Cour
Pénale
Internationale

International
Criminal
Court

Original: **English**

No.: **ICC-01/18**
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

Submission of Observations to the Pre-Trial Chamber Pursuant to Rule 103

Source: **Professor Malcolm N Shaw QC**

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

The Office of the Prosecutor

Ms Fatou Bensouda, Prosecutor
Mr James Stewart, Deputy Prosecutor

Counsel for the Defence

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants (Participation/Reparation)

The Office of Public Counsel for Victims
Ms Paolina Massidda

The Office of Public Counsel for the Defence

States' Representatives
The Competent Authorities of Palestine
The Competent Authorities of Israel

Amicus Curiae

See Annex for List of Amici Curiae

REGISTRY

Registrar
Mr Peter Lewis, Registrar

Counsel Support Section

Victims and Witnesses Unit
Mr Nigel Verrill

Detention Section

Victims Participation and Reparations Section
Mr Philipp Ambach, Chief

Other

I. INTRODUCTION

1. These observations are made pursuant to the Order setting the procedure and the schedule for the submission of observations relating to the "Situation in the State of Palestine" ("the Order")[1] and in the light of Rule 103 (1) of the ICC's Rules of Procedure and Evidence.[2] These submissions relate to the "Prosecution request pursuant to Article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine" ("the Prosecutor's Request"),[3] where it is noted that "considering the complexity and novelty of the Prosecutor's Request", the Pre-Trial Chamber "considers it desirable to … invite States, organisations and/or persons to submit observations on the question of jurisdiction set forth in paragraph 220 of the Prosecutor's Request".[4]

2. Paragraph 220 of the Prosecutor's Request provides in part as follows:

> "The Prosecution respectfully requests Pre-Trial Chamber I to rule on the scope of the Court's territorial jurisdiction in the situation of Palestine and to confirm that the 'territory' over which the Court may exercise its jurisdiction under article 12(2)(a) comprises the West Bank, including East Jerusalem, and Gaza…".[5]

3. My submissions will address two particular issues. First, and primarily in view of the number of citations to my work on this matter in the Prosecutor's Request,[6] I will address the question of statehood and Palestine. My work has

[1] ICC-01/18-14, 28 January 2020.
[2] This provides that "At any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to any State, organization or person to submit, in writing or orally, any observation on any issues that the Chamber deems appropriate."
[3] ICC-01/18-12, 22 January 2020.
[4] The Order, para. 15.
[5] Footnote omitted.
[6] See Prosecutor's Request, footnotes 462, 463, 464, 466, 468, 469, 470, 471, 472, 475, 477, 500, 502, 503, 504, 581, 608 and 609.

been relied upon in support of a "unique" doctrine of Palestinian statehood that I believe to be incorrect in law. Secondly, I will address the consequential question of territorial jurisdiction.

I. Submissions

A. International Law, Statehood and Palestine

4. I will focus upon the Prosecutor's argument that "Palestine may be considered a 'state' for the purposes of the Rome Statute under relevant principles and rules of international law".[7] The preliminary point to be made is that the formulation chosen by the Prosecutor is rather unusual. The argument is not that Palestine is a state under international law *tout court.* It is rather that Palestine is a state under international law "for the strict purposes of the Rome Statute only".[8] This constitutes in essence a contradiction unsupported in international law. Leaving aside the Prosecutor's argument that Palestine is a state because, for various reasons, it acceded to the Rome Statute, the question that arises is whether there is a special category for states so-determined under international law for the purposes of the Rome Statute only. The implication, of course, is that in some fashion the rules of international law are indeed amended. But this is highly unusual and profoundly controversial. There is nothing whatsoever in the Rome Statute to allow for the definition of a state "under relevant principles and rules of international law" that is in any way different from the normal international legal definition merely "for the purposes of the Rome Statute".[9]

[7] Prosecutor's Request, para. 136 and following.
[8] Prosecutor's Request, para. 9.
[9] Article 31 (1) of the Vienna Convention on the Law of Treaties, 1969, provides that a treaty is to 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 the light its object and purpose". Under Article 31 (4), if any "special meaning" is to be given to a treaty provision, it must be shown to have been so intended by the parties.

5. With regard to the question of the claimed statehood of Palestine, the Prosecutor accurately sets the scene. She notes "the unique history and circumstances of the Occupied Palestinian Territory", emphasizing that, "determination of the Court's jurisdiction may, in this respect, touch on complex legal and factual issues". In particular, "Palestine does not have full control over the Occupied Palestinian Territory and its borders are disputed. The West Bank and Gaza are occupied and East Jerusalem has been annexed by Israel. The Palestinian Authority does not govern Gaza".[10] This factual determination does not appear only one time, it is repeated in the Prosecutor's Request, thus emphasizing its centrality.[11] The conclusion reached on the basis of this factual context is that "the question of Palestine's Statehood under international law does not appear to have been definitively resolved".[12] The Request correctly lays down that this is a "foundational issue".[13]

6. In the normal course of events, this conclusion would appear to mark the termination of any relevant enquiry as to statehood in the current context. If the question of Palestine's status as a state has not been resolved under international law, the matter is by definition unsettled, so that Palestine cannot thus be regarded as a state. The determination of statehood is one of the key functions of international law and the absence of precision and certainty in this critical task cannot simply be passed over or disregarded. The onus of proving such a status lies upon the claimant. A matter which has not been "definitively resolved" cannot thus be regarded as having been settled, *a fortiori* in a highly complicated and legally controversial situation with regard to which the international community is clearly divided, as the Requests for Leave to Submit Observations and the ensuing Observations to the Court made by the Federal

[10] Prosecutor's Request, paragraph 5.
[11] Prosecutor's Request, paragraph 35.
[12] Prosecutor's Request, paragraphs 5 and 35.
[13] Prosecutor's Request, paragraph 6.

Republic of Germany, the Czech Republic, Hungary, Australia, the Republic of Austria and the Federative Republic of Brazil demonstrate.

7. However, the Prosecutor does not follow the logical and necessary implication of her conclusion, which would be to determine that if the question of Palestine's statehood had not been "definitively resolved" in international law, Palestine cannot therefore be regarded as a state under international law and thus cannot be so accepted by the Court. Palestine's status has yet to be finally settled by the international community, which has not delegated the question of the determination of statehood to the Court, an international organization of limited competence and not possessed of universal membership. This is especially so where several key participants in the dispute in question robustly deny the statehood of Palestine and indeed where binding international agreements between the relevant parties clearly preclude the conclusion that statehood has been established or recognized.

