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International Criminal Court

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No.: **ICC-01/18**
Date: **23 September 2024**

PRE-TRIAL CHAMBER I

Before: **Judge Iulia Motoc, Presiding Judge**
Judge Reine Adélaïde Sophie Alapini-Gansou
Judge Nicolas Guillou

SITUATION IN THE STATE OF PALESTINE

Public

Public Redacted Version of "Israel's challenge to the jurisdiction of the Court pursuant to article 19(2) of the Rome Statute"

With Confidential Prosecution and the State of Israel only Annex A

Source: **The State of Israel**

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

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Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

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Amicus Curiae

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I. INTRODUCTION

1. The State of Israel ("Israel") hereby challenges, pursuant to Article 19(2)(c) of the Rome Statute ("the Statute"), the jurisdiction of the ICC ("the Court") in the pending application concerning Benjamin Netanyahu and Yoav Gallant, or in any other investigative action on the same jurisdictional basis.[1]

2. The fundamental precondition to the exercise of jurisdiction enshrined in the Rome Statute – namely, that the conduct occurred on the "territory" of a State as required by Article 12(2)(a) – is not met. The act of accession by the "Government of the State of Palestine", which was relied upon by a previous Pre-Trial Chamber in the 2021 decision on the Prosecution's request pursuant to article 19(3) ("the 2021 Decision"),[2] does not, of itself, fulfil the jurisdictional requirements that arise under Article 12(2).

3. The 2021 Decision had the effect of recognising that a non-sovereign entity may, in principle, accept the jurisdiction of the Court within the meaning of Article 12(2) of the Rome Statute. This is made clear by the Majority's express acknowledgment that it did not need to make a determination on Palestinian statehood under international law.[3] The only substantive examination of Palestinian status under international law appears in the Partly Dissenting Opinion, which observed that "Palestine" does not at present fulfil the conditions of statehood.[4]

4. Israel is a State not party to the Statute. Israel's consistent and well-established position is that only sovereign States can accept the jurisdiction of the Court.[5] However, if, *arguendo*, a non-sovereign entity could accept the jurisdiction of the Court, an inquiry into the competences that such an entity actually possesses under international law is required.

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[1] This filing, which was initially submitted to the Registry on 20 September 2024, has been modified at the instruction of the Pre-Trial Chamber on 23 September 2024 to read on the cover page "Situation in the State of Palestine" rather than "Situation in Palestine". This change is made without prejudice to Israel's well-known position that "Palestine" is not a State. Israel's challenge to jurisdiction in the case of Mr. Netanyahu and Mr. Gallant pursuant to Article 19(2)(c) is brought without prejudice to any of its other rights under the Rome Statute which remain reserved.
[2] Decision on the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine', ICC-01/18-143, 5 February 2021 ("Article 19(3) Decision"), para. 112.
[3] Article 19(3) Decision, para. 111.
[4] Judge Peter Kovács Partly Dissenting Opinion, ICC-01/18-143-Anx1, 5 February 2021 ("Judge Kovács' Partly Dissenting Opinion"), para. 267.
[5] Attorney General of the State of Israel, "Memorandum on the International Criminal Court's Lack of Jurisdiction over the so-called 'Situation in Palestine'", 20 December 2019 ("Attorney General Memorandum"), paras. 9-16.

5. Jurisdiction is not a mere formality. It plays a critical role in defining judicial competence in order to prevent abuse of the judicial process and guarantee that courts do not exceed the carefully defined mandates entrusted to them. The legitimacy of the Court depends in equal measure on the effective discharge of its mandate, and on adherence to its jurisdictional limitations.

6. In the matter under discussion, there seems to be no disagreement between Israel and the Office of the Prosecutor ("OTP" or "Prosecution") that Article 12(2) reflects traditional grounds of criminal jurisdiction (namely, territoriality and active personality) that are inherent aspects of sovereignty, and which should be interpreted in accordance with their ordinary meaning under international law.[6]

7. The sovereign status of the territory relevant to the "*Situation in Palestine*" is, at present, indeterminate. The absence of sovereign Palestinian territory means that there is no "territory of" a State (within the meaning of Article 12(2)(a)) over which the Court may exercise its jurisdiction. To determine otherwise necessarily entails a judicial pronouncement as to sovereignty over the territory, with respect to which there are competing legal claims. Any delimitation by the Court of the territory concerned would require it to act in contravention of binding Israeli-Palestinian agreements that expressly leave such matters to direct negotiation between the Parties, and to make determinations that are wholly unsuitable for an international criminal tribunal.

8. In these unique circumstances, when sovereignty remains indeterminate pending final status negotiations, it is the Oslo Accords that establish the jurisdictional competences over the territory between the Parties in the interim period. These agreements make clear that the Palestinian authorities have no criminal jurisdiction either in law or in fact over Area C, Jerusalem and Israeli nationals – and thus cannot validly delegate such jurisdiction to the Court. Suggestions that the Palestinian authorities have plenary jurisdiction that exceeds the competences that were specifically ascribed to them in the Israeli-Palestinian bilateral agreements, are without legal foundation.

9. Accordingly, the Statute does not permit the Court to exercise jurisdiction in the cases brought by the Prosecutor against senior Israeli officials. Granting the Prosecutor's

[6] Prosecution's consolidated response to observations by interveners pursuant to article 68(3) of the Rome Statute and rule 103 of the Rules of Procedure and Evidence, ICC-01/18-346, 23 August 2024 ("Prosecution's Consolidated Response"), para. 53.

request to issue arrest warrants would exceed the Court's jurisdiction and would illegitimately infringe upon Israel's rights.

10. Israel acknowledges that the lack of jurisdiction on the part of international tribunals in respect of any particular dispute does not relieve States of their duty to fulfil their international legal obligations. Israel remains deeply committed to the rule of law and to the values underpinning international criminal justice. Israel's robust legal system has jurisdiction over alleged wrongdoing by Israeli nationals in the context of the Israeli-Palestinian conflict. Israel's civilian and military justice systems will not hesitate, where and when necessary, to examine, investigate, prosecute and ensure accountability, including with respect to senior officials, in accordance with Israeli and international law.

11. Israel therefore respectfully requests that the Pre-Trial Chamber:

    a. declare with immediate effect, pursuant to Articles 19(7) and (8) of the Statute and Rule 58 of the ICC Rules of Procedure and Evidence, that the investigation of the Prosecutor in the cases of Mr. Netanyahu and Mr. Gallant, and the proceedings before this Chamber under Article 58 of the Statute, are to be suspended until the Court has given its ruling on this challenge to jurisdiction;

    b. determine that the application concerning Mr. Netanyahu and Mr. Gallant, and any investigative action on the same jurisdictional basis, are not within the Court's jurisdiction; and, accordingly,

    c. dismiss the Prosecutor's application for arrest warrants for Mr. Netanyahu and Mr. Gallant.

II. PROCEDURAL BACKGROUND

12. On 1 January 2015, the Registrar received a purported declaration under Article 12(3) of the Statute,[7] claiming to be signed by the "President of the State of Palestine", and which stated that "the Government of the State of Palestine" accepted the jurisdiction of the Court with respect to crimes "committed in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014".[8]

13. On 2 January 2015, the United Nations Secretary General received a purported instrument of accession to the Statute by the "State of Palestine" pursuant to Article 125(2) of the Statute.[9]

14. On 16 January 2015, the former Prosecutor announced that she had decided to open a preliminary examination into the "*Situation in Palestine*" ("the Situation").[10]

15. On 22 May 2018, the Prosecution received a purported referral by the "Government of the State of Palestine" pursuant to Articles 13(a) and 14 of the Statute, requesting the investigation of crimes "committed in all parts of the territory of the State of Palestine".[11]

16. On the same day, the OTP notified the Presidency, pursuant to Regulation 45 of the Regulations of the Court, that it had received from the "State of Palestine" a referral under Articles 13(a) and 14 of the Statute regarding the Situation.[12]

17. On 24 May 2018, the Presidency, noting the memorandum from the Prosecutor dated 22 May 2018, assigned the Situation to Pre-Trial Chamber I.[13]

18. On 20 December 2019, the OTP announced that it had concluded its preliminary examination into the Situation with the determination that the statutory criteria for the opening of an investigation had been met.[14] The announcement further stated that the

[7] ICC Press Release, "Palestine declares acceptance of ICC jurisdiction since 13 June 2014", 5 January 2015.
[8] Document dated 31 December 2014, "Declaration Accepting the Jurisdiction of the International Criminal Court".
[9] Depositary Notification, C.N.13.2015.TREATIES-XVIII.10 ("State of Palestine: Accession"), 6 January 2015.
[10] ICC OTP, "The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine", 16 January 2015.
[11] ICC OTP, "Statement by ICC Prosecutor, Mrs Fatou Bensouda, on the referral submitted by Palestine", 22 May 2018.
[12] ICC OTP, "Notification – Referral from the State of Palestine pursuant to articles 13(a) and 14 of the Rome Statute", ICC-01/18-1-AnxI, 22 May 2018.
[13] Decision assigning the situation in the State of Palestine to Pre-Trial Chamber I, ICC-01/18-1, 24 May 2018.
[14] ICC OTP, "Statement of ICC Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination of the Situation in Palestine, and seeking a ruling on the scope of the Court's territorial jurisdiction", 20 December 2019.

Prosecutor had earlier the same day made a request pursuant to Article 19(3) of the Statute for a jurisdictional ruling from Pre-Trial Chamber I on the scope of the territorial jurisdiction of the Court under Article 12(2)(a) of the Statute with respect to the Situation. The request was subsequently rejected *in limine* by the Pre-Trial Chamber for procedural reasons, and the Prosecutor was invited to file a new request.[15]

19. On 22 January 2020, the OTP filed a renewed request for a jurisdictional ruling pursuant to Article 19(3) of the Statute,[16] seeking a ruling from the Pre-Trial Chamber on "the scope of the Court's territorial jurisdiction in the situation of Palestine".[17]

20. On 28 January 2020, the Pre-Trial Chamber issued an Order, by which it set the procedure and the schedule for the submission of observations.[18] Noting "the complexity and novelty of the Prosecutor's request", the Chamber considered it desirable to invite States, organisations and/or persons to submit observations on the question of jurisdiction, subject to being granted leave.[19]

21. By 25 March 2020, the Pre-Trial Chamber received more than 50 observations by the Palestinian authorities, *amicus curiae* authorised to participate in the proceeding, and victims' representatives.[20] Israel did not participate in those proceedings.

22. On 26 May 2020, the Pre-Trial Chamber requested the Palestinian authorities to provide additional information on a statement made by President Abbas on 19 May 2020, "including on the question whether it pertains to any of the Oslo Accords between Palestine and Israel".[21] On 4 June 2020, the Palestinian authorities provided a response.[22]

23. On 30 April 2020, the OTP filed its "Response to the Observations of Amici Curiae, Legal Representatives of Victims, and States".[23]

24. On 5 February 2021, the Pre-Trial Chamber issued its Decision on the "Prosecution request pursuant to article 19(3)". This Decision found, unanimously, that "Palestine is a

[15] Decision on the Prosecutor's Application for an extension of the page limit, ICC-01/18-11, 21 January 2020.
[16] Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine, ICC-01/18-12, 22 January 2020 ("Prosecution's Article 19(3) Request").
[17] Prosecution's Article 19(3) Request, para. 220.
[18] Order setting the procedure and the schedule for the submission of observations, ICC-01/18-14, 28 January 2020 ("Order Setting the Procedure"), p. 7.
[19] Order Setting the Procedure, para. 15.
[20] Article 19(3) Decision, paras. 11-13.
[21] Order requesting additional information, ICC-01/18-134, 26 May 2020, paras. 5-6.
[22] The State of Palestine's response to the Pre-Trial Chamber's Order requesting additional information, ICC-01/18-135, 4 June 2020.
[23] Prosecution Response to the Observations of *Amici Curiae*, Legal Representatives of Victims, and States, ICC-01/18-131, 30 April 2020 ("Prosecution's Response of 30 April 2020").

State Party to the Statute"; and, by a majority, that due to its "State Party" status, "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 that "the Court's territorial jurisdiction […] extends to the territories occupied by Israel since 1967, namely Gaza and the West Bank, including East Jerusalem".[24]

25. Judge Peter Kovács appended a Partly Dissenting Opinion, in which he disagreed on the fact that 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 that the Court's territorial jurisdiction in the Situation extends – in a quasi-automatic manner and without restrictions – to the territories of Gaza, the West Bank and East Jerusalem. Instead, he found that in the absence of Israel's acceptance of the Court's jurisdiction, such jurisdiction could not exceed the restricted competences *ratione personae* and/or *ratione loci* transferred to the Palestinian Authority pursuant to the Oslo Accords that created it.[25]

26. Judge Marc Perrin de Brichambaut appended a Partly Separate Opinion on the applicability of Article 19(3) of the Statute under the circumstances.[26]

27. On 3 March 2021, the former Prosecutor announced the initiation of an investigation into crimes within the jurisdiction of the Court that are alleged to have been committed in the Situation since 13 June 2014.[27]

28. On 17 November 2023, the Prosecutor announced that the OTP had received a referral of the "Situation in the State of Palestine" from South Africa, Bangladesh, Bolivia, Comoros, and Djibouti.[28] On 18 January 2024, the Prosecutor received an additional referral from Chile and Mexico.[29]

29. On 20 May 2024, the Prosecutor announced the filing of confidential and *ex parte* applications under Article 58 of the Statute for warrants of arrest against Israel's Prime Minister, Mr. Benjamin Netanyahu, and Israel's Minister of Defence, Mr. Yoav Gallant

[24] Article 19(3) Decision, p. 60.
[25] Judge Kovács' Partly Dissenting Opinion, paras. 370-371 *et seq*.
[26] Partly Separate Opinion of Judge Perrin de Brichamnaut, ICC-01/18-143-Anx2, 5 February 2021.
[27] ICC OTP, "Statement of ICC Prosecutor, Fatou Bensouda, respecting an investigation of the Situation in Palestine", 3 March 2021.
[28] ICC OTP, "Statement of the Prosecutor of the International Criminal Court, Karim A.A. Khan KC, on the Situation in the State of Palestine: receipt of a referral from five States Parties", 17 November 2023.
[29] Republic of Chile and the United Mexican States, referral, 18 January 2024.

