

# **Territory and Statehood in International Law: The Controversy over International Criminal Court Jurisdiction in Palestine<sup>1</sup>**

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**DRAFT: CITATIONS TO BE COMPLETED.**

## **Introduction**

The Rome Statute<sup>2</sup> confers on the International Criminal Court jurisdiction to investigate and prosecute conduct on the territory of any State Party that may constitute an international crime as set out in the Statute. The act of acceding to the Rome Statute constitutes acceptance by each State Party of territorial jurisdiction thus defined. In turn, Article 125 and 126 set out the procedures by which accession to the Rome Statute occurs; it is comprehensive, and no other

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<sup>1</sup> An earlier version of this paper was presented at the International Law Forum at Hebrew University on June 23 2020 and as a Faculty Workshop at NYU Law School in fall 2020. Many thanks to the participants for their helpful reactions including responses from a representative of the Attorney General for Israel. I particularly note the useful thoughts of Moshe Hirsch, Leora Bilsky and Jeremie Bracka. My colleagues Jeremy Waldron and Mattias Kumm offered very helpful suggestions. I am grateful to Ruti Teitel and to Luis Moreno Ocampo for many illuminating discussions on some of the issues in this paper and especially to the students in my International Criminal Law and Transitional Justice Seminar at NYU Law School, who coming together in class remotely under the difficult circumstances spring 2020 contributed enormously to enriching my understanding of this controversy and whose enthusiasm helped my decision to try my hand at writing about Palestine and the ICC. The views expressed herein are entirely my own, and do not represent those any state or person or organization with an interest in this controversy. Thanks to Photeine Lambridis for excellent research assistance.

<sup>2</sup> Rome Statute of the International Criminal Court, 17 July 1998, 37 ILM 999.

provision of the Statute addresses the requirements of accession.<sup>3</sup> Under the territorial jurisdiction that flows from accession, those investigated and/or prosecuted need not be nationals of a State Party of the Rome Statute.

That the ICC can acquire jurisdiction over defendants who are nationals of non-States Parties has always been controversial. Nevertheless, this was the choice of the founding States Parties after extensive negotiations. It reflects the paramount value of anti-impunity in the legal framework for international criminal justice. Under customary international law it is well established, from *Lotus* on<sup>4</sup>, that a state lacks any general right to block courts elsewhere from asserting criminal jurisdiction over its nationals. Immunity of the foreign sovereign and certain of its agents (high officials) has been the exception. The major rationale for this exception is the sovereign equality of states—one sovereign should not pass judgment on another. This rationale is not present in the case of an independent international tribunal such as the ICC, as the Court has pointed out.

A corollary to the anti-impunity principle is the complementarity principle. The ICC does not usurp the function of domestic law enforcement or adjudicative authorities. Rather, the ICC will only intervene where necessary to avoid impunity. A case will not be admissible in the ICC where there is a domestic jurisdiction that is willing and able to investigate and prosecute. Deference extends to situations where there has been a genuine investigation and on the basis of

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<sup>3</sup> Article 125 reads in relevant part: “This Statute shall be open to accession by all States. Instruments of accession shall be deposited with the Secretary-General of the United Nations.”

<sup>4</sup> S.S. *Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7), 90(1), [http://www.worldcourts.com/pcij/eng/decisions/1927.09.07\\_lotus.htm](http://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus.htm). The *Lotus* case illustrates the principle that states may act as they wish unless they contravene an express prohibition. Thus the *Lotus* court held that the Turkish Government, by instituting criminal proceedings in pursuance of Turkish law against Lieutenant Demons due to the loss of the Turkish steamer *Boz-Kourt* and the death of eight Turkish sailors and passengers, has not acted in conflict with the principles of international law.

that investigation the domestic authorities have decided not to prosecute. In such a situation the ICC will have no jurisdiction to prosecute.<sup>5</sup> Thus, a non-State Party would only be affected by the ICC if it chose not to investigate or prosecute the offense in question or were unable to do so (a failed or conflict-afflicted state, for example).

Palestine joined the ICC in 2015 and referred to the Office of the Prosecutor (OTP) a range of incidents for examination and possible investigation and prosecution as crimes under the Rome Statute, including some involving Israeli soldiers and officials. As a result of a preliminary examination, the Prosecutor has determined that there is a reasonable basis to proceed with a full investigation.<sup>6</sup> In a case like this, that originates from a referral from a State

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<sup>5</sup> Article 17 of the Rome Statute reads in relevant part: “1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;... 2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable: (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5; (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice; (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice. 3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.”

