



**Original: English**

**No. ICC-01/18  
Date: 5 February 2021**

**PRE-TRIAL CHAMBER I**

**Before: Judge Péter Kovács, Presiding Judge  
Judge Marc Perrin de Brichambaut  
Judge Reine Adélaïde Sophie Alapini-Gansou**

**SITUATION IN THE STATE OF PALESTINE**

**URGENT**

**Public**

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

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

**The Office of the Prosecutor**

Fatou Bensouda

James Stewart

**Counsel for the Defence**

**Legal Representatives of Victims**

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

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
for Participation/Reparations**

**The Office of Public Counsel  
for Victims**

Paolina Massidda

Sarah Pellet

**The Office of Public Counsel  
for the Defence**

**States Representatives**

The competent authorities of the State of Palestine

**Amici Curiae**

- Professor John Quigley
- Guernica 37 International Justice Chambers
- The European Centre for Law and Justice
- Professor Hatem Bazian
- The Touro Institute on Human Rights and the Holocaust
- The Czech Republic
- The Israel Bar Association
- Professor Richard Falk
- The Organization of Islamic Cooperation
- The Lawfare Project et al.
- MyAQSA Foundation
- Professor Eyal Benvenisti
- The Federal Republic of Germany
- Australia
- UK Lawyers for Israel et al.
- The Palestinian Bar Association
- Prof. Laurie Blank et al.

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

## **REGISTRY**

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**Registrar**  
Peter Lewis

**Victims and Witnesses Unit**

**Victims Participation and  
Reparations Section**  
Philipp Ambach

**Counsel Support Section**

**Detention Section**

**Other**

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

## I. PROCEDURAL HISTORY

1. On 1 January 2015, the State of Palestine (‘Palestine’) lodged a declaration under article 12(3) of the Rome Statute (the ‘Rome Statute’ or the ‘Statute’), thereby accepting the jurisdiction of the Court over alleged crimes ‘committed in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014’.<sup>1</sup>
2. On 2 January 2015, Palestine deposited its instrument of accession to the Statute with the Secretary-General of the United Nations (the ‘United Nations Secretary-General’) pursuant to article 125(2) of the Statute.<sup>2</sup>
3. On 22 May 2018, Palestine referred the *Situation in the State of Palestine* to the Prosecutor pursuant to articles 13(a) and 14 of the Statute.<sup>3</sup>
4. On 24 May 2018, the Presidency assigned the *Situation in the State of Palestine* to the Chamber (the ‘*Situation in Palestine*’).<sup>4</sup>
5. On 13 July 2018, the Chamber issued its ‘Decision on Information and Outreach for the Victims of the Situation’.<sup>5</sup> The Registry subsequently submitted seven reports on its information and outreach activities in the Situation of Palestine.<sup>6</sup>

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<sup>1</sup> Presidency, Decision assigning the situation in the State of Palestine to Pre-Trial Chamber I (‘Presidency Decision’), [Annex I](#), 24 May 2018, ICC-01/18-1-AnxI, p. 2.

<sup>2</sup> Secretary-General of the United Nations, ‘[Rome Statute of the International Criminal Court, Rome, 17 July 1998, State of Palestine: Accession](#)’, 6 January 2015, C.N.13.2015. TreatiesXVIII.10 (Depositary Notification).

<sup>3</sup> Presidency Decision, [Annex I](#).

<sup>4</sup> [Presidency Decision](#), p. 3.

<sup>5</sup> [ICC-01/18-2](#).

<sup>6</sup> Registry’s Initial Report on Information and Outreach Activities Concerning Victims and Affected Communities in the Situation, 12 November 2018, ICC-01/18-3-Conf; a public redacted version is also available, *see* [ICC-01/18-3-Red](#). Registry’s Second Report on Information and Outreach Activities Concerning Victims and Affected Communities in the Situation, 12 February 2019, ICC-01/18-4-Conf; a public redacted version is also available, *see* [ICC-01/18-4-Red](#). Registry’s Third Report on Information and Outreach Activities Concerning Victims and Affected Communities in the Situation, 13 May 2019, ICC-01/18-5-Conf; a public redacted version is also available, *see* [ICC-01/18-5-Red](#). Registry’s Fourth Report on Information and Outreach Activities Concerning Victims and Affected Communities in the Situation, 9 August 2019, ICC-01/18-6-Conf; a public redacted version is also available, *see* [ICC-01/18-](#)

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

7. On 22 January 2020, the Chamber received the ‘Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine’ (the ‘Prosecutor’s Request’).<sup>8</sup>

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

9. On 20 February 2020, the Chamber issued the ‘Decision on Applications for Leave to File Observations Pursuant to Rule 103 of the Rules of Procedure and

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[6-Red](#). Registry’s Fifth Report on Information and Outreach Activities Concerning Victims and Affected Communities in the Situation, 14 November 2019, [ICC-01/18-7](#). Registry’s Sixth Report on Information and Outreach Activities Concerning Victims and Affected Communities in the Situation, 12 February 2020, ICC-01/18-20-Conf; a public redacted version is also available, *see* [ICC-01/18-20-Red](#). Registry’s Seventh Report on Information and Outreach Activities Concerning Victims and Affected Communities in the Situation, 11 May 2020, ICC-01/18-132-Conf; a public redacted version is also available, *see* [ICC-01/18-132-Red](#).

<sup>7</sup> [ICC-01/18-11](#).

<sup>8</sup> [ICC-01/18-12](#), together with Public Annex A.

<sup>9</sup> [ICC-01/18-14](#).

<sup>10</sup> [ICC-01/18-14](#), paras 13, 17, 20.

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

10. On 11 March 2020, the Chamber issued the ‘Decision on the “Appeal to the ‘Decision on Applications for Leave to File Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence’”’, thereby rejecting the appeal from the 20 February 2020 Decision on behalf of Ralph Wilde and Ata Hindi.<sup>13</sup>

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

12. From 3 until 19 March 2020, the Chamber received observations on the Prosecutor’s Request on behalf of the *amici curiae* authorised to participate in the proceedings by the 20 February 2020 Decision, namely: (i) Professor John Quigley;<sup>15</sup> (ii) the Czech Republic;<sup>16</sup> (iii) the European Centre for Law and Justice;<sup>17</sup> (iv) Professor

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<sup>11</sup> [ICC-01/18-63](#).

<sup>12</sup> [ICC-01/18-63](#), paras 51-56, 59, 60-61.

<sup>13</sup> [ICC-01/18-67](#).

<sup>14</sup> [ICC-01/18-82](#) (submitted and notified on 16 March 2020).

<sup>15</sup> [ICC-01/18-66](#), together with annex (submitted and notified on 3 March 2020).

<sup>16</sup> [ICC-01/18-69](#) (submitted and notified on 13 March 2020).

<sup>17</sup> [ICC-01/18-70](#) (submitted on 13 March 2020, notified on 16 March 2020).

William Schabas;<sup>18</sup> (v) the Palestinian Bar Association;<sup>19</sup> (vi) Professor Asem Khalil and Assistant Professor Halla Shoaibi;<sup>20</sup> (vii) Professor Hatem Bazian;<sup>21</sup> (viii) Professor Malcolm N Shaw;<sup>22</sup> (ix) the Republic of Austria;<sup>23</sup> (x) Professor Richard Falk;<sup>24</sup> (xi) MyAQSA Foundation;<sup>25</sup> (xii) Shurat Hadin – Israel Law Center;<sup>26</sup> (xiii) the Israel Bar Association;<sup>27</sup> (xiv) the Lawfare Project, the Institute for NGO Research, Palestinian Media Watch, and the Jerusalem Center for Public Affairs;<sup>28</sup> (xv) Todd F. Buchwald and Stephen J. Rapp;<sup>29</sup> (xvi) the Organization of Islamic Cooperation;<sup>30</sup> (xvii) the International Federation for Human Rights, No Peace Without Justice, Women’s Initiatives for Gender Justice and REDRESS;<sup>31</sup> (xviii) Australia;<sup>32</sup> (xix) Me Yael Vias Gvirsman;<sup>33</sup> (xx) Hungary;<sup>34</sup> (xxi) the Office of Public Counsel for the Defence;<sup>35</sup> (xxii) Guernica 37 International Justice Chambers;<sup>36</sup> (xxiii) UK Lawyers for Israel, B’nai B’rith UK, the International Legal Forum, the Jerusalem Initiative and the Simon Wiesenthal Centre;<sup>37</sup> (xxiv) Prof. Laurie Blank, Dr. Matthijs de Blois, Prof. Geoffrey Corn, Dr. Daphné Richemond-Barak, Prof. Gregory Rose, Prof. Robbie Sabel, Prof. Gil Troy and Mr. Andrew Tucker;<sup>38</sup> (xxv) Ambassador Dennis Ross;<sup>39</sup> (xxvi) Professor Eyal Benvenisti;<sup>40</sup> (xxvii) the Palestinian Center for Human Rights, Al-Haq Law in the Service of Mankind, Al-Mezan Center for Human Rights and Aldameer Association

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<sup>18</sup> [ICC-01/18-71](#) (submitted on 15 March 2020, notified on 16 March 2020).

<sup>19</sup> [ICC-01/18-72](#) (submitted on 15 March 2020, notified on 16 March 2020).

<sup>20</sup> [ICC-01/18-73](#) (submitted and notified on 16 March 2020).

<sup>21</sup> [ICC-01/18-74](#) (submitted and notified on 16 March 2020).

<sup>22</sup> [ICC-01/18-75](#) (submitted and notified on 16 March 2020).

<sup>23</sup> [ICC-01/18-76](#) (submitted and notified on 16 March 2020).