("Article 58 Application"), as well as against three senior Hamas operatives. The Prosecutor chose to make public certain details regarding his applications.[30]

30. On 10 June 2024, the United Kingdom submitted a request to file *amicus curiae* observations.[31] On 27 June 2024, the Pre-Trial Chamber issued a decision granting the UK's request, and setting the deadline for any additional requests to submit *amicus curiae* observations.[32] The large majority of the requests was subsequently granted.[33] The Pre-Trial Chamber issued additional Orders with respect to the participation of victims,[34] and the OPCD.[35]

31. By 16 August 2024, the Pre-Trial Chamber received over 70 observations submitted by, *inter alia*, States, organisations, individuals and victims' representatives.

32. On 23 August 2024, the OTP filed a consolidated response to observations by interveners.[36]

33. [REDACTED].[37] [REDACTED].[38] [REDACTED].[39] [REDACTED].[40]

III. APPLICABLE LAW

34. Article 19(1) requires a Pre-Trial Chamber to "satisfy itself that it has jurisdiction in any case brought before it".

35. Article 19(2) provides that:

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[30] ICC OTP, "Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for arrest warrants in the situation in the State of Palestine", 20 May 2024 ("Prosecutor's Statement on Applications for Arrest Warrants"). The Prosecutor also released, in conjunction with his announcement, a report by a "Panel of Experts In International Law Convened by the Prosecutor of the International Criminal Court", ("Report of the Panel of Experts"). This report purports to offer further information about the Prosecutor's confidential and *ex parte* allegations, including regarding the Court's jurisdiction over the "*Situation in Palestine*", *ibid.*, para. 10.
[31] Request by the United Kingdom for leave to submit written observations pursuant to Rule 103, ICC-01/18-171-SECRET-Exp, 10 June 2024.
[32] Public redacted version of 'Order deciding on the United Kingdom's request to provide observations pursuant to Rule 103(1) of the Rules of Procedure and Evidence, and setting deadlines for any other requests for leave to file amicus curiae observations', ICC-01/18-173-Red, 27 June 2024.
[33] Decision on requests for leave to file observations pursuant to rule 103 of the Rules of Procedure and Evidence, ICC-01/18-249, 22 July 2024.
[34] Public redacted version of 'Decision concerning the views, concerns and general interests of victims', 30 July 2024, ICC-01/18-256-Conf, ICC-01/18-256-Red, 7 August 2024.
[35] Order in relation to OPCD's submissions on *amicus curiae* observations and the Prosecution's request to provide a consolidated response, ICC-01/18-325, 9 August 2024.
[36] Prosecution's Consolidated Response.
[37] [REDACTED].
[38] [REDACTED].
[39] [REDACTED].
[40] [REDACTED].

> Challenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by:
>
> (a) An accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58;
>
> (b) A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted; or
>
> (c) A State from which acceptance of jurisdiction is required under article 12.

36. Article 12, titled "Preconditions to the exercise of jurisdiction", is divided into three provisions: the first and third respectively prescribe how States accept the Court's jurisdiction and its exercise – either by becoming a party to the Statute (Article 12(1)) or through an *ad hoc* declaration (Article 12(3)).

> 1. 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.
>
> […]
>
> 3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

37. The second provision (Article 12(2)) provides the terms under which the Court may exercise jurisdiction with respect to the aforementioned States.

> 2. In the case of [a referral by a State Party or an investigation initiated by the Prosecutor], the Court may exercise its jurisdiction if one or more of the following States are parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
>
> (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
>
> (b) The State of which the person accused of the crime is a national.

IV. ISRAEL HAS STANDING TO CHALLENGE JURISDICTION UNDER ARTICLE 19(2)(C)

(i) Israel is a State from which acceptance of jurisdiction is required

38. Article 19(2)(c) allows a jurisdictional challenge from "[a] State from which acceptance of jurisdiction is required under article 12." Article 12(2) provides that the Court may exercise jurisdiction with respect to a crime if the State of nationality or the State of territoriality is a Party to the Statute or has accepted the jurisdiction of the Court by lodging an Article 12(3) declaration.

39. Israel accordingly has standing to challenge jurisdiction on two independent grounds: (i) as a "State of which the person accused of the crime is a national" under Article 12(2)(b); and (ii) as "a State which is not Party to this Statute" in respect of which a declaration accepting the exercise of jurisdiction of the Court is required under Article 12(3).

40. The 2021 Decision presupposes that Israel would have standing to bring a jurisdictional challenge at the appropriate juncture. In respect of the impact of the Oslo Accords on "the scope of the Court's territorial jurisdiction in Palestine," the Pre-Trial Chamber held that "these issues may be raised by interested States based on article 19 of the Statute."[41] Judge Kovács referred to Israel as one of the "directly interested States in the present […] situation".[42]

41. In circumstances where the Court asserts jurisdiction with respect to conduct committed by nationals of a State, or in the territory of a State, that State would be a "[a] State from which acceptance of jurisdiction is required under Article 12", within the meaning of Article 19(2)(c). Depending on the circumstances, there may be situations where more than one State is entitled to challenge the jurisdiction of the Court under Article 19(2)(c) (for example, an assertion of jurisdiction by the Court with respect to a national of a State that occurred in the territory of another State, or with respect to a person with dual nationality).

42. This will be so, even if one of the States in question *has* accepted the jurisdiction of the Court. The Appeals Chamber's view in the *Situation in Afghanistan* substantiates the position that in such circumstances a State may, at an appropriate stage, challenge an

[41] Article 19(3) Decision, para. 129.
[42] Judge Kovács' Partly Dissenting Opinion, para. 378.

assertion of jurisdiction by the Court over its nationals.[43] The Prosecutor appears to have likewise accepted that position.[44] Indeed, the assertion of jurisdiction by an international criminal court over nationals of a State may touch upon sovereign rights and interests that States have a legitimate interest in ensuring are not unduly infringed upon.

43. Israel is, for purposes of Article 19(2)(c), a State "from which acceptance of jurisdiction *is required*", namely a State of the kind referred to in Article 12(2)(b). Israel is therefore entitled to make a jurisdictional challenge under article 19(2)(c).

44. Secondly, Israel also has standing on the basis that it is the sole State whose acceptance of jurisdiction is "required" pursuant to article 12(3). Indeed, the basis of this jurisdictional challenge is that "Palestine" is not "the *State* on the territory *of which* the conduct in question occurred" within the meaning of Article 12(2)(a) of the Rome Statute. Accordingly, Israel's acceptance of jurisdiction as "a State which is not a Party to [the] Statute" is required under Article 12(3) in respect of any case based on acts purportedly committed by Israeli nationals on the territory of the Gaza Strip, or any other claimed territory of "Palestine". This again means, pursuant to Article 19(2)(c) of the Statute, that Israel is "a State from which acceptance of jurisdiction is required under article 12", entitling it to challenge the jurisdiction of the Court under that provision.

45. This second basis of standing is substantiated by the arguments presented in the jurisdictional claim itself. It would be problematic, however, to deny standing on the basis that a State needs to establish the merits of a jurisdictional challenge as a prerequisite to its standing to make it. Logically, all that should be required is that the claim is *prima facie* tenable. The *prima facie* merit of the claim is confirmed by the Partly Dissenting

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[43] *Situation in the Islamic Republic of Afghanistan,* Appeals Chamber, Judgment on the Appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan, ICC-02/17-138, 5 March 2020 ("Afghanistan Appeal Decision"), para. 44 ("As highlighted by the Prosecutor and LRV 1, article 19 allows States to raise challenges to the jurisdiction of the Court [….] Thus, these issues may be raised by interested States should the circumstances require, but the arguments are not pertinent to the issue of the authorization of an investigation."). *Situation in the Islamic Republic of Afghanistan*, Transcript of hearing, ICC-02/17-T-003-ENG, 6 December 2019 ("Afghanistan Hearing Transcript"), p. 39- 40. ("Afghanistan or the United States can challenge the admissibility of the case or the jurisdiction of the case under Article 19(2)(b). […] Now, if Afghanistan or the United States were to disagree with a jurisdiction or an admissibility decision of the Pre-Trial Chamber, they have an appeal as of right to the Appeals Chamber under Article 19(6) and the now famous Article 82(1)(a)").

[44] In asserting that it was premature to entertain arguments concerning whether the court could assert its jurisdiction over the nationals of States not Party to the Rome Statute, the Prosecution reassured the Appeals Chamber that such arguments could be heard later, as "the Statute itself provides for mechanisms for States to avail themselves of if they consider it justified, such as challenges to jurisdiction of the Court, or consultations procedure in Article 97 for part 9 requests made by the Court": Afghanistan Hearing Transcript, p. 37, line 23 to p. 38, line 2; p. 40, line 13 to p. 41, line 15.

Opinion of Judge Kovács, who expressly found that Israel is a State whose consent is required under Article 12(3) of the Statute in respect of any exercise of jurisdiction by the Court that exceeds the limits set out in the Oslo Accords.[45]

(ii) Israel may exercise prerogatives under Article 19(2)(c) at the current stage of the proceedings

46. The Prosecution opened an investigation in the Situation on 3 March 2021, following the 2021 Decision.[46] [REDACTED].[47] [REDACTED].

47. On 20 May 2024, the Prosecutor announced that he had filed an Article 58 application within the "*Situation in Palestine*" for the arrest of two Israeli nationals, the Prime Minister and Minister of Defence, for crimes allegedly committed at least in part in the territory of the Gaza Strip. While the application under Article 58 remains confidential, the Prosecutor issued a public announcement that included a description of the jurisdictional basis of the application as being that "the Court can exercise its criminal jurisdiction in the Situation in the State of Palestine and that the territorial scope of this jurisdiction extends to Gaza and the West Bank, including East Jerusalem".[48]

48. Under these circumstances, Israel has an immediate right to challenge jurisdiction under Article 19 given the current stage of proceedings in the Situation.

49. **First**, Article 19(5) states expressly that "a State referred to in paragraph 2(b) and (c) shall make a challenge at the earliest opportunity". The earliest opportunity has now arisen. Israel, a State under paragraph 2(c), is now faced with various actual or potential legal acts against senior Israeli officials that request concrete actions. Furthermore, Israel now knows, [REDACTED] and details concerning the application for arrest warrants that the Prosecutor has made public, that these legal measures target Israeli nationals for alleged acts on the territory of the Gaza Strip.[49] Indeed, the Prosecution has explained that the jurisdictional basis for the Article 58 application is the claim that "Palestine is a State for the purposes of article 12(2)(a)" and that the territorial scope of the Court's

[45] Judge Kovács' Partly Dissenting Opinion, paras. 365, 370-371 ("the Prosecutor should satisfy herself that Israel […] also consents according to article 12(3) of the Statute").
[46] Article 19(3) Decision.
[47] [REDACTED].
[48] Prosecutor's Statement on Applications for Arrest Warrants.
[49] Prosecutor's Statement on Applications for Arrest Warrants; [REDACTED].

jurisdiction extends to the Gaza Strip.[50] This is the territorial basis of jurisdiction that Israel challenges which, in turn, would invalidate these actual and potential legal acts.

50. Resolving jurisdictional issues at the current juncture has the beneficial effect of ensuring that the legality of certain actual or potential legal acts – which may have momentous and irreversible practical consequences – is assessed as soon as possible. Determining now whether these legal acts are within the Court's jurisdiction is important to avert or minimise the impact of acts that may subsequently be found to be outside of the ICC's capacity to exercise jurisdiction.

51. **Second**, Article 19 expressly permits jurisdictional challenges (as opposed to admissibility challenges) to be brought in relation to a *Situation* as a whole, and not only in relation to "a case". Hence, the title of Article 19 is "[c]hallenges to the jurisdiction of the Court *or* to the admissibility of a case". The distinction is repeated in the chapeau language of Article 19(2): "[c]hallenges to the admissibility of a case […] *or* challenges to the jurisdiction of the Court may be made by […]". As the Prosecution comprehensively argued in 2020:

> The use of the conjunction "or" suggests that the word "case" applies only to admissibility proceedings and not to those concerning jurisdiction. This accords with the Court's jurisdictional design. The Rome Statute, unlike the constitutive instruments of other ad hoc international criminal tribunals, does not establish the precise temporal or territorial parameters of all potential situations. Rather, articles 11 to 14 set out the jurisdictional requirements for all situations, and the Court must ultimately define the jurisdictional scope of its activities within a given situation. Moreover, while "admissibility is an 'ambulatory' process" and complementarity assessments might vary, the territorial scope of the Court's jurisdiction within any given situation is generally static. It thus makes sense to resolve jurisdictional questions as promptly as possible, including before an individual prosecution is commenced or even before an investigation is opened.[51]

52. Accordingly, the ordinary language of Article 19, as reinforced by the statutory context elucidated by the OTP, demonstrates that there is no requirement of a pre-existing "case" for a State to make a jurisdictional challenge under Article 19(2) generally, and Article

[50] Prosecution's Consolidated Response, para. 20; *See also* Report of the Panel of Experts, paras. 9-10.
[51] Prosecution's Article 19(3) Request, para. 24.

