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Date: **16 March 2020**

**PRE-TRIAL CHAMBER I**

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

**SITUATION IN THE STATE OF PALESTINE**

**Public**

**Submissions Pursuant to Rule 103**
**(Robert Heinsch & Giulia Pinzauti)**

**Source:** **Associate Professor Dr. Robert Heinsch**
**Assistant Professor Dr. Giulia Pinzauti**

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

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**Unrepresented Victims**

**Unrepresented Applicants (Participation/Reparation)**

**The Office of Public Counsel for Victims**
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**States' Representatives**
The competent authorities of the State of Palestine
The competent authorities of the State of Israel

**Amicus Curiae**
All Amici Curiae

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## I. INTRODUCTION

1. In accordance with paragraph 56 of the Chamber's "Decision on Applications for Leave to File Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence" of 20 February 2020,[1] Dr Robert Heinsch and Dr Giulia Pinzauti ("*Amici*") respectfully submit observations to the Pre-Trial Chamber as *amici curiae* on the question of jurisdiction set forth in paragraph 220 of the "Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine" of 22 January 2020 ("Prosecution Request").[2]

## II. SUBMISSIONS

2. The Amici submit on three main issues: (II.A.) the status of the State of Palestine ("Palestine") as a State for the purpose of article 12(2)(a) of the Rome Statute ("Statute"); (II.B.) the relevance of the law of occupation in determining Palestine's statehood under relevant rules of international law; and (II.C.) the scope of the Court's territorial jurisdiction in respect of the Occupied Palestinian Territories ("OPT"), including the West Bank, East Jerusalem, and the Gaza Strip ("Gaza").

3. They are preceded by two preliminary observations. First, the territorial scope of the Court's jurisdiction is a legal question, and as such it falls within the Court's competence to determine, notwithstanding any political ramifications. Second, arguments that the "Monetary Gold" rule[3] precludes the Court from exercising jurisdiction are inapposite. The rule applies in the context of inter-State proceedings. Proceedings before the Court concern the criminal responsibility of individuals, and do not address questions of State responsibility as such. Thus, under no circumstance would the rights and obligations of States form the very subject matter of the Court's

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1 Pre-Trial Chamber I, "Decision on Applications for Leave to File Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence", 20 February 2020, Decision on Applications for Leave to File Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence, para. 56.

2 Pre-Trial Chamber I, "Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine", 22 January 2020, ICC-01/18-12, para. 220 ("Prosecution Request").

3 International Court of Justice ("ICJ"), *Case of the Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America)*, "Preliminary Question", 15 June 1954, ICJ Rep 1954, p. 32.

decisions. States whose interests are affected by the Court's decision, including Israel, have been invited to present their observations.[4]

## A. Palestine's status as a State for the purpose of article 12(2)(a) of the Statute

4. In addition to the arguments advanced by the Prosecutor in her Request of 22 January 2020, the *Amici* would like to present the following additional arguments in support of Palestine's statehood within the framework of the Rome Statute.

### *1. There is no indication that the term "State" in article 12 should be interpreted differently than in articles 124 and 125 of the Rome Statute*

5. A contextual reading of the Rome Statute supports the interpretation that, once a State accedes to the Rome Statute (pursuant to article 125), it automatically accepts the Court's jurisdiction, subject to the preconditions indicated in article 12, and subject to any declaration under article 124. At the same time—as of the moment of accession—the Court is able to exercise the jurisdiction *ratione loci* and *ratione personae* with regard to this new Member State.

6. Pursuant to article 12(2) of the Rome Statute, the Court may exercise its jurisdiction if the alleged crimes are committed on the territory of a State Party (jurisdiction *ratione loci*) or by its nationals (jurisdiction *ratione personae*). Article 12(1) affirms that "a State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5", clearly adopting an automatic approach to jurisdiction,[5] with no opt-out possibility.[6] In the words of Olásolo, this can be characterised as *"*the system of automatic attribution of dormant jurisdiction".[7]

7. A different interpretation would run against the principle of effectiveness, which is a commonly accepted general principle of public international law, also governing the interpretation

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4 Pre-Trial Chamber I, "Order setting the procedure and the schedule for the submission of observations", 28 January 2020, ICC-01/18, para. 16.

5 S.H. Steiner and L.N. Caldeira Brant, "O Tribunal Penal Internacional: Comentários ao Estatuto de Roma", (Konrad Adenauer Stiftung, CEDIN, Del Rey, 2016), p. 275.

6 W. A. Schabas and G. Pecorella in Triffterer, & Ambos, *Rome Statute of the International Criminal Court: A Commentary* (3rd ed., Oxford 2016), p. 680.

7 H. Olásolo, *The Triggering Procedure of the International Criminal Court* (Martinus Nijhoff Publishers, 2005), p. 131.

of institutional treaties like the Rome Statute.[8] Denying the effects of automatic jurisdiction would mean that a Member State, after acceding to the Rome Statute, could deny the legal consequences of its membership, specifically the exercise of jurisdiction. To consider the Court unable to exercise its jurisdiction over Palestine after it acceded to the Statute would mean to create a two-step approach to jurisdiction—something the drafters clearly wanted to avoid.

8. The Rome Statute is the fruit of years of negotiated consensus. The provisions governing the Court's jurisdiction reflect a conscious choice by the States that drafted the Statute.[9] In comparison to previous international tribunals, the drafters opted to extensively regulate, through codification, any possible legal outcome. Thus, it is not surprising that one of the original proposals concerning jurisdiction encompassed an "opt-in clause" combined with a case-by-case analysis.[10] Schabas and Pecorella explain that *"*this declaration of consent over specified crimes could have been placed at the time of ratification or at a later stage […]", which would have allowed States to render individuals immune when politically desirable and make the Court ineffective.[11]

9. Yet, this option was later discarded. Thus, denying an automatic approach to jurisdiction would be in contrast to the drafters' will and, ultimately, the consent of the States parties to the Rome Statute, since article 121 of the Statute addresses the proper procedure for amendments.

10. The Statute supports the interpretation that the word "State" has the same meaning when referring to the act of acceding to the Rome Statute under article 125(3); when permitting a State that becomes a party to the Statute to halt the automatic jurisdiction for war crimes under article 8 for a period of seven years (as in article 124); and when it deals with the triggering of its jurisdiction under article 12(2) of the Statute. Since the argument related to article 125 has already been examined extensively in the Prosecutor's Request, the *Amici* will focus their observations on article 124.[12]

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[8] For more *see* H. Thirlway, "The Law and Procedure of The International Court of Justice 1960-1989: Supplement", 2006: Part Three. The British Yearbook of International Law, 77(1) (2007), 1-82. p. 52.

[9] H.- P. Kaul and C. Kreβ in O. Bekou and R. Cryer, eds., *The International Criminal Court* (University of Nottingham, UK, Asghate Dartmouth, 2004), p. 202-204.

[10] W. A. Schabas and G. Pecorella, *above* note 6, p. 679.

[11] *Ibid*.

[12] H.- P. Kaul and C. Kreβ, *above* note 9, p. 205.

11. While article 124 acknowledges the effects of article 12(1) and (2), it allows States to exempt war crimes from the ICC's jurisdiction for a period of seven years if they lodged a declaration of "not accepting the jurisdiction".[13] Article 124 of the Statute therefore envisages a so-called "opt-out"[14] for a limited category of cases and time period. By contrast, if one does not lodge such a declaration, jurisdiction is activated at the time the State accedes—in other words, automatically.

12. The view of eminent commentators supports this interpretation of article 12 of the Statute. Schabas and Pecorella specifically compare article 12 to an example of *ipso facto* jurisdiction for those accepting the jurisdiction of the ICC, in contrast to article 124.[15] Former ICC Judge and member of the Brazilian delegation to the Preparatory Commissions of the Rome Statute, H.E. Sylvia Steiner stated that "article 12, and its paragraphs (1), (2)(a) and (b), do not establish any 'condition' to the exercise of the jurisdiction of the International Criminal Court, but, only, its competence *ratione loci* and *ratione personae*".[16]

13. The special triggering mechanism for the Court's jurisdiction over the crime of aggression in article 15*bis* of the Statute further supports the interpretation that the Court's jurisdiction in relation to the article 5 crimes is automatic under article 12. In fact, the Kampala conference addressed the State Parties' will to differentiate the crime of aggression regime from other article 5 crimes. As Stahn noted, it was a "new creative development" because it essentially treated aggression as a new crime "rather than a crime that is already under the jurisdiction of the Court and subject to automatic jurisdiction".[17]

14. Hence, independently of whether it is a system of opt-in/opt-out, or just opt-out, the Court's standard form of exercising jurisdiction has to be qualified as automatic, otherwise the Member States would have not sought a specific trigger mechanism to be implemented especially for the crime of aggression. As a result, to accept Palestine as a Member State without giving effect to the principle of automatic jurisdiction would be equivalent to creating a reservation to the Court's jurisdiction. However, this is prohibited under article 120 of the Rome Statute.

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[13] *Ibid*.

[14] A. Zimmerman, in O. Triffterer and K. Ambos, *above* note 6, p. 2312.

[15] *Ibid*., p. 2313.

[16] S. H. Steiner and L.N. Caldeira Brant, *above* note 5, p. 275 *[free translation]*.

[17] C. Stahn, *A Critical Introduction to International Criminal Law* (CUP 2019), p. 99.