<sup>24</sup> [ICC-01/18-77](#) (submitted and notified on 16 March 2020).

<sup>25</sup> [ICC-01/18-78](#) (submitted and notified on 16 March 2020).

<sup>26</sup> [ICC-01/18-79](#) (submitted and notified on 16 March 2020).

<sup>27</sup> [ICC-01/18-80](#) (submitted and notified on 16 March 2020).

<sup>28</sup> [ICC-01/18-81](#) (submitted and notified on 16 March 2020).

<sup>29</sup> [ICC-01/18-83](#) (submitted and notified on 16 March 2020).

<sup>30</sup> [ICC-01/18-84](#) (submitted and notified on 16 March 2020).

<sup>31</sup> [ICC-01/18-85](#) (submitted and notified on 16 March 2020).

<sup>32</sup> [ICC-01/18-86](#) (submitted and notified on 16 March 2020).

<sup>33</sup> [ICC-01/18-88](#) (submitted and notified on 16 March 2020).

<sup>34</sup> [ICC-01/18-89](#) (submitted and notified on 16 March 2020).

<sup>35</sup> [ICC-01/18-90](#) (submitted and notified on 16 March 2020).

<sup>36</sup> [ICC-01/18-91](#) (submitted on 16 March 2020, notified on 17 March 2020).

<sup>37</sup> [ICC-01/18-92](#), together with annex (submitted on 16 March 2020, notified on 17 March 2020).

<sup>38</sup> [ICC-01/18-93](#), together with annex (submitted on 16 March 2020, notified on 17 March 2020).

<sup>39</sup> [ICC-01/18-94](#) (submitted on 16 March 2020, notified on 17 March 2020).

<sup>40</sup> [ICC-01/18-95](#) (submitted on 16 March 2020, notified on 17 March 2020).



for Human Rights;<sup>41</sup> (xxviii) the Honourable Professor Robert Badinter, the Honourable Professor Irwin Cotler, Professor David Crane, Professor Jean-François Gaudreault-DesBiens, Lord David Pannick and Professor Guglielmo Verdirame;<sup>42</sup> (xxix) the International Association of Jewish Lawyers and Jurists;<sup>43</sup> (xxx) the Popular Conference for Palestinians Abroad;<sup>44</sup> (xxxi) the Touro Institute on Human Rights and the Holocaust;<sup>45</sup> (xxxii) the Federal Republic of Germany;<sup>46</sup> (xxxiii) International-Lawyers.org;<sup>47</sup> (xxxiv) the Federative Republic of Brazil;<sup>48</sup> (xxxv) Dr. Robert Heinsch and Dr. Giulia Pinzauti;<sup>49</sup> (xxxvi) the Israel Forever Foundation;<sup>50</sup> (xxxvii) Intellectum Scientific Society;<sup>51</sup> (xxxviii) Dr. Uri Weiss;<sup>52</sup> (xxxix) Dr. Frank Romano;<sup>53</sup> (xl) the International Commission of Jurists;<sup>54</sup> (xli) the International Association of Democratic Lawyers;<sup>55</sup> (xlii) the Republic of Uganda;<sup>56</sup> and (xliii) the League of Arab States.<sup>57</sup>

13. From 12 until 25 March 2020, the Chamber received the following observations on the Prosecutor's Request on behalf of various (groups of) victims: (i) 'The Khan al-Ahmar Victims' Observations';<sup>58</sup> (ii) 'Victims' observations on the Prosecutor's request for a ruling on the Court's territorial jurisdiction in Palestine';<sup>59</sup>

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

<sup>42</sup> [ICC-01/18-97](#) (submitted on 16 March 2020, notified on 17 March 2020).

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

<sup>44</sup> [ICC-01/18-100](#) (submitted on 16 March 2020, notified on 17 March 2020).

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

<sup>46</sup> [ICC-01/18-103](#) (submitted on 16 March 2020, notified on 17 March 2020).

<sup>47</sup> [ICC-01/18-104](#) (submitted on 16 March 2020, notified on 17 March 2020).

<sup>48</sup> [ICC-01/18-106](#) (submitted on 16 March 2020, notified on 17 March 2020).

<sup>49</sup> [ICC-01/18-107](#) (submitted on 16 March 2020, notified on 17 March 2020).

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

<sup>51</sup> [ICC-01/18-111](#) (submitted on 16 March 2020, notified on 17 March 2020).

<sup>52</sup> [ICC-01/18-114](#) (submitted on 16 March 2020, notified on 17 March 2020).

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

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

<sup>55</sup> [ICC-01/18-118](#) (submitted on 16 March 2020, notified on 18 March 2020).

<sup>56</sup> [ICC-01/18-119](#) (submitted on 16 March 2020, notified on 18 March 2020).

<sup>57</sup> [ICC-01/18-122](#) (submitted on 16 March 2020, notified on 19 March 2020).

<sup>58</sup> [ICC-01/18-68](#) (submitted by Liesbeth Zegveld and notified on 12 March 2020).

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

(iii) ‘Submissions on behalf of child victims and their families pursuant to article 19(3) of the statute’;<sup>60</sup> (iv) ‘Observations on the “Prosecutor request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine” on behalf of unrepresented victims’;<sup>61</sup> (v) ‘Observation of Victims of Palestinian Terror in respect to the Court’s Territorial Jurisdiction in Palestine’;<sup>62</sup> (vi) ‘Persecution Victims’ Observations’;<sup>63</sup> (vii) ‘Submission on Behalf of Palestinian Victims Residents of the Gaza Strip’;<sup>64</sup> (viii) ‘Observations écrites sur la question de compétence énoncée au paragraphe 220 de la Demande du Procureur’;<sup>65</sup> (ix) ‘Observations au nom des victimes palestiniennes sur la Demande du Procureur’;<sup>66</sup> (x) ‘Observations on behalf of Victims’;<sup>67</sup> and (xi) ‘Submission pursuant to article 19(3) of the Rome Statute in accordance with paragraph 220 of the Prosecution Request for a ruling on the Court’s territorial jurisdiction in Palestine’.<sup>68</sup>

14. On 23 March 2020, the Chamber issued the ‘Decision on the “Prosecution’s Urgent Request for Extension of Time”’, thereby granting the Prosecutor’s request for an extension of the time limit to submit her response to any observations on the Prosecutor’s Request until 30 April 2020.<sup>69</sup>

15. On 31 March 2020, the Chamber issued the ‘Decision on Requests for Variation of the Time Limit for Submitting Observations and Issues Arising out of *Amici Curiae* Observations’, thereby: (i) rejecting the corrected version of the observations on behalf

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

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

<sup>62</sup> ICC-01/18-109-Conf (submitted by Nitsana Darshan-Leitner (Shurat HaDin – Israel Law Center [on behalf of Victims of Palestinian Terror] on 16 March 2020, notified on 17 March 2020); a public redacted version is also available; see [ICC-01/18-109-Red](#).

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

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

<sup>65</sup> [ICC-01/18-113](#) (submitted by Dominique Cochain Assi on 16 March 2020, notified on 17 March 2020).

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

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

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

<sup>69</sup> [ICC-01/18-125](#).

of the Touro Institute on Human Rights and the Holocaust; (ii) finding that Mr Fouad Baker does not have standing to submit observations on the Prosecutor’s Request and declining to accept the documents transmitted by the Registry on his behalf; and (iii) rejecting the ‘Amicus Curiae Request for Extension of Time’ on behalf of Intellectum Scientific Society and the ‘Request for an extension of time to submit written observations’ on behalf of Ms Jennifer Robinson.<sup>70</sup>

16. On 30 April 2020, the Chamber received the ‘Prosecution Response to the Observations of *Amici Curiae*, Legal Representatives of Victims, and States’.<sup>71</sup>

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

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

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

20. On 8 June 2020, the Chamber received the ‘Prosecution Response to “The State of Palestine’s response to the Pre-Trial Chamber’s Order requesting additional information”’.<sup>75</sup>

21. On 17 June 2020, the Chamber issued the ‘Decision on the “Motion for Leave to File Supplemental Observations with respect to the Situation in the State of Palestine

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<sup>70</sup> [ICC-01/18-128](#).

<sup>71</sup> [ICC-01/18-131](#), together with annex A.

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

<sup>73</sup> [ICC-01/18-134](#).

<sup>74</sup> [ICC-01/18-135](#), together with public Annex A.

<sup>75</sup> [ICC-01/18-136](#).

on behalf of the European Centre for Law and Justice’’, thereby: (i) rejecting the ‘Motion for Leave to File Supplemental Observations with respect to the Situation in the State of Palestine on behalf of the European Centre for Law and Justice’; and (ii) ordering the Registry to strike this Motion from the record of the *Situation in Palestine* and to withdraw it from the Court’s website.<sup>76</sup>

## II. SUBMISSIONS AND OBSERVATIONS

### A. The Prosecutor’s Request

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

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<sup>76</sup> [ICC-01/18-138](#).

<sup>77</sup> [ICC-01/18-12](#), para. 3.

<sup>78</sup> [ICC-01/18-12](#), para. 5.

<sup>79</sup> [ICC-01/18-12](#), paras 5-6, 20.

<sup>80</sup> [ICC-01/18-12](#), paras 22-23.

<sup>81</sup> [ICC-01/18-12](#), para. 29.

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

24. With regard to her aforementioned conclusion regarding the scope of the Court’s territorial jurisdiction, the Prosecutor indicates that she ‘has been guided by Palestine’s status as a State Party to the Rome Statute since 2 January 2015 following the deposit of its instruments of accession with the United Nations [...] Secretary General pursuant to article 125(3)’.<sup>90</sup> The Prosecutor recalls that ‘in order to exercise its jurisdiction in the territory of Palestine under 12(2), the Court need not conduct a separate assessment

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<sup>82</sup> [ICC-01/18-12](#), para. 19.