19(2)(c) specifically. The OTP, without any reference to its position in 2020, has now directly contradicted these arguments in its Response to *amici* submissions.[52]

53. **Third**, this interpretation is reinforced further by the absence of any reference – direct or indirect – to "case" in Article 19(2)(c), unlike Articles 19(2)(a) and (b). Article 19(2)(a) expressly limits jurisdictional challenges to "[a]n accused or a person for whom a warrant of arrest or a summons to appear has been issued". Article 19(2)(b) expressly limits admissibility challenges to a "State which has jurisdiction over a case". *A contrario*, Article 19(2)(c) contains no reference to "a case" in respect of jurisdictional challenges by a State. As Chambers have routinely held, the non-inclusion of a condition that appears in a neighbouring sub-clause is indicative of the non-applicability of that condition.[53]

54. Indeed, the OTP itself previously argued in seeking a jurisdictional ruling under Article 19(3) that it was incorrect to insert the "case" requirement by analogy into provisions of Article 19 where it is not found: "[a]part from article 19(1), no other sub-paragraph of article 19 textually limits jurisdictional proceedings or decisions to 'cases'".[54] Although this statement is not textually correct, the reasoning is: there is no reference to the word "case" in Article 19(2)(c), unlike other provisions addressing challenges by other actors (Article 19(1)(a)) or other types of challenge (Article 19(2) *chapeau* and Article 19(2)(b)). The Prosecution, incidentally, has contradicted itself in its later Response to the *amici* submissions, arguing there that "[i]nterpreting article 19(2) in context indicates that the same restriction applies to articles 19(2)(b) and (c)". No explanation of the "context" is given, nor is there any acknowledgement or explanation for the OTP's change of view.[55]

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[52] Prosecution's Consolidated Response, para. 48 (asserting that no jurisdictional challenge is available until after the issuance of an Article 58 decision, which "is made clear by not only by the reference to 'case' in the chapeau of article 19(2), but also by the reference in article 19(2)(a) that a jurisdictional challenge by a natural person is ripe only once 'a warrant of arrest or a summons to appear has been issued").

[53] *Lubanga*, Appeals Judgment, ICC-01/04-01/06-2205, 8 December 2009, para. 93 (finding that an express limitation in Article 74(2) limiting re-characterisation of the charges to facts and circumstances implies "*a contrario* that article 74(2) of the Statute does not rule out a modification of the legal characterisation of the facts and circumstances"); *Ongwen*, Decision on the Confirmation of Charges, ICC-02/04-01/15-422-Red, para. 151 (permitting the defence of duress, provided under Article 31(1), to be raised at confirmation of charges stage where other defences were expressly limited under Article 31(3) to "at trial"); Article 19(3) Decision, para. 73 (finding that the absence of reference to "case" in Article 19(3), unlike in Article 19(1) and (2), "confirms, *a contrario*, that this mechanism extends beyond a case.").

[54] Prosecution's Article 19(3) Request, para. 24.

[55] Prosecution's Consolidated Response, para. 48. The Prosecution argument also ignores that Article 19(2)(b) itself has its own reference to "case", thus obviating the need for any reliance on the chapeau language. In any event, both 19(2)(b) and the chapeau expressly confine the application of "case" to challenges to admissibility, not jurisdiction.

55. **Fourth**, even assuming that the requirement of a "case" could somehow be imported into Article 19(2)(c) from other subsections of Article 19, this term must be approached with sensitivity to the context and stage of proceedings. In interpreting the word "case" in an article concerning the investigation stage of proceedings, the *Kenya* Pre-Trial Chamber held that "the reference to the word 'case' in article 53(1)(b) of the Statute does not mean that the text is mistaken but rather that the Chamber is called upon to construe the term 'case' in the context in which it is applied" which meant, in that context, that "the admissibility assessment at this stage actually refers to the admissibility of one or more potential cases within the context of a situation".[56] More directly relevant for current purposes, Article 15(4) also requires a Pre-Trial Chamber to examine whether a "*case* appears to fall within the jurisdiction of the Court" as a prerequisite to the opening of an investigation (emphasis added). The word "case" in Article 19 must likewise be interpreted as not precluding a jurisdictional challenge until after an Article 58 decision.

56. **Fifth**, even if the term "case" is interpreted literally (and somehow imported into Article 19(2)(c)), this condition comes into existence for the purposes of a jurisdictional challenge as soon as an application is made for an arrest warrant or summons. This is implied in Article 19(1), which expressly requires a Pre-Trial Chamber to "satisfy itself that it has jurisdiction in any case brought before it". Hence, the jurisdictional assessment begins no later than the moment that the case is "brought before" the Pre-Trial Chamber, and is "a prerequisite for the issue of a warrant of arrest".[57] Thus, it is not premature for a State to raise a jurisdictional challenge once a case has been "brought before" a Chamber, especially where the Prosecutor has authorised the issuance of an external report that identifies the suspects; provided a detailed description of the conduct; and even has offered a legal explanation as to the ostensible basis for the Court's jurisdiction over the case.[58] A "case" therefore now exists insofar as "the defining elements of a concrete case before the Court are the individual and the alleged conduct".[59] As regards some

[56] *Situation in the Republic of Kenya,* Decision pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation, ICC-01/09-19-Corr, para. 48.
[57] *Bemba Gombo*, Decision on the Prosecutor's Application for a Warrant of Arrest, ICC-01/05-01/08-14-tENG, 10 June 2008, para. 11; *Ntaganda,* Decision on the Prosecutor's Application for a Warrant of Arrest, ICC-01/04-02/06-1-Red-tENG, 6 March 2007, paras. 25-26; *Kony*, Warrant of Arrest, ICC-02/04-01/05-53, 27 September 2005, para. 38; *Mbarushimana*, Decision on the Prosecutor's Application for a Warrant of Arrest, ICC-01/04-01/10-1, 28 September 2010, paras. 5-8; *Guchmazov*, Arrest Warrant, ICC-01/15-41-Red, 30 June 2022, para. 2; *Ngaissona*, Warrant of Arrest, ICC-01/14-01/18-89-Red, 7 December 2018, para. 4; *Al-Werfalli*, Second Warrant of Arrest, ICC-01/11-01/17-13, 4 July 2018, para. 20.
[58] Report of the Panel of Experts, paras. 9-10, 22-33. *See also* Prosecutor's Statement on Applications for Arrest Warrants.
[59] Ruto *et al.*, Appeals Judgment, ICC-01/09-01/11-307, 30 August 2011, para. 40.

caselaw defining "case" as the subject-matter of an arrest warrant, as the Prosecution pointed out in 2020, "[a]lthough a few ICC decisions have stated that article 19 applies to 'concrete cases,' these were issued in the context of article 19(1) admissibility determinations or article 19(2) admissibility challenges".[60]

57. **Sixth**, an ongoing *ex parte* procedure does not negate, suspend, or limit a State's prerogatives to challenge "the jurisdiction of the Court" under Article 19(2)(c). Article 19(2)(c), as the foregoing analysis demonstrates, does not depend on the issuance of an arrest warrant. The Prosecution's claim that Article 19(2)(c) is inapplicable "until after the Chamber has positively ruled on a request under article 58"[61] is not based on any authority, and broadly contradicts its own position as presented in 2020 showing that the word "case" did not limit jurisdictional challenges and that, even if it did, that word should be read flexibly as encompassing "potential cases".[62] *It is preferable – not prohibited –* for a jurisdictional challenge be made prior to any of those measures and decisions so that, as argued by the Prosecution in 2020, "the Court's proceedings move forward on a proper jurisdictional basis".[63]

(iii) The 2021 decision issued by the PTC under Article 19(3) is not a bar to Israel's right to challenge jurisdiction under Article 19 of the Rome Statute

58. The 2021 Decision constitutes a preliminary decision, in an *ex parte* context, on the scope of the Court's exercise of jurisdiction under Article 12 of the Statute. Whatever the legal findings made by the Majority of the Pre-Trial Chamber at that stage of the proceedings, these cannot constitute a bar to a State or an individual exercising their right to challenge the jurisdiction of the Court or the admissibility of a case under Article 19(2), under a claim of *res judicata*. To make such a claim would empty Article 19(2) of its corrective function, because it would mean that an individual or a State could not challenge jurisdiction once a Chamber has made even a preliminary assessment *ex parte* of the Court's capacity to exercise such jurisdiction.

59. This view accords with the general scope and effect of proceedings under Article 19(3). As stated in the Ambos Commentary: "an Article 19(3) decision should not *per se* prevent

[60] Prosecution's Article 19(3) Request, para. 24. The Prosecution now contradicts its previous position: Prosecution's Consolidated Response, para. 48.
[61] Prosecution's Consolidated Response, para. 50.
[62] Prosecution's Article 19(3) Request, paras. 24-26.
[63] Prosecution's Article 19(3) Request, para. 23.

a concerned State from subsequently demonstrating to the Court […] that the Court does not have jurisdiction [….] Article 19(2) is not nullified by the existence of an Article 19(3) decision".[64] Accordingly, once there is standing under Article 19(2), not only is the doctrine of *res judicata* (or any related or analogous doctrine) inapplicable, but there is an independent statutory basis for a full jurisdictional challenge unencumbered by contrary presumptions as might apply in the case of, for example, reconsideration.

60. The Prosecution concedes that the 2021 Decision is not *res judicata* in respect of any challenge by Israel under Article 19(2)(c) because Israel would then be a "new party" to the proceedings.[65] This would negate one of the three essential conditions of *res judicata* in international law, which requires (1) the same parties, (2) the same object, and (3) the same cause.[66] Accordingly, no issue of *res judicata* arises given that this application is brought by Israel as a "new party" to the jurisdiction issue.

61. Indeed, the Pre-Trial Chamber deemed it "opportune to emphasise" that its conclusions pertained only to "the current stage of proceedings, namely the initiation of an investigation by the Prosecutor".[67] The Pre-Trial Chamber went further still, expressly reserving further consideration of jurisdictional issues as and when the Prosecution might bring an Article 58 application, or a challenge were brought under Article 19(2): "[w]hen 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".[68] The Prosecution misreads this statement,[69] whereby the Majority states that it will "examine further" (*i.e., in more detail*) questions of jurisdictions, which necessarily includes all relevant jurisdictional questions, including the significance of the Oslo Accords, especially given the fact that the Pre-Trial Chamber chose not to "address these arguments" in "the context of the present proceedings".[70] This interpretation of the Majority's Decision is further

[64] Kai Ambos, *Article 19: Challenges to the jurisdiction of the Court or the admissibility of a case, in* ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: ARTICLE-BY-ARTICLE COMMENTARY (4th ed., 2022), p. 1064, mn. 53.
[65] Prosecution's Consolidated Response, para. 50.
[66] Rose Theofanis, *The doctrine of Res Judicata in International Criminal Law, in* 3 INT'L. CRIM. L. REV. (2003), p. 196.
[67] Article 19(3) Decision, para. 131.
[68] Article 19(3) Decision, para. 131 (emphasis added).
[69] Prosecution's Consolidated Response, para. 50.
[70] Article 19(3) Decision, para. 129.

supported by the fact that Judge Kovács questioned the efficacy of deferring an in-depth legal analysis to a later stage of the proceedings.[71]

62. Accordingly, neither the jurisdictional significance of the Oslo Accords, nor any other jurisdictional issue, is precluded by the doctrine of *res judicata*, or any other related doctrine.

V. SUBMISSIONS ON JURISDICTION

(i) Background

63. Israel's position, shared by other States,[72] has been and remains that "Palestine" cannot accept the Court's jurisdiction, since no sovereign Palestinian State exists under international law, and there is no sovereign Palestinian territory. Israel maintains that the territorial precondition to the Court's exercise of jurisdiction contained in Article 12(2)(a) is not met with respect to this situation.[73]

64. Nonetheless, in its 2021 Decision, the Pre-Trial Chamber determined by a 2-1 majority that in view of its accession, "Palestine" could be considered a "State" within the meaning of Article 12(2) of the Statute.[74] Given this finding, the Majority did not consider it necessary to determine whether "Palestine" constituted a State under general international law, or to make a determination as to its territorial sovereignty and borders.[75]

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[71] Judge Kovács' Partly Dissenting Opinion, paras. 86-95. *See also* in para. 93 ("Why postpone the *in depth* assessment? What is supposed to happen in the meantime? Which important legal provisions will be different from those that are already identified…?").

[72] States that have filed submissions before the Court arguing that the Court lacks jurisdiction in this matter for various reasons, include, *inter alia*, Argentina, Australia, The Czech Republic (2020, 2024), the Democratic Republic of the Congo, The United States of America, The Federal Republic of Germany, Hungary (2020, 2024), and Uganda.

[73] See Attorney General Memorandum, paras. 26-54.

[74] Article 19(3) Decision, para. 112.