<sup>6</sup> “Statement of ICC Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination of the situation in Palestine, and seeking a ruling on the scope of the Court’s territorial jurisdiction”, Office of the Prosecutor, International Criminal Court, 20 December 2019, at: <https://www.icc-cpi.int/Pages/item.aspx?name=20191220-otp-statement-palestine>. The crimes under the Rome Statute identified by the OTP are as follows: “In particular, the Office found there was a reasonable basis to believe that members of the Israel Defense Forces (“IDF”) committed the war crimes of: intentionally launching disproportionate attacks in relation to at least three incidents which the Office has focused on (article 8(2)(b)(iv)); willful killing and willfully causing serious injury to body or health (articles 8(2)(a)(i) and 8(2)(a)(iii), or article 8(2)(c)(i)); and intentionally directing an attack against objects or persons using the distinctive emblems of the Geneva Conventions (article 8(2)(b)(xxiv), or 8(2)(e)(ii)). In addition, Office found there was a reasonable basis to believe that members of Hamas and Palestinian armed groups (“PAGs”) committed the war crimes of: intentionally directing attacks against civilians and civilian objects (articles 8(2)(b)(i)-(ii), or 8(2)(e)(i)); using protected persons as shields (article 8(2)(b)(xxiii)); willfully depriving protected persons of the rights of fair and regular trial (articles 8(2)(a)(vi) or 8(2)(c)(iv)) and wilful killing (articles 8(2)(a)(i),

Party, the OTP can proceed to such an investigation without a preliminary ruling of the Court's Pre-Trial Chamber (PTC). Nevertheless the Chief Prosecutor decided to obtain legal cover from the PTC prior to opening a full investigation.<sup>7</sup> The PTC's ruling has been long awaited and last month the Chief Prosecutor indicated that she expected it early this year.<sup>8</sup>

Israel's government has engaged in an extensive, and intense, political and legal campaign to forestall prosecution of its nationals for international crimes based on territorial jurisdiction over conduct in Palestine.<sup>9</sup> This campaign is an extension of Israel's general determination that its soldiers and officials be not held accountable for their conduct in Palestine. On the legal front, Israel's main stratagem is to create confusion about Palestine's status as a "state" under the Rome Statute. Israel has sought to reframe the issue in terms of Palestine's status as an entity seeking to exercise the right of self-determination under international law and achieve full independence. But this is not the pertinent legal question posed by the jurisdictional provisions of the Rome Statute. Rather the question is whether Palestine has sufficient

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or 8(2)(c)(i)); and torture or inhuman treatment (article 8(2)(a)(ii), or 8(2)(c)(i)) and/or outrages upon personal dignity (articles 8(2)(b)(xxi), or 8(2)(c)(ii)). 65 222...In addition, the Office found there was a reasonable basis to believe that in the context of Israel's occupation of the West Bank, including East Jerusalem, members of the Israeli authorities have committed war crimes under article 8(2)(b)(viii) in relation, inter alia, to the transfer of Israeli civilians into the West Bank since 13 June 2014. ...Finally, the Office observed that the scope of the situation could encompass an investigation into crimes allegedly committed in relation to the use by members of the IDF of non-lethal and lethal means against persons participating in demonstrations beginning in March 2018 near the border fence between the Gaza Strip and Israel, which reportedly resulted in the killing of over 200 individuals, including over 40 children, and the wounding of thousands of others." International Criminal Court, Office of the Prosecutor, Report on Preliminary Examination Activities, The Hague, December 2020, Paragraphs 221-224.

<sup>7</sup> Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine, Situation in the State of Palestine, ICC-01/19, 22 January 2020, at: [https://www.icc-cpi.int/CourtRecords/CR2020\\_00161.PDF](https://www.icc-cpi.int/CourtRecords/CR2020_00161.PDF).

<sup>8</sup> "Statement of the ICC Prosecutor" supra n. 7.

<sup>9</sup> See for example Barak Ravid, "Israel to Launch Media Campaign Against ICC," Haaretz, 10/4/2018, available at <https://www.haaretz.com/premium-netanyahu-to-launch-campaign-against-icc-1.5362188>; Noa Landau, "Netanyahu calls to impose sanctions on International Criminal Court," 21/1/2020, available at <https://www.haaretz.com/israel-news/premium-netanyahu-calls-to-impose-sanctions-against-international-criminal-court-1.8431418>; "Netanyahu will fight ICC's Investigations into Israel's War Crimes," Middle East Monitor, May 18 2020, available at <https://www.middleeastmonitor.com/20200518-netanyahu-will-fight-iccs-investigation-into-israels-war-crimes/>

international legal personality to become a full member and participant of an international institution, the ICC. Historically, international legal personality may have converged during certain periods with full external self-determination. But this is not the case today. A State Party under the Rome Statute or some other international intergovernmental organization may possess the attributes of statehood needed to accept the responsibilities of full participation in the organization. But it need not have fulfilled the right to external self-determination, obtaining full independence. The concept of statehood plays a different role with respect to external self-determination than it does in the case of international legal personality generally.