<sup>83</sup> [ICC-01/18-12](#), para. 21.

<sup>84</sup> [ICC-01/18-12](#), para. 22.

<sup>85</sup> [ICC-01/18-12](#), para. 24.

<sup>86</sup> [ICC-01/18-12](#), paras 24-28.

<sup>87</sup> [ICC-01/18-12](#), para. 30.

<sup>88</sup> [ICC-01/18-12](#), para. 36.

<sup>89</sup> [ICC-01/18-12](#), para. 38.

<sup>90</sup> [ICC-01/18-12](#), para. 7.

of Palestine’s status (nor of its Statehood) from that which was conducted when Palestine joined the Court’.<sup>91</sup> Consequently, the Prosecutor avers that Palestine’s accession to the Statute has the following two consequences. First, ‘under the ordinary operation of the Rome Statute, a State that becomes a Party to the Statute pursuant to article 125(3) “thereby accepts the jurisdiction of the Court” according to article 12(1)’.<sup>92</sup> Second, ‘[a]rticle 12(2) in turn specifies the bases on which the Court may exercise its jurisdiction as a consequence of a State becoming a Party to the Statute under article 12(1) or having lodged a declaration under article 12(3)’.<sup>93</sup> Accordingly, ‘a state under article 12(1) and article 125(3) should also be considered a State under article 12(2)’.<sup>94</sup> The Prosecutor contends that this logic should also apply to Palestine.<sup>95</sup> In the alternative, the Prosecutor submits that the Chamber could likewise conclude—for the strict purposes of the Statute only—that Palestine is a State under relevant principles and rules of international law’.<sup>96</sup> In this regard, the Prosecutor argues that Palestine’s restrictions in the practical exercise of its authority over the entirety of the Occupied Palestinian Territory have ‘to be assessed against the backdrop of the Palestinian people’s right to self-determination [...] the exercise of which has been severely impaired by, *inter alia*, the imposition of certain unlawful measures’.<sup>97</sup>

25. With regard to the argument that ‘Palestine’s ability to delegate its jurisdiction to the Court is limited because it does not have criminal jurisdiction with respect to Israelis or with respect to crimes committed in Area C (*nemo dat quod non habet*)’,<sup>98</sup> the Prosecutor ‘does not consider these limitations in the Oslo Accords to be obstacles to the Court’s exercise of jurisdiction’.<sup>99</sup> First, the Prosecutor advances that the Oslo Accords ‘have not precluded Palestine from acceding to numerous multilateral treaties, many of them under the auspices of the United Nations, and others with national governments as depositaries’<sup>100</sup> and that, as a consequence of the United Nations

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<sup>91</sup> [ICC-01/18-12](#), para. 7.

<sup>92</sup> [ICC-01/18-12](#), para. 7.

<sup>93</sup> [ICC-01/18-12](#), para. 7.

<sup>94</sup> [ICC-01/18-12](#), para. 7.

<sup>95</sup> [ICC-01/18-12](#), para. 7.

<sup>96</sup> [ICC-01/18-12](#), para. 9.

<sup>97</sup> [ICC-01/18-12](#), para. 9.

<sup>98</sup> [ICC-01/18-12](#), para. 183.

<sup>99</sup> [ICC-01/18-12](#), para. 183.

<sup>100</sup> [ICC-01/18-12](#), para. 184 (footnotes omitted).

General Assembly Resolution 67/19, ‘the UN OLA expressly recognised Palestine’s capacity to accede to treaties bearing the “all States” or “any State” formula’.<sup>101</sup> Accordingly, the Oslo Accords ‘appear not to have affected Palestine’s ability to act internationally’.<sup>102</sup> According to the Prosecutor, this means that ‘the resolution of the State’s potential conflicting obligations is not a question that affects the Court’s jurisdiction’ upon accession to the Statute, although this ‘may become an issue of cooperation or complementarity during the investigation and prosecution stages’.<sup>103</sup> Second, the Prosecutor argues that the Oslo Accords, as a ‘special agreement’ within the terms of Geneva Convention IV, ‘cannot violate peremptory rights nor can they derogate from or deny the rights of “protected persons” under occupation’.<sup>104</sup>

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

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

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<sup>101</sup> [ICC-01/18-12](#), para. 184 (footnotes omitted).

<sup>102</sup> [ICC-01/18-12](#), para. 184.

<sup>103</sup> [ICC-01/18-12](#), para. 185 (footnote omitted).

<sup>104</sup> [ICC-01/18-12](#), para. 186.

<sup>105</sup> [ICC-01/18-12](#); [ICC-01/18-12-AnxA](#), p. 34.

<sup>106</sup> Israel, Office of the Attorney General, [The International Criminal Court’s Lack of Jurisdiction over the So-Called “Situation in Palestine”](#), 20 December 2019 (the ‘Israel Attorney General Memorandum’), para. 2; *see also* paras 7-16; Israel, Ministry of Foreign Affairs, [Office of the Legal Adviser, The International Criminal Court’s Lack of Jurisdiction over the So-Called “Situation in Palestine”, Synopsis](#), 20 December 2019 (the ‘Israel Ministry of Foreign Affairs Memorandum’), para. 8.

<sup>107</sup> [Israel Attorney General Memorandum](#), para. 19; [Israel Ministry of Foreign Affairs Memorandum](#), paras 14-15, 19-20.

Palestinian participation in the Court’s Assembly of States Parties cannot be taken to constitute or demonstrate such statehood either’.<sup>108</sup>

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

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

30. Lastly, Israel professes that, ‘even if the Rome Statute were to be misinterpreted so as to allow for non-sovereign entities to confer jurisdiction upon the Court, the latter

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<sup>108</sup> [Israel Attorney General Memorandum](#), para. 19; *see also* paras 21-25; [Israel Ministry of Foreign Affairs Memorandum](#), paras 16-18.

<sup>109</sup> [Israel Attorney General Memorandum](#), para. 26; *see also* paras 27-39; [Israel Ministry of Foreign Affairs Memorandum](#), paras 21-22, 29.

<sup>110</sup> [Israel Attorney General Memorandum](#), para. 32; *see also* paras 27-31; [Israel Ministry of Foreign Affairs Memorandum](#), para. 23.

<sup>111</sup> [Israel Attorney General Memorandum](#), para. 33; *see also* paras 34-39; [Israel Ministry of Foreign Affairs Memorandum](#), paras 4, 23-24.

<sup>112</sup> [Israel Attorney General Memorandum](#), para. 26; *see also* paras 40-48; [Israel Ministry of Foreign Affairs Memorandum](#), paras 25-28.

<sup>113</sup> [Israel Attorney General Memorandum](#), para. 49; [Israel Ministry of Foreign Affairs Memorandum](#), paras 31-32.

<sup>114</sup> [Israel Attorney General Memorandum](#), para. 50; *see also* paras 50-54; [Israel Ministry of Foreign Affairs Memorandum](#), para. 32.



would still be constitutionally constrained by the limits of delegation and unable to exercise jurisdiction where the delegating entity has no jurisdiction to the extent required'.<sup>115</sup> In this regard, Israel adds that, '[a]s the Palestinian entity has no criminal jurisdiction over either Israeli nationals or over Area C and Jerusalem [pursuant to the Israeli-Palestinian Interim Agreement of 1995], it is therefore legally impossible for it to delegate any such jurisdiction to the Court'.<sup>116</sup>

## B. Observations on behalf of Palestine

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

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

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

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<sup>115</sup> [Israel Attorney General Memorandum](#), para. 55.

<sup>116</sup> [Israel Attorney General Memorandum](#), para. 60; *see also* paras 56-59; [Israel Ministry of Foreign Affairs Memorandum](#), para. 30.

<sup>117</sup> [ICC-01/18-82](#), para. 6.

<sup>118</sup> [ICC-01/18-82](#), para. 7.

<sup>119</sup> [ICC-01/18-82](#), para. 8.

<sup>120</sup> [ICC-01/18-82](#), para. 9.

<sup>121</sup> [ICC-01/18-82](#), para. 10.

<sup>122</sup> [ICC-01/18-82](#), para. 21.

<sup>123</sup> [ICC-01/18-82](#), para. 21.

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

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

36. Lastly, Palestine is of the view that ‘[i]t is beyond dispute that special agreements between an occupied State and an occupying Power cannot diminish or prejudice the rights of those under occupation’.<sup>132</sup> In this regard, Palestine adds that ‘an agreement that would purportedly qualify or diminish the obligations under the Statute of a State Party to investigate and prosecute crimes within the jurisdiction of the Court would be

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<sup>124</sup> [ICC-01/18-82](#), para. 28.

<sup>125</sup> [ICC-01/18-82](#), para. 29.

<sup>126</sup> [ICC-01/18-82](#), para. 34.

<sup>127</sup> [ICC-01/18-82](#), para. 40.

<sup>128</sup> [ICC-01/18-82](#), para. 45.

<sup>129</sup> [ICC-01/18-82](#), para. 50.

<sup>130</sup> [ICC-01/18-82](#), para. 61.

<sup>131</sup> [ICC-01/18-82](#), para. 63.