2. *The Assembly of States Parties has not treated Palestine differently than other Member States*

15. Since its accession to the Rome Statute in 2015, Palestine has been treated as any other Member State within the Assembly of the States Parties ("ASP"). During the 14th ASP in 2015, Palestine was included among the list of delegations of Member States rather than in another category.[18] This should not be taken lightly, especially considering the fact that on 18 October 2017, the Bureau shared an "Understanding on the Participation of Observer States in meetings of the Assembly of States Parties", stressing that some rights are only enjoyable by Member States.[19]

16. Even more significantly, on 26 June 2016,[20] the ASP considered Palestine the 30th State to ratify Resolution RC/6, which was the decisive trigger for activating jurisdiction over the crime of aggression, as laid down in articles 15*bis*(2) and 15*ter*(2) of the Statute.[21] The significance of this development is such that, if Palestine were not considered a State, and therefore a proper Member State of the Rome Statute, the now-active jurisdiction for the crime of aggression would be flawed. Furthermore, during the 16th ASP in 2017, Palestine's representatives participated in, and made proposals on, the discussions for the activation for the crime of aggression.[22]

17. Another important factor, which supports that Palestine must be considered as a full-fledged Member State of the Rome Statute, is the fact that since its accession and first attendance to the ASP as a member on the 14th session in 2015, Palestine has contributed to the Court's budget[23] and has been able to vote.[24]

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[18] Delegations to the fourteenth session of the Assembly of States Parties to the Rome Statute of the International Criminal Court, ICC-ASP/14/INF.1, p.1 and 30.

[19] 16th ASP documents, available at https://asp.icc-cpi.int/en_menus/asp/sessions/documentation/16th-session/Pages/default.aspx.

[20] Depositary UN information - https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10-b&chapter=18&lang=en.

[21] Official press release, ICC-ASP-20160629-PR1225.

[22] "Report on the facilitation on the activation of the jurisdiction of the International Criminal Court over the crime of aggression", ICC-ASP/16/24, para. 25.

[23] "Outstanding" contributions according to the Report of the Committee on Budget and Finance on the work of its twenty-fourth session, ICC-ASP/14/5, p.20 and the Report of the Committee on Budget and Finance on the work of its twenty-eighth session, ICC-ASP/16/5, p. 24.

[24] This is apparent from the fact that a number of resolutions were adopted unanimously during sessions where Palestine was present. Only Member States can vote, *see* Rules of Procedure of the Assembly of States Parties, ICC-ASP/1/3, Annex C, Rule 60.

18. Finally, Rule 29 of the Rules of Procedure of the ASP affirms that only State Parties can be elected to the ASP Bureau.[25] During the 16th ASP in December 2017, Palestine assumed the position of one of the Court's Asia-Pacific group representatives.[26] And, in accordance with Rule 11, Palestine has submitted items to the provisional agenda of the 17th ASP in 2018,[27] a right endowed only on Member States.

### *3. The principle "qui tacet consentire videtur si loqui debuisset ac potuisset" supports the accession of Palestine as a full-fledged Member State*

19. The *Amici* respectfully submit that Palestine should be considered a State Party to the Rome Statute with all its rights and duties because since its accession the other Member States did not object properly and timely against Palestine's role and function in that regard. Therefore, they have acquiesced to Palestine being a full-fledged Member State.

20. As a consequence of the UN General Assembly's ("UNGA") approval of Palestine as a non-member observer State in Resolution 67/19, the UN Secretary-General ("UNSG"), acting in his capacity as Depositary and applying the "all States" formula, notified all Rome Statute Member States about Palestine's accession to the Rome Statute on 6 January 2015.[28] Accordingly, article 45(b) of the Vienna Convention on the Law of Treaties ("VCLT") affirms that a State may no longer invoke a ground for suspending the operation of a treaty after becoming aware of the facts and by "reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force".[29] Yet, among the Rome Statute Member States,[30] only Canada reacted to this notification,[31] as will be briefly examined below.

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[25] "Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002," Part C. Rules of Procedure of the Assembly of States Parties, ICC-ASP/1/3.

[26] ICC-ASP/17/1/Add.1, p. 5, and ASP official website with Bureau member available at https://asp.icc-cpi.int/en_menus/asp/bureau/Pages/bureau%20of%20the%20assembly.aspx.

[27] "Request by the State of Palestine for the inclusion of an item on the provisional agenda of the seventeenth session of the Assembly", ICC-ASP/17/22.

[28] Depositary Notice, C.N.13.2015.TREATIES-XVIII.10.

[29] Vienna Convention on the Law of the Treaties, 23 May 1969, art. 45.

[30] The USA and Israel have notified the UNSG however they are not part of the Rome Statute thus, should not be accounted as relevant for this discussion.

[31] Communication to the UNSG on 23 January 2015, C.N.57.2015.TREATIES-XVIII.10.

21. First, Canada argued that the States Parties should "make their own determination with respect to any legal issues"[32] and not the UNSG as a depositary. This is a misconception, since the UNSG followed the UNGA and strictly adhered to the "all States" formula.[33] The UNSG would actually have been in violation of the institutional framework of the UN system and his own role, if he did not accept Palestine's accession to the Rome Statute after Resolution 67/19 and after all other indications that Palestine was fulfilling the well-known "all States" formula.[34]

22. Secondly, while questioning Palestine's role as a State, Canada has nevertheless affirmed that "'Palestine' is not able to accede to this convention, and that the Rome Statute of the International Criminal Court does not enter into force, or have an effect on Canada's treaty relations, with respect to the 'State of Palestine'".[35] Regarding the first part, Canada, as any State, is obviously free to take its own stance with regard to their own diplomatic position. However, regarding their position within the multilateral agreement, States cannot selectively deny the Court's jurisdiction since the Rome Statute forbids reservations under article 120.[36]

23. In addition, when addressing possible agreements to modify multilateral treaties between certain parties, article 41(1)(b)(ii) of the VCLT recalls that a modification cannot take place if it is "incompatible with the effective execution of the object and purpose of the treaty as a whole". Accordingly, it seems impossible to argue the validity of Canada's statement considering the intention to limit the Court jurisdiction when the object and purpose of the Rome Statute is "to establish an independent permanent International Criminal Court […] with jurisdiction over the most serious crimes of concern to the international community as a whole".[37]

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[32] *Ibid.*

[33] The UNSG practice of the "all States" formula dates back to 1973, on its first discussions on the 2202nd meeting of the 28th GA session, when the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents was approved (GA Res. 3166 (XXVIII)). Its purpose, which can be found on the Official records of the 28th General Assembly, A/PV.2202, paragraphs 199 and 325, was to promote treaties universalization without submitting the UNSG to a political decision. Furthermore, according to the 1994 Summary of the Practice of the Secretary-General as a Depositary of Multilateral Treaties, it is important to point out the "all States" formula is based on the UNSG possibility of asking the GA, when he thinks is advisable. In fact, not only he could, but there is precedent of UNSG basing his position on indication. On the Republic of Guinea-Bissau case, he has exercised his depositary role based on the existence of a resolution that did not directly addressed a State`s status but only indicated the UNGA position on the matter (paragraphs 82-83).

[34] Internal Memorandum from the Legal Affairs Office to the Secretary- General, 21 December 2012, pp. 2-4

[35] Communication to the UNSG on 23 January 2015, C.N.57.2015.TREATIES-XVIII.10.

[36] G. Hafner, in O. Triffterer and K. Ambos, *above* note 6, p. 2287-2288.

[37] Preamble of the Rome Statute, para. 9.

24. The Court—which has the obligation to primarily apply the Statute under article 21(1)(a) thereof—has its own dispute settlement provision laid down in article 119.[38] Aligned with the *Kompetenz-Kompetenz* principle,[39] scholars have argued that jurisdiction is a classic example of a matter falling under the scope of article 119(1) as "judicial functions of the Court" that "shall be settled by the decision of the Court".[40] Despite the presumption that the method laid down in paragraph 1 is prevailing,[41] article 119(2) could also be considered relevant. This paragraph affirms that any other dispute between two or more States Parties relating to the interpretation of the Statute, not settled by negotiations, shall be referred to the ASP within three months of its commencement. The ASP may then settle the dispute or make recommendations that could potentially include a referral to the International Court of Justice ("ICJ").[42]

25. Thus, if a State's position towards the accession of Palestine would eventually give rise to a 'dispute',[43] a timely, formal and definite protest should have been made.[44] Canada indeed mentioned its reservations again during their commencement speech on the 14th ASP, when Palestine attended the ASP as a Member State for the first time. However, neither Canada nor any other ICC Member State made a reference to article 119 and a possible dispute referral.[45] It just, once again, affirmed they would "not recognize a 'State of Palestine' and do not consider the Palestinians to be a State Party".[46] However, Canada never used the dispute settlement mechanism of article 119, and since the Statute does not allow reservations according to article 120, their statements do not have any effect on Palestine's role as a full-fledged Member State of the ICC.

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38 A. Pellet, in A. Cassese, P. Gaeta, J.R.W.D. Jones, The Rome Statute of International Criminal Court: A commentary. Vol. II. Oxford University Press, 2002, pp.1841-1848.

39 ICTY, Prosecutor v. Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on jurisdiction, Appeals Chamber, 2 October 1995.

40 R.S. Clark, in O. Triffterer and K. Ambos, *above* note 6, p. 2276.

41 See Alain Pellet in A. Cassese, P. Gaeta, J. R.W.D. Jones, The Rome Statute of International Criminal Court: A commentary. Vol. II. Oxford University Press, 2002, p. 1843.

42 Art. 119(2) Rome Statute.

43 According to the *Mavrommatis Palestine Concessions* case, 30 August 1924, PCJI, p. 11, "dispute" has been interpreted as "d*isagreement on a point of law or fact, a conflict of legal views or interests"*.