As Rosalyn Cohen puts it: “[W]hen examining what is meant by the word "state," an appraisal of the community interests which will be affected by the decision to interpret it in one way rather than in another is necessary.”<sup>10</sup> The interpretation of the word “state” in the Rome Statute must respond to the real issue at hand, which is the functioning of the ICC as an international institution concerned with criminal justice.<sup>11</sup> James Crawford notes: “to refer merely to statehood ‘for the purposes of international law’ assumes that a State for one purpose is necessarily also a State for another. This may be true in most cases but not necessarily all.”<sup>12</sup>

In the *Kosovo Declaration of Independence* advisory case, the International Court of Justice observed: “During the second half of the twentieth century, the international law of self-determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and

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<sup>10</sup> Rosalyn Cohen, *Concept of Statehood in United Nations Practice*, 109 U. PA. L. REV. 1127 (1961). Available at: [https://scholarship.law.upenn.edu/penn\\_law\\_review/vol109/iss8/4](https://scholarship.law.upenn.edu/penn_law_review/vol109/iss8/4), p. 1127.

<sup>11</sup> Yuval Shany, “In Defence of Functional Interpretation of Article 12(3) of the Rome Statute”, *Journal of International Criminal Justice* 8, Oxford University Press, 2010.

<sup>12</sup> James Crawford, *The Creation of States in International Law*, 2<sup>nd</sup> edition, 2006, p. 31.

exploitation.”<sup>13</sup> There is no question that the Palestinian people have this right, and that their representatives have taken numerous steps in the direction of exercising it. As Ruti Teitel and I have articulated, the exercise of the right of external self-determination, and especially its fulfilment in independence, implicates an extensive range of international legal norms and interests: human rights including minority rights, the possible territorial claims of other peoples, and the territorial integrity of existing states.<sup>14</sup>

It is obvious as both a factual and legal matter that Palestine’s right to external self-determination is yet to be fulfilled, however strong the legal basis of the right, whatever the steps taken, and regardless of the extent to which internationally illegal actions by Israel have frustrated its exercise. But the accession of Palestine to the ICC, and the resulting territorial jurisdiction of the Court, are not dependent on any judgment about the extent to which the right of external self-determination has been realized under international law. Instead, Palestine has been accepted as a “State Party” of the Rome Statute because it is capable of assuming the obligations of the Statute, and fully participating in the activity of the Court. As Hersch Lauterpacht pointed out, a community of people with a territory and government not yet recognized as fully independent nevertheless “possesses a measure of statehood;... In such cases the flexible logic of the law adapts itself to circumstances. It refuses to accept the easy dichotomy: either no rights and duties or all rights and duties following upon recognition. A situation is created in which the unrecognized community is treated for some purposes as if it were a subject of international law. It thus becomes a subject of international law to the extent to which existing States elect to treat it as such in conformity with general rules of international

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<sup>13</sup> *Kosovo Advisory Opinion*, 2010 I.C.J. (July 22) Paragraph 79.

<sup>14</sup> Robert Howse and Ruti Teitel, “Humanity Bounded and Unbounded: The Regulation of External Self-Determination under International Law,” 7 *L. & Ethics Hum. Rts.* 155 (2013).

law. In many cases substantial rights of statehood have been accorded, notwithstanding the absence of recognition as a State.”<sup>15</sup>

The aim of this paper is to clear away the smoke and mirrors put about by those seeking to obfuscate the territorial jurisdiction of the ICC as set forth in the Rome Statute. While I believe that these specious and spurious arguments are unlikely to move the PTC, there is a risk that some of them will infect academic study of international criminal law or even its practice well beyond the immediate context of Israel and Palestine, spreading erroneous assumptions about matters quite fundamental to the ICC but also more generally to questions of statehood, international legal personality, and even the interpretation of treaties. The paper is directed at the only comprehensive statement by Israel of its position on ICC jurisdiction, a December 2019 memorandum of the Ministry of Justice.<sup>16</sup>

### **The Rome Statute Accessions Provisions Do Not Contain a Restricted or Limited Definition of “State” That Would Preclude Palestine’s Accession**

The Rome Statute sets out the requirements and procedures that must be followed to accede to the Statute as a State Party. Thus, Article 125 (3) provides: “This statute shall be open to accession by all States. Instruments of Accession shall be deposited with the Secretary-General of the United Nations.” In January 2015, following established UN practice, the

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<sup>15</sup> Hersch Lauterpacht, “Recognition of States in International Law,” 53 YALE L.J. (1944). Available at: <https://digitalcommons.law.yale.edu/ylj/vol53/iss3/1>, pp. 435-436.

