

Judge Péter Kovács' Partly Dissenting Opinion

Public

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I. Introduction

1. I share the Majority's finding that Pre-Trial Chamber I (the 'Chamber') is competent to answer the question raised in the Prosecutor's request¹ (the 'Request'). Together with Judge Alapini Gansou, I share the view that the Chamber's competence is grounded in article 19(3) of the Statute, as the Prosecutor rightly submitted. As it is evident in his partly separate opinion, Judge Brichambaut does not entirely share this view even if he agrees on the applicability of article 19(3) of the Statute.

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

II. Methodology and reasoning

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

4. Abstraction is rightly made in the Majority Decision of the political sensitivity of the issue (which is certainly not up to the Chamber to evaluate) and of the complexity of the Palestinian-Israeli situation. However, in my opinion, the deep involvement of the United Nations Organization (the 'United Nations', 'UNO' or 'UN') in finding a proper solution for the realization of the so-called 'two-state vision', the contribution of the Quartet with the Road

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

² Majority Decision, para. 87.

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

Map and the previous peace initiatives generally supported and promoted by the United Nations and reflected in the long line of resolutions adopted by the UN General Assembly (the ‘General Assembly’), the UN Security Council (the ‘Security Council’) as well as other UN bodies, and the references in these resolutions to the Oslo I Accords⁴ (‘Oslo I’ or ‘Declaration of Principles’) and Oslo II Accords⁵ (‘Oslo II’ or ‘Interim Agreement’), together form an important network of international law instruments. These instruments must not be swept behind the formal observation of the accession instrument of the State of Palestine (‘Palestine’), and its interplay with resolution 67/19 of the General Assembly of the UNO (the ‘General Assembly’)⁶ (the ‘Resolution 67/19’).

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

A) What is the legal value of the United Nations resolutions?

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

7. The current situation is vastly different from the formation of custom where repetitive practice could create a norm which was formerly only an ‘emerging’ norm (pending adequate proof of the existence of an *opinio juris*). However, with respect to borders, I am concerned

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

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

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

that not a single ‘precedent’ can be shown for situations where a ‘recommendation’ would establish definitely and *per se* an international legal frontier.⁷

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

9. Of course, the Prosecutor does not state that a recommendation is binding. However, in the Palestinian situation, she apparently does not deem it important to distinguish what is binding from what is only a recommendation, a suggestion, or an opinion. An analysis of the distinction between the auto-normative and hetero-normative competences⁸ is missing and even the potential impact of article 25 of the United Nations Charter - as interpreted by the International Court of Justice (the “ICJ”) in the Namibia case⁹ - is not addressed as regards Resolution 67/19, from the point of view of auto-normativity and hetero-normativity. The Prosecutor’s position is a bit more nuanced in the ‘Prosecution Response to the Observations of *Amici Curiae*, Legal Representatives of Victims, and States’¹⁰ (the ‘Response’) but, as will be elaborated in the following pages: *i.* she presents a simplified reading of the resolutions; *ii.*

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

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

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

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

she does not attribute any importance to the fact that a non-binding resolution, adopted by majority voting, has very limited legal value in a judicial procedure; and *iii*. the resolutions adopted by the Security Council and the General Assembly subsequently to Resolution 67/19 far from prove a *fait accompli*, but rather present a reserved attitude *vis-à-vis* the actual status of Palestine's statehood, despite the General Assembly's undeniable sympathy towards the Palestinian situation.

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

11. In my view, speaking about a State *in statu nascendi* would be closer to the current state of affairs and there is nothing pejorative or outdated therein. Peculiar circumstances (for example, State identity *vs.* State succession problems) were also presented before the ICJ.¹¹ To accept as determinative a unilateral statement¹² concerning the exact demarcation of a territory that is known to be the object of a very slowly progressing and frequently suspended series of negotiations, would have required at least an explanation.

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

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

¹¹ ICJ, *Croatia v. Serbia and Montenegro (Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide)*, [Judgment of 18 November 2008, Preliminary Objections](#), 18 November 2008, paras 126-127; [Judgment of 3 February 2015](#), 3 February 2015, paras 81, 103. *See also* [Separate Opinion of Judge Owada](#), paras 9, 12, 20; [Declaration of Judge Xue](#), paras 2, 4, 5.

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

B) Interlocking presumptions?

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

15. As it will be elaborated thereafter, the greatest problem with this line of reasoning is that: *i.* Palestine's statehood was not at all (and is still not) a settled issue within the United Nations, contrary to what the Prosecutor argues; *ii.* the focal point of the discussion is not the validity of the accession but rather the legal character of the *territory* falling (potentially) under the jurisdiction of the ICC; *iii.* it is highly questionable – and certainly not substantiated either in the Request or in the Response¹⁴ – that article 119(2) of the Statute applies to the contestation of validity, given that the wording of the text¹⁵ manifestly does not promise a final and legally binding settlement of the dispute;¹⁶ and *iv.* the 'equality of States' rule, as applied by intergovernmental organizations, does not preclude consideration of particularities or special circumstances in situations following accession, if such consideration is required to resolve an actual problem.¹⁷ There is no reason why the ICC should proceed differently and I do not see

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

¹⁴ [Response](#), paras 19-23.

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

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

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

how such an approach would inevitably lead ‘to consequences which are inconsistent with the object and purpose of the Statute.’¹⁸ The assessment of a State’s ‘inability or unwillingness’ to prosecute in the jurisprudence of the Court shows that certain circumstances and particularities specific to a State (such as the inability to prosecute due to the temporary collapse or stay of the proper functioning of State organs, a civil war, an epidemic, natural disasters etc.) can and should be the object of an examination without conflicting with the equal treatment rule.

16. The Prosecutor also argues that ‘[i]t would appear contrary to the principle of effectiveness and good faith to allow an entity to join the ICC but to then deny the rights and obligations of accession’.¹⁹ While such a denial would certainly be contrary to these principles, the crucial issue is rather whether the given geographical territory can be considered *hic et nunc* ‘the territory of the State’ on the basis of international law.

17. The Request and the Response follow a *circulus vitiosus* reasoning.

18. In fact, the Prosecutor follows an approach which should be rightly qualified as a ‘presumption’ or more precisely a series of complex interlocking presumptions. Neither the Request nor the Response use this notion (excluding reference to the word ‘presumption’ in certain citations and a single mention in a different context²⁰), but if one follows the reasoning of the Prosecutor’s argument, one can only reach this conclusion.²¹

19. It is well known that there are two types of presumptions: *i.* the rebuttable/refutable presumption (*presumptio iuris*)²² and *ii.* the irrefutable/conclusive presumption (*presumptio iuris et de iure*).²³ All legal systems recognize the value of these presumptions, which enable a party to establish a fact without requiring its proof. However, the use of irrefutable presumptions is rather exceptional. They are typically used as a legislative tool in resolving disputes and often have a high moral background.

¹⁸ [Response](#), subsection B.4, p. 17.

¹⁹ [Request](#), para. 114 (footnotes omitted); [Response](#), para. 28.

²⁰ [Response](#), para. 21 (‘As the Prosecution has previously observed, the delicate nature of Statehood determinations - and the political issues which are inevitably associated with them - may raise the presumption that such matters are best regulated by States themselves.’).

²¹ See [Request](#), para. 7 (‘There is no reason why this logic should not apply to Palestine.’).

²² For example, the principle of presumption of innocence or the presumption of a husband’s paternity for a child born inside of wedlock.

²³ For example, the principle of presumption of 300 days as the date of conception for a newborn child.

20. Both the primary and secondary (alternative) positions laid out in the Request can be qualified as a series of presumptions.

21. In my reading, the Prosecutor makes the following presumptions in her primary position: *i.* Palestine’s ‘already existing’ statehood is reflected in Resolution 67/19; *ii.* the State Party status resulting from Palestine’s accession according to the ‘all States’ formula excludes *ab ovo* any doubts on its ‘statehood’ and ‘territory’;²⁴ and *iii.* with respect to the geographical scope of the Court’s territorial jurisdiction, it is sufficient to rely ‘on the views of the international community as expressed primarily by the UN General Assembly’.²⁵

22. The Prosecutor’s secondary position includes the following presumptions: *i.* the status of the ‘State for the purpose of the Statute’ exists;²⁶ *ii.* if an entity is a ‘State for the purpose of the Statute’, it should be treated equally in every respect;²⁷ *iii.* the use of the terms ‘non-member observer State’ in the wording of Resolution 67/19 means that the General Assembly was convinced of Palestine’s ‘statehood’;²⁸ *iv.* recommendation type resolutions can fill the gap created by the lack of binding resolutions of the Security Council; and *v.* whatever in-depth examination of the particularity of the ‘statehood’ or ‘territory’ issues is *ab ovo* an illegitimate obstacle to Palestine’s accession and incompatible with judicial functions.²⁹

²⁴ [Request](#), para. 7 (‘In order to exercise its jurisdiction in the territory of Palestine under article 12(2), the Court need not conduct a separate assessment of Palestine’s status (nor of its Statehood) from that which was conducted when Palestine joined the Court. This is because, under the ordinary operation of the Rome Statute, a State that becomes a Party to the Statute pursuant to article 125(3) “thereby accepts the jurisdiction of the Court” according to article 12(1). Article 12(2) in turn specifies the bases on which the Court may exercise its jurisdiction as a consequence of a State becoming a Party to the Statute under article 12(1) or having lodged a declaration under article 12(3). Simply put, a State under article 12(1) and article 125(3) should also be considered a State under article 12(2).’), para. 101 (‘Further, the Prosecution considers that Palestine is the “State on the territory of which the conduct in question occurred” (under article 12(2)(a)) because of its status as an ICC State Party. Once an entity has become a State Party, the Rome Statute does not require the Prosecutor to conduct a new assessment regarding its statehood to trigger the Court’s jurisdiction.’), para. 106 (‘Moreover, since its accession to the Statute, the Assembly of States Parties (“ASP”) has not treated Palestine any differently from any other State Party. There is no reason why the Court should do so now.’).

²⁵ [Request](#), para. 11. *See also* paras 44, 102.

²⁶ [Request](#), para. 101 (‘Alternatively, if the Chamber disagrees and finds it necessary to conduct such assessment, the Prosecution submits that Palestine is also a “State” for the purposes of the Rome Statute under relevant principles and rules of international law.’).

²⁷ [Request](#), para. 182; [Response](#), para. 15 (‘In the Prosecution’s view, once an entity is permitted to accede to the Statute, the organs of the Court are required to accept the status of that entity as a State Party (and, in the context of the treaty, their status as a State) for all purposes under the Statute and may not substitute their own assessment for that of the depositary (and, if necessary, the UN General Assembly) and the States Parties, as explained below.’).

²⁸ [Response](#), para. 14.

²⁹ [Response](#), paras 22, 23, 24. *See also* para. 30 (‘[T]he protection and deterrence that accession provides to States Parties [is a] [...] substantial benefit for States Parties [that] would be substantially diminished if “two tiers” of

23. It bears repeating that the Prosecutor does not herself characterize these statements as ‘presumptions’ or state that she is permitted to make presumptions.³⁰ However, by their nature, the approaches laid out in both the Request and Response are presumptions and more specifically are worded as irrefutable presumptions.³¹ In this way, a presumption forms the basis of a second presumption, which then forms the basis of a third, and so on.

24. Some of the above presumptions (for example, *iii.* the ‘non-member observer State’ language in Resolution 67/19 means that the General Assembly was convinced of Palestine’s ‘statehood’) might eventually be accepted as a starting point if we treat them as refutable presumptions subject to evaluation. But in the Prosecutor’s view, no such evaluation is allowed³² or deemed necessary.³³

25. Why should the Chamber accept interlocking presumptions instead of legal argumentation? Would it not be preferable to identify, as soon as possible, the risks of relying on presumptions and not to delay further such exercise?

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

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

accession to the Statute were possible, such that the acceptance of an entity’s accession to the Statute was not understood to be a guarantee that the Court could in principle exercise jurisdiction over crimes committed on its territory.’).

³⁰ In my reading, the presumption is mentioned only once (if we abstract a few citations from the doctrine). See [Response](#), para. 21 (‘As the Prosecution has previously observed, the delicate nature of Statehood determinations—and the political issues which are inevitably associated with them—may raise the presumption that such matters are best regulated by States themselves.’).

³¹ See *e.g.* [Response](#), para. 55 (‘Yet, it cannot be denied that the Occupied Palestinian Territory must have a sovereign.’), para. 68 (‘the Occupied Palestinian Territory must have a sovereign’). But what is the legal basis for affirming *hic et nunc* that this sovereign already exists? Despite its inherent cynicism, the famous statement ‘*certus an incertus quando*’ must not be forgotten. See on this issue *below* VII. Why challenging the legality of the ‘occupation’ has no impact on how this issue will be politically resolved in the future (as shown by historical examples).

³² [Request](#), para. 106; [Response](#), paras 18, 22.

³³ [Request](#), paras 101, 114, 119, 218.

C) Competence for an *in merito* assessment of the notion of ‘the territory of the State’ in the situation *sub judice*

28. According to the legal doctrine regarding the issue of enlargement (States’ accession), international conventions can be classified into four categories: *i. closed treaties* (where no accession is permitted); *ii. half-closed treaties* (where accession is permitted only with the approval of the current member States, by unanimity, qualified majority or simple majority, according to the provisions of the given treaty); *iii. half-open treaties* (where there is no admission procedure but there are some objective criteria limiting the eligibility for accession, such as geographical belonging or participation in a specific treaty); and *iv. open treaties* (where there is no admission procedure and there are no special conditions).

29. The ‘all States formula’ is a well-known characteristic of open treaties, while the ‘Vienna formula’ is a classical example of half-open treaties. Typically, open treaties are conventions comprised of general interests, contracted for the purpose of protecting human rights, fighting against criminality, or protecting the environment.

30. Statutes, constitutions, and founding treaties of international organizations are typically considered by the doctrine half-closed treaties where the admission procedure aims to preserve coherence, commonly shared values, solidarity, and economic, political and/or military efficiency. It is also well-known that the attitude of organizations towards successive enlargement may change based on the historical or political context of the time. As an example, while the UNO was rather reluctant to admit small States in the 1950-1960’s, this attitude changed in the 1970’s and it became a *quasi*-universal organization.

31. However, the Court and its chambers must recognize that the founding fathers, contrary to the traditions of other organization-creating treaties (the so-called ‘constitutive treaties’), opted for the ‘all States formula’ and incorporated it under article 125(3) of the Statute.

32. It is worth noting that in the Request, the Prosecutor characterizes an assessment of Palestine’s statehood by this Chamber as unnecessary³⁴ rather than statutorily forbidden.

³⁴ [Request](#), para. 103 (‘No additional consent or separate assessment is needed.’), para. 114 (‘Nor does it require the Court to conduct a separate assessment of the status of a State Party before it can exercise its jurisdiction under article 12.’).

Nevertheless, elsewhere in the Request, the Prosecutor seems to indicate a preference that the Chamber not undertake such an assessment.³⁵

33. Similarly, in the Response, the Prosecutor makes statements reflecting that such an assessment is unnecessary³⁶ while other numerous statements openly contest the Chamber's competence to carry out such an assessment.³⁷ However, the Prosecutor's challenge to judicial

³⁵ [Request](#), para. 105 ('[I]n the ICC context it would contradict the principle of effectiveness to permit an entity to agree to the terms of the Rome Statute and thereby join the Court, to then later negate the natural consequence of its membership - the exercise of the Court's jurisdiction in accordance with the Statute. '), para. 114 ('It would appear contrary to the principle of effectiveness and good faith to allow an entity to join the ICC but then to deny the rights and obligations of accession - *i.e.* the Court's exercise of jurisdiction for crimes committed on its territory or by its nationals, whether prompted by the State Party or otherwise. Notably, the Statute does not provide for or regulate the implications of a negative determination of statehood by the Court.') (footnotes omitted), para. 115 ('The most plausible interpretation resulting from the interplay between article 12 and article 125 is that the Court can exercise its jurisdiction on the territory of a member State or "State Party" if the requirements under article 53(1) are met, but without any additional precondition, such as a determination of statehood under international law.').

³⁶ [Response](#), para. 11 (citing [Request](#), para. 103).

³⁷ [Response](#), para. 11 ('It is consistent with the principle that organs of the Court (including the Prosecution) should not allow themselves to be drawn into political decision-making concerning membership of treaty regimes, and that questions of capacity to join treaties are best resolved by States themselves.') (footnotes omitted), para. 15 ('In the Prosecution's view, once an entity is permitted to accede to the Statute, the organs of the Court are required to accept the status of that entity as a State Party (and, in the context of the treaty, their status as a State) for all purposes under the Statute and may not substitute their own assessment for that of the depositary (and, if necessary, the UN General Assembly) and the States Parties, as explained below. '), para. 18 ('Consistent with the views of some participants, the Prosecution submits that organs of the Court cannot rule on the validity of an accession to the Statute, which is a matter reserved for States Parties under article 119(2).') (footnotes omitted), para. 21 ('As the Prosecution has previously observed, the delicate nature of Statehood determinations - and the political issues which are inevitably associated with them - may raise the presumption that such matters are best regulated by States themselves. '), para. 22 ('Nothing in the Statute supports the view that the drafters considered it "appropriate" to endow the organs of the Court (as defined in article 34) with a role in approving the validity of accessions. Not only is article 125 of the Statute silent on this matter, but there appears to be no mechanism for a State Party to seize the Court of any objection to an accession, as might be envisaged by article 77(2) of the VCLT. Nor does the Court have any power to grant an appropriate remedy if it were to determine that an accession was indeed invalid. '), para. 23 ('For her own part - subject to the further guidance of the Chamber - the Prosecutor does not consider that she would be well placed (as an organ of the Court) to resolve any dispute between States Parties as to the validity of an accession to the Statute. As judicial bodies, the chambers of the Court may naturally be better situated for such a task than the Prosecutor - yet the delicate and politicised nature of the subject matter still remains a particular concern, and is potentially incompatible with the concept of a "judicial function" in article 119(1). '), para. 24 ('Subjective expressions of disapproval, or unilateral measures, are wholly insufficient, and it is not for the Court to attempt to resolve any ambiguities in the stance of States Parties. Indeed, such an exercise is potentially fraught with difficulty. Either an entity is a valid State Party - entailing the acceptance of its Statehood by the Court, for its own purposes - or it is not. The Statute does not foresee any "halfway" status, nor would it be consistent with the object and purpose of the Court for the status of a State Party to be uncertain for a sustained period after its instrument of accession has been accepted. '), para. 29 ('In particular, it follows from articles 12(1) and 125 of the Statute, and Part 9, that the threshold criterion for all participation in the Statute - membership of the ASP, acceptance of the jurisdiction of the Court, and obligations to cooperate with the Court - is that the entity in question is a "State" for all the purposes of the treaty. This being so, there is no logical reason why acceptance of the Court's jurisdiction would be divisible from accession to the Statute and participation in the Court's maintenance and governance; to the contrary, considerations of equity would suggest that the two spheres of activity must be linked. '), para. 30 ('Furthermore, a primary reason for States to accede to the Statute is the protection and deterrence that accession provides to States Parties - simply put, any person who commits an

competence only concerns the *validity of the accession*.³⁸ The legality of assessing the specificities of statehood is therefore not *ab ovo* contested by the Prosecutor. Rather, she only contests the Chamber's competence to issue a decision on the validity of a State's accession to the Rome Statute.

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

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

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

article 5 crime on the territory of a State Party is liable to investigation and prosecution either by a State or at the Court, irrespective of their citizenship. Ensuring this deterrence is one reason why the drafters of the Statute rejected a double jurisdictional requirement (both for territoriality and nationality of the perpetrator). This substantial benefit for States Parties would be substantially diminished if "two tiers" of accession to the Statute were possible, such that the acceptance of an entity's accession to the Statute was not understood to be a guarantee that the Court could in principle exercise jurisdiction over crimes committed on its territory.'

³⁸ See [Response](#), para. 30.

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

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

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

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

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

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

40. If the assessment of the judiciary’s functioning (as one of the three branches of a state’s power according to Montesquieu and as the sub-component of the ‘government’ within the

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

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

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

Montevideo criterion of statehood) is undoubtedly within the competence of the Court (and in the given case, of a pre-trial chamber), it is even more difficult to understand the Majority's reluctance 'to determine matters of statehood' where needed.

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

42. As a historical jurisprudential 'precedent', it is worth remembering that the Permanent Court of International Justice (the 'PCIJ'), when seized with a request for an advisory opinion dealing with the question of the rights granted to Poland and its postal services, did not refrain from examining some of the specificities of the territorial administration in the port situated in the territory of the Free City of Danzig.⁴⁴ Apparently, the PCIJ judges did not believe that such an examination – and the ultimate recognition of the lawfulness of the Polish claim – would *per se* challenge the validity of the international legal status of the Free City of Danzig, as established by the Versailles Treaty⁴⁵ and subsequent agreements, and placed under the protection of the League of Nations.

43. In order to better understand the reasons why chambers are permitted to undertake such an assessment, in accordance with the rules of contextual interpretation, it is worth comparing the similarity in the construction of article 12(2)(a) and (b) of the Statute.

44. Looking at the second half of article 12(2)(a) of the Statute, it is clear that in the context of a '*crime [...] committed on board a vessel or aircraft*', checking the registration document to verify its conformity with the applicable conventions and rules of maritime law⁴⁶ or air law,⁴⁷ and to establish whether there is a '*State of registration of that vessel or aircraft*' and whether this particular State is a State Party, by no means implies a challenge to the validity of that State's accession to the Rome Statute. Moreover, in cases where sub-state entities are also granted the right of registration,⁴⁸ and the given entity holding the '*droit du pavillon*' is itself

⁴⁴ PCIJ, *Polish Postal Service in Danzig*, [Advisory Opinion of 16 May 1925](#), 16 May 1925, Series B, No. 11.

⁴⁵ Diplomatic Conference, [Versailles Treaty](#), 28 June 1919, Section XI ('Free City of Danzig'), articles 100-108.

⁴⁶ United Nations, [United Nations Convention on the Law of the Sea](#), 10 December 1982.

⁴⁷ International Civil Aviation Organization, [Chicago Convention on International Civil Aviation](#), 7 December 1944.

⁴⁸ M. Stephens, '[Jersey Ship Registry](#)', 1 April 2015, p. 6 ('Under the United Nations Convention on the Law of the Sea (UNCLOS) and under international law, all ships registered within the Crown Dependencies and UK

not a State Party, the establishment of the nexus to a State Party requires an examination of the overlapping commitments of the State under the United Nations Convention on the Law of the Sea and the Rome Statute, with special regards to the declarations on responsibilities for ‘overseas territories’.

45. Additionally, the *ratione temporis* criterion regarding the Court’s jurisdiction, the vessel, the flag and the timeframe when the alleged crimes occurred, must also be evaluated.⁴⁹

46. Similarly, as to the jurisdiction *ratione personae*, formulated in article 12(2)(b) of the Statute, the assessment of whether there exists a legal relationship between a given State and a person and of whether ‘[t]he State of which the person accused of the crime is a national’ is a State Party, cannot be considered to contest the validity of the accession of the State Party involved.

47. The similarity between the three legal constructions, namely ‘*State on the territory of which*’, ‘*State of registration of that vessel or aircraft*’ and ‘*[t]he State of which the person accused of the crime is a national*’, must be emphasised. Assessing any of those requirements does not impact in any way the validity of the State’s accession.

48. Moreover, such an assessment, which must be carried out within the strict limits of what is necessary to properly answer the question raised in the Request, may be substantiated by the principle of *Kompetenz/Kompetenz*. Even the Prosecutor recognizes that in some respect, the

Overseas Territories are British Ships. In exercise of its powers, the United Kingdom as the Flag State under international law for these ships has devolved to the Crown Dependencies and UK Overseas Territories, which collectively with the United Kingdom are known as the Red Ensign Group (REG) [...] Under the Merchant Shipping (Categorisation of Registries of Relevant British Possessions) Order 2003, the ship registers of Bermuda, British Virgin Islands, Cayman Islands, Gibraltar, UK and the Isle of Man have been granted Category 1 status, permitting them to register international trading fleets of unlimited tonnage, type and length, because the UK’s ratification of certain international conventions has been extended to these jurisdictions. In each case, the UK is the State Party to these conventions and remains ultimately responsible as a matter of international law for the discharge of treaty obligations by relevant REG members. The same Order makes provision for Anguilla, Falkland Islands, Guernsey, Jersey, Montserrat, St Helena and the Turks and Caicos Islands to operate a Category 2 register which limits the registration to passenger ships or of other ships of less than 150 gross tons. However, there is an exemption which allows the registration of domestic passenger ships, pleasure vessels between 150 and 400 tons and ships of special local importance, provided that arrangements are in force for such ships to be surveyed and inspected by reference to the standards set out in UK safety and pollution regulations.’)

⁴⁹ For an example of the assessment of the *ratione loci* and *ratione temporis* conditions, see *Situation on Registered Vessels of Comoros, Greece and Cambodia*, [Annex A Notice of filing the report prepared by the Office of the Prosecutor pursuant to article 53\(1\) of the Rome Statute](#), 6 November 2014, ICC-01/13-6-AnxA, para. 17, n. 20.

Chamber definitely enjoys a certain margin of appreciation in its interpretation of what constitutes a ‘State’.⁵⁰

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

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

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

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

⁵² [PTC I Rohingya Decision](#), para. 32.

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

⁵⁴ Pre-Trial Chamber II, *The Prosecutor v. Jean-Pierre Bemba Gombo*, [Decision Pursuant to Article 61\(7\)\(a\) and \(b\) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo](#), 15 June 2009, ICC-01/05-01/08-424, para. 23; *The Prosecutor v. William Samoei Ruto et al.*, [Decision on the Prosecutor’s Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang](#), 8 March 2011, ICC-01/09-01/11-1, para. 8; *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, [Decision on the Confirmation of Charges Pursuant to Article 61\(7\)\(a\) and \(b\) of the Rome Statute](#) (‘*Ruto et al.* Confirmation of Charges Decision’), 23 January 2012, ICC-01/09-01/11-373, para. 24.

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

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

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

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

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

⁵⁶ Majority Decision, para. 102.

D) The Majority Decision and the rules of interpretation of the Vienna Convention

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

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

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

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

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

59. However, a purely grammatical interpretation does not provide an answer to the question of what is to be done when a ‘State Party’ is not a State or its statehood is not yet fully fledged. Further, it cannot entirely answer the question of how to interpret the interplay between articles 12 and 13 in such an hypothesis. To answer this question, all methods of interpretation contained in the Vienna Convention on the Law of Treaties⁵⁸ (the ‘VCLT’ or the ‘Vienna Convention’) should be applied.

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

61. The Majority satisfies itself with having recourse only to article 31 of the Vienna Convention, and by doing so, its interpretation is not *lege artis*. This is obvious when one reads paragraph 93 of the Majority Decision,⁵⁹ which suggests that the formula ‘States Parties to this Statute’ appears in the chapeau of article 12(2) of the Statute, when in reality, the formula worded as such, does not. Article 12(2) of the Statute rather reads: ‘if one or more of the following States *are* Parties to this Statute’.⁶⁰ The arbitrary disappearance of the word ‘are’ in the phrase ‘States are Parties to this Statute’ is not explained at all, and paragraph 94 is worded in such a way as to suggest that the chapeau contains two similar expressions, namely ‘States are Parties to this Statute’ and ‘States Parties to this Statute’. Of course, only the former is actually present in the chapeau, and the latter is not more than the Majority’s creation.

62. Moreover, instead of using legal arguments, the Majority uses its own perception in order to prove its point.⁶¹ In other words, the Majority’s reasoning is flawed due to its circular logic

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

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

⁶⁰ Emphasis added.

⁶¹ Majority Decision, para. 93 (‘In more specific terms, this provision establishes that the reference to “[t]he State on the territory of which the conduct in question occurred” in article 12(2)(a) of the Statute must, in conformity with the chapeau of article 12(2) of the Statute, be interpreted as referring to a State Party to the Statute. It does

whereby proper inferences are not made: point A proves point A. The formulation of the premises used in the Majority's syllogism is unconvincing to me.

63. At the end of paragraph 93, in stating that '[i]t does not, however, require a determination as to whether that entity fulfils the prerequisites of statehood under general international law', the Majority seems to pay no attention to article 31(3)(c) of the Vienna Convention.⁶² I have to note, however, that the Chamber (under the same composition) adopted a very different view in the Rohingya Decision⁶³ when it referred to the applicability of international law in the contextual interpretation of article 12(2)(a) of the Statute *expressis verbis*. This was also the approach taken by Pre-Trial Chamber III in its decision in the same situation.⁶⁴

64. It is worth remembering that the Preamble of the Statute refers several times to 'States' (more precisely once as 'States Parties', once as 'every State', once as 'all States' and twice as 'any State').⁶⁵ So do the articles of the Statute: among them, I cite only article 8*bis* on the crime of aggression,⁶⁶ the English text of which follows *quasi verbatim* Resolution 3314 (XXIX) of

not, however, require a determination as to whether that entity fulfils the prerequisites of statehood under general international law.')

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

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

⁶⁴ Pre-Trial Chamber III, [Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar](#), 14 November 2019, ICC-01/19-27, para. 55 ('As noted above, the wording of article 12(2)(a) is generally accepted to be a reference to the territoriality principle. In order to interpret the meaning of the words 'on the territory of which the conduct occurred', it is instructive to look at what territorial jurisdiction means under customary international law, as this would have been the legal framework that the drafters had in mind when they were negotiating the relevant provisions. It is particularly significant to look at the state of customary international law in relation to territorial jurisdiction, as this is the maximum the States Parties could have transferred to the Court.') (footnotes omitted).

⁶⁵ Statute, Preamble ('The States Parties to this Statute [...] [r]ecalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes, Reaffirming the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations, Emphasizing in this connection that nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State').

⁶⁶ Statute, article 8*bis* ('Crime of aggression') ('1. For the purpose of this Statute, "crime of aggression" means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale,

the General Assembly. Obviously, in this article, the notion of ‘State’ is to be understood in its traditional sense: if the perpetrator entity or victim entity is not a State, then the crime of aggression cannot be constituted. In article 8*bis* of the Statute, the notion of ‘territory’ (‘territory of another State’ or ‘a State in allowing its territory’) should not be taken lightly either. In my humble view, the wording of article 8(3) of the Statute⁶⁷ also points to the understanding that the word ‘State’ is used in its traditional sense, or in other words, as it is used in the Charter of the United Nations.

65. Even in article 12(2) of the Statute, we find the word ‘State’ in ‘State of registration of that vessel or aircraft’ and ‘State of which the person accused of the crime is a national’.⁶⁸

66. In its interpretation ‘in the light of the object and purpose of the Statute’, the Majority’s recourse to the Preamble of the Statute seems one-sided. The two sentences quoted,⁶⁹ one from the Preamble and one from article 1 of the Statute, are without any doubt important but pertinent only to the uncontested issue of individual criminal responsibility. They hardly furnish any additional argument as to the issue of the ‘State’, or the ‘territory of the State’,⁷⁰ a

constitutes a manifest violation of the Charter of the United Nations. 2. For the purpose of paragraph 1, “act of aggression” means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression: (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof; (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State; (c) The blockade of the ports or coasts of a State by the armed forces of another State; (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State; (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement; (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State; (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.’).

⁶⁷ Statute, article 8(3) (‘Nothing in paragraph 2 (c) and (e) shall affect 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, by all legitimate means.’).

⁶⁸ On the importance of the similarity between the phrase ‘the State, on the territory of which’ and the other notions contained in article 12(2)(a) and (b), *see supra* paras 43-47.

⁶⁹ Majority Decision, para. 104 (‘As specified in article 1 of the Statute, the Court has been established to ‘exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute’. The preamble further emphasises that the States Parties are ‘determined to put an end to impunity for the perpetrators of these crimes and thus contribute to the prevention of such crimes’.’).

⁷⁰ Majority Decision, para. 104 (‘The reference to ‘[t]he State on the territory of which the conduct in question occurred’ in article 12(2)(a) of the Statute must, accordingly, be understood as defining the territorial parameters of the Court’s jurisdiction for the sole purpose of establishing individual criminal responsibility.’).

notion interpreted as ‘defining the territorial parameters of the Court’s jurisdiction’ in the Majority Decision.

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

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

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

68. It is worth remembering that when referring to the ‘principle of effectiveness’, different chambers of the Court (Pre-Trial Chamber,⁷³ Trial Chamber⁷⁴ or Appeals Chamber⁷⁵) took

⁷³ Pre-Trial Chamber II, *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen, Decision on the Prosecutor’s Application that the Pre-Trial Chamber disregard as irrelevant the Submission filed by the Registry on 5 December 2005*, 9 March 2006, ICC-02/04-01/05-147, para. 25 (A. ‘The second necessary condition to be met for the Chamber to be able to actually exercise its powers, including the power to assess its own jurisdiction and competence, is that any information which might be relevant for the exercise of such powers be promptly submitted to it. With specific regard to the powers enshrined in article 57, paragraph 3(c), of the Statute, it is of essence for the Chamber to receive without undue delay relevant information to enable it to determine whether it is “necessary” to make provision for the protection of victims and witnesses. To state that the Chamber has a power to provide on its own motion for the security of victims and witnesses, without at the same time ensuring that the information required to do so actually flows to the Chamber, would be tantamount to depriving this power of any meaningful content. It is a general principle of international law that the provisions of a treaty must be interpreted not only in “good faith in accordance with the ordinary meaning” to be given to the relevant terms, but also “in their context” and “in the light of its object and purpose” (article 31, paragraph 1, of the 1969 Vienna Convention on the Law of the Treaties), i.e., in such a way as not to defeat that object and purpose. The method of interpretation aimed at achieving this result is usually referred to as “functional” or “teleological” interpretation. Equally inferred from article 31 of the 1969 Vienna Convention, and equally generally accepted, is the *principle (commonly referred to as “effet utile”, “useful effect” or “principle of effectiveness”) that a treaty as a whole, as well as its individual provisions, must be read in such a way so as not to devoid either the treaty as such or one or more of its provisions of any meaningful content.*) (emphasis added) (footnotes omitted) ; Pre-Trial Chamber I, *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia, Decision on the ‘Application for Judicial Review by the Government of the Union of the Comoros*, 15 November 2018, ICC-01/13-68, para. 105 (‘Third, even if arguing a request under article 53(3)(a) of the Statute could potentially be interpreted as not imposing an obligation on the Prosecutor to comply with a decision of the Chamber, as the Prosecutor appears to believe, the *principle of effectiveness nonetheless requires that a request under article 53(3)(a) of the Statute be interpreted as entailing an obligation of compliance on the part of the Prosecutor.*’) (emphasis added), para. 106 (‘Indeed, according to this principle, “[w]hen a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted”. The possibility of the Prosecutor simply disregarding a decision under article 53(3)(a) of the Statute would mean that the oversight function of the Pre-Trial Chamber is without effect and that a *State Party’s opportunity to challenge the Prosecutor’s decision not to proceed with an investigation is devoid of substance.* This interpretation must, therefore, yield to the interpretation giving effect to article 53(3)(a) of the Statute, namely that a decision under this provision compels the Prosecutor to comply with it.’) (emphasis added).

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

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

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

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

71. I do not contest the importance of jurisprudential innovation but, according to practice, those developments should be justified by a comprehensive reappraisal of the *travaux préparatoires*, the emergence of new rules of customary international law, the impacts of new

requiring the Chamber to dismiss any interpretation of the applicable law that would result in disregarding or rendering any other of its provisions void. The Chamber agrees with this approach.’ (emphasis added) (footnotes omitted).

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

⁷⁶ Emphasis added.

conventions or jurisprudential interactions between international tribunals, etc. The ‘principle of effectiveness’ has been used rather as an additional argument, alongside others.

72. I also have doubts about the fact that the ‘ordinary meaning’, as used in the Majority Decision, is in conformity with article 31 of the Vienna Convention. The formulation chosen by the Majority in paragraph 109 of the Majority Decision (‘In light of the foregoing, the Chamber finds that, in accordance with the ordinary meaning given to its terms in their context and in the light of the object and purpose of the Statute, the reference to “[t]he State on the territory of which the conduct in question occurred” in article 12(2)(a) of the Statute must be interpreted as a reference to a State Party to the Statute.’) is so complex that it is much closer to a ‘special meaning’ than to an ‘ordinary meaning’. The ‘special meaning’ is of course compatible with the Vienna Convention, but requires the application of its article 31(4).⁷⁷ Yet, there is no indication that the Majority ever examined the intention of the States participating at the Rome Diplomatic Conference.

73. This leads me to wonder why the Majority stops at article 31 of the Vienna Convention – but excluding the recourse to the instruments mentioned in article 31(3)(c) (‘any relevant rules of international law applicable in the relations between the parties’) – instead of profiting from the rules of article 32 of the said convention⁷⁸ in accordance with the jurisprudence in the *Katanga* case.⁷⁹

74. The argument in paragraph 88 of the Majority Decision stating that ‘recourse to article 31(3)(c) of the Vienna Convention on the Law of Treaties [...] being a rule of interpretation, cannot in any way set aside the hierarchy of sources of law as established by article 21 of the Statute, which is binding on the Chamber’ reflects the Majority’s misunderstanding of the relationship between this disposition of the VCLT and article 21 of the Statute in the context

⁷⁷ VCLT, article 31(4) (‘A special meaning shall be given to a term if it is established that the parties so intended.’).

⁷⁸ VCLT, article 32 (‘Supplementary means of interpretation’) (‘Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable’).

⁷⁹ Trial Chamber II, *The Prosecutor v. Germain Katanga*, [Judgment pursuant to article 74 of the Statute](#), 7 March 2014, ICC-01/04-01/07-3436-tENG, para. 49 (‘It must also be recalled that, in addition to the General Rule, article 32 of the Vienna Convention provides for “supplementary means of interpretation” such as the preparatory work of the treaty and the circumstances of its conclusion. Having examined the texts in accordance with the General Rule, the bench may then have recourse to the supplementary means of interpretation to confirm the meaning resulting from the application of article 31, or to determine the meaning of a provision where the interpretation according to article 31 “leaves the meaning ambiguous or obscure; or leads to a result which is manifestly absurd or unreasonable”.’) (emphasis added).

of the issue *sub judice*. When strongly advocating for the *sacred character* of the hierarchy of norms of article 21(1) of the Statute, the Majority does not take notice of the fact that the legal problems are elsewhere, namely in: *i.* how to identify the real and full content of those UNO resolutions which are referred to by the Prosecutor; *ii.* how to measure the actual weight of these resolutions in conformity with international law; *iii.* how to identify the international agreements, the pertinence of which, is emphasized in these resolutions; *iv.* how to double-check the accuracy of some of the Majority's statements when it is *prima facie* evident that conflicts of norms may emerge not only with general international law but also with some recent *dicta* of the ICC and; *vi.* when and how to assess whether the norms of article 21(1)(a) of the Statute are in themselves sufficient or that recourse is required to other instruments under article 21(1)(b) of the Statute.⁸⁰

75. Everything points towards the conclusion that the interpretation made by the Majority on the basis of article 31 should have been completed by applying the instruments mentioned in article 32 of the Vienna Convention. The problem with accepting the Majority's interpretation is that, according to it, '[t]he State on the territory of which the conduct in question occurred' in article 12(2)(a) of the Statute' is to be understood as a State Party to the Statute, while in the context of article 8*bis* of the Statute, the very similar wording of 'the territory of another State' is to be understood differently.

76. Moreover, according to the Majority, ruling on the quality of 'statehood' does not fall within the judicial competence of the Court in the context of article 12(2)(a) of the Statute, while in the context of article 8*bis* of the Statute, a chamber would hardly be able to avoid ruling on the matter if the statehood of the attacking or attacked entity was challenged before it. The same can be said about the necessity of fulfilling the criterion of 'territory' understood as 'the territory of another State' under article 8*bis* of the Statute. Therefore, following the Majority's logic, the assessment of statehood *in concreto* undeniably falls within the judicial competence of the Court in the context of article 8*bis*, but not in the context of article 12(2)(a) of the Statute. However, it is hardly arguable that those two contradicting logics would coexist in the same Statute.

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

77. To conclude this section, I should say that at least one of the four hypothesis listed under article 32 of the Vienna Convention seems to be applicable when reading the interpretation of the Majority Decision, which is in my view only partially based on the Vienna Convention.

78. At least two additional verifications demonstrate that the rules of the Vienna Convention were not correctly applied and why the achieved result is manifestly flawed when the Majority concludes that ‘[i]n light of the foregoing, the Chamber finds that, in accordance with the ordinary meaning given to its terms in their context and in the light of the object and purpose of the Statute, the reference to “[t]he State on the territory of which the conduct in question occurred” in article 12(2)(a) of the Statute must be interpreted as a reference to a State Party to the Statute.’⁸¹

79. The first assessment consists of comparing the meaning attributed to the Majority’s formula and the use of the same formula elsewhere in the Statute. The second assessment is linked to the identification of the formula in other legal documents, fruits of current international law-making.

80. As to the first method: the formula ‘the State on the territory of which’ can be found three times in the Statute. In addition to article 12(2)(a), it also appears in articles 89(1)⁸² and 99(4)(a) of the Statute.⁸³ If the Majority is right, ‘the State on the territory of which’ formula could, without difficulty, be replaced in articles 89(1) and 99(4)(a) of the Statute with the formula ‘a State Party to the Statute’. However, this is not the case because in article 89(1) of the Statute,

⁸¹ Majority Decision, para. 109.

⁸² Rome Statute, article 89 (‘Surrender of persons to the Court’) (‘1. The Court may transmit a request for the arrest and surrender of a person, together with the material supporting the request outlined in article 91, to any *State on the territory of which* that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person. States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender.’) (emphasis added).

⁸³ Rome Statute, article 99 (‘Execution of requests under articles 93 and 96’) (‘4. Without prejudice to other articles in this Part, where it is necessary for the successful execution of a request which can be executed without any compulsory measures, including specifically the interview of or taking evidence from a person on a voluntary basis, including doing so without the presence of the authorities of the requested State Party if it is essential for the request to be executed, and the examination without modification of a public site or other public place, the Prosecutor may execute such request directly on the territory of a State as follows: (a) When the State Party requested is *a State on the territory of which* the crime is alleged to have been committed, and there has been a determination of admissibility pursuant to article 18 or 19, the Prosecutor may directly execute such request following all possible consultations with the requested State Party; (b) In other cases, the Prosecutor may execute such request following consultations with the requested State Party and subject to any reasonable conditions or concerns raised by that State Party. Where the requested State Party identifies problems with the execution of a request pursuant to this subparagraph it shall, without delay, consult with the Court to resolve the matter.’) (emphasis added).

the second sentence is devoted only to States Parties while the first sentence concerns ‘any State on the territory of which’. Therefore, in article 89(1) of the Statute, one may see two concentric circles where the larger one concerns ‘any State on the territory of which’ and the smaller one covers only the States Parties.⁸⁴ Concerning article 99(4)(a) of the Statute, which closely resembles the structure of article 12(2)(a) of the Statute, if one substitutes ‘the State on the territory of which’ with the formula ‘a State Party to the Statute’, the sentence becomes redundant and will lose its meaning.

81. It follows that the formula ‘the State on the territory of which’ may only be interpreted in its traditional, grammatical meaning in articles 89(1) and 99(4)(a) of the Statute. It would be at least atypical to assume that such a formula could have different meanings in different parts of the Statute, namely an ordinary meaning in article 12(2)(a) of the Statute and a different ordinary meaning common to articles 89(1) and 99(4)(a) of the Statute. Taking into account the similarity of the formulas referring to the Court’s *ratione loci* jurisdiction in articles 12(2)(a) and 99(4)(a) of the Statute, the existence of two ‘ordinary meanings’ is even less credible.

82. We arrive at a similar conclusion when observing the use of the formula ‘the State on the territory of which’ in different international treaties, instruments and decisions. For example, this formula is present in the following conventions: the Convention for the Establishment of a European Organization for Nuclear Research,⁸⁵ the Hague Convention of 1 March 1954 on Civil Procedure,⁸⁶ the Budapest Treaty on the International Recognition of the Deposit of

⁸⁴ See C. Kreß and K. Prost, ‘Article 98’ in *Ambos and Triffterer Commentary*, p. 2048 (‘Finally, the term “State” is used here to recognize that the Court has the power to transmit requests to all States – States Parties and non-States Parties. This is to contrast the next sentence, which imposes obligations on States and is therefore limited in application to States Parties.’). See also *Fernandez and Pacreau Commentary*, pp. 2218-2219.

⁸⁵ [Convention for the establishment of a European Organization for Nuclear Research](#), 1953, article XIV, ‘Dissolution’ (‘The Organization shall be dissolved if at any time there are less than five Member States. It may be dissolved at any time by agreement between the Member States. Subject to any agreement which may be made between Member States at the time of dissolution, *the State on the territory of which* the seat of the Organization is at that time established shall be responsible for the liquidation, and the surplus shall be distributed among those States, which are members of the Organization at the time of the dissolution, in proportion to the contributions actually made by them from the dates of their becoming parties to this Convention. In the event of a deficit this shall be met by the existing Member States in the same proportions as those in which their contributions have been assessed for the financial year then current.’) (emphasis added).

⁸⁶ [Convention of 1 March 1954 on civil procedure](#), article 4 (‘Where a request for service complies with Articles 1, 2 and 3, *the State on the territory of which* it has to be effected may refuse to comply therewith only if it deems that compliance would infringe its sovereignty or security.’) (emphasis added), article 6 (‘The provisions of the foregoing Articles shall not interfere with - (1) the freedom to send documents, through postal channels, directly to the persons concerned abroad; (2) the freedom of the persons concerned to have service effected directly through the judicial officers or competent officials of the country of destination; (3) the freedom of each State to

Microorganisms for the Purposes of Patent Procedure,⁸⁷ the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children,⁸⁸ the Vienna Agreement on Succession Issues between Successor States of the Former Yugoslavia⁸⁹ and the Czech-Ukrainian Agreement on War Graves.⁹⁰ It can also be found in the law of the European Union,

have service effected directly by its diplomatic or consular agents of documents intended for persons abroad. In each of these cases, the freedom mentioned shall only exist if allowed by conventions concluded between the States concerned or if, should there be no convention, *the State on the territory of which* service must be effected does not object. That State may not object when, in the cases mentioned in sub-paragraph 3 of the above paragraph, the document is to be served without any compulsion on a national of the requesting State.’) (emphasis added), article 15 (‘The provisions of the foregoing Articles shall not exclude the right of each State to have Letters of Request executed directly by its diplomatic officers or consular agents, if that is allowed by conventions concluded between the States concerned or if *the State on the territory of which* the Letter is to be executed does not object.’) (emphasis added).

⁸⁷ [Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure](#), 1977, article 7 (‘Acquisition of the Status of International Depositary Authority’) (‘A depositary institution shall acquire the status of international depositary authority by virtue of a written communication addressed to the Director General by the Contracting *State on the territory of which* the depositary institution is located and including a declaration of assurances to the effect that the said institution complies and will continue to comply with the requirements specified in Article 6(2). The said status may be acquired also by virtue of a written communication addressed to the Director General by an intergovernmental industrial property organization and including the said declaration.’) (emphasis added).

⁸⁸ [Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children](#), 1996, article 6 (‘1 For refugee children and children who, due to disturbances occurring in their country, are internationally displaced, the authorities of the Contracting *State on the territory of which* these children are present as a result of their displacement have the jurisdiction provided for in paragraph 1 of Article 5. 2 The provisions of the preceding paragraph also apply to children whose habitual residence cannot be established.’) (emphasis added).

⁸⁹ [Agreement on Succession Issues](#), adopted in Vienna on 29 June 2001, article 2 (‘(1) (b) External debt in (i)-(iv) above is described as allocated debt if the final beneficiary of the debt is located on the territory of a specific successor State or group of successor States. Allocated debt is not subject to succession and shall be accepted by the successor *State on the territory of which* the final beneficiary is located.’) (emphasis added).

⁹⁰ [Agreement Between the Cabinet of Ministers of Ukraine and the Government of the Czech Republic on War Graves](#), article 6 (‘3. The exhumation and re-interment of remains shall be carried out in accordance with the procedure provided for by the national legislation of the *state on the territory of which* they are located taking into account ethnical, religious and cultural traditions.’) (emphasis added).

for example in the law relating to internal market⁹¹ or victims of crimes.⁹² Guidelines adopted by the Council of Europe also belong to the latter category.⁹³

83. When observing the wording of these conventions, treaties, rulings or resolutions, it seems clear that the formula ‘the State on the territory of which’ is used in its traditional meaning, irrespective of the criminal, administrative or civil law nature of the given instrument. Where the drafters of a given instrument deemed it necessary, they added the words ‘Member’ or ‘Contracting’ to the formula.

84. Thus, even the treaty-making process and the norms created by international organizations do not sustain the Majority’s interpretation of the formula ‘the State on the territory of which’.

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

⁹¹ Council of the European Union, [Council Regulation \(EC\) No 2679/98 of 7 December 1998 on the functioning of the internal market in relation to the free movement of goods among the Member States](#), Preamble, (‘8) Whereas a Member State on the territory of which obstacles to the free movement of goods occur should take all necessary and proportionate measures to restore as soon as possible the free movement of goods in their territory in order to avoid the risk that the disruption or loss in question will continue, increase or intensify and that there may be a breakdown in trade and in the contractual relations which underlie it; whereas such Member State should inform the Commission and, if requested, other Member States of the measures it has taken or intends to take in order to fulfil this objective’) (emphasis added).

⁹² Council of the European Union, [Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims](#), article 1 (‘Right to submit an application in the Member State of residence’) (‘Member States shall ensure that where a violent intentional crime has been committed in a Member State other than the Member State where the applicant for compensation is habitually resident, the applicant shall have the right to submit the application to an authority or any other body in the latter Member State.’), article 2 (‘Responsibility for paying compensation’) (‘Compensation shall be paid by the competent authority of the Member State on whose territory the crime was committed.’) (emphasis added).

⁹³ Council of the European Union, [Guidelines on the Protection of Victims of Terrorist Acts](#), 2 March 2005 (‘Compensation’) (‘1. Victims of terrorist acts should receive fair, appropriate and timely compensation for the damages which they suffered. When compensation is not available from other sources, in particular through the confiscation of the property of the perpetrators, organisers and sponsors of terrorist acts, *the state on the territory of which* the terrorist act happened must contribute to the compensation of victims for direct physical or psychological harm, irrespective of their nationality. 2. Compensation should be easily accessible to victims, irrespective of nationality. To this end, *the state on the territory of which* the terrorist act happened should introduce a mechanism allowing for a fair and appropriate compensation, after a simple procedure and within a reasonable time. 3. States whose nationals were victims of a terrorist act on the territory of another state should also encourage administrative cooperation with the competent authorities of that state to facilitate access to compensation for their nationals. 4. Apart from the payment of pecuniary compensation, states are encouraged to consider, depending on the circumstances, taking other measures to mitigate the negative effects of the terrorist act suffered by the victims.’) (emphasis added).

E) Did the Majority provide a practical answer to the Prosecutor?

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

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

88. In paragraph 131 the Chamber states: 'It is further opportune to emphasise that the Chamber's conclusions pertain to the current stage of the proceedings'. The reason for the presence of the phrase 'at this stage of the proceedings' is unclear. This reasoning⁹⁶ seems to suggest that, at a later stage of proceedings, the Court may arrive at a different conclusion. Of note, this lack of clarity is what the Prosecutor sought to avoid, as underlined in her Request⁹⁷ and in her Response.⁹⁸

⁹⁴ Majority Decision, Disposition, p. 60.

⁹⁵ Majority Decision, Disposition, p. 60.