44 ICJ, Fisheries Case, 18 December 1951, pp. 138-139.

45 R. S. Clark, *above* note 40, p. 2279

46 States commencement speeches available at https://asp.icc-cpi.int/EN_Menus/asp/sessions/general%20debate/pages/generaldebate_14th_session.aspx

26. Following this, Canada, Germany, The Netherlands and the United Kingdom of Great Britain and Northern Ireland ("UK") affirmed during the ASP Bureau meeting on 15 November 2016 that the designation "State of Palestine" should not be construed as a recognition of a State of Palestine and was without prejudice to their individual positions on the issue.[47] In this regard, the principle "*qui tacet consentire videtur si loqui debuisset ac potuisset"* (he who keeps silent is held to consent if he must and can speak), as reflected in article 45(b) VCLT, is relevant. In fact, Germany,[48] the Netherlands, and the UK only voiced their concerns more than a year after Palestine's accession to the Rome Statute.

27. The fact is, these three States abstained from voting for Resolution 67/19,[49] and none of them objected to Palestine's accession to the ICC when they were duly notified in 2015. Furthermore, none of the States objected during their 14th ASP commencement speeches,[50] when Palestine attended for the first time as a Member State, or during their 13th ASP speeches,[51] when Palestine attended by invitation. Thus, their protest should be considered untimely, meaning that they tacitly agreed to Palestine's accession. Their protest could thus be considered an expression of individual political stances. Incidentally, if the practice of the depositary is evidence of a political positioning—as some countries have argued with regard to the UNSG's general practice regarding Palestine—such political positioning would be contradictory at least for the Netherlands, which accepted Palestine as a member state for the Convention Respecting the Laws and Customs of War on Land 1907 (Hague Convention IV),[52] and the UK, regarding the Non-Proliferation of Nuclear Weapons Treaty.[53]

28. Finally, the *Amici* submit that the statements made by other States Parties in the course of the present proceedings before the Pre-Trial Chamber are also untimely and should not be given

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47 Bureau of the ASP, Seventh meeting, The Hague, 15 November 2016, Annex II.

48 Bofaxe Newsletter, "Deutschland als Amicus Curiae", NR. 546 D 24.02.2020, available at https://voelkerrechtsblog.org/deutschland-als-amicus-curiae/.

49 Official Records of the 67th General Assembly meeting. A/67/PV.44, p. 12.

50 States commencement speeches available at https://asp.icc-cpi.int/EN_Menus/asp/sessions/general%20debate/pages/generaldebate_14th_session.aspx

51 commencement speeches available at https://asp.icc-cpi.int/en_menus/asp/sessions/general%20debate/Pages/GeneralDebate_13th_session.aspx.

52 Palestine acceded on 2 April 2014 according to the Netherlands Depositary Information website - https://treatydatabase.overheid.nl/en/Verdrag/Details/003319.

53 Palestine acceded on 12 February 2015 to the Non-Proliferation of Nuclear Weapons that has a Depositary with the UK, Government information website https://www.gov.uk/government/publications/treaty-on-the-non-proliferation-of-nuclear-weapons-london-171968

weight. One example is Brazil, which not only voted in favour of Resolution 67/19,[54] but also affirmed during its commencement speech for the 14th ASP that it "welcomes the accession of the State of Palestine to the Rome Statute, raising the number of States Parties to 123".[55] Similarly, Austria and Uganda voted in favour of Resolution 67/19.[56] Austria did not make any speech and Uganda did not mention Palestine in their 14th ASP statement. [57] While Australia and Hungary abstained from voting for Resolution 67/19,[58] they explained their position on political grounds, referring to the stability of the region and the possible effects on the peace negotiations. However, they have never protested against Palestine's accession to the Rome Statute properly, e.g. during their 14th ASP speeches.[59] As to the Czech Republic, despite having voted against Resolution 67/19,[60] it has never mentioned the issues timely and in the relevant venue during the 14th ASP.[61] Moreover, none of their statements during the 13th ASP mentioned Palestine.[62]

29. As has been shown, the States' positions on this matter have been deeply anchored in their foreign policy views, that can be influenced by Government changes. This is reflected by their non-usage of the Rome Statute dispute settlement mechanism and untimely contradicting statements, which should be interpreted as acquiescence. Moreover, the only timely protest issued by one State (Canada) cannot be sustained. To accept it would, in practice, create a reservation concerning the Court's jurisdiction, whereas the Statute clearly prohibits reservations in article 120. Therefore, the Court should not take into account these statements.

### B. The relevance of the law of belligerent occupation with regard to Palestine's statehood

30. The *Amici* respectfully submit that, if the Pre-Trial Chamber came to the conclusion that it is not sufficient to consider Palestine as a State within the legal regime of the Rome Statute,

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54 Official Records of the 67th General Assembly meeting. A/67/PV.44, p. 12

55 States commencement speeches available at https://asp.icc-cpi.int/EN_Menus/asp/sessions/general%20debate/pages/generaldebate_14th_session.aspx

56 Official Records of the 67th General Assembly meeting. A/67/PV.44, p. 12.

57 *See* note 55 *above*.

58 Official Records of the 67th General Assembly meeting. A/67/PV.44, p. 12.

59 *See* note 55 *above*.

60 Official Records of the 67th General Assembly meeting. A/67/PV.44, p. 12.

61 See note 55 *above*.

62 Specifically, Czech Republic did not give a statement on the 13th ASP. States commencement speeches available at https://asp.icc-cpi.int/en_menus/asp/sessions/general%20debate/Pages/GeneralDebate_13th_session.aspx.

Palestine fulfils the requirements for statehood under general international law. In this regard, the *Amici* emphasise the importance of taking into account the law of belligerent occupation as regulated by the body of international (humanitarian) law treaties, when determining the criteria for Statehood.

*1. Occupation prevents the occupied State from having an effective government*

31. Article 1 of the 1933 Montevideo Convention provides that for an entity to achieve statehood it must have a "government" which in practice has been required to be "effective".[63] This must "include some degree of maintenance of law and order and the establishment of basic institutions".[64] Crawford in his seminal work on the creation of States has defined "government" as the "exercise of authority […] within the territory of the State".[65] He further elaborated that "to be a State, an entity must possess a government […] to the exclusion of other entities not claiming through or under it".[66]

32. This requirement is in stark contrast with the law of occupation whereby the occupying power exercises authority over the occupied territory. Article 42 of the 1907 Hague Regulations ("HR") is the cornerstone of the law of occupation. Pursuant to that provision, occupation arises when a territory is "placed under the authority of the hostile army". By "exercise of authority", one should understand the ability of the foreign forces to exert authority in the concerned territory *in lieu* of the local government.[67] In general, "effective control" by the occupying power is necessary to confirm a state of occupation. Article 43 HR further clarifies that the occupying power needs to "respect […], unless absolutely prevented, the laws in force in the country."

33. This has been further regulated in article 47 of the 1949 Geneva Convention IV ("GC IV"), according to which the occupying power is to be considered as a *de facto* administrator. However, as an exception to the general rule in Article 43 HR, article 64(2) GC IV allows the occupying power to subject the population of the occupied territory "to whatever measures it considers necessary for its own security and to ensure that the present Convention is enforced, and the

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[63] *Montevideo Convention on the Rights and Duties of States* opened for signature 26 December 1933 (entered into force 26 December 1934), Article 1.

[64] J. Crawford, *The Creation of States in International Law* (OUP, 2nd ed, 2006) p. 59.

[65] *Ibid*, p. 55.

[66] *Ibid*, p. 59.

[67] E. Benvenisti, *The international law of occupation* (OUP, 2012), p. 188.

territory properly administered".[68] This legislative power is secured by the occupying power's judicial powers under article 65 GC IV (right to enact penal provisions) and article 66 GC IV (right to constitute military courts). Hence, the powers conferred to the occupying power are—under certain circumstances—quite permissive and extensive,[69] which in many ways contradicts the assumption that the occupied State is able to have an effective government for the duration of the occupation.

34. Consequently, while commenting on GC IV, Jean Pictet recognised that the occupation of a territory interferes with the occupied power's ability to exercise its sovereign rights.[70] Indeed, such interference with the institutions or government of an occupied country has the effect of transforming the country's structure and organisations. The law of occupation further allows the occupying power to modify the institutions or even the government of the occupied territory.[71]

35. The European Court of Human Rights (ECtHR) in *Ilaşcu v. Moldova and Russia*,[72] *Loizidou v. Turkey*,[73] and *Cyprus v. Turkey*[74] recognised that under occupation, the occupying power effectively controls the territory concerned and as such, prevents the occupied State "from exercising its authority in part of its territory".[75] Under the law of occupation, the occupying power is authorised to exercise an extensive degree of authority over the occupied territories; therefore, the effect of occupation is the inability of the occupied entity to exercise effective control. As a consequence, an occupied State will usually not be in possession of an "effective government" as required by article 1 of the 1933 Montevideo Convention. This would lead to the absurd conclusion that no occupied entity could ever be considered a State.

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[68] J.S. Pictet, O.M. Uhler & R. Griffin, The Geneva Conventions of 12 August 1949: commentary. IV: Geneva Convention relative to the protection of civilian persons in time of war (Geneva: International Committee of the Red Cross, 1958), p. 339.

[69] *Ibid,* p. 337.

[70] *Ibid*, p. 275.

[71] *Ibid*, p. 274.

[72] ECHR, *Ilascu v Moldova and Russia* (European Court of human Rights, Grand Chamber, Application No 487887/99, 8 July 2004), pp. 312-313.