<sup>132</sup> [ICC-01/18-82](#), para. 64.

null and void as the Statute reflects *jus cogens* prohibitions that would prevail over any competing legal obligations not of the same rank'.<sup>133</sup>

### C. Observations on behalf of Victims

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

38. *The Khan al-Ahmar Victims' Observations (ICC-01/18-68)*. The victims aver that 'Palestine is a State for the purposes of article 12(2)(a) and that the Court has territorial jurisdiction over Palestine'.<sup>134</sup> In this regard, the victims raise three arguments. First, Palestine's 'status as an ICC State Party must be read in the context of the relevant proceedings before this Court and not in *abstract* or based on political considerations'.<sup>135</sup> Second, the Chamber 'is bound to interpret Article 12(2)(a) consistent with prevention, effective prosecution and punishment of grave crimes arising out of the hostilities and Israel's illegal settlement activities' in view of the object and purpose of the Statute.<sup>136</sup> Third, pursuant to article 21(3) of the Statute, article 12(2)(a) of the Statute must be interpreted in accordance with the victims' rights to *inter alia* access to justice, effective remedies, and redress.<sup>137</sup>

39. *Victims' observations on the Prosecutor's request for a ruling on the Court's territorial jurisdiction in Palestine (ICC-01/18-99)*. The victims are of the view that '[t]he Chamber can validly decline to rule on the Request, and invite the Prosecutor to commence the investigation'.<sup>138</sup> In addition, the victims submit that, '[s]hould the Chamber decide to rule on the Request, it should find that Palestine validly acceded to the Statute' and '[i]t is entitled, as is every State Party, to refer crimes on its territory for investigation by the Court'.<sup>139</sup> The victims add that, alternatively, the Chamber

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<sup>133</sup> [ICC-01/18-82](#), para. 68.

<sup>134</sup> [ICC-01/18-68](#), para. 19.

<sup>135</sup> [ICC-01/18-68](#), para. 19 (emphasis in original).

<sup>136</sup> [ICC-01/18-68](#), para. 19.

<sup>137</sup> [ICC-01/18-68](#), para. 19.

<sup>138</sup> [ICC-01/18-99](#), para. 2. *See also* paras 16-32.

<sup>139</sup> [ICC-01/18-99](#), para. 3. *See also* paras 33-46.

‘ought to apply a treaty-specific definition of the term “State”’.<sup>140</sup> Furthermore, according to the victims, ‘[t]he scope of the territory of Palestine has been recognized [...] as encompassing the West Bank, including East Jerusalem, and the Gaza Strip’.<sup>141</sup> Lastly, the victims aver that ‘[a]ny interpretation of the Oslo Accords which reduces the protections available to the Victims under the Fourth Geneva Convention, or breaches peremptory norms of customary international law, is invalid’.<sup>142</sup>

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

41. *Observations on the “Prosecutor request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine” on behalf of unrepresented victims (ICC-01/18-105)*. The victims contend that ‘the Chamber is empowered to rule on the scope of the Court’s territorial jurisdiction in the situation in Palestine on the basis of both Article 19(3) and the principle of “Kompetenz-Kompetenz” or “compétence de la compétence”’, while it could alternatively rely on article 119(1) of the Statute.<sup>147</sup> The victims further add that, ‘[i]rrespective of the legal basis chosen by the Chamber, it would be opportune for the Chamber to rule on the issue at the present stage of the proceedings in the interests of judicial economy, as well as to enable victims to

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<sup>140</sup> [ICC-01/18-99](#), para. 48. *See also* paras 47-86.

<sup>141</sup> [ICC-01/18-99](#), para. 4. *See also* paras 87-105.

<sup>142</sup> [ICC-01/18-99](#), para. 5. *See also* paras 106-118.

<sup>143</sup> [ICC-01/18-102](#), para. 55.

<sup>144</sup> [ICC-01/18-102](#), para. 61.

<sup>145</sup> [ICC-01/18-102](#), p. 17.

<sup>146</sup> [ICC-01/18-102](#), para. 73.

<sup>147</sup> [ICC-01/18-105](#), para. 1. *See also* paras 4-7.

meaningfully contribute to the Prosecution’s investigation’.<sup>148</sup> Furthermore, in the submission of the victims, ‘[t]he Secretary-General’s acceptance of [Palestine’s instrument of accession] based on General Assembly Resolution 67/19 settled the question of Palestine’s statehood for the purposes of accession to the Statute’.<sup>149</sup> The victims add that Palestine ‘qualifies as a “State” for the purposes of Article 12(2)(a) on the same basis’.<sup>150</sup> Lastly, according to the victims, ‘[a]pplicable international law rules confirm that the “territory of” Palestine covered by the Court’s jurisdiction extends to [...] the West Bank (including East Jerusalem) and the Gaza Strip’.<sup>151</sup>

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

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

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<sup>148</sup> [ICC-01/18-105](#), para. 1. *See also* paras 8-11.

<sup>149</sup> [ICC-01/18-105](#), para. 2. *See also* paras 12-20, 27-29.

<sup>150</sup> [ICC-01/18-105](#), para. 2. *See also* paras 21-26.

<sup>151</sup> [ICC-01/18-105](#), para. 3. *See also* paras 30-56.

<sup>152</sup> [ICC-01/18-109-Red](#), para. 55.

<sup>153</sup> [ICC-01/18-109-Red](#), paras 56-57. *See also* paras 61-65, 72-73.

<sup>154</sup> [ICC-01/18-109-Red](#), para. 68. *See also* paras 69-71.

<sup>155</sup> [ICC-01/18-110-Red](#), para. 2. *See also* paras 29-35.

community to comprise the Gaza Strip and West Bank, including East Jerusalem'.<sup>156</sup> According to the victims, '[s]uch a conclusion is mandated by a plain reading of the Rome Statute and Rules of the Court as well as the legislative history of relevant provisions, supported by Court precedent, and aligns fully with the object and purpose of the ICC'.<sup>157</sup> The victims add that 'such a conclusion accords with the obligation of the State of Palestine to provide a remedy for serious violations of international law that occur on its territory and/or are committed by or against its nationals'.<sup>158</sup>

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

45. *Observations écrites sur la question de compétence énoncée au paragraphe 220 de la Demande du Procureur (ICC-01/18-113)*. The victims submit that the Chamber '*ne pourra que se déclarer incompétente à remettre en cause l'adhésion de la Palestine au Statut et en conséquence, se déclarer compétente à connaître de la situation en Palestine*'.<sup>163</sup> The victims add that, '*s'il suffisait à une puissance occupante d'annexer un territoire pour exclure celui-ci et sa population du champ d'application des normes protectrices et du bénéfice de la justice pénale internationale, celle-ci n'aurait plus aucun intérêt*'.<sup>164</sup> In addition, according to the victims, '*[i]l convient [de] conclure à la souveraineté palestinienne sur les territoires occupés depuis 1967, dans la partie Est*

<sup>156</sup> [ICC-01/18-110-Red](#), para. 2. *See also* paras 53-55.

<sup>157</sup> [ICC-01/18-110-Red](#), para. 2. *See also* paras 37-52.

<sup>158</sup> [ICC-01/18-110-Red](#), para. 2. *See also* para. 56.

<sup>159</sup> [ICC-01/18-112](#), para. 29. *See also* paras 30-34.

<sup>160</sup> [ICC-01/18-112](#), para. 35. *See also* paras 36-37.

<sup>161</sup> [ICC-01/18-112](#), para. 38. *See also* paras 39-54.

<sup>162</sup> [ICC-01/18-112](#), para. 62. *See also* paras 63-65.

<sup>163</sup> [ICC-01/18-113](#), para. 16. *See also* paras 2-15.

<sup>164</sup> [ICC-01/18-113](#), para. 24. *See also* paras 16-23.

*de Jérusalem*'.<sup>165</sup> Lastly, it is the view of the victims that '*le statut de la Palestine sous mandat a eu pour effet de conserver, au minimum aux Territoires occupés depuis 1967, y compris Jérusalem-Est, la capacité juridique d'un Etat*'.<sup>166</sup>

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

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

48. *Submission pursuant to article 19(3) of the Rome Statute in accordance with paragraph 220 of the Prosecution Request for a ruling on the Court's territorial jurisdiction in Palestine (ICC-01/18-126-Red)*. The victims aver that 'the exercise of effective control under the peculiar circumstances of the occupation is not an adequate criterion for examining Palestinian statehood'.<sup>171</sup> In addition, according to the victims, 'a multitude of UN Resolutions and relevant documents carrying international legal weight have identified the territory in question as the "Occupied Palestinian Territory" which includes Gaza, the West Bank and East Jerusalem, in agreement with the pre-

<sup>165</sup> [ICC-01/18-113](#), para. 44. *See also* paras 24-43.

<sup>166</sup> [ICC-01/18-113](#), para. 69. *See also* paras 44-68.

<sup>167</sup> [ICC-01/18-120](#), paras 10, 28. *See also* paras 11-27.

<sup>168</sup> [ICC-01/18-120](#), para. 37. *See also* paras 38-61.

<sup>169</sup> [ICC-01/18-123](#), para. 8. *See also* paras 10-27.

<sup>170</sup> [ICC-01/18-123](#), para. 8. *See also* paras 28-35.

<sup>171</sup> [ICC-01/18-126-Red](#), para. 20. *See also* paras 26-40.

1967 lines'.<sup>172</sup> In any event, the victims are of the view that 'the ongoing occupation should not prejudice Palestine from eventual statehood claims and does not interfere with the Court's ability to consider Palestine a state for the purposes of the Rome Statute'.<sup>173</sup> Lastly, the victims add that, 'as a "member state" for the purposes of the Rome Statute, Palestine can delegate criminal jurisdiction over the territories identified as the Occupied Palestinian Territory'.<sup>174</sup>

#### D. Observations on behalf of *Amici Curiae*

49. The Chamber has carefully studied the numerous observations submitted by the *amici curiae*. However, the Chamber has refrained from summarising these observations in full for reasons of efficiency and judicial economy. The Chamber will, nevertheless, address particular arguments raised by certain *amici curiae* in so far as it considers it necessary to do so for its determination.