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

⁹⁷ [Request](#), para. 6 ('The resolution of this foundational issue is necessary now for several reasons. *First*, it will allow judicial consideration of an essential question *before* embarking on a course of action which might be contentious. The jurisdictional regime of the Court is a cornerstone of the Rome Statute, and it is therefore in the interests not only of the Court as a whole, but also of the States and communities involved, that any investigation proceeds on a solid jurisdictional basis. And it would be contrary to judicial economy to carry out an investigation in the judicially untested jurisdictional context of this situation only to find out subsequently that relevant legal bases were lacking. *Second*, an early ruling will facilitate the practical conduct of the Prosecutor's investigation by both demarcating the proper scope of her duties and powers with respect to the situation and pre-empting a potential dispute regarding the legality of her requests for cooperation. By ensuring that there is no doubt as to the proper scope of the Prosecutor's investigation, it will potentially save considerable time and effort for all parties concerned.') (emphasis in original).

⁹⁸ [Response](#), subtitle A, p. 8 ('There is no basis to require the Prosecutor to defer her request for a ruling on jurisdiction until she has made any application under article 58, and the Chamber should promptly rule on the merits.'). *See also* para. 7 ('[R]esolving the question of jurisdiction at the present time not only favours procedural economy but also ensures that the Court remains on the correct course. [...] Nothing in a prompt ruling causes

89. As an aside, given the *a priori* refusal of examining anything else than the interplay between articles 125(3) and 12(2)(a) of the Statute in the mirror of the - only partially quoted - Resolution 67/19, without convincingly substantiating this choice, and which seemingly predetermined the outcome, I do not believe that the reasonable basis standard was correctly applied at all.

90. The Majority attempts to defend its position from a possible criticism of acting *ultra vires*, which is why it warns against applying the decision outside the scope of the issue *sub judice*.⁹⁹ However, the Majority mentions at the same time the right to self-determination in a way that negates the intended effects of the warning.¹⁰⁰ Some parts of the Decision are worded as a clear cut statement¹⁰¹ while others use wording that reverts back to ‘diplomatic’ ambiguity.¹⁰²

unfair prejudice to the victims, who are fully able to participate, and will benefit either from a clear ruling on the scope of the Court’s territorial jurisdiction (and consequently its entitlement to expect full cooperation from all ICC States Parties in conformity with Part 9 of the Statute), or that the Court cannot be the proper forum for them to have access to justice.’) (footnotes omitted), para. 10 ([The Chamber] should promptly issue the requested ruling on the merits.’).

⁹⁹ Majority Decision, para. 60 (‘As such, it must be emphasised that the present decision is strictly limited to the question of jurisdiction set forth in the Prosecutor’s Request and does not entail any determination on the borders disputes between Palestine and Israel. The present decision shall thus not be construed as determining, prejudicing, impacting on, or otherwise affecting any other legal matter arising from the events in the Situation in Palestine either under the Statute or any other field of international law.’), para. 62 (‘Therefore, any territorial determination by the Chamber for the purpose of defining its territorial jurisdiction for criminal purposes has no bearing on the scope of Palestine’s territory.’).

¹⁰⁰ Majority Decision, para. 123 (‘More specifically, the Chamber is of the view that the aforementioned territorial parameters of the Prosecutor’s investigation pursuant to articles 13(a), 14 and 53(1) of the Statute implicate the right to self-determination. Accordingly, it is the view of the Chamber that the above conclusion – namely that the Court’s territorial jurisdiction in the Situation in Palestine extends to the territories occupied by Israel since 1967 on the basis of the relevant indications arising from Palestine’s accession to the Statute – is consistent with the right to self-determination.’).

¹⁰¹ Majority Decision, para. 116 (‘with regard to the territory of Palestine for the sole purpose of defining the Court’s territorial jurisdiction’), para. 130.

¹⁰² Majority Decision, para. 114 (‘the delimitation of the territory of Palestine for the sole purpose of defining the Court’s territorial jurisdiction’). Note in particular the use of the words ‘delimitation’ and ‘State of Palestine’, as compared to the wording used in para. 116 (‘with regard to the territory of Palestine for the sole purpose of defining the Court’s territorial jurisdiction’). *See also* para. 60 (‘As such, it must be emphasised that the present Decision is strictly limited to the question of jurisdiction set forth in the Prosecutor’s Request and does not entail any determination on the border disputes between Palestine and Israel. The present decision shall thus not be construed as determining, prejudicing, impacting on, or otherwise affecting any other legal matter arising from the events in the Situation in Palestine either under the Statute or any other field of international law.’), para. 62 (‘Therefore, any territorial determination by the Chamber for the purpose of defining its territorial jurisdiction for criminal purposes has no bearing on the scope of Palestine’s territory.’).

91. Moreover, the Majority finds that territorial jurisdiction may be further examined at a later time, in the context of a request for an arrest warrant.¹⁰³ I have to note that the Prosecutor wanted precisely to avoid such a decision, as underlined in her Request¹⁰⁴ and Response.¹⁰⁵

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

93. Why postpone the *in depth* assessment? What is supposed to happen in the meantime? Which important legal provisions will be different from those that are already identified and were abundantly analysed by the Prosecutor, the *amici curiae* and the victims’ representatives? One cannot reasonably expect resolutions of the General Assembly – the main legal basis of the Request – to become binding. Moreover, and abstraction made of the legal nature of the resolutions, if one pays close attention to the text of the resolutions adopted in the last years

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

¹⁰⁴ [Request](#), para. 6 (‘The resolution of this foundational issue is necessary now for several reasons. *First*, it will allow judicial consideration of an essential question *before* embarking on a course of action which might be contentious. The jurisdictional regime of the Court is a cornerstone of the Rome Statue, and it is therefore in the interests not only of the Court as a whole, but also of the States and communities involved, that any investigation proceeds on a solid jurisdictional basis. And it would be contrary to judicial economy to carry out an investigation in the judicially untested jurisdictional context of this situation only to find out subsequently that relevant legal bases were lacking. *Second*, an early ruling will facilitate the practical conduct of the Prosecutor’s investigation by both demarcating the proper scope of her duties and powers with respect to the situation and pre-empting a potential dispute regarding the legality of her requests for cooperation. By ensuring that there is no doubt as to the proper scope of the Prosecutor’s investigation, it will potentially save considerable time and effort for all parties concerned.’) (emphasis in original).

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

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

(which will be examined below), one can hardly conclude that the Prosecutor's main starting point¹⁰⁷ – that, according to the General Assembly, Palestine *already* and *independently* possesses sufficient attributes of Statehood – is substantiated, even today.

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

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

96. In the following pages, I present an alternative approach based on an *in extenso* reading of relevant international instruments, most of them referenced in the Request. This approach will also cover the issues, legal problems and legal aspects abundantly analysed by the Prosecutor (in the Request and Response) and by some *amici*, but which the Majority did not address at all or only superficially (such as the question of the Montevideo criteria and the impact of the Oslo Accords).

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

97. The Majority Decision is largely based on the interplay between article 12(2)(a),¹⁰⁹ article 21(1)(a)¹¹⁰ and article 125(3)¹¹¹ of the Statute.

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

¹⁰⁸ [Response](#), para. 7.

¹⁰⁹ Article 12(2)(a) of the Statute ('Preconditions to the exercise of jurisdiction') reads: 'In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3: (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'.

¹¹⁰ Article 21(1)(a) of the Statute ('Applicable law') reads: 'The Court shall apply: (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence'.

¹¹¹ Article 125 of the Statute ('Signature, ratification, acceptance, approval or accession') reads: 'This Statute shall be open to accession by all States. Instruments of accession shall be deposited with the Secretary-General of the United Nations'.

98. I am convinced that article 21(1)(b)¹¹² and (c)¹¹³ of the Statute should also be considered and I am not satisfied with the surprisingly rather short reasoning in the Majority Decision¹¹⁴ that article 21(1)(a) of the Statute forms an adequate legal basis in itself. To the contrary, the numerous but one-sided references in the Request to different UN resolutions and other international rules and principles should provide the Chamber with an appropriate basis for proceeding under article 21(1)(b) and (c) of the Statute. If this had been the case, the outcome would have been considerably different from the current position of the Majority.

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

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

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

102. From the onset, the Prosecutor’s application for a leave for extension of pages stated that ‘[h]owever, mindful of the unique and complex factual and legal circumstances in this

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

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

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

situation, and the significance of the requested ruling on the Court’s exercise of jurisdiction, the Prosecution requests an extension of pages to a maximum of 110 pages.’¹¹⁵ It further added that ‘the Request addresses an issue which is not only highly significant to any exercise of jurisdiction over this situation by the Court, but touches upon matters which are perhaps uniquely controversial within the international community. As such, it is legally and factually complex.’¹¹⁶

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

104. The Request also emphasised the complexity¹¹⁸ of the issues at hand, including the division of states,¹¹⁹ historical¹²⁰ and political aspects,¹²¹ among others. The Request also referred to the practice of the United Nations and several other international organizations.¹²²

105. This complexity is perhaps what led the Prosecutor to suggest two options in the Request, a primary position and a secondary position: *i.* ‘Palestine is a State’¹²³ and *ii.* ‘Palestine is a State for the purpose of the Statute.’¹²⁴ According to the different logic of the primary and the secondary positions, the Prosecutor first suggested to refuse a special assessment for Palestine¹²⁵ and secondarily, she advocated for it: ‘the Chamber should consider the particularities of the Palestinian situation.’¹²⁶

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

¹¹⁶ [Application for extension of pages](#), para. 5.

¹¹⁷ [Decision on the Prosecutor’s Application for an extension of the page limit](#), 21 January 2020, ICC-01/18-11, para. 12.

¹¹⁸ [Request](#), para. 5.

¹¹⁹ [Request](#), para. 5.

¹²⁰ [Request](#), paras 46-52.

¹²¹ [Request](#), paras 65, 80, 116.

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

¹²³ [Request](#), paras 8, 115, 135.

¹²⁴ [Request](#), paras 9, 43, 101-103.

¹²⁵ [Request](#), para. 103 (‘The Prosecution considers that a “State” for the purposes of articles 12(1) and 125(3) should also be considered a “State” under article 12(2) of the Statute. Following the deposit of its instrument of accession with the UN Secretary-General pursuant to article 125(3), Palestine qualified as a “State on the territory of which the conduct in question occurred” for the purposes of article 12(2)(a) of the Rome Statute. This means that once a State becomes party to the Statute, the ICC is automatically entitled to exercise jurisdiction over article 5 crimes committed on its territory. No additional consent or separate assessment is needed.’), para. 114.

¹²⁶ [Request](#), para. 101. *See also* paras 138, 144, 178; Majority Decision, para. 110 (‘The Appeals Chamber has held that, if “a matter is exhaustively dealt with by [the Statute] or [...] the Rules of Procedure and Evidence, [...]’

106. Additionally, the other documents presented to the Chamber, namely the States' and victims' observations and *amici curiae* contributions as well as various cited legal publications, repeatedly emphasised this complexity. Most of them also emphasised the concurrent relevance of 'international criminal law' and classic 'public international law' concerning almost all the important issues at stake.

107. In support of its refusal to deal with international law, the Majority provides too simple of a justification, relying merely on two Appeals Chamber judgments¹²⁷ adopted in an entirely different context.

108. The first is a case where the defence requested a stay of proceedings on the basis of an alleged irregularity in the cooperation between the Prosecutor and the government of the Democratic Republic of the Congo. In support of its argument, the defence referred to the practice developed in several common law countries under the name of 'doctrine of abuse of process'. Of note, this concept only received limited acceptance in civil law countries.¹²⁸ In fact, the question was whether to accept what was presented by a party as a 'general principle of law'. In the second decision (which pre-dates the first), the Prosecutor, in attempting to obtain an interlocutory appeal, also referred to some common law rules as general principles of law. This led the Appeals Chamber into a detailed examination in order to establish that article 82 of the Statute exhaustively regulates the issue. The Appeals Chamber also considered the preparatory works dedicated to this article as well as the wording of some international human rights conventions.

no room is left for recourse to the second or third source of law [in article 21(1) of the Statute] to determine the presence or absence of a rule governing a given subject.”) referring to Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, [Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 \(2\) \(a\) of the Statute of 3 October 2006](#), 14 December 2006, ICC-01/04-01/06-772, para. 34. See also Appeals Chamber, *Situation in the Democratic Republic of the Congo*, [Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal](#), 13 July 2006, ICC-01/04-168, paras 33-39.

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

¹²⁸ See Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, [Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 \(2\) \(a\) of the Statute of 3 October 2006](#), 14 December 2006, ICC-01/04-01/06-772, para. 33.

109. In my view, the lesson learned from these two judgments is that an extensive analysis is in fact required before accepting a *prima facie* rule as a general principle of law.

110. It is true that in the first ten years of the ICC jurisprudence, several decisions adopted the ‘only in case of lacuna’ approach (such as in the *Al Bashir* case¹²⁹ or in the Kenyan situation).¹³⁰ This is also the position adopted in some commentaries.¹³¹ It is worth mentioning that for some commentators, the issue is whether the ‘lacuna’ can be adequately filled through the interpretation of the Rome Statute according to the Vienna Convention on the Law of Treaties¹³² and by taking into account the Elements of Crimes and the Rules. Another commentary criticizes the wording of article 21 of the Statute, because, in its view, it confuses primacy with priority.¹³³ These commentators nevertheless emphasise that in practice:

The Court is free to refer to all treaties in its search for the principles and rules of international law referenced in paragraph 1(b). While treaties that are merely ‘relevant’ to the work of the Court cannot be applied directly, therefore, they can nonetheless provide evidence in support of the other sources. This makes sense because [...] it is unlikely that the drafters wished to deprive the Court of the possibility of referring to international treaties to assist them in deciding novel issues.¹³⁴

¹²⁹ *The Prosecutor v. Omar Hassan Ahmad Al-Bashir*, [Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir](#), 3 April 2009, ICC-02/05-01/09-3, para. 44 (‘Third, the consistent case law of the Chamber on the applicable law before the Court has held that, according to article 21 of the Statute, those other sources of law provided for in paragraphs 1(b) and 1(c) of article 21 of the Statute, can only be resorted to when the following two conditions are met: (i) there is a lacuna in the written law contained in the Statute, the Elements of Crimes and the Rules; and (ii) such lacuna cannot be filled by the application of the criteria of interpretation provided in articles 31 and 32 of the Vienna Convention on the Law of the Treaties and article 21(3) of the Statute.’).

¹³⁰ [Ruto et al. Confirmation of Charges Decision](#), para. 289 (‘The jurisprudence of other international or hybrid tribunals is not, in principle, applicable law before the Court and may be resorted to only as a sort of persuasive authority, unless it is indicative of a principle or rule of international law. But even then, applying a customary rule of international law only “where appropriate” limits its application to cases where there is a lacuna in the Statute and the other sources referred to in article 21(1)(a). In other words, the Chamber should not resort to applying article 21(1)(b), unless it has found no answer in paragraph (a).’).

¹³¹ M. M. deGuzman, ‘Article 21: Applicable law’ in *Ambos and Triffterer Commentary* (‘deGuzman’), p. 936; M. Heikkilä, ‘Article 21(1)(b)’, online commentary on CaseMatrixNetwork, <https://www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc/commentary-rome-statute/commentary-rome-statute-part-2-articles-11-21/#c2020>; N. C. Bicudo, ‘Article 21’ in *Fernandez-Pacreau Commentary*, p. 969.

¹³² DeGuzman, paras 11, 20, 21.

¹³³ Bicudo, p. 969.

¹³⁴ DeGuzman, p. 939, para. 22, n. 57 (citing L. Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millenium* (2002), para. 12).

111. Obviously, there is a great difference between *i.* claiming an *additional*, typically procedural right, not recognized by the Rome Statute or the Rules, simply by referring to its presence in another international treaty (or in the interpretation of such treaty in the jurisprudence) and *ii.* referring to the provisions of the United Nations Charter and the practice of the UNO when interpreting the content of a certain document relevant to an actual situation or case submitted before the ICC.

112. While the former is a claim for ‘importation’, the latter is a question of interpretation. The ‘only in case of lacuna’ approach seems to pertain to the first category (the claim for importation). Of note, the question of whether there is a lacuna or not may also not necessarily be easy to answer at once (as it has been the case, for example, with the issue of ‘*no case to answer*’ before several chambers of the Court).

113. That is why, in my view, when implementing the latter (the tool of interpretation of a document), the restrictions reflected in the above cited decisions do not prevent consideration of the rules of public international law relevant for assessing the value and content of the UN documents referred to by the Prosecutor.

114. Accordingly, given that a good number of factors reflect that the actual text is far from unambiguous, I do not find that the Majority provided a reasoned opinion in this respect or sufficiently justified its reliance on these *dicta*. Even if *per tangente*, the cited judgment referred at the same time to article 21(1)(b) and (c) of the Statute, one must not forget that the Appeals Chamber highlighted in these same cases the importance of interpretation in accordance with the rules of the Vienna Convention, namely articles 31 and 32.

115. The exclusion¹³⁵ of relevant international legal rules is even more problematic because of the Vienna Convention, which stipulates that, under article 31(3): ‘[t]here shall be taken into account, together with the context: [...] (c) any relevant rules of international law applicable in the relations between the parties.’

116. Moreover, the *Katanga* judgment superseded the two old *dicta* sometimes referred to for substantiating the ‘only in case of lacuna’ concept. Trial Chamber II gave a rather lengthy presentation of the rules of interpretation contained in articles 31 and 32 of the Vienna

¹³⁵ Majority Decision, para. 103 (‘It follows that the absence of such a power conferred upon the Chamber confirms the exclusion of an interpretation of “[t]he State on the territory of which the conduct in question occurred” in article 12(2)(a) of the Statute as referring to a State within the meaning of general international law’).

Convention, and then clarified when a chamber ‘may’ and when it ‘must’ rely on extraneous rules.¹³⁶ The chamber did not reiterate the alleged ‘prohibition’ to have recourse to extraneous rules. On the contrary, according to its interpretation, it is an obligation (‘the Chamber *must*’) ‘where the founding texts do not specifically resolve a particular issue’, and there is always a possibility (‘the Chamber *may*’) to profit from extraneous international legal rules ‘where it is established that they are applicable to the relations between the States Parties’.¹³⁷ It is clear from the examples it gives that the chamber understood article 21(1)(b) and (c), and article 21(3) of the Statute as needing to be interpreted in conjunction with article 31(3)(c) of the Vienna Convention.

117. Consequently, as to the recourse to international law, the ‘only in case of lacuna’ approach is rather an arbitrary interpretation made in some academic and scholarly works. Yet, as to restrictions regarding tools of interpretation, it was not and is not an authoritative position established in the Court’s jurisprudence.

118. Refusing to work with rules and established notions of international law is unusual given that the ICC is itself an international tribunal and the issue *sub judice* raises multiple questions of international law. Moreover, even the Prosecutor emphasised that:

Certainly, it is not the case that anything in the Request asks the Chamber to decline to apply international law. Such a position would indeed be inconsistent with article 21 of the Statute. Rather, the Request merely asks the Chamber to confirm *which* principles of international law apply, given the interlocking nature of the issues raised by this situation of treaty interpretation. Statehood, international humanitarian law, and international human rights law. On that basis, the Chamber will decide how the Court should proceed.¹³⁸

¹³⁶ Trial Chamber II, *The Prosecutor v. Germain Katanga*, [Judgment pursuant to article 74 of the Statute](#), 7 March 2014, ICC-01/04-01/07-3436-tENG (‘*Katanga Judgment*’), para. 47 (‘Article 31 of the Vienna Convention also provides that in addition to the context consideration shall be given to “any relevant rules of international law applicable in the relations between the parties”. The General Rule provides that, to interpret or impart meaning to a provision of a treaty, *the bench may rely on rules extraneous to the text concerned (in this case, the founding texts) where it is established that they are applicable to the relations between the States Parties. Where the founding texts do not specifically resolve a particular issue, the Chamber must refer to treaty or customary humanitarian law and the general principles of law.* To this end, the Chamber may, for example, be required to refer to the jurisprudence of the *ad hoc* tribunals and other courts on the matter. Nonetheless, the ultimate meaning which the Chamber will apply must always be underpinned by the above-mentioned method of interpretation, which means that it must construe, in good faith, the terms used in accordance with their ordinary meaning, considered in their context and in the light of the purpose and object of the Statute.’) (emphasis added) (footnotes omitted).

¹³⁷ [Katanga Judgment](#), para. 47.

¹³⁸ [Response](#), para. 12 (footnotes omitted) (emphasis in original).

She further added that ‘[t]he Prosecution did not disregard nor circumvent public international law—which is obviously not possible; instead it applied its principles and rules to this case, while also considering the context and purpose of the Statute.’¹³⁹

119. Consequently, I do not see clearly how ‘the unique and complex factual and legal circumstances in this situation’, with special regard to the ‘nature, novelty and complexity of the issue’, can be answered having recourse only to article 125(3), article 12(2)(a) and article 21(1)(a) of the Statute, especially if we take into account the Chamber’s previous statement on the complexity of the situation in its decision of 21 January 2020.

IV. The issue of the Montevideo criteria

120. The Request and a number of the *amici curiae* contributions paid exceptional attention to the satisfaction (or lack thereof) of the Montevideo criteria which are, incidentally, very similar to the famous Austrian professor Georg Jellinek’s definition of ‘State’ formulated decades earlier.¹⁴⁰

121. However, I note with interest professor (and since then ICJ Judge) James Crawford’s remark describing the Montevideo criteria as a ‘hackneyed’ formula.¹⁴¹ My personal opinion is that their alleged mandatory character, their value or even their practical usefulness should not be overemphasised.

122. The Montevideo criteria (‘The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states’) contained in article 1 of the Montevideo Convention on the Rights and Duties of States (1933) are abundantly analysed in the Request and in the *amici curiae* submissions. Most of the submissions refer to the Montevideo criteria as the expression of customary international law.

A) The Montevideo Convention and customary law

123. First, it is to be noted that if the Montevideo criteria are found to be of customary nature, their use in the reasoning of the Chamber would presuppose that article 21(1)(a) of the Statute

¹³⁹ [Response](#), para. 59 (footnotes omitted).

¹⁴⁰ See G. Jellinek, *Allgemeine Staatslehre* (1914), pp. 180-181.

¹⁴¹ [Request](#), para. 140, n. 467, where the formula of the Montevideo Convention is considered to a certain extent insufficient and outdated, even ‘hackneyed’ (*referring to J. Crawford, The Creation of States in International Law* (2007), p. 437).

cannot actually be its sole legal basis, but that it is rather necessary to turn ‘in the second place, where appropriate’ to article 21(1)(b) of the Statute. This also bears the logical consequence that other applicable treaties of international law will also form part of the reasoning. Since the Montevideo Convention was concluded within the framework of the Pan-American cooperation at the Seventh International Conference of American States, it cannot be relied upon *per se* by the Chamber. It can, however, be used as proof of customary law at the regional level, enjoying very large doctrinal support worldwide.

124. It is worth noting, however, that even proponents of its customary law character are not unanimous as to: *i.* whether the Montevideo Convention as a whole is of customary character or only its article 1 (containing the definition), and *ii.* whether the customary law nature of the so-called declaratory concept of State recognition is manifested here (namely in articles 3(1)¹⁴² and 6¹⁴³) or whether fundamental principles of international law should also be added (namely articles 3(2), 4, 5, 8, 10, 11(2),¹⁴⁴ which were later included with more or less a very similar formulation in the Preamble and article 2 of the Charter of the United Nations). Moreover, it also contains very important rules that cannot be considered customary in nature (such as article 11,¹⁴⁵ a manifestation of the so-called Stimson-doctrine).

¹⁴² Montevideo Convention on the Rights and Duties of States, article 3(1) (‘The political existence of the state is independent of recognition by the other states. Even before recognition the state has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organize itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts.’).

¹⁴³ Montevideo Convention, article 6 (‘The recognition of a state merely signifies that the state which recognizes it accepts the personality of the other with all the rights and duties determined by international law. Recognition is unconditional and irrevocable.’).

¹⁴⁴ Montevideo Convention, article 3(2) (‘The exercise of these rights has no other limitation than the exercise of the rights of other states according to international law.’), article 4 (‘States are juridically equal, enjoy the same rights, and have equal capacity in their exercise. The rights of each one do not depend upon the power which it possesses to assure its exercise, but upon the simple fact of its existence as a person under international law.’), article 5 (‘The fundamental rights of states are not susceptible of being affected in any manner whatsoever.’), article 8 (‘No state has the right to intervene in the internal or external affairs of another.’), article 10 (‘The primary interest of states is the conservation of peace. Differences of any nature which arise between them should be settled by recognized pacific methods.’), article 11(2) (‘The territory of a state is inviolable and may not be the object of military occupation nor of other measures of force imposed by another state directly or indirectly or for any motive whatever even temporarily.’).

¹⁴⁵ Montevideo Convention, article 11 (‘The contracting states definitely establish as the rule of their conduct the precise obligation not to recognize territorial acquisitions or special advantages which have been obtained by force whether this consists in the employment of arms, in threatening diplomatic representations, or in any other effective coercive measure.’).

125. The Montevideo Convention also contains rules that can be considered as ‘main principles’ but which have not been strictly followed in international practice¹⁴⁶ or treaty making.¹⁴⁷

126. Even article 12 of the Convention may be cited against the argument that the contracting parties must have wanted to codify customary law as it stood at that time.¹⁴⁸ This, however, does not rule out *per se* the possibility of referring to the Montevideo Convention or its criteria approximately 90 years later, in the context of subsequent changes in modern international law. The Montevideo criteria, in their original form, can hardly be of immemorial character as it will be shown in the subsequent parts of my Opinion and obviously even the ‘more than 99 years’ time frame has not yet elapsed since its adoption.

127. The Montevideo Convention was, however, ratified with reservations by, *inter alia*, the United States. The language of its reservation is not easy to understand. Manifestly, it reflects Washington’s resentment for the rejection of some of the United States’ proposals and may have had as a purpose to distinguish between Theodore Roosevelt’s policies and those of Franklin Delano Roosevelt.¹⁴⁹ However, according to Sir Hersch Lauterpacht, the reason

¹⁴⁶ See Montevideo Convention, article 6 (‘Recognition is unconditional and irrevocable’) and the denunciation (on 29 April 1945) of the Soviet-Japanese Neutrality Pact of 13 April 1941 with its secret protocol, in which the Soviet Union recognized Manchoukuo: ‘In conformity with the spirit of the Pact on neutrality concluded on April 13, 1941, between the U.S.S.R. and Japan, the Government of the U.S.S.R. and the Government of Japan, in the interest of insuring peaceful and friendly relations between the two countries, solemnly declare that the U.S.S.R. pledges to respect the territorial integrity and inviolability of Manchoukuo and Japan pledges to respect the territorial integrity and inviolability of the Mongolian People’s Republic.’ See <http://www.ibiblio.org/pha/policy/1941/410413a.html>.

¹⁴⁷ See Montevideo Convention, article 9 (‘The jurisdiction of states within the limits of national territory applies to all the inhabitants. Nationals and foreigners are under the same protection of the law and the national authorities and the foreigners may not claim rights other or more extensive than those of the nationals.’) See also the Status of Forces Agreements (‘SOFA’), which are multilateral or bilateral agreements aiming to exempt military personnel and civilians from the host state’s jurisdiction or from fulfilling other treaty obligations, *e.g. vis-à-vis* the Rome Statute.

¹⁴⁸ Montevideo Convention, article 12 (‘The present Convention shall not affect obligations previously entered into by the High Contracting Parties by virtue of international agreements.’).

¹⁴⁹ See League of Nations, Reservation made by the Government of the United States to the Convention on Rights and Duties of States adopted by the Seventh International Conference of American States signed at Montevideo on 26 December 1933, [Treaty Series: Treaties and International Engagements Registered with the Secretariat of the League of Nations](#), Nos. 3801-3824 (1936), p. 29. The United States’ reservation reads, in full: ‘The Delegation of the United States, in voting “yes” on the final vote on this committee recommendation and proposal, makes the same reservation to the eleven Articles of the project or proposal that the United States Delegation made to the first ten Articles during the final vote in the full Commission, which reservation is in words as follows: “The policy and attitude of the United States Government toward every important phase of international relationships in this hemisphere could scarcely be made more clear and definite than they have been made by both word and action especially since March 4 th. I have no disposition therefore to indulge in any repetition or rehearsal of these acts and utterances and shall not do so. Every observing person must by this time thoroughly understand that under the Roosevelt Administration the United States Government is as much opposed as any

behind the reservation was that the notions were ambiguous.¹⁵⁰ Regardless of the reason, the use of reservations and their wording¹⁵¹ reflect the hypothesis that the Montevideo Convention as a whole cannot be considered purely codificatory.

128. As previously stated, the Montevideo criteria are incidentally very similar to the definition of ‘State’ given by the famous Austrian professor, Georg Jellinek, formulated decades earlier.¹⁵² It is well known, however, that all four components faced criticisms and are often also based on purely political/geopolitical considerations. This can also be linked to the fact that in Montevideo, the participating States viewed the world from their own perspective, conditioned by their particular position, namely on the American continent.

B) The ‘permanent population’ criterion

129. The ‘easiest’ is to begin by asking whether the adjective *permanent*, preceding the term *population*, still holds practical significance today or whether it held any practical meaning at the time.

other Government to interference with the freedom, the sovereignty, or other internal affairs or processes of the Governments of other nations. In addition to numerous acts and utterances in connection with the carrying out of these doctrines and policies, President Roosevelt, during recent weeks, gave out a public statement expressing his disposition to open negotiations with the Cuban Government for the purpose of dealing with the treaty which has existed since 1903. I feel safe in undertaking to say that under our support of the general principle of non-intervention as has been suggested, no Government need fear any intervention on the part of the United States under the Roosevelt Administration. We think it unfortunate that during the brief period of this Conference there is apparently not time within which to prepare interpretations and definitions of these fundamental terms that are embraced in the report. Such definitions and interpretations would enable every Government to proceed in a uniform way without any difference of opinion or of interpretations. I hope that at the earliest possible date such very important work will be done. In the meantime in case of differences of interpretations and also until they (the proposed doctrines and principles) can be worked out and codified for the common use of every Government, I desire to say that the United States Government in all of its international associations and relationships and conduct will follow scrupulously the doctrines and policies which it has pursued since March 4th which are embodied in the different addresses of President Roosevelt since that time and in the recent peace address of myself on the 15th day of December before this Conference and in the law of nations as generally recognized and accepted.”

¹⁵⁰ H. Lauterpacht, ‘Recognition of States in International Law’ in *53 The Yale Law Journal* 385 (1944) (‘Lauterpacht’), p. 423 (‘In signing the Convention the United States added a reservation, which described as unfortunate the fact that the conference did not prepare a definition or interpretation of the fundamental terms used in the Convention so as to “enable every government to proceed in a uniform way without any difference of opinion or interpretations.”’).

¹⁵¹ League of Nations, [Treaty Series: Treaties and International Engagements Registered with the Secretariat of the League of Nations](#), Nos. 3801-3824 (1936), p. 29 (‘The delegates of Brazil and Peru recorded the following private vote with regard to Article 11: That they accept the doctrine in principle but that they do not consider it codifiable because there are some countries which have not yet signed the Anti-War Pact of Rio de Janeiro of which this doctrine is a part and therefore it does not yet constitute positive international law suitable for codification.’).

¹⁵² G. Jellinek, *Allgemeine Staatslehre* (1914), pp. 180-181.

130. While it is evident that there is no State without a population, international law neither sets a minimum size requirement, nor requires a *permanent* character for a population. This is because populations experience natural growth and loss, but also because of the phenomenon of immigration with which a large number of States are familiar. The territorial changes following World War I and World War II produced changes in demographic and ethnic composition, without necessarily having an impact on the legal identity of States. Even the Holocaust during World War II or the odious genocide and ethnic cleansing attempts since that time, did not impact the legal identity of the given States.

C) The ‘defined territory’ criterion

131. As to a ‘*defined territory*’, it goes without saying that a State needs a territory. However, international law prescribes neither a minimum nor a maximum size for it. Rather, what matters is that a substantial part of that territory may be used for normal human life, meaning agriculture and industry.

132. It is rather unclear whether the adjective ‘defined’ should be understood as ‘well defined’, *a fortiori* internationally defined or recognized, or only as an equivalent to ‘a certain’.

133. When scrutinizing pre-20th century States, it is obvious that there were large empires, the precise territorial scope of which are not easy to establish with absolute precision.¹⁵³ When a given empire or kingdom was composed of an ‘ancestral home’ surrounded by a certain number of vassal entities, the fidelity of which depended largely on the military success of the empire, it was not always easy to define the borders of that empire.¹⁵⁴ The arbitral decision of Pope Alexander VI (the Bull *Inter Caetera* of 4 May 1493, basis of the Treaty of Tordesillas) is a famous example not only of the division of ‘spheres of interests’ but also of the fact that a territory may be defined with considerable latitude. Even the 20th century provides examples where a given State’s territory was only defined *grosso modo*, and yet other States did not consider this to affect that State’s statehood.¹⁵⁵

¹⁵³ See e.g. Attila’s Hun empire, the Mongols’ Golden Horde, the Maya, Aztec and Inca empires.

¹⁵⁴ See e.g. the Ottoman Empire which had a number of half-sovereign duchies on the periphery, including the khanate (*knyazivstvo*) in Eastern Europe and around the Black Sea, and the banate (*banstvo*) in the Balkans.

¹⁵⁵ See e.g. Articles of Agreement for a Treaty between Great Britain and Ireland (the Anglo-Irish Treaty of 1921), 6 December 1921, article 12 (‘[A Commission] shall determine in accordance with the wishes of the inhabitants, so far as may be compatible with economic and geographic conditions, the boundaries between Northern Ireland and the rest of Ireland, and for the purposes of the Government of Ireland Act, 1920, and of this instrument, the boundary of Northern Ireland shall be such as may be determined by such Commission.’) (cited in K. J. Rankin,

134. The ICJ also touched upon this phenomenon in its advisory opinion on Western Sahara, albeit in the context of nomadic state-formations.¹⁵⁶

135. One might say that these are only exceptions. Yet, if there is such a large number of exceptions, why should we consider a certain rule to be absolute?

D) The ‘government’ criterion

136. The third Montevideo criterion is ‘*government*’.

137. In practice, this involves not only a necessary central authority, but also the effective implementation of its functions, namely its ability to manage the territory and its capacity to legislate and to see its laws executed by the administration and applied by the judiciary. The events of the 20th century contributed to the enlargement of the criterion of effective government by considering that the exercise of power by a puppet government could not be considered effective (*see* the Stimson doctrine¹⁵⁷ and its follow ups in the League of Nations and after 1945 in the United Nations). This approach was manifested in the UN General

‘[The Creation and Consolidation of the Irish Border](#)’ (2005), Working Papers in British-Irish Studies No. 48, p. 18). *See also below* the history of Poland’s borders as established at the Tehran, Yalta and Potsdam conferences, n. 221-223.

¹⁵⁶ ICJ, *Western Sahara*, [Advisory Opinion of 16 October 1975](#), 16 October 1975, (‘Western Sahara Advisory Opinion’), para. 148 (‘In the case concerning Reparation for Injuries Suffered in the Service of the United Nations, the Court observed: “The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community” (*I.C.J. Reports 1949*, p. 178). In examining the propositions of Mauritania regarding the legal nature of the Bilad Shinguitti or Mauritanian entity, the Court gives full weight both to that observation and to the special characteristics of the Saharan region and peoples with which the present proceedings are concerned. Some criterion has, however, to be employed to determine in any particular case whether what confronts the law is or is not legally an “entity”.’).

¹⁵⁷ ‘With the recent military operations about Chinchow, the last remaining administrative authority of the Government of the Chinese Republic in South Manchuria, as it existed prior to September 18th, 1931, has been destroyed. The American Government continues confident that the work of the neutral commission recently authorized by the Council of the League of Nations will facilitate an ultimate solution of the difficulties now existing between China and Japan. But in view of the present situation and of its own rights and obligations therein, the American Government deems it to be its duty to notify both the Imperial Japanese Government and the Government of the Chinese Republic that it cannot admit the legality of any situation de facto nor does it intend to recognize any treaty or agreement entered into between those Governments, or agents thereof, which may impair the treaty rights of the United States or its citizens in China, including those which relate to the sovereignty, the independence, or the territorial and administrative integrity of the Republic of China, or to the international policy relative to China, commonly known as the open door policy; *and that it does not intend to recognize any situation, treaty or agreement which may be brought about by means contrary to the covenants and obligations of the Pact of Paris of August 27, 1928, to which Treaty both China and Japan, as well as the United States, are parties.*’ (available at: <http://courses.knox.edu/hist285schneid/stimsondoctrine.html>) (emphasis added). *See also* <https://2001-2009.state.gov/r/pa/ho/time/id/16326.htm>; <https://history.state.gov/milestones/1921-1936/mukden-incident>.

Assembly *vis-à-vis* the so-called Turkish Republic of Northern Cyprus¹⁵⁸ and was interpreted in the self-determination and anti-apartheid context *vis-à-vis* the Bantustan policy of South Africa.¹⁵⁹ Some scholars consider these to be additional criteria, while a great part of the academic world classifies them under the condition of ‘effective government’.

138. Yet, the question of government is even more nuanced.

139. It is well known that it is not easy to differentiate between autonomy and statehood-like participation in a greater statehood-entity. Ordinarily, if the competences of the smaller unit are regulated by the constitution of the greater unit, the smaller unit is considered only an autonomy. If its competences are regulated by an international treaty which was not replaced by a constitution, the smaller unit is probably a sovereign State (generally a component of a ‘personal union’ or a confederation). The Montevideo Convention refers only to the issue of federal states¹⁶⁰ from the point of view of the federation, but there are examples of special rights sometimes enjoyed by member states of certain federations *vis-à-vis* the outside world.¹⁶¹

140. Historical examples are important to observe. It is worth mentioning the Holy Roman Empire,¹⁶² the subsequent forms of the empire under the Habsburgs¹⁶³ and its final

¹⁵⁸ Security Council, [Resolution 541](#), 18 November 1983, S/RES/541 (‘The Security Council [...] Considering therefore that the attempt to create a “Turkish Republic of Northern Cyprus” is invalid, [...] Calls upon all states not to recognise any Cypriot state other than the Republic of Cyprus’). *See also* United Nations, Security Council, [Resolution 550](#), 11 May 1984, S/RES/550, adopted in response to the ‘exchange of ambassadors’ between Turkey and the ‘Turkish Republic of Northern Cyprus’ (‘Reiterates the call upon all States not to recognise the purported State of the “Turkish Republic of Northern Cyprus”’).

¹⁵⁹ General Assembly, Resolution 3411 D, 28 November 1975, A/RES/3411 (‘Calls upon all Governments and organizations not to deal with any institutions or authorities of the bantustans or to accord any form of recognition to them.’).

¹⁶⁰ Montevideo Convention, article 2 (‘The federal state shall constitute a sole person in the eyes of international law.’).

¹⁶¹ *See E.* The ‘capacity to enter into relations with the other states’ criterion below.

¹⁶² Sigismund of Luxemburg (1368-1437) first became Hungary’s king (1387) and was then elected emperor of the Holy Roman Empire (1433). He could perform his royal/imperial duties independently, without bringing Hungary inside the empire. The emperor of the Holy Roman Empire was chosen by the seven prince-electors (*i.e.* by three ecclesiastical Electors, namely the Archbishop of Mainz, the Archbishop of Trier, and the Archbishop of Cologne, and four secular Electors, including the King of Bohemia, the Count Palatine of the Rhine, the Duke of Saxony and the Margrave of Brandenburg). One of them was the king of Bohemia who, under the Jagello dynasty, happened to also be a Hungarian king as he was in a personal union relationship. At that time, both Bohemia (*i.e.* Czech) and Hungary had their own dieta (*i.e.* legislative assembly).

¹⁶³ In order to receive protection against the expansionism of the Osman Empire, Hungary joined the Habsburg Empire in 1526 with the election of Ferdinand Habsburg as king of Hungary at the time Charles V was emperor of the Holy Roman Empire. In the following centuries, a considerable part of the nobility and population entered into secessionist uprisings (emancipation movements, revolution) as for example in 1606, 1703-1711, and 1848-1849 based on the violation of the royal oath paid on the observation of the rules of the Hungarian constitutionalism. Between 1526 and 1541, the territory was shared between two rival kings (Ferdinand 1st von Habsburg and John 1st Zapolya). Thereafter, between 1541 and 1699, a considerable part of Hungary was annexed

transformation into the Austro-Hungarian Monarchy (1867-1918).¹⁶⁴ Similarly, the union between Sweden and Norway (1814-1905)¹⁶⁵ and the Grand Duchy of Finland in the framework of the Czars' Russia (1809-1917)¹⁶⁶ show notable state-like specificities. In these State formations, the rights and obligations of the territorially smaller entities cannot be described as being territorial autonomies only.

141. From a purely legal standpoint, the structure of the Soviet Union could be conceived as a federation, the composite elements of which were, at least constitutionally, sovereign

by the Osman Empire while Transylvania, ruled by an elected 'grand duke', was acting as a kind of legal continuator of the former independent Hungary. Yet, the Sultan *manu militari* sanctioned the policies he considered to be a threat to Turkish interests. The Hungarian Kingdom and Transylvanian Duchy contracted with each other peace treaties and other agreements recognizing Transylvanian Duchy as a distinct, independent entity while reaffirming the right of the Habsburgs to rule as kings of Hungary for the reunification (1538, 1606). Note that this is a very simplified explanation of very complicated historical events.

¹⁶⁴ The Austro-Hungarian Monarchy, according to the so-called great reconciliation (also known as 'the great compromise') of 1867, was composed of *i.* the 'Austrian eternal territories' (Cisleutania *i.e. grosso modo* current Austria), Bohemia-Moravia (*i.e.* the Czech kingdom), Galicia (*i.e.* the southern part of today's Poland and some parts of today's Ukraine), Bukowina, Dalmatia, and *ii.* the historical Hungary. There was no common assembly and no common government for the constituting entities. Both units had their own national assembly, their own legislation, their own civil and penal law system, their own citizenship, their own government, and their own police. Military and foreign affairs (*i.e.* army and diplomatic staff and their respective budget) belonged to the 'common affairs' managed by the monarch, Franz-Joseph, emperor of Austria and king of Hungary. Despite the common foreign policy, Franz-Joseph mandated the Hungarian government to enter into interstate contractual obligations in the name of Hungary only (*see e.g.* the agreement of 31 January 1903, contracted between Hungary and Romania on the preservation and management of the fishing activity in the Danube, as promulgated by the act of 1907/II). There was even an international arbitral award between Austria and Hungary concerning a small lake in the High Tatras, before Austrian and Hungarian judges with the president of the Swiss Federal Court as the umpire. (*See [Decision of the arbitral tribunal established to settle the dispute concerning the course of the boundary between Austria and Hungary near the lake called the 'Meerauge'](#)*, 13 September 1902, Reports of International Arbitral Awards, Recueil des Sentences Arbitrales, Volume XXVIII, pp. 379-396). While recognizing that participation in the Olympic games is decided by national olympic committees and not by states, it is still worth mentioning that there was no common austro-hungarian participation at the Olympic games, but rather the participants were sent by the Austrian Olympic Committee and the Hungarian National Olympic Committee, respectively. The situation was, however, even more complicated because within the Hungarian Kingdom, the Kingdom of Croatia was a constituent entity with Franz-Joseph as its king, a national assembly (*Sabor*) in Zagreb and its own government. Croatia was competent to rule on domestic affairs, the judiciary, religion and education, while the military and its related budgetary issues belonged to the common affairs (with Hungary).

¹⁶⁵ The Union between Sweden and Norway was a personal union with separate constitutions, legislation, administrations, armed forces and finances. However, foreign affairs were considered common and were managed through the Swedish foreign ministry.

¹⁶⁶ After acquiring Finland from Sweden in the Fredrikshamn peace treaty, the Russian czar succeeded the Swedish king as Grand duke of Finland. The (until 1905 parliamentless) autocratic czarist regime had to rule the democratic Finnish Grand duchy, having a constitution (suspended in 1903), a legislative assembly (Diet), the convocation of which, depended on the Czar and the sessions became regular only after 1863 but until 1909. The government (*i.e.* the 'Senate') was acting under the authority of the governor appointed by the czar and there was also an independent judiciary system. The policy of 'russification', the forced infiltration of Russian imperial law in the legal system and the different interventions into the autonomy caused, however, serious tensions on the territory of the Grand Duchy. The Grand Duchy could send its own Olympic athlete delegation to the Olympic games of 1912.

entities,¹⁶⁷ even if in practice this had only some, rather symbolical appearances, such as participation in some international treaties.¹⁶⁸ Moreover, autonomous republics and autonomous territories completed the picture under the strict power of the communist party until the collapse of the regime. In today's Russia, the different levels of state-like structures – some of them equipped with their own constitution – are constitutionally institutionalized.¹⁶⁹

142. On the other hand, several sovereign States,¹⁷⁰ mostly micro-States belonging to the common law world, operate with a judiciary whose highest level is the Judicial Committee of the Privy Council of Her Majesty the Queen. This is generally explained by the necessities or at least specificities of the common law system. However, not all common law States are formally attached to the Privy Council and they are not at all obliged to do so.

143. Similarly, important judiciary competences may be transferred to supranational or similar institutions¹⁷¹ without this putting an end to either sovereignty or to the identity of those States. The same is applicable to the well-known institution of international arbitrations in the context of transnational litigation involving States and non-State private entities. Because of Andorra's special status, one member of the Constitutional Court is appointed by the bishop of Urgell in Spain, and the other by the President of the Republic of France, acting as co-prince of Andorra.

144. The transfer of power in regards to military protection against enemies is also legally possible, not only in colonial times but also in modern times.¹⁷²

145. All these examples illustrate that the third Montevideo criterion faces challenges too. Even an analysis based on the triangle of prescriptive, adjudicative and executive

¹⁶⁷ See e.g. the Constitution of 1936, article 15, and Constitution of 1977, articles 76-81, <http://www.departments.bucknell.edu/russian/const/36cons01.html#chap02>. It is to be noted that the 1977 Constitution mentioned sovereignty generally as an attribute of the USSR, but it preserved a short reference to the sovereign rights of the republics. See <https://www.constitution.org/cons/ussr77.txt>.

¹⁶⁸ See e.g. the Constitution of 1977, article 80.

¹⁶⁹ Note the complexity of the rules in articles 65-79 of the Constitution on 'subjects' of the Federation composed of 'republics', 'territories', 'autonomous regions' and 'autonomous areas', <http://www.constitution.ru/en/10003000-04.htm>.

¹⁷⁰ See e.g. Antigua and Barbados, Cook Islands, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and Grenadines, Trinidad and Tobago among the States Parties to the Rome Statute.

¹⁷¹ See e.g. the position of the Court of Justice of the European Union *vis-à-vis* the national judiciary and especially the institution of the 'preliminary ruling'. A similar institution has been introduced in the framework of the European Convention on Human Rights.

¹⁷² The Cook Islands entered into such a relationship with New Zealand, and the Marshall Islands empowered the United States of America to secure its defence.

(enforcement) jurisdictions does not necessarily provide a clear answer to the question of whether the entity at issue is or is not a sovereign state.

E) The ‘capacity to enter into relations with the other states’ criterion

146. As to the fourth Montevideo criterion – the ‘*capacity to enter into relations with the other states*’ – one may ask whether it is in fact a distinct criterion in addition to Jellinek’s three criteria or rather is not a criterion but merely a corollary of sovereignty.

147. Nevertheless, emphasis is to be placed on the fact that history has provided several examples of entities with dubious statehood status that could have effectively entered into interstate contractual obligations or at least *de facto* relations.¹⁷³ In modern times, it is worth remembering the independent Principality of Monaco, the international relations of which were managed by France during the greater part of the 20th century (1918-2002). New Zealand exercises a similar competence over the foreign relations of the Cook Islands, a State Party to the Rome Statute.

148. On the other hand, Switzerland, which, despite its then official name ‘*Confédération helvétique*’, is a federal State equipped with a federal assembly and a federal government over the cantons, recognizes some external competences to the constituting cantons.¹⁷⁴

149. Some remarks have already been made above on the Soviet Union. Without addressing in-depth the inherent failures, problems and crimes of the Soviet regime, it should be noted that the participation of today’s independent Ukraine and Belarus in a number of conventions adopted under the auspices of the United Nations stems officially (and continuously) from their signature and ratification by the Ukrainian SSR and Belarus SSR under their own names.

¹⁷³ See e.g. Transylvania’s participation in the Osnabrück treaty (1648) or the presence of marquis Des Alleurs as Louis XIV’s special envoy sent to the Hungarian uprising led by F. Rákóczi (1703-1711).

¹⁷⁴ See Constitution of Switzerland, article 55 (‘*Participation des cantons aux décisions de politique extérieure*’) (‘1. Les cantons sont associés à la préparation des décisions de politique extérieure affectant leurs compétences ou leurs intérêts essentiels. 2. La Confédération informe les cantons en temps utile et de manière détaillée et elle les consulte. 3. L’avis des cantons revêt un poids particulier lorsque leurs compétences sont affectées. Dans ces cas, les cantons sont associés de manière appropriée aux négociations internationales.’), article 56, ‘*Relations des cantons avec l’étranger*’ (‘1. Les cantons peuvent conclure des traités avec l’étranger dans les domaines relevant de leur compétence. 2. Ces traités ne doivent être contraires ni au droit et aux intérêts de la Confédération, ni au droit d’autres cantons. Avant de conclure un traité, les cantons doivent informer la Confédération. 3. Les cantons peuvent traiter directement avec les autorités étrangères de rang inférieur; dans les autres cas, les relations des cantons avec l’étranger ont lieu par l’intermédiaire de la Confédération.’). See also Loi fédérale sur la participation des cantons à la politique extérieure de la Confédération (LFPC) du 22 décembre 1999, <https://www.admin.ch/opc/fr/classified-compilation/19996351/index.html>.

150. Under the auspices of the Council of Europe, the internationalized transboundary cooperation (but not necessarily of an interstate-type character) is promoted, *inter alia*, through the States' participation in the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities (ETS No. 106). In this context, there is also international co-operation such as the Alpen-Adria cooperation, which includes Austrian Länder, (several) Italian provinces, a Hungarian county and Slovenia as a full-fledged State.¹⁷⁵

151. In the Nordic Council, some territorial autonomies (such as the Åland Islands) are working together with States (including Finland as their national State) and in the *Organisation de la Francophonie*, not only Canada but also Québec and New-Brunswick participate as Canadian federal states.¹⁷⁶ Québec has its own representation in Paris¹⁷⁷ in a distinct building even though Québec diplomats are also placed on the Canadian embassy's official list of diplomats. Several countries accredit as consulates, 'representations' or representative offices, the contact delegations of non-State entities. Generally, but not always, this is done with the explicit or implicit approval of the other national State.

152. Finally, as will be elaborated below, it is worth mentioning that the special taxation regime in place in some dependencies, such as Guernsey¹⁷⁸ and Jersey,¹⁷⁹ could also have an impact on their treaty-making capacity, mandated to them by either Her Majesty the Queen or by a customary or parliamentary norm.

153. This phenomenon of the participation of sub-State entities in international treaties and instruments requires a closer look.

154. In modern times, one might realize that several sovereign States have considerably diversified their original 'treaty-making power'. Similarly, this could have already been observed within the Austro-Hungarian Monarchy where, from time to time, some special legal

¹⁷⁵ See Republic of Croatia, Ministry of Foreign and European Affairs, 'Multilateral Relations', <http://www.mvep.hr/en/foreign-politics/multilateral-relationships/the-alps-adriatic-working-group>.

¹⁷⁶ See Organisation Internationale de la Francophonie, <https://www.francophonie.org/88-etats-et-gouvernements-125>.

¹⁷⁷ See Délégation Générale du Québec à Paris, <http://www.international.gouv.qc.ca/fr/paris>.

¹⁷⁸ Agreement Between the Government of Hungary and the States of Guernsey on Exchange of Information on Tax Matters, 11 September 2013, promulgated under Hungarian Act 2013/CLII., <https://net.jogtar.hu/jogszabaly?docid=a1300162.tv>.