<sup>16</sup> The State of Israel, Office of the Attorney General, *The International Criminal Court’s Lack of Jurisdiction over the So-Called “Situation in Palestine,”* 20 December 2019, available at: <https://assets.documentcloud.org/documents/6589835/Israel-AG-Brief-on-ICC-Jurisdiction-in-Palestine.pdf> A similar exercise to that of this paper has been undertaken by Adalah, a human rights NGO in Israel. Challenging the Israeli Attorney General’s Conception of Sovereignty: The Issue of Jurisdiction concerning the ‘Situation of Palestine’ before The International Criminal Court,” June 2020, available at [https://www.adalah.org/uploads/uploads/Adalah\\_AG\\_ICC\\_Report\\_June\\_2020\\_Final.pdf](https://www.adalah.org/uploads/uploads/Adalah_AG_ICC_Report_June_2020_Final.pdf). I learned of Adalah study after finishing a first draft of this paper (through requesting comments on my draft from Hassan Jabareen, the General Director). There is a considerable overlap between the legal analysis in this paper and some of that in the Adalah study.

Secretary-General took note of Palestine's status within the General Assembly as a "Non-Member Observer State." In January 2015, The Secretary General duly accepted Palestine's instrument of accession.<sup>17</sup>

International law does not impose a single definition of statehood. Chen observes that there is no definition of a state in the United Nations Charter, and that UN practice has not converged on a definition: "Under this practice, states can mean a full-fledged independent sovereign entity, a political subdivision, an overseas possession of a state, a mandated territory, an entity with a dubious degree of independence, an entity with a government controlled in varying degrees by another government, an entity without a government, an entity with a disputed territory, and so on."<sup>18</sup>

The founding States Parties to the Rome Statute consciously established a formal and proceduralist route to ICC accession; thus, the Rome Statute contains no hint of any restrictive interpretation of "state" that would preclude the accession of an entity such as Palestine. (As will be discussed below, the Rome Statute does contain a mechanism-Article 119 (2)-where one or more States Parties can challenge eligibility for accession under the Statute, including a process to resolve disagreement.)

The founding States Parties could have, but did not, put in the Statute an external benchmark for the requisite status of being a state. For instance, they could have limited accession to existing member states of the United Nations. Or they could have limited accession to those entities already fully recognized as states by the existing States Parties of the Statute.

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<sup>17</sup> Official Note of Secretary General of the United Nations, January 6, 2015, available at <https://pbs.twimg.com/media/B6trevClcAAoMlo.png>. The Statute will enter into effect for the State of Palestine on 1 April 2015."

<sup>18</sup> "The Meaning of "State" in the Membership Provisions of the United Nations Charter," *Indiana International & Comparative Law Rev.* (2001), p. 26.



These are just two examples of how the drafters could have introduced a restrictive statehood criterion into the accession requirements of the Rome Statute. But they did not. The drafters thus allowed for flexibility that could withstand, if not embrace, the changing nature of the international community, allowing for a dynamic expansion of the Court’s reach. This is consonant with the governing principle of anti-impunity and the universal character of the crimes with which the Court is concerned.<sup>19</sup>

### **The Vienna Convention on the Law of Treaties Does Not Require A Restrictive Interpretation of “state” That Would Exclude Palestine**

Nevertheless, the Attorney General of Israel claims that a restrictive interpretation of “state” is required by the rules of the Vienna Convention on the Law of Treaties, even if there are no restrictive or limiting words in the Rome Statute itself.

The Attorney General of Israel makes the point that States Parties are presumed to have embraced the rules of treaty interpretation of Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*.<sup>20</sup> These provisions of the VCLT are generally considered to have the status of customary international law and are in any case extremely widely followed by international courts and tribunals. The Attorney General for Israel asserts that applying these rules properly would inevitably lead to an interpretation of “state” in the Statute that excludes Palestine.

It is certainly true that international criminal tribunals, including the ICC, have been guided by the Vienna Convention Articles 31 and 32 in the interpretation of their governing instruments.<sup>21</sup> But (unlike for example the Dispute Settlement Understanding of the WTO,

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<sup>19</sup> This accords with the project of the Court as deeply connected to the human rights revolution in international law. See Adalah, supra n.11, and generally Ruti Teitel, *Humanity’s Law* (Oxford and New York: Oxford University Press, 2010).

<sup>20</sup> [Vienna Convention on the Law of Treaties, May 23, 1969](#), 1155 U.N.T.S. 331; 8 I.L.M. 679 (1969)

<sup>21</sup> “Generally, the [international criminal tribunals] tribunals have held that the interpretative rules enshrined in the VCLT apply to their respective statutes (irrespective of whether they are a treaty or other instrument – in the latter case, of course, we are talking about a *mutatis mutandis* application). Arts. 31-32 of the VCLT are frequently quoted

among many other agreements), the Rome Statute does not contain a provision requiring that the customary international law of treaty interpretation be applied in reading the Statute. At least one prominent scholar of international criminal law, Dov Jacobs, has suggested reasons why this omission might be intentional; there are aspects of international criminal justice that do not map neatly onto the VCLT framework. The VCLT rules are designed to facilitate interstate treaty relations, while the interpretation of the Rome Statute affects other relationships, with the accused & with victims, for instance.<sup>22</sup>

When we turn to the Vienna Convention on the Law of Treaties itself, Article 5 states: “The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization.” In other words, in the case of constituent instruments such as the Rome Statute the treaty interpreter should be attentive to any “relevant rules” of the organization in question that might suggest the need for adaptation or deviation from the VCLT.