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

51. The following *amici curiae* take the view that, for the reasons specified in their observations, the conditions for the exercise of the Court's jurisdiction in the present Situation have not been fulfilled: (i) the Czech Republic;<sup>176</sup> (ii) the European Centre for Law and Justice;<sup>177</sup> (iii) Professor Malcolm N Shaw;<sup>178</sup> (iv) the Republic of Austria;<sup>179</sup> (v) Shurat Hadin – Israel Law Center;<sup>180</sup> (vi) the Israel Bar Association;<sup>181</sup> (vii) the Lawfare Project, the Institute for NGO Research, Palestinian Media Watch, and the Jerusalem Center for Public Affairs;<sup>182</sup> (viii) Todd F. Buchwald and Stephen J. Rapp;<sup>183</sup>

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<sup>172</sup> [ICC-01/18-126-Red](#), para. 21. *See also* paras 41-48.

<sup>173</sup> [ICC-01/18-126-Red](#), para. 23. *See also* paras 49-55.

<sup>174</sup> [ICC-01/18-126-Red](#), para. 24. *See also* paras 56-59.

<sup>175</sup> [ICC-01/18-90](#).

<sup>176</sup> [ICC-01/18-69](#).

<sup>177</sup> [ICC-01/18-70](#).

<sup>178</sup> [ICC-01/18-75](#).

<sup>179</sup> [ICC-01/18-76](#).

<sup>180</sup> [ICC-01/18-79](#).

<sup>181</sup> [ICC-01/18-80](#).

<sup>182</sup> [ICC-01/18-81](#).

<sup>183</sup> [ICC-01/18-83](#).



(ix) Australia;<sup>184</sup> (x) Me Yael Vias Gvirsman;<sup>185</sup> (xi) Hungary;<sup>186</sup> (xii) UK Lawyers for Israel, B'nai B'rith UK, the International Legal Forum, the Jerusalem Initiative and the Simon Wiesenthal Centre;<sup>187</sup> (xiii) Prof. Laurie Blank, Dr. Matthijs de Blois, Prof. Geoffrey Corn, Dr. Daphné Richemond-Barak, Prof. Gregory Rose, Prof. Robbie Sabel, Prof. Gil Troy and Mr. Andrew Tucker;<sup>188</sup> (xiv) Ambassador Dennis Ross;<sup>189</sup> (xv) Professor Eyal Benvenisti;<sup>190</sup> (xvi) the Honourable Professor Robert Badinter, the Honourable Professor Irwin Cotler, Professor David Crane, Professor Jean-François Gaudreault-DesBiens, Lord David Pannick and Professor Guglielmo Verdirame;<sup>191</sup> (xvii) the International Association of Jewish Lawyers and Jurists;<sup>192</sup> (xviii) the Touro Institute on Human Rights and the Holocaust;<sup>193</sup> (xix) the Federal Republic of Germany;<sup>194</sup> (xx) the Federative Republic of Brazil;<sup>195</sup> (xxi) the Israel Forever Foundation;<sup>196</sup> and (xxii) the Republic of Uganda.<sup>197</sup>

52. The following *amici curiae* take the view that, for the reasons specified in their observations, the conditions for the exercise of the Court's jurisdiction in the present Situation have been fulfilled: (i) Professor John Quigley;<sup>198</sup> (ii) Professor William Schabas;<sup>199</sup> (iii) the Palestinian Bar Association;<sup>200</sup> (iv) Professor Asem Khalil and Assistant Professor Halla Shoaibi;<sup>201</sup> (v) Professor Hatem Bazian;<sup>202</sup> (vi) Professor Richard Falk;<sup>203</sup> (vii) MyAQSA Foundation;<sup>204</sup> (viii) the Organization of Islamic Cooperation;<sup>205</sup> (ix) the International Federation for Human Rights, No Peace Without

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<sup>184</sup> [ICC-01/18-86](#).

<sup>185</sup> [ICC-01/18-88](#).

<sup>186</sup> [ICC-01/18-89](#).

<sup>187</sup> [ICC-01/18-92](#).

<sup>188</sup> [ICC-01/18-93](#).

<sup>189</sup> [ICC-01/18-94](#).

<sup>190</sup> [ICC-01/18-95](#).

<sup>191</sup> [ICC-01/18-97](#).

<sup>192</sup> [ICC-01/18-98-Corr.](#)

<sup>193</sup> [ICC-01/18-101](#).

<sup>194</sup> [ICC-01/18-103](#).

<sup>195</sup> [ICC-01/18-106](#).

<sup>196</sup> [ICC-01/18-108-Corr.](#)

<sup>197</sup> [ICC-01/18-119](#).

<sup>198</sup> [ICC-01/18-66](#).

<sup>199</sup> [ICC-01/18-71](#).

<sup>200</sup> [ICC-01/18-72](#).

<sup>201</sup> [ICC-01/18-73](#).

<sup>202</sup> [ICC-01/18-74](#).

<sup>203</sup> [ICC-01/18-77](#).

<sup>204</sup> [ICC-01/18-78](#).

<sup>205</sup> [ICC-01/18-84](#).

Justice, Women’s Initiatives for Gender Justice and REDRESS;<sup>206</sup> (x) Guernica 37 International Justice Chambers;<sup>207</sup> (xi) the Palestinian Center for Human Rights, Al-Haq Law in the Service of Mankind, Al-Mezan Center for Human Rights and Aldameer Association for Human Rights;<sup>208</sup> (xii) the Popular Conference for Palestinians Abroad;<sup>209</sup> (xiii) International-Lawyers.org;<sup>210</sup> (xiv) Dr. Robert Heinsch and Dr. Giulia Pinzauti;<sup>211</sup> (xv) Intellectum Scientific Society;<sup>212</sup> (xvi) Dr. Uri Weiss;<sup>213</sup> (xvii) Dr. Frank Romano;<sup>214</sup> (xviii) the International Commission of Jurists;<sup>215</sup> (xix) the International Association of Democratic Lawyers;<sup>216</sup> and (xx) the League of Arab States.<sup>217</sup>

### III. DETERMINATION BY THE CHAMBER

#### A. Preliminary issues

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

53. Some participants, including certain *amici curiae*,<sup>218</sup> State Parties,<sup>219</sup> and representatives of victims,<sup>220</sup> have raised the argument that the Prosecutor’s Request is of a political nature rather than a legal one. On this basis, some have argued that a ruling on the Court’s jurisdiction over the territory of Palestine, with the political consequences it would entail, would constitute a political decision and potentially affect the Court’s legitimacy. Others have stated that the territorial scope of the Court’s jurisdiction is a legal question and falls within the Court’s competence to determine,

<sup>206</sup> [ICC-01/18-85](#).

<sup>207</sup> [ICC-01/18-91](#).

<sup>208</sup> [ICC-01/18-96](#).

<sup>209</sup> [ICC-01/18-100](#).

<sup>210</sup> [ICC-01/18-104](#).

<sup>211</sup> [ICC-01/18-107](#).

<sup>212</sup> [ICC-01/18-111](#).

<sup>213</sup> [ICC-01/18-114](#).

<sup>214</sup> [ICC-01/18-115-Corr.](#)

<sup>215</sup> [ICC-01/18-117](#).

<sup>216</sup> [ICC-01/18-118](#).

<sup>217</sup> [ICC-01/18-122](#).

<sup>218</sup> See [ICC-01/18-108](#), paras 62-64; [ICC-01/18-81](#), paras 8, 21.

<sup>219</sup> See [ICC-01/18-106](#), paras 10, 33; [ICC-01/18-119](#), para. 5.

<sup>220</sup> See [ICC-01/18-110](#), para. 30.

notwithstanding any political ramifications.<sup>221</sup> It is necessary to address those arguments since they not only encompass the case and its developments but also the Court's work and its very mandate.

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

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

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

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<sup>221</sup> See [ICC-01/18-107](#), para. 3; [ICC-01/18-77](#), para. 41; [ICC-01/18-66](#), para. 59; [ICC-01/18-112](#), paras 66-67.

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

including East Jerusalem, and Gaza’,<sup>223</sup> that is capable of a legal answer based on the provisions of the Statute.

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

## 2. Israel’s participation in the proceedings

58. Some participants have argued that the subject-matter of the Prosecutor’s Request cannot be examined by this Chamber as this assessment would take place without the participation of one of the main stakeholders – Israel – and directly impact its territorial sovereignty, referring to the principle of Monetary Gold to support their argument.<sup>226</sup> The International Court of Justice consecrated this principle in the *Monetary Gold Removed from Rome in 1943* case, in which it declared that it could not decide on a

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<sup>223</sup> [ICC-01/18-12](#), para. 220.

<sup>224</sup> See [ICC-01/18-94](#), paras 16, 39, 41; [ICC-01/18-106](#), paras 30-33; [ICC-01/18-119](#), para. 6.

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

<sup>226</sup> See [ICC-01/18-119](#), paras 8-9; [ICC-01/18-108-Corr](#), para. 65; [ICC-01/18-93](#), para. 30.

matter when the legal interest of third parties ‘would not only be affected by the decision, but would form the very subject matter of the decision’.<sup>227</sup>

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

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

### 3. Criminal jurisdiction v. territory of States

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

62. More importantly, as recognised by the Permanent Court of International Justice<sup>231</sup> and explicitly affirmed by this Chamber in the ‘Decision on the

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

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

<sup>229</sup> [ICC-01/18-14](#).

<sup>230</sup> See [ICC-01/18-71](#), para. 27.

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

“Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute” of 6 September 2018, ‘[t]he territoriality of criminal law [...] is not an absolute principle of international law and by no means coincides with territorial sovereignty’.<sup>232</sup> Therefore, any territorial determination by the Chamber for the purpose of defining its territorial jurisdiction for criminal purposes has no bearing on the scope of Palestine’s territory.