¹⁷⁹ Agreement between the Government of Hungary and the Government of Jersey on Exchange of Information on Tax Matters, 28 January 2014, promulgated under Hungarian Act 2014/L., <https://net.jogtar.hu/jogszabaly?docid=A1400050.TV>.

agreements between the constitutive entities were contracted and then promulgated,¹⁸⁰ or where the two main entities were admitted as distinct parties by other contracting parties¹⁸¹ or where the geographical field of application concerned only the territory of one of the entities.¹⁸² The United Kingdom developed a widespread practice with several of its dependencies (BOTs: British Overseas Territories) where the arrangements of a legal nature are contracted between *i.* the United Kingdom and the given dependency,¹⁸³ or *ii.* the dependencies,¹⁸⁴ or *iii.* a British dependency and a foreign dependency or territories with special status,¹⁸⁵ or *iv.* full-fledged

¹⁸⁰ See e.g. Act 1880/LIV adopted by the Hungarian Parliament for the promulgation of an agreement on financial settlements concluded between Hungary and Croatia-Slavonia-Dalmatia; Act 1889/XL adopted by the Hungarian Parliament for the promulgation of an agreement on financial settlements concluded between Hungary and Croatia-Slavonia-Dalmatia. The Meerauge arbitration was resolved by parallel legislative acts, instead of ‘compromise’/arbitration agreement. See also Act 1897/II, para. 1 (‘The Ministerium is empowered to submit the determination of the frontier at [...] to arbitration and to act in agreement with the Austrian Government in order to set up the arbitral tribunal.’). See further United Nations, Decision of the arbitral tribunal established to settle the dispute concerning the course of the boundary between Austria and Hungary near the lake called the ‘Meerauge’, 13 September 1902, Reports of International Arbitral Awards, Vol. XXVIII, p. 383 (‘By Imperial Austrian Act of 25 January 1897 (Reichsgesetzblatt RGBI No. 32) and Royal Hungarian Law II of 1897, the Imperial Austrian Government and the Royal Hungarian Government were authorized to entrust an arbitral tribunal, to be constituted, with determining the course of the boundary between Galicia and Hungary close to the lake called the “Meerauge” in the Tatra mountains.’).

¹⁸¹ United States Department of State, Office of the Historian, Convention concerning the sugar regime, signed at Brussels, 5 March 1902, article 7 (‘The high contracting parties agree to create a permanent commission, having charge of the surveillance of the execution of the provisions of the present convention. This commission shall be composed of delegates of the different contracting States, and to it will be attached a permanent bureau. [...] Each of the high parties is entitled to be represented on the commission by a delegate or by a delegate and associate delegates. *Austria and Hungary shall be considered separately as contracting parties.* The first meeting of the commission shall take place at Brussels, on the call of the Belgian Government, at least three months before the present convention comes into force.’) (emphasis added).

¹⁸² See e.g. Act 1907/II adopted by the Hungarian Parliament for the promulgation of the agreement concluded with Romania on 31 January 1903 on the protection and management of the fishing in the Danube, article 1 (‘The field of application covers only the Hungarian and Rumanian part of the Danube’).

¹⁸³ See UK/Falkland Island Double taxation arrangement signed on 17 December 1997, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/496668/falklands-dt_-_in_force.pdf; UK/Jersey Double Taxation Agreement and Protocol, Given Effect by an Exchange of Letters Signed in London on 2 July 2018, <https://www.gov.uk/government/publications/jersey-tax-treaties>; UK/Guernsey Double Taxation Arrangement, signed on 24 June 1952, amended by protocol and arrangements on 20 July 1994, 20 January 2009, 22 September 2015 and 29 February 2016, <https://www.gov.uk/government/publications/guernsey-tax-treaties>; UK – Isle of Man Double Taxation Agreement and Protocol, Given Effect by an Exchange of Letters, 2 July 2018, <https://www.gov.uk/government/publications/isle-of-man-tax-treaties>.

¹⁸⁴ Arrangement Between the States of Guernsey and the States of Jersey for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, 1 January 1956, <https://www.gov.gg/dta>.

¹⁸⁵ Agreement Between the States of Guernsey and the Faroes for the Avoidance of Double Taxation on Individuals, 28 October 2008, <https://www.gov.gg/dta>; Agreement Between the States of Guernsey and Greenland for the Avoidance of Double Taxation on Individuals, 28 October 2008, <https://www.gov.gg/dta>; Agreement Between the Government of Guernsey and the Government of the Hong Kong Special Administrative Region of the People’s Republic of China for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, 28 March and 22 April 2013, <https://www.gov.gg/dta>; Agreement Between the Government of Guernsey and the Government of the Macao Special Administrative Region of the People’s

sovereign States and the British dependencies.¹⁸⁶ Similarly, Danish dependencies, such as self-governing Greenland¹⁸⁷ or the Faroe Islands,¹⁸⁸ also contracted several agreements on tax issues with sovereign States.

155. Other territories with special status (for example, Hong Kong) have also entered into treaties with sovereign States concerning, *inter alia*, issues of cooperation in air traffic,¹⁸⁹ tax, judicial and criminal prosecution.¹⁹⁰

156. Agreements that contain dispositions regarding entry into force, denunciation, notification on the completion of home approbation and promulgation, among others,¹⁹¹ are

Republic of China for the Exchange of Information Relating to Tax Matters, 3 September 2014, <https://www.gov.gg/tiea>.

¹⁸⁶ Agreement Between the Government of Australia and the States of Guernsey for the Allocation of Taxing Rights with Respect to Certain Income of Individuals and to Establish a Mutual Agreement Procedure in Respect of Transfer Pricing Adjustments, 7 October 2009, <https://www.gov.gg/dta>; Agreement between the States of Guernsey and the Republic of Poland for the Avoidance of Double Taxation with Respect to Certain Income of Individuals, 8 October 2013, <https://www.gov.gg/dta>; Agreement between the Government of Guernsey and the Government of Japan for the Exchange of Information Relating to Tax Matters and the Avoidance of Double Taxation with Respect to Taxes on Income of Individuals, 6 December 2011, <https://www.gov.gg/dta>; Agreement Between the States of Guernsey and the Government of Hungary on Exchange of Information on Tax Matters, 11 September 2013, <https://www.gov.gg/tiea> (In Hungary, it was promulgated by the Act 2013/CLXII, <https://net.jogtar.hu/jogszabaly?docid=a1300162.tv>); Agreement Between the Government of the United States of America and the Government of the States of Guernsey for the Exchange of Information Relating to Taxes, 19 September 2002, <https://www.gov.gg/tiea>.

¹⁸⁷ See e.g. Treaty between Greenland and Norway, 4 October 2005, <https://www.regjeringen.no/no/dokumenter/stprp-nr-78-2004-2005-/id138940/?q&ch=6>; Agreement Between The Government Of Greenland And The Government Of The Republic Of San Marino Concerning Information On Tax Matters, <https://www.oecd.org/countries/sanmarino/43753194.pdf>.

¹⁸⁸ See e.g. UK/Faroes Double Taxation Convention, signed in London on 20 June 2007 (<https://www.gov.uk/government/publications/faroes-tax-treaties>); Agreement between the Faroes and Monaco for the exchange of information relating to tax matters, 23 June 2010, <https://www.oecd.org/countries/faroeislands/>; Agreement between the Faroe Islands and Antigua & Barbuda for the exchange of information relating to tax matters, 19 May 2010, <https://www.oecd.org/countries/faroeislands/>; Agreement between the Faroe Islands and Dominica for the exchange of information relating to tax matters, 19 May 2010, <https://www.oecd.org/countries/faroeislands/>.

¹⁸⁹ See e.g. Agreement between the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the Government of the State of Israel Concerning Air Services, 9 September 1998 (Preamble: 'The Government of the Hong Kong Special Administrative Region of the People's Republic of China ("the Hong Kong Special Administrative Region") and the Government of the State of Israel [...], Desiring to conclude an Agreement for the purpose of providing the framework for air services between the Hong Kong Special Administrative Region and the State of Israel, Have agreed as follows'), <https://www.doj.gov.hk/eng/laws/table1ti.html>.

¹⁹⁰ See e.g. the list of States having contracted bilateral treaties with Hong Kong, such as the Transfer of sentenced persons agreements (<https://www.doj.gov.hk/eng/laws/table5ti.html>), Surrender of Fugitive Offenders Agreements (<https://www.doj.gov.hk/eng/laws/table4ti.html>), Consular Agreements (<https://www.doj.gov.hk/eng/laws/table8ti.html>), Double Taxation Avoidance Agreements (<https://www.doj.gov.hk/eng/laws/table6ti.html>), Air Services Agreements and Air Services Transit Agreements (<https://www.doj.gov.hk/eng/laws/table1ti.html>).

¹⁹¹ See e.g. Agreement Between the Government of Australia and the State of Guernsey, article 9 ('The Parties shall notify each other, in writing, through the appropriate channel of the completion of their constitutional and

mostly related to taxation issues (avoidance of double taxation and avoidance of tax evasion) but some of them also concern the suppression of money laundering or the financing of international terrorism¹⁹² (they possess an evident criminal law character).

157. On a multilateral level, other relevant examples illustrate the participation of sub-State territorial entities, such as the tax convention between Norway, Denmark, Sweden, Finland and the Faroe Islands¹⁹³ or the agreement on fishery between the European Union and Greenland.¹⁹⁴

158. As the Corten-Klein Commentary puts it as regards article 3¹⁹⁵ of the Vienna Convention on the Law of Treaties:

Territorial entities dependent on States [...] are generally, but not exclusively, part of a federal State. The rules of international law leave it to each federal State to determine if its own components should have the capacity to conclude treaties. If a State's constitution grants this capacity, these sub-entities enter the realm of international law precisely because they are able to conclude treaties. Whether one entity is called a State, a 'canton', a 'land', or a province, it is ultimately for

legal procedures for the entry into force of this Agreement. This Agreement shall enter into force on the thirtieth day after the date of the last notification and shall, provided an Agreement for the Exchange of Information Relating to Tax Matters is in force between the Parties, thereupon have effect').

¹⁹² See e.g. Agreement between the Government of the United States of America and the Government of the States of Guernsey, Preamble ('Whereas Guernsey has long been active in international efforts in the fight against financial and other crimes, including recent efforts involving terrorist financing; Whereas the Internal Revenue Service of the United States has determined Guernsey's "know your customer" rules to be acceptable for purposes of the Qualified Intermediary regime, which provides simplified withholding and reporting obligations for payments of income from the United States to an account holder through one or more foreign intermediaries; Whereas the Government of the States of Guernsey and the Government of the United States ("the parties") recognise that present legislation already provides for the exchange of information in criminal tax matters, which under current practice is conducted by the United States through the Department of Justice and by Guernsey through its Attorney General; Whereas the parties wish to establish the terms and conditions governing the exchange of information relating to taxes; Now, therefore, the parties have agreed as follows') (emphasis added).

¹⁹³ *Skatteavtale mellom Norge Danmark, Sverige, Finland, Island og Færøyene*, 1 July 2011, <https://www.regjeringen.no/no/tema/okonomi-og-budsjett/skatter-og-avgifter/skatteavtaler/skatteavtale-mellom-de-nordiske-land/id651100/>.

¹⁹⁴ Fisheries Partnership Agreement between the European Community on the one hand, and the Government of Denmark and the Home Rule Government of Greenland, on the other hand (2 July 2007), Official Journal of the European Union L172-EN, 30 June 2007, p. 4, <http://www.fao.org/faolex/results/details/en/c/LEX-FAOC072582/>; Protocol setting out the fishing opportunities and the financial contribution provided for by the Fisheries Partnership Agreement between the European Community on the one hand, and the Government of Denmark and the Home Rule Government of Greenland, on the other hand, [https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:22015A1121\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:22015A1121(01)&from=EN).

¹⁹⁵ VCLT, article 3 ('International agreements not within the scope of the present Convention') ('The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law, or to international agreements not in written form, shall not affect: (a) the legal force of such agreements; (b) the application to them of any of the rules set forth in the present Convention to which they would be subject under international law independently of the Convention; (c) the application of the Convention to the relations of States as between themselves under international agreements to which other subjects of international law are also parties.')

each State to determine what should be the capacity of that particular entity. In some federations, the power to conclude treaties is vested exclusively in the federal government. Some States have granted this capacity to their federated entities in specific areas, while other States have extended such capacity to all areas falling within the competences of these entities.¹⁹⁶

159. To conclude this point, it should be emphasised that under current State practice, *i.* it is not at all absurd to involve sub-State entities in the international law network; but *ii.* such practice depends on the entity's recognition by the sovereign State or on the mandate given to its entities according to the sovereign State's constitutional or legal system; *iii.* it depends on whether the partner States consider it useful to enter into a bilateral contract with these entities and to conceive this contractual relationship as having the character of international law; *iv.* more or less the same can be said for cooperation at the multilateral level; *v.* in the bilateral and multilateral context, the sovereign States may have several technical solutions (for example, *(a)* to give an *ad hoc* mandate,¹⁹⁷ *(b)* to give or to recognize a permanent mandate to act alone, *(c)* to participate together on one side of the negotiation and conclusion of the agreement,¹⁹⁸ or *(d)* to reserve the power of acting to the sovereign State who will enter into treaty obligations with another sovereign State only *vis-à-vis* the self-governing entity,¹⁹⁹ if they would like to

¹⁹⁶ Y. le Bouthillier and J.F. Bonin, 'Art.3 1969 Vienna Convention' in O. Corten and P. Klein (eds) *The Vienna Conventions on the Law of Treaties: A Commentary* (2011) ('Bouthillier and Bonin'), p. 74, paras 22, 23 (footnotes omitted).

¹⁹⁷ See e.g. Agreement between the Government of the United States of America and the Government of Montserrat to Improve International Tax Compliance and to Implement FATCA, Preamble ('Whereas, the Government of the United States of America and the Government of Montserrat (each, a "Party," and together, the "Parties") desire to conclude an agreement to improve international tax compliance; Noting that the Government of the United Kingdom of Great Britain and Northern Ireland (the "United Kingdom") informed the Government of the United States by providing a copy of a Letter of Entrustment, via note verbale no. 21/03/14 of 26 March 2014 to the Government of the United States of America, that the Government of the United Kingdom of Great Britain and Northern Ireland has entrusted the Government of Montserrat to negotiate and conclude a tax agreement with the Government of the United States of America on information exchange to facilitate implementation of the Foreign Account Tax Compliance Act'), <https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Agreement-Montserrat-9-8-2015.pdf>.

¹⁹⁸ See e.g. Fisheries Partnership Agreement between the European Community on the one hand, and the Government of Denmark and the Home Rule Government of Greenland, on the other hand ('The European Community, [...], and The Government of Denmark And the Home Rule Government of Greenland, (hereinafter referred to as "Greenland"), [...] Having regard to the Protocol on the special arrangement applicable to Greenland, Recognising that the European Community and Greenland wish to strengthen the links between them and to establish a partnership and a cooperation which would support, complement and extend the relations and cooperation established between them in the past'), Official Journal of the European Union, 30 June 2007, L 172/4-8.

¹⁹⁹ Protocol between the Kingdom of Norway and the Kingdom of the Netherlands in respect of the Netherlands Antilles, amending the convention between the Kingdom of Norway and the Kingdom of the Netherlands in

involve these entities in the formation of commitments of international law); and finally *vi*. States may also decide not to recognize that capacity or to recognize it only for non-international law type transboundary contracts.

160. It is worth noting that nearly all of the States acting as *amici curiae* in the present case are also contracting parties in at least one, if not several treaties, where a sub-State entity is also a contracting party.²⁰⁰

F) Interpretation of statehood in the jurisprudence and practice of interstate institutions

161. International jurisprudence is scarce when it comes to defining statehood or any closely related notion.

162. During a German-Polish litigation, four years before the adoption of the Montevideo convention, a special arbitral tribunal whose establishment was prescribed by the Versailles peace treaty, namely the *German-Polish Mixed Arbitral Commission*, gave the following definition, slightly relativizing the importance of precision as it relates to borders: '[a] State does not exist unless it fulfills the conditions of possessing a territory, a people inhabiting that territory, and a public power which is exercised over the people and the territory.'²⁰¹ It added that:

In order to say that a State exists and can be recognized as such [...] it is enough that this territory has a sufficient consistency, even though its boundaries have not yet been accurately delimited [...] There are numerous examples of cases in which States have existed without their statehood being called into doubt [...] at a time when the frontier between them was not accurately traced.²⁰²

163. It is worth mentioning the PCIJ's advisory opinion on the Customs Regime between Germany and Austria.²⁰³ If we make abstraction of the reference to Austria and the peace treaty

respect of the Netherlands Antilles for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital, 13 November 1989.

²⁰⁰ See e.g. Tax Information Exchange Agreements contracted by Jersey with Australia, Austria, Brazil, Czech Republic, Germany, and Hungary, <https://www.gov.je/TaxesMoney/InternationalTaxAgreements/TIEA/Pages/TIEACountries.aspx#anchor-2>.

²⁰¹ *Deutsche Continental Gas-Gesellschaft v. Polish State*, 1 August 1929, 5 Annual Digest of Public International Law Cases (1929) 11 ('*Deutsche Continental Gas*'), pp. 14-15.

²⁰² *Deutsche Continental Gas*, p. 15.

²⁰³ PCIJ, *Customs Regime Between Germany and Austria*, [Advisory Opinion of 5 September 1931](#), Series A/B, No. 41, 5 September 1931 ('Advisory Opinion of 5 September 1931').

of Saint-Germain, we get a definition of independence also referring to the territorial and governmental aspects:

If we consider the general observations at the beginning of the present Opinion concerning [...]’s present status, and irrespective of the definition of the independence of States which may be given by legal doctrine or may be adopted in particular instances in the practice of States, the independence of [...], according to Article [...] of the Treaty of [...], must be understood to mean the continued existence of [...] within her present frontiers as a separate State with sole right of decision in all matters economic, political, financial or other with the result that that independence is violated, as soon as there is any violation thereof, either in the economic, political, or any other field, these different aspects of independence being in practice one and indivisible.²⁰⁴

164. It should be noted, however, that it is doubtful whether the ‘sole right of decision in all matters economic, political, financial or other’ and the indivisibility of the economic and political fields provide a valid approach today, given the interdependence and integration phenomena characterizing the 20th century since World War II.

165. The PCIJ dealt with cases where the borders (or more precisely some parts of the borders) of Albania²⁰⁵ (with Serbia and then with the SHS Kingdom) and of Poland²⁰⁶ (with Czechoslovakia) were not defined at the time that the Great Powers decided on their recognition. In these cases, the PCIJ considered whether the first and subsequent decisions altogether properly determined the frontier or whether some parts remained undefined.

166. In the PCIJ’s recapitulation of the history of Albanian borders,²⁰⁷ it seems clear that Albania’s status (as a State) was not really challenged on the basis that the determination of its

²⁰⁴ [Advisory Opinion of 5 September 1931](#), p. 45.

²⁰⁵ PCIJ, *Question of the Monastery of Saint-Naoum*, [Advisory Opinion of 4 September 1924](#), 4 September 1924, Series B, No. 9 (‘Advisory Opinion of 4 September 1924’).

²⁰⁶ PCIJ, *Question of Jaworzina*, [Advisory Opinion of 6 December 1923](#), 6 December 1923, Series B, No. 8.

²⁰⁷ See [Advisory Opinion of 4 September 1924](#), pp. 9-10 (‘At the termination of the second Balkan War, in 1912, the Great Powers agreed in principle that an *independent State of Albania should be created*, which should be neutralised and placed under the administrative and financial control of the Powers. The Treaty of London of May 17/30th, 1913 (article 3) reserved to them “*the task of settling the frontiers of Albania and any other questions regarding Albania*”. Accordingly the question of the *fixing of the frontiers of the new State* was submitted to the Conference of Ambassadors which sat at London in 1913. The Conference adopted certain decisions in this connection which are known as the “Protocol of London”. Under one of these decisions a Delimitation Commission was created which was at work in 1913, and concluded its work by the final Protocol signed at Florence on December 17th of that year, Albania, which had in the first place been established as a principality under the sovereignty of the Prince of Wied, became a Republic in 1914; *but the Great War prevented the complete*

borders was partially delayed. The Polish-Czechoslovakian dispute over Jaworzina was related to the previously mentioned arbitral award between the Austrian and the Hungarian components of the Austro-Hungarian Monarchy concerning ownership of the Meerauge lake.²⁰⁸ *Per tangemem*, the PCIJ confirmed *expressis verbis* the ‘distinct international units’ nature of the components of the Dual Monarchy.

fixing of the frontiers of the new State, which was also invaded by the belligerent armies. [...] From 1920 onwards, Albania entered into relations with the League of Nations, to which it asked to be admitted. This request was granted by a decision taken by the Assembly of the League of Nations in December 1920. The Resolution regarding its admittance expressly reserved the question of the settlement of the frontiers of the new Member State. Having been admitted to the League of Nations, Albania brought before the Council the question of the evacuation of its territory – as fixed by the Conference of London of 1913 – by the Serbian and Greek troops. *This question made urgent that of the settlement of the frontiers*; for Serbia and Greece maintained that the Principal Powers were alone competent to deal with the latter, whereas Albania contended that the League of Nations, as successor to the European concert of nations, should possess this competence. The Assembly of the League of Nations, however, by its unanimous vote of October 2nd, 1921, *left the task of settling the Albanian frontiers to the Principal Powers*, recommending Albania to accept then and there the forthcoming decision of the Powers on this subject. At this point the Conference of Ambassadors took its decision of November 9th, 1921, with which the Court will deal in detail at a later stage. A Commission of Enquiry, however, sent by the League of Nations to Albania, drew attention to difficulties which had arisen with regard to the line of the Albanian frontier in the region of the Monastery of Saint-Naoum amongst others; and subsequently the Delimitation Commission established by the decision above mentioned was faced with difficulties in the same region.’ (emphasis added).

²⁰⁸ [Advisory Opinion of 6 December 1923](#), pp. 42-43 (‘In the opinion of the Court, which differs from that adopted by the Delimitation Commission on September 25th, 1922, the frontier between Hungary and Galicia was in August 1914 an international frontier, Galicia being then part of the Austrian Monarchy. This is proved, *e.g.* by the Arbitration Award of September 13th, 1902, with regard to the “Meerauge” question. Although Austria and Hungary had common institutions based on analogous laws passed by their legislatures, *they were nonetheless distinct international units.*’) (emphasis added).

167. The PCIJ made a lengthy historical summary²⁰⁹ and cited an opinion of the boundary commission²¹⁰ before concluding that the borders were already well decided and only the visual markings needed to be made.²¹¹ It should be pointed out that the PCIJ referred to a decision of the Council of Ambassadors post-dating not only the Saint-Germain²¹² and Trianon²¹³ Treaties, which recognized Czechoslovakia, but also its participation (as a founding member)²¹⁴ in the League of Nations.

168. In its advisory opinion on the Lausanne Treaty in which the Council of the League of Nations was mandated to define a part of Turkey's border²¹⁵ (namely that with Iraq to be

²⁰⁹ [Advisory Opinion of 6 December 1923](#), p. 20 ('When, as a result of the European War and the dissolution of the Austro-Hungarian Monarchy, Poland and Czechoslovakia were reestablished as independent States, their frontiers were, generally speaking, indicated by the same historical and ethnological factors which had led to their reconstitution. The necessity remained, however, either for a formal pronouncement with regard to the extent of the territories respectively allocated to two States above-mentioned or for a settlement of territorial questions in regions where, owing to special circumstances, the historical or ethnological frontier remained uncertain or met with difficulties which prevented the parties concerned from voluntarily accepting it. The task of ensuring the recognition of the frontiers of the new States and of settling disputes which might arise between them was undertaken by the Principal Allied and Associated Powers represented in the Supreme Council then sitting at Paris. Thus, in the Peace Treaties, side by side with clauses regarding the frontiers of Germany, Austria and Hungary, are to be found clauses by which the Principal Allied and Associated Powers reserve the right subsequently to fix the frontiers of the new States, having obtained in advance the consent of the States enumerated above, to the frontiers thus to be determined. As regards Poland and Czechoslovakia, clauses of this kind are to be found in Articles 81 and 87 of the Treaty of Versailles, Article 91 of the Treaty of St. Germain-en-Laye and Article 75 of the Treaty of Trianon.'). p. 28 ('The preamble of the decision of July 28th, 1920, clearly shows that this decision is intended to carry into execution the terms of the Resolution of the Supreme Council of July 11th, 1920. A comparison of the two documents proves that it was intended to carry out these terms completely and definitively. In view of the reservations made and doubts raised on this subject, it is, however, necessary to consider very closely three questions: (1) What is the nature and effect of the decision of July 28th, 1920; (2) What is the frontier line as defined by this decision in the Spisz district; (3) Is this frontier line wholly or partly subject to modifications, and in what circumstances. A further question, namely, whether the delimitation effected in the Teschen and Orava districts might, as the Polish Government maintained, depend upon the solution adopted as regards the Spisz territory, will be considered separately, after the various aspects of the special problem of Spisz have been analysed.') (emphasis added).

²¹⁰ [Advisory Opinion of 6 December 1923](#), p. 35 ('Since the Treaty of August 10th, 1920, the only one which deals with the region of Jaworzina is not in force, and since the decision of July 29th, 1920, *leaves this frontier undetermined*, it follows that the Principal Allied Powers have, at the present time, only to consider the declaration of Spa of July 10th, 1920, which provides them with full powers for the determination of this frontier.') (emphasis added).

²¹¹ [Advisory Opinion of 6 December 1923](#), p. 57 ('The Court is of the opinion, that the question of the delimitation of the frontier between Poland and Czechoslovakia has been settled by the decision of the Conference of Ambassadors of July 28th, 1920, which is definitive, but that this decision must be applied in its entirety, and that consequently that portion of the frontier in the region of Spisz topographically described therein remains subject (apart from the modifications of detail which the customary procedure of marking boundaries locally may entail) to the modifications provided for under paragraph 3 of Article II of the same decision.').

²¹² Dated 10 September 1919.

²¹³ Dated 4 June 1920.

²¹⁴ On 10 January 1920.

²¹⁵ [Advisory Opinion of 21 November 1925](#), pp. 18-19 ('From the Mediterranean to the frontier of Persia, the frontier of Turkey is laid down as follows: (1) With Syria: The frontier described in Article 8 of the Franco-Turkish Agreement of October 20th, 1921; (2) With Iraq: *The frontier between Turkey and Iraq shall be laid down*

established under British mandate), in circumstances where bilateral Turkish-British negotiations did not yield any result, the PCIJ emphasised the importance of precision with respect to boundaries.²¹⁶ Yet, here too, the PCIJ admitted that this aspect did not mean that all segments of the border should be fixed at the same time.²¹⁷

169. The practice of the various political organs of the League of Nations also addressed the question of statehood. It is important to cite a statement made by an *ad hoc* conflict settling body entrusted by the Council to mediate the dispute between Sweden and Finland, which highlights the difficulty of establishing a precise timeframe for the establishment of statehood in a post-secession context.²¹⁸

170. As Sir Hersch Lauterpacht put it:

Most of the new States which arose after the War of 1914-1918 were recognized *de facto* or *de jure* before their frontiers were finally laid down in treaties, although as a rule such recognition was accompanied

in friendly arrangement to be concluded between Turkey and Great Britain within nine months. In the event of no agreement being reached between the two Governments within the time mentioned, the dispute shall be referred to the Council of the League of Nations. The Turkish and British Governments reciprocally undertake that, pending the decision to be reached on the subject of the frontier, no military or other movement shall take place which might modify in any way the present state of the territories of which the final fate will depend upon that decision.) (emphasis added).

²¹⁶ [Advisory Opinion of 21 November 1925](#), p. 20 ('[T]he very nature of a frontier and of any convention designed to establish frontiers between two countries imports that a frontier must constitute a definite boundary line throughout its length [...] It is, however, natural that at any article designed to fix a frontier should, if possible, be so interpreted that the result of the application of its provisions in their entirety should be the establishment of a precise, complete and definitive frontier.')

²¹⁷ [Advisory Opinion of 21 November 1925](#), pp. 20-21 ('It often happens that, at the time of signature of a treaty establishing new frontiers, certain portions of these frontiers are not yet determined and that the treaty provides certain measures for their determination. [...] Even if there were any possible doubt in regard to the meaning of the first two sub-paragraphs of paragraph 2 of the article, this would be dissipated by the terms of the third sub-paragraph. By this clause, the British and Turkish Governments undertake that, *pending the decision to be reached on the subject of the frontier, no military or other movement shall take place which might modify in any way the present state of the territories of which the final fate will depend upon that decision.* This, therefore, is a temporary settlement, pending a definitive settlement. The latter will be effected by the "decision to be reached", or, according to the Protocol of July 24th, 1923, relating to the evacuation of the Turkish territory occupied by the British, French and Italian forces, by the "determination of the frontier". Again this decision may be either an agreement between the Parties or, failing such agreement, the solution given by the Council. Now a decision on which the final fate of the territories in question depends can only be a decision laying down in a definitive manner the frontier between Turkey and Iraq binding upon the two States.') (emphasis in original).

²¹⁸ League of Nations, 'The Aaland Islands Question: Report of the Committee of Jurists', League of Nations Official Journal, Special Supplement No. 3 (1920), p. 9 ('It is therefore difficult to say at what exact date the Finnish Republic in the legal sense of the term actually became a definitely constituted sovereign state. This certainly did not take place *until a stable political organization had been created, and until the public authorities had become strong enough to assert themselves throughout the territories of the state without the assistance of foreign troops.*') (emphasis added).

by stipulations relating to the acceptance by the State concerned of the frontiers to be laid down by the peace conference.’²¹⁹

171. He added: ‘[t]he existence of the conditions of statehood outlined above—external independence and effective internal government within a reasonably well-defined territory may be and has often been controversial in reference to particular situations. But, in essence, these conditions are definite and exhaustive.’²²⁰

172. It bears repeating that at the end of World War II, on 26 June 1945, Poland was a founding State of the United Nations even though its borders, which were treated vaguely and with cynicism in Tehran²²¹ and in Yalta,²²² were decided on weeks later at the Potsdam Conference of 17 July to 2 August 1945 (and still with some uncertainties).²²³ The events of World War II and the language of some armistice agreements²²⁴ also exemplify this – at first glance – strange

²¹⁹ Lauterpacht, p. 412.

²²⁰ Lauterpacht, pp. 412-413.

²²¹ The Tehran Conference, 28 November to 1 December 1943, <https://avalon.law.yale.edu/wwii/tehran.asp>. See also Churchill’s famous demonstration with three matches on the map, <https://history.state.gov/historicaldocuments/frus1943CairoTehran/d362>.

²²² Protocol of Proceedings, Yalta (Crimea) Conference, February 1945, Section VII. Poland (‘The three heads of Government consider that the eastern frontier of Poland should follow the Curzon Line with digressions from it in some regions of five to eight kilometers in favor of Poland. They recognize that *Poland must receive substantial accessions in territory in the north and west*. They feel that the opinion of the new Polish Provisional Government of National Unity should be sought in due course of the extent of these accessions and that the final delimitation of the western frontier of Poland should thereafter await the peace conference.’) (emphasis added).

²²³ The Berlin (Potsdam) Conference, 17 July-2 August 1945, https://avalon.law.yale.edu/20th_century/decade17.asp (‘Western frontier of Poland. In conformity with the agreement on Poland reached at the Crimea Conference the three Heads of Government have sought the opinion of the Polish Provisional Government of National Unity *in regard to the accession of territory in the north ’end west which Poland should receive*. The President of the National Council of Poland and members of the Polish Provisional Government of National Unity have been received at the Conference and have fully presented their views. *The three Heads of Government reaffirm their opinion that the final delimitation of the western frontier of Poland should await the peace settlement*. The three Heads of Government agree that, *pending the final determination* of Poland’s western frontier, the former German territories east of a line running from the Baltic Sea immediately west of Swinamunde, and thence along the Oder River to the confluence of the western Neisse River and along the Western Neisse to the Czechoslovak frontier, including that portion of East Prussia not placed under the administration of the Union of Soviet Socialist Republics in accordance with the understanding reached at this conference and including the area of the former free city of Danzig, shall be under the administration of the Polish State and for such purposes should not be considered as part of the Soviet zone of occupation in Germany.’) (emphasis added).

²²⁴ Agreement Between the Governments of the United States of America, the United Kingdom, and the Union of Soviet Socialist Republics, on the One Hand, and the Government of Rumania, on the Other Hand, Concerning an Armistice, article 4 (‘The state frontier between the Union of Soviet Socialist Republics and Rumania, established by the Soviet-Rumanian Agreement of June 8 1940, is restored.’), article 19 (‘The Allied Governments regard the decision of the Vienna award regarding Transylvania as and void and are agreed that Transylvania the greater part thereof) should be returned to Rumania, subject to confirmation at the peace settlement, and the Soviet Government agrees that Soviet forces shall take part for this purpose in joint military operations with Rumania against Germany and Hungary.’). This is to be read in conjunction with the Armistice Agreement with Hungary,

phenomenon, where it is sometimes (or rather rarely and under very peculiar historical circumstances) possible to definitely speak of a State having a territory even where the extent of said territory is yet to be geographically defined, at least in some aspects.

173. It is worth mentioning that in the practice of the United Nations, even Israel's admission to the UN was hindered by British and Arab arguments contesting Israel's statehood and emphasising the inchoate character of its borders.²²⁵

174. The States' positions were expressed first and foremost in the debates of the Security Council and the General Assembly. In 1948, four Security Council meetings (383rd, 354th, 385th, 386th) were devoted thereto, and only one in the General Assembly.

175. From all these statements, the most remarkable one in the context of the question *sub judice* is that of Philip Jessup, who at that time was still in the State Department and who reacted as follows before the Security Council:

It is common knowledge that, while there are traditional definitions of a State in international law, the term has been used in many different ways. We are all aware that, under the traditional definition of a State in international law, all the great writers have pointed to four qualifications: first, there must be a people; second, there must be a territory; third, there must be a government; and, fourth, there must be capacity to enter into relations with other States of the world. [...] [But] the term 'State', as used and applied in Article 4 of the Charter of the United Nations, may not be wholly identical with the term 'State' as it is used and defined in classic textbooks of international law.²²⁶

20 January 1945 ('Hungary has accepted the obligation to evacuate all Hungarian troops and officials from the territory of Czechoslovakia, Yugoslavia, and Rumania occupied by her within the limits of the frontiers of Hungary existing on December 31, 1937, and also to repeal all legislative and administrative provisions relating to the annexation or incorporation into Hungary of Czechoslovak, Yugoslav and Rumanian territory. '), <https://avalon.law.yale.edu/wwii/hungary.asp>. The peace treaties of 10 February 1947 between the Allies and these two countries definitively re-established the previous boundaries based on the decisions of the Council of Foreign Ministers where some American proposals were rejected (Meetings of 7 May and 5 September 1946 in Paris).

²²⁵ R. Cohen, 'The Concept of Statehood in the United Nations Practice' in *109 University of Pennsylvania Law Review* 1127 (1961) ('Cohen'), p. 1134 ('Much of the controversy which surrounded the application of the newly proclaimed state of Israel for membership in the United Nations stemmed from doubts as to whether it met the requirement of a defined territory. The Arab states, led by Syria, contended that since Israel's borders were contested, its statehood must be denied. The United Kingdom also offered this as the reason for its refusal either to recognize the state of Israel or to support its application for admission. Other representatives, construing the territorial requirement more liberally, thought that the General Assembly resolution of 1947 conferred territory upon Israel and that it did not matter that certain details as to the delimitation of this territory remained unsettled. When, after postponement of the issue, consideration of the application was taken up again, Israel's request for membership was granted.').

²²⁶ Security Council, [383rd Meeting](#), Official Records, 2 December 1948 ('UNSC 383rd Meeting'), p. 10.

176. He added that:

One does not find in the general classic treatment of this subject any insistence that the territory of a State must be exactly fixed by definite frontiers. [...] The formulae in the classic treatises somewhat vary, [...] but both reason and history demonstrate that the concept of territory does not necessarily include precise delimitation of the boundaries of that territory. The reason for the rule that one of the necessary attributes of a State is that it shall possess territory is that one cannot contemplate a State as a kind of disembodied spirit [...] [T]here must be some portion of the earth's surface which its people inhabit and over which its Government exercises authority. No one can deny that the State of Israel responds to this requirement.²²⁷

177. At that time, when the full-fledged statehood of some founding States was not at all evident,²²⁸ Jessup also advocated for a flexible interpretation of sovereignty based on the will of the founding States in San Francisco and established practice.²²⁹

178. According to Rosalyn Cohen:

In other cases the requirement of a 'defined territory' has tended to be blurred by the existence of territorial disputes and other factors; and in yet other cases it has been used as something of an automatic argument in the cold war.²³⁰ Nevertheless, the only unambiguous case which

²²⁷ [UNSC 383rd Meeting](#), p. 11.

²²⁸ Tse-shyang Chen, p. 37 ('When the Charter came into effect on October 24, 1945, India was still a non-self-governing entity under the rule of the United Kingdom, the Philippines was an overseas possession of the United States, Lebanon and Syria were mandated territories under the administering authority of France, and Byelorussia and Ukraine were constituent republics of the Soviet Union. In sum, under Article 3, "states" seems to mean not only states under the traditional definition but also territorial bodies politic that failed to comply with this definition.') (footnotes omitted).

²²⁹ See F. Tse-shyang Chen, 'The meaning of "States" in the Membership Provisions of the United Nations Charter' in *12 Indiana International & Comparative Law Review* 25 (2001) ('Tse-shyang Chen'), p. 33 ('In so far as the question of capacity to enter into relations with other States of the world is concerned, learned academic arguments can be and have been made to the effect that we already have, among the Members of the United Nations, some political entities which do not possess full sovereign freedom to form their own international policy, which traditionally has been considered characteristic of a State. We know, however, that neither at San Francisco nor subsequently has the United Nations considered that complete freedom to frame and manage one's own foreign policy was an essential requisite of United Nations membership.').

²³⁰ See Cohen, pp. 1134-1135, n. 32 ('Thus France couched its objections to the admission of Siam, with which it had a territorial dispute, in terms of the continuation of a state of war between the two countries caused by Siam's aggression in Indo-China. In actual fact, Siam's agreement to participate in a projected conciliation commission was the *sine qua non* of French support for her application, and this support was ultimately obtained.'). n. 33 ('Thus Greece's objection to the admission of Albania, whose application came in the coldest era of the cold war, was that a disputed claim between them to northern Epirus was still outstanding. [...] The issue of defined territory constantly arose with regard to the applications of the divided states of North and South Korea and North and

could be cited in support of the contention that power politics has caused the United Nations to ignore this traditional legal requirement is that of Israel. However, an examination of past practice will at once reveal that this criterion has never been interpreted very strictly. [...] It would therefore seem that this traditional criterion of statehood has been treated as of importance in United Nations practice, and that, given its traditional liberal interpretation, it has always been properly applied.²³¹

179. While the ICJ adjudicated an impressive number of States' boundary disputes, its judges did not give a precise definition of statehood as it relates to borders. Rather, they avoided the issue such as in the advisory opinion on Kosovo.²³² The border disputes concerned existing states, most of which had a colonial past, and the ICJ could generally submit its reasoning on the use of the *uti possidetis juris* principle and the exemptions referenced above.²³³ That is why the ICJ's jurisprudence, despite its legal authority, is not very helpful in the case *sub judice* insofar as the legal problem at issue is very different.

180. As a starting point, like the PCIJ, the ICJ attributes the utmost importance to the stability of borders, as emphasised in the Preah Vihear Judgment.²³⁴

South Vietnam. The Afghanistan representative refused to vote for the admission of Pakistan because his government did not recognize the northwest frontier as a part of Pakistan.').

²³¹ Cohen, pp. 1134-1135.

²³² ICJ, [Advisory Opinion of the International Court of Justice on the Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo](#), 22 July 2010, para. 51 ('In the present case, the question posed by the General Assembly is clearly formulated. The question is narrow and specific; it asks for the Court's opinion on whether or not the declaration of independence is in accordance with international law. It does not ask about the legal consequences of that declaration. *In particular, it does not ask whether or not Kosovo has achieved statehood.* Nor does it ask about the validity or legal effects of the recognition of Kosovo by those States which have recognized it as an independent State. [...] Accordingly, the Court does not consider that it is necessary to address such issues as whether or not the declaration has led to the creation of a State or the status of the acts of recognition in order to answer the question put by the General Assembly. The Court accordingly sees no reason to reformulate the scope of the question.') (emphasis added).

²³³ See e.g. ICJ, *Burkina Faso/Republic of Mali (Frontier Dispute)*, [Judgment of 22 December 1986](#), 22 December 1986, p. 554; *El Salvador v. Honduras (Case Concerning The Land, Island And Maritime Frontier Dispute)*, [Judgment of 11 September 1992](#), 11 September 1992, p. 558, para. 333; *Benin v. Niger (Case Concerning Frontier Dispute)*, [Judgment of 12 July 2005](#), 12 July 2005, p. 110, paras 28, 29.

²³⁴ ICJ, *Cambodia v. Thailand (Case Concerning Temple of Preah Vihear)*, [Judgment of 15 June 1962](#), 15 June 1962, ICJ Report 1962, p. 34 ('In general, when two countries establish a frontier between them, one of the primary objects is to achieve stability and finality. This is impossible if the line so established can, at any moment, and on the basis of a continuously available process, be called in question, and its rectification claimed, whenever any inaccuracy by reference to a clause in the parent treaty is discovered. Such a process could continue indefinitely, and finality would never be reached so long as possible errors still remained to be discovered. Such a frontier, so far from being stable, would be completely precarious.').

181. In another case, it dealt with the boundary dispute between Belgium and the Netherlands. Although both States subsequently agreed on the borders for the first dozen years after the separation, a section of the Belgian and Dutch borders was not properly defined, especially around some enclaves. As for the 1830 separation, it was formally recognized in the 1839 Treaty of London which also contained an article calling for the precision of the boundary.²³⁵ Belgium's *de facto* and *de jure* independence started with only partially clear boundaries.

182. The ICJ highlighted the relativity of the precision of boundaries and the court referred to the previously mentioned Albanian case, stating:

The appurtenance of a given area, considered as an entity, in no way governs the precise delimitation of its boundaries, any more than uncertainty as to boundaries can affect territorial rights. There is for instance no rule that the land frontiers of a State must be fully delimited and defined, and often in various places and for long periods of time they are not, as is shown by the case of the entry of Albania into the League of Nations.²³⁶

183. Neither must we forget the ICJ's conclusions in its advisory opinion on Western Sahara, even if it concerned nomadic state-formations.²³⁷

G) Conclusions on the importance of the Montevideo criteria

184. It can be deduced from the above that all elements of the Montevideo criteria are arguable and can be nuanced, as there exist sub-rules and exceptions. Though, this is clear, it should be noted that it is well known that (either rightly or wrongly) several States did not always follow these rules, which were formulated in an abstract manner in 1933. It is worth noting that the Badinter Arbitration Committee (*Commission d'arbitrage de la conférence pour la paix en Yougoslavie*) used a definition similar to the Montevideo criteria, but which was simpler and

²³⁵ ICJ, *Belgium v. Netherlands (Case Concerning Sovereignty over Certain Frontier Land)*, [Judgment of 20 June 1959](#), 20 June 1959, pp. 213-214.

²³⁶ ICJ, *Federal Republic of Germany v. Denmark (Case Concerning North Sea Continental Shelf)*, [Judgment of 20 February 1969](#), 20 February 1969, p. 32.

²³⁷ [Western Sahara Advisory Opinion](#), para. 148 ("In the case concerning Reparation for Injuries Suffered in the Service of the United Nations, the Court observed: "The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community" (*I.C.J. Reports 1949*, p. 178). In examining the propositions of Mauritania regarding the legal nature of the Bilad Shinguitti or Mauritanian entity, the Court gives full weight both to that observation and to the special characteristics of the Saharan region and peoples with which the present proceedings are concerned. Some criterion has, however, to be employed to determine in any particular case whether what confronts the law is or is not legally an "entity"").

did not contain the problematic adjectives referenced above. In the Opinion No. 1, it stated that ‘the state is commonly defined as a community which consists of a territory and a population subject to an organized political authority; that such a state is characterized by sovereignty’.²³⁸

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

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

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

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

189. From my reading, the fact that an entity is a State (because it has a population, a territory and sovereignty) does not mean that its borders are absolutely settled. Something similar can

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

²³⁹ *Deutsche Continental Gas*, p. 15.

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

also be said concerning Palestine's territory: at this time, Palestine's actual boundaries are uncertain and no one is in the position to say – despite resolutions suggesting what would be just or equitable – when they will be settled or finalized. Certainly, defining them is by no means the task of this Court.

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

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

A) Outsourcing or *fait accompli* in the relationship between the Court and the General Assembly of the United Nations?

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

192. The Majority Decision lengthily describes the accession²⁴¹ and touches upon the respective roles of the Secretary-General and the General Assembly.²⁴² In this context, it conceives that Resolution 67/19 was determinative in the opening of the accession to the Rome Statute and other treaties, on the basis of the 'all States' formula.

193. Years ago, the then-Prosecutor refused to deal with the Palestinian declaration submitted in 2009 based on a particular reading of article 12(3) of the Statute, stating that he could not act until the relevant UN organs explicitly recognised Palestine as a State.²⁴³ This position was

²⁴¹ Majority Decision, paras 95-99.

²⁴² Majority Decision, para. 96.

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

criticized by legal academics, questioning why the Prosecutor considered himself dependent on the stocktaking of an institution external to the Rome Statute.²⁴⁴

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

195. The Majority Decision highlights that:

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

196. It is worth pointing out, however, that at the top of the previously cited document of the United Nations Office of Legal Affairs, one can read the statement: '*Please be advised that the memorandum is for internal use and it is not for distribution to Member States or the media.*' It is not clear when this document became publicly accessible. However, it was seemingly originally prepared for approximately 20 high officials, such as under-secretary-generals, top

method to define the term "State" under article 12(3) which would be at variance with that established for the purpose of article 12(1).') See also [Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda: 'The Public Deserves to know the Truth about the ICC's Jurisdiction over Palestine'](#), 2 September 2014.

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

²⁴⁵ Majority Decision, para. 98.

leaders of specialized agencies and other UN institutions. While some academic papers published in 2014 may have summarized or cited to its content, it is not so evident that this document can be cited as evidence of a commonly held view by the UN and its members.

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

198. In order to better understand the legal debate surrounding the attribution of 'non-member observer State' status to Palestine based on Resolution 67/19, it is important to have an overview of the UN practice in similar matters.

B) 'Precedents' in United Nations and specialized agencies' practice of participation by 'pre-sovereign' States and special subjects of laws

199. It bears repeating that the institution of 'non-member observer State' status is not foreseen by the UN Charter, but has been created through practice. It is true that creation through practice is not unique in the life of the United Nations. The 'abstention' during voting in the Security Council, the peacekeeping operations or the determination of the different regions to ensure equitable geographical representation, are, among others, well known examples of such a practice.

200. Is the meaning of the three components of the 'non-member observer State' formula (*i.* non-member *ii.* observer *iii.* State) absolutely clear in this context and can these components be interpreted independently or must they only be interpreted together, meaning 'non-member observer State' as a *sui generis* entity?

201. Even the practice of the United Nations' protocol service may be cited in support of affirming the inseparability of the constituting elements. In the Blue Book,²⁴⁶ there are currently two entities under the title of 'Non-member States having received a standing invitation to participate as observers in the sessions and the work of the General Assembly and maintaining permanent offices at Headquarters.' These are Palestine and the Holy See.²⁴⁷

²⁴⁶ Permanent Missions to the United Nations, [Protocol and Liaison Service](#), N° 308 Rev. 2 (August 2019), ST/PLS/SER.A/308/Rev.2 (the 'Blue Book').

²⁴⁷ Blue Book, pp. 8, 342.

202. It is well-known that the international legal personality of the Holy See is completely different from that of the State of Vatican City. Nevertheless, it is the Holy See that has enjoyed ‘Permanent Observer State’ status since 1964.²⁴⁸

203. The Holy See may accede to treaties according to the ‘all States’ formula.²⁴⁹ This leads to the following question: if, *i.* the Holy See decided to accede to the Rome Statute through the ‘all States’ formula contained in article 125(3) of the Statute, *ii.* States Parties adopted a similar attitude in this respect, as the one they had *vis-à-vis* Palestine’s accession (with no or only a few explicit denials), and *iii.* according to the Prosecutor and the Majority Decision, no accession may subsequently be examined if conducted according to the correct procedure, then, what would be the geographical scope of the ‘territory’ in this case? Would it be the 44 hectares of Vatican City, or to the contrary, can the word ‘territory’ not be used as a legal notion as far as the Holy See is concerned? With the exception of a special interpretation given by the Holy See itself, the question is not easy to answer.

204. It would be easy to reply that the Holy See cannot join because it is not a State but merely a special *sui generis* subject of international law. However, this would lead us back to one of the basic questions in the issue *sub judice*: what should be the determining factor? The acquired statehood or the automatism of the ‘all States’ formula, as also enshrined in the Rome Statute?

205. Moreover, it is well known that the Holy See has acceded to a number of important multilateral conventions (for example, in the field of humanitarian law or concerning the prohibition of different types of weapons, human rights violations, refugee law, education, environmental protection, intellectual property, fight against drugs, etc.), some of them interfering with rules of the Rome Statute. These accessions were allegedly not due to an actual

²⁴⁸ See also General Assembly, Resolution 58/314 (Participation of the Holy See in the work of the United Nations), 16 July 2014, A/RES/58/314.

²⁴⁹ [United Nations Juridical Yearbook](#) (2012), pp. 468-469 (‘As the General Assembly has never treated Palestine as a State but as a *sui generis* entity, Palestine cannot fall under the “all States” formula and should continue to participate as an observer entity in such Conferences. The Holy See on the other hand has always been treated by the Assembly as an Observer State and thus falls under the “all States” formula. [...] Palestine became a member State of the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 23 November 2011. The specialized agencies of which the Holy See is a member include the World Intellectual Property Organization (WIPO), the Universal Postal Union (UPU) and the International Telecommunication Union (ITU). As the Geographical Names Conference has previously been convened under the “Vienna” formula, we would recommend that Palestine and the Holy See as States members of specialized agencies both participate as full members. As the Small Arms Conference is to be convened under the “all States” formula, we would recommend that the Holy See participate as a full member and Palestine as an observer entity.’). As to Palestine, please note that this document was prepared before the adoption of Resolution 67/19.

need of the sovereign Vatican City but to the Holy See's desire to contribute to a better world by sharing its religious and moral authority on a global level.²⁵⁰ As to its participation in international organizations and bodies, it has been mostly granted in the name of the Holy See,²⁵¹ either in full member capacity or as an observer, while only few organizations have restricted membership to the entity of 'the Vatican City'.²⁵²

²⁵⁰ See e.g. The Holy See, [Comments of the Holy See on the Concluding Observations of the Committee on the Rights of the Child](#) ('The Holy See, in affirming its proper nature as a subject of international law, reiterates that the international obligations contracted upon adherence to the CRC, with reservations and interpretative declaration, and its Optional Protocols are fulfilled first and foremost through the implementation of the aforementioned duties within the territory of the Vatican City State (VCS), over which the Holy See exercises full territorial sovereignty. Beyond this geographic territory, which it administers, the Holy See disseminates principles recognized in the CRC to all people of goodwill and to various local Catholic churches and institutions, which operate in different States in compliance with national laws. Therefore, the obligations of the Convention and its Optional Protocols refer to Vatican citizens, as well as, where appropriate, the diplomatic personnel of the Holy See or its Officials residing outside the territory of Vatican City State. The Holy See does not have the capacity or legal obligation to impose the abovementioned principles upon the local Catholic churches and institutions present on the territory of other States and whose activities abide with national laws. The Holy See, in accordance with the rules of international law, is aware that attempting to implement the CRC in the territory of other States could constitute a violation of the principle of non-interference in the internal affairs of States.')