[75] The majority considered that General Assembly Resolution 67/19 forms the basis for defining the territorial scope of its jurisdiction, since it was this Resolution that led to the accession of Palestine, Article 19(3) Decision, para. 116. This ignores, however, that UN General Assembly resolutions are by nature non-binding. Indeed, even if this resolution could be relied upon, it does not purport to determine territorial boundaries. Operative paragraph 5 specifically calls for negotiations "for the achievement of a just, lasting and comprehensive peace settlement between the Palestinian and Israeli sides that resolves all outstanding core issues, namely the Palestine refugees, Jerusalem, settlements, *borders*, security and water" (emphasis added), See UNGA Resolution 67/19 (2012). *See also* Judge Kovács' Partly Dissenting Opinion, paras. 232-234 ("Resolution 67/19 cannot be referred to as proof as far as alleged perfect statehood, precise borders or territory are concerned. It is in fact just the contrary: the carefully chosen formulas counterbalancing each other and the statements made by States show that there was an understanding that these issues could be, should be and would be settled later. […] the same can be said of nearly all resolutions adopted since the 1990's. Their 'pre-1967 borders' type formulas do not stand alone: they should be read alongside the references to Oslo I and Oslo II, the Road Map (which is very clear about when and how

65. Furthermore, the Majority considered that "the arguments regarding the Oslo Accords *in the context of the present proceedings are not pertinent* to the resolution of the issue under consideration," and that as a consequence, "the Chamber [would] not address these arguments".[76] Indeed, the Pre-Trial Chamber deemed it "opportune to emphasise" that "the Chamber will be in a position to examine further questions of jurisdiction which may arise," specifically, when the Prosecution might bring an Article 58 application, or a challenge brought under Article 19(2).[77]

66. In his Partly Dissenting Opinion, Judge Kovács questioned the efficacy of deferring an in-depth legal analysis to a later stage.[78] Furthermore, following a substantive analysis of the jurisdictional questions at issue with reference to general international law, Judge Kovács concluded that "the Oslo Accords could be the key to adequately answering the question presented by the Prosecutor concerning the geographical scope of the Court's jurisdiction".[79] He further stated:

> Given that Palestine's borders are not yet settled under international law, and consequently one cannot say with certainty and authoritative value if a particular parcel of land belongs or not to Palestine, the situation and potential cases cannot be easily matched with the wording of article 12(2)(a) of the Statute, specifically 'the State on the territory of which'.[80]

67. He went on to find that in the absence of Israel's acceptance of the Court's jurisdiction, such jurisdiction could not exceed the restricted competences *ratione personae* and/or *ratione loci* transferred to the Palestinian Authority pursuant to the Oslo Accords that created it.[81]

68. In other words, according to Judge Kovács, the Oslo Accords were determinative as to the scope of jurisdiction that the Court was permitted to exercise, while the Majority limited the applicability of its findings to the stage of an initiation of an investigation, and left the issue of the Oslo Accords to be decided later. That time has now come given the Prosecutor's applications.

Palestine's borders will be established) and the Quartet, or even with direct reference to negotiations on borders and recalling the previously adopted resolutions containing the same elements...").
[76] Article 19(3) Decision, para. 129 (emphasis added).
[77] Article 19(3) Decision, para. 131.
[78] Judge Kovács' Partly Dissenting Opinion, paras. 86-95. *See also* in para. 93.
[79] Judge Kovács' Partly Dissenting Opinion, para. 320.
[80] Judge Kovács' Partly Dissenting Opinion, para. 322.
[81] Judge Kovács' Partly Dissenting Opinion, paras. 370-371 *et seq*.

(ii) Article 12(2)(a) is predicated on the existence of territorial sovereignty under public international law

69. Article 12(2) of the Statute prescribes a jurisdictional regime expressly founded on the traditional jurisdictional bases of territoriality and nationality. This, in turn, reflects the fact that the Court's authority is contingent on sovereign States delegating to it plenary criminal jurisdiction over their territory and over their nationals, which flows from their sovereign prerogatives under international law.[82]

70. Article 12(2)(a) requires the Court to determine, as a precondition to any exercise of jurisdiction over the crimes set forth in Article 5, that "the *State* on the territory *of which*

[82] That the source of the Court's authority is the delegated sovereign authority of States to prescribe criminal law, *see 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, para. 60 ("when States delegate authority to an international organisation they transfer all the powers necessary to achieve the purposes for which the authority was granted to the organisation […] since the States Parties did not explicitly restrict their delegation of the territoriality principle, they must be presumed to have transferred to the Court the same territorial jurisdiction as they have under international law"); *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, ICC-RoC46(3)-01/18-1, 9 April 2018 (Bangladesh/Myanmar Prosecution's 19(3) Request), para. 49 ("article 12(2)(a) itself functions to delegate to the Court the States Parties' own "sovereign ability to prosecute" article 5 crimes"). *See also* Rod Rastan, *Jurisdiction*, in THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 141, 155 (Carsten Stahn ed., 2015) (referring to delegation in the context of personal jurisdiction; on delegation in the context of territorial jurisdiction, see pp. 163-164); Mahmoud Cherif Bassiouni, *The Permanent International Criminal Court*, *in* JUSTICE FOR CRIMES AGAINST HUMANITY 173, 180 (Lattimer and Sands eds., 2003) ("[the ICC] is not a supra-national body, but an international body similar to existing ones … The ICC does no more than what each and every state can do under existing international law … The ICC is therefore an extension of national criminal jurisdiction …"); The Board of Editors, *The Rome Statute: A Tentative Assessment*, *in* Cassese et al. Commentary, *supra* note 10, at pp. 1901, 1911 ("Territorial jurisdiction is the primary basis for jurisdiction under international law; indeed, it is an essential attribute of State sovereignty. … if the State wishes to delegate this jurisdiction to an international criminal court … this is something it is clearly entitled to do … The ICC is not premised on universal jurisdiction, but on conventional bases of jurisdiction – territoriality and/or nationality"); Michael A. Newton, *How the International Criminal Court Threatens Treaty Norms*, 49 VAND. J. TRANSNAT'L L. 371, 374-375 (2016) ("the Court's authority is not independent or omnipotent. Treaty-based ICC jurisdiction flows exclusively from the delegation of a State Party's sovereign jurisdictional power. Except for the overarching authority of the United Nations Security Council to convey jurisdiction to the Court through binding resolutions under Chapter VII of the UN Charter, the jurisdiction of the ICC, as embodied in Article 12 of the Rome Statute, is based only on derivative jurisdiction granted by states at the time they ratify the multilateral treaty"); Roger O'Keefe, *Response: "Quid" Not "Quantum": A Comment on "How the International Criminal Court Threatens Treaty Norms"*, 49 VAND. J. TRANSNAT'L L. 433, 439 (2016) ("by way of Article 12(2)(a) of the Rome Statute, a receiving State Party to the Statute delegates to the ICC the exercise of its customary right to entertain criminal proceedings in respect of the crimes specified in Article 5 of the Statute when these crimes are committed in its territory"); Kevin Jon Heller, *What Is an International Crime? (A Revisionist History)*, 58 HARV. INT'L L.J. 353, 375 (2017) ("the Court is based on the delegated jurisdiction of its member states"); William A. Schabas and Giulia Pecorella, *Article 12: Preconditions to the exercise of jurisdiction*, *in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT – A COMMENTARY 672, 682 (Otto Triffterer and Kai Ambos eds., 3rd ed., 2016), (referring to the jurisdiction of the ICC as being delegated by a territorial State); Yuval Shany, *In Defence of Functional Interpretation of Article 12(3) of the Rome Statute: A Response to Yaël Ronen*, 8 J. INT'L CRIM. JUST. 329, 331-333 (2010) ("Article 12 referrals, which are conditioned on membership in the Statute or ad hoc consent to ICC jurisdiction by the 'territorial' state or the state whose nationality the alleged perpetrator holds, are reflective of the delegation-based approach").

the conduct in question occurred" is a Party to the Rome Statute or has accepted the jurisdiction of the Court pursuant to Article 12(3) (emphasis added).

71. While the term "State" is not defined in the Rome Statute, its meaning commonly accepted and recognised in general international law is a sovereign State. This interpretation accords with the Vienna Convention on the Law of Treaties, which requires that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose".[83] The act of delegating criminal jurisdiction to the Court is itself an "exercise of national sovereignty",[84] and the Prosecution has recognised in the past that the Court's jurisdiction derives from the existence of a "sovereign ability to prosecute".[85]

72. That Article 12(2)(a) refers to the "territory of" a "State" reinforces that the term "State" in this context refers to a *sovereign* State,[86] as the "territory of" a State comprises, under international law, "all the land, internal waters and territorial sea, and the airspace above them, over which the State has sovereignty".[87] In the same vein, "… sovereignty in relation to a portion of the surface of the globe is the legal condition necessary for the inclusion of such portion in the territory of any particular State".[88]

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[83] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, Article 31(1). The Court has had occasion to state that "[t]he interpretation of treaties, and the Rome Statute is no exception, is governed by the Vienna Convention on the Law of Treaties (23 May 1969), specifically the provisions of article 31 and 32", *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, ICC-01/04-168, 13 July 2006, para. 33. *See also Bemba Gombo et al*., Judgment pursuant to Article 74 of the Statute, ICC-01/05-01/13-1989-Red, 19 October 2016, para. 17.

[84] Mahmoud Cherif Bassiouni and William A. Schabas, *The ICC's Nature, Functions, and Mechanisms, in* THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT (2nd ed., 2016), p. 148.

[85] Bangladesh/Myanmar Prosecution's 19(3) Request, para. 49.

[86] William A. Schabas and Giulia Pecorella, *Article 12: Preconditions to the exercise of jurisdiction*, *in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT – A COMMENTARY (Otto Triffterer and Kai Ambos eds., 3rd ed., 2016), pp. 672, 681-682. (observing, in reference to Article 12(2)(a), that "territorial jurisdiction is a manifestation of State sovereignty"). Reference in Article 12(2)(b) of the Rome Statute to the term "nationality", too, indicates that the term "State" means a sovereign State. *See also* Harmen van der Wilt, *The Rome Statute: Only States are Invited to Tune In*, 20 QUEST. INT'L L. 5, 7-8 (2015) (observing that Article 12 of the Rome Statute alludes to the criteria of statehood accepted under international law).

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

[88] *Island of Palmas Case (Netherlands, U.S.)*, Permanent Court of Arbitration, 4 April 1928, Reports of International Arbitral Awards, Vol. II, p. 838. The Grand Chamber of the European Court of Justice similarly

73. Article 12(2)(a) implies an autonomous, objective determination of whether the territorial precondition to the exercise of the Court's jurisdiction is satisfied. That accession to the Statute by a State Party (or a valid declaration under Article 12(3)) as a *necessary* precondition to the exercise of jurisdiction under Article 12(2)(a) cannot be conflated with the position that accession is a *sufficient* condition for the exercise of jurisdiction under it. The plain text of Article 12(2)(a) requires more than simply acceptance of jurisdiction: (i) there must be a "State" (through which the exercise of jurisdiction is preconditioned); (ii) the "State" has "accepted" the Court's jurisdiction over Article 5 crimes; and (iii) the "State" *possesses* the "territory" on which there is a reasonable basis to believe that Article 5 conduct has occurred.

74. The Prosecutor argues that turning to sources external to the Rome Statute such as the Oslo Accords in order to assess the jurisdictional competence of the Court would create an exception with respect to the application of Article 12(2)(a),[89] and would even "fragment the Court's jurisdiction and render its scope uncertain," or "impermissibly render it variable over time, in substance, and in relation to particular categories of individuals".[90] This misunderstands the normative legal framework.

75. The Chamber is simply requested to examine whether the preconditions to the exercise of the Court's jurisdiction under Article 12 are met. The territorial precondition to the exercise of jurisdiction under Article 12(2)(a) does not relate to the rights and obligations of a State Party; it refers to the preconditions that must be satisfied for the Court to exercise jurisdiction. It is an objective, legal, determination of a jurisdictional question. Faithful and impartial execution of the Court's duty in this regard cannot be results-based, but must ensure consistent and equal application of principles of international law, even if the result is that the Court lacks jurisdiction over a particular case or situation.

76. As noted above, Article 12(2) reflects traditional bases of territorial and personal jurisdiction, which are inherent to States' sovereignty, and are regulated by public international law. The Court's consistent jurisprudence, as well as the OTP's traditional positions, and the Prosecutor's interpretation of Article 12(2) in this case, rely on recourse

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determined that the term "territory of the Kingdom of Morocco" means "the geographical space over which [the Kingdom of Morocco] exercises the fullness of the powers granted to sovereign entities by international law": Case C-104/16 P *Council* v. *Front Polisario* [2016] EU:C:2016:973, paras. 16, 95.

[89] Prosecution's Consolidated Response, para. 51 (The Oslo argument "… seeks to treat the State of Palestine differently from every other State Party"). *See also* paras. 57, 63, 65, 66, 69.

[90] Prosecution's Consolidated Response, para. 67.

to this ordinary meaning of the words "territory of" and "State" under public international law when interpreting Article 12(2)(a).