8. The Prosecutor instead has sought to evade her own conclusion by the use of arguments and assertions that cannot be regarded as part of established international law. The initial step is to declare that the Court indeed is "not required to make a pronouncement with respect to or resolve Palestine's statehood under public international law more generally".[14] There are two points here. First, the Court is not constitutionally competent to determine matters of statehood as such under international law in the absence of any such authority in the Rome Statute. It cannot bind the international community on such matters. Its focus is upon the determination of the guilt or innocence of individuals charged with particular offences as defined in its Statute. Secondly, whether or not Palestine is a state is actually critical to defining and determining the Court's territorial jurisdiction in this matter. If Palestine is not a state, then

[14] Prosecutor's Request, paragraph 42.

it cannot have sovereignty over territory and cannot come within the terms of article 12 of the Statute. Thus, in the absence of clear and irrefutable evidence of Palestine's existence as a state and taking into account the lack of an international consensus in this regard, both quantitative and qualitative, the Court cannot assert that there is such a state at this point in time.

9. Article 12 defines the preconditions to the exercise of jurisdiction and provides in subsection (2) that:

> "the Court may exercise its jurisdiction if one or more of the following *States* are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
> (a) The *State* on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the *State* of registration of that vessel or aircraft;
> (b) The *State* of which the person accused of the crime is a national." (Emphasis added).

10. It is thus clear that the Court cannot exercise jurisdiction with regard to an entity which is not a sovereign state. In addition, the request by the Prosecutor is for a ruling on "the scope of the Court's territorial jurisdiction in the situation of Palestine"[15] and territorial jurisdiction is essentially an emanation of state sovereignty, as discussed below (paragraph 40 and following).

11. The Rome Statute contains no definition of a state, so that there is no authority for the proposition that the Court may exercise jurisdiction (either on territorial or on nationality grounds) with regard to a state defined other than on the

[15] Prosecutor's Request, paragraph 220.

accepted basis of international law. Leaving aside the accession argument not discussed in these observations for reasons of space, the Court has no competence to revise the traditional definition of statehood already established in international law, *a fortiori* where the Court has jurisdiction only over individuals charged with specific criminal offenses.

12. However, the second stage in the Prosecutor's journey is constituted by an argument that the long-established conditions of statehood may essentially be circumvented by recourse to a re-definition of other principles of international law. At best both the methodology and the result are highly controversial. At worst, they contradict international law and risk a degradation of the Court's reputation. The test that the Prosecutor herself provides is that the investigation to be authorized must be placed "on the soundest legal foundation"[16] and this is a high standard. The Prosecutor's argument is that the "normative criteria of statehood under international law"[17] may in the "unique" situation of Palestine, which is "therefore not comparable to other entities", [18] be reconfigured or, put bluntly, ignored. This is a highly controversial argument of exception for which there is no legal authority.

i) The Normative Criteria of Statehood

13. Article 1 of the Montevideo Convention on Rights and Duties of States, 1933, lays down, in a formulation which has been widely accepted as binding, that a state as an international person should possess the following qualifications: a permanent population, a defined territory, a government and the capacity to enter into relations with other states. The leading classical textbook on international law refers to "four conditions which must obtain for the existence

[16] Prosecutor's Request, paragraph 5.
[17] Prosecutor's Request, paragraph 42.
[18] Prosecutor's Request, paragraph 144.

of a state", being the existence of a people, a territory, a government and a "sovereign government", defined in terms of legal authority "not in law dependent on any other earthly authority". It is further noted that sovereignty implies "independence all round".[19] James Crawford in his edition of *Brownlie's Principles of Public International Law*, lays down the four Montevideo conditions, noting that "[i]ndependence is the decisive criterion of statehood", defining this condition in the following manner, "the state must be independent of other state legal orders".[20] Further, it is noted that "a state which has consented to another state managing its foreign relations, or has granted extensive extraterritorial rights to another state, may be said not to be 'sovereign'".[21] *A fortiori* where the claimant in question never had those competences to grant to third states.

14. The *Third US Restatement of the Foreign Relations Law* declares that, "[u]nder international law, a state is an entity that has defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities".[22] Comment (a) to this paragraph notes that, "[t]he definition in this section is well-established in international law; it is nearly identical to that in article 1 of the Montevideo Convention".[23] Craven and Parfitt in their chapter on

[19] *Oppenheim's International Law* (eds R.Y. Jennings and A.D. Watts), London, 9th ed., 1992, pp. 120-22.
[20] Oxford, 9th ed., 2019, pp. 118-9.
[21] Oxford, 9th ed., 2019, p. 124. Crawford in his seminal work, *The Creation of States in International Law*, refers to article 1 of the Montevideo Convention as the "[b]est known formulation of the basic criteria for statehood", but emphasizes that these criteria are based on the principle of effectiveness among territorial units, Oxford, 2nd ed., 2006, pp. 45-6. This is further explained in terms of five "exclusive and general legal characteristics of states" as follows: first, states have plenary competence to perform acts, make treaties and so on in the international sphere, this being one meaning of the terms "sovereign"; secondly, states are exclusively competent with respect to their internal affairs in the sense of plenary jurisdiction over internal matters not subject to the control of other states; thirdly, states are not subject to compulsory international process, jurisdiction or settlement without their consent; fourthly, states are equal in a formal sense, states have equal status and standing; and fifthly, derogations from these principles are not to be presumed, at pp. 40-1.
[22] St Paul, 1987, vol. 1, p. 72, paragraph 201.
[23] St Paul, 1987, vol. 1, pp. 72-3. The leading French treatise emphasizes that the state is, "le seul sujet du droit qui bénéficie d'un attribute fundamental, la *souveraineté* ou l'*indépendance*". In particular, the state "n'est subordonné à aucun autre member de la communauté". The following definition of a state is cited with approval: "[L]'État est communément défini comme une collectivité que se compose d'un territoire et d'une population soumis à un pouvoir politique organisé …[et] .. se caractérise par la souveraineté" and that, "seul mériteront la

"Statehood, Self-Determination and Recognition" declare that article 1 is "in effect, all we have in terms of an accepted definition of statehood".[24]

15. Turning to international practice, the Trial Chamber in the *Milosevic* case referred to article 1 of the Montevideo Convention as, "[t]he best known definition of a state", while the four enumerated criteria "have been used time and again in questions relating to the creation and formation of states. In fact, reliance on them is so widespread that in some quarters they are seen as reflecting customary international law".[25] The Trial Chamber concluded that, "the formation of states is a matter that is regulated by law, that is, the criteria of statehood are laid down by law. That law, in the Trial Chamber's view, is reflected in the four criteria set out in the Montevideo Convention".[26] In addition, Opinion No. 1 of the Arbitration Commission of the European Conference on Yugoslavia concluded that, "the state is commonly defined as a community which consists of a territory and a population subject to an organized political authority …. such a state is characterized by sovereignty".[27]

16. While these conditions are not necessarily exhaustive in all circumstances and while the balance between them may vary in particular instances, it is abundantly clear that the four Montevideo criteria constitute the presumptive paradigm and it is the element of sovereignty or independence from the control of other states, that is the key element. To put it another way, it would take a formidable argument of exception, buttressed by clear proof, to displace the

qualification d'État que les collectivités présentant le caractère unique d'être souveraines", P. Daillier, M. Mathias and A. Pellet, *Droit International Public*, Paris, 8th ed., 2008, p. 450 and following.
[24] *International Law* (ed. MD Evans), Oxford, 5th ed., 2018, p.
[25] *Prosecutor v. Slobodan Milosevic*, IT-02-54-T, Decision on Motion for Judgement of Acquittal, 16 June 2004, paragraphs 85 and 86.
[26] *Prosecutor v. Slobodan Milosevic*, IT-02-54-T, Decision on Motion for Judgement of Acquittal, 16 June 2004, paragraph 87.
[27] 92 *ILR*, pp. 162, 165. See also the *Island of Palmas* case, II UNRIAA, 1928, pp. 829, 839.

rule that the Montevideo criteria are required in order to display statehood in international law.

ii) Elements Supplemental to the Montevideo Criteria

17. There are two legal principles that may possibly bear upon the application of the Montevideo criteria, but they do not (and cannot) replace any one or all of them: these are recognition and the principle of self-determination.