²⁵¹ See on the Vatican's official website: 'The Holy See participates in various Intergovernmental Organizations and Bodies and International Programmes, including: UN United Nations Organization, New York, Observer; UNOG United Nations Office in Geneva, Geneva, Observer; UNOV United Nations Office in Vienna, Vienna, Observer; UNHCR United Nations High Commissioner for Refugees, Geneva, Member of the Executive Committee; UNCTAD United Nations Conference on Trade and Development, Geneva, Member; WIPO World Intellectual Property Organization, Geneva, Member; IAEA International Atomic Energy Agency, Vienna, Member; OPCW Organization for the Prohibition of Chemical Weapons, The Hague, Member; CTBTO Preparatory Commission for the Comprehensive Nuclear-Test Ban Treaty Organization, Vienna, Member; ICMC International Committee of Military Medicine, Brussels, Member; FAO United Nations Food and Agriculture Organization, Rome, Observer; ILO International Labour Organization, Geneva, Observer; WHO World Health Organization, Geneva, Observer; UNESCO United Nations Educational, Scientific and Cultural Organization, Paris, Observer; UNIDO United Nations Industrial Development Organization, Vienna, Observer; IFAD International Fund for Agricultural Development, Rome, Observer; UNWTO World Tourist Organization, Madrid, Observer; WMO World Meteorological Organization, Geneva, Observer; WTO World Trade Organization, Geneva, Observer; UNDP United Nations Development Program, New York, Observer; UN-HABITAT United Nations Centre for Human Settlements, Nairobi, Observer; UNEP United Nations Environment Programme, Nairobi, Observer; WFP World Food Programme, Rome, Observer; INTOSAI International Organization of Supreme Audit Institutions, Vienna, Member; CIEC International Commission on Civil Status, Strasbourg, Observer; UL Latin Union, Paris, Permanent Guest; OSCE Organization for Security and Co-operation in Europe, Vienna, Member; CE Council of Europe, Strasbourg, Observer; AU African Union, Addis Abeba, Non-Member Accredited State; OAS Organization of American States, Washington, Observer; LAS League of Arab States, Cairo, Non-Member Accredited State; AALCO Asian-African Legal Consultative Organization, New Delhi, Guest; UNIDROIT International Institute for the Unification of Private Law, Rome, Member; IOM/OIM International Organization for Migration, Member.', http://www.vatican.va/roman_curia/secretariat_state/documents/rc_seg-st_20010123_holy-see-relations_en.html.

²⁵² See on the Vatican's official website: 'The Vatican City State participates in various International and Intergovernmental Organizations, including: UPU Universal Postal Union, Bern, Member; ITU International Telecommunication Union, Geneva, Member IGC International Grains Council, London, Member; ITSO International Telecommunications Satellite Organization, Washington D.C., Member; EUTELSAT IGO European Telecommunication Satellite Organization, Paris, Member; CEPT European Conference of Postal and Telecommunications, Copenhagen, Member; IISA International Institute of Administrative Sciences, Brussels,

206. The history of the United Nations provides even more interesting lessons. As Jure Vidmar²⁵³ puts it, the first of the few ‘precedents’ in the UN’s practice is probably that of Austria. Its ‘Non-Member State’ status was attributed in 1953 and was in effect until 1955 when it was admitted as a full Member State together with several former Axis-Member States (Bulgaria, Finland, Hungary and Romania). As it is well-known, Austria’s sovereignty and statehood was re-established only by the four power agreement of 1955 (called also Four Party Treaty and *Staatsvertrag*) putting an end to the occupation by the United States, the United Kingdom, France and the Soviet Union. This is to say that Austria’s ‘Non-Member State’ status in the UN coincided with a time period (1953 to 1955) when Austria’s independence and sovereignty had not yet been achieved.

207. Austria had succeeded in gaining admission into the International Civil Aviation Organization²⁵⁴ (the ‘ICAO’) in 1948 and its membership in this UN specialized agency opened the way for Austria’s special status in the UN. Of note, the ICAO admission occurred seven years before Austria was granted its sovereignty and independence. Can the 1948 ICAO membership then be considered proof of Austria’s statehood before 1955? And what about its 1953 to 1955 status before *Staatsvertrag* and its admission to the UN?

208. Austria’s membership in the United Nations Educational, Scientific and Cultural Organization (the ‘UNESCO’) also dates back to 1948, seven years before *Staatsvertrag*. Nevertheless, the Four Party Treaty is considered the founding international legal instrument of the reborn, sovereign Austria.

209. It must be noted that Austria was admitted into the International Labour Organization (the ‘ILO’) earlier, in 1947 (eight years prior to the 1955 Four Party Treaty granting back sovereignty to Austria). It is true that even if the ILO is an intergovernmental organization,²⁵⁵ its composition is not reduced only to governmental representation, but employers and employees are also represented in the four member national delegations. Austria’s admission

Member.’, http://www.vatican.va/roman_curia/secretariat_state/documents/rc_seg-st_20010123_holy-see-relations_en.html.

²⁵³ J. Vidmar, ‘Palestine and the Conceptual Problem of Implicit Statehood’ in *12 Chinese Journal of International Law* 19 (2013), pp. 24-26.

²⁵⁴ R. E. Clute, *The International Legal Status of Austria 1938-1955* (1962), pp. 128-129; D. Mackenzie, *ICAO: A History of the International Civil Aviation Organization* (2010), p. 221.

²⁵⁵ See ILO Constitution, article 2 (‘The Members of the International Labour Organization shall be the States’). See also article 3 (‘Any original member of the United Nations and any State admitted to membership of the United Nations’), article 6 (‘In the event of any State having ceased to be a Member’).

was, *inter alia*, facilitated by the fact that the disposition on admissions refers to ‘Member’ and not to ‘State’.²⁵⁶

210. As an ILO-member, Austria ratified several ILO conventions²⁵⁷ while still holding this peculiar pre-sovereign status. While these are intergovernmental, multilateral conventions, they generally refer not to ‘States’ but to ‘Members’, and generally use the ‘Each Member’ / ‘Any Member’ formula.

211. To sum up, Austria’s pre-sovereign status did not prevent either its admission into the UNESCO, the International Civil Aviation Organization (the ‘ICAO’), the ILO or its accession to the ILO Conventions. However, these admissions and these accessions did not elevate its legal status to the level of a *de jure* sovereign state. This status was only achieved in 1955.

212. Additionally, before the signature and entry into force of their peace treaties, in their ‘pre-sovereign’ status imposed by the armistice agreements, several former Axis-member States could rejoin the ILO (as Italy did), or revitalize their ‘frozen’ participation (as Bulgaria, Finland and Hungary did). They then became new contracting parties to several ILO Conventions.²⁵⁸

As Stuart Hull MacIntyre puts it:

[M]ore significance may be attached to the decision of the 1948 International Labor Conference that Bulgaria and Hungary were liable, after a reduction of 80% for the contributions they failed to make during the war. Thus recognition was given to the continuous

²⁵⁶ ILO Constitution, article 4 (‘The General Conference of the International Labour Organization may also admit Members to the Organization by a vote concurred in by two-thirds of the delegates attending the session, including two-thirds of the Government delegates present and voting. Such admission shall take effect on the communication to the Director General of the International Labour Office by the government of the member of its formal acceptance of the obligations of the Constitution of the Organization.’).

²⁵⁷ ILO, Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) (acceded on 18 October 1950); Right to Organise and Collective Bargaining Convention, 1949 (No. 98) (acceded on 10 November 1951); Equal Remuneration Convention, 1951 (No. 100) (acceded on 29 October 1953); Labour Inspection Convention, 1947 (No. 81) (acceded on 30 April 1949); Workmen’s Compensation (Agriculture) Convention, 1921 (No. 12) (acceded on 14 June 1954); Final Articles Revision Convention, 1946 (No. 80) (acceded on 14 June 1949); Labour Clauses (Public Contracts) Convention, 1949 (No. 94) (acceded on 10 November 1951); CO95: Protection of Wages Convention, 1949 (No. 95) (acceded on 10 November 1951); Minimum Wage Fixing Machinery (Agriculture) Convention, 1951 (No. 99) (acceded on 29 October 1953); Holidays with Pay (Agriculture) Convention, 1952 (No. 101) (acceded on 14 June 1954). See https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102549.

²⁵⁸ The Paris Peace Treaties were all signed on the same date (10 February 1947) and entered into force a couple of weeks/months later in accordance with the parliamentary ratification requirements. However, according to the ILO public documentation, Bulgaria’s membership seems to have been continuous since 16 December 1920, Finland’s since 16 December 1920 and Hungary’s since 18 September 1920. Italy left the ILO and the League of Nations at the same time but returned on 19 October 1945, *i.e.* well before its peace treaty and the reacquisition of its full sovereignty. Romania returned to the ILO only after its admission to the United Nations. See <https://www.ilo.org/dyn/normlex/en/f?p=1000:11001::NO>.

membership of these two countries throughout the war. [...] Bulgaria and Hungary had been actively participating in the International Labor Conferences from October 1945 and had done so without a special invitation.²⁵⁹

213. MacIntyre also rightly remarks that: '[a]mong the 76 countries sending delegates to the Atlantic City conferences [of the ILO, organized in autumn 1947] were Bulgaria, Hungary, Italy and Romania, at a time when their peace treaties had been signed but were not yet in force'.²⁶⁰

214. Something similar happened related to the birth of the World Health Organization (the 'WHO'), created by the members of the United Nations at a conference held from 19 June to 22 July 1946, during which the former Axis-member countries were also invited as observers. Due to the wording of article 5,²⁶¹ Hungary signed the WHO Constitution on 19 February 1947 (after the signature of the peace treaty, but before its entry into force, which occurred only on 15 September 1947, following the deposition of all the required instruments of ratification). It then promulgated²⁶² it in 1948, in conjunction with the entry into force of the WHO Constitution which took place in 1948,²⁶³ long after the entry into force of the peace treaty, which granted back full sovereignty to Hungary.

215. This example illustrates that, due to general interests (for example, prevention of epidemics and other diseases), their knowledge of the results of negotiations of peace treaties and the readiness of the former Axis members to fully accept them, United Nations Member States, when inviting the defeated States as observers, were ready to establish conditions to facilitate their full participation at the earliest time, even though those States did not enjoy full sovereignty.

²⁵⁹ S. H. MacIntyre, *Legal Effect of World War II on Treaties of the United States* (1958) ('MacIntyre'), pp. 128-129.

²⁶⁰ MacIntyre, p. 271.

²⁶¹ WHO, Constitution of the World Health Organization, article 5 ('The States whose Governments have been invited to send observers to the International Health Conference held in New York, 1946, may become Members by signing or otherwise accepting this Constitution in accordance with the provisions of Chapter XIX and in accordance with their constitutional processes provided that such signature or acceptance shall be completed before the first session of the Health Assembly.').

²⁶² '[1948. évi XII. törvénycikk az Egészségügyi Világszervezet Alkotmányának becikkelyezéséről](#)' [Act XII/1948 on the promulgation of the Constitution of the World Health Organization].

²⁶³ WHO, Constitution of the World Health Organization, n. 1 ('The Constitution was adopted the International Health Conference held in New York from 19 June to 22 July 1946, signed on 22 July 1946 by the representatives of 61 States (Off. Rec. Wld Hlth Org., 2,100), and entered into force on 7 April 1948.').

216. Turning back to the UNO's history, let us remember that in the late 1940's, some admissions were criticized by States and scholars as being too generous *vis-à-vis* entities whose full-fledged sovereignty did not seem to be evident.²⁶⁴

217. For the other States whose admission could not be immediately granted, a special status was sometimes granted similar to that enjoyed by Austria between 1953 to 1955 in the United Nations (called 'observers' or 'observer States'), but the picture is shadowed.²⁶⁵ It is common, however, that after a shorter or longer stay, generally due to geopolitical considerations, they were admitted into the United Nations as full members.

218. All this means that one cannot say that it would be a complete absurdity (without any 'precedent') to admit a pre-sovereign entity into an interstate organization. On the other hand, participation in an interstate (and even *quasi* universal) international organization is not in itself irrefutable proof of statehood or of an alleged perception of full-fledged statehood by the Member States having voted in favour of the admission.

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

C) Resolution 67/19 and the States' explanation of votes at the time of adoption

220. The procedural correctness of the adoption of Resolution 67/19 cannot be contested. However, a first glance at the voting results and the States' positions before and after the explanation of votes shows a very contrasted picture.

221. Resolution 67/19 states that 'to date, 132 States Members of the United Nations have accorded recognition to the State of Palestine'.²⁶⁶ I do not contest the accuracy of this number,

²⁶⁴ See Cohen; Tse-shyang Chen.

²⁶⁵ South Vietnam having possessed UN observer status since 1952, collapsed after the retreat of the United States troops in 1975. Thereafter, Vietnam became united. The so-called German Democratic Republic, having enjoyed observer status between 1972 and 1973, was granted full member status in 1973, which it enjoyed until the moment when, following the collapse of the Berlin Wall (1989) and of the communist regime, its territory was returned to the Federal Republic of Germany under the unification treaty called 'Two Plus Four Treaty' (Treaty on the Final Settlement with Respect to Germany).

²⁶⁶ [Resolution 67/19](#), p. 3.

the source of which is not revealed in the resolution, which was adopted by 138 votes in favour,²⁶⁷ 9 against,²⁶⁸ with 41 abstentions²⁶⁹ and 5 States²⁷⁰ not participating in the voting.

222. However, of the 138 votes in favour, nearly half of them (55) are not from States Parties²⁷¹ to the Rome Statute, even to this day. It is worth noting the special status of three States who were either States Parties in 2012²⁷² or currently are not States Parties.²⁷³

223. Mathematically, 138 votes were more than enough for the adoption of Resolution 67/19, and even without the 56 non-ICC States Parties votes, the simple majority would have still been achieved. It is worth noting that, of the 41 abstaining countries, 31 were/are States Parties²⁷⁴ while, of the 9 countries voting against, 5 were/are States Parties.²⁷⁵ This means that the States Parties were very divided during the vote on Resolution 67/19: 88 were in favour, 5 against and 31 abstained. While still a majority, the *ratio* of abstention is alarming. Due to the

²⁶⁷ These States were: Afghanistan, Algeria, Angola, Antigua and Barbuda, Argentina, Armenia, Austria, Azerbaijan, Bahrain, Bangladesh, Belarus, Belgium, Belize, Benin, Bhutan, Bolivia, Botswana, Brazil, Brunei, Burkina Faso, Burundi, Cambodia, Cape Verde, Central African Republic, Chad, Chile, China, Comoros, Republic of the Congo, Costa Rica, Côte d'Ivoire, Cuba, Cyprus, Denmark, Djibouti, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Eritrea, Ethiopia, Finland, France, Gabon, Gambia, Georgia, Ghana, Greece, Grenada, Guinea, Guinea-Bissau, Guyana, Honduras, Iceland, India, Indonesia, Iran, Iraq, Ireland, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kenya, North Korea, Kuwait, Kyrgyzstan, Laos, Lebanon, Lesotho, Libya, Liechtenstein, Luxembourg, Malaysia, Maldives, Mali, Malta, Mauritania, Mauritius, Mexico, Morocco, Mozambique, Myanmar, Namibia, Nepal, New Zealand, Nicaragua, Niger, Nigeria, Norway, Oman, Pakistan, Peru, Philippines, Portugal, Qatar, Russia, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, São Tomé and Príncipe, Saudi Arabia, Senegal, Serbia, Seychelles, Sierra Leone, Solomon Islands, Somalia, South Africa, South Sudan, Spain, Sri Lanka, Sudan, Suriname, Swaziland, Sweden, Switzerland, Syria, Tajikistan, Tanzania, Thailand, Timor-Leste, Trinidad and Tobago, Tunisia, Turkey, Turkmenistan, Tuvalu, Uganda, United Arab Emirates, Uruguay, Uzbekistan, Venezuela, Vietnam, Yemen, Zambia and Zimbabwe.

²⁶⁸ These States were: Canada, Czech Republic, Micronesia, Israel, Marshall Islands, Nauru, Palau, Panama and United States of America.

²⁶⁹ These States were: Albania, Andorra, Australia, Bahamas, Barbados, Bosnia and Herzegovina, Bulgaria, Cameroon, Colombia, Croatia, Democratic Republic of the Congo, Estonia, Fiji, Germany, Guatemala, Haiti, Hungary, Latvia, Lithuania, North Macedonia, Malawi, Moldova, Monaco, Mongolia, Montenegro, Netherlands, Papua New Guinea, Paraguay, Poland, Romania, Rwanda, Samoa, San Marino, Singapore, Slovakia, Slovenia, South Korea, Togo, Tonga, United Kingdom and Vanuatu.

²⁷⁰ These States were: Equatorial Guinea, Kiribati, Liberia, Madagascar and Ukraine.

²⁷¹ These States were: Algeria, Angola, Armenia, Azerbaijan, Bahrain, Belarus, Bhutan, Brunei, China, Cuba, Egypt, Eritrea, Ethiopia, Guinea-Bissau, India, Indonesia, Iran, Iraq, Jamaica, Kazakhstan, North Korea, Kuwait, Kyrgyzstan, Laos, Lebanon, Libya, Malaysia, Mauritania, Mauritius, Morocco, Mozambique, Myanmar, Nepal, Nicaragua, Oman, Pakistan, Qatar, Russia, São Tomé and Príncipe, Saudi Arabia, Solomon Islands, Somalia, South Sudan, Sri Lanka, Sudan, Swaziland, Syria, Thailand, Turkey, Turkmenistan, Tuvalu, United Arab Emirates, Uzbekistan, Vietnam, Yemen, and Zimbabwe.

²⁷² This State was Côte d'Ivoire.

²⁷³ These States were Burundi and the Philippines.

²⁷⁴ These States were: Albania, Andorra, Australia, Barbados, Bosnia and Herzegovina, Bulgaria, Cameroon, Colombia, Croatia, Democratic Republic of the Congo, Estonia, Germany, Guatemala, Hungary, Latvia, Lithuania, North Macedonia, Malawi, Moldova, Mongolia, Montenegro, Netherlands, Paraguay, Poland, Romania, Samoa, San Marino, Slovakia, Slovenia, South Korea, United Kingdom and Vanuatu.

²⁷⁵ These States were: Canada, Czech Republic, Marshall Islands, Nauru and Panama.

special nature of abstention, I cannot say that votes by non-States Parties were determinative concerning the ICC. However, the division of the States Parties is worth noting.

224. Resolution 67/19 was adopted in a procedurally correct manner and the General Assembly as an institution is not required to address the eventual impact of its resolution upon another international institution. Of course, Resolution 67/19 did not and does not directly concern the ICC. However, the Request (in its primary position) relies on this resolution as its ‘*atout*’ card.

225. Moreover, it should be emphasised that during the explanation of votes,²⁷⁶ several countries voting ‘in favour’ felt it necessary to state that their positive vote did not have any effect on actual recognition either *erga omnes*, or even between them and Palestine. These countries include France,²⁷⁷ Switzerland,²⁷⁸ Belgium,²⁷⁹ Denmark,²⁸⁰ Finland,²⁸¹ New Zealand²⁸² and Norway.²⁸³ Other countries voting ‘in favour’ emphasised that their vote should not be understood as a decision on borders and territory (Honduras)²⁸⁴ and that they considered

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

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

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

²⁷⁹ UN, Question of Palestine, p. 16 (‘For Belgium, the resolution adopted today by the General Assembly does not yet constitute a recognition of a State in the full sense. The establishment of a fully legal State must result from negotiations between Israelis and Palestinians.’).

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

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

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

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

²⁸⁴ UN, Question of Palestine, pp. 17-18 (‘In voting for the resolution, Honduras takes no position on the territorial and border claims of the parties, since we also know from the lessons of our own experience that such matters should not be a matter for political pronouncement by third parties. Such intervention not only exceeds our authority as third parties and our legitimate interest but makes it more difficult to resolve disputes and hardens positions.’).

Palestine's statehood to be a legitimate claim which should be achieved in the future (Serbia²⁸⁵ and Greece²⁸⁶).

226. Additionally, several non-recognizing States²⁸⁷ (meaning States that do not recognize Palestine as a State under international law) can be found among the voters 'in favour' (for example, Austria, Finland, France, Greece, Italy, New Zealand and Norway) while a good number of States, qualified in the register of the Palestine Mission to the UN as recognizing States, abstained (for example, Hungary, Poland and Romania) or voted against (the Czech Republic). Some voters 'in favour' referred to guarantees promised by the Palestinian delegation (for example, Italy)²⁸⁸ while other States did not find them satisfactory and for that reason decided to abstain (for example, the United Kingdom²⁸⁹ and Germany²⁹⁰).

227. When reacting to the outcome of the vote, the Secretary-General gave a very diligently and diplomatically formulated and well-balanced speech describing Palestine's statehood as something that has yet to be achieved through negotiations.²⁹¹ A year later, in his report

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

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

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

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

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

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

²⁹¹ UN, Question of Palestine, pp. 12-13. The statement reads in full: 'An important vote has taken place today in the General Assembly. The decision by the General Assembly to accord Palestine non-member State status in the United Nations was a prerogative of the Member States. I stand ready to fulfil my role and report to the Assembly as requested in resolution 67/19. My position has been consistent all along. I believe that the Palestinians have a legitimate right to their own independent State. I believe that Israel has the right to live in peace and security with its neighbours. There is no substitute for negotiations to that end. Today's vote underscores the urgency of a

submitted to the General Assembly on the implementation of Resolution 67/19, he repeated the primarily political impetus and character of the resolution, alongside its necessary legal and procedural consequences to Palestine's position in the UN. Further, he warned again that the core issues such as 'territory, security, Jerusalem, refugees, settlements, water' should be settled through negotiations.²⁹²

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

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

D) Resolution 67/19 and its balanced wording on 'territory' and 'borders'

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

resumption of meaningful negotiations. We must give a new impetus to our collective efforts to ensure that an independent, sovereign, democratic, contiguous and viable State of Palestine lives side by side with a secure State of Israel. I urge the parties to renew their commitment to a negotiated peace. I count on all concerned to act responsibly, preserve the achievements in Palestinian State-building under the leadership of President Abbas and Prime Minister Fayyad, and intensify efforts towards reconciliation and the just and lasting peace that remains our shared goal and priority.'

²⁹² General Assembly, Status of Palestine in the United Nations, Report of the Secretary-General, A/67/738, 8 March 2013, para. 31 (emphasis added). The statement reads, in relevant part: 'The adoption by the General Assembly of resolution 67/19 on 29 November 2012 by a majority of 138 votes in favour, following a period of prolonged stalemate in the political process, *symbolized the growing international impatience with the long-standing occupation and clearly endorsed Palestinian aspirations* to live in freedom and dignity in an independent State of their own, side by side with Israel in peace and security. The end to the occupation and to the conflict and the achievement of the two-State solution on the ground is long overdue. This can only be achieved, however, through *negotiations to solve all final status issues*. [...] As Secretary-General, I will continue to do my utmost to achieve a *negotiated* two-State solution, in accordance with Security Council resolutions 242 (1967), 338 (1973), 1397 (2002), 1515 (2003) and 1860 (2009), *that will resolve the core issues - territory, security, Jerusalem, refugees, settlements, water - and constitute the end of the Israeli-Palestinian conflict and all claims related to it*. I call on the parties and all stakeholders to act with determination, responsibility and vision. None of the steps to that end are easy, but we cannot afford another year without courageous action for the purpose of achieving the two-State solution reaffirmed by resolution 67/19.' (emphasis added).

231. A full reading of Resolution 67/19 reveals that the ‘pre-1967 borders’ type formulas²⁹³ are counterbalanced with a continuous warning referring to previous UN resolutions and peace initiatives emphasising the necessity of negotiations on core issues, including borders.²⁹⁴

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

E) The actual - well balanced - content of Resolution 67/19

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

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

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

234. Their ‘pre-1967 borders’ type formulas do not stand alone: they should be read alongside the references to Oslo I and Oslo II, the Road Map (which is very clear about when and how Palestine’s borders will be established)²⁹⁵ and the Quartet,²⁹⁶ or even with direct reference to negotiations on borders and recalling the previously adopted resolutions containing the same

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

²⁹⁶ United Nations System: The Quartet, <https://www.un.org/unispal/un-system/un-system-partners/the-quartet> (‘The Quartet, comprised of the European Union, Russia, United Nations, and United States was established in 2002 to facilitate the Middle-East Peace Process negotiations. The Quartet was welcomed in United Nations Security Council resolution 1397 (2002) following the Second Intifada. The Quartet’s principals, namely the EU High Representative for Common Foreign and Security Policy, the Foreign Minister of Russia, the UN Secretary-General, and the United States Secretary of State have met 54 times since 2002 in furtherance of their Performance-based Road Map to a Permanent Two-State Solution. The Road Map, endorsed in Security Council resolution 1515 (2003) called for a three-phased performance-based strategy to move the peace process towards a final resolution of the conflict. The Quartet is guided by three overarching Principles – nonviolence, recognition of Israel, and acceptance of previous agreements – in furthering the Middle East peace process. The Quartet’s first report, addressing major threats to the peace process and providing recommendations for advancing the two-state solution, was released in July 2016.’).

elements, such as Security Council Resolution 1397 of 12 March 2002,²⁹⁷ Resolution 1515 of 19 November 2003²⁹⁸ and Resolution 1850 of 16 December 2008.²⁹⁹ The same can be said regarding most of the statements pronounced in the Security Council on 11 February 2020.³⁰⁰

235. The ‘pre-1967 borders’ type formulas are cited in abundance in the Request. However, the formulas referring to negotiations on borders are much less cited and the few existing references are not presented in conjunction with the ‘pre-1967 borders’ formula, contrary to the original wording.

236. The same stands for the Request’s presentation of the ICJ advisory opinion on the Wall,³⁰¹ which mostly deals with the obligations under the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 1949³⁰² (the ‘Geneva Convention IV’) and under the Hague Convention on Laws and Customs of War of 1907³⁰³ (‘The Hague Convention IV’).

237. Important *dicta* are cited from this advisory opinion in the Request,³⁰⁴ but they deal only with the rights and obligations of Israel, which was considered by the ICJ an occupying power

²⁹⁷ Security Council, [Resolution 1397](#), 12 March 2002, S/RES/1397.

²⁹⁸ Security Council, [Resolution 1515](#), 19 November 2003, S/RES/1515 (the ‘Resolution 1515’).

²⁹⁹ Security Council, [Resolution 1850](#), 16 December 2008, S/RES/1850 (the ‘Resolution 1850’).

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

³⁰¹ ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, [Advisory Opinion of 9 July 2004](#), 9 July 2004 (‘ICJ Wall Advisory Opinion’).

³⁰² Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 United Nations Treaty Series 973.

³⁰³ Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 18 October 1907, The Hague.

³⁰⁴ [Request](#), para. 78.

under the Geneva and The Hague Conventions. The cited *dicta* and the advisory opinion as a whole may hardly be cited in support of actual or envisaged territories and borders. Even the ICJ warned about the need for a correct, contextual interpretation.³⁰⁵

F) Impact of Resolution 67/19 on the Secretary-General as depositary of the accession instrument

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

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

³⁰⁵ [ICJ Wall Advisory Opinion](#), para. 162 (‘The Court has reached the conclusion that the construction of the wall by Israel in the Occupied Palestinian Territory is contrary to international law and has stated the legal consequences that are to be drawn from that illegality. The Court considers itself bound to add that this construction must be placed in a more general context. Since 1947, the year when General Assembly resolution 181 (II) was adopted and the Mandate for Palestine was terminated, there has been a succession of armed conflicts, acts of indiscriminate violence and repressive measures on the former mandated territory. The Court would emphasize that both Israel and Palestine are under an obligation scrupulously to observe the rules of international humanitarian law, one of the paramount purposes of which is to protect civilian life. Illegal actions and unilateral decisions have been taken on all sides, whereas, in the Court’s view, this tragic situation can be brought to an end only through implementation in good faith of all relevant Security Council resolutions, in particular resolutions 242 (1967) and 338 (1973). The “Roadmap” approved by Security Council resolution 1515 (2003) represents the most recent of efforts to initiate negotiations to this end. The Court considers that it has a duty to draw the attention of the General Assembly, to which the present Opinion is addressed, to the need for these efforts to be encouraged with a view to achieving as soon as possible, on the basis of international law, a negotiated solution to the outstanding problems and the establishment of a Palestinian State, existing side by side with Israel and its other neighbours, with peace and security for all in the region.’) (emphasis added).

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

³⁰⁷ [Secretary-General Summary of Practice](#), para. 83.

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

241. It is important to read this statement in conjunction with the Secretary-General’s own ‘disclaimer’ message transmitted some months earlier through his spokesperson which is a *quasi* warning against a hurried automatism.³⁰⁹

242. The perception of neutrality and the emphasis placed on the administrative observance and control while leaving the task of the decision *in merito* to the States themselves seems to be the main approach of the successive Secretary-Generals. This policy is *quasi* the same when

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

³⁰⁹ United Nations, Daily Press Briefing by the Office of the Spokesperson for the Secretary-General, 10 April 2014 (‘[O]n 2 April, the Secretary-General in his capacity as depositary received from the Permanent Observer Mission of the State of Palestine through the United Nations copies of instruments of accession to 14 multilateral treaties. In conformity with the relevant international rules and in his practice as depositary, the Secretary-General has ascertained through his Office of Legal Affairs and more specifically through the Treaty Section in the Office of Legal Affairs that the instruments received were in due and proper form before accepting them for deposit and has informed all States concerned accordingly, through the circulation of depositary notification. Now, if I can explain that in slightly less legal terms, as depositary, when these instruments are deposited, it’s up to the Treaty Section in the Office of Legal Affairs to kind of go through an administrative check list that verifies the conditions for participation with the relevant provision of each treaty; also, verifies that the instruments are in proper and due form, which mainly means the instrument of accession include clear and fair expression of commitment to undertake the rights and obligations to the treaty, that it’s signed by the right people. So it’s really, I would say an administrative function performed by the Secretariat as part of the Secretary-General responsibility as depositary of the treaty. But I think it’s also important to emphasize that it is for States, each individual Member States, to make their own determination with respect to any legal issues raised by instruments circulated by the Secretary-General.’).

individual States act as depositaries³¹⁰ and coincides with the interpretation of the International Law Commission.³¹¹

243. While *arguendo* the behaviour of States within the ASP in the five years following Palestine's solemn admission might eventually be taken into consideration by the Chamber as an additional factor to consider when dealing with Palestine's statehood,³¹² this, nevertheless, cannot play any role *vis-à-vis* the question of borders, which manifestly lies outside the ASP's competences.

244. It is true that Palestine's status can eventually be addressed under the concept of 'State for the purposes of the Statute under international law' (as suggested in the 'alternative position' of the Request)³¹³ and that this approach may be substantiated by remarkable doctrinal support.³¹⁴ However, the question of territory remains to be answered.

³¹⁰ S. Sakran and M. Hayashi, 'Palestine's Accession to Multilateral Treaties: Effective Circumvention of the Statehood Question and its Consequences' in 25 *Journal of International Cooperation Studies* 81 (2017), pp. 84, 86.

³¹¹ United Nations, Yearbook of the International Law Commission, Volume II (1966), p. 270 ('In this connexion, as in others, although the depositary has the function of making a preliminary examination of the matter, it is not invested with competence to make a final determination of the entry into force of the treaty binding upon the other States concerned. However normal it may be for States to accept the depositary's appreciation of the date of the entry into force of a treaty, it seems clear that this appreciation may be challenged [...] the depositary is not invested with any competence to adjudicate upon or to determine matters arising in connexion with the performance of its functions.'). https://legal.un.org/ilc/publications/yearbooks/english/ilc_1966_v2.pdf; L. Caflisch, 'Art. 76' in O. Corten and P. Klein (eds) *The Vienna Conventions on the Law of Treaties: A Commentary* (2011), p. 1712 ('Suffice it to note here that, according to Article 76(2), those functions are "international in character", this assertion being corroborated by the appeal addressed to the depositary to act "impartially". In this connection, the ILC's commentary on Article 76(2) stresses the "representative" character of the depositary's functions, that is, the fact that the depositary acts on behalf of the contracting parties as a whole, which obviously presupposes the independence and the international character of the depositary's functions. [...] When performing depositary functions, a State or organization must therefore avoid favouring its own political objectives.').

³¹² See the election of the State of Palestine to the Bureau of the ASP in December 2017 (See ASP, Press Release, '[Assembly of States Parties to the Rome Statute elects a new President and six judges](#)') and the [Communication](#) of Canada, 23 January 2015 ('In that context, the Permanent Mission of Canada notes that "Palestine" does not meet the criteria of a state under international law and is not recognized by Canada as a state. Therefore, in order to avoid confusion, the Permanent Mission of Canada wishes to note its position that in the context of the purported Palestinian accession to the Rome Statute of the International Criminal Court, "Palestine" is not able to accede to this convention, and that the Rome Statute of the International Criminal Court does not enter into force, or have an effect on Canada's treaty relations, with respect to the "State of Palestine".'). No other State Party seemingly followed Canada's example and no further formal objections or communications were submitted.

³¹³ See [Request](#), paras 9, 43, 101-103.

³¹⁴ A. Pellet, 'The Effects of Palestine's Recognition of the International Criminal Court's Jurisdiction' in C. Meloni and G. Tognoni (eds) *Is there a Court for Gaza? A Test Bench for International Justice* (2012), p. 425 (In the context of Palestine's 2009 Declaration, Pellet states: '[I]t appears to me that the Court does not, for the reasons developed above, need to pronounce, in theory, on the issue of whether, "in absolute", Palestine is or not a State. This would necessitate for it to decide between the sovereign assessments of the States that constitute the international society (and that have a power of appreciation for that purpose) whereas they are deeply divided. Rather, it just has to acknowledge that, whatever the situation in other cases, for the purpose of the Rome Statute,

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

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

G) The actual content of Resolution 67/19 in light of subsequently adopted UN Security Council and General Assembly resolutions

247. Before attributing any decisive role to a particular (and, in my view, improper) interpretation of Resolution 67/19, it is important to examine this interpretation in light of the resolutions that were adopted concerning various aspects of the Question on Palestine. It is worth analyzing the General Assembly's subsequent practice. In the years following the adoption of Resolution 67/19, the General Assembly adopted a number of resolutions dealing with different aspects of the Palestinian situation. These resolutions referred to the importance of the Road Map of the Quartet and stated that full-fledged statehood would only be achieved

this Declaration could be made in accordance with the provisions of Article 12 and that it can have the effects specified by Article 13.'). This legal opinion was co-signed by 38 professors, including Georges Abi-Saab, Cherif Bassiouni, Benedetto Conforti, Luigi Condorelli, Zdzislaw Galicki, Vera Gowlland-Debbas, Djamchid Momtaz, William Schabas, and Linos-Alexander Sicilianos.

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

at the end of the third phase of the Road Map.³¹⁶ It must be emphasised that these resolutions also contain references to Resolution 67/19.³¹⁷

248. Several of these resolutions contain the same language as Resolution 67/19,³¹⁸ namely the call to UN Member States and UN specialized agencies ‘to continue to support and assist the Palestinian people in the *early realization*³¹⁹ of their right to self-determination, including the right to their independent State of Palestine.’³²⁰

249. Other frequently used wording – using a slightly different structure – reads as follows:

The General Assembly [...] 1. Reaffirms the right of the Palestinian people to self-determination, including the right to their independent State of Palestine. 2. Urges all States and the specialized agencies and organizations of the United Nations system to continue to support and assist the Palestinian people in the early realization of their right to self-determination.³²¹

250. It is also worth examining the following formula: ‘The General Assembly [...] [u]rges all States and the United Nations [...] to support the development and strengthening of Palestinian institutions and *Palestinian State-building efforts in preparation for independence*.’³²²

251. These formulas (‘*early realization*’ — in French: ‘*en vue de la réalisation rapide*’ – and ‘*in preparation for independence*’) can hardly be interpreted as referring to an already existing, independent and sovereign State.

³¹⁶ See e.g. General Assembly, [Resolution 74/11](#), 3 December 2019, A/RES/74/11 (the ‘Resolution 74/11’), paras 1, 2. See also [Resolution 74/10](#), 3 December 2019, A/RES/74/10 (the ‘Resolution 74/10’), para. 4; [Resolution 73/89](#), 6 December 2018, A/RES/73/89; [Resolution 73/158](#), 17 December 2018, A/RES/73/158 (the ‘Resolution 73/158’), Preamble; [Resolution 73/19](#), 30 November 2018, A/RES/73/19 (the ‘Resolution 73/19’), Preamble and para. 4; [Resolution 72/160](#), 19 December 2017, A/RES/72/160 (the ‘Resolution 72/160’), Preamble; [Resolution 71/184](#), 19 December 2016, A/RES/71/184 (the ‘Resolution 71/184’), Preamble; [Resolution 71/97](#), 6 December 2016, A/RES/71/97, Preamble; [Resolution 70/225](#), 22 December 2015, A/RES/70/225 (the ‘Resolution 70/225’), Preamble; [Resolution 70/141](#), 17 December 2015, A/RES/70/141 (the ‘Resolution 70/141’), Preamble; [Resolution 69/20](#), 25 November 2014, A/RES/69/20 (the ‘Resolution 69/20’), Preamble, para. 4; [Resolution 68/12](#), 26 November 2013, A/RES/68/12 (the ‘Resolution 68/12’), Preamble, para. 4.

³¹⁷ See e.g. [Resolution 74/11](#); [Resolution 73/158](#); [Resolution 72/160](#); [Resolution 71/184](#); [Resolution 70/225](#); [Resolution 70/141](#); [Resolution 69/20](#); [Resolution 68/12](#).

³¹⁸ [Resolution 67/19](#), para. 6.

³¹⁹ [Resolution 67/19](#), para. 6 (emphasis added).

³²⁰ See e.g. [Resolution 74/10](#), para. 8; [Resolution 73/18](#), para. 8; [Resolution 69/20](#), para. 8.

³²¹ See e.g. [Resolution 73/158](#); [Resolution 72/160](#); [Resolution 71/184](#); [Resolution 70/141](#); [Resolution 68/12](#).

³²² See [Resolution 74/11](#), para. 14; [Resolution 73/19](#), para. 25; General Assembly, [Resolution 72/14](#), 7 December 2017, A/RES/72/14, para. 26 (emphasis added).

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

253. It is clear from the statements made by the permanent members of the Security Council (China,³²⁴ France,³²⁵ Russia,³²⁶ the United Kingdom,³²⁷ and the United States of America³²⁸),

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

³²⁴ Permanent Mission of the People's Republic of China to the UN, '[Remarks by Amb. Zhang Jun at Security Council VTC on the Situation in the Middle East, including the Palestinian Question](#)', 21 July 2020 ('China is also deeply concerned about reports of the plan to annex part of the occupied Palestinian territory. Such a plan, if implemented, will seriously violate international law and relevant UN resolutions, and imperil the "two-state solution." [...] It's a critical moment to advance the Middle East peace process and resume equal and meaningful peace talks between Palestine and Israel. International agreements such as relevant UN resolutions, the "land for peace" principle and the two-state solution are important parameters in the Middle East peace process. [...] During a phone talk with President Abbas Yesterday, President Xi Jinping reiterated China's firm support for Palestine's just demands, the "two-state solution", as well as all efforts conducive to resolving the Palestine question.').

³²⁵ Permanent Mission of France to the United Nations in New York, '[Statement by Mr. Nicolas de Riviere, Permanent Representative of France to the United Nations, at the Security Council](#)', 21 July 2020 ('[O]nly the two-state solution will respond to the aspirations of the Palestinians and guarantee Israel's security, with which France will never compromise. [...] Any annexation of territory would also deal an irreversible blow to the peace process, as well as to the two-State solution.').

³²⁶ Permanent Mission of the Russian Federation to the United Nations, '[Statement by Dmitry Polyanskiy, First Deputy Permanent Representative of Russia to the UN, at the VTC of UNSC members on the situation in the Middle East, including Palestinian question](#)', 21 July 2020 ('The Palestinian question is central to the entire Middle East. We have passed the date of July 1, after which the Israeli parliament threatened to begin discussing plans for the annexation of the West Bank of the Jordan River. No action has yet been taken, but it is important to understand that implementation of these plans may close the door for prospects for the two-state principle of the settlement and might lead to the consequences that would only exacerbate the situation. [...] As a permanent member of the UN Security Council and the Quartet of international mediators Russia is ready to undertake efforts in the interests of achieving a settlement within the internationally recognized parameters - UN resolutions, Madrid principles, the Arab Peace Initiative - which provide for the creation of an independent, sovereign and territorially contiguous Palestinian state within 1967 borders with East Jerusalem as its capital.').

³²⁷ Ambassador Jonathan Allen, United Kingdom Chargé d'Affaires to the UN, '[Statement by Ambassador Jonathan Allen, UK Chargé d'Affaires to the UN, at the Security Council briefing on the Middle East](#)', 21 July 2020 ('Settlement construction in these highly sensitive areas threatens to further undermine the viability of a future Palestinian state with its capital in East Jerusalem. [...] We support a negotiated settlement leading to a safe and secure Israel living alongside a viable and sovereign Palestinian state based on 1967 lines with agreed land swaps, Jerusalem as the shared capital of both states and a just fair, agreed and realistic settlement for refugees.').

³²⁸ United States Mission to the United Nations, '[Remarks at a UN Security Council Briefing on the Situation in the Middle East \(via VTC\)](#)', 21 July 2020 ('The status quo is a failure. We should be discussing how to get responsible Israeli and Palestinian leadership to sit down at the negotiating table. [...] In fact, we've seen more discussion of the potential punitive responses against Israel, rather than discussion of productive ways to engage in peace and encourage the Palestinians to come to the negotiating table.').

by the current elected member States (Belgium,³²⁹ the Dominican Republic,³³⁰ Estonia,³³¹ Germany,³³² Indonesia,³³³ Niger,³³⁴ Saint Vincent and the Grenadines,³³⁵ South Africa,³³⁶

³²⁹ Kingdom of Belgium, '[Statement delivered by Marc Pecsteen de Buytswerve, Permanent Representative of Belgium to the United Nations](#)', 21 July 2020 ('[A]nnexation would undermine all efforts aimed at restarting negotiations and would mean the end of the two-state solution. [...] The peaceful resolution of the Israeli-Palestinian conflict can be an important driver for peace and stability in a volatile region. It is therefore necessary that the international community redoubles its efforts with the view of achieving a just and durable peace that is rooted in international law, including the resolutions of this Council. Belgium will support all efforts in this regard, including in the framework of the Middle East Quartet.').

³³⁰ Security Council, Press Release, '[Palestinians Witnessing "Crushing of Their Dream" of Own Independent, Sovereign State. Veteran Academic Tells Security Council](#)', 21 July 2020, SC/14258 ('SC/14258') ('But Palestinian national unity and Israeli political will need to precede any meaningful dialogue. The only way forward for Palestinians and Israelis is to negotiate their way out of this long and painful conflict and lead their own paths towards lasting peace for present and future generations.').

³³¹ Permanent Mission of Estonia to the United Nations, '[Estonia's Statement at UN Security Council VTC Meeting on Middle East](#)', 21 July 2020 ('Estonia remains committed to a negotiated two-State solution, based on internationally agreed parameters and relevant UN resolutions, taking into account the legitimate aspirations of both parties and Israeli security concerns. We have taken note of the announcements on the readiness of the Palestinian Authority to resume peace negotiations as well as the counter-proposal submitted to the Middle East Quartet. [...] A possible annexation by Israel of parts of the occupied West Bank would undermine the prospects for a negotiated two state solution and threaten the stability of the region. [...] We are also concerned about the announcement by the Palestinian leadership regarding the suspension of agreements with Israel, including in the area of security cooperation. We call on the Palestinian Authority to reconsider this decision. [...] We encourage all Palestinian factions to work towards reconciliation, which would enable them to address common challenges and the needs and expectations of the Palestinian population and is essential in order to reach the two state solution.').

³³² Permanent Mission of the Federal Republic of Germany to the United Nations, '[Statement by State Secretary Miguel Berger in the Security Council VTC Meeting on the situation in the Middle East](#)', 21 July 2020 ('Our briefers have cited voices that call into question whether we can still speak of a peace process twenty-six years after Oslo. Yet, their presentations underscore that the negotiated two-state solution remains the only viable solution to the conflict – and it still enjoys public support. It meets Israeli and Palestinian security needs, fulfils legitimate Palestinian aspirations for statehood, ends the occupation, resolves all permanent status issues, and guarantees equal rights for all inhabitants based on international law and the relevant UN resolutions. [...] Annexation would severely undermine, if not render impossible, the resumption of direct negotiations between Israelis and Palestinians. Instead, it would bring them closer to a one-state reality.').

³³³ Permanent Mission of the Republic of Indonesia to the United Nations, <https://kemlu.go.id/newyork-un/en/read/indonesia-desak-israel-batalkan-rencana-aneksasi/3850/etc-menu>. See also SC/14258.

³³⁴ Press Release SC/14258 ('Niger's representative said that [...] it is incumbent today on the Council, the Quartet and the international community to spare no effort to relaunch the Israeli-Palestinian peace process on the basis of unanimously accepted ideals and principles, in particular through resolution 1515 (2003) which enshrines the two-State solution.').

³³⁵ Press Release SC/14258 ('The representative of Saint Vincent and the Grenadines, welcoming the Palestinian Authority's willingness to resume negotiations with Israel under the auspices of the Middle East Quartet, said that direct negotiations can bolster the prospects for a negotiated two-State solution.').

³³⁶ Republic of South Africa, Department of International Relations and Co-operation, Press Release, '[Statement by Ambassador Jerry Matjila, Permanent Representative of South Africa to the United Nations, during the Security Council Open Video Teleconference Meeting on the situation in the Middle East, including the question of Palestine](#)', 21 July 2020 ('South Africa, once again, reiterates our full support for a two-State solution with the establishment of a viable, contiguous Palestinian state, existing side-by-side and in peace with Israel, within internationally recognised borders, based on those of 4 June 1967, with East Jerusalem as its capital, in line with all relevant UN resolutions, international law and internationally agreed parameters.').

Tunisia,³³⁷ and Vietnam³³⁸) at the 21 July 2020 meeting, and by other States such as Cuba,³³⁹ Japan,³⁴⁰ Kuwait,³⁴¹ Liechtenstein,³⁴² Malaysia,³⁴³ Norway,³⁴⁴ the United Arab Emirates³⁴⁵

³³⁷ Press Release SC/14258 (‘Tunisia’s representative said that it is regrettable and scandalous that Israel, the occupying Power, persists in blatantly disregarding all legal obligations and repeated calls by the international community for ending its illegal occupation of the Palestinian territory. The Quartet, with the support of the Council and other international actors, could live up to the challenge of preserving a two-State solution and relaunching the peace process.’).

³³⁸ Permanent Mission of the Socialist Republic of Vietnam to the United Nations, ‘[Statement by H.E. Ambassador Dang Dinh Quy Permanent Representative of Viet Nam to the United Nations at the UNSC open VTC on “The situation in the Middle East, including the Palestinian question”](#)’, 21 July 2020 (‘If realized, the plans would exert severe and irreversible impacts on the viability of the two-State solution, as well as to peace and stability in the Middle East region. Such annexation would be a serious violation of international law, the Charter of the United Nations, and would also run counter to the long term interests of the Israelis themselves. [...] We welcome the recent statement by President Mahmoud Abbas that the Palestinian Authority is ready to resume the long-stalled peace talks with Israel. We express our appreciation for the determination of the Secretary-General and the Special Coordinator in engaging with all related parties to restart dialogue and alleviate Palestinians’ hardship. We commend the multiple efforts by various interested parties, including the Quartet, to resume negotiations in a creative and sustainable manner. [...] It is critical to strive to ensure the legitimate interests of parties concerned, as well as promote peace, stability and development in the Middle East. The only option toward that end is the two-state solution.’).

³³⁹ Permanent Mission of Cuba to the United Nations, Press Release, ‘[Cuba declares to the Security Council that even in the midst of the pandemic, Israel continues to violate the UN Charter and international law](#)’, 21 July 2020 (‘Cuba has fully supported a comprehensive, just and lasting solution to the Israeli-Palestinian conflict, which allows the Palestinian people to exercise the right to self-determination and establish an independent and sovereign State in the pre-1967 borders, with East Jerusalem as its capital, and guarantees the refugees’ right to return.’).

³⁴⁰ Permanent Mission of Japan to the United Nations, ‘[Statement by H.E. Ambassador ISHIKANE Kimihiro, Permanent Representative of Japan to the United Nations, United Nations Security Council Open VTC on the Middle East](#)’, 21 July 2020 (‘Japan remains committed to supporting a two-state solution. The conflict between the Israeli and the Palestinian sides should be resolved only through negotiations, based on the relevant Security Council resolutions and known parameters. We are very concerned about the continued settlement activities by Israel, including the demolition of Palestinian-owned structures, which undermines efforts toward a peaceful resolution. If the “application of sovereignty” to the West Bank were to be unilaterally put into effect by Israel, irrespective of the territorial scope of such measures, it would severely undermine mutual confidence between the parties toward achieving a two-state solution and might lead to the destabilization of the region.’).

³⁴¹ Kuwait News Agency, Press Article, ‘[Kuwait Calls on Ending Israeli Crimes in Palestine](#)’ (22 July 2020) (‘Mansour al Otaibi, permanent representative [...] reaffirmed Kuwait’s commitment to the views of the Arab and Islamic World on the peace process and the two-states solutions and having an independent Palestinian State with Jerusalem as capital.’).

³⁴² Permanent Mission of the Principality of Liechtenstein to the United Nations, ‘[Statement Attributable to H.E. Ambassador Christian Wenaweser, Permanent Representative of the Principality of Liechtenstein to the United Nations](#)’, 21 July 2020 (‘Far from making Israel more secure, annexation undermines the prospect of a two-state solution based on applicable international law, in particular international humanitarian law, and relevant Security Council resolutions, which remain the only viable pathway to a sustainable solution to the Israeli-Palestinian conflict.’).

³⁴³ Permanent Mission of Malaysia to the United Nations, ‘[Statement by H.E. Syed Mohamad Hasrin Aidid, Permanent Representative of Malaysia to the United Nations at the Security Council Open VTC on the Situation in the Middle East, Including the Palestinian Question](#)’, 21 July 2020 (‘A just, comprehensive and lasting solution is only possible through a negotiated political settlement – a process that the international community and this august body must actively pursue. [...] We also reaffirm our support on establishing an independent State of Palestine.’).

³⁴⁴ Permanent Mission of Norway to the United Nations, ‘[Statement by Ambassador Mona Juul in the Open Debate on Situation in the Middle East, including the Palestinian Question](#)’, 21 July 2020 (‘Annexation violates international law, and it would undermine the possibility of establishing a contiguous Palestinian state and the prospects of achieving a lasting peace. [...] Existing agreements and relevant UN resolutions should form the

(also on behalf of the Group of Member States of the Organization of Islamic Cooperation) and the European Union,³⁴⁶ during the discussion regarding the Palestinian situation, on the basis of the newest report submitted and presented by the UN Special coordinator for the Middle East,³⁴⁷ that they all spoke of the two-State solution as an aim still to be achieved. In their criticism of the Israeli annexation plans, all elected and permanent members with the exception of the US, which viewed the present criticism as unjustified, shared the perception that the plans were a threat to the two-State solution or an attempt to stabilize a *de facto* one-State solution. Thus, to this day, the Security Council has interpreted Palestine's status as a special entity deserving statehood, but whose genuine statehood is yet to be realized.

254. This is consistent with the Secretary-General's position, as expressed in his report of July 2020, that dangerous steps 'systematically erod[e] the possibility of establishing a contiguous, independent and sovereign Palestinian State'.³⁴⁸ The terms '*possibility of establishing*' can

basis for the resumption of talks. Under the Oslo Accords, the parties have undertaken to resolve all outstanding issues, including borders, security, refugees and Jerusalem, in the final-status negotiations. There is a strong international consensus that only a negotiated two-state solution can lead to a durable peace between the Israelis and the Palestinians.').