[73] ECHR, *Loizidou v.* Turkey (Preliminary Objections) (1995) 310 Eur Court HR (ser A).

[74] ECHR, *Cyprus v. Turkey* (European Court of Human Rights, Grand Chamber, Application No 25781/94, 10 May 2001) §§76-83.

[75] ECHR, *Ilascu v Moldova and Russia,* see above note 75 (European Court of human Rights, Grand Chamber, Application No 487887/99, 8 July 2004), pp. 312-313.

36. Applying those considerations to the situation of the State of Palestine as it has been referred to the ICC—and the question of its territorial jurisdiction—it is therefore important to keep in mind that the ICJ has confirmed that Israel exercises control over the Occupied Palestinian Territory ("OPT").[76] Therefore, the law of occupation inherently would prevent the fulfilment of the conditions laid down in article 1 of the 1933 Montevideo Convention if applied strictly to the situation of Palestine.[77]

*2. The notion of effective government is relative*

37. The notion of "government" in article 1 of the Montevideo Convention must be characterised as a legal term that is relative according to special circumstances.[78] This interpretation is confirmed by State practice. There have been various examples of entities achieving statehood despite not having an effective government. These examples include the Democratic Republic of Congo (DRC),[79] Bosnia-Herzegovina,[80] Croatia,[81] Rwanda, and Burundi.[82] It also includes entities which did not completely fulfil the Montevideo criteria because their territory was under occupation, but were nonetheless regarded as States, such as Namibia[83] and Guinea-Bissau.[84]

38. The DRC, for one, achieved statehood while not having an effective government following its declaration of independence in 1960.[85] By that time, the DRC was still dealing with various secessionist movements, its central government was divided in two fractions (each one of them claiming to be the lawful government), and the new State was also in need of international aid because of the bankruptcy of its authorities.[86] Thus, the UN Security Council ("UNSC") in its Resolution 143 decided to provide assistance for the government of the DRC until the government

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76 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 ("*Wall* Advisory Opinion"), 62.

77 J.S. Pictet, O.M. Uhler & R. Griffin, above note 68, 274-275.

78 J. Crawford, The Creation of States in International Law (OUP, 2nd ed, 2006), 61.

79 UNSC Res 143, UN Doc S/4387 (14 July 1960), 2.

80 M.D. Evans, *International Law* (OUP, 6th ed, 2018), 202.

81 *Ibid*.

82 R. Higgins, Problems and process: international law and how we use it (OUP, 1994), 40.

83 ILO, *Resolution on the Admission of Namibia*, Selection Committee, 64th sess (7-28 June 1978) [50]; John Quigley, *The Statehood of Palestine* (CUP, 2012) 223.

84 UNGA Res 3061, UN Doc A/RES/3061 (2 November 1973).

85 M.N. Shaw, *International Law* (CUP, 6th ed, 2008) 205 referring to a "breakdown of the government".

86 J. Crawford, *The Creation of States in International Law* (OUP, 2nd ed, 2006) 56-57.

was able to "fully meet its tasks" while calling upon Belgium to withdraw its troops from the territory of the DRC.[87] Both Bosnia-Herzegovina and Croatia were also recognised by the European Community as independent States in 1992 while they had limited effective control.[88] They were also admitted to the UN although non-governmental forces "controlled substantial areas of the territories in question in civil war conditions".[89]

39. Further, it has been acknowledged that "[…] lack of effective central control might be balanced by significant international recognition, culminating in membership of the UN".[90] As will be further elaborated below, this has been the case with regard to Palestine. In addition, "a comprehensive breakdown in order and the loss of control by the central authorities in an independent State will not obviate statehood".[91] In a broader sense, even States which are not occupied are more and more constrained in the way they operate. They cannot exist without transferring part of their sovereignty to international or regional organisations.[92] Lauterpacht goes even further in arguing that "the notion of sovereignty – in the comprehensive sense of a plenitude of power remaining within the uncontrolled discretion of states – has been significantly eroded".[93]

40. Israel's occupation over Palestine would necessarily preclude Palestine from achieving statehood if effective control over a territory were to be a decisive criterion. However, when it comes to determining the statehood of emerging States, it is important to keep in mind that "the principle of effectiveness is not usually employed as the definitive explanation".[94] There have been a number of commentators who have supported the approach that while the classical Montevideo criteria "still form the initial and basic normative requirements for assessing statehood, their complete fulfilment is no longer the exclusive yardstick."[95] Following a similar argumentation, Shaw concluded that the Montevideo criteria "are neither exhaustive nor

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87 SC Res 143, UN Doc S/4387 (14 July 1960), 2.

88 M.D. Evans, above note 80, p. 202.

89 *Ibid,* p. 201.

90 *Ibid*.

91 *Ibid*.

92 J. Quigley, *The Statehood of Palestine* (CUP, 2012), p. 245.

93 E. Lauterpacht, 'Sovereignty – Myth or Reality' (1997) 73 *International Affairs (Royal Institute of International Affairs)* 137, 141.

94 Malcolm D. Evans, *International Law* (OUP, 6th ed, 2018) p. 202.

95 Z. Nevo & T. Megiddo 'Lessons from Kosovo: The Law of Statehood and Palestinian Unilateral Independence' (2013) 5(2) *Journal of International Law and International Relations* 89, p. 95.

immutable".[96] Finally, Crawford in the latest edition of *Brownlie's Principles of Public International Law* came to the conclusion that "[n]ot all the conditions are necessary, and in any case further criteria must be employed to produce a working definition".[97]

41. There is ample previous State practice with regard to the phenomenon that an entity can achieve statehood while under occupation. The situation in Palestine is analogous to the one in Guinea-Bissau which declared its independence from Portugal (the occupying power) in 1973. In its Resolution 3061 of 2 November 1973, the UNGA welcomed the creation of the "sovereign State of the Republic of Guinea-Bissau" while condemning the illegal occupation of the forces of Portugal in the newly formed State, to which it received the support of 93 States.[98]

42. The UNGA further recognised Guinea-Bissau as an "independent State" from Portugal.[99] Such recognition led to the accession of Guinea-Bissau to several international organisations while Portugal still had not recognised its independence. Examples include the African Union, which Guinea-Bissau joined on 11 November 1973, and the Food and Agriculture Organisation (FAO), which it joined 26 November 1973.[100]

43. Equally, after Palestine proclaimed its independence on 15 November 1988, the UNGA in its Resolution 43/77 "affirm[ed] the need to enable the Palestinian people to exercise their sovereignty over their territory occupied since 1967".[101] In 2011, Palestine was admitted as a member State of UNESCO,[102] which requires, in article II (2) of its Constitution, statehood as a condition for membership.[103] In 2012, while hoping that the UNSC would favour the admission to full membership of the State of Palestine,[104] the UNGA granted the status of non-member observer State to Palestine with Resolution 67/19.[105] Among the 138 States which voted in favour,

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96 M. N. Shaw, *International Law* (CUP, 8th ed, 2017), p. 158.

97 J. Crawford, *Brownlie's Principles of Public International Law* (OUP, 9th ed, 2019), p. 118.

98 GA Res 3061, UN Doc A/RES/3061 (2 November 1973).

99 GA Res 3181, UN Doc A/RES/3181 (17 December 1973).

100 FAO C73/REP *Rapport de la Conférence de la FAO* (10-29 Novembre 1973, 17ème sess), 81 (57 favourable votes were needed for its admission: 66 out of 105 members voted in favour).

101 UNGA, Res 43/77, UN Doc A/RES/43/77 (15 December 1988), para. 2.

102 UNSECO, Records of the General Conference (Vol I, Resolutions, 36th sess), 79.

103 Constitution of UNSECO Article II.2.

104 UNGA Res 67/19, UN Doc A/RES/67/19 (29 November 2012), para 3.

105 *Ibid*., para 2.

many delegations expressed that such Resolution was a landmark for a "two-State solution".[106] This paved the way for further recognition of the State of Palestine and its inclusion in other international organisations. In 2015, Palestine became a member of the Permanent Court of Arbitration,[107] the World Customs Organisation,[108] and most importantly, ratified the Rome Statute and became a member of the ICC.[109]

### *3. Examples of entities being recognised as States while under occupation*

44. There are two important examples from recent State practice which show that entities can become States while still under belligerent occupation. The first is the recognition of Guinea-Bissau as an independent State.[110] The process was the result of, first, the UNSC condemning the aggression of Portugal against Guinea-Bissau with UNSC Resolutions S/289 and S/290.[111]

45. At the same time, the UNGA adopted its Resolution 2795 in 1971 which requested the Special Committee on Decolonisation to keep the situation of Guinea-Bissau "under review".[112] This Special Committee then confirmed that Guinea-Bissau was the only representative of the people of Guinea Bissau.[113] On 24 September 1973, Guinea-Bissau declared its independence. On 2 November 1973, the UNGA recognised the declaration of independence with 93 States supporting the Resolution.[114] It is important to note that the liberation movement of Guinea-Bissau, the PAIGC, at the time of the declaration of independence had substantial control over certain areas of its territory, while Portugal was only occupying cities and some military areas.[115]

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[106] UN, 'General Assembly Votes Overwhelmingly to Accord Palestine 'Non-Member Observer State' Status in United Nations', *UN Meeting Coverage and Press Releases* (Web Page, 29 November 2012) <https://www.un.org/press/en/2012/ga11317.doc.htm>.

[107] PCA, 'New PCA Member State: Palestine', *PCA* (Web Page, 15 March 2016) <https://pca-cpa.org/en/news/new-pca-member-state-palestine/>.