### **The Vienna Convention on the Law of Treaties and the Roles of the Depository and the States Parties in Accession**

The VCLT includes as among the responsibilities of the depository to ascertain that any instrument deposited (including instruments of accession) is “in due and proper form.” (Article 77 (1) (d)). Obviously the “due and proper” standard requires that depository engage in some

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by international criminal tribunals either as such, or by reference to their constitutive elements, and applied in a holistic manner, albeit not all elements being given equal weight. ‘Ordinary meaning’, ‘object and purpose’, ‘subsequent practice’, and ‘supplementary means’ have all featured prominently in the jurisprudence of international criminal tribunals.” ILA Study Group on the Content and Evolution of the Rules of Interpretation, Interim Report, August 19-24, Sydney, pp. 12-13 (footnotes omitted).

<sup>22</sup> Dov Jacobs, ‘Why the Vienna Convention Should Not Be Applied to the ICC Rome Statute’ (*Spreading the Jam*, 2013) <https://dovjacobs.com/2013/08/24/why-the-vienna-convention-should-not-be-applied-to-the-icc-rome-statute>

level of interpretation of the treaty requirements for accession. However, the reference to “form” in 77 (1) (d) suggests that accession through this kind of depositary function is not intended to place the depositary in the position of evaluating the *substantive* eligibility for accession under the treaty. This is reinforced by VCLT 77.2, which explicitly states the process to be followed where controversy exists concerning the depositary’s performance of its functions: “In the event of any difference appearing between a State and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of *the signatory States and the contracting States or, where appropriate, of the competent organ of the international organization concerned.*”

In other words, it would not be up to the Secretary General to resolve any substantive interpretive disagreement surrounding an instrument of accession, but rather to refer this back to the States Parties. But in the case of the Rome Statute there is in fact an explicit provision that allows for the States Parties to deal with such situations, Article 119 (2). Article 119 (2) provides; “disputes between two or more States Parties relating to the interpretation or application of this Statute which is not settled through negotiations within three months of their commencement shall be referred to the Assembly of States Parties. The Assembly may itself seek to settle the dispute or may make recommendations on further means of settlement of the dispute, including referral to the International Court of Justice in conformity with the Statute of that Court.”

At the time at which Palestine notified of its intention to accede to the ICC, no dispute existed between States Parties existed under Article 119.2 of the Rome Statute concerning Palestine and the meaning of “state” in the Statute (although the intent of the ICC to accede had

been known to States Parties for some time.) There being no dispute under 119.2, there was no reason for the Secretary General to withhold his acceptance of the instrument of accession.

This is confirmed by the communication of January 7 2015, where the President of the Assembly of States Parties of the Rome Statute welcomed the accession of Palestine on behalf of the States Parties: ““Each ratification of the Rome Statute constitutes welcome progress towards its universality. I call on all members of the United Nations to join this permanent and independent system of international justice to fight against impunity and prevent the most serious crimes under international law, which is based on the principle of complementarity with domestic jurisdictions.”<sup>23</sup> Canada filed with the UN Secretary General a communication on January 23, 2015-*after* the completion of accession, objecting that Palestine “is not able to accede to the Convention”; yet notably Canada did *not* follow this objection through with a dispute under Article 119.2 of the Rome Statute. The accession provisions of the Rome Statute allow for 60 days from the deposit and acceptance of the instrument of accession before the Statute is in force for the acceding State Party (Article 126). This 60-day window provided more than enough time for a State Party to deliberate on whether to bring a dispute under 119.2, and to formulate its disagreement on interpretation. Yet none did, not even Canada.

To insist today, after years of Palestine’s participation in the Court, that the PTC open the question of the lawfulness of Palestine’s accession in 2015 seems an utter lost cause. On the other hand, contrary to the position taken by the Chief Prosecutor in her Request, I think that the PTC could intervene in theory-*if* there were reason to think that the accession process was

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<sup>23</sup> Yonah Jeremy Bob, “ICC Assembly of States Parties ‘welcomes State of Palestine,’” *Jerusalem Post*, January 7, 2015, available at <https://www.jpost.com/breaking-news/icc-assembly-of-state-parties-welcomes-state-of-palestine-rome-statute-documents-387039>

manifestly unlawful, arbitrary, or corrupt. No court operating under the rule of law would affirm jurisdiction acquired in such a manner.