³⁴⁵ Permanent Mission of the United Arab Emirates to the United Nations, '[OIC Underscores Need to Salvage Prospects for Peace Between Palestine, Israel](#)', 21 July 2020 ('On behalf of the Group of Member States of the Organization of Islamic Cooperation (OIC) in its capacity as Chair, the UAE urged the international community to salvage the prospects of peace between Palestine and Israel during the UN Security Council quarterly open debate on the situation in the Middle East, including the Palestinian Question. [...] We are determined to support the Palestinian people and protect the two-state solution, with a Palestinian state living side-by-side with Israel in peace, security and mutual recognition. [...] OIC Member States reiterated their call to support the Palestinian people in exercising their legitimate rights, including their right to self-determination and sovereignty over the territory of the State of Palestine, based on the 4 June 1967 borders, with East Jerusalem as its capital.').

³⁴⁶ Delegation of the European Union to the United Nations, '[Statement by H.E. Mr. Olof Skoog, Head of Delegation, Delegation of the European Union to the United Nations, at the Security Council Open VTC on the Situation in the Middle East](#)', 21 July 2020 ('The European Union remains united in its commitment to achieving a two-state solution that meets Israeli and Palestinian security needs and Palestinian aspirations for statehood and sovereignty, ends the occupation that began in 1967, and resolves all permanent status issues in order to end the conflict.').

³⁴⁷ The Office of the United Nations Special Coordinator for the Middle East Peace Process, '[Security Council Briefing on the Situation in the Middle East, Including the Palestinian Question \(as Delivered by UN Special Coordinator Mladenov\)](#)', 21 July 2020 (addressing the necessity of 'preserv[ing] the prospect for a two-state solution' and of 'identify[ing] realistic steps to avoid increasing polarisation and advance the goal of two states' and 'to regain the path towards a negotiated two-state solution.').

³⁴⁸ Security Council, '[Implementation of Security Council Resolution 2334 \(2016\): Report of the Secretary-General](#)', 18 June 2020, S/2020/555, para. 55 ('For over 25 years, Palestinians have believed that the peaceful pursuit of their right to self-determination, through meaningful negotiations, would result in an independent, contiguous and sovereign state of their own – Palestine, living side-by-side with Israel, in peace, with secure and recognized borders, and with Jerusalem as the capital of both States. I have always shared this belief. However, unilateral Israeli annexation of any part of the occupied West Bank would effectively close the door for a renewal of negotiations and destroy the prospect of a viable Palestinian State and the two-State solution. This would be calamitous for Palestinians, Israelis and the region. I cannot overemphasize the urgency of reversing this dangerous trajectory.'). para. 57 ('I reiterate that Israeli settlements in the occupied West Bank, including East Jerusalem, have no legal validity and constitute a flagrant violation under international law. The establishment

hardly be understood to mean that the Secretary-General considered the ‘independent and sovereign Palestinian State’ to be a reality. The Office of the Secretary-General, Mr. Guterres, when welcoming on 13 August 2020 the conclusion of an agreement (the so-called ‘*Abraham accords*’) between Israel and the United Arab Emirates,³⁴⁹ once again spoke of the State of Palestine and of the two-State solution only in future terms.³⁵⁰ This coincides with the perception of Palestine’s status as expressed by Prime Minister Mohammed Shtayyeh at a press conference on 9 June 2020 when informing the media about the content of a letter, addressed some days earlier to the members of the Quartet and containing an alternative to the ‘deal of the century’ project.³⁵¹ President Mahmoud Abbas’ spokesman made a similar statement a

and expansion of settlements fuel resentment, hopelessness and disillusionment among Palestinians, are key drivers of human rights violations and significantly heighten Israeli-Palestinian tensions. They entrench the military occupation of Israel and undermine the prospect of achieving a viable two-State solution by systematically eroding the possibility of establishing a contiguous, independent and sovereign Palestinian State. I urge the Government of Israel to stop the advancement of all settlement plans immediately.’).

³⁴⁹ The White House, [Joint Statement of the United States, the State of Israel, and the United Arab Emirates](#), 13 August 2020.

³⁵⁰ United Nations, Secretary-General, ‘[Statement attributable to the Spokesman for the Secretary-General – on the announcement of an agreement between Israel and the United Arab Emirates](#)’, 13 August 2020 (‘Today’s joint statement by United States President Donald J. Trump, Prime Minister Benjamin Netanyahu of Israel, and His Highness Sheikh Mohamed bin Zayed Al Nahyan, Crown Prince of Abu Dhabi suspends Israeli annexation plans over parts of the occupied West Bank, something the Secretary-General has consistently called for. *Annexation would effectively close the door for a renewal of negotiations and destroy the prospect of a viable Palestinian State and the two-State solution.* The Secretary-General welcomes this agreement, hoping it will create an opportunity for Israeli and Palestinian leaders to re-engage in *meaningful negotiations that will realize a two state-solution* in line with relevant UN resolutions, international law and bilateral agreements. Peace in the Middle East is more important than ever as the region confronts the grave threats of COVID-19 and radicalization. The Secretary-General will continue to work with all sides to open further possibilities for dialogue, peace and stability. Stéphane Dujarric, Spokesman for the Secretary-General.’) (emphasis added).

³⁵¹ Several articles cite to the statement, originally written in Arabic. The English translations are similar. See Mark Stone, ‘[Palestine says it will declare statehood along pre-1967 border if Israel annexes West Bank](#)’ on SkyNews (10 June 2020) (“‘If Israel is going to annex after July 1st, we are going to go from the interim period of the Palestinian Authority into the manifestation of a state on the ground. That is where we will be heading in the next phase. This authority cannot continue to be an authority without any authority,” Mr Shtayyeh said. “What does the manifestation of the state on the ground mean? It means that there will be a founding council, there will be a constitutional declaration, and Palestine will be on the borders of ’67 with Jerusalem as its capital and we will call our international community to recognise this fact.”’). See also ‘[PNA will declare State of Palestine if Israel annexes](#)’ on ANSAMED (9 June 2020) (‘From interim institution, the PNA will become a manifestation of the state on the ground with a Council of foundation, a constitutional declaration. Palestine will extend beyond the borders of 1967 with Jerusalem as capital. We will seek international recognition: the world must choose between international law and annexation.’). See also Linda Gradstein, ‘[Palestinian Leadership Threatens to Declare a State](#)’ on VOANews (9 June 2020) (“‘We are waiting and pushing for Israel not to annex. If Israel is going to annex after July 1, we are going to go from the interim period of the Palestinian Authority into a manifestation of a state on the ground. That is where we will be heading in the next phase,” he said. He described what that next phase would look like to create a Palestinian state in the pre-1967 borders, meaning a state in the West Bank and Gaza Strip with East Jerusalem as its capital. “It means there will be a founding council, there will be a constitutional declaration, and Palestine will be on the borders of 67 with Jerusalem as its capital and we will call on the international community to recognize this fact. That is where we are and as it has been said, I think the world and us we have to face the moment of truth,” said Dr. Stayyeh.’).

couple of days later.³⁵² The Prime Minister warned that the ‘interim institution’ of the Palestine National Authority may transform ‘into the manifestation of a state on the ground’ should Israel’s government follow through with its annexation plan. Seemingly, a number of recent official statements by Palestinian leaders, namely Mr. President Abbas³⁵³ and Mr. Prime

³⁵² Kifah Zboun, Press Article, ‘[PA Ready to Discuss Maps after Ruling out Annexation](#)’ on Asharq Al-Awsat (21 June 2020) (‘Nabil Abu Rudeineh, spokesman for President Mahmoud Abbas, has stated that the Palestinian Authority is willing to discuss maps when a unilateral Israeli annexation of parts of the occupied West Bank is ruled out. Speaking after a meeting for the Fatah Central Committee held in Ramallah and chaired by Abbas, Rudeineh stated: “We refuse to talk about the maps except on the negotiating table, if the basic conditions are met; negotiations on the basis of Palestinian and international legitimacy and the decisions of the National and Central Councils of the Palestine Liberation Organization (PLO), which will lead to the establishment of a Palestinian state on the 1967 borders, and not on the basis of (US President Donald) Trump’s plan and Israeli annexation plans.” “The United States and Israel should fully understand that the message of the Palestinian people is clear: We will not accept annexation of even one centimeter (of Palestinian land). There will either be a Palestinian state on the borders of June 4, 1967 with East Jerusalem as its capital or there will be no security, no peace, and no stability in the region,” he said.’).

³⁵³ President M. Abbas, [Statement given at the 75th Session of the UN General Assembly](#), 25 September 2020 (‘We have rejected [the US “Deal of the Century”], as did the international community, as it contravenes international law and UN resolutions, which recognized, *inter alia*, the existence of the State of Palestine in 2012 as part of the international order. [...] Israel [...] violated all agreements signed with us, undermined the two-State solution through its oppressive practices [...]. The Palestine Liberation Organization has not given a mandate to anyone to speak or negotiate on behalf of the Palestinian people and *the only path to lasting, comprehensive and just peace in our region requires ending the occupation and securing the independence of the State of Palestine* on the 1967 borders with East Jerusalem as its capital. In this regard, I call on the Secretary-General of the United Nations to undertake, in cooperation with the Quartet and the Security Council, preparations to convene an international conference with full authority and with the participation of all concerned parties, early next year, to engage in a genuine peace process, based on international law, UN resolutions and the relevant terms of reference, *leading to an end the occupation and the achievement by the Palestinian people of their freedom and independence within their State*, with East Jerusalem as its capital, on the 1967 borders, and resolving all final status issues, notably the question of the refugees, based on resolution 194. [...] *We will continue building the institutions of our State and consolidating them on the basis of the rule of law.*’) (emphasis added). See also United States Embassy in China, ‘[Remarks by President Trump and President Abbas of the Palestinian Authority in Joint Statements](#)’, 23 May 2017 (President Mr. Abbas stated: ‘Our fundamental problem is with the occupation and settlements, and failure of Israel to recognize the state of Palestine in the same way we recognize it, which *undermines the realization of the two-state solution*. The problem is not between us and Judaism. It’s between us and occupation. [...] Achievement of peace, Your Excellency, the President, will give us broad horizons and prospects to recover our economy and continue building our national institutions based on rule of law and in the spirit of tolerance and coexistence, and a culture of peace, nonviolence, no incitement, and building bridges instead of walls inside our lands.’) (emphasis added). See also Statement by H.E. Mr. Mahmoud Abbas, President of the State of Palestine, Delivered before the United Nations General Assembly 74th Session on 26 September 2019 (‘Your august Assembly granted the State of Palestine observer State status in the United Nations in 2012. We are grateful for this legal and moral stance, and we thank you for your principled position in support of our collective, just demands to end the Israeli occupation of the land of the State of Palestine *and to actualize its full and complete independence* on the 4 June 1967 borders, along with a just and lasting solution to the question of the Palestine refugees, whose plight has been tragically prolonged, in conformity with the relevant UN resolutions and the Arab Peace Initiative, which affirmed the two-State solution: the State of Palestine and the State of Israel. [...] Then, it somehow speaks of the so-called “Deal of the century”, and peddles deceptive and illusive economic “solutions”, after it destroyed by its policies and measures all possibilities to achieve peace. [...] This United States policy has emboldened the government of the Israeli occupation to renege all signed agreements with us and its commitments towards peace, depriving the peace process of any credibility, pushing large segments of the Palestinian people to lose hope in the possibility of long-awaited peace, and *jeopardizing the two-State solution*. This has led many to seriously question: *if the two-State solution has become impossible* because of Israel’s policies, then why don’t we pursue a one-state solution where all citizens can be fairly treated and are equal in

rights and duties? Here, I must ask you: How can I answer these questions raised by the people? How can one fulfill reciprocal commitments that the other side is not abiding by? And despite all of this, I remain committed to the two-State solution.’) (emphasis added). See also [Statement by H.E. President Mahmoud Abbas, President of the State of Palestine, Delivered before the United Nations Security Council on The Situation in the Middle East, including the Palestine Question on 11 February 2020, 11 February 2020](#) (‘This broad rejection of the deal stems from the unilateral positions contained in it, and the fact it clearly violates international law, United Nations resolutions and the Arab Peace Initiative; ignores the *legitimate aspirations of the Palestinian people and their right to self-determination, freedom, independence in their own State*; and attempts to grant legitimacy to illegal measures such as the settlements and expropriation and annexation of Palestinian land. [...] This plan destroys the basis on which the peace process was launched. It disregards the signed agreements based on the vision of two States on 1967 borders. It will not bring security or peace to our region. We therefore cannot accept it and will confront its implementation on the ground. [...] And we continue building the national institutions of our State based on the rule of law and the international standards for a modern, democratic State, as well as on transparency and accountability, including fighting against corruption. [...] The plan presented by President Trump does that and denies the legitimate national rights of the Palestinian people, and removes East Jerusalem from under Palestinian sovereignty, and *will not lead to the implementation of the vision of two independent sovereign States, Israel and Palestine.*’) (emphasis added). See also [Annex A](#) to The State of Palestine’s response to the Pre-Trial Chamber’s Order requesting additional information, 4 June 2020, ICC-01/18-135-AnxA, Statement delivered by President Mahmoud Abbas, 19 May 2020 (‘Given our unshakeable faith in, and our firm commitment to, the right of our people to pursue their national struggle to end occupation and *achieve their independent, contiguous and sovereign State of Palestine* on the 4 June 1967 borders, with East Jerusalem as its capital, and a solution to the question of refugees in accordance with the Arab Peace Initiative and relevant UN resolutions, and the release of the Palestinian prisoners from Israeli detention centers and jails; Given also our commitment to achieve just and comprehensive peace in fulfilment of the two-State solution, based on the Arab Peace Initiative and UN resolutions, notably Security Council resolution 1515, which endorses the Arab Peace Initiative, and resolution 2334 that pertains to Jerusalem and settlements, and General Assembly resolution 194 regarding Palestine refugees, as well as General Assembly resolution 67/19 on the status of the State of Palestine in the United Nations; Abiding by the decisions of the National Council and Central Council of the Palestine Liberation Organization, the sole and legitimate representative of the Palestinian people, the Palestinian leadership has today decided the following’) (emphasis added). See further Wafa, Press Article, ‘[At the leadership meeting, President Abbas says Palestinian issue is not only about annexation](#)’ (18 August 2020) (‘Speaking at a leadership meeting held in Ramallah and called for to discuss the recent agreement between the United Arab Emirates (UAE), Israel and the United States to normalize relations between the former two, President Abbas said [...] “This is what the agreement is about, and this is the purpose of this particular issue. But then they added the term annexation and attempted to give the others and the world the illusion that the UAE had come up with a great achievement for us and that is the rejection of annexation, *as if the Palestinian issue is only about annexation while they disregard everything else: the rights of the Palestinian people, the Palestinian state, the two-state vision, holy Jerusalem that was annexed and its annexation was declared. They disregarded all of this and said we came to you with a halt to annexation, so be happy, Palestinians. This is deception, and this is totally unacceptable. We consider it a stab in the back of the Palestinian cause.*” [...] “Whatever happens,” he added, “we will remain committed to the international legitimacy. *Whatever happens, we will remain committed to the signed agreements. Whatever happens, we will remain committed to the decisions of the Arab and Islamic summits. Whatever happens, we will remain committed to fighting terrorism whatever it is.*”) (emphasis added). See also Wafa, Press Article, [President Abbas to British Foreign Secretary: Peace will not be achieved by bypassing the Palestinians](#) (25 August 2020) (‘“We welcome the British Foreign Secretary Dominic Raab in Palestine, and we appreciate the importance of this visit in these *complicated circumstances as the Israeli occupation authorities still controls occupied Jerusalem, the capital of the State of Palestine*, in contravention of the international legitimacy, and continues with its settlement activities, while not abandoning its plans for annexation. These are practices that will destroy what is left of the peace process,” President Abbas told Raab at his Ramallah headquarters. “There will be no peace, security and stability in our region *without ending the Israeli occupation of our land and the Palestinian people gaining their freedom and independence in their sovereign state on the 1967 borders,*” he added. [...] “We say that it is time for Britain to *recognize the state of Palestine, which will help achieve justice, inspire hope and work to establish the two-state solution on the basis of the 1967 borders,* so that Palestine and Israel can live in security, peace and as good neighbors,” said the President.’) (emphasis added). See also Riyad Mansour, Permanent Observer of Palestine to the United Nations, on behalf of President Abbas, Speech given during a virtual meeting held at the United Nations on the 2020 observance of the International Day of Solidarity with the

Minister Shtayyeh,³⁵⁴ as well as organs³⁵⁵ of the State of Palestine/Palestinian Authority and its important high ranking officials (for example, Chief Negotiator and Secretary General of the Palestine Liberation Organization Executive Committee, the late Saeb Erekat),³⁵⁶ or acting diplomats such as Ambassador Kassissieh,³⁵⁷ have followed a similar approach when speaking

Palestinian People, and retranscribed on: Wafa, Press Article, '[President Abbas at UN meeting: It is time for international community to support independence of Palestine](#)' (1 December 2020) ('I seize this opportunity to reiterate my call to the Secretary-General to undertake, in coordination with the Quartet and the Security Council, preparations, early next year, *to convene an international conference*, with full authority, involving all concerned parties, so as to launch a genuine and meaningful peace process on the basis of international law, UN resolutions and the internationally recognized terms of reference, *leading to an end of the occupation and the achievement* by the Palestinian people *of their freedom and independence in their State*, with East Jerusalem as its capital, on the 1967 borders, and resolving all final status issues.') (emphasis added).

³⁵⁴ State of Palestine, Council of Ministers, '[The Emergency Cabinet Meeting \(58\)](#)', 20 May 2020 ('The Prime Minister added: "The international position rejecting annexation and the Deal of the Century stands in support of Palestine and *building its institutions towards the materialization of the State of Palestine on the ground* with Jerusalem as its capital and the right of return for refugees. We call on the world's countries to recognize Palestine. It's the right time and moment of truth for all who believe in the two-state solution.") (emphasis added).

³⁵⁵ State of Palestine, Palestine Liberation Organization, '[The Threat of Annexation: Israel's Acquisition of Lands, Belonging to the State of Palestine, by Force](#)', 16 June 2020 ('Most recently, and to deter Israel's annexation plans, the Palestinian leadership has intensified its international contacts, including with members of the Quartet, to prepare for this conference. It has also sent direct messages to many countries: to convene an international peace conference with full powers under international sponsorship, based on international law and internationally agreed-upon terms of reference. This *conference should ensure the realization of the vision of a two-state solution*, ending the Israeli occupation, *achieving the national independence of the State of Palestine* on the 1967 borders with East Jerusalem as its capital, resolving the issue of Palestine refugees per UN Resolution 194, and the release of all prisoners. President Mahmoud Abbas invited the United Nations Secretary-General to work directly on holding this conference.') (emphasis added).

³⁵⁶ Daoud Kuttab, Press Article, '[Saeb Erekat says Israelis and Americans were informed of Palestinian decision](#)' on Arab News (22 May 2020) ('The PLO official told journalists that the Palestinian leadership's decision is not an abandonment of the people but a reflection of our desire for a just peace. "We are now in the process *of moving from an authority to a state*. We will continue to build the institutions of the Palestinian state.") (emphasis added). See also S. Erekat, 'Contextual Background with Analysis: Annexation' in *Looming Annexation: Israel's Denial of Palestine's Right to Exist* (Palestine Liberation Organization, 2020), p. 10 ('This does not signify that Palestinians reject international forms of mediation. On the contrary, we have actively called upon the international community to organize a peace conference based on the internationally agreed parameters for Middle East peace, with the aim of implementing international law and relevant UN resolutions. It is Palestine's responsibility to do everything possible to stop annexation, dismantle Israel's colonial-settlement enterprise, and *achieve freedom and independence*.') (emphasis added).

³⁵⁷ I. J. Kassissieh, 'Annexation and Threat to the Two State Solution' in *Looming Annexation: Israel's Denial of Palestine's Right to Exist* (Palestine Liberation Organization, 2020), <https://www.nad.ps/sites/default/files/06302020.pdf>, pp. 81-85 ('Non-Compliance by Israel to the Agreements. Non-compliance was not simply a different interpretation by the two parties on the illegality of settlements but a failure to comply with the signed agreements, *leading gradually to dwindling hopes of instating the two-state solution*. [...] Today, more than 25 years after mutual recognition between the PLO and the State of Israel, the latter has consolidated its grip through the Civil Administration on all spheres of life, adversely affecting the PNA's image and functions. This has *resulted in a loss of hope in the minds and hearts of the Palestinian people of achieving an independent Palestinian state*. [...] Today, 29 years after former Secretary James Baker's letter of assurances, *Palestinians have not achieved their national aspirations*. [...] Ironically, Israeli governments have expected Palestinians to implement the signed agreements, including the security arrangements, whilst over the years Israel violated almost all the signed agreements. It did not redeploy its forces as stipulated in the interim agreements. It continued to act unilaterally and against the spirit of peace by building settlements in the heart of *the future Palestinian state*, thereby turning its back on international law and on the agreements signed with the Palestinians under the auspices of the international community. [...] The main focus of the Palestinian leadership

about the ‘future materialization’ of the State of Palestine. Speaking metaphorically of the former apartheid regime of South Africa and quoting Nelson Mandela, Mr. Riyad Mansour, Permanent Observer of the State of Palestine to the United Nations, compared the current situation in Palestine to the then ‘Bantustans’ in his statement made at the 21 July 2020 meeting of the Security Council.³⁵⁸ Some days later, Mr. Riyad Mansour sent another communication to the Security Council, urging for the preservation of the two-State solution and calling for *the final realization* of those aspirations.³⁵⁹ Shortly after, when reacting to the news of the agreement between Israel and the United Arab Emirates dated 13 August 2020, Mr. Mansour used similar language.³⁶⁰ While it is certainly true that these high-ranking officials use the official name of ‘State of Palestine’, as the citations attest, such reference should be understood

nowadays is to generate diplomatic momentum in the hope that the world’s capitals will succeed jointly to halt the impending annexation in a last attempt *to rescue the two-state solution before it is too late.*) (emphasis added).

³⁵⁸ Permanent Observer Mission of the State of Palestine to the United Nations, [Statement by H.E. Minister Riyad Mansour, Permanent Observer of the State of Palestine to the United Nations, before the United Nations Security Council, Open Debate on the Situation in the Middle East, including the Palestine Question](#), 21 July 2020 (‘Who are the rejectionists? Those adhering to UN Security Council resolutions or those violating them? Those accepting the two-State solution on the pre-1967 borders or those destroying it? [...] Those calling for international involvement, including through the Quartet and other multilateral efforts, to foster peace and hold the parties accountable, or those who seek endless “talks” with no results? Those who have presented maps and clear positions on all final status issues or those fleeing and violating any commitment? Who are the delusional ones? Those seeking just and lasting peace that ensures the rights, dignity and security of all, or those who believe that Palestinians must accept, after a century of struggle for freedom, to live in Bantustans and surrender to perpetual injustice? Those who pursue an end of occupation to allow for peaceful and normal relations in the region, or those who believe it is possible to achieve acceptance by the region and security while denying the rights of an entire nation and undermining regional peace and security? Those advocating respect for international law and UN resolutions, or those who use religious extremism, supremacist theories, and unhinged nationalism to justify violating them.’).

³⁵⁹ Permanent Observer Mission of the State of Palestine to the United Nations, [Israeli Violations and Escalation of Settlement Activities](#), 6 August 2020 (‘There is no other way to compel compliance with international law and the relevant United Nations resolutions, including resolution 2334 (2016), and to salvage the internationally-endorsed two-State solution on the pre-1967 borders from Israel’s systematic attempts to destroy it. [...] We implore you to act now to stop colonization and annexation and to salvage the prospects for a just solution, in accordance with the international consensus based on the relevant resolutions, that fulfills the inalienable rights of the Palestinian people, including the Palestine refugees, allowing them *to finally realize the freedom, justice and peace* they have been for so long unjustly and cruelly denied.’) (emphasis added).

³⁶⁰ Permanent Observer Mission of the State of Palestine to the United Nations, [Israeli Colonization and Human Rights Violations in Palestine](#), 17 August 2020 (‘What was stressed in the Security Council on 21 July in this regard bears repeating, “Refraining from de jure annexation must of course carry no reward; avoidance of criminality is normative not prize-worthy”. (Briefing by Daniel Levy) Those who believe otherwise are mistaken and fail to understand that stopping colonization and annexation is not an end in itself. Rather it *is a primary condition* for bringing an end to this illegal occupation and *realizing Palestinian self-determination, independence and sovereignty in their land*, two central pillars for a just solution that can ultimately restore the rights of the Palestinian people, including the Palestine refugees, and serve as the cornerstone for true peace and security in our region. [...] As repeatedly demanded by the international community, the Israeli occupation must be brought to an end and the *Palestinian people must realize their right to self-determination and independence in their State of Palestine*, with East Jerusalem as its capital, and all other of their inalienable rights, including to return. This is the key to justice, to an end to the Israeli-Palestinian conflict, and to the peace and security long sought in the Middle East.’) (emphasis added).

as describing an aim to be achieved and emphasising a legal title, and not as recognizing an actual status of statehood under international law. The importance of the verb ‘*to achieve*’ and its equivalent terms in the referenced statements should be highlighted and duly taken into account when reading the communication sent by the State of Palestine to this Chamber.³⁶¹

255. Additionally, it is worth noting that, at the above referenced Security Council meeting of 21 July 2020, Professor Khalil Shikaki (a Palestinian expert) was also heard and presented a survey according to which more than 75% of Palestinians believed that their independent statehood was only realizable in the future.³⁶²

256. Even the Organization of Islamic Cooperation, in its declaration³⁶³ adopted on 10 June 2020 and in its letter of July 2020 addressed to the Security Council and to the Quartet,³⁶⁴ while condemning Israel’s policy and expressing solidarity with Palestine, speaks of the State of Palestine only as an aim to be achieved. Of note, this approach is more reserved than the *amicus* brief submitted by the Organization of Islamic Cooperation to this Chamber.³⁶⁵ Similarly, Resolution 8522 of the Council of the League of Arab States, adopted on 30 April 2020, speaks

³⁶¹ [The State of Palestine’s observations in relation to the request for a ruling on the Court’s territorial jurisdiction in Palestine](#), 16 March 2020, ICC-01/18-82, paras 36, 45, 46, 50, 60, 61, 64 (arguing in favour of recognizing the sovereignty of the State of Palestine in its current status).

³⁶² Security Council, Press Release, SC/14258 (‘In May, more than three quarters of Palestinians surveyed did not believe that a Palestinian State would be created in the next five years, he noted. Most are torn between insisting on their national aspiration for decolonization, building a State of their own, and their recognition that it is not feasible anymore because of the grim reality on the ground in which Israeli settlement expansion destroys day by day the chance for peace based on partition.’).

³⁶³ Organization of Islamic Cooperation (‘OIC’), ‘OIC Adopts Resolution on Annexation’, 10 June 2020, para. 8 (‘Declares its support for the Palestinian leadership’s decisions of 19 May 2020, while reiterating that peace and security in the Middle East, as a strategic option, cannot be achieved without ending Israel’s illegal, colonial occupation of the State of Palestine, including Al-Quds Al-Sharif and the Arab territories occupied since June 1967; and calls on the international community to make every effort necessary to end this illegal occupation, and to help the Palestinian people achieve their inalienable rights and *fulfill their legitimate national aspirations*, including exercising their right to self-determination, *realizing sovereignty and independence of the State of Palestine*, with Al-Quds Al-Sharif as its capital, and reaching a just solution to the question of Palestinian refugees in compliance with the principles of international law, relevant UN resolutions and the Arab Peace Initiative, which was adopted by the Extraordinary Islamic Summit of Mecca (2005).’) (emphasis added).

³⁶⁴ OIC, ‘OIC Secretary General Addresses Letters to Members of the Security Council and the Quartet on Israeli Annexation Plan’, 7 July 2020 (‘The Secretary General also conveyed to the members of the International Quartet the content of the said resolution, which requested holding an emergency meeting to save the chances of peace, pursue work *to launch* a multilateral internationally-sponsored political *process* to achieve the two-state solution *and realize the sovereignty of the State of Palestine* within the 1967 borders, with Al-Quds as its capital, in line with international terms of reference, including the UN resolutions and the Arab Peace Initiative.’) (emphasis added).

³⁶⁵ OIC, [Observations of the Organisation of Islamic Cooperation in relation to the proceedings in the Situation in Palestine](#), 16 March 2020, ICC-01-18-84 (‘OIC *amicus* brief’), para. 26 (‘Palestine’s sovereignty over its territory cannot be legally contested, especially by Israel, the occupying power as occupation does not deprive the occupied State of sovereignty over its territory, nor does annexation, which is a violation of peremptory norms of international law.’). *See also* paras 39, 74, 78.

de facto in future terms when referring to the ‘State of Palestine’ (as a ‘prospect’ of the ‘two–State solution’, ‘to salvage’ and ‘to achieve’).³⁶⁶ Therefore, from this point of view, it would appear more nuanced than the *amicus* brief submitted by the League to this Chamber.³⁶⁷

257. Emphasising these nuances is important because the current position of the League of Arab States and the Organization of Islamic Cooperation is seemingly not the one that was considered ‘noteworthy’ by the Majority after it considered the *amici* observations submitted by both organizations.³⁶⁸ In fact, the *amicus* of the Organization of Islamic Cooperation still emphasised the sovereign character of the State of Palestine.³⁶⁹

258. It is worth noting that even some important Arab states have recently issued statements in which they have used the verb ‘to achieve’ (or similar wording) as far as Palestine’s

³⁶⁶ General Assembly, Letter dated 1 May 2020 from the Permanent Representative of Oman to the United Nations addressed to the Secretary-General, 12 May 2020, A/74/835-S/2020/356, Annex: Resolution 8522 adopted at the extraordinary session of the Council of the League of Arab States at the ministerial level held on 30 April 2020 in Cairo via video teleconference, pp. 3-4 (‘Reaffirming the crucial importance of the Palestine question to the entire Arab nation and the Arab identity of occupied East Jerusalem, the capital of the State of Palestine; [...] 3. To underscore that the Arab State’s will, by all political, diplomatic, legal and financial means, *support any decisions or steps taken by the State of Palestine* to confront the Israeli plans to commit the crimes of annexation and colonial settlement expansion; 4. To affirm that a comprehensive and just *peace* based on international law, internationally recognized resolutions and the Arab Peace Initiative, and *based on a two-State solution embodied by an independent and sovereign State of Palestine*, with East Jerusalem as its capital, within the borders of 4 June 1967, living in security and peace, is a strategic Arab choice and a necessity for regional and international peace and security; and to stress the need to launch serious and effective negotiations, within a specific time frame and with international sponsorship, in line with the internationally recognized resolutions and terms of reference, and signed agreements, so as to resolve the conflict and achieve a peace acceptable to the peoples; 5. To call upon the international Quartet to convene an urgent *meeting to salvage the prospects for peace and the two-State solution* and adopt a position consistent with international resolutions and the terms of reference for the peace process, including the road map and the Arab Peace Initiative, to compel the Israeli occupation Government to abandon its colonial plans, including with regard to annexation and settlement expansion, and end the occupation that began in 1967; [...] 7. To call upon the States of the European Union to apply pressure to the occupation Government to abandon its plans and, as a matter of urgency, to recognize the State of Palestine within the 1967 borders in order to *salvage hopes for achieving peace and a two-State solution*’) (emphasis added).

³⁶⁷ League of Arab States, Submission of the observations of League of Arab States relative to the Situation in Palestine, 19 March 2020, [ICC-01/18-122](#), para. 13 (‘Palestine’s Statehood has already been long established, and is currently reflected in both Palestine’s international relations, and its accession to the Rome Statute.’). *See also* paras 19, 22, 31.

³⁶⁸ Majority Decision, para. 101 (‘It is also noteworthy that a significant number of States Parties to the Statute are also States Parties to the League of Arab States and the Organization of Islamic Cooperation, which intervened in support of Palestine’s full participation as a State Party and further argued that for the sole purpose of the determination of the scope of the Court’s territorial jurisdiction, Palestine has legally transferred its criminal jurisdiction to the Court, allowing it to exercise its territorial jurisdiction on the Occupied Palestinian Territory as a whole (i.e. the West bank, including East Jerusalem, and the Gaza strip).’) (emphasis added) (footnotes omitted).

³⁶⁹ *See OIC amicus brief*, p. 10 (‘Section 2. ‘The State of Palestine is sovereign over its territory.’), para. 40 (‘this special status [of East Jerusalem] does not negate the State of Palestine’s sovereignty over the territory.’), para. 74 (‘a sovereign State, in this case Palestine’), p. 24 (‘Section 4. Palestine conferred criminal jurisdiction to the ICC as a Sovereign State’).

sovereignty and statehood are concerned (for example, Bahrain,³⁷⁰ Egypt,³⁷¹ Jordan,³⁷² Lebanon,³⁷³ Morocco,³⁷⁴ Oman,³⁷⁵ Saudi Arabia³⁷⁶ and Tunisia³⁷⁷). A recent document jointly

³⁷⁰ Bahrain News Agency, Press Article, '[HM King receives US Secretary of State](#)' (26 August 2020) ('His Majesty King Hamad bin Isa Al Khalifa has affirmed Bahrain's pride in its deep-rooted historical relations and close partnership with the United States of America that reflect a long history of mutual understanding, cooperation and coordination in a way that enhances their shared interests at all levels. [...] The meeting discussed the latest developments in the region and the initiatives and efforts to achieve stability and peace in it as well as regional and international developments. The two sides exchanged views on issues of common interest. In this regard, His Majesty the King stressed the importance of intensifying efforts to end the Palestinian-Israeli conflict according to the two-state solution that achieves a just and comprehensive peace that leads to the establishment of an independent and sovereign Palestinian state with East Jerusalem as its capital, in accordance with the legal international resolutions and the Arab Peace Initiative.') (emphasis added).

³⁷¹ Al-Masry Al-Youm, Press Article, '[Sisi, Kushner discuss Middle East peace process](#)' on Egypt Independent (9 April 2019) ('Spokesman for the Egyptian Presidency Bassam Rady said on Tuesday that the meeting dealt with developments regarding the Palestinian cause and the peace process in the Middle East. Kushner stressed the importance in this context that his country attaches to consultation with Egypt as central to the Middle East region with long, accumulated experience in dealing with all concerned parties in this regard. President Sisi affirmed that Egypt will continue to support sincere efforts to ensure a just and lasting solution to the Palestinian cause based on internationally legitimate resolutions and references, the two-state solution and the Arab initiative, preserving the inherent rights of the Palestinian people as this will help shape new reality in the Middle East and achieve the aspirations of its peoples for stability, building, development and coexistence in security and peace.') (emphasis added). See also Egypt Independent, Press Article, '[Sisi, Palestinian President discuss US peace plan in Cairo](#)' (1 February 2020) ('Egypt's Presidential Spokesperson Bassam Rady said that the meeting saw discussions regarding the latest developments of the Palestinian case in light of recent developments and the announcement of the US peace plan, which includes a vision to settle the Palestinian case and the future of its solution. [...] Sisi clarified that the Egyptian position towards resolving the Palestinian case is through the establishment of an independent and sovereign state in occupied Palestinian territories, coming in accordance with international legitimacy and its decisions. He stressed that there is no alternative to direct negotiations between the parties to the conflict until a settlement can be agreed upon within a comprehensive framework guaranteeing the sustainability of the settlement, ending the suffering of the Palestinian people by restoring their full legitimate rights, and preserving the rights of all parties to life and security, stability and peace.') (emphasis added). See also Ahram Online, Press Article, '[Sisi says no alternative for direct talks between Israel, Palestine amid US MidEast plan controversy](#)' (1 February 2020) ('Palestinian President Mahmoud Abbas is in Cairo to garner support from Arab foreign ministers against Trump's controversial Middle East plan. [...] In a statement on Saturday, Egyptian Presidency Spokesman Bassam Rady said El-Sisi received Palestinian President Mahmoud Abbas in Cairo, where he stressed establishing an independent state of sovereignty on occupied Palestinian lands under international legitimacy and accords. [...] El-Sisi stressed the importance of direct negotiations between the Palestinian and Israeli sides towards reaching an agreed settlement under a comprehensive framework that guarantees its sustainability.') (emphasis added).

³⁷² The Embassy of the Hashemite Kingdom of Jordan, '[King Receives Egyptian FM](#)', 19 July 2020 ('His Majesty King Abdullah, at Al Husseinia Palace on Sunday, received Egyptian Foreign Minister Sameh Shoukry [...] Discussions [...] addressed the importance of maintaining coordination and consultation on issues of mutual concern, in line with shared interests and in service of Arab causes. Moreover, the meeting touched on regional developments, foremost of which is the Palestinian cause. His Majesty reaffirmed Jordan's steadfast position and the need to achieve a comprehensive and just peace, based on the two-state solution, guaranteeing the establishment of an independent, sovereign, and viable Palestinian state on the 4 June 1967 lines, with East Jerusalem as its capital. The King reiterated that any unilateral Israeli measure to annex lands in the West Bank is unacceptable, as it would undermine the prospects of achieving peace and stability in the region. Efforts to reach political solutions to regional crises were also discussed.') (emphasis added).

³⁷³ L'Orient le Jour, Press Article, '[Le Liban officiel rejette en bloc le plan américain de paix](#)' (30 January 2020) ('Les responsables libanais ont rejeté en bloc hier le plan pour la paix au Proche-Orient présenté la veille par le président américain Donald Trump, le président Michel Aoun appelant au téléphone son homologue palestinien Mahmoud Abbas pour l'assurer de la solidarité du Liban avec le peuple palestinien. Lors de l'entretien téléphonique, le chef de l'État a insisté sur l'importance d'adopter "une position arabe unifiée" face au "deal du

s siècle”. “Le Liban s’en tient à l’initiative arabe de paix, adoptée au cours du sommet de Beyrouth” en 2002, a-t-il ajouté, notamment “le droit au retour des Palestiniens et l’établissement d’un État indépendant avec Jérusalem pour capitale”. Le président Aoun a par ailleurs reçu le ministre des Affaires étrangères, Nassif Hitti, avec lequel il a évoqué le plan de paix américain. Ce dernier a souligné, lors de déclarations accordées à des chaînes télévisées, que “toute tentative d’aboutir à une paix partielle, ne comprenant pas l’établissement d’un État palestinien avec Jérusalem pour capitale, est vouée à l’échec” (emphasis added); Libanews, Press Article, [‘Réactions négatives au Liban face au plan de Paix américain alors que les camps palestiniens manifestent contre le Deal du Siècle’](#) (29 January 2020) (‘Le Liban a réagi négativement au plan de Paix intitulé Deal du Siècle par le Président Américain, Donald Trump. Les autorités libanaises et notamment le Président de la République, le Général Michel Aoun, a reçu le ministre des AF Nassif Hitti au Palais Présidentiel de Baabda pour évoquer avec lui les propositions américaines. Le chef de l’état s’est également entretenu par téléphone avec son homologue palestinien Mahmoud Abbas, pour lui signifier son rejet du plan américain et son soutien au plan de Paix Arabe, adopté lors du sommet de la Ligue Arabe qui s’était déroulé à Beyrouth, en 2002. Ce plan indique que la Paix ne peut être obtenue que par la restitution des territoires palestiniens à leurs frontières de 1967. Le Président Aoun a souligné le soutien du Liban au droit au retour des réfugiés palestiniens et à la création d’un état palestinien ayant Jérusalem comme capitale.’) (emphasis added); AL Manar TV, Press Article, [‘Deal du siècle : Aoun solidaire avec les Palestiniens. ‘Un pot de vin pour vendre les terres palestiniennes avec l’argent arabe’, selon Berri’](#) (29 January 2020) (‘Le président de la République, Michel Aoun, a contacté son homologue palestinien, Mahmoud Abbas, pour exprimer “la solidarité du Liban avec le peuple palestinien pour faire face aux développements issus de ce qui est désormais connu sous le nom du deal du siècle. Le président a assuré à M. Abbas que “le Liban tient à l’initiative de paix arabe approuvée lors du sommet de Beyrouth, notamment le droit des Palestiniens à retourner sur leurs terres et la création de leur État indépendant avec Jérusalem pour capitale.”’) (emphasis added).

³⁷⁴ Kingdom of Morocco, Ministry of Foreign Affairs, [‘His Majesty the King Sends Message to Chairman of Committee on Exercise of Inalienable Rights of Palestinian People’](#), 29 November 2019 (‘His Majesty King Mohammed VI sent a message to the Chairman of the Committee on the Exercise of the Inalienable Rights of the Palestinian People, Cheikh Niang, on the occasion of the International Day of Solidarity with the Palestinian People, celebrated on 29 November each year. [...] I should like to take this opportunity to reiterate our solidarity with our Palestinian brothers and reaffirm the Kingdom of Morocco’s immutable position and unwavering support for the *Palestinians in their endeavours to achieve their just, legitimate rights and establish their independent State* along the lines of 4 June 1967, with East Jerusalem as its capital. These rights are in accordance with international legitimacy and the relevant UN resolutions. [...] The international community is of the view that a just, comprehensive settlement of the Palestinian question, and an end to the conflict in the Middle East, *cannot be achieved save through a two-State solution*, in accordance with international legitimacy resolutions and the Arab Peace Initiative. After years during which the peace process has stalled, negotiations between the Palestinians and the Israelis have come to a standstill, and illegal, unilateral measures have been taken in the occupied Palestinian territories, *we are entitled to wonder about the fate of the two-State solution*. The latter is the most appropriate strategic option that was endorsed by the international community as a lasting and just solution to the conflict. It is no secret that practices which are contrary to international legitimacy resolutions and international humanitarian law have been continuing in the occupied Palestinian territories. [...] With that in mind, the Kingdom of Morocco, which has always been committed to the principles and objectives of the United Nations and defended international legitimacy, reaffirms that the two-State solution remains the basis for ending the Palestinian-Israeli conflict and achieving comprehensive peace in the Middle East. [...] We, in the Kingdom of Morocco, consider East Jerusalem part of the Palestinian territories occupied in 1967. East Jerusalem is the capital of the Palestinian State. Therefore, this is one of the final status issues which must be resolved through negotiations between the Israeli and Palestinian sides.’) (emphasis added). See also [‘Statement Delivered by Mr. Mohcine Jazouli, Minister Delegate in charge of Foreign Affairs, African Cooperation and the Moroccan Expatriates, Extraordinary meeting of the Arab League on the United States Peace Plan’](#) (1 February 2020) (‘The Kingdom of Morocco hopes that a constructive peace efforts with a view of achieving a realistic, just, lasting and applicable solution to the Israeli Arab conflict will be launched, with the aim to satisfy the legitimate rights of the Palestinian people, *towards achieving independent and sovereign State* with Jerusalem East as its capital and give the opportunity to the people of this region to live in dignity, prosperity and stability.’) (emphasis added). See also [‘Palestinian Cause: Morocco Calls for Constructive Dynamic of Peace for Just, Lasting Settlement’](#) (3 February 2020) (‘The launch of this dynamic is the only way to *achieve a realistic, applicable, just and lasting settlement* of the Palestinian issue, so as to enable the peoples of the region to live in dignity, prosperity and stability and to *guarantee the legitimate rights of the Palestinian people to the establishment of their independent, viable and*

sovereign state with East Al Quds as its capital, said Minister Delegate for Moroccans Abroad Nezha El Ouafi at an extraordinary meeting of the Organization for Islamic Cooperation (OIC), at the level of Foreign Ministers.’) (emphasis added).

³⁷⁵ The New Arab, Press Article, ‘[Oman, Israel discuss ‘recent developments’ after UAE deal](#)’ (17 August 2020) (‘Oman’s foreign minister spoke to his Israeli counterpart on Monday, Muscat said, the first contact since Israel normalised ties with the United Arab Emirates last week. *Oman’s foreign minister spoke to his Israeli counterpart* on Monday, Muscat said, the first contact since Israel normalised ties with the United Arab Emirates last week. Yusuf bin Alawi subsequently spoke with a top Palestinian official, Oman added. [...] Bin Alawi also called for a “resumption of the peace process *in order to satisfy the legitimate rights of the Palestinian people who aspire to an independent state.*” While Oman and Israel do not have formal diplomatic relations, there have been several contacts between the two states, including in 2018, when the late sultan Qaboos received Israeli Prime Minister Benjamin Netanyahu in Muscat. Also Monday, bin Alawi spoke with senior Fatah official Jibril Rajub, who expressed his “appreciation of the role of the sultanate and its balanced and wise policy towards Arab issues and, foremost, the Palestinian question,” according to Oman’s foreign ministry. The Palestinian Authority has voiced its “strong rejection and condemnation” of the Israeli-Emirati deal.’) (emphasis added); AlKhaleej Today, Press Article, ‘[Oman: Mike Pompeo and Sultan Haitham discuss ‘regional peace’ on latest stop of Middle East tour](#)’ (27 August 2020); Taylor Heryman, Press Article, ‘[Oman: Mike Pompeo and Sultan Haitham discuss regional peace on latest stop of Middle East tour - US Secretary of State has visited Jerusalem, Sudan, Bahrain, Oman and the UAE on his Middle East trip](#)’ on The National (27 August 2020).

³⁷⁶ Arab News, Press Article, ‘[Foreign minister: Saudi Arabia is committed to Arab peace plan](#)’ (19 August 2020) (‘Saudi Arabia will adhere to the Arab Peace Plan in its relations with Israel, the Kingdom’s foreign minister said on Wednesday. Peace must be achieved with the Palestinians on the basis of the initiative for any alteration in ties, Prince Faisal bin Farhan said. “Once that is achieved all things are possible.” The minister said: “When we sponsored the Arab Peace Plan in 2002, we fully envisioned that there would eventually be relations between all Arab states, including Saudi Arabia, and Israel if the condition is met. “Saudi Arabia remains committed to peace as a strategic option based on the Arab Peace Plan and relevant international resolutions *enabling the Palestinian people to establish their own state with East Jerusalem as its capital.*”) (emphasis added). See also Al Jazeera, Press Article, ‘[Saudi prince: Palestinian state before Israel ties normalise – Prince Turki al-Faisal responds to President Trump who said he expects Riyadh to normalise relations with Israel](#)’ on Al-Jazeera.com (21 August 2020) (‘Saudi Arabia’s price for normalising relations with Israel is the creation of a sovereign Palestinian state with Jerusalem as its capital, a senior member of the Saudi royal family reaffirmed on Friday. [...] The UAE is only the third Arab state in more than 70 years to forge full relations with Israel. Under the US-brokered deal, Israel temporarily shelved plans to annex settlements in the occupied West Bank, which Palestinians seek as part of a future state. [...] “Any Arab state that is considering following the UAE should demand in return a price, and it should be an expensive price,” he wrote in the Saudi newspaper Asharq al-Awsat. [...] “The Kingdom of Saudi Arabia has set a price for concluding peace between Israel and the Arabs - *it is the creation of a sovereign Palestinian state with Jerusalem as capital, as provided for by the initiative of the late King Abdullah.*” [...] Prince Turki, a former ambassador to Washington and ex-intelligence chief, holds no government office now but remains influential as current chairman of the King Faisal Center for Research and Islamic Studies.’) (emphasis added).

³⁷⁷ Republic of Tunisia, Ministry of Foreign Affairs, ‘*Déclaration de la Tunisie à l’occasion du 30e anniversaire de la proclamation de l’Etat palestinien*’ (‘*À l’occasion du trentième anniversaire de la proclamation de la création de l’État de Palestine, la Tunisie réaffirme son soutien constant et indéfectible à la cause palestinienne juste et au combat du peuple palestinien frère en vue de recouvrer ses droits légitimes et instaurer son Etat indépendant aux frontières du 4 juin 1967 avec pour capitale Jérusalem-Est. La Tunisie réitère son engagement à contribuer activement aux efforts régionaux et internationaux pour la reprise du processus de paix et la réalisation d’une paix globale et juste conformément aux résolutions internationales légitimes, à l’initiative arabe de paix et au principe de deux Etats. La Tunisie appelle également le Conseil de sécurité et la communauté internationale à assumer leurs responsabilités pour arrêter l’agression israélienne contre le peuple palestinien désarmé et mettre un terme à la stratégie israélienne imposant la politique du fait accompli en violation des résolutions onusiennes et du droit international.*’) (emphasis added). See also ‘*Participation du ministre des AE à la 150e session ordinaire du conseil des ministres des affaires Etrangères arabes*’ (‘*Le ministre des Affaires étrangères, Khemaies Jhinaoui a souligné mardi 11 septembre l’importance d’activer une action arabe commune et de renforcer la solidarité entre les pays arabes pour améliorer leur capacité à relever les défis et à la résoudre. Au cours de la 150e session ordinaire du Conseil ministériel de la Ligue des États arabes, le Ministre a rappelé les positions fermes du pays sur les questions arabes actuelles, dont la cause palestinienne et la Libye, la Syrie et le Yémen, soulignant le soutien de la Tunisie à la lutte fraternelle palestinienne pour recouvrer ses droits*’)

adopted by these states at an Arab multilateral level meeting points to the same direction.³⁷⁸

That is why one may once again wonder whether the *amici* submissions on behalf of the League of Arab States and the Organization of Islamic Cooperation well reflect the position of these organizations and their member states with respect to Palestine's statehood.

259. One can conclude that the Majority's perception of Palestine's statehood is far removed from the United Nations' official position. Moreover, the Majority does not address the discrepancies between the repeated official statements of the Palestinian and other Arab States' representatives, the submissions by the State of Palestine/ Palestine Authority and the *amici* from the League of Arab States and the Organization of Islamic Cooperation.

légitimes et la création d'un Etat indépendant aux frontières du 4 juin 1967 avec Jérusalem pour capitale.') (emphasis added); 'OIC Extraordinary Islamic Summit: Tunisia calls on international community to end Israeli attacks against Palestinian people' ('Tunisia called on Friday the international community and UN institutions to urgently intervene to put an end to the Israeli attacks and ensure protection for the Palestinian people. Taking the floor during works of the Organisation of Islamic Co-operation (OIC) Extraordinary Islamic Summit held on Friday in Istanbul, Foreign Minister Khemaies Jhinaoui representing President Beji Caid Essebsi, affirmed that there will be no peace and stability in the region *unless a fair solution for the Palestinian cause is reached so as to help the Palestinian people recover their rights and establish their independent State* with Al-Quds as its capital. He reiterated Tunisia's condemnation of the crimes committed by Israeli forces against Palestinian citizens that left several killed and injured, affirming that the decision to relocate the U.S. embassy to Al-Quds has raised tension in the region. All stakeholders are required to endeavour to preserve the respect of international legitimacy, equally handle the conflict and oblige Israel to opt for peace and to comply with the UN resolutions, he added according to a press release by the Foreign Ministry. Jhianoui also stressed the importance to join all efforts to help the Palestinian people earn further international recognition of their legitimate rights. Organised on Friday in Istanbul (Turkey), the OIC Extraordinary Islamic Summit reviewed the latest developments in Palestine. Numerous leaders of Islamic countries were present.') (emphasis added).