(a) Recognition

18. Recognition is not a condition of statehood. A state may be so characterized notwithstanding the presence or absence of recognition. As Crawford puts it, "[a]n entity is not a state because it is recognized; it is recognized because it is a state".[28] This is the essential point. Recognition may constitute evidence of status without as such establishing or determining that status. Practice shows that in cases of active conflict, widespread recognition by leading states representative of the international community may compensate for a certain level of indeterminacy as to effective control by the relevant government. The examples of this would be the recognition as independent states by European Community member states of Croatia and Bosnia and Herzegovina at a time of conflict where the central government in question did not exercise effective control over all of its territory[29] coupled with the admission to membership of the United Nations of the two states.[30] The latter is especially important, indeed critical, as it is determinative of statehood in the light of the requirement of statehood for membership (article 4, UN Charter) and the universality of

[28] "State", Max Planck Encyclopedia of Public International Law 2011, paragraph 44.
[29] On 15 January 1992 and 6 April 1992 respectively, *Keesings Record of World Events*, 1992, pp. 38703, 38704 and 38833.
[30] On 22 May 1992, see M. Weller, "The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia", 86 *AJIL*, 1992, p. 569.

membership, requiring positive votes by both the General Assembly and the Security Council.

19. The example of Bangladesh is also relevant for present purposes. Bangladesh declared its independence from Pakistan on 26 March 1971. This was recognized by India in December that year, but at a time while most of the territory in question was still under Pakistani control.[31] Bangladesh was recognized by a number of states, but its efforts to join the United Nations failed in 1972 and 1973. It was only following agreement with Pakistan and the latter's recognition of Bangladesh in February 1974,[32] that the issue of statehood was finally resolved. Bangladesh became a member of the UN on 17 September 1974. A further pertinent example is that of Kosovo, which declared independence on 17 February 2008 while certain Serb-inhabited areas were not under the control of the central government. Kosovo's independence was recognized by a wide range of states, but not by a number of important states (such as Serbia, Russia, China and India). Accordingly, Kosovo's existence as a state remains controversial.[33]

20. The conclusion here must be that widespread and uncontroverted recognition by states (most definitively expressed by admission to membership of the UN) is likely to remedy, but not replace, it must be emphasized, a certain deficiency in effective control exercised or not in fact by the central government. Anything less than this (such as Kosovo) will not as such resolve the basic issue nor obviate the need for effective control. Of course recognition of a state by another state is bilaterally constitutive and will operate within the relevant domestic systems as a legal prescription, but such bilateral or unilateral recognition or recognitions cannot simply be bundled together to create a new state under

[31] See *Oppenheim's International Law* (eds. R.Y. Jennings and A.D. Watts), London, 9th ed., 1992, p. 144.
[32] 13 *ILM*, 1974, p. 501 at paragraph 7.
[33] See e.g. *Brownlie's Principles of Public International Law* (ed J. Crawford), Oxford, 9th ed., 2019, pp. 129-30.

international law absent virtual unanimity (including the leading states in the international community) or admission as a member state to the UN.[34] This is discussed further below (paragraph 39).

(b) Self-Determination

21. The second relevant principle is that of self-determination. The right of all peoples to self-determination is a norm of international law, conventionally as a consequence of common article 1 of the two International Covenants on Human Rights, 1966, for states parties,[35] and in terms of customary international law as affirmed by the International Court of Justice in its Advisory Opinion in the *Chagos* case.[36] However, the substantive definition of self-determination is critical. It is the right of all peoples to freely determine their political status and freely pursue their economic, social and cultural development. It applies to mandate, trust and non-self-governing territories.[37] It has also been stated to apply to the Palestinian people.[38] However, the principle of self-determination cannot be equated as such with a right to statehood or indeed to statehood itself, since the key right is that of choice as to political organisation and not the consequences of such choice, which may lead to a variety of different results,

[34] Note that the Brazilian Request for Leave to Submit Observations, dated 14 February 2020, specifically states that, "[a]s any other act of recognition by another state, the Brazilian unilateral and discretionary act of recognition of the State of Palestine does not entail 'erga omnes' effects. As a matter of international law, recognition in [sic] not constitutive of statehood for third states not involved in the act of recognition", paragraph 7.
[35] There are currently 173 states parties to the International Covenant on Civil and Political Rights, see https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en (accessed on 8 March 2020) and 170 states parties to the International Covenant on Economic, Social and Cultural Rights, see https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&clang=_en (accessed on 8 March 2020).
[36] The International Court described UN General Assembly resolution 1514 (XV) of 14 December 1960 (the Colonial Declaration) as having "a declaratory character with regard to the right to self-determination as a customary norm, in view of its content and the conditions of its adoption"[36] and that "the wording used … has a normative character, in so far as it affirms that '[a]ll peoples have the right to self-determination", ICJ Reports, 2019, paragraph 153. This was confirmed by the terms of General Assembly resolution 2625 (XXV), 1970, (the Declaration on Principles of International Law Concerning Friendly Relations), see paragraph 155.
[37] See e.g. *Construction of a Wall,* Advisory Opinion, ICJ Reports, 2004, pp. 136, 172 and 199. See also the *Kosovo Advisory Opinion,* ICJ Reports, 2010, pp. 403, 436 and 438.
[38] See e.g. *Construction of a Wall,* Advisory Opinion, ICJ Reports, 2004, pp. 136, 183, 184, 197 and 199. See also General Assembly resolutions 3236 (XXIX), 55/85, 58/163, 38/16 and 41/100.

ranging from full independence to free association (as in the case of the Cook Islands and New Zealand) and full merger with the metropolitan or indeed other state.[39]

