANNOT VALIDLY DELEGATE IT TO THE COURT

55. As has been demonstrated, the exercise of jurisdiction by the ICC requires that there be a sovereign State that has delegated to the Court its criminal jurisdiction on the basis of territoriality and nationality, a precondition that is clearly not met in the present case. To this it may now be added 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 extent required. Thus, in the present case, the Court would have to satisfy itself that the Palestinian entity has jurisdiction corresponding to the "situation in Palestine". As is readily clear, however, it does not.

56. The Israeli-Palestinian Interim Agreement of 1995 explicitly stipulates that the Palestinians have no criminal jurisdiction over Israeli nationals. In the part entitled 'Jurisdiction', which defines in specific terms the limited scope of jurisdiction to be held by the Palestinian Authority, the Agreement provides that "The territorial and functional jurisdiction of the [Palestinian Authority] will apply to all persons, *except for Israelis*, unless otherwise provided in this Agreement".¹²⁹

57. The Protocol Concerning Legal Affairs appended to the Interim Agreement further lays down that:

"The criminal jurisdiction of the [Palestinian 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 ..., and Gaza Strip territory except for the Settlements and the Military Installation Area".¹³⁰

¹²⁹ Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, *supra* note 66, art. XVII(2)(c) (emphasis added). The exception refers to some civil matters as specified in Appendix 4, art. 3(2).

¹³⁰ *Ibid.*, at Annex IV, art. I(1)(a). The Interim Agreement makes it explicitly clear (in art. XVII) that any jurisdiction of the Palestinian Authority within the West Bank and the Gaza Strip does not extend to Jerusalem. It may also be recalled that the Palestinian Authority has not been exercising any jurisdictional powers over the Gaza Strip since Hamas violently took over the territory in 2007: see also *supra* note 87.



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58. As noted above, this and other agreements, which define comprehensively those powers transferred to and vested in the Palestinian Authority, continue to govern the relationship between Israel and the Palestinians to date.¹³¹ Any jurisdiction currently held by the Palestinians derives from these bilateral agreements, under which Israel continues to hold all powers not explicitly transferred to the Palestinians.¹³²
59. To be clear, the Palestinians did not have any jurisdiction – prescriptive, adjudicative or enforcement – prior to entering into the bilateral agreements with Israel. Jurisdiction over Israeli nationals, Area C and Jerusalem is thus not something the Palestinian entity previously possessed and then subsequently agreed to limit the exercise thereof: it never had it to begin with, and certainly does not have it now, either in law or in fact. Even an expansive approach to delegation that emphasizes the possession of prescriptive jurisdiction where the exercise of adjudicative and enforcement jurisdiction is curtailed,¹³³ would thus still run up against the criminal jurisdictional capacity held by the Palestinian entity.
60. As the Palestinian entity has no criminal jurisdiction over either Israeli nationals or over Area C and Jerusalem, it is therefore legally impossible for it to delegate any such jurisdiction to the Court: *nemo plus iuris transferre potest quam ipse habet* (no one can transfer a greater right than he himself has). Again, the fundamental precondition to the Court’s jurisdiction cannot be met.

CONCLUSION

61. For the reasons specified above, the ICC manifestly lacks jurisdiction over the “situation in Palestine”. As has been demonstrated, the necessary precondition to the Court’s jurisdiction under Article 12(2) of the Rome Statute, which requires there to be a sovereign State that has delegated to the Court criminal jurisdiction over its territory and nationals, cannot be met by virtue of the simple fact that no sovereign Palestinian State is in existence. The events surrounding the purely technical act of the purported accession of “Palestine” to the Rome Statute, or the Palestinian purported Article 12(3) declaration, neither alter this conclusion nor substitute for the substantive inquiry required for the establishment of the Court’s jurisdiction. Moreover, even if a conclusion is erroneously reached that a sovereign Palestinian State exists, the scope of the territory concerned is indeterminate and is clearly not for an international criminal court to define; and if the Rome Statute is misinterpreted to allow for non-sovereign entities to confer jurisdiction upon the Court, the latter would still lack jurisdiction over Area C and Jerusalem as well as Israeli nationals.

¹³¹ See para. 36 above.

¹³² Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, *supra* note 66, art. XVII (4) (providing that “(a) Israel, through its military government, has the authority over areas that are not under the territorial jurisdiction of the Council, powers and responsibilities *not transferred to the Council* and Israelis” (emphasis added)).

¹³³ See Office of the Prosecutor, Situation in the Islamic Republic of Afghanistan - Public redacted version of “Request for authorisation of an investigation pursuant to article 15”, ICC-02/17, p. 27, fn. 47 (20 Nov. 2017).



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62. Ultimately, any conclusion that the requirements of Article 12(2) are met in the case of the “situation in Palestine” would indeed require not one, but a series of highly dubious and untenable legal determinations. It would run counter not only to the jurisdictional regime carefully prescribed by the Rome Statute, but also to international law more broadly, both of which serve to ensure that the Court’s competence is not abused or exercised on the basis of arbitrariness or political prejudice. The OTP and the other organs of the Court have repeatedly made it clear that the legitimacy and future of the ICC depend on its commitment to legal impartiality and judicial independence. If these are to be more than mere words, then they must actually guide, and be seen to guide, the decisions of the OTP and the Court itself. If they are more than mere words, then the conclusion regarding the lack of jurisdiction in the present case is not controversial, it is unavoidable.
63. Even if a sound legal analysis unavoidably leading to the conclusion that jurisdiction is lacking may be unpopular with some at a time when the Israeli-Palestinian conflict still awaits its resolution, nothing could be more harmful to the credibility and legitimacy of a court of law than compromising its judicial character and appearing to over-reach. This would especially be the case where consent to jurisdiction has not been given (such as where the conduct of a State not Party to the Rome Statute is concerned), and where matters that are inherently ill-suited to international criminal adjudication are perversely brought before the Court. It is again worth recalling that the ICC Prosecutor herself, in the face of “arguments of some legal scholars that fundamental jurisdictional rules can be made subject to a liberal and selective interpretation”, has unequivocally confirmed in 2014 that where clear jurisdictional parameters are not met, the exercise of jurisdiction “is neither good law nor makes for responsible judicial action.”¹³⁴ That remains ever as true today.

¹³⁴ *Statement of the Prosecutor of the International Criminal Court, supra* note 4.