[108] WCO, 'The WCO now has 180 Members', *WCO* (Web Page, 19 May 2015) <http://www.wcoomd.org/en/media/newsroom/2015/may/the-wco-now-has-180-members.aspx>.

[109] UN, 'Rome Statute of the International Criminal Court', *UN Treaty Collection* (Web Page) <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&clang=_en>.

[110] UNGA Res 3061, UN Doc A/RES/3061 (2 November 1973), para 1.

[111] UNSC Res 289, UN Doc S/RES/289 (23 November 1970) paras 2-3; SC Res 290, UN Doc S/RES/290 (8 December 1970).

[112] UNGA Res 2795, UN Doc A/RES/2795 (10 December 1971), para 18.

[113] UNGA, Report of the Special Committee on the Situation with regard to the Implementation on the Granting of Independence to Colonial Countries and Peoples, 27th sess, Vol III, Supp No 23, UN Doc A/8723/Rev.1 (1975).

[114] UNGA Res 3061, UN Doc A/RES/3061 (2 November 1973), para 1.

[115] P. Pierson-Mathy, La naissance de l'État par la guerre de libération nationale : le cas de la Guinée-Bissau (UNESCO, 1980), 23.

In this regard, one might be able to compare this situation with the realities of OPT, which also experiences different levels of occupation.[116]

46. Guinea-Bissau's declaration of independence was recognised by 70 States with Portugal recognising its independence a year later.[117] As a comparison, the State of Palestine was recognised by 104 States after declaring its independence[118] and is currently recognised by 138 States.[119]

47. Furthermore, the situation in Palestine is also analogous to the historic example of Namibia. Despite its occupation by South Africa, Namibia achieved statehood on the ground that its statehood could not be precluded by unlawful occupation.[120] The ILO found occupied Namibia to be a State on the rationale that its legitimate rights should not be frustrated by occupation.[121]

*4. Recognition plays a prominent role with regard to the statehood of occupied States*

48. The *Amici* further submit that the recognition of Palestine as a "non-member observer State" by the UNGA should be considered as collective recognition by the international community of Palestine's statehood.[122]

49. Guinea-Bissau and Namibia were recognised as States by international organisations. The UNGA explicitly recognised the State of Guinea-Bissau with its Resolution 3061 in 1973,[123] while Namibia was admitted as a member to several international organisations such as the ILO, FAO,

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[116] For example, Israel withdrew ground forces from the Gaza Strips while it still maintains boots on the ground in the West Bank. *See* UNSC Press Release, "Israel's Disengagement From Gaza, Northern West Bank 'Watershed', Under-Secretary-General Tells Security Council", SC/8479**,** 24 August 2005.

[117] UNGA Res 3061, UN Doc A/RES/3061 (2 November 1973); Jean Salmon, *La proclamation de l'Etat palestinien*, Annuaire français de droit international, vol. 34, 1988, 61.

[118] UNGA Res. 43/177, (15 December 1988).

[119] UN, 'General Assembly Votes Overwhelmingly to Accord Palestine 'Non-Member Observer State' Status in United Nations', *UN Meeting Coverage and Press Releases* (Web Page, 29 November 2012) <https://www.un.org/press/en/2012/ga11317.doc.htm>.

[120] J. Quigley, above note 92, p. 223.

[121] ILO, *Resolution on the Admission of Namibia*, Selection Committee, 64th sess (7-28 June 1978) [50].

[122] H.G. Schermers and N.M. Blokker, *International Institutional Law* (Brill, 6th ed, 2018) §180.

[123] UNGA Res 3061, UN Doc A/RES/3061 (2 November 1973).

ITU and IAEA after recommendations of the UN Council for Namibia promoted Namibia's membership to the UN specialised agencies.[124]

50. Namibia's membership was also recognised in several other international organisations such as UNCTAD, UNIDO, ILO, FAO, ITU and IAEA.[125] Equally, Palestine was accepted as a member State in various international organisations starting with the Organisation of Islamic Cooperation (OIC) in 1969,[126] UNESCO in 2011,[127] the UN which recognised it as a non-member observer State in 2012,[128] UNDOC in 2014,[129] the ICC in 2015,[130] ESCWA,[131] INTERPOL in 2017,[132] and the OPCW,[133] UNDIO[134] as well as UNCTAD[135] in 2018.

51. This shows that Palestine is recognised as being a State. For instance, article 4 of the Constitution of INTERPOL conditions its membership to "any country".[136] While INTERPOL refused to grant membership to Palestine in 2010,[137] it approved Palestine's membership in 2017[138] based on INTERPOL Resolution GA2017-86-RES-01. This Resolution on membership confirmed that the word "country" in article 4 of the Constitution shall be interpreted as 'State'

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[124] UNGA Res 31/149, UN Doc A/RES/31/149 (20 December 1976) para 3; GA Res 33/24, UN Doc A/33/24 (29 November 1978).

[125] UNGA, Report of the United Nations Council for Namibia, A/41/24, 41st sess, Supp No 24 (1986) [16].

[126] OIC, 'Member States', *OIC* (Web Page) < https://www.oic-oci.org/states/?lan=en>.

[127] UNESCO, *Records of the General Conference*, Resolutions, 36th Session, Vol I (25 October – 10 November 2011) [78].

[128] UNGA Res, UN Doc A/RES/67/19 (29 November 2012) para 2.

[129] UNDOC, 'Country Profile', *UNDOC* (Web Page) < https://www.unodc.org/unodc/en/corruption/country-profile/countryprofile.html#?CountryProfileDetails=%2Funodc%2Fcorruption%2Fcountry-profile%2Fprofiles%2Fpse.html>.

[130] ASP.ICC, 'States Parties to the Rome Statute', *ASP.ICC* (Web Page) < https://asp.icc-cpi.int/en_menus/asp/states%20parties/asian%20states/Pages/Palestine.aspx>.

[131] ESCWA, *Member Countries in Alphabetical Order as Designated by the UN* <https://www.unescwa.org/sites/www.unescwa.org/files/uploads/escwamss.pdf>.

[132] INTERPOL, 'PALESTINE', *INTERPOL* (Web Page) <https://www.interpol.int/Who-we-are/Member-countries/Asia-South-Pacific/PALESTINE>.

[133] OPCW, 'Member States', *OPCW* (Web Page) <https://www.opcw.org/about-us/member-states/palestine>.

[134] UNDIO, 'Member States List', *UNDIO* (Web Page) <https://www.unido.org/member_states>.

[135] UNCTAD, 'Membership of UNCTAD and of the Trade and Development Board', *UNCTAD* (Web Page) < https://unctad.org/en/Pages/About%20UNCTAD/UNCTADs-Membership.aspx>.

[136] INTERPOL Constitution, Article 4.

[137] INTERPOL, 'INTERPOL Membership - Historical Perspective Document' Appendix 1 of the GA-2017-86-REP-01, 12.

[138] INTERPOL, 'PALESTINE', *INTERPOL* (Web Page) <https://www.interpol.int/Who-we-are/Member-countries/Asia-South-Pacific/PALESTINE>.

and that each requesting country shall provide that it meets the criteria for statehood to be accepted as a member.[139]

52. Moreover, while acceding to the ICC on 2 January 2015,[140] the State of Palestine also successfully ratified 17 treaties among which, the UN Convention on the Law of the Sea (UNCLOS),[141] the Convention on Cluster Munitions,[142] the International Covenant on Civil and Political Rights,[143] the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment[144] and the International Convention on the Elimination of All Forms of Racial Discrimination.[145] As of today, the State of Palestine has successfully acceded to 70 multilateral agreements,[146] including 14 protocols,[147] with the UNSG acting in his capacity as depositary.

53. In accordance with the assessment of Jean Pictet in the official ICRC Commentary,[148] the occupying power inherently precludes Palestine to have an effective government as required by the 1933 Montevideo Convention.[149] The *Amici* nonetheless submit that examples of entities being recognised as States while under occupation, such as Guinea-Bissau,[150] coupled with the assessment made by Crawford on statehood,[151] clearly confirm that such criterion is relative. Hence, Palestine is a State despite not having an effective government. Additionally, the *Amici*

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[139] INTERPOL, Resolution No.1 GA-2017-86-RES-01 Annex 1, 3.

[140] UN Depositary Notification, Rome Statute of the International Criminal Court, 17 July 1998, State of Palestine: Accession on 2 January 2015, C.N.13.2015.TREATIES-XVIII.10 (6 January 2015).

[141] UN Depositary Notification, UN Convention on the Law of the Sea, 10 December 1982, State of Palestine: Accession on 2 January 2015, C.N.10.2015.TREATIES-XXI.6 (6 January 2015).

[142] UN Depositary Notification, Convention on Cluster Munitions, 30 May 2008, State of Palestine: Accession on 2 January 2015, C.N.14.2015.TREATIES-XXVI.6 (6 January 2015).

[143] UN Depositary Notification, International Covenant on Civil and Political Rights New York, 16 December 1966, State of Palestine: Accession on 2 April 2014, C.N.181.2014.TREATIES-IV.4 (9 April 2014).

[144] UN Depositary Notification, Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment New York, 10 December 1984, State of Palestine: Accession on 2 April 2014, C.N.184.2014.TREATIES-IV.9 (9 April 2014).

[145] UN Depositary Notification, International Convention on the Elimination of All Forms of Racial Discrimination New York, 7 March 1966, State of Palestine: Accession on 2 April 2014, C.N.179.2014.TREATIES-IV.2 (9 April 2014).