22. The right to self-determination may be relevant to the criteria for statehood in one of three ways. First, a claim to statehood made in contravention to the right is likely to be controversial. The example here is that of the unilateral declaration of independence made by the white minority government of Rhodesia on 11 November 1965. The UN adopted resolutions denying the legal validity of such action and called on all states not to recognize it.[40] Secondly, self-determination may arguably serve to mitigate the absence of effective governmental control where the colonial power is contesting the proclaimed independence of the accepted colonial self-determination unit. The example here would be Portuguese Guinea, where a large majority of the member states of the General Assembly of the UN in resolution 3061 (XXVIII), adopted in November 1973, noted the independence of that state declared as Guinea-Bissau in September that year. However, Guinea-Bissau was admitted to membership of the UN only on 17 September 1974, following Portugal's granting of independence to the territory one week earlier and to this extent the Bangladesh example noted earlier was paralleled.[41]

23. Thirdly, the application of the requirement of effective government may be mitigated in recognized cases of self-determination where the new state is in the throes of a civil war. The examples here would be the former Belgian Congo,

[39] See e.g. Crawford, *The Creation of States in International Law*, Oxford, 2nd ed., 2006, pp. 127-8. See also General Assembly resolution 1541 (XV), adopted on 15 December 1960 and the *Chagos* Advisory Opinion, ICJ Reports, 2019, paragraph 156.
[40] Security Council resolutions 216 (1965) and 217 (1966) and General Assembly resolutions 2024 (XX) and 2151 (XXI). The denial of the right in its manifestation as a bundle of collective human rights may be significant in any decision as to recognition, see e.g. the European Community Guidelines on Recognition of New States in Eastern Europe and the Soviet Union, 16 December 1961, 31 *ILM*, 1992, pp. 1486-7.
[41] See e.g. M.N. Shaw, *International Law*, Cambridge, 8th ed., 2017, pp. 162-3.

where that state was accepted as a member of the UN despite an ongoing civil war and contending governmental authorities and Angola, where it was admitted to the UN on 1 December 1976 notwithstanding a civil war. [42]

24. In both the first and third instances, the essential factual background was that of internal conflict, where there was no dispute as to statehood as such but rather armed conflict as to the identity of the appropriate governmental authority. The second instance, that of Portuguese Guinea, did show that a number of states were prepared to accept the statehood of Guinea-Bissau while the fighting persisted notwithstanding that the liberation movement actually was shown to control a significant part of the territory in question. However, it is important to point out that the matter was only finally resolved once Portugal had formally granted independence to its colony and Guinea-Bissau was admitted as a member of the UN.

iii) The Prosecutor's Arguments as to Statehood and Self-Determination

25. Faced with a situation where Palestine clearly does not factually meet the accepted criteria for statehood in international law, it being accepted particularly that Palestine does not have the necessary authority and control over the relevant territory,[43] the Prosecutor has put forward arguments whereby the traditional law should be reformulated or, in essence, circumvented. It is noted that the Montevideo criteria has been "less stringently applied" in particular cases, referring first to where the right to self-determination is seen to apply; secondly, to where the criteria cannot be fulfilled "because of acts deemed to be illegal or invalid under international law" and, thirdly, where "international recognition of statehood … has been

[42] See e.g. M.N. Shaw, *International Law*, Cambridge, 8th ed., 2017, pp. 162-3.
[43] Prosecutor's Request, paragraph 138.

determinative".[44] Of these three arguments, the first is partial only (as discussed in the previous section above), the second is a significant exaggeration at best unsupported by significant evidential authority, and the third is partial and misleading. The approach as a whole is thus tendentious.

(a) A "Case-Specific Situation"?

26. These factors, it is argued by the Prosecutor, justify "a case-specific application of the Montevideo criteria to Palestine".[45] This is in essence an argument for the significant reinterpretation of the criteria, which is unjustified and unsustainable. Both methodology and conclusion are flawed and for the following reasons. First, to establish a *sui generis* or exceptional or "case-specific" situation, compelling evidence is required. To put it another way, proof that the international community, or a considerable and representative variety of states, have accepted that Palestine constitutes an exception to the Montevideo criteria must be clearly manifested as distinct from being merely asserted. There is no evidence provided of this. The point about a general rule is that it is a general rule and any exceptions have to be demonstrated and substantiated.

(b) Self-Determination and Palestine

27. Secondly, the Prosecutor lays down a number of assertions without explanation or analysis. For example, it is noted that "in the light of the principle of self-determination, sovereignty and title in an occupied territory are not vested in

[44] Prosecutor's Request, paragraph 137.
[45] Prosecutor's Request, paragraphs 138, 146 and 178.

the occupying power but remain with the population under occupation".[46] But it is clear law that sovereignty and title to occupied territory remain with the dispossessed sovereign and not with the population as such. Occupation cannot deprive the original sovereign of title nor transfer it to the occupier.[47]

28. With regard to Palestine, the position is complicated by the fact that 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.[48] The confirmation of the mandate over Palestine the previous year by the Council of the League of Nations (which incorporated the obligation laid down in the Balfour Declaration to establish a "Jewish National Home") recognised that the mandatory power (the UK) had "full powers of legislative and of administration", while sovereignty as such was suspended and left unallocated or dormant.[49] Indeed, article 22 (4) of the Covenant of the League of Nations had noted that, "Certain communities formerly belonging to the Turkish Empire" were deemed to have reached a stage of development where "their existence as independent nations can be provisionally recognised subject to the rendering of administrative advice and assistance" by the mandatory power until they were "able to stand on their own". This is a recognition of the potentiality of statehood not an indication or recognition of sovereignty.

---

[46] Prosecutor's Request, paragraph 141, citing an opinion written by James Crawford However, the quotation omits the following sentence, which establishes the interpretive context, which states that, "[a]s such, Israel does not acquire a legal right to or interest in land in the West Bank purely on the basis of its status as an occupier", a proposition which is correct, see Opinion on "Third Party Obligations with respect to Israeli Settlements in the Occupied Palestinian Territories", dated 24 January 2012, paragraph 29.

[47] See e.g. Y. Dinstein, *The International Law of Belligerent Occupation*, Cambridge, 2nd ed., 2019, p. 58 ("The main pillar of the law of belligerent occupation is embedded in the maxim that the occupation does not affect sovereignty. The displaced sovereign loses possession of the occupied territory de facto but it retains title *de jure*").

[48] Article 16 provides that, "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 generally M. Shaw, "The League of Nations Mandates System and the Palestine Mandate", 49 (3) *Israel Law Review*, 2016, p. 287.

[49] Lord McNair, *International Status of South-West Africa*, Advisory Opinion, ICJ Reports, 1950, pp. 128, 150.

29. Subsequently, a range of binding international instruments marked the explicit and unambiguous reservation of rights by all parties until their ultimate determination in final status talks. These instruments include the armistice agreements signed by Israel with its neighbours at the end of the War of Independence in 1948-9,[50] the peace treaties with Egypt, 1979,[51] and Jordan,1994,[52] and the Oslo Peace Accords.[53] Accordingly, any final agreement and settlement between Israel and the Palestinian Authority has to take into account in one way or another all of the reserved rights and entitlements, including, of course, the right to self-determination of the Palestinian people.