## B. The Legal Basis

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

64. In any event, the present proceedings are distinguishable from those pertaining to the 9 April 2018 Request. The latter request arose out of a preliminary examination by the Prosecutor and was assigned to the Chamber under regulation 46(3) of the Regulations of the Court as a ‘matter, request or information not arising out of a situation’ in the absence of either a referral by a State Party or the Security Council, or a request for authorisation of a *proprio motu* investigation.<sup>235</sup> Conversely, with regard to the present request for a ruling on a question of jurisdiction, the Prosecutor has indicated that she ‘is satisfied that there is a reasonable basis to initiate an investigation into the situation in Palestine, pursuant to article 53(1) of the Statute’.<sup>236</sup> In this regard,

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<sup>232</sup> *Request under Regulation 46(3) of the Regulations of the Court*, [Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19\(3\) of the Statute”](#), 6 September 2018, ICC-RoC46(3)-01/18-37 (the ‘*Regulation 46(3) Decision*’), para. 66. See also [ICC-01/18-107](#), para. 75.

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

<sup>234</sup> [Regulation 46\(3\) Decision](#), para. 28.

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

<sup>236</sup> [ICC-01/18-12](#), para. 2.

she has specified that ‘[t]here is a reasonable basis to believe that war crimes have been or are being committed in the West Bank, including East Jerusalem, and the Gaza Strip’, ‘potential cases arising from the situation which would be admissible’ have been identified, and ‘[t]here are no substantial reasons to believe that an investigation would not serve the interests of justice’.<sup>237</sup>

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

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

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

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<sup>237</sup> [ICC-01/18-12](#), para. 2.

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

<sup>239</sup> Article 53(1)(a) of the Statute (emphasis added).

<sup>240</sup> Prosecutor, [Policy Paper on Preliminary Examinations](#), November 2013, para. 2.

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

arises from that situation. In this regard, the Chamber recalls that the legal texts of the Court draw the following distinction between a situation and a case:

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

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

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

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

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

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

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

72. First, the structure of article 19 of the Statute, which distinguishes between three distinct procedural mechanisms, establishes that the scope of application of the third

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



paragraph of article 19 of the Statute is not restricted to a case on account of references to ‘case’ appearing throughout this provision.

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

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

75. Similarly, the reference to ‘[c]hallenges’ in the heading of article 19 of the Statute does not restrict its entire scope of application but merely denotes the main purpose of this provision.<sup>247</sup> The obligation of a chamber to satisfy itself that it has jurisdiction arising from article 19(1) of the Statute omits a reference to ‘challenge’ and, thus, also

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

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

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

<sup>246</sup> See also [ICC-01/18-90](#), para. 11.

<sup>247</sup> See also [ICC-01/18-90](#), para. 7.

applies in the absence of a challenge. This is comparable to the mechanism contained in article 19(3) of the Statute. It, namely, acknowledges that the Prosecutor’s mandate regarding the initiation of investigations and prosecutions may give rise to the need to resolve a question of jurisdiction or admissibility at an early stage of the proceedings by way of a ruling by the Pre-Trial Chamber without a challenge to the Court’s jurisdiction having been lodged.<sup>248</sup> Moreover, it is well-known that various other headings in the Statute also do not entirely encapsulate the contents of the articles they pertain to,<sup>249</sup> which lends further support to the finding that the heading of article 19 of the Statute is not determinative of its scope of application.

76. The drafting history of article 19 of the Statute is also instructive in interpreting its structure. Whereas article 19(1) of the Statute originated in article 24 of the 1994 Draft Statute for an International Criminal Court by the International Law Commission, the second paragraph of article 19 of the Statute resulted from articles 34 to 36 of that Draft.<sup>250</sup> The mechanism laid down in article 19(3) of the Statute was not contained in

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

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

<sup>250</sup> Yearbook of the International Law Commission 1994, Volume II, Part Two, [Report of the Commission to the General Assembly on the Work of its Forty-Sixth Session](#), A/CN.4/SER.A/1994/Add.1 (Part 2), pp. 45, 52-53.

this Draft but only appeared in a 1997 document by the Preparatory Committee.<sup>251</sup> It is noteworthy that the latter document did not refer to either ‘challenge’ or ‘case’, but broadly stipulated that ‘[t]he Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility’. Therefore, although the final version of article 19 of the Statute grouped these three mechanisms together, they were developed independently for different purposes.

77. The Chamber is not persuaded by the argument that ‘[r]ulings on territorial jurisdiction necessarily impair a suspect/accused’s right to challenge jurisdiction under Article 19(2)(a) of the Statute’.<sup>252</sup> A Chamber of this Court has previously held that an ‘accused will always be entitled to raise a challenge under article 19(2) of the Statute, whether or not the Chamber has exercised its powers under article 19(1)’.<sup>253</sup> By the same token, a ruling pursuant to article 19(3) of the Statute does not impair the right of a suspect or accused (or the relevant States) to subsequently challenge the jurisdiction of the Court under article 19(2) of the Statute.

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

79. Under article 53(1) of the Statute, the Prosecutor must consider the same factors, including whether there is ‘a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed’, in deciding whether to initiate a *proprio motu* investigation or an investigation resulting from a referral by a State Party. In the event the Prosecutor initiates a *proprio motu* investigation, her jurisdictional assessment is reviewed by a Pre-Trial Chamber under article 15(4) of the Statute. If article 19(3) of the Statute is interpreted to extend beyond a case, the Prosecutor would be similarly enabled to request, if deemed necessary, judicial review of a question of jurisdiction in relation to an investigation resulting from a referral by a State Party. Conversely, a restrictive reading of article 19(3) of the Statute would create

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

<sup>252</sup> [ICC-01/18-90](#), paras 8, 24.

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

an untenable distinction. On the one hand, a *proprio motu* investigation would proceed on a sound jurisdictional basis from the outset. On the other hand, an investigation resulting from a referral by a State Party would have to be conducted on an uncertain basis if it gives rise to doubts regarding the Court's jurisdiction. These questions would eventually have to be assessed by a Pre-Trial Chamber in relation to an application under article 58 of the Statute, which could lead to the dismissal of a case following a lengthy and costly investigation.

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

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

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

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

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

### 3. The object and purpose of the Statute

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

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

85. With regard to the present request, the Chamber notes that the Prosecutor considers that there is a reasonable basis to believe that members of the Israeli Defense Forces,<sup>256</sup> Israeli authorities,<sup>257</sup> Hamas and Palestinian armed groups<sup>258</sup> have committed

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

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

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

a number of crimes falling within the jurisdiction of the Court.<sup>259</sup> In addition, the Prosecutor has concluded that the potential cases concerning crimes allegedly committed by members of the Israeli authorities, Hamas and Palestinian armed groups would currently be admissible,<sup>260</sup> while her assessment of the admissibility of potential cases regarding crimes allegedly committed by members of the Israeli Defense Forces is ongoing and will be kept under review.<sup>261</sup>

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

### **C. The Merits**

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

88. As will be explained below, the Chamber is satisfied, in keeping with article 21(1)(a) of the Statute, which stipulates that the Court shall apply '[i]n the first place, [the] Statute', that the issues under consideration primarily rest on, and are resolved by, a proper construction of the relevant provisions of the Statute, including in particular articles 12(2)(a), 125(3) and 126(2) of the Statute. In the view of the Chamber, it is not

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

<sup>260</sup> [ICC-01/18-12](#), paras 94-95.

<sup>261</sup> [ICC-01/18-12](#), para. 94.

necessary to have recourse to subsidiary sources of law under article 21(1)(b) and (c) of the Statute. Furthermore, the Chamber considers that recourse to article 31(3)(c) of the Vienna Convention on the Law of Treaties (the ‘Vienna Convention’), being a rule of interpretation, cannot in any way set aside the hierarchy of sources of law as established by article 21 of the Statute, which is binding on the Chamber.

### 1. The First Issue

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

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

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

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<sup>262</sup> [ICC-01/18-12](#), p. 56.

<sup>263</sup> [ICC-01/18-12](#), para. 113.

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

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

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

93. The Chamber notes however that the chapeau of article 12(2) of the Statute stipulates in the relevant part<sup>265</sup> 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.<sup>266</sup>

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

94. The Chamber notes that according to article 31(2) of the Vienna Convention, ‘the context for the purpose of the interpretation of a treaty shall comprise [...] the text, including its preamble and annexes’. In this regard, the Chamber wishes to clarify that it understands this provision as referring both to the text of article 12 of the Statute and to the text of other provisions of the Statute. Having regard to the more general context of the Statute, an assessment as to whether the preconditions to the exercise of the

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

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



Court's jurisdiction under article 12(2) of the Statute have been fulfilled must be conducted in keeping with the outcome of the accession procedure pursuant to articles 125(3) and 126(2) of the Statute, subject to the settlement of a dispute regarding the accession of an entity by the Assembly of States Parties under article 119(2) of the Statute.

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

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

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

United Nations Secretary-General is guided by the United Nations General Assembly's determination (as to whether it considers a particular entity to be a State).

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

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

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<sup>268</sup> See [ICC-01/18-71](#), para. 10.

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

become a party to any treaties deposited with the Secretary-General that are open to ‘all States’ or ‘any State’.<sup>270</sup>

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

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

<sup>271</sup> *See* [ICC-01/18-70](#), para. 8.

<sup>272</sup> *See* [ICC-01/18-83](#), pp. 10-11.

<sup>273</sup> *See* [ICC-01/18-113](#), para. 16.