77. The OTP, for instance, has historically acknowledged that the term "territory of a State", "as used in article 12(2)(a), includes those areas under the sovereignty of the State".[91] In the *Situation in Georgia*, both the OTP and the Chamber (in its Article 15 Decision) addressed South Ossetia's status under general international law in the specific context of assessing "territorial jurisdiction" under Article 12(2)(a).[92]

78. The OTP's position in the present case also relies on this interpretation. For example, the Prosecutor asserts, in relation to the territorial precondition to the exercise of jurisdiction under Article 12(2)(a), that "the Court's jurisdiction is defined by the two classical and universally accepted bases of jurisdiction under general international law—territoriality under article 12(2)(a) and nationality under article 12(2)(b). *The territorial principle as a basis of jurisdiction, in this sense, refers to the plenary competence of States to regulate persons, conduct, and events on their territory. It is an inherent aspect of sovereignty, with its scope defined by customary international law".*[93] Moreover, "the Court's jurisdiction under article 12 of the Statute is defined by the *territorial jurisdiction of its States Parties as it exists under international law".*[94]

79. Given that the application and interpretation of the Rome Statute, and specifically of Article 12, has included recourse by both the OTP and the Court to other sources of law, particularly public international law, it is untenable to hold that "[t]here is no lacuna [in the interpretation of Article 12], no gap that requires recourse to other sources of law".[95]

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[91] OTP, Report on Preliminary Examination Activities 2019, 5 December 2019, para. 47 (the Prosecutor added in the same paragraph that "[s]uch interpretation of the notion of territory is consistent with the meaning of the term under international law"), para. 50 ("the EEZ (and continental shelf) cannot be equated to territory of a State within the meaning of article 12 of the Statute, given that the term 'territory' of a State in this provision should be interpreted as being limited to the geographical space over which a State enjoys territorial sovereignty (*i.e.*, its landmass, internal waters, territorial sea and the airspace above such areas). Criminal conduct which takes place in the EEZ and continental shelf is thus in principle outside of the territory of a Coastal State and as such, is not encompassed under article 12(2)(a) of the Statute…").

[92] *Situation in Georgia*, Decision on the Prosecutor's request for authorization of an investigation, ICC-01/15-12, 20 November 2017, para. 6 ("…the Chamber agrees with the submission of the Prosecutor…that South Ossetia is to be considered as part of Georgia, as it is generally not considered an independent State and is not a Member State of the United Nations"); *Situation in Georgia*, Corrected Version of "Request for authorisation of an investigation pursuant to article 15", 16 October 2015, ICC-01/15-4-Corr, ICC-01/15-4-Corr2, 17 November 2015, para. 54.

[93] Prosecution's Consolidated Response, para. 53 (emphasis added).

[94] Prosecution's Consolidated Response, para. 75 (emphasis added).

[95] Prosecution's Consolidated Response, para. 61.

(iii) The existence and scope of a territory for the purposes of Article 12(2) of the Rome Statute cannot be established

80. Any proper factual and legal account shows that there has never been a sovereign Palestinian State. The last recognised sovereign of the territory in question was the Ottoman Empire, which formally renounced its rights and title in the Treaty of Lausanne, 1923.[96]

81. The 1922 confirmation of the Mandate over Palestine by the Council of the League of Nations (which incorporated the obligation laid down in the Balfour Declaration to establish a "Jewish National Home")[97] recognised that the Mandatory Power had "full powers of legislation and of administration".[98] The Mandatory Power did not acquire sovereignty over the territory it was entrusted with, and sovereignty as such was suspended and left unallocated or dormant.[99]

82. Subsequently, a range of binding international instruments underscored the explicit and unambiguous reservation of rights until their ultimate determination in final status talks. These instruments include the armistice agreements signed by Israel with its neighbours at the end of Israel's War of Independence (1948-9),[100] the peace treaties with Egypt (1979),[101] and Jordan (1994),[102] and the Israeli-Palestinian bilateral agreements.[103] The latter, concluded between the Parties with the support of the international community in

[96] Article 16 provides: "Turkey hereby renounces all rights and title whatsoever over or respecting the territories situated outside the frontiers laid down in the present Treaty and the islands other than those over which her sovereignty is recognised by the said Treaty, the future of these territories and islands being settled or to be settled by the parties concerned". *See* Attorney General Memorandum, p. 16 *et seq.*; *see also* M. Shaw, *The League of Nations Mandates System and the Palestine Mandate: What Did and Does It Say About International Law and What Did and Does It Say About Palestine?*, 49:3 Israel L. Rev. 287 (2016).

[97] The Mandate explicitly entrusted Great Britain with putting into effect the 1917 Balfour Declaration that was made "in favour of the establishment in Palestine of a national home for the Jewish people", *Mandate for Palestine*, 3 League of Nations Official Journal 1007 (1922), preambular para. 2. It further provided that "recognition has thereby been given to the historical connection of the Jewish people with Palestine and to the grounds for reconstituting their national home in that country", thus acknowledging the indigenous rights of the Jewish people to the land as predating the Mandate, *ibid.*, at preambular para. 3.

[98] *Ibid.*, Article 1.

[99] *International Status of South-West Africa, Advisory Opinion, ICJ Reports, 1950,* pp. 128, 150 (separate opinion by Sir Arnold McNair).

[100] General Armistice Agreement, Egypt-Israel, 24 February 1949, 42 U.N.T.S. 251, Articles V(2) and XI; General Armistice Agreement, Israel-Jordan, 3 April 1949, 42 U.N.T.S. 303, Articles II(2) and VI(9). General Armistice Agreement, Israel-Lebanon, 23 March 1949, 42 U.N.T.S 287, Article II(2); General Armistice Agreement, Israel-Syria, 6 October 1949, 42 U.N.T.S 327, Articles II(2) and V(1).

[101] Peace Treaty between Israel and Egypt, Egypt-Israel, 26 March 1979, 1138 U.N.T.S. 59, Articles 1(2) and 2.

[102] Treaty of Peace between the State of Israel and the Hashemite Kingdom of Jordan, Israel-Jordan, 26 October 1994, 2042 U.N.T.S 351, Articles 3(1)-(2).

[103] Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, 28 September 1995 (sometimes termed "Oslo II") ("The Interim Agreement"), Article XXXI (6).

1995, explicitly stated that the status of the territory would be settled through bilateral permanent status negotiations.[104]

83. This means that sovereignty over the territory has remained in abeyance or, as the arbitral tribunal in *Eritrea v. Yemen* explained with respect to territories similarly renounced by the Ottoman Empire, "created for the [territory in question] an objective legal status of indeterminacy pending a further decision of the interested parties".[105]

84. Under these circumstances, when the sovereign status of the territory has been left to negotiations between the Parties, it would be inappropriate for the Court to make legal determinations on the matter. Accordingly, Israel's position is that fundamental pre-conditions for exercising the Court's jurisdiction cannot be met, and that the Court consequently cannot exercise jurisdiction over the Situation. In the absence of Israel's consent to jurisdiction, the Court cannot rely on the Palestinian purported delegation of jurisdiction over the territory.

85. To the extent that a non-sovereign entity can nevertheless confer jurisdiction to the Court, it can do so based on the authority it possesses. At most, the Palestinian authorities can only delegate to the Court the criminal jurisdictional competence that they actually possess. As explained below, in the case of the Palestinians, that competence does not include plenary criminal jurisdiction.

(iv) The Oslo Accords are the only potential source for Palestinian jurisdiction

86. In the absence of sovereignty, the Oslo Accords exclusively prescribe the jurisdictional competencies of the Palestinians with respect to the territory in question pending a negotiated Israeli-Palestinian settlement. The relevance of the Oslo Accords to the Court's analysis in the matter before it is two-fold. First, they underscore the indeterminacy of the territorial issues and establish a framework for reaching a negotiated resolution to the conflict, including by advancing the Palestinian right to self-determination in the interim, in the form of limited autonomy. Second, they define those

[104] The Agreements specifically provide that the issue of "borders" is reserved for permanent status negotiations, and that no side may change the status of the West Bank and the Gaza Strip pending the outcome of the negotiations. *See* Declaration of Principles on Interim Self-Government Arrangements, 13 September 1993 ("Declaration of Principles"), Article V(3); The Interim Agreement, Articles XXXI(5), XXXI(7).
[105] Territorial Sovereignty and Scope of the Dispute (Eritrea v. Yemen), R.I.A.A. Vol XXII 209 (Perm. Ct. Arb. 1996), para. 445 (referring to Article 16 of the Treaty of Lausanne and, more specifically, to territories similarly renounced by Turkey).

areas of responsibility and authority that would be vested in the newly-established Palestinian Authority. There is no other source of Palestinian criminal jurisdiction.

a. In the absence of sovereignty, the Oslo Accords prescribe the jurisdictional competences of the Palestinians with respect to the territory in question

87. Over the course of the 1990's a series of agreements were entered into by Israel and the PLO as the representative of the Palestinian people. The Parties agreed on a mechanism, endorsed by the international community, for resolving outstanding claims and reaching a final agreement. In addition, the Agreements articulated the interim powers and responsibilities of the Parties pending a final status agreement. The Parties continue to rely on the legal framework as set out by the Agreements, and this is reflected in the reality on the ground, as further detailed below.

88. A fundamental tenet of the Agreements was that the Palestinian Authority was to have *only* those powers and responsibilities that were expressly laid down in the Agreements; as a corollary to this, Israel retained all powers and responsibilities that were not specifically and expressly transferred to the Palestinian Authority.[106] This is stated in the Agreements in no uncertain language.[107] Consequently, the Palestinian authorities could not have delegated to the Court a jurisdictional competence that they never had.

89. The provisions that created and which define the Palestinian Authority's jurisdictional powers, including over criminal matters, are of particular relevance. They are contained in the Israel-Palestinian Interim Agreement on the West Bank and the Gaza Strip of 1995 ("the Interim Agreement") and its Protocol Concerning Legal Affairs ("the Legal Protocol").[108] Any jurisdiction currently held by the Palestinian authorities derives from these provisions.

[106] Technically to an elected Council, termed the Palestinian Interim Self-Government Authority, but until such time as this was inaugurated, the Council was to be construed to mean the Palestinian Authority created under the Gaza-Jericho Agreement, The Interim Agreement, Article I(2).
[107] The Interim Agreement, Article I(1) ("Israel shall transfer powers and responsibilities as specified in this Agreement from the Israeli military government and its Civil Administration to the Council in accordance with this Agreement. Israel shall continue to exercise powers and responsibilities not so transferred"); Article XVII(1)(b) ("…the jurisdiction of the Council will cover West Bank and Gaza Strip territory as a single territorial unit, except for … powers and responsibilities not transferred to the Council"); and Article XVII(4)(a) ("Israel, through its military government, has the authority over areas that are not under the territorial jurisdiction of the Council, powers and responsibilities not transferred to the Council and Israelis").
[108] *See e.g.* The Interim Agreement; Annex IV - Protocol Concerning Legal Affairs.

90. The Interim Agreement states that Palestinian authorities have no jurisdiction over Israelis in any sphere, including the sphere of criminal jurisdiction.[109] In the part of the Interim Agreement titled 'Jurisdiction', which specifically defines the limited scope of jurisdiction transferred to the Palestinian Authority, the Agreement provides that "[t]he territorial and functional jurisdiction of the [Palestinian Authority] will apply to all persons, *except for Israelis*, unless otherwise provided in this Agreement".[110]

91. Pursuant to Article I(1)(a) of the Legal Protocol, the Palestinian authorities' criminal jurisdiction is limited to offences committed "by Palestinians and/or non-Israelis" in the territory under its jurisdiction, namely Areas A and B in the West Bank and the Gaza Strip territory. Pursuant to Article I(2)(b) of the Legal Protocol, "Israel *has* sole criminal jurisdiction" (not "*shall exercise*") over offences committed in the territory under Palestinian authority by Israelis.[111]

92. As for territorial jurisdiction, the Palestinian Authority was specifically excluded from having territorial jurisdiction over Israeli settlements and in Area C.[112] Jerusalem and the settlements were defined as "final status" issues, to be resolved as part of the negotiations for a permanent agreement, and no transfer of control was contemplated with respect to those areas.[113]

b. The Oslo Accords do not merely place a limit on the Palestinians' enforcement jurisdiction

93. The provisions of the Oslo Accords which define Palestinian jurisdiction are clearly not restricted to enforcement powers, but also encompass legislative, *i.e.,* prescriptive authority. In particular, Article III of the Interim Agreement deals with the structure of the "Palestinian Council", the term used throughout the Agreements to refer to the Palestinian self-governing body. Article III(2) stipulates that "[t]he Council shall possess

[109] *See* The Interim Agreement, Article XVII(1)(a); Annex IV - Protocol Concerning Legal Affairs, Articles I(1)(a), I(2)(b), I(4)(a), II(2)(c).
[110] Declaration of Principles, Article XVII(2)(c) (emphasis added). The exception refers to some civil matters as specified in Annex IV - Protocol Concerning Legal Affairs, Article. III(2).
[111] The Interim Agreement, Annex IV - Protocol Concerning Legal Affairs, Article I(2) (emphasis added).
[112] The Interim Agreement, Article XVII(2)(a) ("[t]he territorial jurisdiction of the Council shall encompass Gaza Strip territory, except for the Settlements and the Military Installation Area shown on map No. 2, and West Bank territory, except for Area C which, except for the issues that will be negotiated in the permanent status negotiations, will be gradually transferred to Palestinian jurisdiction…"); Annex IV - Protocol Concerning Legal Affairs, Article I(1)(a).
[113] The Interim Agreement, Article XVII(1) ("…the jurisdiction of the Council will cover West Bank and Gaza Strip territory as a single territorial unit, except for: (a) issues that will be negotiated in the permanent status negotiations: Jerusalem, settlements, specified military locations, Palestinian refugees, borders, foreign relations and Israelis; and (b) powers and responsibilities not transferred to the Council.")