30. The second assertion made by the Prosecutor is that, "where a people's right to self-determination is recognised, entities claiming statehood have been recognised as such despite not having stringently fulfilled the Montevideo criteria, particularly in the context of decolonization".[54] This is an exaggeration at best of the true position in international law and an elision of the concepts of self-determination and statehood. As it stands, it constitutes a general proposition unsupported by evidential authority. As discussed earlier, deficiencies in governmental effective control may possibly be assuaged (but not ignored) by taking into account the application of the principle of self-determination in traditional decolonisation situations where there is an ongoing civil war or a war of colonial suppression. It is not a generally accepted proposition of law as such, however, and, in addition, cannot be applicable where the absence of effective control is neither imposed from without nor

[50] See articles 5 (2) and 9 of the Egypt-Israel Armistice Agreement of 24 February 1949, articles 2(2) and 6(9) of the Israel-Jordan Armistice Agreement of 3 April 1949, article II of the Israel-Lebanon Armistice Agreement of 23 March 1949 and articles II(2) and V(1) of the Israel-Syrian Armistice Agreement of 20 July 1949. See also *Construction of a Wall,* Advisory Opinion, ICJ Reports 2004, pp. 136, 166.
[51] See articles I (2) and II.
[52] See article 3, paras 1 and 2.
[53] See article XXXI (6) of the Interim Agreement, 1995 (sometimes termed "Oslo II").
[54] Prosecutor's Request, paragraph 141.

exists as a consequence of civil war, but rather derives from a freely negotiated agreement.

31. As the Prosecutor clearly acknowledges, Palestine's authority "appears largely limited to Areas A and B of the West Bank and subject to important restrictions".[55] These restrictions flow from the Interim Agreement 1995 (Oslo II) between Israel and the PLO, which determined and determines the allocation of jurisdictional competence as between Israel and the Palestinian Authority.[56] The agreement, however, specifically noted that, first, beyond the powers and responsibilities transferred under this agreement to the Palestinians, "Israel shall continue to exercise powers and responsibilities not so transferred",[57] second, that the jurisdiction of the Palestine Council (later Palestine Authority) did not include "issues that will be negotiated in the permanent status negotiations: Jerusalem, settlements, specified military locations, Palestinian refugees, borders, foreign relations and Israelis",[58] and, third, that the territorial and functional jurisdiction of the Palestine Council did not extend to Israelis.[59]

32. The Oslo Accords, including specifically the Interim Agreement, remain in force, neither side having withdrawn from them. This agreement therefore, cannot be used to emasculate the criterion of effective control. Palestine cannot maintain the consensual division of jurisdictional competence and the consequential acknowledged limits of its effective control, both in law and in fact, and at the very same time argue that it should benefit from a weakening of the internationally accepted criteria of statehood so as to circumvent the terms of the agreement to which it remains a party.

[55] Prosecutor's Request, paragraph 145.
[56] Prosecutor's Request, paragraphs 68-76 and 90.
[57] Article 1, Interim Agreement 1995 (Oslo II)
[58] Article XVII (1) and (8), Interim Agreement. See also G.R. Watson, *The Oslo Accords*, Oxford, 2000, chapter 14
[59] Article XVII (2) (c), Interim Agreement.

33. Further, the Prosecutor argues that she "relies on the internationally recognised right of the Palestinian people to self-determination and to an independent and sovereign state in the Occupied Palestinian Territory".[60] While the former proposition is correct, the latter is not. The right to self-determination is a process by which a people, accepted as so entitled, may chose its own political future.[61] It is not the right as such to a sovereign state, which constitutes one possible outcome of the process. One of the complexities of the Palestine situation is that Israel may assert rights derived from the mandate and preserved in a variety of agreements discussed earlier. It is then a matter for negotiation between the parties how these various entitlements may be best resolved. It is not correct that there is an internationally recognised right of the Palestinian people to an independent and sovereign state as such. No people has under international law the right to a sovereign state. The relevant right is to self-determination, which is a right to engage in a particular process which may or may not lead to independence.[62]

34. The fact that a number of General Assembly resolutions have ostensibly called for an independent state for the Palestinian people is indeed of some political interest, but not legally determinative as such resolutions are constitutionally non-binding[63] and there is no indication that such calls are evidence of customary international law demonstrating the required generality of practice and legal obligation (opinion juris). In addition, it is to be noted that many of

[60] Prosecutor's Request, paragraph 146.
[61] Common article 1 of the International Covenants on Human Rights states that, "[a]ll peoples have the right of self-determination. *By virtue of that right, they freely determine their political status* …" (emphasis added). See also A. Cassese, *Self-Determination of Peoples*, Cambridge, 1995, p. 52 and following.
[62] As Crawford has concluded, "[t]hus far international law has distinguished between the right to self-determination and the actual achievement of statehood, and for good reason. Even the exercise of external self-determination need not result in independence; there are other options", *The Creation of States in International Law*, Oxford, 2nd ed., 2006, p. 446.
[63] Apart from certain internal management and procedural matters relating to the function of the UN, see E. Klein and S. Schmahl, "The General Assembly, Functions and Powers, Article 10" in *The Charter of the United Nations: A Commentary* (eds B. Simma et al), Oxford, 3rd ed., 2012, pp. 461, 463 and 480.

these resolutions cited by the Prosecutor[64] note that the right of the Palestinian people is to self-determination "including their right to a state",[65] the use of this phrase means certainly that statehood is one option, but also by definition that there must be others. In addition, it is the position of many important members of the international community that the dispute between Israel and the Palestinians is a matter which can only be resolved on the basis of negotiations between the parties leading to an agreed settlement on terms acceptable to both sides.[66] Even General Assembly resolution 67/19 which raised the status of Palestine in the United Nations to that of "a non-member observer state" affirmed its "determination to contribute to the achievement of the inalienable rights of the Palestinian people and the attainment of a peaceful settlement that ends the occupation that began in 1967 and fulfils the vision of two states ..". Hardly a ringing endorsement of current Palestinian statehood. Indeed, the UN Secretary-General in a report dated 20 March 2019 on the Implementation of Security Council resolution 2334 (2016) referred in terms to "a future Palestinian state",[67] while the EU position on the Middle East Peace Process dated 15 June 2016 referred specifically to "the future Palestinian state".[68]

35. As noted in the Oslo Accords, particularly difficult and complex issues such as Jerusalem, settlements and the borders are to be ultimately determined by the parties as final permanent status matters.[69] This is the agreed position of the

[64] Prosecutor's Request, paragraph 150 and footnotes.
[65] See e.g. General Assembly resolutions 55/87, 58/163, and 66/146. See also Human Rights Council resolution 37/34 (2018) cited in the Prosecutor's Request, paragraph 150.
[66] See e.g. the Israel Attorney General, "The International Criminal Court's Lack of Jurisdiction over the So-Called 'Situation in Palestine'", 20 December 2019, pp. 13-14 and 25-27 and the Middle East Quartet Roadmap, 2003, http://www.hlrn.org/img/documents/The%20roadmap.pdf (accessed on 11 March 2020). See also the Application for Leave to File Written Observations by the Federal Republic of Germany in the "Situation of Palestine", p. 5, by Germany, noting that "it is Germany's consistent position that a Palestinian state and the determination of territorial boundaries can be achieved only through direct negotiations between Israelis and Palestinians".
[67] S/2019/251, paragraph 67.
[68] https://eeas.europa.eu/diplomatic-network/middle-east-peace-process/337/middle-east-peace-process_en (accessed on 11 March 2020).
[69] See e.g. article XVII of the Interim Agreement 1995.

parties as contained in a still operative legal instrument. Accordingly, pre-emption of any of these permanent status issues in advance of agreement between the parties would constitute a violation of the instrument and thus, *a fortiori*, any attempt by an international body to dictate the terms of a final settlement would disrupt the already sensitive fabric of relations between the parties. Indeed, no such body outside of the Security Council has the competence so to act.