But there is no reason to doubt “the due and proper form” of Palestine’s instrument of accession. As is contemplated in the VCLT, *substantive* disagreement over conditions for deposit of an instrument of accession is a matter for the States Parties of the Rome Statute, in this case using the mechanism under 119.2, which has not been triggered. It would not be for the PTC to make a *de novo* construction of the accession provisions in the Statute; the Rome Statute does not provide for any role of the PTC or indeed any chamber of judges in evaluating eligibility for accession. As has been repeatedly emphasized by the PTC, its role at the pre-investigation stage is merely to assure that there is an apparent basis for jurisdiction: “If the Pre- Trial Chamber, upon examination of the request and the supporting material, considers that there is a *reasonable* basis to proceed with an investigation, and that the case *appears to* fall within the jurisdiction of the Court, it shall authorize...” (Article 15 (3), emphasis added). As the majority of the Pre-Trial Chamber held in *Situation in the Republic of Kenya II*, the standard for assessing jurisdiction pre-investigation is a low one, informed by the immediately language in 15 (4) “reasonable basis to proceed.”<sup>24</sup>

Yet the Israel Attorney-General’s argument concerning the interpretation of “state” in the Rome Statute under the VCLT may not so much be aimed at the PTC as more broadly at the international community. There is evidence to suggest that Israeli officials consider it almost inevitable that an investigation will at some point occur that includes Israeli nationals as possible

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<sup>24</sup> Paragraph 32. See also, Cote d’Ivoire Article 15 Decision; Situation in Georgia, Decision on the Prosecutor’s request for authorization of an investigation, 27 January 2016, paragraph 25.

suspects.<sup>25</sup> Because Israel is a non-State Party, and completely resistant to any cooperation with the Court, the OTP must rely ultimately on the support of other states, both States Parties and Non-States Parties, if it is to bring Israeli nationals to justice. Rendering them to the Court would require that either a State Party (acting under a duty of cooperation under the Rome Statute) or a non-State Party (cooperating voluntarily) would participate in such rendition if an Israeli suspect were found on its territory. One way of frustrating such cooperation is to delegitimize the OTP's exercise of jurisdiction as not in accord with widely held objective understandings of law and therefore, by implication, a politicized endeavor.

Fortunately (for the legitimacy of an OTP investigation), it is not difficult to show that Palestine's accession to the Rome Statute is entirely compatible with a reading of the Statute based on the way many regional and international courts and tribunals, including criminal tribunals, have deployed the rules of interpretation in the VCLT.

*Articles 31 and 32 of the Vienna Convention on the Law of Treaties*

Article 31 (1) of the *Vienna Convention on the Law of Treaties* provides for the interpretation of terms in a treaty in light of their ordinary meaning in their context and in light of the treaty's object and purpose. The context includes the text of the treaty as a whole, including the preamble, and also collateral agreements in connection with the treaty. In addition, "there shall be taken into account (a) any subsequent agreement between the parties regarding the application of the treaty which establishes the agreement of the parties regarding its

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<sup>25</sup> Noa Landau, "Israel Drafts Secret List of Hundreds of Officials Who May Stand Trial at International Court", Haaretz, English Edition, July 16 2020.

interpretation; (c) any relevant rules of international law applicable in the relations between the parties.”

Article 32 provides that a treaty interpreter *may* take into account the negotiating history of the treaty (*travaux préparatoires*) for certain purposes, including confirmation of an interpretation based on Article 31 or resolving a situation where interpretation based on Article 31 would lead to an absurdity.

### **“Ordinary Meaning,” Context, Object and Purpose**

In the first instance, as we can see, the VCLT refers to “ordinary meaning.” Contrary to what has been simplistically suggested by some intervenors in the PTC proceedings, there is no self-evident “ordinary” meaning to the term “state.” Thus, when Professor Malcolm Shaw expresses the mantra “A State is a State is a State” in his commentary on the issue of Palestine in the ICC he merely posits an empty tautology.<sup>26</sup> In daily parlance, “state” is used for example to refer to territorial communities with full external self-determination but also to the federal sub-units of various countries. Attempts to essentialize the “state” (for example Carl Schmitt’s effort in the “Concept of the Political”) usually end up as forms of totalizing political ideology. But the Attorney General for Israel concedes that the “ordinary meaning” of “state” is itself contextual, i.e. specific to the *context* of international law- “in general international law” (Paragraph 9) or “under international law” (Paragraph 12).

Recall that, by virtue of VCLT Article 31 (3) ( c), “relevant rules of international law applicable between the parties” are indeed part of the “context” that a treaty interpreter is required to “take

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<sup>26</sup> Malcolm Shaw, “A State is a State is a State? Some Thoughts on the Prosecutor’s Response to Amici Briefs on Territorial Jurisdiction-Part I, June 4 2020, Part I and II, *EJIL:Talk!* blog.