[146] UN Treaty Collection, 'Depositary Notification by the Secretary-General', *UN Treaty Collection* (Web Page) <https://treaties.un.org/Pages/CNs.aspx?cnTab=tab2&clang=_en>.

[147] UN Treaty Collection, 'Depositary Notification by the Secretary-General', *UN Treaty Collection* (Web Page) <https://treaties.un.org/Pages/CNs.aspx?cnTab=tab2&clang=_en>.

[148] J.S. Pictet, O.M. Uhler & R. Griffin, above note 68.

[149] *Ibid,* 274-275, 337, 339.

[150] UNGA Res 3061, UN Doc A/RES/3061 (2 November 1973).

[151] J. Crawford, above note 86, 61.

argue that the wide recognition of the State of Palestine at the UN,[152] in various international organisations—which require statehood as a condition for membership[153]—and its ratification of 70 multilateral conventions[154] further confirm that Palestine is a State under the rules of public international law.

### C. The scope of the Court's territorial jurisdiction comprises the West Bank, including East Jerusalem, and the Gaza Strip

54. The *Amici* support the Prosecutor's submission that the Court's territorial jurisdiction in the situation of Palestine comprises the OPT, including the West Bank, East Jerusalem and the Gaza Strip (henceforth "Gaza").[155] This is the territory of the State of Palestine, a State Party to the Rome Statute, over which the Court can exercise jurisdiction pursuant to article 12(2)(a) of the Statute. Specifically, the territory is delimited by the 1949 Armistice Line (the "Green Line") and the former eastern boundary of Palestine under the British Mandate and was occupied by Israel during the Six-Day War in 1967.

#### *1. The Green Line is the current de facto border of the State of Palestine*

55. As the Prosecutor notes in her Request,[156] UN bodies have recognised Palestine's sovereignty, or the Palestinian people's right to self-determination, over the territory within the pre-1967 borders. For example, the ICJ in the *Wall* Advisory Opinion associated the Palestinian people's right to self-determination with the territory demarcated by the Green Line.[157] Various UNGA resolutions refer to the Palestinian territory occupied by Israel in 1967.[158] Similarly, the UNSC in resolution 2334 called upon all states "to distinguish, in their relevant dealings, between the territory of the State of Israel and the territories occupied since 1967".[159] Such territorial scope has, moreover, not been challenged by the Committee on the Elimination of Racial

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[152] GA Res, UN Doc A/RES/67/19 (29 November 2012) para 2.

[153] INTERPOL, Resolution No.1 GA-2017-86-RES-01 Annex 1, 3.

[154] UN Treaty Collection, 'Depositary Notification by the Secretary-General', *UN Treaty Collection* (Web Page) <https://treaties.un.org/Pages/CNs.aspx?cnTab=tab2&clang=_en>.

[155] Prosecution Request, para. 219.

[156] *Ibid,* paras. 193-210.

[157] *Wall* Advisory Opinion, paras. 73, 78 (defining the scope of the OPT by reference to Palestine's borders under the British Mandate) 122 (stating that the fact that the Wall deviates from the Green Line, and its associate *régime*, impede the right to self-determination of the Palestinian people).

[158] See e.g. UNGA resolution 37/86 (1982), paras. 3, 5; UNGA resolution 43/177 (1988), paras. 1-2; UNGA resolution 58/292 (2004), para. 1; UNGA resolution 67/19 (2012), para. 1.

[159] UNSC resolution 2334 (2016), paras 3, 5.

Discrimination, who recently decided it has jurisdiction over the OPT, including East Jerusalem.[160]

56. Furthermore, on 12 November 2019 the Court of Justice of the European Union ("CJEU") ruled that foodstuffs originating in the territories occupied by Israel must bear the indication of their territory of origin, especially when those foodstuffs come from Israeli settlements within the OPT. The CJEU noted that the European Union, in line with international law, does not recognise Israel's sovereignty over the territories occupied by Israel since June 1967, namely the "Syrian"" Golan Heights, the Gaza Strip and the West Bank, including East Jerusalem and does not consider them to be part of Israel's territory.[161]

57. When Palestine referred the situation in its territory to the Prosecutor on 22 May 2018, it indicated that "[t]he State of Palestine comprises the Palestinian Territory occupied in 1967 by Israel, as defined by the 1949 Armistice Line, [which] includes the West Bank, including East Jerusalem, and the Gaza Strip."[162]

58. The Oslo Accords also recognise that there is a Palestinian people in "the West Bank, Jerusalem and the Gaza Strip"[163] and that "[t]he two sides view the West Bank and the Gaza Strip as a single territorial unit".[164] It is not surprising that, in affirming the territorial unity of the OTP, the Oslo Accords make no mention of East Jerusalem. In fact, the status of Jerusalem was left to final status negotiations.[165]

59. The fact that the Green Line was not intended as a permanent border and that the frontier between Israel and Palestine, together with other issues, is envisaged in the Oslo Accords to be

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[160] See CERD/C/100/3, 12 December 2019, para. paras. 2.8-2.9; CERD/C/100/5, 12 December 2019, para. 3.50. In the jurisdictional proceedings, Israel has not disputed the territorial scope, but rather the existence of treaty-relations.

[161] *See* http://curia.europa.eu/juris/document/document.jsf?text=&docid=220534&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2011810. *See also* the Report of the United Nations High Commissioner for Human Rights (12 Feb. 2020) available at https://www.un.org/unispal/document/un-high-commissioner-for-human-rights-report-on-business-activities-related-to-settlements-in-the-opt-advance-unedited-version-a-hrc-43-71/.

[162] Palestine Article 14 Referral, fn. 4. Similarly, when Palestine accepted the Court's jurisdiction under article 12(3) of the Rome Statute, it did so for alleged crimes committed "in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014". *See* Palestine Article 12(3) Declaration, 31 December 2014.

[163] UNGA Res. 51/889 (1995), Annex, Israeli-Palestinian Interim Agreement on the West *Bank and the Gaza Strip*, 28 September 1995 ("Oslo II"), Preamble, articles III (1) and IV.

[164] Oslo II, Article XI.

[165] Oslo II, Articles XVII(1)(a) and XXXI.

the subject of negotiations between the two parties[166] does not *per se* exclude Palestine's statehood or its territorial jurisdiction over the OPT within its current borders. Pending those negotiations, and in the absence of a permanent settlement agreement, the Green Line has become a *de facto* border between Israel and Palestine.[167]

60. By ruling on the territorial scope of its jurisdiction, the Court would simply confirm the territorial zone in which the Prosecutor can carry out her investigative activities for the purposes of the Rome Statute. The spatial extent of such territory can only be based upon the *status quo*, that is, extend to Palestine's territory occupied by Israel in 1967, as demarcated by the Green Line. By ruling on the territorial scope of its jurisdiction for the purposes of the Rome Statute, the Court would not adjudicate a border dispute under international law, nor would it prejudge the question of the future frontier between Israel and Palestine. The Court's ruling is clearly without prejudice to future status negotiations and possible land swaps between Israel and Palestine.

61. A ruling by the Court that will exclude any parts of the OPT from the scope of its territorial jurisdiction would be encouraging the Israeli policies of colonisation of the West Bank, including East Jerusalem, in violation of article 49(6) of GC IV.[168] It would also undermine the object and purpose of the crime of transfer by the occupying power of parts of its civilian population into the territory it occupies, which is codified in article 8(2)(b)(viii) of the Rome Statute. Furthermore, if the Court were not to uphold the territorial unity of the OPT, it would indirectly encourage Israel's policy of annexation of parts of the OPT in violation of article 2(4) of the UN Charter and the prohibition of territorial acquisition by force, which has the status of *jus cogens*.

*2. The Oslo Accords do not limit the Court's jurisdiction over the West Bank*

62. The Prosecutor's Request correctly finds that the scope of the Court's territorial jurisdiction covers, *inter alia*, the entirety of the West Bank, thus comprising Areas A, B, and C as defined in Oslo II.[169]

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[166] Oslo II, arts. XVII(1)(a) and XXXI.

[167] *See* UNSC Resolution 242 (1967) of 22 November 1967, para 1 (calling on Israel to withdraw "from the territories occupied in the recent conflict" and including a map of the 1949 armistice line). *See also* UNGA Res ES-10/14 (12 December 2003) ("*Affirming* the necessity of ending the conflict on the basis of the two-State solution of Israel and Palestine living side by side in peace and security based on the Armistice Line of 1949, in accordance with relevant Security Council and General Assembly resolutions").

[168] *Wall* Advisory Opinion, para. 120.

[169] Oslo II, art. XI(3). *See* Request, paras 219-220.

63. The Oslo Accords do not bar the Court from exercising jurisdiction over Area C, or Israeli nationals. Oslo II does not confer upon Israel a sovereign right of jurisdiction over Israeli nationals and Area C, but solely, and partially, transfers the Palestinian National Authority's ("PNA") capacity to exercise its enforcement jurisdiction over that area and in relation to Israeli nationals.[170] As the Prosecutor correctly stated, the PNA solely and partially transferred its ability to exercise enforcement jurisdiction to Israel, thereby retaining its ability to exercise prescriptive jurisdiction over the entire OPT, regardless of nationality.[171]

64. Under the law of occupation, the occupying power does not have sovereignty rights over the occupied territory but is only an administrator for such time as the territory remains under belligerent occupation.[172] Plenary territorial and personal jurisdiction within a State's territory is in fact one of the attributes of sovereignty.[173] Instead, under the law of occupation, and especially according to articles 54, 64 and 66 GC IV and article 43 HR, the domestic jurisdiction of the occupying power does not and shall not apply in the occupied territory. Local courts retain their jurisdiction and military courts established by the occupant are responsible for enforcing the penal provisions it enacted in accordance with article 64 GC IV.