(c) "Severe Impairment" of the Right to Self-Determination

36. The Prosecutor further argues that the fact that Palestine, "is restricted in the practical exercise of its authority over the entirety of the Occupied Palestinian Territory … [this] has to be assessed against the backdrop of the Palestinian people's right to self-determination … the exercise of which has been severely impaired by, *inter alia*, the imposition of certain unlawful measures (including the expansion of settlements and the construction of the barrier and its associated regime in the West Bank, including East Jerusalem)".[70] The question as to whether the right to self-determination has or has not been "severely impaired" is a deeply political question of fact with legal implications. This raises the issue of appropriate methodology since the Prosecutor asserts that she "primarily relies on UN General Assembly resolutions" in concluding that the Court's territorial jurisdiction extends to the Occupied Palestinian Territory.[71] The Prosecutor in particular argues that, "[t]he Court is entitled … to rely, *as a matter of fact*, on the prevalent views of the international community with regard to the negative impact of Israel's measures and practices which have consistently, clearly and unequivocally been deemed contrary to

[70] Prosecutor's Request, paragraph 9.
[71] Prosecutor's Request, paragraph 44.

international law".[72] Tangentially one may note the absence of any reference to the reasons that underpinned resort to such measures.

37. It may well be factually accurate to declare that members and organs of the international community have criticized some aspects of Israel's policies and conduct in the occupied territories, but this does not necessarily mean that such policies and conduct are as such contrary to international law, still less that they "severely impair" the right of the Palestinian people to self-determination and indeed so do to such an extent as to significantly impact upon the accepted criteria of statehood in international law. As previously noted, certain issues such as Jerusalem, settlements and border are matters that have been agreed between the parties to be resolved at the final permanent status stage of negotiations (see above paragraph 31). Thus, the questions of the security barrier and the settlements cannot be seen as foreclosing any solution that may be agreed upon by the parties at the appropriate time. They cannot be seen as "severely impairing" the right to self-determination in that only with the ultimate resolution of the dispute on the basis of an agreement between the parties can such matters be settled permanently. It follows *a fortiori* that the political issues raised cannot as such detract from or vary the traditional criteria of statehood. Indeed, the Prosecutor herself notes in discussing this question, "identifying one factor to explain the persistent impasse in the situation of Palestine is impossible. Nor is one party solely responsible. The Court cannot and should not attempt to identify all the contributing factors. This is not necessary for the present determination and, respectfully, goes beyond this Court's competence". [73] It must, therefore, be erroneous to deem certain factors in the situation to be "severely" impairing the right to self-determination and thus impacting upon the criteria of statehood, without considering arguments

[72] Prosecutor's Request, paragraph 157. Emphasis in original.
[73] Prosecutor's Request, paragraph 157.

on the other side, such as persistent resort to violence and repeated rejections of solutions offered by the Palestinian Authority, for example those proposed by Prime Ministers Barak and Olmert. A court dealing with such complex issues must act and be seen to act in an independent and impartial manner in its analysis.

38. Finally, the Prosecutor claims that the establishment of the barrier and of the settlements have had a "negative impact" on "Palestine's effective authority in the Occupied Palestinian Territory".[74] However, there are here two relevant points. First, as article XXXI (7) of the Interim Agreement clearly lays down, "[n]either side shall initiate or take any step that will change the status of the West Bank and the Gaza Strip pending the outcome of the permanent status negotiations" and, secondly, article XII (1) of that agreement provides that Israel would continue to have, "the responsibility for overall security of Israelis and settlements, for the purpose of safeguarding their internal security and public order, and will have all the powers to take the steps necessary to meet this responsibility". To put it another way, it cannot be argued that the Palestinians have lost effective authority with regard to matters over which they never had authority and which they have agreed do not fall within their remit, authority or jurisdiction in any event. These are matters to be definitively resolved in the final permanent status negotiations. Such was the agreement between the parties.

iv) The Prosecutor's Arguments as to Recognition

39. The Prosecutor further notes that "at least 138 states have bilaterally recognized Palestine" and such recognition, while not universal, " is certainly significant

[74] Prosecutor's Request, paragraph 178.

and should be given due weight".[75] The first point to be made is that as the Prosecutor notes (citing my work), the existence of a state is independent of recognition and recognition is in any event "highly political".[76] This means that some care must be exercised before reaching a consequential legal conclusion that such actions can compensate for the absence of the fulfillment of the criteria of statehood, particularly in the absence of admission of the putative state into the UN. Secondly, over two-thirds of these recognitions were made in connection with the Palestinian Declaration of Independence of 1988[77] at a time when no such Palestinian state existed[78] and indeed as so accepted by the Palestinians themselves.[79] Thirdly, a number of subsequent recognitions have in any event referred to a Palestinian state as a future aspiration.[80] Fourthly, some of these recognitions are not in their own terms to be understand as recognition of statehood under international law. For example, the Observations of the Czech Republic in these proceedings specifically notes that it has not recognized Palestine as a state and that it "does not consider certain political steps of the Czechoslovak Socialist Republic towards the PLO as recognition of the Palestinian statehood under international law".[81] Finally, a