<sup>274</sup> *See* [ICC-01/18-71](#), para. 14.

accession accepted by the United Nations Secretary-General – the Chamber will now turn to the circumstances of Palestine’s accession.

*c) Palestine’s accession to the Rome Statute*

100. The Chamber notes that Palestine acceded to the Statute in accordance with the procedure defined in article 125(3) of the Statute. On 2 January 2015, Palestine submitted its instrument of accession to the Statute,<sup>275</sup> and became a State Party to the ICC on 1 April 2015, following the entry into force of the Statute in its territory. The United Nations Secretary-General circulated Palestine’s instrument of accession among the States Parties before accepting it and no State Party, except for Canada, manifested any opposition at the time.<sup>276</sup> Palestine’s accession was subsequently accepted by the United Nations Secretary-General on 6 January 2015 and, on 1 April 2015, the then President of the Assembly of States Parties to the Rome Statute (the ‘Assembly of State Parties’) greeted Palestine in a welcoming ceremony, which ‘marked the entry into force of the Rome Statute for the State of Palestine [...] thereby becoming the 123<sup>rd</sup> State Party’.<sup>277</sup> Further, following its accession, Palestine developed an active role in the work of the Assembly of State Parties, as a State Party to the Statute. During the fourteenth session of the Assembly of States Parties, Palestine was included in the list of States Parties’ delegations, as opposed to another category.<sup>278</sup> At its sixteenth session, the Assembly of States Parties ‘elected the Bureau for the seventeenth to nineteenth sessions’ and ‘[t]he members from the Asia-Pacific group elected to the Bureau, on the recommendation of the Bureau, were Japan and the State of Palestine’.<sup>279</sup> At the same session, Palestine’s representatives participated in and made

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<sup>275</sup> United Nations Secretary General, Depository Notification, C.N.13.2015.TREATIES-XVIII.10, 6 January 2015.

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

<sup>277</sup> Assembly of States Parties, [Welcoming ceremony for a new State Party State of Palestine. Speech by H. E. Minister Sidiki Kaba, President of the Assembly of States Parties](#), 1 April 2015.

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

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

proposals at the discussions regarding the activation of the crime of aggression.<sup>280</sup> Palestine also requested items to be included in the provisional agenda of the seventeenth session of the Assembly of States Parties in 2018, a right held only by States Parties.<sup>281</sup> Moreover, since its accession, Palestine has contributed to the Court's budget<sup>282</sup> and has participated in the adoption of resolutions by the Assembly of State Parties.<sup>283</sup>

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

102. Consequently, regardless of Palestine's status under general international law, its accession to the Statute followed the correct and ordinary procedure, as provided under article 125(3) of the Statute. In this respect, in the view of the Chamber, once the conditions for accession pursuant to article 125 of the Statute have been fulfilled, the

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

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

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

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

<sup>284</sup> See [ICC-01/18-84](#), paras 8-11, 77-79. See also [ICC-01/18-122](#), paras 8-9, 13, 61-65.

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

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

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

Party for the purpose of establishing individual criminal responsibility for the crimes within the jurisdiction of the Court.<sup>286</sup>

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

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

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

[A] teleological interpretation which is mirrored in the principle of effectiveness and based on the object and purpose of a treaty means that the provisions of the treaty are to be ‘interpreted so as to give it its full meaning and to enable the

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<sup>286</sup> This conclusion is without prejudice to the need to determine the *localisation* of the criminal conduct. In this regard, see [Regulation 46\(3\) Decision](#), paras 50-73; Pre-Trial Chamber III, *Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar*, [Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar](#), ICC-01/19-27, 14 November 2019, paras 42-62.

<sup>287</sup> See e.g. Permanent Court of International Justice, *The Case concerning the Factory at Chorzów (Germany v. Poland) (Claim for indemnity)(Jurisdiction)*, Judgment, 26 July 1927, P.C.I.J. Series A. No. 9, p. 24 (‘For the interpretation of Article [...], account must be taken of [...] the function which, in the intention of the contracting Parties, is to be attributed to this provision’); ICTY, Appeals Chamber, *The Prosecutor v. Kordić & Čerkez, Decision on Appeal regarding the admission into evidence of seven affidavits and one formal statement*, 18 September 2000, IT-95-14/2/2-AR73.6, para. 23 (‘The Trial Chamber relied on the principle of effectiveness (*interpretation par la méthode de l’effet utile* or *ut res magis valeat quam pereat*) in finding that “the Rules must be interpreted to give them useful effect”’); ECtHR, *Loizidou v. Turkey* (Preliminary objections), Application No. 15318/89, 23 March 1995, para. 72 (‘The object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective’).

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

system [...] to attain its appropriate effects’, while preventing any restrictions of interpretation that would render the provisions of the treaty ‘inoperative’.<sup>289</sup>

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.<sup>290</sup> Moreover, this interpretation would also have the effect of rendering most of the provisions of the Statute, including article 12(1), inoperative for Palestine.

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

108. Indeed, given the complexity and political nature of statehood under general international law, the Rome Statute insulates the Court from making such a determination, relying instead on the accession procedure and the determination made by the United Nations General Assembly. The Court is not constitutionally competent to determine matters of statehood that would bind the international community.<sup>292</sup> In addition, such a determination is not required for the specific purposes of the present proceedings or the general exercise of the Court’s mandate. As discussed, article 12(2)(a) of the Statute requires a determination as to whether or not the relevant conduct occurred on the territory of a *State Party*,<sup>293</sup> for the sole purpose of establishing

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

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

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

<sup>292</sup> See [ICC-01/18-75](#), para. 8; [ICC-01/18-77](#), para. 40.

<sup>293</sup> See paragraph 93 above.



individual criminal responsibility. Such an assessment enables the Prosecutor to discharge her obligation to initiate an investigation into the present Situation, which would eventually permit the Court to, in accordance with the Statute, exercise its jurisdiction over persons alleged to have committed crimes falling within its jurisdiction.

*e) Conclusion*

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

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

111. As set out above, the Chamber has found that the Statute mandates that the preconditions to the exercise of the Court’s jurisdiction under article 12(2) of the Statute be assessed in keeping with the outcome of the accession procedure pursuant to articles 12(1), 125(3) and 126(2) of the Statute, subject to the settlement of a dispute regarding the accession of an entity by the Assembly of States Parties under article 119(2) of the Statute, and consistent with the purpose of the Court of ending impunity by establishing individual criminal responsibility for crimes. The Statute, thus, exhaustively deals with the issue under consideration and, as a consequence, a determination on the basis of article 21(1)(b) of the Statute as to whether an entity acceding to the Statute fulfils the

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

requirements of statehood under general international law and related questions is not called for.

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

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

## 2. The Second Issue

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

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

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

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

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

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

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

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

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

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

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

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

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

120. The right to self-determination is set forth in the Charter of the United Nations,<sup>303</sup> the International Covenant on Civil and Political Rights,<sup>304</sup> and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.<sup>305</sup> According to the International Court of Justice, the right to self-determination is owed *erga omnes*,<sup>306</sup> and ‘as a fundamental human right, [this right] has a broad scope of application’.<sup>307</sup> Furthermore, the United Nations Human Rights Committee has specified that ‘[t]he right of self-determination is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human

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

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

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

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

<sup>306</sup> ICJ, *East Timor (Portugal v. Australia)*, Judgment, 30 June 1995, I.C.J. Reports 1995, p. 90, para. 29; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, I.C.J. Reports 2004, p. 136, para. 155.

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

rights and for the promotion and strengthening of those rights’.<sup>308</sup> However, the Chamber recognises that controversies arise as to the consequences attached to this right and the way in which it can be exercised.<sup>309</sup> While all ‘people’ have the right to self-determination – the right to freely determine their political status and freely pursue their economic, social and cultural development – only certain ‘people’ have been recognised as having a right to independence derived from the right to self-determination.<sup>310</sup>

121. In the present situation, the Chamber notes that the Palestinian right to self-determination within the Occupied Palestinian Territory has been explicitly recognised by different bodies.<sup>311</sup> The International Court of Justice observed that the ‘legitimate rights’ of the Palestinian people referred to in the Israeli-Palestinian Interim Agreement ‘include the right to self-determination, as the General Assembly has moreover recognized on a number of occasions’ and that certain measures adopted by Israel in areas of the West Bank ‘severely [impede] the exercise by the Palestinian people of its right to self-determination’, while stressing the risk that ‘further alterations to the demographic composition of the Occupied Palestinian Territory [would result] from the construction of the wall’.<sup>312</sup> The United Nations General Assembly has indeed adopted resolutions to this effect,<sup>313</sup> where it consistently associated the Palestinian People’s

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

<sup>309</sup> See [ICC-01/18-92](#), paras 80-83; [ICC-01/18-97](#), paras 43-45; [ICC-01/18-93](#), para. 58; [ICC-01/18-75](#), para. 21.

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

<sup>311</sup> See [ICC-01/18-12](#), paras 147-156, 193-215; [ICC-01/18-99](#), para. 26; [ICC-01/18-102](#), paras 56-61; [ICC-01/18-105](#), paras 42-43; [ICC-01/18-72](#), para. 27.