³⁷⁸ Kingdom of Morocco, Ministry of Foreign Affairs, 'Mr. Nasser Bourita Takes Part in Ministerial Delegation Meeting of Arab Peace Initiative Committee' (7 July 2020) ('Minister of Foreign Affairs, African Cooperation and Moroccans Abroad, Mr. Nasser Bourita took part, on Tuesday by videoconference, in a meeting of Foreign Ministers of member states of the Arab ministerial delegation, under the Arab Peace Initiative Committee. In addition to Mr. Bourita, the Foreign Ministers of Jordan, the United Arab Emirates, Saudi Arabia, Egypt, and Palestine took part in this meeting. This meeting was marked by the participation also of the Foreign Ministers of Tunisia, which currently sits on the UN Security Council, of the Sultanate of Oman (President of the current ordinary session of the council of the League of Arab States at the ministerial level), Kuwait (former member of the Security Council), in addition to the Secretary-General of the League of Arab States. The meeting was an opportunity to review the efforts made to prevent the implementation of the Israeli decision to annex part of the occupied Palestinian territories and preserve the chances of achieving a just and comprehensive peace. In a statement issued at the end of this ministerial meeting, the Arab Foreign Ministers expressed the rejection by the Arab countries of the annexation of part of the occupied Palestinian territories, noting that this annexation constitutes a violation of the international law and will undermine the basis of the peace process, namely the two-state solution. They reiterated their support for the *Palestinians in order to achieve their legitimate rights, on top of which freedom and the establishment of an independent state* with eastern Al Quds as capital. The Arab Ministers also stressed the need to resume serious and active negotiations to find a solution to this conflict on the basis of two states in accordance with international resolutions. In this regard, they called for remaining attached to the Arab peace initiative adopted at the 2002 Beirut summit, noting that this initiative offers comprehensive solutions to achieve global and lasting peace.') (emphasis added).

260. Not surprisingly, at the 25 August 2020 meeting of the Security Council, its permanent members (China,³⁷⁹ France,³⁸⁰ Russia,³⁸¹ the United Kingdom,³⁸² and the United States of America³⁸³) and current elected members (Belgium,³⁸⁴ Dominican Republic,³⁸⁵ Estonia,³⁸⁶ Germany,³⁸⁷ Indonesia, Niger, Saint Vincent and Grenadines,³⁸⁸ South Africa,³⁸⁹ Tunisia and Vietnam³⁹⁰) as well as the UN Special Coordinator, Mr. Nickolay Mladenov,³⁹¹ again referred to the two-State solution and Palestine's statehood and sovereignty using terms such as 'to achieve', 'to realize', 'to save the prospects' and 'to resume the negotiations on.'

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

³⁷⁹ Permanent Mission of the People's Republic of China to the United Nations, '[Remarks by Ambassador Zhang Jun at Security Council VTC on the Situation in the Middle East, including the Palestinian Question](#)', 25 August 2020.

³⁸⁰ Permanent Mission of France to the United Nations in New York, '[France welcomes the announcement of the normalization of relations between the United Arab Emirates and Israel](#)', 25 August 2020.

³⁸¹ Permanent Mission of the Russian Federation to the United Nations, '[Statement and right of reply by Vassily Nebenzia, Permanent Representative of Russia to the UN, at the VTC of UNSC members on the situation in the Middle East, including Palestinian question](#)', 25 August 2020.

³⁸² United Kingdom, Foreign and Commonwealth Office, '[Securing peace between Israel and the Palestinians Statement by Ambassador James Roscoe, Acting UK Deputy Permanent Representative to the UN, at the Security Council briefing on the Middle East](#)', 25 August 2020.

³⁸³ United States Mission to the United Nations, '[Remarks at a UN Security Council Briefing on the Situation in the Middle East](#)', 25 August 2020.

³⁸⁴ Kingdom of Belgium, '[Intervention of Mr. Philippe KRIDELKA, Ambassador, Permanent Representative](#)', 25 August 2020.

³⁸⁵ United Nations, Virtual briefing by Nickolay Mladenov, United Nations Special Coordinator for the Middle East Peace Process (UNSCO), on the situation in the Middle East, including the Palestinian question, 25 August 2020, <http://webtv.un.org/watch/part-1-middle-east-israel%E2%80%9393palestine-security-council-open-vc/6184470858001/> ('UN Virtual Briefing by Nickolay Mladenov').

³⁸⁶ Permanent Mission of Estonia to the UN, '[Estonia's statement at the UN Security Council VTC meeting on MEPP](#)', 25 August 2020.

³⁸⁷ Permanent Mission of the Federal Republic of Germany to the United Nations, '[Statement and Right of Reply by Ambassador Günter Sautter in the UN Security Council Meeting on the Middle East, August 25, 2020](#)', 25 August 2020.

³⁸⁸ [UN Virtual Briefing by Nickolay Mladenov](#). It is worth noting that, on one occasion, the Ambassador used the expression 'to save the territorial integrity of the State of Palestine'.

³⁸⁹ [UN Virtual Briefing by Nickolay Mladenov](#).

³⁹⁰ [UN Virtual Briefing by Nickolay Mladenov](#).

³⁹¹ United Nations, Nickolay Mladenov, UN Special Coordinator for the Middle East Process, '[Briefing to the Security Council on the Situation in the Middle East](#)', 25 August 2020.

³⁹² See Annex II to the present Dissenting Opinion.

contextual, systemic and practical interpretations of United Nations documents do not support the Majority's position. Moreover, it seems to me that the Majority goes considerably beyond the official position taken by the State of Palestine/Palestinian Authority, as it stands at the time of this Ruling.³⁹³

VI. Palestine in the ICC since 2015

262. Palestine participated in the Rome Diplomatic Conference (where participants were separated into five groups³⁹⁴) officially under the name 'Palestine' (neither as Palestine Liberation Organization nor as State of Palestine) as the only member of Group IV called 'Other organizations'.³⁹⁵

263. Palestine submitted³⁹⁶ its instrument of accession to the Rome Statute *via* the Secretary-General of the United Nations who transmitted it with his notification³⁹⁷ of entry into force on 1 April 2015. Sidiki Kaba, President of the ASP, welcomed the accession³⁹⁸ and the formal ceremony was held before him and Vice President Kuniko Ozaki on 1 April 2015.

264. Despite the remarks made by States at the moment of voting³⁹⁹ on Resolution 67/19, when Palestine submitted its accession instrument to the Rome Statute, or later at the ASP or within some of its committees, very few States⁴⁰⁰ openly questioned Palestine's statehood, and

³⁹³ See Annex I to the present Dissenting Opinion.

³⁹⁴ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 15 June – 17 July 1998, A/CONF.183/13, Official Records, Volume II ('UN Diplomatic Conference'), pp. 5-44. The list of delegations included the following categories: I. Participating States, II. United Nations programs and bodies, III. Intergovernmental organizations and other entities having received a standing invitation to participate in the sessions and the work of the General Assembly, IV. Other organizations, and V. Specialized agencies and related organizations.

³⁹⁵ UN Diplomatic Conference, p. 44.

³⁹⁶ On 2 January 2015.

³⁹⁷ On 6 January 2015.

³⁹⁸ On 7 January 2015.

³⁹⁹ See *above* V.C. Resolution 67/19 and the States' explanation of votes at the time of adoption.

⁴⁰⁰ ASP, Resumed Thirteenth Session, 24-25 June 2015, ICC-ASP/13/20/Add.1, Official Records, Annex II ('It is and remains Canada's firm position that the Palestinians do not meet the criteria of a state under international law, and are not recognized by Canada as a state. As the question of Palestinian eligibility to accede to the Rome statute remains a matter of dispute, any decision to treat "Palestine" as a State as of this session of the ASP, rather than continuing to treat them as a non-state-entity, must be understood to be without prejudice to any future judicial determinations on this issue.');

Assembly of States Parties to the Rome Statute of the International Criminal Court, Fourteenth Session, 18-26 November 2015, ICC-ASP/14/20, Official Records, Volume I, Annex III: Statement by Canada in explanation of position after the adoption of resolution ICC-ASP/14/res.4 at the 12th plenary meeting of the assembly, on 26 November 2015 ('Consistent with Canada's statements [...] we have accepted operative paragraph 1 of the omnibus resolution without prejudice to Canada's position on the matter of Palestinian statehood and accession to the Rome Statute and without prejudice to decisions taken for any other purpose, including decisions of any other organizations or organs of the Court regarding any legal issues that may come

its accession capacity. These remarks were not repeated in subsequent years. On the other hand, Palestine followed the inter-institutional and budgetary rules, was on time in making its yearly contribution,⁴⁰¹ exercised its active and passive electoral rights and thus could also act as member of the Bureau (and was re-elected in 2020)⁴⁰² or of the Credentials Committee.⁴⁰³ At the seventeenth session of the ASP, Mr. Ahmad Mohammad Binhamad Barrak, Palestine's candidate, was elected to the Advisory Committee on the nomination of judges.⁴⁰⁴

265. Palestine was the 30th State Party to ratify the Kampala amendment on the definition of the crime of aggression,⁴⁰⁵ which triggered ICC competence over this crime.

266. What is the significance of Palestine's five-year participation in the ASP?

267. I see no reason or legal procedure in the Rome Statute to nullify *ex post facto* the Palestinian accession. Palestine is a State Party, despite its current and perhaps peculiar international legal situation. As a State *in statu nascendi*, Palestine may also perform its rights

before them.');

Bureau of the Assembly of States Parties, Seventh meeting, 15 November 2016, Agenda and decisions, Annex II: Statement by Canada, Germany, the Netherlands and the United Kingdom of Great Britain and Northern Ireland in explanation of their position concerning the use of the term 'State of Palestine' ('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.'). See also Annex III: Statement by the State of Palestine in response to the '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" sent to the Bureau of the Assembly of States Parties to the International Criminal Court on 8 November 2016 ('The Government of the State of Palestine will continue its efforts to ensure that the universal values enshrined in the Rome Statute are implemented and respected, including through the framework of the Assembly of States Parties, and beyond.').

⁴⁰¹ See ASP, Fifteenth Session, The Hague, 16-24 November 2016, ICC-ASP/15/20, Official Records, Volume II, p. 256; ASP, Sixteenth Session, The Hague, 4-14 December 2017, ICC-ASP/16/20, Official Records, Volume II, p. 308; ASP, Seventeenth Session, The Hague, 5-12 December 2018, ICC-ASP/17/20 Official Records, Volume II, pp. 243, 322.

⁴⁰² ICC Press Release, '[Assembly of States Parties to the Rome Statute elects a new President and six judges](#)', 8 December 2017, stating that at the Sixteenth session (held on 4-14 December 2017), '[t]he Assembly elected judge O-Gon Kwon (Republic of Korea) as President for a three year mandate that starts on 15 December 2017. The Assembly elected further, for the same period, the following other members of the Bureau: Argentina, Austria, Columbia, Côte d'Ivoire, Denmark, Ecuador, Estonia, France, Gambia, Ghana, Japan, Mexico, The Netherlands, Senegal, Serbia, Slovakia, Slovenia, the State of Palestine and Uganda.' See also '[Assembly of States Parties concludes the first resumption of its nineteenth session](#)', 24 December 2020.

⁴⁰³ ASP, Seventeenth Session, The Hague, 5-12 December 2018, ICC-ASP/17/20, Official Records, Volume I, p. 5 ('At the Assembly's 1st plenary meeting, on 5 December 2018, in accordance with rule 25 of its Rules of Procedure, the following States were appointed to serve on the Credentials Committee: Austria, Ecuador, Guatemala, Hungary, Japan, New Zealand, Romania, South Africa and the State of Palestine.').

⁴⁰⁴ ASP, Advisory Committee on nominations of judges of the International Criminal Court, 2 July 2020, https://asp.icc-cpi.int/en_menus/asp/ACN/Pages/default.aspx.

⁴⁰⁵ ICC Press Release, '[State of Palestine becomes the thirtieth State to ratify the Kampala amendments on the crime of aggression](#)', 29 June 2016.

and obligations.⁴⁰⁶ However, this does not mean that its ‘statehood’ has been achieved, that the issue of its territory as ‘territory of the State’ has been settled, or that its ‘borders’ can be conceived as State boundaries.

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

268. Do the numerous references to ‘occupation’ (‘to put an end to the occupation’, ‘to observe the international legal norms of the occupation’) necessarily mean that after the end of said ‘occupation’, the formerly occupied ‘possessor’ will automatically acquire the whole territory? And if that was the case, could the occupied possessor also hold legal title to the territory even before the end of the occupation?

269. The Prosecutor⁴⁰⁷ and the Majority Decision⁴⁰⁸ attribute utmost importance to the qualification of ‘occupation’ in the long series of UN resolutions and concluded that if the UNO repeatedly urged Israel to return the Occupied Palestinian Territories, this would practically *ipso facto* recognize the State of Palestine’s title on the occupied territory and the territory as a whole, as defined by the 1949 and 1967 armistice lines.

270. It should first and foremost be emphasised that references to UN resolutions are *ab ovo* weakened by the limited legal value of resolutions adopted by the General Assembly, as well as those adopted by the Security Council when it is not ‘acting under Chapter VII’ but under Chapter VI. It cannot be denied that the Security Council resolutions related to Palestine do not contain the well-known ‘acting under Chapter VII’ formula. Consequently, they do not have binding force. According to the Charter of the United Nations, General Assembly resolutions are only recommendations. The few exceptions⁴⁰⁹ recognized by practice and by scholars are not pertinent to the issue under scrutiny.

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

⁴⁰⁷ [Request](#), paras 11-14, 195-207.

⁴⁰⁸ Majority Decision, paras 116-117.

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

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

272. Moreover, if the previous possessor (State B) was also an occupying power over the territory previously belonging to a sovereign State (State A) and the new occupying power (State C) is acting as a ‘liberator’ in favour of the previously dispossessed sovereign State (State A), it is clear that the Prosecutor’s reasoning is flawed. Such reasoning also shows its limits where the legal title of the so-called ‘reversionary’ sovereign State over the given territory is not recognized (for example, by victorious coalition to which the new occupying power belongs).

273. Historical and international realities are much more complex than the above rule cited by the Prosecutor. The 20th century provides examples not only of ‘*in integrum restitutio*’ type solutions (when the territory returns to the prior State once occupation ends) but also of other different solutions concerning the fate of an occupied territory after the end of the occupation. For example, *i.* attribution to the ‘pre-prior’ State⁴¹¹ (the State exercising sovereignty over the territory before the State that became occupied in a subsequent armed conflict); *ii.* creation of a new State;⁴¹² *iii.* recreation of a historically existing State, annexed centuries ago by the other

⁴¹⁰ [Response](#), para. 42.

⁴¹¹ See *e.g.* The return of Eastern-Macedonia and Thrace in 1945. The territory was occupied, annexed and administered by Bulgaria between 1941-1944, followed by a short British occupation until its return to Greece when the exiled government returned and consolidated its power.

⁴¹² See *e.g.* The recognition of Montenegro as an independent State at the 1878 Berlin Conference (articles 26-33), <https://sourcebooks.fordham.edu/mod/1878berlin.asp>; the Free State of Fiume according to the Rapallo Treaty (1920) which ceased to exist in 1924 when annexed by Italy, <http://www.forost.ungarisches-institut.de/pdf/19201112-1.pdf>. See also the birth of Iraq: Iraq is the only mandate which ceased during the League of Nations’ time (1922), though its acquisition of full sovereignty and the end of British control occurred only in 1932, with its admission to the League of Nations.

State;⁴¹³ *iv.* recreation of a formerly existing State, recently annexed by the other State;⁴¹⁴ *v.* attachment to the occupying State;⁴¹⁵ *vi.* immediate attachment or very soon thereafter to occupying State by a forced agreement with the ‘pre-prior’ State;⁴¹⁶ *vii.* attachment of a part of an occupied country to another State for compensation or strategical reasons;⁴¹⁷ *viii.* medium or long term special regimes, envisaged or effectively realized;⁴¹⁸ *ix.* formal return to the prior State that is forced to grant special status to the territory (autonomy, suzerainty, demilitarization);⁴¹⁹ *x.* internationally controlled administration without sovereignty;⁴²⁰ *xi. de jure or de facto* partitions;⁴²¹ or *xii.* postponement of the final decision – on the whole territory or part of it – to a future decision of great powers.⁴²²

⁴¹³ See e.g. Albania’s rebirth (1912-1913): the occupying Greek and Serbian armies had to leave most parts of Albania, after liberating it from the Ottoman Empire. Albania became independent but without Kosovo, which was split between Serbia and Montenegro. See also article XII of the World War I German Armistice Treaty (11 November 1918), <https://www.loc.gov/law/help/us-treaties/bevans/m-ust000002-0009.pdf> (‘[A]ll German troops at present in territories which before the war formed part of Russia must likewise return to within the frontiers of Germany as above defined, as soon as the Allies shall think the moment suitable, having regard to the internal situation of these territories.’). However, the Baltics, Lithuania, Estonia and Latvia, having already proclaimed their independence, were able to consolidate their sovereignty over the territory after Germany’s withdrawal. The three States enjoyed independence until the Soviet annexation (1940) and again since 1991.

⁴¹⁴ See Austria’s rebirth and the end of the four power occupation in 1955.

⁴¹⁵ See e.g. Attachment of the Northern part of Eastern Prussia with Königsberg to the USSR (where it became part of the Russian SSR), in accordance with the Yalta agreement.

⁴¹⁶ See e.g. Ruthenia (Carpatho-Ukraine) – belonging to Czechoslovakia between 1920 and 1939 – was attached to the USSR and therein to the Ukrainian SSR in 1945.

⁴¹⁷ See the history of Poland’s western boundaries following the Tehran, Yalta and Potsdam decisions and the annexation of the Southern part of Eastern Prussia by Poland (in accordance with the Yalta agreement). See also the cession of three villages occupied by the Soviet Army, from Hungary to Czechoslovakia, in accordance with the Peace Treaty with Hungary (1947).

⁴¹⁸ See Saarland, administered by France (1947-1950) and then by the Council of Europe (1950-1957); Trieste Free City (Peace Treaty with Italy in 1947), although never realized.

⁴¹⁹ See e.g. articles 1 to 11 of the 1878 Berlin Congress, considerably altering the results of the San Stefano Peace Treaty (1878) and involving the rebirth of Bulgaria within the Ottoman Empire under a special status while ‘Eastern Rumelia’ did not enjoy the same freedom.

⁴²⁰ Mandates under the League of Nations, territories under trusteeship within the United Nations.

⁴²¹ See e.g. the history of Korea after 1945 or the split of Vietnam between 1954 and 1975.

⁴²² See e.g. Treaty of London (1913), article 2 (‘His Majesty the Emperor of the *Ottomans cedes to their Majesties the Allied Sovereigns all the territories of his Empire on the continent of Europe* to the west of a line drawn from Enos on the Aegaeon Sea to Midia on the Black Sea with the exception of Albania. The exact line of the frontier from Enos to Midia will be determined by an international commission.’) (emphasis added), article 3 (‘His Majesty the Emperor of the Ottomans and their Majesties the Allied Sovereigns *declare that they remit* to His Majesty the Emperor of Germany, His Majesty the Emperor of Austria, the President of the French Republic, His Majesty the King of Great Britain and Ireland, and His Majesty the Emperor of All the Russians *the care of settling the delimitation of the frontiers of Albania and all other questions concerning Albania.*’) (emphasis added), article 5 (‘His Majesty the Emperor of the Ottomans and their Majesties the Allied Sovereigns declare that *they confide* to His Majesty the Emperor of Germany, His Majesty the Emperor of Austria, the President of the French Republic, His Majesty the King of Great Britain and Ireland, His Majesty the King of Italy, and His Majesty the Emperor of All the Russias *the task of deciding the destiny of all the Ottoman isles of the Aegaeon Sea excepting Crete, and of the Peninsula of Mount Athos.*’) (emphasis added) (cited in R.B. Mowat, ‘Select Treaties and

274. The framework of this dissenting opinion does not allow for a deeper analysis of these examples, including how, why and based on what legal arguments States rightly or wrongly justified these solutions. It is worth emphasising, however, that such complex endeavours, including the resolution of the consequences of the first and second Balkan wars or the peace-making process after World War I and World War II, made extensive use of these approaches, sometimes also mixing them with ‘*restitutio*’ type solutions.

275. Similarly, in some peace treaties,⁴²³ territorial cessions were regulated in a manner that required the former possessor’s renunciation without having to determine which State would be the next possessor: this could have depended on subsequent decisions.

Documents 1815-1916’ (1916), pp.120-121). *See also* the borders (with the exception of the Albanian borders) established according to the Bucharest Treaty (1913) following the Second Balkan War. *See further* on this point the PCIJ’s *Jaworzina*, *Saint-Naoum* and *Lausanne peace treaty* cases, cited *above* in IV. 6. Interpretation of statehood in the jurisprudence and practice of interstate institutions. *See also* Romania’s (1944) and Hungary’s (1945) armistice agreements and peace treaties (1947), *see above* n. 224.

⁴²³ *See* Treaty of Lausanne, 24 July 1923 (‘Article I6. Turkey hereby renounces all rights and title whatsoever over or respecting the territories situated outside the frontiers laid down in the present Treaty and the islands other than those over which her sovereignty is recognised by the said Treaty, the future of these territories and islands being settled or to be settled by the parties concerned. The provisions of the present Article do not prejudice any special arrangements arising from neighbourly relations which have been or may be concluded between Turkey and any limitrophe countries.’); The Treaty of Peace Between The Allied and Associated Powers and Hungary, And Protocol and Declaration, Signed at Trianon June 4, 1920 (Treaty of Trianon), article 53 (‘Hungary renounces all rights and title over Fiume and the adjoining territories which belonged to the former Kingdom of Hungary and which lie within the boundaries which may subsequently be fixed. Hungary undertakes to accept the dispositions made in regard to these territories, particularly in so far as concerns the nationality of the inhabitants, in the treaties concluded for the purpose of completing the present settlement.’). Of note, because of some medieval historical legal heritage, Fiume (today: Rijeka) belonged neither to the Hungarian nor the Croatian parts of the Kingdom of Hungary (within the Austro-Hungarian Monarchy), but it enjoyed a special status as ‘*corpus separatum*’ attached to the Crown. Because of Italian pretensions for Fiume and its dispute with the Serbo-Croatian-Slovenian Kingdom over the future appurtenance of the city, Fiume was included neither in the articles concerning the cessions in favour of Italy nor in the articles dealing with the territorial renunciations in favour of the SHS Kingdom. *See further* on the Free City of Fiume according to the Rapallo Treaty (1920) and its cession to Italy in 1924, n. 412 *above*. *See also* Treaty of Versailles, 28 June 1919, Part III, Section X (Memel) article 99 (‘Germany renounces in favour of the Principal Allied and Associated Powers all rights and title over the territories included between the Baltic, the north eastern frontier of East Prussia as defined in Article 28 of Part II (Boundaries of Germany) of the present Treaty and the former frontier between Germany and Russia. Germany undertakes to accept the settlement made by the Principal Allied and Associated Powers in regard to these territories, particularly in so far as concerns the nationality of the inhabitants.’). While the ‘Great Powers’ originally intended to create a Danzig Free City type status for the Memel, Lithuania occupied the territory in 1923 but had to accept commitments for securing autonomy, under the protection of the League of Nations, according to the 1924 Paris Treaty on the Status of Memel. The territory was reannexed by Hitler’s Germany in 1939. Since 1945, it is again part of Lithuania (in soviet time: Lithuanian SSR in the Soviet-Union).

276. Some aspects and consequences were mentioned in the Eritrea/Yemen arbitration by the PCA as an example of ‘an objective legal status of indeterminacy pending a further decision of the interested parties’.⁴²⁴

277. That is why I find unpersuasive the Prosecutor’s argument implicitly suggesting that the call for retreat and the condemnation of the occupation *automatically* and *ipso facto* mean the confirmation of Palestine’s legal title over the occupied territory⁴²⁵ and, moreover, the whole territory according to the 1967 lines. The reference to a general right to self-determination and to the right to self-determination of the Palestinian people,⁴²⁶ also recognized by the ICJ in its advisory opinion on the Wall,⁴²⁷ and which is uncontested, is not helpful in determining an *existing and recognized legal state-boundary* in 2021. It is even less helpful in light of the effective application of the right to self-determination in conjunction with territorial and boundary issues. Only a few weeks before the submission of the Request, the Prosecutor remained *rightly* convinced that article 12(2)(a) of the Statute was to be interpreted based on international law and that a State’s ‘territory’ should be understood as ‘areas under the sovereignty of the State’.⁴²⁸ In the Response, after having mentioned the maritime law context

⁴²⁴ PCA, [Arbitration between the Government of the State of Eritrea and the Government of the Republic of Yemen, Award of the Arbitral Tribunal in the First Stage of the Proceedings \(Territorial Sovereignty and Scope of the Dispute\)](#), 3 October 1996, para. 445 (‘The Treaty of Lausanne did not expressly provide, as the Treaty of Sèvres would have done, that Turkey renounced her territorial titles in favour of the Allied Powers; which provision would certainly have excluded any possibility of the operation of a doctrine of reversion. Yemen was not a party to the Treaty of Lausanne, which was therefore *res inter alios acta*. Nevertheless, none of the authorities doubts that the formerly Turkish islands were in 1923 at the disposal of the parties to the Lausanne Treaty, just as they had formerly been wholly at the disposal of the Ottoman Empire, which was indeed party to the treaty and in it renounced its sovereignty over them. Article 16 of the Treaty created for the islands an objective legal status of indeterminacy pending a further decision of the interested parties; and this legal position was generally recognised, as the considerable documentation presented by the Parties to the Tribunal amply demonstrates. So, it is difficult so see what could have been left of such a title after the interventions of the Ottoman sovereignty which was generally regarded as unqualified; and its replacement by the Article 16 regime which put the islands completely at the disposal of the “interested parties”.’).

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

⁴²⁶ [Request](#), paras 9, 13, 193-194; [Response](#), para. 46.

⁴²⁷ [ICJ Wall Advisory Opinion](#), para. 155.

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

of her statements,⁴²⁹ the Prosecutor attempted to explain the manifest contradiction between the position she took in her ‘Report on Preliminary Examination Activities 2019’⁴³⁰ and the position in her Request. She stated in the Response (after repeating a statement of the Report that is legally correct)⁴³¹ that ‘under the present circumstances sovereignty over the Occupied Palestinian Territory resides in the Palestinian people under occupation.’⁴³²

278. It cannot be reasonably argued that ‘State’s sovereignty’ equates ‘people’s sovereignty’, or that these are interchangeable notions, and no textbook of international law would state otherwise. The argument based on the *interchangeable* use of a state’s sovereignty and of a people’s sovereignty⁴³³ is not persuasive especially when attempting to identify ‘the territory of the State’ as it stands in 2021.

279. I already stressed the importance of distinguishing between recommendations and binding resolutions. However, the Majority’s deliberate refusal to take into consideration relevant rules of international law has another consequence: statements and resolutions regarding the legitimate rights of Palestinians, originally adopted in the context of the *people’s sovereignty*, are now described in the Majority Decision⁴³⁴ as elements of *State sovereignty* and are accepted as proof of ownership of a precise territory.

280. Elsewhere in the Response, the Prosecutor is a bit more nuanced in this respect⁴³⁵ and defines the Court’s jurisdiction on the basis of a *status quo* argument. However, taking into

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

⁴³⁰ Prosecutor, [Report on Preliminary Examination Activities 2019](#), 5 December 2019.

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

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

⁴³³ [Response](#), para. 70 (‘Sovereignty remained with the “reversionary” sovereign—held by the Palestinian people until such time as a State could exercise it—and plenary prescriptive jurisdiction with their representatives.’).

⁴³⁴ Majority Decision, paras 116-117.

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

account the precise wording of article 12(2)(a) of the Statute ('on the territory of the State'), neither the reference to *status quo* nor the 'scope of territory attaching to'⁴³⁶ language are sufficient to describe the current legal status as 'the territory of the State'. I also note that the wording 'the territory attaching to' contains interpretative uncertainties.⁴³⁷

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

VIII. The importance of the Oslo Accords

A) The Oslo Accords in the Request

282. The Request devotes several pages to outlining the main elements, institutions, aims and commitments of the Oslo I and Oslo II Accord as well as the outcome of subsequent bilateral talks between Israel and Palestine.⁴⁴⁰ I assume that this was necessary to, *inter alia*, substantiate the Prosecution's characterization of 'the unique and complex factual and legal circumstances in this situation' which is 'uniquely controversial within the international community [...] [and]

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

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

⁴³⁸ [Response](#), para. 84.

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

⁴⁴⁰ [Request](#), paras 63-77, 183-189.

legally and factually complex.’⁴⁴¹ It is certainly true that the current situation can hardly be explained without first understanding the functioning of the Palestinian institutions and the repartition of respective competences between Israel and the Palestinian Authority, otherwise known as the State of Palestine.

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

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

284. All of the above warns us to exercise caution before concluding that there is no need to go beyond article 21(1)(a) of the Statute. Even the Request itself demands that article 21(1)(b) of the Statute be taken into account ‘in the second place, where appropriate’. Indeed, the Request is full of references and cross-references to international legal instruments and discusses the role of the UN Secretary-General as depositary of treaties *in abstracto* and *in*

⁴⁴¹ [Application for extension of pages](#), paras 2, 5.

⁴⁴² [Request](#), para. 183 (‘Lastly, it has been argued that Palestine’s ability to delegate its jurisdiction to the Court is limited because it does not have criminal jurisdiction with respect to Israelis or with respect to crimes committed in Area C (*nemo dat quod non habet*). Nonetheless, the Prosecution does not consider these limitations in the Oslo Accords to be obstacles to the Court’s exercise of jurisdiction.’) (footnotes omitted), para. 189 (‘In conclusion, any limitations to the PA’s jurisdiction agreed upon in the Oslo Accords cannot and should not bar the exercise of the Court’s jurisdiction in Palestine pursuant to article 12(2)(a).’). *See also* [Response](#), para. 73 (‘Against this backdrop, the Oslo Accords are better characterised as a transfer or delegation of enforcement jurisdiction which does not displace the plenary jurisdiction of the representatives of the Palestinian people, and do not bar the exercise of the Court’s jurisdiction. Notably, the Appeals Chamber in a different context has recently confirmed that agreements limiting the exercise of enforcement jurisdiction over certain nations are “not a matter for consideration in relation to the authorisation of an investigation under the statutory scheme”. Likewise, any limitation to Palestine’s enforcement jurisdiction arising from Oslo does not affect the exercise of the Court’s jurisdiction; rather, it may become an issue of cooperation or complementarity during the investigation or prosecution stage.’) (footnotes omitted).

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

concreto. Consequently, how can one say that this *imbroglio* can be understood without due consideration to the ‘applicable treaties and the principles and rules of international law’?

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

C) The Oslo Accords and the reasons for their perception as agreements of an international legal nature

286. The factors that must be taken into consideration are the following:

- The substance and language of Oslo I and Oslo II;
- Their characterization in UN practice and by important actors dealing with the issue (such as the Quartet);
- The jurisprudence of Israel and of the territories under the jurisdiction of the Palestinian Authority; and
- Doctrinal analysis, if necessary.

1. The texts and their wording

Oslo I: Declaration of Principles on Interim Self-Government Arrangements (‘DOP’) Washington 1993:

287. The text contains the following factors pointing to its international law character:

- (1) Even if ‘Palestine Liberation Organization team’ is mentioned in the text, it nevertheless clearly states that it ‘is representing the Palestinian people’;⁴⁴⁴

⁴⁴⁴ Oslo I (‘The Government of the State of Israel and the PLO team (in the Jordanian-Palestinian delegation to the Middle East Peace Conference) (the “Palestinian Delegation”’), representing the Palestinian people, agree that it is time to put an end to decades of confrontation and conflict, recognise their mutual legitimate and political rights, and strive to live in peaceful coexistence and mutual dignity and security and achieve a just, lasting and

- (2) The text contains language typically used in international treaties (for example, clauses on dispute settlement⁴⁴⁵ and entry into force⁴⁴⁶); and
- (3) The text contains elements of ‘internationalisation’, namely:
- (i) it refers to existing international legal rules, considers itself an ‘integral part’ of the international peace-making process in the region and its purpose is, *inter alia*, to contribute to the implementation of Security Council resolutions;⁴⁴⁷
 - (ii) in the introductory sentence, there is a reference to the *quasi* recognition of the Palestinian people’s right to self-determination ⁴⁴⁸ as a counterpart to the recognition of Israel’s right to existence and security;
 - (iii) the text contains an invitation for foreign states to participate in the realization of the parties’ aims and constitute a special committee having decision-making authority;⁴⁴⁹

comprehensive peace settlement and historic reconciliation through the agreed political process. Accordingly, the two sides agree to the following principles’).

⁴⁴⁵ Oslo I, article XV: Resolution of disputes (‘1. Disputes arising out of the application or interpretation of this Declaration of Principles, or any subsequent agreements pertaining to the interim period, shall be resolved by negotiations through the Joint Liaison Committee to be established pursuant to Article X above. 2. Disputes which cannot be settled by negotiations may be resolved by a mechanism of conciliation to be agreed upon by the parties. 3. The parties may agree to submit to arbitration disputes relating to the interim period, which cannot be settled through conciliation. To this end, upon the agreement of both parties, the parties will establish an Arbitration Committee.’).

⁴⁴⁶ Oslo I, article XVII: Miscellaneous provisions (‘1. This Declaration of Principles will enter into force one month after its signing. 2. All protocols annexed to this Declaration of Principles and Agreed Minutes pertaining thereto shall be regarded as an integral part hereof.’).

⁴⁴⁷ Oslo I, article I: Aim of negotiations (‘The aim of the Israeli-Palestinian negotiations within the current Middle East peace process is, among other things, to establish a Palestinian Interim Self-Government Authority, the elected Council (the “Council”), for the Palestinian people in the West Bank and the Gaza Strip, for a transitional period not exceeding five years, leading to a permanent settlement based on Security Council resolutions 242 (1967) and 338 (1973). It is understood that the interim arrangements are an integral part of the whole peace process and that the negotiations on the permanent status will lead to the implementation of Security Council resolutions 242 (1967) and 338 (1973).’).

⁴⁴⁸ Oslo I, Preamble (‘The Government of the State of Israel and the PLO team (in the Jordanian-Palestinian delegation to the Middle East Peace Conference) [...], representing the Palestinian people, agree that it is time to put an end to decades of confrontation and conflict, recognise their mutual legitimate and political rights, and strive to live in peaceful coexistence and mutual dignity and security and achieve a just, lasting and comprehensive peace settlement and historic reconciliation through the agreed political process. Accordingly, the two sides agree to the following principles’).

⁴⁴⁹ Oslo I, article XII: Liaison and cooperation with Jordan and Egypt (‘The two parties will invite the Governments of Jordan and Egypt to participate in establishing further liaison and cooperation arrangements between the Government of Israel and the Palestinian representatives, on the one hand, and the Governments of Jordan and Egypt, on the other hand, to promote cooperation between them. These arrangements will include the constitution of a Continuing Committee that will decide by agreement on the modalities of admission of persons displaced from the West Bank and Gaza Strip in 1967, together with necessary measures to prevent disruption and disorder. Other matters of common concern will be dealt with by this Committee.’).

- (iv) one of the annexes envisages the involvement of foreign states, namely *a.* those of the Organisation for Economic Co-operation and Development, *b.* States of the Group of Seven and *c.* Arab states of the region; and⁴⁵⁰
- (v) the signature is ‘witnessed’ by foreign states.⁴⁵¹

Oslo II (Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip), Washington 1995:

288. The text contains the following factors pointing to its international law character:

- (1) On the Palestinian side, the Palestine Liberation Organization is alone (as a contracting party) and its representative character is acknowledged;⁴⁵²
- (2) The Preamble states that the agreement’s aim is the realisation of the commitments undertaken in Oslo I;⁴⁵³
- (3) The text contains formulations typically used in international treaties (for example, clauses on dispute settlement and⁴⁵⁴ entry into force⁴⁵⁵); and

⁴⁵⁰ Oslo I, Annex IV: Protocol on Israeli-Palestinian Cooperation concerning Regional Development Programmes (‘The two sides will cooperate in the context of the multilateral peace efforts in promoting a Development Programme for the region, including the West Bank and the Gaza Strip, to be initiated by the Group of Seven. The parties will request the Group of Seven to seek the participation in this Programme of other interested states, such as members of the Organisation for Economic Cooperation and Development, regional Arab States and institutions, as well as members of the private sector.’).

⁴⁵¹ Oslo I (‘Done at Washington, D.C., this thirteenth day of September 1993. For the Government of Israel: (Signed) Shimon Peres. For the PLO: (Signed) Mahmud Abbas. Witnessed By: The United States of America (Signed) Warren Christopher [and] The Russian Federation (Signed) Andrei V. Kozyrev’).

⁴⁵² Oslo II, p. 1 (‘The Government of the State of Israel and the Palestine Liberation Organization [...], the representative of the Palestinian people’).

⁴⁵³ Oslo II, Preamble (‘[Reaffirming] their adherence to the mutual recognition and commitments expressed in the letters dated September 9, 1993, signed by and exchanged between the Prime Minister of Israel and the Chairman of the PLO; [Desirous] of putting into effect the Declaration of Principles on Interim Self-Government Arrangements signed at Washington, DC on September 13, 1993, and the Agreed Minutes thereto (hereinafter “the DOP”) and in particular Article III and Annex I concerning the holding of direct, free and general political elections for the Council and the Ra’ees of the Executive Authority in order that the Palestinian people in the West Bank, Jerusalem and the Gaza Strip may democratically elect accountable representatives’).

⁴⁵⁴ Oslo II, article XXI: Settlement of Differences and Disputes (‘Any difference relating to the application of this Agreement shall be referred to the appropriate coordination and cooperation mechanism established under this Agreement. The provisions of Article XV of the DOP shall apply to any such difference which is not settled through the appropriate coordination and cooperation mechanism, namely: 1. Disputes arising out of the application or interpretation of this Agreement or any related agreements pertaining to the interim period shall be settled through the Liaison Committee. 2. Disputes which cannot be settled by negotiations may be settled by a mechanism of conciliation to be agreed between the Parties. 3. The Parties may agree to submit to arbitration disputes relating to the interim period, which cannot be settled through conciliation. To this end, upon the agreement of both Parties, the Parties will establish an Arbitration Committee.’).

⁴⁵⁵ Oslo II, article XXXI: Final Clauses (‘This Agreement shall enter into force on the date of its signing.’).

- (4) The text contains elements of ‘internationalisation’, namely:
- (i) as in Oslo I, the text refers to existing international legal rules, considers itself an ‘integral part’ of the international peace-making process in the region and its purpose is, *inter alia*, to contribute to the implementation of Security Council resolutions;⁴⁵⁶
 - (ii) there is a reference which is difficult to understand in any other way than as the recognition of the right of the Palestinian people to self-determination;⁴⁵⁷
 - (iii) the clause on dispute settlement can hardly be implemented without the involvement of a third party (as the super-arbiter/umpire), whether a person or a state, but independent of Israel and Palestine;⁴⁵⁸
 - (iv) the text refers to the fact that Jordan and Egypt are already involved in implementing the Declaration of Principles, and were apparently mandated by the parties to deal with the readmission of displaced persons; and⁴⁵⁹

⁴⁵⁶ Oslo II, Preamble (‘[Within] the framework of the Middle East peace process initiated at Madrid in October 1991; [Reaffirming] their determination to put an end to decades of confrontation and to live in peaceful coexistence, mutual dignity and security, while recognizing their mutual legitimate and political rights; [Reaffirming] their desire to achieve a just, lasting and comprehensive peace settlement and historic reconciliation through the agreed political process; [Recognizing] that the peace process and the new era that it has created, as well as the new relationship established between the two Parties as described above, are irreversible, and the determination of the two Parties to maintain, sustain and continue the peace process; [Recognizing] that the aim of the Israeli-Palestinian negotiations within the current Middle East peace process is, among other things, to establish a Palestinian Interim Self-Government Authority, *i.e.* the elected Council (hereinafter “the Council” or “the Palestinian Council”), and the elected Ra’ees of the Executive Authority, for the Palestinian people in the West Bank and the Gaza Strip, for a transitional period not exceeding five years from the date of signing the Agreement on the Gaza Strip and the Jericho Area (hereinafter “the Gaza-Jericho Agreement”) on May 4, 1994, leading to a permanent settlement based on Security Council Resolutions 242 and 338; [Reaffirming] their understanding that the interim self-government arrangements contained in this Agreement are an integral part of the whole peace process, that the negotiations on the permanent status, that will start as soon as possible but not later than May 4, 1996, will lead to the implementation of Security Council Resolutions 242 and 338, and that the Interim Agreement shall settle all the issues of the interim period and that no such issues will be deferred to the agenda of the permanent status negotiations’).

⁴⁵⁷ Oslo II, Preamble (‘[Recognizing] that these elections will constitute a significant interim preparatory step toward the realization of the legitimate rights of the Palestinian people and their just requirements and will provide a democratic basis for the establishment of Palestinian institutions’).

⁴⁵⁸ Oslo II, article XXI: Settlement of Differences and Disputes (‘The Parties may agree to submit to arbitration disputes relating to the interim period, which cannot be settled through conciliation. To this end, upon the agreement of both Parties, the Parties will establish an Arbitration Committee.’).

⁴⁵⁹ Oslo II, article XXVII: Liaison and Cooperation with Jordan and Egypt (‘1. Pursuant to Article XII of the DOP, the two Parties have invited the Governments of Jordan and Egypt to participate in establishing further liaison and cooperation arrangements between the Government of Israel and the Palestinian representatives on the one hand, and the Governments of Jordan and Egypt on the other hand, to promote cooperation between them. As part of these arrangements a Continuing Committee has been constituted and has commenced its deliberations. 2. The Continuing Committee shall decide by agreement on the modalities of admission of persons displaced from the West Bank and the Gaza Strip in 1967, together with necessary measures to prevent disruption and disorder. 3. The Continuing Committee shall also deal with other matters of common concern.’).

- (v) the signature is ‘witnessed’ by foreign states.⁴⁶⁰

2. The perception of the nature of Oslo I and Oslo II in the practice of the United Nations and of important actors dealing with the issue (the US, the Quartet)

289. As illustrated in the sub-points devoted to Palestine’s ‘borders’, the United Nations and the Quartet referred to Oslo I and/or Oslo II. While these references were sometimes explicit, they generally implicitly alluded to previous agreements between the parties.⁴⁶¹

290. The Oslo Accords were referred to by the Secretary-General’s special envoy, Mr. Nickolay Mladenov, as coinciding with the basic approach of relevant UN resolutions.⁴⁶² In

⁴⁶⁰ Oslo II (‘Done at Washington DC, this 28th day of September, 1995. For the Government of the State of Israel For the PLO Witnessed by: The United States of America, The Russian Federation, The Arab Republic of Egypt, The Hashemite Kingdom of Jordan, The Kingdom of Norway, The European Union’).

⁴⁶¹ See Security Council, [Resolution 1850](#), pp. 1-2 (‘Noting also that lasting peace can only be based on an enduring commitment to mutual recognition, freedom from violence, incitement, and terror, and the two-State solution, building upon previous agreements and obligations [...] Supports the parties’ agreed principles for the bilateral negotiating process and their determined efforts to reach their goal of concluding a peace treaty resolving all outstanding issues, including all core issues, without exception, which confirm the seriousness of the Annapolis process [...] Calls on all States and international organizations to contribute to an atmosphere conducive to negotiations and to support the Palestinian government that is committed to the Quartet principles and the Arab Peace Initiative and respects the commitments of the Palestinian Liberation Organization, to assist in the development of the Palestinian economy, to maximize the resources available to the Palestinian Authority, and to contribute to the Palestinian institution-building programme in preparation for statehood’); [Resolution 2334](#), p. 2 (‘Stressing that the status quo is not sustainable and that significant steps, consistent with the transition contemplated by prior agreements, are urgently needed in order to (i) stabilize the situation and to reverse negative trends on the ground, which are steadily eroding the two-State solution and entrenching a one-State reality, and (ii) to create the conditions for successful final status negotiations and for advancing the two-State solution through those negotiations and on the ground [...] Calls upon both parties to act on the basis of international law, including international humanitarian law, and their previous agreements and obligations, to observe calm and restraint, and to refrain from provocative actions, incitement and inflammatory rhetoric, with the aim, *inter alia*, of de-escalating the situation on the ground, rebuilding trust and confidence, demonstrating through policies and actions a genuine commitment to the two-State solution, and creating the conditions necessary for promoting peace.’); [Resolution 67/19](#) (‘Bearing in mind the mutual recognition of 9 September 1993 between the Government of the State of Israel and the Palestine Liberation Organization, the representative of the Palestinian people’).

⁴⁶² United Nations, The Office of the United Nations Special Coordinator for the Middle East Peace Process, Security Council Briefing on the Situation in the Middle East, including the Palestinian question, 22 January 2019 (‘The period has witnessed an increasing number of Israeli military operations in Areas A and B of the West Bank. In Ramallah, for example, and elsewhere, the almost daily confrontations with Israeli security forces fuel anger and have raised questions among Palestinians as to the viability and relevance of the structures created under the Oslo Accords. Such operations disrupt the lives of civilians, increase tensions, and undermine the Palestinian public’s trust in their own security forces, as well as the morale of their personnel. [...] It has been over 25 years since Oslo opened a pathway to peace. The core of those agreements was long before enshrined in a number of United Nations resolutions and bilateral agreements that remain valid to this day. They also define the final status issues that can only be resolved through negotiations between the parties with the goal of a two-state outcome. Over time these agreements, however, have eroded as the prospect for credible negotiations has dimmed, only to be replaced by the lack of hope and the growing risk of a one-state reality of perpetual occupation, as outlined in the Quartet Report of 2016.’).

the context of putting an end to the ‘temporary international presence in Hebron’, the Secretary-General’s special envoy alluded to the United Nations’ cooperation.⁴⁶³

291. Further, the Wye River Memorandum⁴⁶⁴ was conceived in order to implement the commitments of Oslo II and resume negotiations.⁴⁶⁵ It contains additional commitments, including cooperation with the United States of America,⁴⁶⁶ and illustrates the

⁴⁶³ United Nations, The Office of the United Nations Special Coordinator for the Middle East Peace Process, ‘[Security Council Briefing on the Situation in the Middle East, including the Palestinian question](#)’, 20 February 2019 (‘We also regret Israel’s recent decision on 28 January not to renew the mandate of the Temporary International Presence in Hebron (TIPH), *established pursuant to the provisions of the 1995 Interim Agreement (aka Oslo II Accord)* between Israel and the Palestine Liberation Organization (PLO). I echo the Secretary-General’s appreciation for their service and the generous contribution of all participating countries over the years. The United Nations continues to engage with relevant Member States and the parties on the ground to ensure the protection, safety, and wellbeing of civilians in Hebron, and the rest of the occupied Palestinian territory.’) (emphasis added).

⁴⁶⁴ [Wye River Memorandum](#), 23 October 1998 (‘The following are steps to facilitate implementation of the Interim Agreement on the West Bank and Gaza Strip of September 28, 1995 [...] and other related agreements including the Note for the Record of January 17, 1997 [...] so that the Israeli and Palestinian sides can more effectively carry out their reciprocal responsibilities, including those relating to further redeployments and security respectively. These steps are to be carried out in a parallel phased approach in accordance with this Memorandum and the attached time line. They are subject to the relevant terms and conditions of the prior agreements and do not supersede their other requirements.’).

⁴⁶⁵ [Wye River Memorandum](#), Section IV: Permanent Status Negotiations (‘The two sides will immediately resume permanent status negotiations on an accelerated basis and will make a determined effort to achieve the mutual goal of reaching an agreement by May 4, 1999. The negotiations will be continuous and without interruption. The U.S. has expressed its willingness to facilitate these negotiations.’). *See also* Section V: Unilateral Actions (‘Recognizing the necessity to create a positive environment for the negotiations, neither side shall initiate or take any step that will change the status of the West Bank and the Gaza Strip in accordance with the Interim Agreement.’).

⁴⁶⁶ [Wye River Memorandum](#), Section II(A)(1): Outlawing and Combating Terrorist Organizations (‘In addition to the bilateral Israeli-Palestinian security cooperation, a U.S.-Palestinian committee will meet biweekly to review the steps being taken to eliminate terrorist cells and the support structure that plans, finances, supplies and abets terror. In these meetings, the Palestinian side will inform the U.S. fully of the actions it has taken to outlaw all organizations (or wings of organizations, as appropriate) of a military, terrorist or violent character and their support structure and to prevent them from operating in areas under its jurisdiction. The Palestinian side will apprehend the specific individuals suspected of perpetrating acts of violence and terror for the purpose of further investigation, and prosecution and punishment of all persons involved in acts of violence and terror. A U.S.-Palestinian committee will meet to review and evaluate information pertinent to the decisions on prosecution, punishment or other legal measures which affect the status of individuals suspected of abetting or perpetrating acts of violence and terror.’). *See also* Section II(A)(2): Prohibiting Illegal Weapons (‘The Palestinian side will ensure an effective legal framework is in place to criminalize, in conformity with the prior agreements, any importation, manufacturing or unlicensed sale, acquisition or possession of firearms, ammunition or weapons in areas under Palestinian jurisdiction. In addition, the Palestinian side will establish and vigorously and continuously implement a systematic program for the collection and appropriate handling of all such illegal items in accordance with the prior agreements. The U.S. has agreed to assist in carrying out this program. A U.S.-Palestinian-Israeli committee will be established to assist and enhance cooperation in preventing the smuggling or other unauthorized introduction of weapons or explosive materials into areas under Palestinian jurisdiction.’).

internationalization of these commitments.⁴⁶⁷ In addition, the memorandum was ‘witnessed’ by the United States of America.⁴⁶⁸

3. Jurisprudential practice

a) The Oslo Accords and jurisprudential practice in Israel

292. Several judicial decisions support the contention that Israeli courts recognize the legal value of the Oslo Accords, as emphasised by their commentators. However, this does not mean that the agreements played a decisive role in the reasoning of these various judgments. Rather, according to these commentators, they were treated as intergovernmental agreements. In fact, given the ‘non self-executing’ character of their content, their actual influence seems to be limited. Their legal value was nevertheless repetitively confirmed. This is the case, for example, in the *Dr. Tibi* case,⁴⁶⁹ the *International Legality of the Security Fence and Sections near Alfei Menashe* case,⁴⁷⁰ the *Yesh Din or Quarry activity* case⁴⁷¹ and the *Zinbakh v. IDF Commander in Gaza* and *Gusin v. IDF Commander in Gaza* cases.⁴⁷²

⁴⁶⁷ [Wye River Memorandum](#), Section II(B): Security Cooperation (‘The two sides agree that their security cooperation will be based on a spirit of partnership and will include, among other things, the following steps: 1. Bilateral Cooperation. There will be full bilateral security cooperation between the two sides which will be continuous, intensive and comprehensive. 2. Forensic Cooperation. There will be an exchange of forensic expertise, training, and other assistance. 3. Trilateral Committee. In addition to the bilateral Israeli-Palestinian security cooperation, a high-ranking U.S.-Palestinian-Israeli committee will meet as required and not less than biweekly to assess current threats, deal with any impediments to effective security cooperation and coordination and address the steps being taken to combat terror and terrorist organizations. The committee will also serve as a forum to address the issue of external support for terror. In these meetings, the Palestinian side will fully inform the members of the committee of the results of its investigations concerning terrorist suspects already in custody and the participants will exchange additional relevant information. The committee will report regularly to the leaders of the two sides on the status of cooperation, the results of the meetings and its recommendations.’).

⁴⁶⁸ [Wye River Memorandum](#) (‘Witnessed by: William J. Clinton, The United States of America’).

⁴⁶⁹ *Dr. Ahmed Tibi v. The Government of Israel and Others*, Judgment, 18 October 1995, H.C. 6230/95 (unpublished) (analysed in R. M. Giladi, ‘The Practice and Case Law of Israel in Matters Related to International Law’ in *29 Israel Law Review* 506 (1995), p. 535, n. 148).

⁴⁷⁰ Israel High Court, *International Legality of the Security Fence and Sections near Alfei Menashe*, 15 September 2005, H.C.J. 7957/04, accessible on: https://mfa.gov.il/mfa/aboutisrael/state/law/pages/high_court_rules_on_security_fence_around_alfei_menashe_15-sep-2005.aspx.

⁴⁷¹ See some translated excerpts on the Red Cross website: <https://casebook.icrc.org/case-study/israel-high-court-justice-quarrying-occupied-territory>.