[75] Prosecutor's Request, paragraphs 130, 146 and 179.
[76] Prosecutor's Request, paragraph 140 and footnotes 464 and 466.
[77] See the website of the Permanent Observer Mission of the State of Palestine to the United Nations New York, https://palestineun.org/about-palestine/diplomatic-relations/ (accessed 11 March 2020). This refers to 137 and not 138 recognitions.
[78] See J. Crawford, *The Creation of States in International Law*, Oxford, 2nd ed., 2006, p. 434 and following.
[79] See e.g. the Written Statement submitted by Palestine, 30 January 2004, in the *Construction of a Wall,* advisory proceedings, International Court of Justice, paragraph 375 ("it [the Occupied Palestinian Territory] is territory of the Palestinian people, *destined for a Palestinian State* whose right to exist was recognized by Resolution 18 1 (II), and has been widely recognised ever since". Emphasis added), https://www.icj-cij.org/files/case-related/131/1555.pdf (accessed 11 March 2020).
[80] See e.g. Indian Prime Minister Modi, 13 February 2018, ("India hopes that soon Palestine will become a sovereign and independent country in a peaceful manner"), https://www.diplomaticsquare.com/india-hopes-that-palestine-will-soon-be-a-sovereign-country-achieved-in-a-peaceful-manner/ (accessed 11 March 2020); and President Xi of China, 21 January 2016, (" China firmly supports the Middle East peace process and supports the establishment of a State of Palestine enjoying full sovereignty"), http://www.chinadaily.com.cn/world/2016xivisitmiddleeast/2016-01/22/content_23191229.htm (accessed 11 March 2020).
[81] Dated 12 March 2020, paragraph 6 and footnote 5. Palestine counts the Czechoslovak statement of 18 November 1988 as recognition of statehood, see https://palestineun.org/about-palestine/diplomatic-relations/ (accessed 14 March 2020). See also the Request for Leave to Submit Observations, 14 February 2020, paragraphs 9 and 10.

significant number of leading states (over 50) have not recognized Palestine, including the UK, US, France, Germany, Canada, Australia, Japan and South Korea. The weight to be given to such a complex and inconsistent practice concerning recognition of Palestine must thus be slight.

B. The Scope of the Court's Territorial Jurisdiction with regard to Palestine

40. In addition to the observations submitted above with regard to the asserted statehood of Palestine in the context of article 12 of the Rome Statute, some comments need to be made concerning the consequential question of territorial jurisdiction. The reference in article 12 (2) (a) to the "state on the territory of which the conduct in question occurred" can only be understood in terms of the territorial composition and extent of the state in question. The territory of a state means the territory subject to the sovereignty of the state in question. That is a matter both of fact and of law. As the Prosecutor stated in her Report on Preliminary Examination Activities 2019, "under international law, state territory refers to geographic areas under the sovereign power of a state – i.e. the areas over which a state exercises exclusive and complete authority".[82]

41. In the *Island of Palmas* case, Max Huber, the arbitrator, declared that, "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…..Sovereignty in the relations between states signifies

[82] It was noted that "the 'territory' of a state, as used in article 12 (2) (a), includes those areas under the sovereignty of the state, namely its land mass, internal waters, territorial sea, and the airspace above such areas. Such interpretation of the notion of territory is consistent with the meaning of the term under international law", 5 December 2019, paragraph 48. See also paragraph 50. This view was reaffirmed by Schabas and Pecorella in their chapter on article 12 in *The Rome Statute of the International Criminal Court: A Commentary* (eds O. Triffterer and K. Ambos), Munich, 3rd ed., 2016, pp. 672, 681-2, noting with regard to article 12 (2) (a), that, "territorial jurisdiction is a manifestation of state sovereignty".

independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other state, the functions of a state".[83]

42. Thus in any analysis of "territory" in relation to a particular state, there are two essential factors. First, that the territory in question must be subject in a formal and legal sense to the sovereignty of that state and, secondly, that sovereignty imports the effective control of that territory by that state. But even before that, the state in question must be clear as to the territory it itself is sovereign over. It is far from clear what territory Palestine actually claims as its exclusive spatial domain. There have been claims to the whole of mandatory Palestine, claims to the area known as the Occupied Palestinian Territory and, additionally, some confusion as to the Palestinian reliance upon the 1947 UN designated "*corpus separatum* under a special international regime" status of Jerusalem and its surrounding area pursuant to General Assembly resolution 181 (II) and how this impacts upon its claims to sovereignty.[84] Accordingly in this complex situation, the Court would be required to rule on the validity of Palestine's claims not only to sovereignty but also to the extent of territory subject to such sovereignty, and that is beyond the competence of the Court. The Court exists to determine individual criminal liability not to resolve territorial disputes between states nor indeed to determine sovereign territorial status.

43. The jurisdiction of the Court is based on the delegation by the state in question of its own competence to prosecute. As Rastan has emphasized, "states parties have authorized the Court to substitute itself for their own jurisdiction through

[83] II UNRIAA, 1928, pp. 829, 839. As *Oppenheim's International Law* puts it, "[s]tate territory is that defined portion of the globe which is subjected to the sovereignty of a state"[83] and "[t]he importance of state territory is that is the space within which the state exercises its supreme and normally exclusive authority", *Oppenheim's International Law* (eds. R.Y. Jennings and A.D. Watts), London, 9th ed., 1992, p. 564.
[84] See the Application of Palestine to the International Court of Justice instituting proceedings in the *Relocation of the United States Embassy to Jerusalem (Palestine v. United States)* case, 28 September 2018, paragraph 5 and following.

delegation".[85] The Prosecutor has put it in the following way, "article 12(2)(a) itself functions to delegate to the Court the States Parties' own 'sovereign ability to prosecute' article 5 crimes. Yet this intention would be entirely frustrated if territorial jurisdiction under article 12(2)(a) were to be interpreted more narrowly than a national court would interpret the state's own territorial jurisdiction for the purpose of domestic proceedings for article 5 crimes. This would stand the logic of the Statute, and especially the complementarity regime, on its head".[86]

44. This would apply even more so where a national entity sought to interpret the state's territorial jurisdiction more extensively than actually existed and that is precisely the situation with regard to Palestine. The Court's competence under the system prescribed in the Rome Statute is precisely delimited by the extent of the jurisdiction that exists with regard to the state in question. If that jurisdiction is limited, then the delegation must be similarly limited. No state can convey to another entity more than it itself possesses. *Nemo date quod non habet*. And the Court is simply not competent to extend such jurisdiction. In the "unique" situation of Palestine, the criminal jurisdictional competence of that entity has by agreement been precisely recognized and delineated, particularly in the Interim Agreement. Palestine cannot delegate to the Court an authority or competence that it did not and does not have and that it has clearly agreed by international instrument that it does not have.

45. The Interim Agreement of 1995 specifically, carefully and consensually establishes and affirms the relative jurisdictional competences of Israel on the one hand and the Palestinian Authority (itself established under the Oslo

[85] "Chapter 7: Jurisdiction" in *The Law and Practice of the International Criminal Court* (ed C. Stahn), Oxford, 2015, pp. 141, 164.
[86] Prosecution's Request for a Ruling on Jurisdiction under Article 19 (3) of the Statute, 9 April 2018, ICC-RoC46(3)-01/18-1 09-04-2018 2/31 NM PT, paragraph 49.

Accords) on the other. As noted above (paragraph 31), the Palestine Authority has no jurisdiction over Israelis or over issues to be negotiated in the permanent status negotiations (including Jerusalem, settlements and borders),[87] while Israel retains residual powers and responsibility, that is those not otherwise specifically allocated.[88] An authority, whether or not a state, cannot in law delegate powers, rights, obligations or responsibilities which it does not possess to another entity, especially to a judicial body.