into account.” Article 31 (1) requires a greater (or at least equal) focus on *other* aspects of context, “the treaty as a whole, including the preamble,” as well as the object and purpose of the treaty. In other words, general international law is, under the VCLT, only *one* source of interpretation to be taken into account. Applicable general international law must be integrated into a coherent reading that includes context, object and purpose, as well as taking into account that, as the constitutive instrument of an international organization, the Rome Statute may contain “relevant rules” with special understandings that would apply notwithstanding the general norms of the VCLT (VCLT Article 5). In the words of the WTO Appellate Body, “interpretation pursuant to the customary rules codified in Article 31 of the *Vienna Convention* is ultimately a holistic exercise that should not be mechanically subdivided into rigid components.”<sup>27</sup>

Taken as a whole, the Rome Statute has the character of being the constitutive instrument of an intergovernmental international organization concerned with criminal justice. It does not deal with the international responsibility of states but the criminal responsibility of individuals, Full participation in international intergovernmental organizations requires the requisite legal personality. To be sure, during certain historical periods, only entities exercising full external self-determination were understood as having that personality. But things have changed. For some time, full external self-determination has not been considered essential to the international legal personality required to adhere to and act as a full member of international governmental organizations. For example, Hong Kong is a full member of the World Trade Organization and off the Financial Action Task Force. Hong Kong, Macau and Kosovo are all full Members of the

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<sup>27</sup> *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R (Appellate Body Report, adopted 27 September 2005), [176]



International Monetary Fund and the World Bank. Taiwan, Hong Kong and Macau are all full Members of the Asian Development Bank. Kosovo is a full Member of the World Customs Organization, the Permanent Court of Arbitration, and the European Bank for Reconstruction and Development (EBRD). Palestine itself is a full Member of the Permanent Court of Arbitration, having lawfully acceded to the Hague Convention for the Pacific Settlement of International Disputes. In fact, the status of Palestine as a State was extensively discussed at meetings of the PCA Administrative Council in 2016, which by a vote of 54 in favor (and 25 abstentions) affirmed that “the State of Palestine” is a Contracting Party to the Hague Convention and a Member of the Permanent Court of Arbitration.<sup>28</sup>

Adapting the international judicial practice of such institutions to the fact that, in addition to entities exercising full self-determination, other parties as well are bound, may require a flexible understanding of the word “state”, taken in context. One example is the WTO dispute settlement system. As observed, the WTO regime is an agreement between states exercising full external self-determination and other entities—the EU, Hong Kong, Macau, Taiwan. The VCLT defines treaties as agreements between states and explicitly excludes the application of its rules to agreements between states and other actors (Article 3). Nevertheless, as noted, the Members of the WTO have explicitly chosen to apply the VCLT in WTO dispute settlement, considering that for purposes of treaty interpretation, the WTO agreements qualify as agreements among states for purposes of the VCLT.<sup>29</sup>

### **International Law as Part of the “Context” for Interpreting the Meaning of “State” in the Rome Statute**

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<sup>28</sup> See Andreas Zimmerman, “Palestine at the Gates of the Peace Palace: The long and windy road towards Palestinian membership in the Permanent Court of Arbitration,” (April 5, 2016), *EJIL:Talk!* Blog.

<sup>29</sup> See ILA Study Group, *supra* n.21.

The Attorney General of Israel repeatedly, but without foundation, asserts that there is a single prevailing definition of a “state” in general international law. The Attorney General claims that the legal status of statehood is only granted in general international law to entities that “attain sovereignty” but then suggests that sovereignty itself is a consequence of statehood. One notices here a complete tautology: sovereignty is a *precondition* for statehood, while on the other hand its sovereignty is a *consequence* of statehood. This tautological notion of sovereignty is reiterated again and again by the Attorney General for Israel in its memorandum (Paragraphs 12, 13, 14, 15, 16, 20, 26, 30, 32, 40, 48, 49, 55, 61). Yet for all this reliance on sovereignty in international law, the Attorney General of Israel fails to cite *any* “relevant rules of international law”, which set out the juridical relationship between statehood and sovereignty. Sovereignty is an elusive or at least slippery concept in international legal discourse. Its meanings are complicated by their entanglement with Western normative political theory and history from the middle ages through the contemporary period.<sup>30</sup> It is no wonder then that like “state”, “sovereign” or “sovereignty” lack a definition in general international law, though they seem to form an inevitable part of the discourse at the borderline of law and politics, as it were, and are used without definition in some international legal instruments.<sup>31</sup>

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<sup>30</sup> Saskia Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton NJ, Princeton University Press, 2006); Annabel Brett, *Changes of State: Nature and the Limits of the City in Early Modern Natural Law* (Princeton NJ, Princeton University Press, 2011); Don Herzog, *Sovereignty RIP* (New Haven, CONN: Yale University Press, 2020).

<sup>31</sup> See Martti Koskenniemi, “What Use for Sovereignty Today?” *Asian Journal of International Law*, 1 (2011) 61. See also, Robert Howse, “Sovereignty, Lost and Found”, In W. Shan, P. Simons & D. Singh (Eds.). *Redefining Sovereignty in International Economic Law* (London: Bloomsbury, 2008, pp. 61–76.