⁴⁷² *Zinbakh v. IDF Commander in Gaza*, Judgment, 28 May 2002, HCJ 4363/02; *Gusin v. IDF Commander in Gaza*, HCJ 4219/02, 56(4) P.D. 608. See D. Kretzmer, ‘The law of belligerent occupation in the Supreme Court of Israel’ in *94 International Review of the Red Cross* 207 (2012), n. 83 (summarizing the reasoning of the Supreme Court of Israel in the *Zinbakh* and *Gusin* cases: ‘In both these cases, the Court rejected the argument that protection of the security of persons in Israeli settlements was not a legitimate security interest. The grounds given by the Court were that under the Oslo Agreements the status of the settlements was to be decided in the final stage agreements, and that until that time the commander was duty-bound to protect the security of all persons in the occupied territory.’).

b) The Oslo Accords and jurisprudential practice of the Palestinian Authority

293. Case n° 885/2014 involves a successful appeal against a judgment rendered on 11 January 2015 in Jericho, which declared Oslo to be already extinct. This case was also summarized in English.⁴⁷³ The legal value of the Oslo Accords was confirmed on appeal. This means that the authoritative jurisprudence in the judicial system of the Palestinian Authority is that the Oslo Accords do have a legal value.

294. Moreover, according to a decision of Palestine's Constitutional Court, international agreements enjoy priority over ordinary legislation.⁴⁷⁴

⁴⁷³ 'In the Name of the Palestinian People: Court Abrogates Oslo Accords', *The Legal Agenda* (24 February 2015), <https://www.legal-agenda.com/en/article.php?id=3062> ('On January 11, 2015, Ahmad al-Ashqar, a judge in the Penal Department of the Jenin Magistrate Court in the West Bank, issued an atypical ruling in a criminal case. This ruling decreed that the Oslo Accords are no longer in force. As a result, Israeli nationals are no longer exempt from prosecution by Palestinian courts as stipulated by the Accords. Palestinians applauded the ruling and the judge who issued it. Al-Ashqar was seen as a pristine, independent voice within the Palestinian National Authority (PA), a voice expressing the impartiality of the judicial establishment and concerned with the day-to-day issues that Palestinian citizens have long endured. However, the joy did not last long. Within a week, the head of the Jenin Court Judge Kamal Jabr transferred al-Ashqar out of the criminal department to work as an implementation judge. Jabr claimed the transfer was due to work-related pressures and requirements. [...] Days after al-Ashqar's ruling was published, the head of the Jenin District Court, to which al-Ashqar is subordinate, issued a written decision that transferred him out of the Penal Department to work as an implementation judge. The latter type of judge carries out rulings, but has no jurisdiction to issue them. In a written explanatory statement that followed, the High Judicial Council justified the reassignment on the basis of work requirements, and the fact that it does not affect the judge's standing. However, the statement did not shy away from commenting on al-Ashqar's ruling, implicitly acknowledging that it is connected to the reassignment. After mentioning that magistrate court rulings cannot form legal principles and can be contested via appeal, the statement criticized the ruling's mandating reasons that related to the Oslo Accords and the prosecution of Israelis; "A magistrate judge", it stated, "cannot make a final decision about whether or not the Oslo agreement is still in force, because this is a political matter to be decided by the Palestinian leadership, not a judicial body of any form."').

⁴⁷⁴ United Nations, Committee on the Elimination of Racial Discrimination, 'Initial and second periodic reports submitted by the State of Palestine under article 9 of the Convention, due in 2017', 16 October 2018, CERD/C/PSE/1-2, para. 20 ('The Supreme Constitutional Court of the State of Palestine, in case No. 4 of 2017, indicated the status of international treaties in the Palestinian legal system in affirming that: "International conventions take precedence over domestic legislation whereby the norms of such conventions acquire superior force to domestic legislation, in keeping with the national, religious and cultural identity of the Palestinian Arab people."[7]'). Footnote 7 states: 'In this decision, domestic legislation means ordinary legislation and not core legislation (the Constitution). Constitutional interpretation No. 5/2017 of 12 March 2018 defines the status of international conventions in domestic legislation as inferior to the Declaration of Independence and the Basic Law and superior to various pieces of ordinary domestic legislation.'

4. Some doctrinal interpretations of the international legal nature of the Oslo Accords

295. Several scholars have discussed the legal relevance of the agreements, including Peter Malanczuk,⁴⁷⁵ John Quigley,⁴⁷⁶ Errol Mendes⁴⁷⁷ and Christine Bell.⁴⁷⁸ In the French doctrinal approach, Karin Calvo-Goller⁴⁷⁹ and Madjid Benchikh⁴⁸⁰ are to be mentioned. All of them attribute a high legal value to the agreements: for Malanczuk, Quigley, Mendes and Benchikh,⁴⁸¹ they are of an international legal nature, while to Bell (who qualifies them as belonging to *lex pacificatoria*) and Calvo-Goller, they form part of a convention-based regime of fundamental law.

5. The question of President Mahmoud Abbas' statement of 19 May 2020

296. On 19 May 2020, news agencies reported that in an official statement, the President of the State of Palestine/Palestinian Authority, Mr. Mahmoud Abbas, allegedly denounced all the agreements between Israel and Palestine.

297. This occurred three months after his oral intervention before the Security Council, where in the context of condemning the development and content of the so-called 'Deal of the Century' prepared by the Office of the President of the United States of America, he qualified the Oslo Accords of a very important achievement and appealed for a return to their spirit.⁴⁸²

⁴⁷⁵ P. Malanczuk, 'Some Basic Aspects of the Agreements Between Israel and the PLO from the Perspective of International Law' in 7 *European Journal of International Law* 485 (1996).

⁴⁷⁶ J. Quigley, 'The Israel-PLO Interim Agreements: Are They Treaties?' in 30 *Cornell International Law Journal* 717 (1997).

⁴⁷⁷ E. Mendes, '[Statehood and Palestine for the purposes of Article 12\(3\) of the ICC Statute: a contrary perspective](#)' (30 March 2010), p. 23.

⁴⁷⁸ C. Bell, 'Peace Agreements: Their Nature and Legal Status' in 100 *American Journal of International Law* 373 (2006).

⁴⁷⁹ K. N. Calvo-Goller, 'L'Accord du 13 septembre 1993 entre Israël et l'O.L.P.: le régime d'autonomie prévu par la Déclaration Israël/O.L.P.' in 39 *Annuaire Français de Droit International* 435 (1993).

⁴⁸⁰ M. Benchikh, 'L'accord intérimaire israélo-palestinien sur la Cisjordanie et la bande de Gaza du 28 septembre 1995' in 41 *Annuaire Français de Droit International* 7 (1995).

⁴⁸¹ Benchikh, pp. 27-28 (also referring *per analogiam* to the French legal practice concerning the Evian agreements, or 'les accords d'Evian').

⁴⁸² Security Council, 8717th Meeting, [The situation in the Middle East, including the Palestinian question](#), 11 February 2020, S/PV.8717, pp. 5-6 ('In 1993, we signed the Oslo Accord, with all its details and provisions. We recognized Israel and Israel recognized us. We recognized Israel in Oslo. Yasser Arafat said "I recognize the right of Israel to exist." Yitzhak Rabin also said, and put it in writing, that he recognized the PLO as the legitimate representative of the Palestinian people. We have recognized one other. [...] Let us achieve peace by working together, as we began to do in Oslo, without the interference of any other party — I repeat, without the interference of any other party — and even without the knowledge of any other country. I challenge anybody who says that he

298. Following the order of the Chamber requesting ‘additional information on this statement, including on the question of whether it pertains to any of the Oslo Agreements between Palestine and Israel’,⁴⁸³ Mr. Malki, foreign minister of the State of Palestine/Palestinian Authority, replied⁴⁸⁴ and the Prosecutor submitted her views.⁴⁸⁵ Israel was also invited to present its views but did not reply.

299. Mr. Malki attached the official English translation of the statement to his submission,⁴⁸⁶ the wording of which indicates a denunciation of the agreements. In some respect, the denunciation is of a prompt, *ex nunc* character.⁴⁸⁷ However, in other respects, the denunciation seems of a *pro futuro* character, pending execution of certain items of Israel’s governmental program (2020),⁴⁸⁸ namely those related to the ‘Deal of the Century’ proposal, which was qualified by Mr. Abbas as an annexation. The statement also contains wording that should be understood not as a denunciation on behalf of Palestine, but rather as reflecting Palestine’s view that Israel seems to have *de facto* repudiated the given treaties.⁴⁸⁹

300. Mr. Malki emphasised, however, the rather political character of the statement.⁴⁹⁰ He expressed his view that the statement did not belong in the records of the present proceedings

knew about it. We signed a transition agreement and were ready to uphold it for five years until a final solution was reached. But they killed Yitzhak Rabin. Why did they kill Rabin? May God rest his soul in peace.’).

⁴⁸³ [Order requesting additional information](#), ICC-01/18-134, 26 May 2020, para. 6.

⁴⁸⁴ [The State of Palestine’s response to the Pre-Trial Chamber’s Order requesting additional information](#), 4 June 2020, ICC-01/18-135 (‘Palestine’s Response to Information Request’), together with [Annex A](#), ICC-01/18-135-AnxA (‘Annex A to Palestine’s Response to Information Request’).

⁴⁸⁵ [Prosecution Response to ‘The State of Palestine’s response to the Pre-Trial Chamber’s Order requesting additional information’](#), 8 June 2020, ICC-01/18-136 (‘Prosecution Response to Palestine’s Response to Information Request’).

⁴⁸⁶ See [Annex A to Palestine’s Response to Information Request](#).

⁴⁸⁷ [Annex A to Palestine’s Response to Information Request](#), p. 2 (‘First: The Palestine Liberation Organization and the State of Palestine are absolved, as of today, of all the agreements and understandings with the US and Israeli governments and of all the commitments based on these understandings and agreements, including the security ones.’).

⁴⁸⁸ [Annex A to Palestine’s Response to Information Request](#), p. 1 (‘In light of the provisions of the Israeli government coalition agreement [...] which was devoid of any commitment to the signed agreements declaring instead the application of Israeli sovereignty on the Israeli settlements. The Prime Minister of the occupation government reiterated this declaration in his first Cabinet meeting, considering annexation a priority for this government, which means annexation by the occupying Power of parts of the territory of the State of Palestine, based on the so-called “deal of the century” that we reject in its totality. This would entail the annulment by the occupying Power of the Oslo Accords and all other agreements concluded with it, after years of disregard for all these agreements and for all UN resolutions and international law’).

⁴⁸⁹ See [Annex A to Palestine’s Response to Information Request](#), p. 1 (‘This would entail the annulment by the occupying Power of the Oslo Accords and all other agreements concluded with it, after years of disregard for all these agreements and for all UN resolutions and international law’).

⁴⁹⁰ [Palestine’s Response to Information Request](#), para. 6 (‘In making those submissions, Palestine assiduously avoided (unlike many other intervening Parties) advancing any argument or claims of a political nature so as to preserve and protect the judicial character of these proceedings. Based on these considerations, Palestine

before the Court⁴⁹¹ and that it should, in any event, be read in context.⁴⁹² In his submissions, Mr. Malki used the subtitle: ‘Background and Context of the Statement: the planned annexation of Palestinian territory’.⁴⁹³ Further, he emphasised the conditionality of the measure (according to the effective execution of the Israeli governmental plan)⁴⁹⁴ and submitted that it is the result of Israel’s acts and policy which absolves Palestine of its obligations.⁴⁹⁵ Subsequently, in the present proceedings, Mr. Malki presented his analysis aiming to substantiate the alleged irrelevance of the Oslo Accords, examined in the context of the special agreements rule of the Geneva Convention IV.⁴⁹⁶ These considerations are consistent with the arguments in Palestine’s submissions received in March 2020.⁴⁹⁷

301. The Prosecutor submitted her response shortly thereafter, in which, after having cited Mr. Abbas’ statement, she reiterates her position that the Oslo Accords are irrelevant at this stage of the proceedings, and consequently, that Mr. Abbas’ statement has no bearing.⁴⁹⁸

302. As previously mentioned, Israel did not submit any comments on the matter.

respectfully submits that the Statement has no bearing on and is of no relevance to the legal issue(s) placed before the Chamber by the Prosecutor. Palestine thus reiterates what the International Court of Justice has made clear in the Wall Advisory Opinion about avoiding the cloud of political arguments to focus its jurisdictional attention exclusively on the legal questions.’).

⁴⁹¹ [Palestine’s Response to Information Request](#), para. 6 (‘In response to the Pre-Trial Chamber’s Order, the State of Palestine would indicate the following: Palestine respectfully notes that the Statement was not made as part of the record of these proceedings and did not in any way purport to, nor does it, legally affect the question presently before the Chamber.’).

⁴⁹² [Palestine’s Response to Information Request](#), para. 7.

⁴⁹³ [Palestine’s Response to Information Request](#), para. 7. *See also* paras 8-12.

⁴⁹⁴ [Palestine’s Response to Information Request](#), para. 13 (‘Substantively, the Statement declares that if Israel proceeds with annexation, a material breach of the agreements between the two sides, then it will have annulled any remnants of the Oslo Accords and all other agreements concluded between them.’).

⁴⁹⁵ [Palestine’s Response to Information Request](#), para. 13 (‘It also declares that Israel’s persistent violations of these agreements, and its announced plans and measures for annexation, absolve the Palestine Liberation Organization (“PLO”) and the State of Palestine from any obligation arising from these agreements, including security agreements.’). Similarly, in a statement made on 24 June 2020 before the Security Council, Mr. Malki said: ‘The Oslo accords were supposed to transform us into peace partners, but regrettably Israel continued waging a war against Palestinian lives and rights. It has violated the spirit and letter of the agreements, and with annexation, is taking a decision that will defeat their very purpose. These accords were supposed to pave the way for an end of occupation and a final peace agreement. They cannot survive annexation.’).

⁴⁹⁶ [Palestine’s Response to Information Request](#), paras 16-31.

⁴⁹⁷ [The State of Palestine’s observations in relation to the request for a ruling on the Court’s territorial jurisdiction in Palestine](#), 16 March 2020, ICC-01/18-82.

⁴⁹⁸ [Prosecution Response to Palestine’s Response to Information Request](#), para. 5 (‘The Prosecution does not consider that the Statement has a bearing on the status of Palestine as a State Party to the Rome Statute and on the exercise of the Court’s jurisdiction in the situation in Palestine. The Prosecution has already explained its understanding of the Oslo Accords and its position that the Oslo Accords do not bar the exercise of the Court’s jurisdiction in Palestine. The Prosecution’s position remains the same.’).

303. It is well settled in international jurisprudence that States' unilateral declarations may carry legal effect. Examples often cited include the case of the *Legal status of Eastern Greenland*⁴⁹⁹ before the PCIJ and the *Nuclear test case* before the ICJ⁵⁰⁰ where statements by foreign ministers and a head of State were held to be binding unilateral declarations committing their respective States. However, in both cases, the litigation only concerned sovereign states. Although Mr. Mahmoud Abbas is the Head of State of a State Party, Palestine has not yet achieved a full-fledged and sovereign State status. Therefore, a mechanical transposition of the *dicta* of these cases to the statement of Mr. Mahmoud Abbas does not go without saying.

304. The *Nuclear test case* is, nevertheless, important in establishing the inherent judicial power to take into account public statements.⁵⁰¹ Given that the current phase of the proceedings is not yet an *in personam* procedure but rather deals with a general legal question of jurisdiction, I consider it appropriate to follow the ICJ's jurisprudence in the current stage of proceedings.

305. The wording '*absolved, as of today*' in Mr. Mahmoud Abbas's statement seems to be shadowed by several verbs in the conditional form ('would'). The explanations given by Mr. Malki also militate against the statement's interpretation as a prompt denunciation by Palestine, with immediate effect. This seems to also be the Prosecutor's position and an interpretation

⁴⁹⁹ PCIJ, *Legal Status of Eastern Greenland*, [Judgment of 5 April 1933](#), Series A/B, No. 53, pp. 69-73.

⁵⁰⁰ ICJ, *New Zealand v. France (Case Concerning Nuclear Tests)*, [Judgment of 20 December 1974](#) ('ICJ Nuclear Tests Case'), p. 253, paras 51-56.

⁵⁰¹ [ICJ Nuclear Tests Case](#), para. 15 ('The Court nevertheless has to proceed and reach a conclusion, and in doing so must have regard not only to the evidence brought before it and the arguments addressed to it by the Applicant, but also to any documentary or other evidence which may be relevant. It must on this basis satisfy itself, first that there exists no bar to the exercise of its judicial function, and secondly, if no such bar exists, that the Application is well founded in fact and in law.'). para. 31 ('In view of the object of the Applicant's claim, namely to prevent further tests, *the Court has to take account of any developments*, since the filing of the Application, bearing upon the conduct of the Respondent. Moreover, as already mentioned, the Applicant itself impliedly recognized the possible relevance of events subsequent to the Application, by drawing the Court's attention to the communiqué of 8 June 1974, and making observations thereon. In these circumstances the Court is bound to take note of further developments, both prior to *and subsequent to the close of the oral proceedings*. In view of the non-appearance of the Respondent, it is especially incumbent upon the Court to satisfy itself that it is in possession of all the available facts.') (emphasis added), para. 32 ('It is true that these statements have not been made before the Court, but they are in the public domain, and are known to the Australian Government, and one of them was commented on by the Attorney-General in the Australian Senate on 26 September 1974. It will clearly be necessary to consider all these statements, both that drawn to the Court's attention in July 1974 *and those subsequently made*.') (emphasis added).

seemingly shared within the framework of the United Nations, as expressed by the Secretary-General,⁵⁰² his Special Coordinator⁵⁰³ and the European Union.⁵⁰⁴

⁵⁰² Security Council, Implementation of Security Council resolution 2334 (2016), Report of the Secretary-General, 18 June 2020, S/2020/555, paras 40-41 ('On 19 May, in response to the stated plans of Israel to annex parts of the occupied West Bank, the Palestinian Authority announced that it was absolved "of all the agreements and understandings with the American and Israeli governments and of all the obligations based on these understandings and agreements, including the security ones", further calling on Israel to assume its obligations as the occupying Power. The statement by the President of the State of Palestine, Mahmoud Abbas, also reaffirms the Palestinian "commitment to a solution to the Palestinian-Israeli conflict based on the two-State solution [...] on the condition that negotiations will be held to achieve that under international auspices (the Quartet plus) and through an international peace conference based on international legitimacy." It reaffirms the Palestinian leadership's willingness to "achieve a just and comprehensive peace," based on the Arab Peace Initiative and United Nations resolutions, including Security Council resolution 2334 (2016). On 20 May, the Palestinian Prime Minister instructed Cabinet members to immediately commence implementation of the Palestinian leadership's announcement, while assuring the international community that the Palestinian Authority would not allow security to deteriorate. On the same day, Palestinian officials formally notified Israeli counterparts of the termination of security coordination. On 3 June, the Authority announced that it would refuse to receive the clearance funds that Israel collects on its behalf under the Paris Protocol on Economic Relations between the Government of the State of Israel and the Palestine Liberation Organization. The practical implications of these steps are still unfolding. '), para. 66 ('The Palestinian leadership announced that it considers itself absolved of all agreements and understandings with Israel and the United States. I am concerned that the enforcement of the Palestinian leadership's announcement could alter local dynamics and trigger instability across the Occupied Palestinian Territory and beyond. Particularly worrying is the decision to stop accepting clearance revenues that Israel collects on behalf of the Palestinian Authority. Given the economic uncertainty caused by the COVID-19 pandemic and the reduced donor support, this decision only contributes to the hardship of the Palestinian people. It is critical that humanitarian and other assistance not be delayed or stopped as a result of such policies. The Israeli-Palestinian conflict has been marked by periods of extreme violence, but never before has the risk of escalation been accompanied by a political horizon so distant, an economic situation so fragile and a region so volatile.').

⁵⁰³ Office of the United Nations Special Coordinator for the Middle East Peace Process, [Paper to the Ad-Hoc Liaison Committee](#), 2 June 2020, p. 4 ('In Israel, proposals to annex parts of the West Bank were prominent in the recently completed election campaign and in the agreement to form a coalition government. On 17 May, a Government was formed which stipulates that the Prime Minister can bring a proposal for annexing part the West Bank, in agreement with the United States, to a cabinet or Knesset discussion starting from 1 July. In response, on 19 May, Palestinian President Abbas announced that the Palestinian leadership considered itself "absolved of all the agreements and understandings" with the United States and Israeli governments, considering Israeli plans for annexation. President Abbas also called on Israel to assume its obligations as the occupying power. Threats of unilateral action by both parties risk destabilizing the situation and upending progress attained after years of negotiations and efforts to build Palestinian institutions. It remains to be seen, however, how and whether these stated intentions will be implemented. We can state unequivocally that any move by Israel to annex parts of the occupied West Bank or any Palestinian withdrawal from bilateral agreements would dramatically shift local dynamics and most likely trigger conflict and instability in the occupied West Bank and Gaza Strip. Israeli annexation of parts of the West Bank would also undermine the prospects for a two-state solution and contravene international law. On a more practical but still serious level, the continued delivery of humanitarian and development assistance to the Palestinians by the UN and other organizations could be greatly complicated. UN Secretary-General Antonio Guterres has consistently spoken out against any unilateral action.'). See also United Nations, Press Release, 'UN paper calls for action to avert Palestinian economic collapse; Warns against unilateral moves that can trigger conflict and instability', 31 May 2020, https://unsco.unmissions.org/sites/default/files/press_release_-_unsco_ahlc_paper_-_31_may_2020_1.pdf.

⁵⁰⁴ See 'Virtual Joint Stakeout by the current and incoming EU members (Belgium, Estonia, France, Germany and Ireland) of the Security Council as well as Norway and the United Kingdom', 24 June 2020, <https://onu.delegfrance.org/if-any-Israeli-annexation-of-the-Occupied-West-Bank-is-implemented-it-would> ('In relation to the Palestinian leadership's announcement with regard to agreements with Israel including security cooperation we are worried about the potential implications these steps could have on the ground. We call on both sides to refrain from any unilateral steps that could further deteriorate the situation on the ground, to remain

306. Finally, it must be emphasised that, although Mr. Abbas made a similar statement⁵⁰⁵ in 2015 at the UN General Assembly, both Palestine and Israel seemingly shared the view in the following years that the Oslo Accords remained in force, as evidenced by budgetary transfers and inter-institutional cooperation in the relevant fields. Moreover, if the 2015 declaration had produced a final legal effect,⁵⁰⁶ the 19 May 2020 declaration would have been useless insofar as it would concern a no longer existing treaty. But apparently, this is not the case. It is worth mentioning that in a letter addressed to members of the Quartet at the end of May 2020, which was not made accessible to the public until the end of January of 2021, Mr. Abbas seemingly reconfirmed his commitment to the implementation of the Oslo Accords.⁵⁰⁷ In November 2020,

committed to the Oslo agreements and to fully implement all resolution 2334, including with regard to settlement activities as well as with regard to all acts of violence against civilians, including acts of terror, as well as all acts of provocation, incitement, destruction and inflammatory rhetoric.’).

⁵⁰⁵ [Statement by H.E. Mr. Mahmoud Abbas, President of the State of Palestine](#), General Debate of the 70th Session of the United Nations General Assembly, 30 September 2015 (‘Excellencies, Ladies and Gentlemen, The transitional Oslo Agreement and its annexes, and the subsequent agreements signed with Israel, stipulated that the agreements would be implemented within five years, ending in 1999 with full independence for the State of Palestine and the termination of the Israeli occupation. But Israel stopped the completion of the process of withdrawing its forces from areas classified as “B” and “C”, which represent more than 60% of the territory of the West Bank, including East Jerusalem. Instead, it intensified its settlement activities everywhere. Since the speech of President Obama in Cairo in 2009, in which he called for the cessation of settlement activities, the Israeli Government increased settlement activities by at least 20%, violating its obligation not to undertake any action illegally and unilaterally that would prejudice the final solution. Moreover, the occupying Power has repeatedly infringed upon the areas classified “A”, which are supposed to be under full Palestinian security jurisdiction and in which we have developed the institutions of the Palestinian State. At the same time, as Israel refuses to review the economic agreements that control the ability of the Palestinian economy to develop and be independent, it is determined to impose dominance on our economy, similar to its military and security dominance, and rejects the right of the Palestinian people to development and to their natural resources. As such, Israel has destroyed the foundations upon which the political and security agreements are based, which have also been undermined by the measures taken by successive Israeli governments that have negated the transitional phase aimed at realizing the independence of our State, and has perpetrated gross violations, which have made the situation unsustainable. Thus, we declare that as long as Israel refuses to commit to the agreements signed with us, which render us an authority without real powers, and as long as Israel refuses to cease settlement activities and to release of the fourth group of Palestinian prisoners in accordance with our agreements, they leave us no choice but to insist that we will not remain the only ones committed to the implementation of these agreements, while Israel continuously violates them. We therefore declare that we cannot continue to be bound by these agreements and that Israel must assume all of its responsibilities as an occupying Power, because the status quo cannot continue and the decisions of the Palestinian Central Council last March are specific and binding.’).

⁵⁰⁶ The meaning attributed to the declaration may vary depending on, *inter alia*, the importance attributed to the repeated use of ‘*as long as*’ before the words ‘we cannot continue to be bound by these agreements’.

⁵⁰⁷ I. J. Kassissieh, ‘Annexation and Threat to the Two State Solution’ in *Looming Annexation: Israel’s Denial of Palestine’s Right to Exist* (Palestine Liberation Organization, 2020), <https://www.nad.ps/sites/default/files/06302020.pdf>, p. 85 (‘It is our view that the resumption of negotiations should be based on the international legitimacy and consensus, international law and relevant UNSC resolutions, including 242, 338, 478, 1515 and 2334, as well as the Arab Peace Initiative (API) and the implementation of signed agreements between the State of Israel and the PLO.’).

the security cooperation appeared to resume upon Mr. Abbas's decision, according to a Palestinian minister,⁵⁰⁸ cited and confirmed by international press.⁵⁰⁹

307. In my view, under these circumstances and for the purpose of the present proceedings, Mr. Abbas's statement of 19 May 2020 should be understood as having no legal impact on the Oslo Accords, which should be deemed to remain unchanged by the statement.

D) The relevance of the Oslo Accords in answering the main question of the Request

308. All the above supports the contention that the Oslo Accords may be considered an applicable treaty of international law despite their *sui generis* character, or at a minimum, can be considered applicable treaties for the purposes of the Statute under article 21(1)(b) of the Statute. Why is this so important? Is it not contradictory to refer to the Oslo Accords when the Oslo Accords cannot *prima facie* be relied upon in order to substantiate Palestine's accession to the Rome Statute?

309. According to article IX of the Interim Agreement, Palestine's external competences seem to be very limited⁵¹⁰ and do not extend to diplomatic or consular representation, and international judicial or criminal co-operation.

⁵⁰⁸ H. Sheikh on Twitter: 'In light of the calls made by President #Abbas regarding Israel's commitment to the bilateral signed agreements,& based on the official written and oral letters we received, confirming Israel's commitment to them. Accordingly, the relationship with #Israel will return to how it was.' (<https://twitter.com/HusseiniSheikh/status/1328737394502365185>).

⁵⁰⁹ David M. Halbfinger and Adam Rasgon, Press Article, [Reassured by Biden Win, Palestinians Will Resume Cooperation With Israel](#) on The New York Times (17 November 2020); Al Jazeera, Press Article, ['Palestinian Authority to resume coordination with Israel'](#) (17 November 2020); Haaretz, Press Article, [Palestinian Authority Announces It Will Resume Cooperation With Israel](#) (17 November 2020).

⁵¹⁰ See Subsection 5, which states in full: 'a. In accordance with the DOP, the Council will not have powers and responsibilities in the sphere of foreign relations, which sphere includes the establishment abroad of embassies, consulates or other types of foreign missions and posts or permitting their establishment in the West Bank or the Gaza Strip, the appointment of or admission of diplomatic and consular staff, and the exercise of diplomatic functions. b. Notwithstanding the provisions of this paragraph, the PLO may conduct negotiations and sign agreements with states or international organizations for the benefit of the Council in the following cases only: (1) economic agreements, as specifically provided in Annex V of this Agreement; (2) agreements with donor countries for the purpose of implementing arrangements for the provision of assistance to the Council, (3) agreements for the purpose of implementing the regional development plans detailed in Annex IV of the Declaration of Principles or in agreements entered into in the framework of the multilateral negotiations, and (4) cultural, scientific and educational agreements. Dealings between the Council and representatives of foreign states and international organizations, as well as the establishment in the West Bank and the Gaza Strip of representative offices other than those described in subparagraph 5.a above, for the purpose of implementing the agreements referred to in subparagraph 5.b above, shall not be considered foreign relations'.

310. It is well-known that Palestine has a large network of formally diplomatic or *quasi* diplomatic representation abroad, and has received accredited diplomats under various forms at home, Ramallah or in a neighbouring capital. Some of this representation resides in the ‘embassy’ or ‘legation’ of their countries, others belong to representative offices of their respective States and are formally accredited not to the State of Palestine but to the Palestinian Authority or the Palestine Liberation Organization. In addition, several dozen diplomats residing in neighbouring countries are also accredited to Palestine or the Palestinian Authority. Apparently, this is acceptable to Israel.

311. However, it is also well-known that Israel has stood up against the admission of Palestine as a Member State of some organizations, emphasising that ‘Palestine is not a State’. This happened, for example, within the UNESCO, the International Criminal Police Organization (the ‘INTERPOL’) and the ICC. The respective admission/accession procedures ended – as it is known – with Palestine’s entry into these organizations. Given that the Request also mentions Palestine’s admission into INTERPOL,⁵¹¹ it is worth noting that the Constitution of INTERPOL speaks of *countries* (in French: *pays*) and not of *States* (in French: *États*). This was a deliberate choice in 1956,⁵¹² which was of great help to Palestine.

⁵¹¹ [Request](#), para. 128.

⁵¹² Constitution of the International Criminal Police – Interpol, 13 June 1956, I/CON/GA/1956 (2008), Appendix I: List of States to Which the Provisions of Article 45 of the Constitution Shall Apply (‘Argentina, Australia, Austria, Belgium, Brazil, Burma, Cambodia, Canada, Ceylon, Chile, Colombia, Costa Rica, Cuba, Denmark, Dominican Republic, Egypt, Eire, Finland, France, Federal German Republic, Greece, Guatemala, India, Indonesia, Iran, Israel, Italy, Japan, Jordan, Lebanon, Liberia, Libya, Luxembourg, Mexico, Monaco, Netherlands, Netherlands Antilles, New Zealand, Norway, Pakistan, Philippines, Portugal, Saar, Saudi Arabia, Spain, Sudan, Surinam, Sweden, Switzerland, Syria, Thailand, Turkey, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Venezuela, Yugoslavia’) (emphasis added), *see* https://www.interpol.int/content/download/590/file/Constitution_of_the_ICPO-INTERPOL-EN.pdf. The title of Appendix I is the only instance where the word ‘State’ appears instead of the word ‘country.’ The French text, however, states ‘*Liste des pays auxquels seront applicables les dispositions de l’article 45 du Statut*’. If we look to the founding fathers, it is obvious that the choice of the word ‘country’ (‘*pays*’) was made in order to account for the special status of the post World War II Saar (before it adhered to the Federal Republic of Germany) and of two special Dutch royal dependencies of that time (*i.e.* Surinam and the Antilles). It is also worth noting that the Statute of the Council of Europe (1949, London) contains references to both ‘States’ and ‘countries.’ *See e.g.* article 4 (‘Any European State which is deemed to be able and willing to fulfil the provisions of Article 3 may be invited to become a member of the Council of Europe by the Committee of Ministers. Any State so invited shall become a member on the deposit on its behalf with the Secretary General of an instrument of accession to the present Statute.’) and article 5(a) (‘In special circumstances, a European country which is deemed to be able and willing to fulfil the provisions of Article 3 may be invited by the Committee of Ministers to become an associate member of the Council of Europe. Any country so invited shall become an associate member on the deposit on its behalf with the Secretary General of an instrument accepting the present Statute. An associate member shall be entitled to be represented in the Consultative Assembly only.’). On this basis, Saarland could have been an associate member between 1950 and 1957.

312. The Palestinian entry into these organizations was preceded and followed by declarations or statements on behalf of Israel and other states (for example, the United States of America) expressing opposition on the basis that ‘Palestine is not a State’ and emphasising that, in bilateral relationships, this cannot be considered as an implicit recognition of statehood.

313. The Majority Decision speaks about ‘drastic changes’⁵¹³ that occurred after the adoption of Resolution 67/19. I am not convinced of such changes. Palestine’s accession to many multilateral conventions containing the ‘all States formula’ is certainly an important achievement. However, its attempts to gain admission into international organizations having an admission procedure (the half-closed treaties) were less successful on a universal level. For example, the World Tourism Organization had to postpone its decision on admission.⁵¹⁴ It is true that Palestine’s accession to the United Nations Industrial Development Organization (the ‘UNIDO’) was successful in 2018 – but this was due to the ‘half-open’ character of the UNIDO Constitution⁵¹⁵ which uses the ‘Vienna formula’ and grants automatic membership to those who are already members of the UN or any UN specialized agency, and Palestine’s membership in the UNESCO evidently fulfilled this criterion. While the World Intellectual Property Organization⁵¹⁶ also contains the Vienna formula (as one mean of accession), Palestine seemingly did not attempt to gain entry. In the IAEA, Palestine is still an observer.⁵¹⁷ Recently, its request for admission to the Universal Postal Union did not receive the approval of the required majority.⁵¹⁸ Palestine’s request for admission into the WHO, submitted in 1989,

⁵¹³ Majority Decision, para. 98.

⁵¹⁴ H. Taha, ‘Annexation and Tourism’ in *Looming Annexation: Israel’s Denial of Palestine’s Right to Exist* (Palestine Liberation Organization, 2020), p. 44 (‘Palestine is not yet a full member in the World Tourism Organization (UNWTO). In 1999, Palestine gained observatory status in this organization and in 2015 organized an international inter-congress on Religious Tourism in Bethlehem in cooperation with UNWTO. [...] In 2016, Palestine submitted a formal request for membership in the UNWTO. In 2017, WTO postponed the vote on the request by Palestine to become a full-fledged member of the organization. The postponement is due to aggressive Israeli and American efforts to prevent Palestine from any membership status in international organizations, despite the acknowledgment of international organizations of the extraordinary Palestinian efforts to develop tourism.’).

⁵¹⁵ UNIDO Constitution, article 3 (a).

⁵¹⁶ Convention establishing the World Intellectual Property Organization, article 5 (2)(i).

⁵¹⁷ International Atomic Energy Agency (IAEA), Press Release, ‘[IAEA Spokesperson Statement on Palestine’s Signing of Safeguards Agreement](#)’, 21 June 2019 (‘Media reports that the International Atomic Energy Agency (IAEA) has recognized Palestine as a state by signing a safeguards agreement with it are wrong. The conclusion of a safeguards agreement does not imply the expression by the IAEA of any opinion regarding the status of Palestine and doesn’t affect its status in the IAEA. Media reports suggesting otherwise are wrong.’).

⁵¹⁸ David May, ‘Palestinians Fail in Bid to Join UN Postal Agency’ (20 September 2019), <https://www.fdd.org/analysis/2019/09/20/palestinians-fail-in-bid-to-join-un-postal-agency> (‘The Palestinians needed two-thirds approval, but only 56 countries supported the move; seven opposed, 23 abstained, and 106 failed to respond and were counted as abstentions.’).

did not produce the expected results up until now, even though the cooperation between the WHO and Palestine through the WHO Regional Office is strong. On the other hand, a select number of international organizations contain the ‘all States’ or ‘any State’ formula for accession (for example, the Convention establishing the Organization for the Prohibition of Chemical Weapons)⁵¹⁹ and as a result, the State of Palestine became a member of the Organization for the Prohibition of Chemical Weapons in 2018. Therefore, the picture is rather contrasted and is far from clear, contrary to what the Majority Decision suggests.

314. On the other hand, Palestine succeeded in acceding to several conventions which may be called conventions of general or universal interests (for example, the United Nations Convention against Corruption, the International Convention for the Suppression of Acts of Nuclear Terrorism, the United Nations Convention against Transnational Organized Crime, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, the Convention on the Political Rights of Women, the Convention on the Nationality of Married Women, the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, and the Convention on Biological Diversity).

315. It is worth pointing out that despite the presence of the ‘all States’ formula in the final part of these conventions, it is not always easy to locate the Israeli statement opposing the Palestinian accession in the UN Treaty Office document database. It is well known, however, that Israel challenged Palestine’s accession ‘on principle’.⁵²⁰

316. It is noteworthy that Palestine is not a Member State of the WHO⁵²¹ and yet, professional relations have been established since 1994 with three representation offices of the WHO, namely in Jerusalem, Ramallah and Gaza.⁵²² These contacts aim, *inter alia*, ‘to strengthen the Palestinian national health system, [...] to strengthen the country’s core capacities for

⁵¹⁹ See Convention establishing the Organization for the Prohibition of Chemical Weapons, Article 20.

⁵²⁰ See e.g. Israeli communication of 11 December 2019 concerning Palestine’s accession to the Convention on Road Traffic.

⁵²¹ See WHO, countries admitted as members of WHO, <https://www.who.int/countries/en>.

⁵²² See WHO, WHO presence in occupied Palestinian territory, <http://www.emro.who.int/pse/who-presence-in-palestine>.

International Health Regulations and the capacities of the Ministry of Health, its partners and the communities in health emergency and disaster risk management'.⁵²³

317. In 2020, after the COVID-19 outbreak, the law regulating health and sanitary issues in areas A and B was that of the Palestinian Authority⁵²⁴ and area C was under the law of the Israeli authorities.⁵²⁵ During that time, the Ministry of Health of Palestine maintained professional contacts with the Ministry of Health of Israel on the one hand,⁵²⁶ and direct contacts with the WHO⁵²⁷ and other foreign actors on the other.⁵²⁸

318. Such types of direct foreign contacts hardly fall under those enumerated *expressis verbis* in the Interim Agreement (Oslo II).⁵²⁹ There is no need to enter into an analysis of whether health issues fall under the label of scientific cooperation. However, no one would contest the professional need for these contacts under the circumstances. One may assume that the question of the legitimacy of Palestine's international contacts cannot be solely analysed from the point of view of whether a sub-State entity is or is not a State. This factor is certainly very important in the assessment, but it is the given international organization or the participants of a given multilateral convention who decide on whether it is determinant. Additionally, the object and the purpose of the organization's statute or given convention probably play a very important role in the assessment of the submitted instrument of accession.

319. Similarly, the repartition of competences in the Oslo Accords is certainly the starting point for the analysis, but it should be viewed in the context of the subsequent *de jure* or *de facto* interpretation given in bilateral (namely Israeli-Palestinian) actions.

⁵²³ WHO, Regional Office for the Eastern Mediterranean, Country cooperation strategy for WHO and the Occupied Palestinian Territory 2017–2020, WHO-EM/PME/008/E (2017), p. 36.

⁵²⁴ See U.S. Embassy in Israel, Palestinian Affairs Unit, Covid-19 Information, <https://il.usembassy.gov/covid-19-information>.

⁵²⁵ See U.S. Embassy in Israel, Palestinian Affairs Unit, Covid-19 Information.

⁵²⁶ Joshua Mitnick, 'Israel's War Footing Against the Coronavirus' (11 March 2020), <https://foreignpolicy.com/2020/03/11/israel-coronavirus-response-war-footing>.

⁵²⁷ WHO, Occupied Palestinian territory: Updates on Coronavirus disease 2019 (COVID-19) in oPt, <http://www.emro.who.int/countries/pse/index.html>; United Nations, Coronavirus Disease 2019 (COVID-19) WHO Update 4 oPt, 5 March 2020, <https://www.un.org/unispal/document/coronavirus-disease-2019-covid-19-in-the-occupied-palestinian-territory-who-update>.

⁵²⁸ See Security Council, Letter dated 27 April 2020 from the President of the Security Council addressed to the Secretary-General, S/2020/341, 5 May 2020 (discussing the persistent difficulties, challenges, and results achieved in the fight against COVID-19 on the territory under the Palestinian Authority).

⁵²⁹ Article IX, 5(b) ('[T]he PLO may conduct negotiations and sign agreements with states or international organizations for the benefit of the Council in the following cases only: [...] economic agreements [...], agreements with donor countries for the purpose of implementing arrangements for the provision of assistance to the Council, [...] agreements for the purpose of implementing the regional development plans [...] [and] cultural, scientific and educational agreements.').

E) Similarity between repartition of competences in the regime established by the Oslo Accords and in some special regimes established for the protection and self-administration of minorities, ethnic groups and/or co-existing peoples

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

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

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

323. Consequently, we find ourselves in an ambiguous and delicate situation where a State (Israel) and a *nasciturus* State⁵³⁰ (Palestine) – undisputedly recognized by a large number of States as a genuine, real State – exercise different legislative, administrative and judicial competences *ratione personae* and/or *ratione loci* over life in the given territory where – as the ICJ confirmed – the rules of the Geneva Convention IV and of the The Hague Convention IV are also to be applied. It is a truly extraordinary, unique and complex situation, as it was rightly qualified in the Request.

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

325. For some time, in the context of the ICC, a similar reasoning motivated Denmark's use of the territorial clause in order to temporarily exclude Greenland and the Faroe Islands from the scope of application of the Rome Statute. This lasted until the territorial self-governments

⁵³⁰ Stated in other terms: a State *in statu nascendi*.

of these islands did consent to the Court's jurisdiction on their territory, which happened in 2004 and 2006 when Denmark withdrew its formerly submitted declaration *vis-à-vis* these islands.⁵³¹ The respect of autonomous competences is also behind New Zealand's still valid declaration *vis-à-vis* Tokalu.⁵³²

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

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

⁵³¹ United Nations Treaty Collection, Chapter XVIII: Penal Matters, Subchapter 10: Rome Statute of the International Criminal Court ('UNTC Chapter XVIII'), p. 14. The notice reads as follows: 'Until further notice, the Statute shall not apply to the Faroe Islands and Greenland.' Subsequently, on 17 November 2004 and 20 November 2006, respectively, the Secretary-General received from the Government of Denmark the following territorial applications: 'With reference to the Rome Statute of the International Criminal Court, done at Rome on 17 July 1998, [the Government of Denmark informs the Secretary-General] that by Royal [Decrees of 20 August 2004 entering into force on 1 October 2004, and 1 September 2006 entering into force on 1 October 2006, respectively] the above Convention will also be applicable in [Greenland and the Faroe Islands]. Denmark therefore withdraws its declaration made upon ratification of the said Convention to the effect that the Convention should not apply to the Faroe Islands and Greenland.'

⁵³² UNTC, Chapter XVIII, p. 14 ('With a declaration to the effect that "consistent with the constitutional status of Tokelau and taking into account its commitment to the development of self-government through an act of self-determination under the Charter of the United Nations, this ratification shall not extend to Tokelau unless and until a Declaration to this effect is lodged by the Government of New Zealand with the Depositary on the basis of appropriate consultation with that territory."').

⁵³³ See e.g. the specificities of the Isle of Man examined in ECHR, *Tyrer v. The United Kingdom*, [Judgment](#), 25 April 1978, paras 13-18; the specificities of Guernsey examined in *Gillow v. The United Kingdom*, [Judgment](#), 24 November 1986, paras 28-37; the specificities of Greenland examined in *Barfod v. Denmark*, [Judgment](#), 22 February 1989, paras 17-21 and in *Custers, Devaux and Turk v. Denmark*, [Judgment](#), 3 May 2007, paras 27-53; the specificities of the Aland islands examined in *Ekholm v. Finland*, [Judgment](#), 24 July 2007, paras 42-51 and in *Boman v. Finland*, [Judgment](#), 17 February 2015, paras 14-16; the specificities of the Netherlands Antilles examined in Grand Chamber, *Murray v. The Netherlands*, [Judgment](#), 26 April 2016, paras 8-11.

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

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

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

F) Are there any reasons for not taking into account the Oslo Accords?

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

332. Secondly, she states that because of Israel’s status as an occupying power under international humanitarian law conventions, the Oslo Accords should be considered ‘a “special

⁵³⁴ [Island of Palmas case \(Netherlands, USA\)](#), 4 April 1928, 2 *Reports of International Arbitral Awards* 829, p. 838. Although in a State-to-State context, Max Huber made the following comments on the exceptional phenomenon of overlapping: ‘[I]t may be stated that territorial sovereignty belongs always to one, or in exceptional circumstances to several States, to the exclusion of all others.’

⁵³⁵ [Request](#), Title II.B (3), p. 98. See also [Prosecution Response to Palestine’s Response to Information Request](#), para. 5 (‘The Prosecution does not consider that the Statement has a bearing on the status of Palestine as a State Party to the Rome Statute and on the exercise of the Court’s jurisdiction in the situation in Palestine. The Prosecution has already explained its understanding of the Oslo Accords and its position that the Oslo Accords do not bar the exercise of the Court’s jurisdiction in Palestine. The Prosecution’s position remains the same.’).

⁵³⁶ [Request](#), para. 184.

⁵³⁷ [Request](#), para. 184.

agreement” within the terms of the Fourth Geneva Convention’,⁵³⁸ and such type of agreements may not ‘derogate from or deny the rights of “protected persons” under occupation’ according to the Geneva Convention IV.⁵³⁹

333. The Prosecutor suggests that because no agreement may run contrary to peremptory norms of international law (according to the Vienna Convention), because the peoples’ right to self-determination belongs to such norms⁵⁴⁰ and because ‘[t]he ability to engage in international relations with others is “one aspect” of the right to self-determination’,⁵⁴¹ then the limitations relating to competences in the Oslo Accords would run contrary to peremptory norms of international law. ‘Thus, and to the extent that certain provisions of the Oslo Accords could be considered to violate the right of the Palestinian people to self-determination, these could not be determinative for the Court.’⁵⁴²

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

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

⁵³⁸ [Request](#), para. 186.

⁵³⁹ [Request](#), para. 186.

⁵⁴⁰ [Request](#), para. 187.

⁵⁴¹ [Request](#), para. 187.

⁵⁴² [Request](#), para. 187.

⁵⁴³ [Request](#), para. 184.

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

337. The first question is whether the Vienna Convention is applicable to the Oslo Accords. While article 3 of the Vienna Convention⁵⁴⁴ makes it clear that the VCLT does not cover treaties between a State and a non-State subject, its application *mutatis mutandis* may well be argued, as it has been done for example in the Corten-Klein Commentary.⁵⁴⁵

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

339. The *erga omnes* nature of the right to self-determination and its judicial recognition with respect to Palestinians in the advisory opinion of the ICJ on the Wall⁵⁴⁶ is not contested. However, one must not overlook the basic norms regarding the invalidity of treaties.

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

⁵⁴⁴ VCLT, article 3 (International agreements not within the scope of the present Convention) reads as follows: ‘The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law, or to international agreements not in written form, shall not affect: (a) the legal force of such agreements; (b) the application to them of any of the rules set forth in the present Convention to which they would be subject under international law independently of the Convention; (c) the application of the Convention to the relations of States as between themselves under international agreements to which other subjects of international law are also parties.’

⁵⁴⁵ See Bouthillier and Bonin, p. 74, para. 25 (With respect to *inter alia* national liberation movements, territorial entities dependent on States, and entities created to administer territories, ‘[t]here is a strong consensus that the entities listed *supra* have the capacity to conclude treaties.’), para. 30 (‘While international agreements involving the entities discussed *supra* do not fall within the scope of the Convention, it is worth repeating that the purpose of Article 3 was to ensure that their legal validity was not questioned by the Convention. In fact, many of the rules of the Convention that have since then acquired customary status can be transposed to these agreements. As a result the Convention has indirectly contributed to the clarification of rules applicable to agreements excluded from its scope.’).

⁵⁴⁶ [ICJ Wall Advisory Opinion](#), para. 155 (‘The obligations *erga omnes* violated by Israel are the obligation to respect the right of the Palestinian people to self-determination, and certain of its obligations under international humanitarian law.’).

of an already existing peremptory norm,⁵⁴⁷ or the extinction of an ordinary treaty concluded prior to the emergence of a peremptory norm⁵⁴⁸).

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

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

343. The Prosecutor's other argument focuses on an alleged conflict between the Oslo Accords and the 'special agreements rule'⁵⁵¹ of the Geneva Convention IV. However, insofar

⁵⁴⁷ VCLT, article 53 ('Treaties conflicting with a peremptory norm of general international law ("jus cogens")') reads as follows: 'A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.'

⁵⁴⁸ VCLT, article 64 ('Emergence of a new peremptory norm of general international law ("jus cogens")') reads as follows: 'If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.'

⁵⁴⁹ VCLT, article 44 ('Separability of treaty provisions') reads as follows: '1. A right of a party, provided for in a treaty or arising under article 56, to denounce, withdraw from or suspend the operation of the treaty may be exercised only with respect to the whole treaty unless the treaty otherwise provides or the parties otherwise agree. 2. A ground for invalidating, terminating, withdrawing from or suspending the operation of treaty recognized in the present Convention may be invoked only with respect to the whole treaty except as provided in the following paragraphs or in article 60. 3. If the ground relates solely to particular clauses, it may be invoked only with respect to those clauses where: a) the said clauses are separable from the remainder of the treaty with regard to their application; b) it appears from the treaty or is otherwise established that acceptance of those clauses was not essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and c) continued performance of the remainder of the treaty would not be unjust. 4. In cases falling under articles 49 and 50, the State entitled to invoke the fraud or corruption may do so with respect either to the whole treaty or, subject to paragraph 3, to the particular clauses alone. 5. In cases falling under articles 51, 52 and 53, no separation of the provisions of the treaty is permitted.'

⁵⁵⁰ [Response](#), para. 50.

⁵⁵¹ Geneva Convention IV, article 7 ('[T]he High Contracting Parties may conclude other special agreements for all matters concerning which they may deem it suitable to make separate provision. No special agreement shall adversely affect the situation of protected persons, as defined by the present Convention, nor restrict the rights which it confers upon them.'). article 47 ('Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.').

as the Oslo Accords deal with repartition of competences without granting or promising impunity to either Israeli or Palestinian perpetrators (under the jurisdiction of Israeli military or ordinary tribunals and authorities), it cannot be said that the Oslo Accords *per se* restrict the rights conferred under the Geneva Convention. According to the 1958 Commentary,⁵⁵² while different from typical special agreements⁵⁵³ and other more common ones,⁵⁵⁴ article 7 of the Geneva Convention IV can be understood to also cover the Oslo Accords.

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

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

⁵⁵² International Committee of the Red Cross, Commentary of 1958 on Convention (IV) relative to the Protection of Civilian Persons in Time of War (12 August 1949) (‘ICRC Commentary’), article 7: Special Agreements.

⁵⁵³ See ICRC Commentary, pp. 66-67 (‘(a) Appointment of an impartial organization as a substitute for the Protecting Power (Article 11, para. 1); (b) Establishment of hospital and safety zones and localities (Article 14); (c) Establishment of neutralized zones (Article 15); (d) Evacuation of besieged areas (Article 17); (e) Exchange and repatriation of enemy nationals (Article 36); (f) Relief shipments for internees (Article 108); (g) Distribution of collective relief to internees (Article 109); (h) Release, repatriation, return to places of residence or accommodation in a neutral country of internees during hostilities (Article 132); (i) Search for dispersed internees (Article 133); (j) Fixing the procedure for enquiries instituted at the request of one of the Parties in cases of alleged violation of the Convention (Article 149). The above list, which appears in the Convention, must be regarded as having been given mainly as an indication; for there are other Articles in the Convention which refer to agreements between the belligerents. Article 22 lays down that unless there is an agreement to the contrary, medical aircraft are forbidden to fly over enemy territory. Article 23 implies the conclusion of an agreement between the Parties concerned. According to Article 83, on the marking of internment camps, the Powers concerned may agree upon a method of marking other than that laid down in the Convention. Article 135 makes a reservation in regard to any agreements concluded between the belligerents in connection with the exchange and repatriation of their nationals. Article 143 envisages the possibility of fellow-countrymen of the internees taking part in visits to internment camps by special agreement. This list shows at once that the term “agreements” is used to denote a wide variety of arrangements. Sometimes it is a matter of local arrangements of a purely temporary nature (evacuation), sometimes of actual regulations (distribution of relief consignments), sometimes of a quasi-political agreement (substitute for the Protecting Power, investigations).’).