46. The attempt by the Prosecutor to circumvent the Oslo Accords division of jurisdictional competence by arguing that the relevant provisions of the Interim Agreement concern only enforcement jurisdiction and not prescriptive jurisdiction (including the ability to vest the Court with jurisdiction) is wholly without merit.[89] There is no basis in the Accords for such a distinction. On the contrary a number of provisions directly contradict this claim of the existence and preservation of prescriptive jurisdiction. First, the statement in article I (1) of the Interim Agreement that "Israel shall continue to exercise powers and responsibilities not so transferred [under the Agreement]" means that all powers not specifically granted to the Palestinian Council/Authority stay with Israel and if prescriptive powers are not expressly transferred to the Palestinian Authority, they perforce remain with Israel. Secondly, article XVII (1) provides that the jurisdiction of the Authority does not cover issues to be negotiated in the permanent status negotiations (see paragraphs 31 and 45 above). These cannot be understood to mean only enforcement powers, by definition they must relative to the jurisdiction to prescribe. Thirdly, there is simply no basis

[87] Article XVII (1) (a) and Article XVII (8). See also Annex III. Note that the relevant issue is the status of the entire territory, as Article XXXI (7) states: "[n]either side shall initiate or take any step that will change the *status* of the West Bank and the Gaza Strip pending the outcome of the permanent status negotiations." Emphasis added.
[88] Article I (1). Legislation adopted by the Palestinian Council/Authority "which exceeds the jurisdiction of the Council or which is otherwise inconsistent with the provisions of the DOP [Declaration of Principles, 1993], this Agreement [Interim Agreement, 1995] 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", Article XVIII (4).
[89] Prosecutor's Request, paragraph 184.

upon which to argue that the exclusion of jurisdictional capacity with regard to Israelis does not apply to prescriptive jurisdiction. Article XVII (2) (c) specifically emphasizes that "[t]he *territorial and functional jurisdiction* of the Council will apply to all persons, except for Israelis" (emphasis added).

II. Conclusion

47. I, therefore, conclude as follows:

(i) Palestine is not a state under international law as it does not conform with the internationally recognised Montevideo criteria. This is accepted by the Prosecutor. In an effort to circumvent the criteria, the Prosecutor argues the "case-specific" nature of the "unique" Palestine situation, while accepting the complexity of the problem. However, there is no basis either under the Rome Statute or in general international law to deviate from the accepted conditions for statehood to allow for Palestine's statehood on the basis of an exceptional definition for the purposes of the Rome Statute alone. The Court does not have the competence to determine statehood where the international community has clearly not so determined.

(ii) The various recognitions that have been extended by states to Palestine are not determinative of statehood. First, because as the Prosecutor has accepted, recognition is declaratory only and not constitutive of statehood; second, because the range of such recognitions do not sufficiently encompass the leading countries in the world, showing that the international community is deeply divided on this issue, and, thirdly, because an analysis of such recognitions as have been given in time and

in content are far from consistent in declaring the existence of Palestine as a state today.

(iii) The principle of self-determination can only arguably mitigate the effects of a deficiency in effective control in particular circumstances and these do not embrace the situation in Palestine. Further, the right is not a synonym of statehood and the existence of right of the Palestinian people is not akin to acceptance of statehood as such, nor can the existence of political difficulties and conflicts as to its application in Palestine and actions taken by Israel for various reasons remove the necessity to demonstrate the existence of the Montevideo criteria. In any event, whatever the relevance of self-determination to the criterion of effective control, it cannot and does not impact upon the necessity to prove the independence or sovereignty of the claimant state.

(iv) Thus, in the absence of clear irrefutable evidence of Palestine's existence as a state and taking into account the lack of an international consensus in this regard, both quantitative and qualitative, the Court cannot assert that there is such a state at this point in time.

(v) Further, and decisively, the agreed recognition between the parties as to jurisdictional allocation underlines that the Palestinian Authority has no competence with regard to Israelis, settlements, Jerusalem and borders for these are final permanent status matters. Palestine cannot delegate to the Court powers that it has explicitly agreed that it does not possess, nor is it possible for the Court to re-write the jurisdictional distribution in the absence of the express consent of the parties.

(vi) As to territorial jurisdiction, as international law makes clear this is a reference to territory under the sovereignty of the state. Palestine clearly does not currently possess sovereignty in international law to the territory in question.

(vii) Accordingly, the Court is respectfully requested to hold that it cannot exercise territorial jurisdiction under article 12(2)(a) over the Palestinian territories, deemed to include the West Bank, including East Jerusalem, and Gaza.

Malcolm Shaw

Professor Malcolm N Shaw QC

Dated this 16 March, 2020

At Leicester, UK

ANNEX - List of Amici Curiae

Professor John Quigley
Guernica 37 International Justice Chambers
The European Centre for Law and Justice
Professor Hatem Bazian
The Touro Institute on Human Rights and the Holocaust
The Czech Republic
The Israel Bar Association
Professor Richard Falk
The Organization of Islamic Cooperation
The Lawfare Project, the Institute for NGO Research, Palestinian Media Watch, and the Jerusalem Center for Public Affairs
MyAQSA Foundation
Professor Eyal Benvenisti
The Federal Republic of Germany
Australia
UK Lawyers for Israel, B'nai B'rith UK, the International Legal Forum, the Jerusalem Initiative and the Simon Wiesenthal Centre
The Palestinian Bar Association
Prof. Laurie Blank, Dr. Matthijs de Blois, Prof. Geoffrey Corn, Dr. Daphné Richemond-Barak, Prof. Gregory Rose, Prof. Robbie Sabel, Prof. Gil Troy and Mr. Andrew Tucker
The International Association of Jewish Lawyers and Jurists
Professor Asem Khalil and Assistant Professor Halla Shoaibi
Shurat Hadin – Israel Law Center
Todd F. Buchwald and Stephen J. Rapp
Intellectum Scientific Society
The International Commission of Jurists
Dr. Robert Heinsch and Dr. Giulia Pinzauti
The Republic of Austria
The International Association of Democratic Lawyers
The Office of Public Counsel for the Defence
The Honourable Professor Robert Badinter, the Honourable Professor Irwin Cotler, Professor David Crane, Professor Jean-François Gaudreault-DesBiens, Lord David Pannick and Professor Guglielmo Verdirame
The Palestinian Center for Human Rights, Al-Haq Law in the Service of Mankind, Al-Mezan Center for Human Rights and Aldameer Association for Human Rights The Federative Republic of Brazil
Professor Malcolm N Shaw
Hungary
Ambassador Dennis Ross

The International Federation for Human Rights, No Peace Without Justice, Women's Initiatives for Gender Justice and REDRESS
Professor William Schabas
International-Lawyers.org
The League of Arab States
Me Yael Vias Gvirsman
The Popular Conference for Palestinians Abroad
The Israel Forever Foundation
Dr Frank Romano
Dr Uri Weiss
The Republic of Uganda