both legislative power and executive power" and "carry out and be responsible for all the legislative and executive powers and responsibilities transferred to it under this Agreement". It is further provided that "[t]he exercise of such legislative powers shall be in accordance with Article XVIII of this Agreement". Article XVIII(4)(a), in turn, stipulates that:

> Legislation, including legislation which amends or abrogates existing laws or military orders, which exceeds the jurisdiction of the Council or which is otherwise inconsistent with the provisions of the DOP, this Agreement, or of any other agreement that may be reached between the two sides during the interim period, shall have no effect and shall be void *ab initio*.[114]

94. The Agreements cannot be seen simply as placing limitation on the Palestinians' ability to exercise jurisdiction, but rather they are those which created and defined the existence of jurisdiction to begin with.[115] In other words, the Palestinian authorities did not possess any jurisdiction of any kind over the West Bank and Gaza Strip prior to entering into the Oslo Accords. Palestinian jurisdiction over Israeli nationals was not previously possessed or subsequently relinquished. *Prior to the Oslo Accords, Palestinian plenary criminal jurisdiction did not exist. After Oslo, it still does not exist.*

95. For similar reasons, the Oslo Accords are not comparable to treaty arrangements in which States undertake to refrain from exercising one or more of their jurisdictional powers, *e.g.*, treaty provisions concerning the jurisdictional immunities to be accorded to certain categories of persons, or Status of Forces Agreements (SOFAs), by which a sending State might retain exclusive jurisdiction over its personnel in the territory of the receiving State.[116]

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[114] The Interim Agreement, Article XVIII(4)(a) (Legislative Powers of the Council).
[115] *Amicus Curiae* Observations on Issues Raised by the "Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine", Ambassador Dennis Ross, ICC-01/18-94, 16 March 2020 ("Ross *Amicus Curiae* Observations"), para. 15 (further stating that the Agreements explicitly stipulate, in accordance with this understanding of the parties, that the Palestinian Authority's "legislative, executive and judicial functions are only those transferred to it in the [agreements], thereby covering all possible aspects of jurisdiction, whether it is considered jurisdiction to prescribe, adjudicate, or enforce").
[116] With respect to SOFAs, the former Prosecutor asserted that "while a SOFA might constitute a decision by a State not to exercise its enforcement jurisdiction, such an agreement does not extinguish a State's prescriptive and adjudicative jurisdiction, which serve as inherent attributes of State sovereignty", *Situation in the Islamic Republic of Afghanistan*, "Request for authorization of an investigation pursuant to article 15", ICC-02/17-7-Red, 20 November 2017, para. 46, fn. 47 (referring to *Island of Palmas Case (Netherlands, U.S.)*, Permanent Court of Arbitration, 4 April 1928, Reports of International Arbitral Awards, Vol. II, p. 838); Roger O'Keefe, *Response: "Quid," Not "Quantum": A Comment on "How the International Criminal Court Threaten Treaty Norms"*, 49 VAND. J. TRANSNAT'L L. (2016), pp. 433-441; Carsten Stahn, *Response: The ICC, Pre-Existing Jurisdictional Treaty Regimes, and the Limits of the* Nemo Dat Quod Non Habet *Doctrine – A Reply to Michael Newton*, 49 VAND. J. TRANSNAT'L L. 443 (2016), pp. 443- 454).

96. Without taking a position on distinct legal questions that may arise with respect to SOFA agreements or other bilateral agreements conferring immunities, the Oslo Accords are of a qualitatively different nature. It was the Oslo Accords themselves which created the Palestinian Authority as a legal entity and vested it with jurisdictional powers that it did not previously have. As such, the Agreements did not limit any pre-existing jurisdictional power and are markedly different from SOFA agreements between two sovereign States, in which a State may agree to put limitations on its enforcement jurisdiction without surrendering its prescriptive jurisdiction.

97. To equate the Oslo Accords with bilateral agreements limiting enforcement jurisdiction is to assume that prior to entering into the Agreements, the Palestinians already had territorial criminal jurisdiction over the West Bank and the Gaza Strip; which they did not. Rather, the Agreements are the exclusive source of jurisdictional competences for Palestinian authorities during a period of indeterminacy of territorial status.

98. Against this background, the Appeals Chamber's decision in the *Situation in Afghanistan*, concerning the case in which the Islamic Republic of Afghanistan entered into agreements with the United States of America regarding the presence of the latter's military forces on the former's territory, has no material bearing on the current case.[117] Indeed, as recognised by Judge Kovács, the Appeals Chamber's decision concerned agreements which were "very different from the content of the Oslo Accords", leading him to conclude that "this single dictum is insufficient to justify setting aside the rules of competence under the Oslo Accords".[118]

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[117] *See* Afghanistan Appeal Decision, para. 44. The Appeals Chamber briefly addressed arguments that by entering into a series of agreements with the United States, Afghanistan ceded exclusive jurisdiction over United States forces to the United States, and therefore had no jurisdiction to delegate to the ICC as it relates to the United States personnel. The Appeals Chamber noted that "effect of these agreements is not a matter for consideration in relation to the authorisation of an investigation under the Statutory scheme", and that "these issues may be raised by interested States should the circumstances require", pointing both to Article 19 (challenges to the jurisdiction of the Court), and Articles 97 and 98 (safeguard with respect to pre-existing obligations and other international obligations that may affect the execution of requests under Part 9 of the Statute). The Appeals Chamber thus refrained from making a definitive finding on whether or not such agreements can affect the jurisdiction of the Court beyond the stage of opening the investigation, and seemed to acknowledge that such agreements can raise questions both in terms of jurisdiction and in terms of cooperation. It should also be noted that the Prosecution specifically requested the Chamber not to delve into these matters, which were not raised by it as part of its appeal brief.

[118] Judge Kovács Partly Dissenting Opinion, paras. 360-361. *See also* Carsten Stahn, *Response: The ICC, Pre-Existing Jurisdictional Treaty Regimes, and the Limits of the* Nemo Dat Quod Non Habet *Doctrine – A Reply to Michael Newton*, 49 Vand. J. Transnat'l L. 443 (2016), pp. 443-454, noting that the issue of SOFAs in the context of the situation in Afghanistan "is rather straightforward", whereas the Palestinian situation "is far more complex", and that the argument that Palestine's ability to adhere to treaties as a state and thereby confer jurisdiction to the Court "becomes more difficult if one takes the view that ICC jurisdiction can only be asserted through a delegation of jurisdiction that matches a domestic title […]. Then the decisive question is who delegated what to whom".

99. To conclude: any suggestion that the Israeli-Palestinian agreements merely limit the Palestinian authorities' capacity to exercise jurisdiction, rather than reflecting a lack of plenary prescriptive jurisdiction to begin with, cannot be reconciled with the non-sovereign status of the Palestinians and the indeterminate legal status of the territory. Such an argument ignores the fact that at the time of the conclusion of the Oslo Accords, the Palestinians were not (and still are not) sovereign in the West Bank and the Gaza Strip. The Oslo Accords are the origin of criminal jurisdiction held by the Palestinians, and the nature of the jurisdictional provisions in the Agreements make clear that the scope of authority vested in the Palestinian authorities is not plenary.

c. The continuing binding nature of the Oslo Accords is not in dispute between the Parties

100. Suggestions that the provisions of the Oslo Accords dealing with the powers and jurisdiction of the Palestinian Authority are no longer considered valid or legitimate by the international community are unfounded and lack evidentiary grounding.[119] This assertion runs contrary to the fact that the international community has consistently affirmed its support for the bilateral framework and has called upon the Parties to abide by their respective obligations.[120] The Agreements are in force,[121] and the Parties rely on

[119] Prosecution's Response of 30 April 2020, para. 75.
[120] *See, e.g.*, UNGA Resolution 78/121 (2023) ("stresses the need for the full implementation by both parties of existing agreements"); UNGA Resolution 77/L.26 (2022) ("stressing the urgent need for efforts to ensure full compliance with the agreements concluded between the two sides"). For additional statements to that effect, *see* Attorney General Memorandum, para. 36 and the references therein. *See also Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion, 19 July 2024* ("Advisory Opinion of 19 July 2024"), para. 102 ("…the Court will take the Oslo Accords into account as appropriate"); *ibid*., para. 140 ("The arrangements agreed upon between Israel and the PLO in the Oslo Accords point in the same direction"). *See also* the Joint Opinion of Judges Tomka, Abraham and Aurescu, para. 7 ("These Accords, along with the relevant resolutions of the Security Council, define the fundamental framework of a peaceful resolution of the conflict aiming at implementing the 'two-State solution'"); *ibid.,* para. 42 ("[a] correct combined interpretation of the Oslo Accords and of the relevant Security Council resolutions clearly illustrates their legal effects, which continue to be valid at present"); *ibid.,* para. 43 ("First, the Oslo Accords, the relevance of which was emphasized by many participants to these proceedings, are the main instruments of the Israeli-Palestinian relationship. They have not ceased to be in force. Second, from a legal standpoint, the two Oslo Accords, in particular Oslo II, continue to be applicable to almost all aspects of daily life in Palestine, and are intended to govern the multidimensional relationship between Israel and Palestine"). Vice-President Sebutinde also specifically recalled in her Dissenting Opinion the continuing binding nature of the Oslo Accords in allocating responsibilities between Israeli and Palestinian authorities, *see* Dissenting Opinion of Vice-President Sebutinde, paras. 27, 31.
[121] *See e.g.*, U.S. Department of State, Media Note, "Joint Communique from the 19 March 2023 meeting in Sharm El Sheikh", para. 3 ("The two sides reaffirmed … their unwavering commitment to all previous agreements between them"); *ibid*, para. 5 ("The two sides reaffirmed their commitment to all previous agreements between them"); U.S. Department of State, Media Note, "Aqaba Joint Communique", 26 February 2023, para. 1 ("The two sides … affirmed their commitment to all previous agreements between them, and to work towards a just and lasting peace"). For additional statements to this effect, see Attorney General Memorandum, para. 36 and the references therein.

them in practice,[122] including the arrangements regarding the divisions of powers and responsibilities. The Agreements also continue to regulate the situation between the Parties vis-à-vis the Gaza Strip,[123] notwithstanding the circumstances created by Israel's disengagement from the territory and Hamas' takeover of it. In fact, the Palestinian authorities have not argued against the continued validity of the Agreements in the various submissions they have made to the Court with respect to the "*Situation in Palestine*". The dispute in this context concerns the Agreements' proper construction.[124]

101. The fact that the Palestinian authorities have acted in violation of the Agreements by purporting to confer jurisdiction to the Court does not diminish from the Agreements' validity. The ICC, as an international criminal judicial institution, should respect the clear terms of international legal agreements rather than lend support to their breach. Certainly, a "pick and choose" approach finding *some* provisions invalid in order to reach a preferred outcome with respect to the Court's jurisdiction would be highly inappropriate.

102. As has been explained, the provisions of the Oslo Accords regarding the allocation of powers and responsibilities are a central element of the Agreements. They reflect a legal

[122] For example, coordination between Israel and the Palestinian Authority on civil and security matters is conducted through Joint District Coordination Offices which were established and operate in accordance with the Agreements. With respect to economic matters, the Protocol on Economic Relations ("the Paris Protocol") governs the economic relations between the parties, including with respect to imports and exports, customs and tax policy. Israel and the Palestinian Authority continue to discuss and coordinate various issues, such as electricity, water, telecommunications, postal issues, through designated Joint Committees which were established and operate in accordance with the Agreements. In this context, in recent years the Parties signed bilateral agreements on these issues, including most recently in December 2022, which all refer in explicit terms to the Interim Agreement and are concluded pursuant to it.

[123] As has been stated previously by the Government of Israel, "[t]he process set forth in the [disengagement] plan is without prejudice to the relevant agreements between the State of Israel and the Palestinians. Relevant arrangements shall continue to apply", *Israeli Cabinet Resolution regarding the Disengagement Plan, Government Decision No. 1996*, Revised Disengagement Plan, Addendum A, para. 1(7) (6 June 2004). Indeed, both parties have continued to rely on the Agreements *vis-à-vis* the Gaza Strip. The Palestinian Authority's practical ability to implement the Agreements was severely curtailed by Hamas' takeover of the Gaza Strip. Hamas, an internationally recognised terrorist organisation, is responsible for the horrific terrorist attacks perpetrated against Israel and Israeli civilians on 7 October 2023. Hamas, whose declared goal is to annihilate the State of Israel, forcefully ousted the forces of the Palestinian Authority and became the *de-facto* ruler of the Gaza Strip in 2007. Thus, regarding the Gaza Strip, Israel and the Palestinian Authority continue to rely on the Oslo Accords for certain limited purposes, chiefly with respect to civilian and economic matters, reflecting the Palestinian Authority's limited presence and influence there. The level of engagement has also been affected by the change of circumstances following 7 October 2023.

[124] It is worth recalling that, in response to a request for additional information by the Pre-Trial Chamber in 2020 with respect to a certain statement made by President Abbas, the Palestinians refrained from arguing that the Oslo Accords were no longer in force, leading Judge Kovács to conclude that the Agreements "remain unchanged", *see* Judge Kovács Partly Dissenting Opinion, para. 307; The State of Palestine's response to the Pre-Trial Chamber's Order requesting additional information, ICC-01/18-135, 4 June 2020. Notably, the Palestinian observations of 6 August 2024, similarly refrained from arguing that that the Oslo Accords were no longer in force: Observations by the State of Palestine to the Pre-Trial Chamber I pursuant to Rule 103 of the Rules of Procedures and Evidence, ICC-01/18-291, 6 August 2024.

reality that cannot be ignored or replaced by unilateral acts or political statements on the international plane where jurisdictional competence does not exist. The issue is therefore not simply that the Palestinian authorities have violated the Agreements, but more importantly that they have acted beyond their lawful capacity *(nemo dat quod non habet*).