⁵⁵⁴ ICRC Commentary, p. 67 (‘It is conceivable, for example, that States may conclude special agreements, whereby nationals of the other State who are in their hands are free to dispose of their property. The position of civilian medical personnel, doctors in particular, should also be settled in detail. Special agreements will be concerned above all with the position of protected persons who are in the actual territory of Parties to the conflict, because in such cases the mutual interest of the States concerned will generally be involved. They will, on the other hand, be harder to conclude in the case of occupied territories. Two Powers at war are seldom both in occupation of a portion of each other’s territory.’).

⁵⁵⁵ ICRC Commentary, p. 67.

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

346. In this context, it is not clear⁵⁵⁸ whether the Prosecutor views the alleged conflict between the Oslo Accords and the Geneva Convention IV as a simple conflict of norms,⁵⁵⁹ as a conflict with an *erga omnes* norm, or with a peremptory norm.⁵⁶⁰

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

348. However, if we take into account the text, the purpose and the original five-year time frame of the Oslo Accords, it is not easy to state that an instrument aiming to set up a limited

⁵⁵⁶ See ICRC Commentary, p. 70 ('It will not always be possible to decide at once whether or not a special agreement "adversely affects the situation of protected persons". What is the position, for instance, if their situation is improved in certain ways and made worse in others? Some of the agreements mentioned above may have appeared to bring them advantages at the time of conclusion; the drawbacks only became apparent later. The criterion "adversely affect the situation" is not, therefore, in itself an adequate safeguard. That is why the second condition is of value. In what sense should the words "rights conferred by the Convention" be understood?').

⁵⁵⁷ See ICRC Commentary, pp. 70-71 ('In the final analysis, each rule of the Convention represents an obligation on the States party to the Convention. The sense of the expression "restrict the rights" then becomes clear: the States may not by special agreement restrict, *i.e.* derogate from their obligations under the Conventions. On the other hand, nothing prevents them from undertaking further and wider obligations in favour of protected persons. Obligations under the Geneva Convention must, in fact, be considered as representing a minimum. It is thus the criterion of "derogation", rather than that of "adverse effects", which provides the best basis for deciding whether a special agreement is, or is not, in conformity with the Convention. In the majority of cases deterioration in the situation of the persons protected will be an immediate or delayed consequence of derogation.').

⁵⁵⁸ [Request](#), para. 188 ('Accordingly, and to the extent that provisions of the Oslo Accords could be interpreted as excluding from the PA's jurisdiction the obligation to prosecute individuals allegedly responsible for grave breaches under article 146(2) (or to delegate such duty to an international tribunal), those provisions could not be determinative for the Court.') (footnotes omitted).

⁵⁵⁹ [Response](#), para. 78 ('The fact that those participating in Oslo were skilful negotiators does not detract from the fact that the Occupying Power and the occupied population were not in the same factual position, or could be seen as "equals" for the 50 years that the occupation has lasted. This does not mean that the Oslo Accords are invalid. While it would indeed be incongruous to invoke the Geneva Convention to undermine the Accords, it is equally incongruous to invoke the Oslo Accords "to *trump* rather than *translate*" the objective that they sought to achieve, *i.e.* self-governance for the Palestinian people over most of the West Bank and Gaza.') (emphasis in original) (footnotes omitted).

⁵⁶⁰ [Request](#), para. 186 ('*Second*, the Accords have been described as a "special agreement" within the terms of the Fourth Geneva Convention that was concluded between Israel, as the "Occupying Power", and the PLO, as the legitimate representative of the Palestinian population in the "Occupied Territory", for the purpose of setting out a series of practical arrangements concerning the administration of the "Occupied Territory". Yet, special agreements cannot violate peremptory rights nor can they derogate from or deny the rights of "protected persons" under occupation.') (emphasis in original) (footnotes omitted).

self-government for the purpose of developing and enlarging competences, and affecting about 90% of the population living in the given territory, could be considered as aiming to derogate from rights conferred under the Geneva Conventions and in particular the Geneva Convention IV.

349. As the ICJ stated, Israel is under the obligation to implement the Geneva Convention IV.⁵⁶¹ The victims' right to seek justice before a national tribunal and the State's obligation under the Convention⁵⁶² to sanction the offenders are binding obligations on Israel. However, the Geneva Convention does not prescribe the victims' individual right to seek justice before international judiciary bodies.

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

351. It is worth adding that the Israeli High Court of Justice emphasised the application of the necessity/proportionality test concerning the use of force in the context of the Geneva

⁵⁶¹ [ICJ Wall Advisory Opinion](#), paras 89, 91, 96, 137, 149.

⁵⁶² Geneva Convention IV, article 146 ('The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article. Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a "*prima facie*" case. Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article. In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949.'). article 147 ('Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or willfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.'). article 148 ('No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article.').

Conventions⁵⁶³ and recently declared unconstitutional a law aiming at regularizing unlawful settlements.⁵⁶⁴ Its reasoning was based on Parliament having exceeded its law-making

⁵⁶³ See *Yesh Din – Volunteers for Human Rights, et. al v. The IDF Chief of Staff, et. al*, [Judgment](#), 24 May 2018, HCJ 3003/18 (joined with *Adalah – The Legal Center for Arab Minority Rights in Israel, et. al v. The IDF Chief of Staff, et. al*, HCJ 3250/18), paras 39-46, 57 (calling for a proper application of the necessity/proportionality test when conducting an assessment in the context of the use of lethal weapons under the Geneva Conventions). See also para. 65 (speaking of ‘the security forces’ obligation to act in accordance with the Rules that apply thereto, both by virtue of Israeli law and by virtue of international humanitarian law. This obligation also requires the security forces to examine, increase, and improve, to the extent possible, the use of alternative non-lethal means, all alongside maintaining an orderly process for debriefing and extracting operational and other lessons for implementing them.’).

⁵⁶⁴ *Silwad Municipality, et al. v. The Knesset, et. al*, [Judgment](#), 9 June 2020, HCJ 1308/17 (‘Silwad Municipality Judgment’).

authority⁵⁶⁵ by enacting a law conflicting with the Geneva and The Hague Conventions⁵⁶⁶ that violates the Palestinians' right to property⁵⁶⁷ and is discriminatory in nature.⁵⁶⁸

⁵⁶⁵ [Silwad Municipality Judgment](#), para. 32 ('Indeed, the Regulation Law stands in contradiction to the principle of territorial sovereignty and is an outlier in the Israeli legislative landscape, since in this law the Knesset had established, in major legislation, regulations that apply to Palestinians residing in the territory and to land in the territory. [...] The law is intended to retroactively regulate and legalize illegal construction in Israeli settlements in the territory, and as will be explained here, this regulation has far-reaching, harmful implications on essential rights of Palestinians in the territory.'). para. 69 ('Indeed, throughout the years, this court has ruled that the military commander's duty to secure the needs of the population in the territory that is under military seizure refers first and foremost to the "protected residents," who are the Palestinian residents of the territory'). For translations of excerpts into English, see also ADALAH, '[Initial Analysis of the Israeli Supreme Court's Decision in the Settlements Regularization Law Case HCJ 1308/17, Silwad Municipality, et al. v. The Knesset, et al.](#)' (15 June 2020).

⁵⁶⁶ [Silwad Municipality Judgment](#), para. 33 ('Also, the court considered section 27 of the Fourth Geneva Convention – indicating a list of human rights afforded to protected residents – as a source to draw on for the protection of these rights of the Palestinian residents of the territory'), para. 40 ('The right to property is recognized both in international law and in the laws of military seizure that apply in the territory [...] The central anchor for the customary laws of military seizure, on which the protection of the right to private property is founded, is regulation 46 of the Hague regulations, stating the following: "Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated"'), para. 68 ('This, as long as the action is consistent with the general obligations that apply to the military commander under regulation 43 of the Hague Regulations – which serves as a sort of "uber" general directive in respect to the authority of the military commander in the territory – and as long as the authority is used in accordance with the basic rules of Israeli administrative law. [...] Regulation 43 of the Hague Regulations is about the authority of the military government to return and secure "public life and order", including the security requirements needed by the military government itself and the needs of the civilian population under its rule'), para. 69 ('The issue of the expropriation of private Palestinian lands for the purpose of building Israeli settlement in the territory has already been examined in 1980, in an opinion prepared by the then Government Legal Counsel, Prof. Yitzhak Zamir. In his opinion, Zamir indicated, inter alia, that "a decision to expropriate land pursuant to Jordanian law [...] for the purpose of building new Israeli settlements will stand on shaky judicial ground [...] [and] there is serious doubt about the legality of using the Jordanian law for the expropriation of private land for the purpose of the Israeli settlement" (Emphasis added). Indeed, throughout the years, this court has ruled that the military commander's duty to secure the needs of the population in the territory that is under military seizure refers first and foremost to the "protected residents," who are the Palestinian residents of the territory').

⁵⁶⁷ [Silwad Municipality Judgment](#), paras 46, 70 ('This argument can not be accepted, as it ignores the overall aspects which differentiate the Israeli population in the territory from the Palestinian population, and in any event, as we have shown above and as will be shown later, the law that applies to the Palestinian population in the territory does not support the argument made by the government in this context. Although, as this court has ruled by in the past, the military commander may also, under his authority according to Regulation 43 of the Hague Regulations, take into account considerations related to the benefits to the overall local population, including the Israeli population in the territory').

⁵⁶⁸ [Silwad Municipality Judgment](#), para. 52 ('What we learn from the above is that the harm done by the arrangements set in this law, and even more so, their cumulative weight, is mostly directed at Palestinian residents of the territory [...]. This is because the law gives distinct priority to Israeli residents of the territory over Palestinian residents there.'). para. 54 ('The actual application of a different law to populations in the territory in respect to matters concerning construction offences and the invasion into private land, due to considerations of religious or national belonging, "is severely in opposition to the principle of equality before the law'), para. 57 ('So, at least in terms of the result, discrimination exists between the Israeli residents of the territory and the Palestinian residents in all matters regarding the regulation of illegal construction in the territory, and there is no ability to point out a relevant difference in this context between the population living in these villages. Therefore, it can be determined that the Regulation Law harms the Palestinian residents of the territory's constitutional right to equality and dignity.'). para. 110 ('The Regulation Law seeks to retroactively legalize illegal actions taken by a specific population in the territory, while harming the rights of another population, all this in a territory which is under military seizure. This is not an arrangement that is "blind" to the group that is damaged by its

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

353. The Request⁵⁷⁰ also alleges the incompatibility of the Oslo Accords with article 146 of the Geneva Convention IV and cites in support a sentence from the 1958 Commentary on the Convention.⁵⁷¹

354. The quoted statement ('this paragraph does not exclude handing over the accused to an international criminal court') was regarded with considerable pessimism⁵⁷² by the Pictet Commentary, a view supported by the lengthy preparatory works, but that came to fruition with the establishment of the ICC decades later. It refers to the second paragraph of article 146 of the Geneva Convention IV, which addresses inter-State extradition and the related condition of a '*prima facie*' case.⁵⁷³ However, considering the above references to the commentary, the second sentence of that second paragraph of article 146 of the Geneva Convention IV can

implementation, but an arrangement that knowingly and unequally harms the property rights of only the Palestinian residents in the territory and it provides primacy to the property interests of the Israeli settlers, without any individual testing and without providing sufficient weight to the special status of the Palestinian residents in the territory as "protected residents").

⁵⁶⁹ VCLT, article 66 (Procedures for judicial settlement, arbitration and conciliation) ('If, under paragraph 3 of article 65, no solution has been reached within a period of 12 months following the date on which the objection was raised, the following procedures shall be followed: (a) any one of the parties to a dispute concerning the application or the interpretation of article 53 or 64 may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration.').

⁵⁷⁰ Request, para. 188, n. 603.

⁵⁷¹ ICRC Commentary, article 146: Penal Sanctions, p. 593 ('Furthermore, this paragraph does not exclude handing over the accused to an international criminal court whose competence has been recognized by the Contracting Parties. On that point, the Diplomatic Conference specially wished to reserve the future position and not to raise obstacles to the progress of international law.').

⁵⁷² ICRC Commentary, p. 589 ('There seems to be very little chance, because of the widespread opposition encountered, of the United Nations setting up an international criminal court in the near future.').

⁵⁷³ ICRC Commentary, p. 593 ('Extradition is restricted by the municipal law of the country which detains the accused person. Indeed, a rider is deliberately added: "in accordance with the provisions of its own legislation". Moreover, a special condition is attached to extradition. The Contracting Party which requests the handing over of an accused person must make out a "*prima facie*" case against him. There is a similar clause in most of the national laws and international treaties concerning extradition. The exact interpretation of "'prima facie' case" will in general depend on national law, but it may be stated as a general principle that it implies a case which, in the country requested to extradite, would involve prosecution before the courts. Most national laws and international treaties on the subject refuse the extradition of accused who are nationals of the State detaining them. In such cases Article 146 quite clearly implies that the State detaining the accused person must bring him before its own courts.').

hardly be deemed to contain a rule so evident that it could be considered *erga omnes* or *a fortiori* peremptory.

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

356. In the Response, the Prosecutor denies having claimed the invalidity of the Oslo Accords⁵⁷⁴ as a whole. However, the suggested solution (not to take into account those articles of the Oslo Accords which allegedly contradict the Rome Statute) remains questionable and can definitely not be reached from applying the Vienna Convention.

357. At this point, the Request⁵⁷⁵ and the Response⁵⁷⁶ describe the conflict as a conflict of ordinary norms: ‘if a State has conferred jurisdiction to the Court, notwithstanding a previous bilateral arrangement limiting the enforcement of that jurisdiction domestically, the resolution of the State’s potential conflicting obligations is not a question that affects the Court’s jurisdiction.’⁵⁷⁷

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

359. In order to substantiate this position, the Prosecutor refers to only three scholarly works in the Request. In her Response, she quotes the Appeals Chamber’s judgment in the

⁵⁷⁴ [Response](#), para. 76.

⁵⁷⁵ [Request](#), para. 185.

⁵⁷⁶ [Response](#), para. 73.

⁵⁷⁷ [Request](#), para. 185.

⁵⁷⁸ Charter of the United Nations, article 103 (‘In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.’).

Afghanistan situation, stating: ‘Notably, the Appeals Chamber in a different context has recently confirmed that agreements limiting the exercise of enforcement jurisdiction over certain nations are “not a matter for consideration in relation to the authorisation of an investigation under the statutory scheme”.’⁵⁷⁹ The Majority shares this opinion.⁵⁸⁰

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

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

362. It is true that neither the Request nor the Response speak about complete irrelevance: ‘Rather, it may become an issue of cooperation or complementarity during the investigation and prosecution stages.’⁵⁸³ This is repeated in the Response.⁵⁸⁴ While in the Request,⁵⁸⁵ the

⁵⁷⁹ [Response](#), para. 73.

⁵⁸⁰ Majority Decision, paras 128-129.

⁵⁸¹ *Situation in the Islamic Republic of Afghanistan*, [Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan](#), 5 March 2020, ICC-02/17-138, para. 44 (‘Arguments were also advanced during the hearing that certain agreements entered into between the United States and Afghanistan affect the jurisdiction of the Court and should be a factor in assessing the authorisation of the investigation. The Appeals Chamber is of the view that the effect of these agreements is not a matter for consideration in relation to the authorisation of an investigation under the statutory scheme. As highlighted by the Prosecutor and LRV 1, article 19 allows States to raise challenges to the jurisdiction of the Court, while articles 97 and 98 include safeguards with respect to pre-existing treaty obligations and other international obligations that may affect the execution of requests under Part 9 of the Statute. Thus, these issues may be raised by interested States should the circumstances require, but the arguments are not pertinent to the issue of the authorisation of an investigation.’).

⁵⁸² See e.g. [Transcript of Appeals Hearing](#), 5 December 2019, ICC-02/17-T-002-ENG, p. 100, line 13 (‘specific treaties between the United States and the Islamic Republic of Afghanistan’), p. 104, lines 18-19 (‘specific bilateral agreements’), line 23 (‘explicit agreements between sovereign states’).

⁵⁸³ [Request](#), para. 185 (‘In particular: With respect to complementarity, Palestine’s inaction as to particular categories of persons or groups because of the Oslo Accords might be relevant for admissibility purposes. With respect to cooperation, the relevance of the Oslo Accords could arise in the context of article 98(2), when the Court requests the arrest and surrender of a person.’) (footnotes omitted).

⁵⁸⁴ [Response](#), para. 73.

⁵⁸⁵ [Request](#), para. 185.

statement is based on one academic work with respect to complementarity, on three scholarly works with respect to cooperation and on the (since then reversed) decision of Pre-Trial Chamber II in the Afghanistan situation,⁵⁸⁶ the Response refers only to the Appeals Chamber's judgment.⁵⁸⁷

363. However, as one may see in Pre-Trial Chamber II's decision, that Chamber based its reasoning only on article 98(2) of the Statute. Article 98(2) of the Statute⁵⁸⁸ speaks of agreements between 'sending states' and 'receiving states'. Therefore, *prima facie*, the provision primarily concerns status of forces agreements, while not excluding other types of agreements (for example, on re-extradition or on special missions, according to the Triffterer Commentary⁵⁸⁹ and the Fernandez and Pacreau Commentary).⁵⁹⁰

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

365. It follows that I am not persuaded by the Prosecutor's argument that the Oslo Accords have no impact on the geographical scope of the Court's jurisdiction,⁵⁹¹ that they cannot be

⁵⁸⁶ Pre-Trial Chamber II, *Situation in the Islamic Republic of Afghanistan*, [Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation in the Islamic Republic of Afghanistan](#), 12 April 2019, ICC-02/17-33, para. 59 ('Furthermore, as to the Agreement of 30 September 2014 between the United States and Afghanistan pursuant to article 98, requiring the consent of a sending State to surrender a national of that State to the Court, the Chamber concurs with the Prosecution that agreements entered into pursuant to article 98(2) of the Statute do not deprive the Court of its jurisdiction over persons covered by such agreements. Quite to the contrary, article 98(2) operates precisely in cases where the Court's jurisdiction is already established under articles 11 and 12 and provides for an exception to the obligation of States Parties to arrest and surrender individuals.').

⁵⁸⁷ [Response](#), para. 73.

⁵⁸⁸ Article 98 of the Statute ('Cooperation with respect to waiver of immunity and consent to surrender') reads, in relevant part: '2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.'

⁵⁸⁹ C. Kreß and K. Prost, 'Article 98' in *Ambos and Triffterer Commentary*, p. 2143.

⁵⁹⁰ M. Ubeda-Saillard, 'Article 98: Coopération en relation avec la renonciation à l'immunité et le consentement à la remise' in *Fernandez and Pacreau Commentary*, pp. 2322-2323.

⁵⁹¹ [Request](#), para. 189.

considered an obstacle to jurisdiction⁵⁹² and that their impact is only to be dealt with at the time when admissibility and cooperation are under scrutiny.⁵⁹³ The position in the Majority Decision⁵⁹⁴ is similar to that in the Request.

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

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

367. In its decision delivered by majority on the issue of competence as regards the alleged deportation of Rohingyas from Myanmar to Bangladesh, the Chamber (in the same composition) stated:

Thus, the drafters of the Statute intended to allow the Court to exercise its jurisdiction pursuant to article 12(2)(a) of the Statute in the same circumstances in which States Parties would be allowed to assert jurisdiction over such crimes under their legal systems, within the confines imposed by international law and the Statute.⁵⁹⁵

368. The decision then continued:

It follows that a restrictive reading of article 12(2)(a) of the Statute, which would deny the Court's jurisdiction on the basis that one or more elements of a crime within the jurisdiction of the Court or part of such crime was committed on the territory of a State not Party to the Statute, would not be in keeping with such an object and purpose.⁵⁹⁶

⁵⁹² [Request](#), paras 186-189.

⁵⁹³ [Request](#), para. 185.

⁵⁹⁴ Majority Decision, para. 129 ('[T]he Chamber finds that the arguments regarding the Oslo Agreements in the context of the present proceedings are not pertinent to the resolution of the issue under consideration, namely the scope of the Court's territorial jurisdiction in Palestine. The Chamber considers that these issues may be raised by interested States based on article 19 of the Statute, rather than in relation to a question of jurisdiction in connection with the initiation of an investigation by the Prosecutor arising from the referral of a situation by a State under articles 13(a) and 14 of the Statute. As a consequence, the Chamber will not address these arguments.').

⁵⁹⁵ [PTC I Rohingya Decision](#), para. 70.

⁵⁹⁶ [PTC I Rohingya Decision](#), para. 70.

369. This sentence should, however, be understood in the following context: a situation involving the respective territories and boundaries of two full-fledged and sovereign States, which could be considered well-established, legally existing, and mutually recognized.

370. It follows then, by applying *mutatis mutandis* the above cited statement from the Rohingya Decision⁵⁹⁷ to the peculiarities of the present situation, that the Prosecutor may exercise her investigative competences *under the same circumstances that would allow Palestine, as a State Party, to assert jurisdiction over such crimes under its legal system*, namely by duly taking into account the repartition of competences according to the Oslo Accords.

371. When the Prosecutor concludes that continuing an investigation may trespass the limits *ratione loci* or *ratione personae* of Palestine's competences in this complex criminal law regime, the Prosecutor should satisfy herself that Israel, a non-State Party having jurisdiction over crimes and perpetrators either *ratione loci* or *ratione personae* according to the Oslo Accords, also consents according to article 12(3) of the Statute,⁵⁹⁸ taking into account the content of rule 44 of the Rules⁵⁹⁹ or any future bilateral agreements pending its compatibility with the Statute. The present opinion does not intend to analyze the legal and potential practical importance of the fact that, concerning an article 12(3) declaration, the singular form is used in the Statute ('with respect to the crime in question'), while in rule 44(2) of the Rules, dealing with the Registrar's obligation of information, the plural form is used ('with respect to the crimes referred to in article 5'). According to the hierarchy of norms in the Court's legal regime and the precedence of the Statute over the Rules, this issue may be solved in an adequate, pragmatic manner. Otherwise, according to the positive complementarity approach, Israel could also prosecute alleged perpetrators according to its obligations under its Basic Law, national criminal law and international legal commitments under international treaties and

⁵⁹⁷ [PTC I Rohingya Decision](#), para. 70.

⁵⁹⁸ Article 12(3) of the Statute ('Preconditions to the exercise of jurisdiction') reads: 'If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.'

⁵⁹⁹ Rule 44 (Declaration provided for in article 12, paragraph 3) reads: '1. The Registrar, at the request of the Prosecutor, may inquire of a State that is not a Party to the Statute or that has become a Party to the Statute after its entry into force, on a confidential basis, whether it intends to make the declaration provided for in article 12, paragraph 3; 2. When a State lodges, or declares to the Registrar its intent to lodge, a declaration with the Registrar pursuant to article 12, paragraph 3, or when the Registrar acts pursuant to sub-rule 1, the Registrar shall inform the State concerned that the declaration under article 12, paragraph 3, has as a consequence the acceptance of jurisdiction with respect to the crimes referred to in article 5 of relevance to the situation and the provisions of Part 9, and any rules thereunder concerning States Parties, shall apply.'

conventions concluded in the field of international humanitarian law, international criminal law or the protection of human rights.

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

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

⁶⁰⁰ Oslo II, Annex IV: Protocol Concerning Legal Affairs, article I (Criminal Jurisdiction), at paragraph 1(a), reads as follows: 'The criminal jurisdiction of the Council covers all offenses committed by Palestinians and/or non-Israelis in the Territory, subject to the provisions of this Article. For the purposes of this Annex, "Territory" means West Bank territory except for Area C which, except for the Settlements and the military locations, will be gradually transferred to the Palestinian side in accordance with this Agreement, and Gaza Strip territory except for the Settlements and the Military Installation Area.'

⁶⁰¹ Oslo II, Annex IV, article I.1(c) ('Notwithstanding the provisions of subparagraph a. above, the criminal jurisdiction of each side over offenses committed in Area B shall be in accordance with the provisions of paragraph 2.a of Article XIII of this Agreement.').

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

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

⁶⁰⁴ Oslo II, Annex IV, article I.7 ('a. Without prejudice to the criminal jurisdiction of the Council, and with due regard to the principle that no person can be tried twice for the same offense, Israel has, in addition to the above provisions of this Article, criminal jurisdiction in accordance with its domestic laws over offenses committed in the Territory against Israel or an Israeli. b. In exercising its criminal jurisdiction in accordance with subparagraph a. above, activities of the Israeli military forces related to subparagraph a. above shall be as set out in the Agreement and Annex I thereto.').

of the Rome Statute and the utility of profiting from the possibility stipulated in article 87(5) of the Rome Statute.

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

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

When there is no Security Council referral in conformity with article 13(b) of the Rome Statute, the geographical scope of the ICC jurisdiction, according to the applicable legal provisions, is as follows:

i. As to areas A and B, and taking into account rule 1(a) of article I of Annex IV to the Interim Agreement,⁶⁰⁵ the Prosecutor may proceed to investigate. However, it would be useful to conclude in advance an agreement with Israel under article 87(5)(a) of the Statute in order to secure the optimal conditions for the missions and investigations. If and when the Prosecutor concludes that her investigations have been successful and she has identified specific individuals as alleged perpetrators who are not covered by the Israeli-Palestinian competence transfer pursuant to the Oslo Accords, the Prosecutor cannot pursue the investigations against these individuals until the conditions of article 12(3) of the Statute are met, as outlined above, in paragraph 371;

ii. For cases falling under the scope of rules 1(c),⁶⁰⁶ (2),⁶⁰⁷ (4)⁶⁰⁸ and (7)⁶⁰⁹ of article I of Annex IV to the Interim Agreement, the following rules should be observed: if the agreement contracted under article 87(5) of the Statute does not provide a clear resolution to an actual dispute, the solution should be looked for in the application of conditions settled in article 12(3) of the Statute;

iii. As far as area C and East-Jerusalem are concerned, and taking into account the Oslo Accords, the Prosecutor may proceed to investigate only if the conditions of article

⁶⁰⁵ See n. 600 for full text of rule 1(a) of Article I.

⁶⁰⁶ See n. 601 for full text of rule 1(c) of Article I.

⁶⁰⁷ See n. 602 for full text of rule 2 of Article I.

⁶⁰⁸ See n. 603 for full text of rule 4 of Article I.

⁶⁰⁹ See n. 604 for full text of rule 7 of Article I.

12(3) of the Statute are met, except under the circumstances described in rule 1(b) of article of Annex IV to the Interim Agreement;⁶¹⁰

iv. All of the above references to the Interim Agreement should be understood in conformity with the subsequent Israeli-Palestinian agreements adopted on this basis.

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

376. If the famous and so often discussed *Monetary Gold principle*⁶¹¹ is *at all* applicable to the present issue⁶¹² – depending, for example, on the interpretation of what is the ‘*very subject-matter*’ in the current proceedings and on the future relevance of exceptions recognized by international jurisprudence⁶¹³ – it would be compatible with the above answer. I do not consider, however, that a detailed analysis of the applicability of the *Monetary Gold principle* would be a *sine qua non* condition of issuing this ruling.

⁶¹⁰ Oslo II, Annex IV, article I.1(b) (‘In addition, the Council has criminal jurisdiction over Palestinians and their visitors who have committed offenses against Palestinians or their visitors in the West Bank and the Gaza Strip in areas outside the Territory, provided that the offense is not related to Israel’s security interests.’).

⁶¹¹ ICJ, *Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America (Case of Monetary Gold Removed from Rome in 1943)*, [Judgment of June 15th, 1954](#), 15 June 1954, p. 17 (‘To adjudicate upon the international responsibility of Albania without her consent would run counter to a well-established principle of international law embodied in the Court’s Statute, namely, that the Court can only exercise jurisdiction over a State with its consent [...] Albania’s legal interests would not only be affected by a decision, but would form the very subject-matter of the decision.’).

⁶¹² See [Request](#), para. 35, n. 60 (denying briefly the applicability of the Monetary Gold Rule). See also [Response](#), paras 13, 31, 39 (extensively analysing the applicability of the Monetary Gold Rule). This position is criticized, *inter alia*, in Dapo Akande, ‘The Monetary Gold Doctrine and the ICC: Can the ICC Determine the Territorial Boundaries of Israel and Palestine’ on EJIL:Talk! (16 June 2020), <https://www.ejiltalk.org/the-monetary-gold-doctrine-and-the-icc-can-the-icc-determine-the-territorial-boundaries-of-israel-and-palestine>.

⁶¹³ Despite criticism, Dapo Akande calls attention to a possible exception to the Monetary Gold principle via the *mutatis mutandis* application of a sub-rule, confirmed in a decision of the Permanent Court of Arbitration. See PCAT, *Lance Paul Larsen v. The Hawaiian Kingdom*, [Award](#), 5 February 2001, p. 35, para. 11.24 (‘The Tribunal notes, for the sake of completeness, that there may well be exceptions to the Monetary Gold principle. For example, if the legal finding against an absent third party could be taken as given (for example, by reason of an authoritative decision of the Security Council on the point), the principle may well not apply. It is also possible that the principle does not apply where the finding involving an absent third party is merely a finding of fact, not entailing or requiring any legal assessment or qualification of that party’s conduct or legal position.’).

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

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

379. All this should be understood within the framework of the famous *Lac Lanoux* arbitration⁶¹⁶ rule: ‘there is a general and well-established principle of law according to which bad faith is not presumed’ or ‘*il est un principe général de droit bien établi selon lequel la mauvaise foi ne se présume pas.*’⁶¹⁷



M. le juge Péter Kovács

Dated this Friday, 5 February 2021

At The Hague, The Netherlands

⁶¹⁴ [PTC I Rohingya Decision](#), para. 48 (‘In the light of the foregoing, it is the view of the Chamber that more than 120 States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity called the “International Criminal Court”, possessing objective international personality, and not merely personality recognized by them alone, together with the capacity to act against impunity for the most serious crimes of concern to the international community as a whole and which is complementary to national criminal jurisdictions. Thus, the existence of the ICC is an objective fact. In other words, it is a legal-judicial-institutional entity which has engaged and cooperated not only with States Parties, but with a large number of States not Party to the Statute as well, whether signatories or not.’).

⁶¹⁵ [PTC I Rohingya Decision](#), para. 49.

⁶¹⁶ Arbitral Tribunal, *Lake Lanoux Arbitration (France v. Spain)*, 16 November 1957, 12 Reports of International Arbitral Awards 281 (‘Lake Lanoux Arbitration’).

⁶¹⁷ Lake Lanoux Arbitration, p. 305.

| Public Annex 1 : Recent statements of leading Palestinian personalities on the 'State of Palestine' as an 'aim to achieve' but not as an existing, sovereign and independent State | | | | |
|--|-------------------|---|---|--------|
| Who | Date | Where | Important excerpts | Source |
| President Mahmoud Abbas | 11 February 2020 | United Nations Security Council | 'Mr. Trump's plan [...] will not lead to the implementation of the vision of two independent sovereign States, Israel and Palestine.' | MA1 |
| | 19 May 2020 | Ramallah | 'that the peace process will then be held under the auspices of the United Nations through holding an international conference [...] to end the occupation and establish an independent Palestinian state.' | MA2 |
| | 25 August 2020 | Ramallah (meeting with Raab, Foreign Minister of UK) | 'There will be no peace, security and stability in our region without ending the Israeli occupation of our land and the Palestinian people gaining their freedom and independence in their sovereign state on the 1967 borders' | MA3 |
| | 25 September 2020 | United Nations General Assembly | 'to convene an international conference [...] leading to an end of the occupation and the achievement by the Palestinian people of their freedom and independence within their State' | MA4 |
| | 29 October 2020 | Letter to A. Guteres | 'The conference 'has to lead to an end to the Israeli occupation and help the Palestinian people achieve their freedom and independence within the State of Palestine'' | MA5 |
| | 1 December 2020 | United Nations with Secretary-General, Presidents of the General Assembly, Security Council and Committee of Inalienable Rights of the Palestinian People | 'to convene an international conference [...] leading to an end of the occupation and the achievement by the Palestinian people of their freedom and independence within their State' | MA6 |
| Prime Minister Mohammad Shtayeh | 20 May 2020 | 58th Emergency Cabinet meeting, Ramallah | 'The international position rejecting annexation and the deal of the century stands in support of Palestine and building its institutions towards the materialization of the State of Palestine on the ground.' | MS1 |
| | 7 October 2020 | 77th Council of Ministers session, Ramallah | 'We celebrate this day as a mean of determination that we are standing still on this land until we achieve our national project and we establish the state with Jerusalem as its capital and the right of return.' | MS2 |
| | 13 October 2020 | Message to the European Union | 'In order for us and you to get closer, a full association agreement should be activated between Palestine and Europe. This would help Palestine to be a state' | MS3 |
| | 27 October 2020 | Al Aawsat interview, Ramallah | 'the Palestinian leadership is looking forward to holding an international peace conference which would help establish a Palestinian state and advance the political process' | MS4 |
| | 10 December 2020 | Meeting with Spanish Foreign Minister | 'For the Palestinian side, any political path must aim to end the [Israeli] occupation and establish a Palestinian state on the 1967 borders' | MS5 |
| | 11 January 2021 | Statement, Ramallah | 'conference is [...] an international political endeavor that opens up prospects for ending the occupation and establishing the Palestinian State' 'We call upon every nation to fulfill its legal obligations: to distinguish in their official dealings between Israel and occupied Palestine, prohibit and boycott colonial settlement products and services, support the Palestinian people's legitimate rights to freedom towards achieving their national independence in a sovereign State of Palestine on the 1967 borders with Jerusalem as its capital.' | MS6 |

| | | | | |
|--------------------------------|------------------|---|--|-----|
| Foreign Minister Riad Malki | 31 January 2019 | Meeting with EU Ambassador | 'The Minister for Foreign Affairs of Palestine expressed his thanks for the continued efforts of the European Union [...] and appreciated its support for the Palestinian people so that they could build their state institutions, enhance their economy and support them to achieve their freedom and independence.' | RM1 |
| | 20 February 2020 | Brussels, EU | 'Al-Malki applauded the EU's firm position on the Palestinian question and briefed [...] on [...] the US 'peace plan', which aims to dismiss the Palestinian people's right to self-determination and establish its independent state.' | RM2 |
| | 30 April 2020 | Ramallah | 'If the annexation plan is implemented, the possibility of an independent, sovereign, viable and geographically contiguous Palestinian state will be undermined' | RM3 |
| | 24 June 2020 | United Nations Security Council | 'Every State has the power to help us before it is too late; the power to help end the Israeli occupation and salvage the two-State solution.' | RM4 |
| | 7 October 2020 | Meeting with Foreign Minister of Turkey, Ramallah | 'the two ministers exchanged their views on the situation in the region and the world, including ideas on how to confront the US policy aimed at undermining the Palestinian capabilities to withstand challenges and establish the independent and sovereign Palestinian state' | RM5 |
| | 26 October 2020 | United Nations Security Council | 'it is preposterous to consider that Israel's right to security could justify its occupation and oppression of an entire nation for decades, or justify denying us our right to self-determination and to a sovereign and independent State.' | RM6 |
| | 26 January 2021 | United Nations Security Council | 'It is our collective responsibility to salvage the two-State solution on the pre-1967 borders before it is too late.' 'In this context, we call for revival of the Quartet and its engagement with partners and the parties, as well as for the continued mobilization of this Security Council. We also reiterate our call for the convening of an international peace conference that can signal a turning point in this conflict, like Madrid did three decades ago, and to launch final status negotiations based on the international terms of reference and parameters. Our call for multilateral engagement is not an attempt to evade bilateral negotiations, but rather an effort to ensure their success.' 'This is not a time for passive resignation but a time for resolute action. Without such action, neither reversing negative trends on the ground, first and foremost illegal settlement activities, nor resuming meaningful final status negotiations, will be possible. The deterioration of the situation on the ground is directly linked to the attempts of one party to prejudge and dictate the outcome of negotiations, implementing annexation that would destroy any prospect for a sovereign and contiguous State of Palestine, while pretending to accept a two-State solution.' 'Why not conduct final status negotiations under international auspices?' 'We will spare no effort in advancing an independent, sovereign, viable, contiguous and democratic State of Palestine on the pre-1967 borders with East Jerusalem as its capital.' 'While we pursue our long journey to freedom and peace, we call for immediate protection for our people, who are equally entitled to security, until such time where we can ensure their protection as a sovereign State.' | RM7 |

Sources

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|-----|---|
| MA1 | http://palestineun.org/statement-by-the-president-mahmoud-abbas-president-of-the-state-of-palestine-delivered-before-the-united-nations-security-council-on-the-situation-in-the-middle-east-including-the-palestine-quest/ |
| MA2 | The State of Palestine's response to the Pre-Trial Chamber's Order requesting additional information, 4 June 2020, ICC-01/18-135-AnxA https://english.wala.ps/page.aspx?id=18724Ua117154132029a1s724U |
| MA3 | https://english.wala.ps/Pages/Details/118990 |
| MA4 | https://statements.unmecthngs.org/statements/100010202009253Yf6Qppa2Nf/TNW70VITwUN_en.pdf |
| MA5 | https://english.wala.ps/Pages/Details/120758 |
| MA6 | https://english.wala.ps/Pages/Details/122208 |
| MS1 | http://www.palestinecabinet.gov.ps/portal/Meeting/Details/51407 |
| MS2 | http://www.palestinecabinet.gov.ps/portal/meeting/details/51579 |
| MS3 | https://english.wala.ps/Pages/Details/120551 |
| MS4 | https://english.aawsat.com/home/article/2588851/palestinian-pm-in-%E2%80%99peace-conference-will-advance-political-process |
| MS5 | https://english.wala.ps/Pages/Details/122397 |
| MS6 | https://english.wala.ps/Pages/Details/122803 |
| RM1 | http://www.mofa.pna.ps/es-es/oficinasmedios/declaracionpolitica/minister-dnrad-na-ki-meets-with-the-european-union-representative-in-ramallah |
| RM2 | https://english.wala.ps/page.aspx?id=mb3Qqa11514684952amB3Qq |
| RM3 | https://english.wala.ps/page.aspx?id=3TjMPGal16929518321a3TjMPG |
| RM4 | https://palestineun.org/statement-by-the-riad-naiki-minister-of-foreign-affairs-of-the-state-of-palestine-before-the-united-nations-security-councils-monthly-briefing-on-the-situation-in-the-middle-east-includn/ |
| RM5 | https://english.wala.ps/Pages/Details/120481 |
| RM6 | https://palestineun.org/statement-by-the-riad-naiki-minister-of-foreign-affairs-and-expatriates-of-the-state-of-palestine-before-the-security-council-26-january-2020/ |
| RM7 | https://palestineun.org/statement-of-the-riad-naiki-minister-of-foreign-affairs-and-expatriates-of-the-state-of-palestine-before-the-security-council-26-january-2021/ |

Public Annex 2: Overview of how the question of Palestine's statehood and territory is dealt with in several UN documents

| Documents | Is the wording 'State of Palestine' present in the text? | Is there any explicit, affirmative statement on Palestine's statehood (as if being an already existing state)? | Presence of formulas 'to achieve', 'to prepare for' or 'to assist in the early realization' as to Palestine's statehood | The aim is the two-state solution as a necessary element of a genuine peace | Is there any explicit statement on Palestine's state territory? | Reference to the 'Palestinian territory' or 'Occupied Palestinian Territory' | Reference to 1967 lines or 1967 borders | Reference to 1967 in the context of a call for ending the occupation or for applying the Geneva Convention | Direct or indirect reference to 1967 is twinned with explicit reference to 'negotiations on borders', 'negotiations' or 'negotiation on core issues' etc | Direct or indirect reference to 1967 is twinned with reference to Quartet |
|-------------------------|--|--|---|---|---|--|---|--|--|---|
| Security Council | | | | | | | | | | |
| Resolution 242 (1967) | no | no | no | no | no | no | 'recent conflict' | yes | no | no |
| Resolution 338 (1973) | no | no | no | no | no | no | no | yes | no: only 'negotiations' | no |
| Resolution 1397 (2002) | no | no | yes: 'a vision' | yes | no | no | no | no | no: only 'negotiations' | yes: (UN, US, RU, EU efforts) |
| Resolution 1515 (2003) | no | no | yes: 'a vision' | yes | no | no | no | no | no | yes |
| Resolution 1850 (2008) | no | no | yes: 'a vision' | yes | no | no | no | no | yes: negotiating on core issues | yes |
| Resolution 2334 (2016) | no | no | yes: 'a vision' | yes | no | no | yes | yes | yes: negotiating on final status issues | yes |
| General Assembly | | | | | | | | | | |
| Resolution 67/19 | yes | no | yes: 'a vision' | yes | no | yes | yes | yes | yes: negotiating on all core issues | yes |
| Resolution 68/12 | yes | no | yes: 'early realization' | yes | no | yes: when recalling ICJ advisory opinion | yes: 'on the basis of 1967 borders' | no | yes: negotiating on all core issues | yes |
| Resolution 69/20 | yes | no | yes: 'early realization' | yes | no | yes: when recalling ICJ advisory opinion: 'preservation of the territorial contiguity of the Occupied Palestinian Territory' | yes: 'on the basis of 1967 borders' | yes | yes: resolution of all final status issues | yes |
| Resolution 70/141 | | | | | | yes: when recalling ICJ advisory opinion: 'preservation of the territorial contiguity of the Occupied Palestinian Territory' | | yes | no | yes |
| Resolution 70/225 | no | no | yes: 'urgency of achieving peace on the basis of UNO resolutions + Quartet' | yes | no | yes: 'Occupied Palestinian Territory' | no | yes | yes: final status negotiations | yes |
| Resolution 71/97 | no | no | yes: 'prospects of achievement of peace in accordance with the two-state solution' | yes | no | yes: threats on the contiguity of the Occupied Palestinian Territory | yes: 'on the basis of pre-1967 borders' | yes | yes: future negotiations | yes |
| Resolution 71/184 | yes | no | yes: 'early realization'; 'urgency of achieving peace on the basis of UNO resolutions + Quartet' | yes | no | yes: when recalling ICJ advisory opinion: 'preservation of the territorial contiguity of the Occupied Palestinian Territory' | no | yes | yes: reference to Road map | yes |

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| Resolution 72/14 | yes | no | yes: 'to achieve peace on the basis of UNO resolutions + Quartet'; 'risks posed to achievements regarding readiness for statehood'; 'in preparation for independence' | yes | no | yes: 'Occupied Palestinian Territory'; 'threats on the contiguity of the Occupied Palestinian Territory' | yes: 'based on the pre-1967 borders' | yes | yes: 'negotiations on all final status issues' | yes |
| Resolution 72/160 | yes | no | yes: 'early realization'; 'urgency of achieving' peace on the basis of UNO resolutions + Quartet | yes | no | yes: when recalling ICJ advisory opinion; 'preservation of the territorial contiguity of the Occupied Palestinian Territory' | no | yes | yes: 'reference to Road map' | yes |
| Resolution 73/19 | yes | no | yes: 'a vision'; 'in preparation for independence'; 'risks posed to achievements regarding readiness for independence'; 'accelerating peace process for the achievement of peace and results in the independence of a contiguous State of Palestine' | yes | no | yes: when recalling ICJ advisory opinion; 'Occupied Palestinian Territory'; 'threats on the contiguity of the Occupied Palestinian Territory' | yes: 'based on the pre-1967 borders' | yes | yes: 'resolution of all final status issues'; 'meaningful negotiations'; 'final status negotiations'; 'negotiations on all final status issues' | yes |
| Resolution 73/89 | no | no | yes: 'achievement without delay'; 'peace on the basis of UNO resolutions + Quartet' | yes | no | no | yes: 'based on the pre-1967 borders' | yes | yes: 'reference to Road map' | yes |
| Resolution 73/158 | yes | no | yes: 'early realization' | yes | no | yes: when recalling ICJ advisory opinion; 'preservation of the territorial contiguity of the Occupied Palestinian Territory' | no | yes | yes: 'reference to Road map'; 'negotiations on all final status'; 'resolution of all core final status' | yes |
| Resolution 74/10 | yes | no | yes: 'early realization' | yes | no | yes: when recalling ICJ advisory opinion | yes: 'on the basis of the pre-1967 borders' | yes | yes: 'reference to Road map'; 'negotiations on all final status'; 'resolution of all core final status' | yes |
| Resolution 74/11 | no | no | yes: 'achievement without delay'; 'peace on the basis of UNO resolutions + Quartet'; 'in preparation for independence'; 'risks posed to achievements regarding readiness for independence' | yes | no | yes: when recalling ICJ advisory opinion; 'preservation of the territorial integrity and unity of the Occupied Palestinian Territory' | yes: 'based on the pre-1967 borders' | yes | yes: 'reference to Road map'; 'negotiations on all final status issues' | yes |
| Resolution 75/20 | yes | no | yes: 'early realization of their right [...] to an independent State of Palestine' | yes | no | yes: 'Occupied Palestinian Territory' | yes: 'on the basis of the pre-1967 borders' | yes | yes | yes |

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| Resolution 75/21 | no | no | no | no: (however 'on the basis of international law and UN resolutions') | no | no | no | no | no | no | no | no | no | no | no | no | no | yes: 'peaceful settlement of the Palestinian question' | no | |
| Resolution 75/22 | no: 'Palestinian Government'; 'Palestinian Authority' | no | yes: 'efforts towards an independent Palestinian State'; 'Calls for: [...] the realization of their right to their independent State'; 'Palestinian State-building efforts in preparation for independence' | yes | no | yes: when recalling ICJ advisory opinion: 'Occupied Palestinian Territory' | yes: 'based on the pre-1967 borders' | yes | yes | yes | yes | yes | yes | yes | yes | yes | yes | yes | yes | yes |
| Resolution 75/23 | | no | yes: 'support the achievement [...] of the two-state solution'; 'the achievement by the Palestinian people of their inalienable rights'; 'to assist the Palestinian people in the early realization of their right to self-determination, including their right to their independent State' | yes | no | yes: when recalling ICJ advisory opinion: 'Occupied Palestinian Territory' | yes: 'on the basis of the pre-1967 borders' | yes | yes | yes | yes | yes | yes | yes | yes | yes | yes | yes | yes | yes |
| Vozkiri, President of the General Assembly at the 75th session | | no | yes: 'vision of the two-state solution' | yes | no | | yes: 'on the basis of the pre-1967 lines' | yes | yes | yes | yes | yes | yes | yes | yes | yes | yes | yes | yes | yes |
| 1 December 2020 | | no | no: 'However, in the seven decades that followed [Resolution 181], we have failed to establish a state for the Palestinian people' | yes | no | | | | | | | | | | | | | | | |
| Secretary-General | | | | | | | | | | | | | | | | | | | | |
| Reaction after the adoption of Resolution 67/19 (A/67/PV 44, pp 12-13) | yes | no: 'to ensure that an independent, sovereign, democratic, contiguous and viable State of Palestine lives' | yes: 'preserve the achievements in Palestinian state-building' | yes | no | | | | | | | | | | | | | yes: negotiations; meaningful negotiations | no explicit mention | |

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| Report March 2013 (1st report under General Assembly Resolution 67/19) (A/67/738) | yes | no : 'a vision of two States: an independent sovereign, democratic, contiguous and viable State of Palestine, living side by side [...] with Israel Palestinian aspirations on [...] and independent State [...] and [...] the two-State solutions [...] can only be achieved through negotiations' (para 24) | yes | | yes | | no | yes: 'Occupied Palestinian Territory' | yes: 'on the basis of the pre-1967 borders' | yes | yes: negotiations in the framework of the Middle East peace process; 'negotiations on all final status issues' to resolve the core issues – territory, security, Jerusalem, refugees, settlements, water' (para 31) | Middle East peace process |
| July 2020 Report (S/2020/555) | yes | no : 'eroding the possibility of establishing a contiguous, independent and sovereign Palestinian State' (para 57) See also paras 55, 71 'prospects of a negotiated two-state solution' | yes | | yes | | no | yes: 'Occupied Palestinian Territory' (paras 2, 10, 11, 45, 48, 50, 64, 66) | yes: 'on the basis of the pre-1967 borders' (para 71) | yes | yes: reference to Road map negotiations on all final status issues' (paras 50, 52, 53, 55, 71) | yes |
| Mladenov 15 October 2020 Jerusalem | no | no : 'the possibility of establishing a contiguous and independent Palestinian State' | yes | | yes | | no | no | no: 'Occupied West Bank'; 'illegal constructions' | no | no | no |
| Mladenov 26 October 2020 Report | yes: 'greetings to Mr. Malki, of the State of Palestine'; But current status: Palestinian Authority (2x) | no : 'impeding the contiguity of a future Palestinian state'; 'the hope that their right to statehood can be achieved through peaceful negotiations' | yes | | yes | | no | yes: 'Occupied Palestinian Territory'; 'Occupied West Bank' | yes: 'recognized borders, based on the 1967 lines' | yes | yes | no |
| 29 November 2020 Guteres on commemorating the International Day of Solidarity with the Palestinian People | no | no : 'achieve a two-State solution'; 'a vision of the two-State solution'; 'prospects of a viable two-State solution are growing more distant' | yes: 'to achieve'; 'vision'; 'prospect' | | yes | | no | no | yes: 'within secure and recognized borders, on the basis of the pre-1967 borders' | yes | yes: 're-engage in meaningful negotiations, with the support of the international community' | no explicit mention ('support of the international community') |

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| Mladenov 21 December 2020 United Nations Security Council briefing | no | no : 'viability of a future Palestinian State'; 'undermine the establishment of a viable and contiguous Palestinian State as part of a negotiated two-state solution'; 'prospect of achieving a two-State solution' | yes | yes | no | yes: 'Occupied Palestinian Territory'; 'Occupied West Bank' | no | no | yes: 'meaningful negotiations'; 'direct negotiations facilitated by the international community' | yes |
| 16 January 2021 Secretary-General on Palestinian elections (as transmitted by his spokesperson) | no | no | yes: 'restarting a process towards a negotiated two-State solution' | yes | no | No: '(however' 'Occupied West Bank, including East Jerusalem and Gaza) | yes | no | yes: 'The Secretary-General hopes that the holding of the elections will contribute to restarting a process towards a negotiated two-State solution based on the pre-1967 lines, and in accordance with relevant UN resolutions, bilateral agreements and international law' | no: '(however, United Nations documents etc) |
| Wennesland 26 January 2021 United Nations Security Council briefing | no: (only 'Palestine Authority') | no : 'Elections are a crucial part of building a democratic Palestinian State'; 'settlements [...] undermine the prospect of achieving a two-state solution'; 'supporting Palestinians and Israelis to resolve the conflict; end the occupation and achieve the vision of two states' | yes | yes | no | yes: 'Occupied Palestinian Territory'; 'Occupied West Bank' | yes: 'the vision of two States living side by side in peace and security, based on the 1967 lines, UN resolutions and international law' | yes | yes: 'to identify concrete steps to bring the parties back to the path of meaningful negotiations' | yes |
| 28 January 2021 Guteres on Palestine United Nations Press Conference (SG/SM/20559) | yes: 'in Palestine, in the State of Palestine' | no | 'to create a positive environment for the future of the peace process in the Palestinian Israeli situation and for the rights of the Palestinian people, namely, its right to self-determination and its right to independence, to be fully respected' | yes | no | no | no | indirect reference: ('self-determination') | yes: 'to facilitate the resumption of a true peace process [...] that [...] can only be successful if it is based on the two-State solution and if it is based on all the international agreements that already exist in this regard' | yes |

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| ICJ | | | | | | | | | | |
| Advisory Opinion on the Wall | yes: when citing Switzerland's statement on the accession to the Geneva Convention (para 91) | no | yes | yes: (para 22) | no | yes | yes | yes | yes: reference to "Road map" (paras 53, 162) | yes: (paras 22, 51, 53) |