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

<sup>313</sup> While the United Nations General Assembly may only make non-binding recommendations, according to article 10 of the Charter of the United Nations, the International Court of Justice underlined the specific responsibility of the United Nations towards the question of Palestine. See ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9

right to self-determination with the Occupied Palestinian Territory demarcated with the Green Line,<sup>314</sup> and stressed the need for respect for and preservation of the territorial

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July 2004, I.C.J. Reports 2004, para. 49: ‘The responsibility of the United Nations in this matter also has its origin in the Mandate and the Partition Resolution concerning Palestine [...]. This responsibility has been described by the General Assembly as “a permanent responsibility towards the question of Palestine until the question is resolved in all its aspects in a satisfactory manner in accordance with international legitimacy” (General Assembly resolution 57/107 of 3 December 2002). Within the institutional framework of the Organization, this responsibility has been manifested by the adoption of many Security Council and General Assembly resolutions, and by the creation of several subsidiary bodies specifically established to assist in the realization of the inalienable rights of the Palestinian people’. *See also* United Nations, General Assembly, Committee on the Exercise of the Inalienable Rights of the Palestinian People, Resolution 57/107, 14 February 2003, A/RES/57/107 (‘*Reaffirms* that the United Nations has a permanent responsibility towards the question of Palestine until the question is resolved in all its aspects in a satisfactory manner in accordance with international legitimacy’).

<sup>314</sup> *See for instance*: United Nations, General Assembly, United Nations Relief and Works Agency for Palestine Refugees in the Near East, Resolution 2672 (XXV), 8 December 1970, A/RES/2672 (XXV), part C, para. 1 (‘*Recognizes* that the people of Palestine are entitled to equal rights and self-determination, in accordance with the Charter of the United Nations’); United Nations, General Assembly, Question of Palestine, Resolution 3236 (XXIX), 22 November 1974, RES/RES/3236 (XXIX), para. 1 (‘*Reaffirms* the inalienable rights of the Palestinian people in Palestine, including (a) The right to self-determination without external interference; (b) The right to national independence and sovereignty’), and adopted by 89 votes to 8, with 37 abstentions; United Nations, General Assembly, Resolution 3376, 10 November 1975, A/RES/3376 (XXX), para. 2 (‘*Expresses its grave concern* that no progress has been achieved towards: (a) The exercise by the Palestinian people of its inalienable rights in Palestine, including the right to self-determination without external interference and the right to national independence and sovereignty’), and adopted by 94 votes to 18, with 26 abstentions; United Nations, General Assembly, Question of Palestine, Resolution 37/86, 10 December 1982, A/RES/37/86, Part E, para. 5 (‘*Recommends* that, following the withdrawal of Israel from the occupied Palestinian territories, those territories should be subjected to a short transitional period under the supervision of the United Nations, during which period the Palestinian people would exercise its right to self-determination’); United Nations, General Assembly, Question of Palestine, Resolution 43/177, 15 December 1988, A/RES/43/177, para. 2 (‘the need to enable the Palestinian people to exercise their sovereignty over their territory occupied since 1967’), and adopted by 104 votes to 2, with 36 abstentions; United Nations, General Assembly, Status of the Occupied Palestinian Territory, including East Jerusalem, Resolution 58/292, 6 May 2004, A/RES/58/292, para. 1 (‘*Affirms* that the status of the Palestinian territory occupied since 1967, including East Jerusalem, remains one of military occupation, and affirms, in accordance with the rules and principles of international law and relevant resolutions of the United Nations, including Security Council resolutions, that the Palestinian people have the right to self-determination and to sovereignty over their territory’), and adopted by 140 votes to 6, with 11 abstentions; United Nations, General Assembly, The right of the Palestinian people to self-determination, Resolution 62/146, 4 March 2008, A/RES/62/146, paras 1-2 (‘1. *Reaffirms* the right of the Palestinian people to self-determination, including the right to their independent State of Palestine; 2. Urges all States and the specialized agencies and organizations of the United Nations system to continue to support and assist the Palestinian people in the early realization of their right to self-determination’), and adopted by 176 votes to 5, with 4 abstentions; United Nations, General Assembly, Status of Palestine in the United Nations, Resolution 67/19, 29 November 2012, A/RES/67/19, para. 1 (‘*Reaffirms* the right of the Palestinian people to self-determination and to independence in their State of Palestine on the Palestinian territory occupied since 1967’), and adopted by 138 votes to 9, with 41 abstentions. *See also* United Nations, General Assembly, Peaceful settlement of the question of Palestine, Resolution 71/23, 15 December 2016, A/RES/71/23, para. 22; United Nations, General Assembly, Peaceful settlement of the question of Palestine, Resolution 72/14, 7 December 2017, A/RES/72/14, para. 24; United Nations, General Assembly, Peaceful settlement of the question of Palestine, Resolution 73/19, 5 December 2018, A/RES/73/19, para. 22; United Nations, General Assembly, Work of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories, Resolution 73/96, 18

unity, contiguity and integrity of all of the Occupied Palestinian Territory.<sup>315</sup> More recently, this was further reaffirmed by the United Nation Security Council which called on States not to recognise acts in breach of international law in the Occupied Palestinian Territory by ‘condemning all measures aimed at altering the demographic composition, character and status of the Palestinian Territory occupied since 1967, including East Jerusalem’, and:

1. Reaffirm[ed] that the establishment by Israel of settlements in the Palestinian territory occupied since 1967, including East Jerusalem, has no legal validity and constitutes a flagrant violation under international law and a major obstacle to the achievement of the two-State solution and a just, lasting and comprehensive peace;
2. [...]
3. Underlin[ed] that it will not recognize any changes to the 4 June 1967 lines, including with regard to Jerusalem, other than those agreed by the parties through negotiations;
4. [...]
5. Call[ed] upon all States, bearing in mind paragraph 1 of this resolution, to distinguish, in their relevant dealings, between the territory of the State of Israel and the territories occupied since 1967.<sup>316</sup>

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

123. The Chamber considers that, in light of the broad remit of the Appeals Chamber’s determination, it must also ensure that its interpretation of article 12(2)(a) of the Statute,

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December 2018, A/RES/73/96, preamble; United Nations, General Assembly, Peaceful settlement of the question of Palestine, Resolution 70/15, 4 December 2015, A/RES/70/15, para. 21.

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

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

<sup>317</sup> See also [ICC-01/18-77](#), paras 9, 12, 30.

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

### 3. The Oslo Accords

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

125. The Chamber notes the Oslo process and the agreements arising from this process (the ‘Oslo Agreements’) and, in particular, the ‘Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (Oslo II)’ which was concluded on 28 September 1995.<sup>318</sup> The Chamber notes that this agreement contains a number of clauses limiting the scope of the jurisdiction of the ‘Palestinian Interim Self-Government Authority’. Most noticeably, article XVII(2)(c) of this agreement stipulates *inter alia* that ‘[t]he territorial and functional jurisdiction of the [Palestinian Interim Self-Government Authority] will apply to all persons, *except for Israelis*, unless otherwise provided in this Agreement’. Article I(1)(a) of Annex IV to this agreement, the ‘Protocol Concerning Legal Affairs’, further provides that ‘[t]he criminal jurisdiction of the [Palestinian Interim Self-Government Authority] covers all offenses committed by *Palestinians and/or non-Israelis* in the Territory, subject to the provisions of this article. For the purposes of this Annex, “Territory” means West Bank territory *except for Area C* which, except for the Settlements and the military locations, will be gradually

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



transferred to the Palestinian side in accordance with this Agreement, and Gaza Strip territory except for the Settlements and the Military Installation Area’.<sup>319</sup>

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

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

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<sup>319</sup> See on the United Nations website (document last accessed on 2 February 2021): <https://unispal.un.org/DPA/DPR/unispal.nsf/eed216406b50bf6485256ce10072f637/bb2b59417609ec9485256f1800663122?OpenDocument>.

<sup>320</sup> See II. Submissions and Observations.

<sup>321</sup> [ICC-01/18-109-Red](#), para. 55.

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

<sup>323</sup> [ICC-01/18-12](#), paras 183-186.

<sup>324</sup> [ICC-01/18-82](#), para. 64.

<sup>325</sup> [ICC-01/18-99](#), paras 106-118; [ICC-01/18-112](#), paras 48-54; [ICC-01/18-120](#), paras 10-28; [ICC-01/18-123](#), paras 22-27.

<sup>326</sup> [ICC-01/18-72](#), paras 39-48; [ICC-01/18-73](#), paras 6-29; [ICC-01/18-84](#), paras 65-76; [ICC-01/18-96](#), paras 49-50; [ICC-01/18-71](#); [ICC-01/18-100](#), paras 74-78; [ICC-01/18-115](#), paras 17-20; [ICC-01/18-118](#), para. 2; [ICC-01/18-122](#), paras 56-57.

<sup>327</sup> [ICC-01/18-12](#), para. 185; [ICC-01/18-73](#), paras 6-29.

that the drafters expressly sought to accommodate any obligations of a State Party under international law that may conflict with its obligations under the Statute.

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

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

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

#### 4. Final Considerations

130. As a final matter, the Chamber finds it appropriate to underline that its conclusions in this decision are limited to defining the territorial parameters of the Prosecutor's investigation in accordance with the Statute. The Court's ruling is, as noted above,<sup>329</sup> without prejudice to any matters of international law arising from the events in the *Situation in Palestine* that do not fall within the Court's jurisdiction. In particular, by ruling on the territorial scope of its jurisdiction, the Court is neither

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<sup>328</sup> [Situation in Afghanistan Appeals Chamber Judgment](#), para. 44.

<sup>329</sup> See paragraph 113 above.

adjudicating a border dispute under international law nor prejudging the question of any future borders.

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

**FOR THESE REASONS, THE CHAMBER HEREBY**

**FINDS** that Palestine is a State Party to the Statute;

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

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

Done in both English and French, the English version being authoritative.

Judge Péter Kovács appends a partly dissenting opinion.

Judge Marc Perrin de Brichambaut appends a partly separate opinion.



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**Judge Péter Kovács, Presiding Judge**



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**Judge Marc Perrin de Brichambaut**



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**Judge Reine Adélaïde Sophie  
Alapini-Gansou**

Dated this Friday, 5 February 2021

At The Hague, The Netherlands