(v) At present, the Palestinian lack of plenary jurisdiction cannot be remedied

103. In the absence of sovereignty, the Oslo Accords are the legal source that determines the scope of Palestinian criminal jurisdiction over the territory. Reliance on alternative sources of law to create a sovereign jurisdiction where none exists is unsustainable.

a. The right to self-determination does not provide an alternative source of authority to exercise plenary jurisdiction and delegate such authority to the Court

104. As explained above, the Oslo Accords imbued the Palestinian authorities with limited criminal jurisdiction that does not apply to Israeli nationals and hence could not have been delegated to the Court. In an effort to circumvent this deficiency, the Prosecutor has suggested that "[p]lenary jurisdictional competence—as an aspect of sovereignty—rested in the Palestinian people as a group entitled by international law to exercise the right of self-determination", and that "the right of the Palestinian people to self-determination and the related entitlements of the State of Palestine includes plenary criminal jurisdiction over all individuals, regardless of nationality throughout the Palestinian Territory".[125]

105. As the Prosecution seems to rely on the right to self-determination as an independent source for Palestinian plenary criminal jurisdiction,[126] it is crucial to first elucidate what that right actually entails (and what it does not). As will be explained below, the right to self-determination is insufficient to constitute, and does not equate to, a plenary prescriptive jurisdiction.[127]

[125] Prosecution's Consolidated Response, para. 73. The Prosecution moreover referenced the *amicus* brief of the League of Arab States, which further argued that: "the Palestinian people and their representatives, and the State of Palestine, do not depend on Oslo for their legal entitlement to exercise the prerogatives provided for therein. They enjoy this entitlement anyway, as part of a much broader, general right to exercise exclusive, plenary self-administration, operating throughout the entirety of the Palestinian territory, based on the right of the Palestinian people to self-determination, and the related sovereign entitlements of the State of Palestine, in international law. This right of self-administration includes plenary criminal jurisdiction over all individuals, regardless of nationality". Written Observations Pursuant to Rule 103, League of Arab States ICC-01/18-282, 6 August 2024, para. 3.
[126] *See also* Prosecution's Response of 30 April 2020, para. 70.
[127] *See* IJL observations submitted pursuant to "Decision on requests for leave to file observations pursuant to rule 103 of the Rules of Procedure and Evidence", ICC-01/18-298, 6 August 2024, paras. 20-21.

106. The Charter of the United Nations describes as one of the purposes of the United Nations "[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples …" The right to self-determination has been described by the International Court of Justice as a central principle of contemporary international law.[128]

107. The right to self-determination "does not impose a specific mechanism … in all instances".[129] This means that the realisation of the right to self-determination may come in various forms, and may lead to a variety of different results, ranging from full independence to free association or integration with an independent State (as in the case of the Cook Islands and New Zealand) and full merger with the metropolitan or indeed another State.[130]

108. Prior to the realisation of the right to self-determination, it does not confer any particular status upon the people to whom it is owed, nor does it include jurisdictional or other relevant competences, not least because the exercise of the right could result in various outcomes. State practice with regard to non-self-governing territories demonstrates that until independence, no inherent or latent jurisdiction is recognised as belonging to the people concerned.[131]

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[128] *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995,* p. 102, para 29.
[129] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019* ("Chagos Advisory Opinion"), p. 134, para. 158.
[130] Shaw, Submission of Observations to the Pre-Trial Chamber Pursuant to Rule 103, ICC-01/18-75, 16 March 2020, ("Shaw *Amicus Curiae* Observations") para. 21. *See also* James R. Crawford, THE CREATION OF STATES IN INTERNATIONAL LAW 127-128, (2nd ed., 2006). See also UNGA Resolution 1541(XV) (1960).
[131] In contrast to mandated territories, colonialism previously meant the acquisition of title to, and thus sovereignty over, the relevant territory, so that the colonial power could exercise full legislative and executive power over it. This was confirmed in *Cameroons v. Nigeria*, where the Court accepted that treaties of protection signed by the British with local rules sufficed to pass sovereignty over the territory in question, such that Britain was able to establish boundaries with the neighbouring German colony of Kamerun. *See Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 405-407, para. 205-209. The sovereignty of the colonial power became subject to the right to self-determination as from around 1960, *see* Chagos Advisory Opinion, para. 150. This did not involve as such the transfer of sovereignty.

109. It is well-established that plenary jurisdiction flows from sovereignty.[132] The Prosecutor recognises as much.[133] However, as stated above, the right to self-determination, in and of itself, does not entail the existence of sovereignty and as a corollary, plenary jurisdiction over territory. Indeed, there is no prior State practice supporting this notion. Self-determination may sometimes lead to statehood and with it, sovereignty, but sovereignty does not automatically flow from the existence or exercise of the right to self-determination and is certainly not synonymous with such a right. The fact that Palestinian self-determination is currently exercised within the framework of competences allocated in the Oslo Accords and has yet to be fully realised is determinative in this respect.[134]

110. The former Prosecutor sought to overcome this in previous litigation by trying to characterise the Palestinian people as the "reversionary sovereign" over the West Bank, Gaza Strip, and East Jerusalem, until such time as a State is able to exercise prescriptive

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[132] In the *Lotus* case, the Permanent Court of International Justice held that the "title to exercise jurisdiction rests in its sovereignty". *See S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7), p. 19, para. 47. *See also* James Crawford, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 440 (9th edition, 2019) ("jurisdiction is an aspect of sovereignty: it refers to a state's competence under international law to regulate the conduct of natural and juridical persons"); Malcolm N. Shaw, INTERNATIONAL LAW 554 (9th edition, 2021), ("Jurisdiction concerns the power of the state under international law to regulate or otherwise impact upon people, property and circumstances and reflects the basic principles of state sovereignty, equality of states and non-interference in domestic affairs. Jurisdiction is a central feature of state sovereignty"); Cedric Ryngaert, *The concept of jurisdiction in international law*, in Alexander Orakhelashvilli (ed.), RESEARCH HANDBOOK ON JURISDICTION AND IMMUNITIES IN INTERNATIONAL LAW 50 (2015), pp. 50-51 ("Jurisdiction is an aspect of a state's sovereignty, as the right to prescribe and enforce laws is an essential component of statehood"; and "In public international law, the concept of jurisdiction has traditionally had a strong link with the notion of sovereignty. Jurisdiction allows states to give effect to the sovereign independence which they are endowed with in a global system of formally equal states…"); Roger O'keefe, INTERNATIONAL CRIMINAL LAW (2015), p. 3 ("The concept of jurisdiction and the concept of sovereignty are often conflated. They are not synonymous, although the former is an aspect of the latter"), and p. 6 ("Jurisdiction to prescribe, to reiterate, refers to a state's authority under international law to assert the applicability of its law to given persons or property. In the specifically penal context, the term refers to a state's international legal authority to treat given conduct as criminal, whether by means of primary or subordinate legislation, executive decree or judicial action"); Alex Mills, *Private Interests and Private Law Regulation in Public International Law Jurisdiction*, in Stephen Allen and others (eds.), THE OXFORD HANDBOOK OF JURISDICTION IN INTERNATIONAL LAW (2019), pp. 333 ("both prescriptive and enforcement jurisdiction have been approached traditionally as a question of state discretionary power, reecting a state's sovereign control over the exercise of its regulatory authority"); Kimberley N. Trapp, *Jurisdiction and State Responsibility*, in Stephen Allen and others (eds.), THE OXFORD HANDBOOK OF JURISDICTION IN INTERNATIONAL LAW (2019), pp. 357-358 ("The international law of prescriptive jurisdiction can be understood as tracking or reecting certain conceptions of sovereignty").

[133] Prosecution's Consolidated Response, para. 53.

[134] Tellingly, while the International Court of Justice recently reiterated the importance of the Palestinians' right to exercise self-determination, the Court did not conclude that Palestinian sovereignty had materialised: Advisory Opinion of 19 July 2024, p. 32, para. 102 ("[t]he Court recalls that the 'legitimate rights' of the Palestinian people recognized in the Oslo Accords includes the right to self-determination"), and para. 283 ("[t]he Court also considers that the realization of the right of the Palestinian people to self-determination, including its right to an independent and sovereign State, living side by side in peace with the State of Israel within secure and recognized borders for both States … would contribute to regional stability and the security of all States in the Middle East"). *See also ibid.*, paras. 237, 262.

jurisdiction.[135] This proposition should be rejected. First, it conflates two concepts: the right to self-determination on the one hand, and sovereignty on the other, which, as explained above, entail materially different consequences as they relate to the existence of jurisdictional competence. Second, in cases of occupied territory, it is a principle of international law that sovereignty over such territory rests with the dispossessed sovereign, *i.e.*, the State whose sovereign territory was occupied, and not with the population as such.[136] Third, the territory in question was never under the sovereignty of a Palestinian State. To find otherwise would require a revisionist approach to history which inverses the concept of the "reversionary sovereign".[137]

111. Attempts to argue that the Oslo Accords themselves represent an infringement of the Palestinians' right to self-determination would similarly be improper and unfounded and would amount to a subversion of historical fact.[138] The Agreements constituted Palestinian autonomy for the first time and established a framework for permanent status negotiations. They are premised on the notion of mutual recognition.[139] As noted by former US ambassador and chief American negotiator of the Israeli-Palestinian peace process Dennis Ross, "characterizing the agreements today as going against the Palestinian right of self-determination represents a grave and unfortunate distortion, and amounts to rewriting history: the agreements did not in any way renounce the Palestinians' right to self-determination, but rather considerably promoted it".[140]

112. The fact that the Palestinian right to self-determination has not yet been fully realised is not a product of the Oslo Accords, but is the result of subsequent developments which defy simplistic and selective explanations. The reasons for the absence of a resolution of the Israeli-Palestinian conflict are complex and far beyond the scope of these

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[135] *Cf.* Prosecution's Response of 30 April 2020, para. 70.
[136] Shaw *Amicus Curiae* Observations, para. 27. *see also* Yoram Dinstein, THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION (2nd ed., 2009), p. 58 ("The displaced sovereign loses possession of the occupied territory de facto but it retains title *de jure*"); Judge Kovács' Partly Dissenting Opinion, paras. 277-278.
[137] A reversion to sovereignty presupposes that a sovereign state once existed, then ceased to exist, and is now reclaiming its former sovereign status. Therefore, neither a new state nor peoples can revert to sovereignty, as they have never previously held sovereign status. *See* Charles H. Alexandrowicz, *New and Original States: The Issue of Reversion to Sovereignty*, 45.3 INT'L AFFS. (1969), 465-480, p. 397 ("There is a legal presumption that a State which lost its sovereignty but reverted to it [. . .] recovers a full and unencumbered sovereignty"); *Ibid., p*. 401 ("on regaining independence they [Ceylon and States in a similar position] reverted to sovereignty rather than joined the Family of Nations as newcomers"); James Crawford, *Problems of Identity, Continuity and Reversion, in* THE CREATION OF STATES IN INTERNATIONAL LAW (2nd ed., 2006), p. 697 ("a claim of a State to revert to the sovereignty and thus reassume the rights of an assertedly identical State definitively extinguished at an earlier time").
[138] Prosecution's Article 19(3) Request, para. 187; Prosecution's Response of 30 April 2020, para. 75.
[139] Declaration of Principles, preamble; The Interim Agreement, preamble.
[140] Ross *Amicus Curiae* Observations, para. 17.

submissions. But if one were to make an assessment of this issue, attention must also be paid to the actions of the Palestinian leadership. Such actions include Palestinian rejection of offers of Palestinian statehood made in international initiatives and negotiation efforts,[141] and incitement to terrorism and violence against Israelis.

113. While the lack of progress in peace negotiations is undoubtedly a source of great frustration, including for Israel, it is important to recognise that the Oslo Accords "provide the crucial framework for the parties to achieve peace by settling their competing claims and determining the final status of the territory". Thus, subverting the Agreements' normative content not only undermines the path to resolving the conflict, but also "undercuts the foundational bedrock of the relationship between the parties".[142]

b. The laws of occupation are not relevant to Palestinian plenary jurisdictional competence

114. The Prosecution has correctly stated that "occupation does not and cannot transfer title of sovereignty to the occupying power".[143] Based on this premise, however, the Prosecutor further claims that "[p]lenary jurisdictional competence—as an aspect of sovereignty—rested in the Palestinian people as a group entitled by international law to exercise the right of self-determination,"[144] and that to claim that the Oslo Accords bar the exercise of the Court's jurisdiction reflects "a flawed understanding of the jurisdictional entitlements of occupying powers under international law".[145] It would appear that the Prosecutor invokes the laws of occupation in a way that suggests that plenary jurisdiction cannot reside with Israel given its status as an occupant; and as such, it must reside with the Palestinian population. This leap is, at best, misguided, as it ignores the unique circumstances and relevant historical facts of the present situation.