65. Bearing these IHL provisions in mind, it is apparent that Israel is not vested with the sovereign right of jurisdiction over Area C, or Israeli nationals. This right is vested with the lawful sovereign, that is Palestine. If Israel were to exercise sovereign rights over the occupied territory, this would be in breach of the law of occupation. Consistent with the relevant legal framework, through the Oslo Accords the PNA has simply delegated the exercise of jurisdiction (enforcement jurisdiction) over a particular area to Israel, without relinquishing its inherent entitlement to such jurisdiction.[174] As such, the PNA preserved its inherent jurisdiction encompassing the entire OPT.

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[170] Oslo II, art. XVII(2)(a) and Art XVII(2)(c). *See* Hannes Jöbstl, 'An Unlikely Day In Court? Legal Challenges For The Prosecution Of Israeli Settlements Under The Rome Statute' (2018) 51(3) Israel Law Review 339, 351.

[171] Prosecution Request, para. 184.

[172] Art. 55 Hague Regulations.

[173] S. Besson, "Sovereignty", in Max Planck Encyclopedia of Public International Law, 2011, at 118. A State's jurisdiction is exclusive within the limits fixed by international law. PCIJ, Judgment, *Lotus*, Series A, No 10, p 18.

[174] *See* H. Jöbstl, 'An Unlikely Day In Court? Legal Challenges For The Prosecution Of Israeli Settlements Under The Rome Statute' (2018) 51(3) Israel Law Review 339, at 351-352: "A state retains such prescriptive territorial jurisdiction even when under occupation. The Oslo Accords cannot take away this inherent criminal jurisdiction but merely oblige the State of Palestine not to exercise it with regard to Israeli nationals or conduct in Area C"; *see also* Y. Shany, 'In Defence of Functional Interpretation of Article 12(3) of the Rome Statute', 8 JICJ 329, 339: "The right to delegate jurisdiction is reflective of an internationally recognized legal authority, and not of

Accordingly, nothing in the Oslo Accords precludes the PNA from validly conferring upon the Court the exercise of such jurisdiction by acceding to the Statute and making a referral in accordance with Articles 12(2)(a) and 14 of the Statute.

66. The fact that article XVII(4)(a) Oslo Accords speaks of "powers and responsibilities […] transferred to the Council [meaning the PNA]"[175] is not indicative of a transfer of jurisdiction from Israel to the PNA, which would then preclude Palestine from triggering the Court's jurisdiction, as some commentators have argued.[176] As mentioned above, if Israel were to exercise the sovereign right of jurisdiction over parts of the OPT, this would exceed its authority under the law of occupation. The Accords concern the transfers of responsibilities and authority from Israel, as an occupying power, to the PNA. Thus, where Oslo II refers to a 'transfer' of jurisdiction from Israel to the PNA during the redeployment phases,[177] this term truly indicates a restoration of the full exercise of jurisdiction to the sovereign State, namely Palestine.[178]

67. In conclusion, the existence of a bilateral arrangement limiting the enforcement of jurisdiction, such as Oslo II, does not affect the scope of the Court's territorial jurisdiction but is only relevant for the purposes of complementarity. Indeed, at the admissibility stage, the Rome Statute envisages the Court's jurisdiction over a State Party's territory where the State is unable to prosecute due to the "unavailability of its national judicial system".[179] Within the specific context of occupation, and particularly the unique mechanism through which Palestine partly delegated the exercise of enforcement jurisdiction to Israel, it is relevant that the Palestinian national judicial system is substantially unavailable to prosecute certain crimes. Palestine's exercise of enforcement jurisdiction is limited to less than 40% of its territory,[180] and the

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the material ability of actually exercising jurisdiction over either the territory in question or over certain individuals within or outside that territory".

[175] The provision states as follows: "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."

[176] R. Badinter et al., Application for leave to file written observations on the question of jurisdiction pursuant to Rule 103 of the Rules of Procedure and Evidence, ICC-01/18-45, 14 February 2020, para. 27.

[177] Oslo II, arts. XI(2)(e) and XVII.

[178] See Eugène Borel, Arbitral Award in the case of the Dette publique ottomane, RIAA vol. I, 535: "Quels que soient les effets de l'occupation d'un territoire par l'adversaire avant le rétablissement de la paix, il est certain qu'à elle seule cette occupation ne pouvait opérer le transfert de souveraineté".

[179] *See* Rome Statute, art. 17(3).

[180] Directorate-General for External Policies, Policy Department, European Parliament, 'Policy Briefing: Area C: More than 60 % of the occupied West Bank threatened by Israeli annexation' (April 2013) DG EXPO/B/PolDep/Note/2013_138.

prosecution of Israeli nationals by Palestinian courts—a usual component of territorial jurisdiction—is proscribed by the Oslo Accords. In this context, the admissibility assessment takes into account the limits on the exercise of jurisdiction by an occupied sovereign.[181] Without full control over the exercise of its territorial jurisdiction, Palestine is thus unable to fulfil its duty to exercise criminal jurisdiction over those responsible for international crimes.

### *3. The Court's territorial jurisdiction extends to East Jerusalem*

68. On 30 July 1980, the Israeli Parliament adopted the Basic Law, "officially annexing the pre-1967 eastern parts of the city of Jerusalem, and illegally declaring Jerusalem the eternal undivided capital of Israel, over which Israel exercised exclusive sovereignty".[182]

69. The *Amici* submit that Israel's annexation of East Jerusalem is null and void from the point of view of international law, as it amounts to acquisition of territory by force in violation of article 2(4) of the UN Charter. Thus, East Jerusalem remains occupied territory belonging to the state of Palestine, over which the Court can exercise its territorial jurisdiction. In the *Wall* Advisory Opinion, the ICJ confirmed the status of East Jerusalem as occupied territory. In relation to "[t]he territories situated between the Green Line […] and the former eastern boundary of Palestine under the Mandate", the ICJ explicitly stated that "[all] these territories (*including East Jerusalem*) remain occupied territories".[183]

70. This has also been confirmed repeatedly since the beginning of the occupation in numerous resolutions of the UNSC[184] and the UNGA.[185] There is no compelling reason for the

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[181] *See* Y. Shany above note 174, 339: "situations in which states (or quasi-states) lose control over parts of their territory represent a paradigmatic case for self-referral of situations to the ICC in so far as they reflect the 'inability of the State genuinely to prosecute'.

[182] ARIJ, 'Annexation of East Jerusalem' in *Chapter One: The June 1967 War* <https://www.arij.org/atlas40/chapter1.5.html>.

[183] *Wall* Advisory Opinion, para. 78 (emphasis added).

[184] For example, resolution 298 (1971) referred to "the Israeli-occupied section of Jerusalem", with resolution 465 (1980) (and, similarly, resolution 476 (1980)) "*[a]ffirming* once more that the [GC IV] is applicable to the Arab territories occupied by Israel since 1967, including Jerusalem". The phrase "Arab territories" was replaced with "all the territories occupied by Israel since 1967" in resolution 672 (1990). More recently, resolution 2334 (2016) explicitly refers to "the Palestinian Territory occupied since 1967, including East Jerusalem".

[185] The standard expression can be seen, for example, in res. 55/130 **(**2001**)**, which refers to "the Occupied Palestinian Territory, including Jerusalem". In fact, resolution 10/14 (2003) – the resolution requesting the Advisory Opinion – is entitled "Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory". This has been consistently practised: *see e.g.* res. 60/104 (2006) ("the Occupied Palestinian Territory, including East Jerusalem"), 70/89 (2015) (entitled "Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem"), 71/96 (2016) (confirming that the GC IV was applicable to the Occupied Palestinian Territory,

Court to depart from the clear international consensus. Some may argue that the reliance on the resolutions of UN organs is misplaced as they are expression of mere political, as opposed to legal, viewpoints.[186] Nevertheless, the ICJ, in its *Wall* Advisory Opinion, did not question those resolutions (including the one requesting its advisory opinion).

71. Further, as held by the ICJ[187] and restated in the ILC's 2018 draft conclusions on identification of customary international law, such resolutions and conduct in connection thereto may constitute both practice and *opinio juris*.[188] It would depend, *inter alia*, on the resolution's "content and the conditions of its adoption".[189] In this regard, it bears emphasising that, in addition to the overwhelming support of the UN Member States in the UNGA, even the UNSC has explicitly referred to East Jerusalem as part of the OPT, meaning that none of the Permanent Members exercised their veto power on this issue.[190]

72. Some commentators have argued that if the Court were to exercise jurisdiction over East Jerusalem, this would contradict Palestine's own stance before other *fora*,[191] where Palestine argued that Jerusalem is a *corpus separatum* under Resolution 181 of the General Assembly.[192] However, this argument is not conclusive, as Palestine's arguments before the ICJ in relation to the alleged violation of the Vienna Convention on Diplomatic Relations (VCDR) by the United

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including East Jerusalem), 72/87 (2017) (concerning "Israeli practices affecting the human rights of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem") and, more recently, 74/139 (2019) ("Stressing also the need for respect for and preservation of the territorial unity, contiguity and integrity of all of the Occupied Palestinian Territory, including East Jerusalem".

[186] See, for example, the Rule 103 requests of International Association of Jewish Lawyers and Jurists and the Touro Institute on Human Rights and the Holocaust.