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[141] See, for example, Bill Clinton, MY LIFE (2005), pp. 944-945 ("Arafat's rejection of my proposal after Barak accepted it was an error of historic proportions"); Condoleezza Rice, *No Higher Honor: A Memoir Of My Years In Washington* (2011), p. 724 ("In the end, the Palestinians walked away from the negotiations") (referring to Annapolis negotiations of 2007-2008). The Palestinians have similarly rejected or refused to respond to other compromise proposals, including those made in the Proximity Talks process (May-September 2010), and the proposals made to them by the Quartet in September 2011; in the Amman rounds of January 2012; and during the Kerry Framework negotiations between July 2013 and April 2014. *See also* Jonathan Heuberger, FROM THE MADRID CONFERENCE TO THE KERRY INITIATIVE: AN INSIGHT INTO THE ISRAELI-PALESTINIAN PEACE PROCESS (2016).
[142] Ross *Amicus Curiae* Observations, para. 21.
[143] Prosecution's Consolidated Response, para. 73.
[144] Prosecution's Consolidated Response, para. 73.
[145] Prosecution's Consolidated Response, para. 72.

115. As explained above, and as the Prosecutor recognises, plenary jurisdictional competence derives from sovereignty. Traditionally, the laws of occupation were designed to address situations in which one State occupies the sovereign territory of another State.[146] The present situation, however, is qualitatively different—as noted above, when Israel gained control of the West Bank and the Gaza Strip in 1967, these were not under the recognised sovereignty of any State (still less, a Palestinian State).

116. There is no previous or original sovereign which held plenary jurisdictional competence and to whom the territory is to be returned. Israel is administering territory with respect to which sovereignty is in abeyance. This does not diminish Israel's obligations to administer the territory in accordance with international law, as it has undertaken to do, notwithstanding its position regarding the inapplicability of the law of occupation *de jure* under these unique circumstances.[147]

117. Moreover, it is uncontested that the belligerent occupation of a territory does not presuppose, alter, or in any other way transfer sovereignty over the said territory.[148] Equally, it cannot be properly suggested that belligerent occupation diminishes or alters any pre-existing claims or rights to sovereignty, including claims by the Occupying Power itself.

118. In the present situation, Israel possesses its own valid legal claims to the territory in question.[149] In asserting that sovereignty over the territory currently rests solely with the Palestinians, the Prosecutor fails to recognise that Israel is a party with valid legal claims to the territory which it makes on the basis of international law, a legal situation which remains unaltered by effective control.

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[146] *See, e.g.,* Eyal Benvenisti, THE INTERNATIONAL LAW OF OCCUPATION (2nd ed., 2012), p. 1 ("The law of occupation … assign[s] authority to one state to act in the territory of another state"); Tristan Ferraro, *Determining the beginning and end of an occupation under international humanitarian law*, 94 INT'L REV. RED CROSS (2012), p. 160 ("Usually, occupation involves one state exerting effective control over another state's territory").

[147] Israel's long-held position is that because Jordan and Egypt, which occupied the West Bank and Gaza Strip respectively pre-1967, were not a legitimate sovereign in these territories, which were therefore not the territory of a High Contracting Party in 1967, the law of belligerent occupation was inapplicable *de-jure* in these territories when Israel gained control of them in 1967. Accordingly, Israel chose to administer these territories under the law of belligerent occupation, *de-facto* and as a matter of policy given these unique circumstances of sovereign indeterminacy. On the origins of this approach, *see* Meir Shamgar, *The Observance of International Law in the Administered Territories*, 1 ISR. Y.B. ON HUM. RTS. 262 (1971); Yehuda Z. Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 ISR. L. REV. 279 (1968), p. 281.

[148] *See, e.g.*, Yoram Dinstein, THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION (2nd ed., 2009), p. 58 ("The main pillar of the law of belligerent occupation is embedded in the maxim that the occupation does not affect sovereignty"). This principle has also been explicitly acknowledged by Israel's Supreme Court, see Civ.A 1432/03, Yinon Production and Marketing of Food Products Ltd. v. Majda Qaraan *et al.*, 59(1) PD 345 (Heb.), pp. 355-336.

[149] Attorney General Memorandum, paras. 27-32.

c. The jurisdictional regime established by the Oslo Accords is compatible with the Geneva Conventions which cannot create separate criminal powers for the Palestinian Authority

119. Article 47 of the Fourth Geneva Convention aims to ensure that protected persons under the Convention are not "deprived" of "benefits" afforded to them by the Convention, as a result of, *inter alia*, certain agreements.[150] The Oslo Accords' jurisdictional regime does not constitute a deprivation of benefits granted to protected persons by the Convention, as set out by Article 47, and they are compatible with the Convention. As such, Article 47 does not affect the validity of the jurisdictional regime established by the Oslo Accords.

120. In particular, the duty to prosecute grave breaches prescribed by Article 146(2) and any exercise of criminal jurisdiction which derives from that duty, cannot be construed as a right or benefit enjoyed by protected persons as such. The Convention does not confer a right on protected persons whereby local authorities in the territory must be permitted to exercise jurisdiction over foreign nationals. Nor does the Convention confer a right on protected persons that the jurisdiction of local authorities over foreign nationals (which is, in any event, not constituted by the Convention) must be delegable to an international criminal court. There is no textual support for these propositions in the text of the Convention, nor in State practice.[151]

121. The duty to prosecute Grave Breaches pursuant to Article 146(2) of the Fourth Geneva Convention has no relationship – in terms of conferring a specific protection, rights or benefits to civilians – with Articles 7,[152] 8, or 47 of the Fourth Geneva Convention; it cannot be extended to conferring an authority to delegate criminal jurisdiction to an

[150] Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), adopted on 12 August 1949 Article 47 ("Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.").

[151] Shany and Cohen, Written observations on the question of jurisdiction pursuant to Rule 103 of the Rules of Procedure and Evidence, ICC-01/18-265, 5 August 2024 ("Shany and Cohen"), para. 22.

[152] Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), adopted on 12 August 1949, Article 7 ("[T]he High Contracting Parties may conclude other special agreements for all matters concerning which they may deem it suitable to make separate provision. No special agreement shall adversely affect the situation of protected persons, as defined by the present Convention, nor restrict the rights which it confers upon them."). While it is not evident that Article 7 is applicable, as at the time of the Interim Agreement's signature, the Palestinian authorities did not purport to have acceded to the Convention as a High Contracting Party, the Oslo Accords do not adversely affect the situation of persons protected by the Convention.

international criminal court. Simply, "the Geneva Convention does not prescribe the victims' individual right to seek justice before international judiciary bodies."[153]

122. Moreover, the grave breaches regime of the Geneva Conventions cannot create a criminal jurisdiction that does not otherwise exist or authorize, in and of itself, a delegation of such jurisdiction to an international criminal court. The 1958 Commentary on the Convention notes that the Geneva Diplomatic Conference "specially wished to reserve the future position" with respect to whether Article 146(2) of the Fourth Geneva Convention extended to surrender to an international criminal court *with jurisdiction* ("competence… recognized by the Contracting Parties").[154] Firstly, it is open to question whether this Commentary can properly "be deemed to contain a rule so evident that it could be considered *erga omnes* or *a fortiori* peremptory".[155] Second, the obligation conferred by Article 146(2) simply prescribes means for the Convention's enforcement by States' Parties.[156] Third, the obligation conferred by Article 146(2) (imposing an *aut dedere aut judicare* obligation for grave breaches at the *preference* of the sending State, on the basis of the showing of a *prima facie* case) cannot readily be analogised with surrender arrangements under the Rome Statute, still less with preconditions to the exercise of jurisdiction under Article 12.[157] Fourth, and in any event, the 1958 Commentary reserved its position with respect to surrender to an international criminal court with "competence" (*i.e.* jurisdiction). The Commentary therefore cannot be construed as suggesting that Article 146(2) constitutes a jurisdictional power. It simply entertains the possibility that

[153] Judge Kovács' Partly Dissenting Opinion, para. 349.
[154] See J. Pictet (ed.), COMMENTARY ON THE GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR (FOURTH GENEVA CONVENTION), 12 AUGUST 1949 594 (ICRC, 1958), Article 146: Penal Sanctions, ("Furthermore, this paragraph does not exclude handing over the accused to an international criminal court whose competence has been recognized by the Contracting Parties. On that point, the Diplomatic Conference specially wished to reserve the future position and not to raise obstacles to the progress of international law.").
[155] Judge Kovács' Partly Dissenting Opinion, para. 354.
[156] Paola Gaeta, *Grave Breaches of the Geneva Conventions, in* THE 1949 GENEVA CONVENTIONS: A COMMENTARY (Clapham, Gaeta & Sassoli eds., 2015), p. 644.
[157] See Judge Kovács' Partly Dissenting Opinion, para. 355 ("One might also ask if the *in personam* wording referring to an actual, well-specified crime and the '*prima facie case*' requirement of article 146 of the Geneva Convention IV reflect the same type of competence-transfer as that stipulated in the Rome Statute. The Rome Statute provides for a rather general, typically *pro futuro* competence, granting the Prosecutor a large amount of independence concerning the specification of the perpetrators under investigation and the preparation of a 'case' in a given 'situation'. If this is so, it would be even more difficult to conclude that a manifest conflict exists between article 146 of the Geneva Convention IV and the Oslo Accords. Consequently, it would also be problematic to justify invalidating the Oslo Accords or prioritising the Rome Statute over the Oslo Accords based on a certain degree of similarity between the Rome Statute and the Geneva Convention.").

in certain circumstances the obligation to extradite or prosecute prescribed by the provision could be met through the surrender of a suspect to an international court.[158]

123. Nothing in the Fourth Geneva Convention, therefore, displaces the determinative nature of the Oslo Accords with respect to the jurisdiction that the Palestinian Authority does and does not possess. The Oslo Accords do "not detract from any jurisdictional arrangement that existed under international law before the Accords were concluded, nor from the responsibility of Israel to try or extradite individuals that committed grave breaches of the Geneva Convention."[159]

[158] In any event, it does not have bearing on the investigation and prosecution of other war crimes and crimes against humanity that are not covered by the grave breaches regime.

[159] Shany and Cohen, para. 22. See also Judge Kovács' Partly Dissenting Opinion, para. 343 ("insofar as the Oslo Accords deal with repartition of competences without granting or promising impunity to either Israeli or Palestinian perpetrators (under the jurisdiction of Israeli military or ordinary tribunals and authorities), it cannot be said that the Oslo Accords per se restrict the rights conferred under the Geneva Convention"). See also *ibid.*, para. 348 ("it is not easy to state that an instrument aiming to set up a limited self-government for the purpose of developing and enlarging competences, and affecting about 90% of the population living in the given territory, could be considered as aiming to derogate from rights conferred under the Geneva Conventions and in particular the Geneva Convention IV").

VI. CONCLUSION AND RELIEF REQUESTED

124. A sound assessment of the legal and factual record presented above leads to the conclusion that the pre-conditions to the Court's jurisdiction cannot be fulfilled. This is because sovereignty over the West Bank and the Gaza Strip remains in abeyance, and there is no "territory of" a State (within the meaning of the Rome Statute) over which the Court may exercise its jurisdiction. Any delimitation by the Court of the territory concerned would require it to act in contravention of binding Israeli-Palestinian agreements that expressly leave such matters to direct negotiation between the Parties, and to make determinations that are wholly unsuitable for an international criminal tribunal.

125. Assuming, *arguendo*, that a non-sovereign entity can accept the Court's jurisdiction, the scope of that jurisdiction must be assessed with reference to the jurisdiction actually possessed by the entity, *i.e.*, the competences vested by the Oslo Accords in the Palestinian authorities. The existing Israeli-Palestinian agreements make it clear that the Palestinian authorities have no criminal jurisdiction either in law or in fact over Area C, Jerusalem and Israeli nationals – and thus cannot validly delegate such jurisdiction to the Court. The continued applicability of the Oslo Accords, which created the legal reality that exists on the ground, is not in dispute between the Parties.

126. In an effort to remedy the absence of Palestinian plenary jurisdiction over the territory, the OTP attempts to rely on the principle of self-determination. However, the right of self-determination by itself, and in the absence of territorial sovereignty, cannot imbue plenary criminal (or other) jurisdiction where previously none existed. Establishing the jurisdiction of a criminal court requires an objective, legal determination. Faithful and impartial execution of the Court's duty in this regard cannot be results-based, but must ensure consistent and equal application of principles of international law, even if the result is that the Court lacks jurisdiction over a particular case or situation. Under these circumstances, a decision that this Court nevertheless has plenary criminal jurisdiction would run up against the terms of the Rome Statute itself, as well as the rules of general international law more broadly.

127. There is no impunity gap with respect to Israeli nationals. Israel is cognizant of its legal obligations and is deeply committed to preventing and punishing any breaches of international humanitarian and international criminal law. In any case, claimed concerns

as to a potential gap in the Court's jurisdiction cannot be used as a justification for extending the scope of the Court's jurisdiction beyond its lawful limits.

128. The necessary relief arising from the foregoing is that the Pre-Trial Chamber:

a. declare with immediate effect, pursuant to Article 19(7) and (8) of the Statute and Rule 58 of the Rules, that the investigation of the Prosecutor in the cases of Mr. Netanyahu and Mr. Gallant, and the proceedings before this Chamber under Article 58 of the Statute, are to be suspended until the Court has given its ruling on this challenge to jurisdiction;

b. determine that the application concerning Mr. Netanyahu and Mr. Gallant, and any investigative action on the same jurisdictional basis, are not within the Court's jurisdiction; and, accordingly,

c. dismiss the Prosecutor's applications for arrest warrants for Mr. Netanyahu and Mr. Gallant.

Respectfully submitted:

Dr. Gilad Noam, Office of the Attorney-General of Israel

Dated this 23 day of September 2024, at Jerusalem, Israel.