[187] Legality of the Threat or Use of Nuclear Weapons, para. 70 ("even if they [viz., the resolutions] are not binding […] can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*").

[188] International Law Commission, Draft conclusions on identification of customary international law, with commentaries, A/73/10, Conclusions 6, 10; *compare* Conclusion 12.

[189] Legality of the Threat or Use of Nuclear Weapons, para. 70.

[190] *See* note 184 above.

[191] *See*, e.g., UK Lawyers for Israel, B'nai B'rith UK, International Legal Forum, Jerusalem Initiative and Simon Wiesenthal Centre, paras. 15(i), 16; and Shurat Hadin – Israel Law Center, para. 12.

[192] Reference is made here to Palestine's application instituting proceedings against the United States before the ICJ for alleged violations of the Vienna Convention on Diplomatic Relations for the United States' decision to relocate the US embassy to Israel from Tel Aviv to Jerusalem. *See Relocation of the United States Embassy to Jerusalem (Palestine v. United States of America)*, Application instituting proceedings, 28 September 2018, <https://www.icj-cij.org/files/case-related/176/176-20180928-APP-01-00-EN.pdf>.

States do not have a bearing on proceedings before the ICC for the purposes of determining the territorial scope of its jurisdiction.

73. In any event, Palestine's reference in its ICJ Application to Jerusalem's special status, as provided for in UNGA Resolution 181, does not change the fact that Palestine claims East Jerusalem as part of its territory.[193] Nor does Resolution 181 have an impact on the city's current legal status. The special international regime that UNGA Resolution 181 sought to establish for Jerusalem was never implemented, as Israel occupied West Jerusalem during the 1948 war, and the Armistice Agreement then sealed the division of Jerusalem into East and West Jerusalem. Israel occupied East Jerusalem during the Six-Day war in 1967, and East Jerusalem remains occupied since then.[194]

74. In addition, even if Palestine's action before the ICJ could somehow bear on the present proceedings, one should be mindful that Palestine has not requested the ICJ to adjudge and declare that East Jerusalem has the status of *corpum separatum*. It only requested the ICJ to pronounce on the United States' alleged violation of the VCDR in connection with the decision to move the US embassy from Tel Aviv to Jerusalem.[195] Palestine, like with all parties, is entitled to argue on multiple grounds or in the alternative—especially in separate *fora*, against distinct respondents, with entirely different applicable laws. Since it is Israel but not Palestine which in fact violated UNGA Resolution 181 and the international status of Jerusalem, Palestine is entitled to invoke the *corpus separatum* status to support its allegation that the US breached the VCDR, without prejudice to its acceptance of the Court's criminal territorial jurisdiction over East Jerusalem.

75. In any event, there would be no inconsistency between the *corpus separatum* status of Jerusalem and the Court's exercise of its territorial jurisdiction over East Jerusalem. The argument has been made that Jerusalem's special status would somehow bar Palestinian sovereignty over East Jerusalem, and thus preclude the Court's jurisdiction.[196] However, it is a rule of international law well established by the PCIJ[197] and explicitly affirmed by the Court in the Bangladesh/Myanmar Article 19(3) Decision that "[t]he territoriality of criminal law […] is not

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[193] *See* para. 57 *above*.

[194] *See* para. 69 *above*.

[195] Palestine ICJ Application, supra note 192, paras. 51-53.

[196] *See*, e.g., Shurat Hadin – Israel Law Center, para. 12

[197] PCIJ, *The Case of the SS "Lotus"* (France v. Turkey), Judgment of September 7, 1927, PCIJ Series A No 10.

an absolute principle of international law and by no means coincides with territorial sovereignty".[198] If anything, it is *due to* the international character of the Holy City that criminal jurisdiction over core international crimes would be best exercised by an international court under *jus puniendi* of the international community.[199]

*4. Gaza falls under the scope of the Court's territorial jurisdiction*

76. The *Amici* submit that Gaza is part of the OPT, and as such it falls under the scope of the Court's territorial jurisdiction.

77. The fact that Gaza is administered by Hamas rather than the PNA does not bar the Court from exercising its jurisdiction over acts occurring on its territory. Even if Gaza is placed under a separate administration from the West Bank, it is an integral part of the territory of the State of Palestine, a State Party to the Rome Statute. As was mentioned above, the Oslo Accords affirm that the West Bank and the Gaza Strip constitute "a single territorial unit".[200] In fact, both Palestinians in the West Bank and in Gaza have the same PNA ID and the same passport (travel document). Issuance and renewal of IDs and passports for Palestinians from Gaza is only possible through the PNA in the West Bank.[201] When Hamas leaders want to renew their passports, they have to send it by post to the West Bank (PNA) as all Palestinians from Gaza. In addition, both the Gaza Strip and the West Bank have the same telephone country code (+970), as they are part of the same State's territory.

78. For the Court to exercise jurisdiction over the territory of a State Party pursuant to article 12(2)(a) of the Statute, there is no requirement that the central government has effective control over the entirety of its territory. Notably, an ICC Pre-Trial Chamber authorised the Prosecution to investigate alleged crimes committed on Georgia's territory occupied by Russian forces during the armed conflict in 2008, even though Georgia did not exercise effective control over South Ossetia at the relevant time.[202]

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[198] Bangaldesh/Myanmar Article 19(3) Decision, para. 66.

[199] See ICC Bangladesh/Myanmar Article 19(3) Decision, paras. 34-48 and Jordan Appeal re Arrest Warrant.

[200] Oslo II, art. XI.

[201] *See* Go Palestine, "The Palestinian Passport", 27 March 2018, <https://gopalestine.org/the-palestinian-passport/>.

[202] Decision on the Prosecutor's request for authorization of an investigation, P-TC, ICC-01/15, 27 January 2016, paras. 6, 64 (holding that "the Chamber agrees with the submission of the Prosecutor (Request, para. 54) 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").

79. Nor is there a requirement that the central government needs to exercise effective control over the entirety of the State's territory for it to be considered a State under the relevant rules of public international law. As was shown in section II.B.2 above, the requirement of "effective government" which is necessary for statehood under the Montevideo Convention, is a relative notion.

80. Even if the PNA does not run the local administration in Gaza in its relations with other States and international organisations, it represents all of its nationals in all of the occupied territory. The PNA's foreign relations are conducted by the Minister of Foreign Affairs. Abroad, the PNA is represented by the Palestine Liberation Organisation ("PLO"), which speaks on behalf of all the Palestinians all over the globe. This is shown by the fact that the PLO has since 1974 been recognised by the UNGA as the representative of the Palestinian people, and has been granted the right to participate in the deliberations of the UNGA on the question of Palestine in plenary meetings.[203] In Resolution 3237 of 1974, the UNGA subsequently accorded the PLO the status of observer organisation within the UN.[204]

81. Importantly, neither Hamas nor any other Palestinian faction has ever denied that Gaza is part of Palestine,[205] or the PLO/PNA representation of the Palestinian people before international *fora*. Especially with regard to the ICC, Hamas welcomed the OTP decision to open an investigation into the situation in Palestine.[206] There are other examples of the PNA leadership and Hamas reaching a common position despite their differences and divisions. When the United States released the so-called "Peace to Prosperity" peace plan in January 2020, representatives of the PNA, Hamas, Islamic Jihad and other Palestinian factions gathered in Ramallah and unanimously agreed on rejecting the plan.[207] In addition, they agreed on a second meeting in Gaza City.[208]

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[203] *See* UNGA Res. 3210 (XXIX) (1974).

[204] *See* UNGA Res. 3237 (1974).

[205] *See e.g.* the agreement between leaders of the Fatah and Hamas Palestinian factions signed in 2011, which was affirmed by way of a Reconciliation Agreement signed on 10 October 2017 in Cairo, Egypt.

[206] Haaretz, Hamas Welcomes ICC Probe into Possible War Crimes in Palestinian Territories. https://www.haaretz.com/hamas-welcomes-icc-inquiry-1.5361697.

[207] Haaretz, Gathering in Ramallah includes Palestinian Authority, Hamas and Islamic Jihad. https://www.haaretz.com/middle-east-news/palestinians/.premium-palestinian-factions-to-unite-in-opposition-to-trump-peace-plan-1.8465841.

[208] Asharq Al-Awsat, Palestinian President Sends Delegation to Gaza to End Division, 30 January, 2020, https://aawsat.com/english/home/article/2106556/palestinian-president-sends-delegation-gaza-end-division.

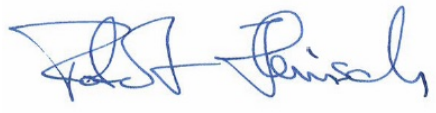
82. In light of the above, the *Amici* submit that the Court's territorial jurisdiction also extends to the Gaza Strip.

## III. CONCLUSION

83. Since its accession to the Rome Statute, Palestine is a Member State within the framework of the Statute, with rights and obligations equal to those of other Member States. Treating it differently from other Member States would amount to creating a reservation to the Rome Statute, something which is not contemplated in the Statute itself.

84. In any event, taking into account that it is subject to belligerent occupation, Palestine fulfills the criteria for statehood under public international law.

85. Since Palestine in 2018 referred the situation on its territory to the ICC Prosecutor pursuant to articles 12(2)(a) and 14 of the Statute, the Court can now exercise jurisdiction over Palestine's territory in accordance with the Statute. This territory comprises the territory that was occupied by Israel in 1967, including the West Bank, East Jerusalem, and Gaza, as recognised most notably by UN bodies, including the ICJ, the UNSC and the UNGA.



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Dated this Monday, 16 March 2020

At the Hague, Netherlands