The Attorney General does invoke the individual opinion of a M. Anzilotti in a 1931 Advisory Opinion of the Permanent Court of International Justice as well as a 1928 award of the Permanent Court of Arbitration. Such opinions and arbitral awards constitute supplementary sources of international law in accordance with Article 38 (1) of the Statute of the International Court of Justice but are not “binding rules of international law applicable between the parties” within the meaning of VCLT 31 (3) ( c). Apart from these pre-World War II opinions, the only other authority cited is a decision of Grand Chamber of the European Court of justice, which refers to “the fullness of the powers granted to sovereign entities by international law.” But this passage neither defines what those powers are, what instruments or customary rules of international law grant them, nor what the relationship of these powers is to the definition of a “state.”

Successive efforts in the post-World War II period to achieve agreement of the international community on a single definition of “state” or “statehood” have failed, despite the devotion of considerable attention to this exercise. These failed efforts include negotiations over the Declaration on the Rights and Duties of States (1949), the Vienna Convention on the Law of Treaties (1956 and 1966) and the articles on Succession of States in respect of Treaties (1974).<sup>32</sup>

If there are any “relevant rules” of international law to be taken into account in interpreting the meaning of “state” in the accession provisions of the Rome Statute, these would surely include the 1934 Montevideo Convention.<sup>33</sup> The Montevideo Convention disaggregates the meaning of “state” in international law into the presence of a variety of attributes-permanent

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<sup>32</sup> Ali Zadeh, “International Law and the Criteria for Statehood,” Tilburg University Faculty of Law, citing N. Hobach, R. Lefeber & Ribbelink, *Handboek Internationaal Recht*, Den Haag: Asser Press 2007.

<sup>33</sup> *Convention on the Rights and Duties of States*, Montevideo, 26 December 1933, 165 LNTS 19, at 25 [“Montevideo Convention”].

population, defined territory, a government, and capacity to enter into relations with other States. This disaggregated approach to defining “state” requires that, in each case, an assessment be made of the *extent* to which an entity may possess each of these criteria. Article 1 of the Montevideo Convention, which sets out the attributes a state needs to possess in adequate measure to be a “person of international law” does not even mention notions such as independence, sovereignty, sovereign control, sovereign title or complete control over territory, which are repeatedly invoked throughout the Attorney General for Israel’s memorandum.

As Imseis observes: “...the Montevideo criteria have almost uniformly been given [a liberal, flexible and permissive] interpretation by States... Thus, as demonstrated by the so-called micro-States (e.g. Lichtenstein, San Marino, Monaco) there is no minimum population required... Likewise, the defined territory criterion does not require fixed, recognized or contiguous borders, .... As affirmed by the ICJ in *North Sea Continental Shelf*. Similarly, the government criterion has required neither absolute effectiveness nor independence, as evidenced by States that have been admitted to the UN while in the throes of conventional civil war between competing governmental authorities (e.g. Congo) and others who’ve been admitted while governed, in whole or in part by, external powers (e.g. Belorussia, Burundi, India, Philippines, Rwanda, Ukraine, etc.). Finally, foreign relations need not even be exercised by the State in question but can be done by other States (e.g. Belorussia & Ukraine/Soviet Union; Monaco/France; Marshall Islands & the Federated States of Micronesia (FSM)/United States, etc.”<sup>34</sup>

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<sup>34</sup> Ardi Imseis, “State of Exception: Critical Reflections on the Amici Curiae Observations and Other Communications of States Parties to the Rome Statute in the Palestine Situation,” *Journal of International Criminal Justice*, November 2020, pp. 11-12.

There is no inherent reason why the attributes of statehood or their extent should be the same to establish statehood for purposes of joining a specialized international organization like the ICC as for assuming all of the rights and obligations of sovereign States under the UN Charter, for example. The Oslo Accords themselves established that Palestine has institutions of government and public administration, a judiciary and police and some capacity to conduct international relations (How else would Palestine be able to engage in negotiations and enter into an agreement such as the Oslo Accords?)<sup>35</sup> Further, the Oslo Accords suppose that Palestine represents a sufficiently well-defined territorial community to allow for proper allocation of rights and responsibilities over, for example, civil and criminal justice. The same is the case with many of the international instruments cited by the Prosecutor that refer to the territory of Palestine.

Palestine's participation as a State Party in the ICC advances the fundamental aims of the Statute. Here, one thinks immediately of the anti-impunity principle. This principle is served by the possibility of obtaining evidence concerning international crimes that occurred on the territory of Palestine, identifying witnesses and victims. In the case of alleged offenses committed by Israeli nationals, in the Oslo Accords Palestine agreed to exempt the prosecution of such offenses from its general criminal jurisdiction. Yet evidence of their commission is found within Palestine, and if Palestine has bound itself not to prosecute such offenses itself, and Israel

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<sup>35</sup> See Imseis, *supra* n.34: "Palestine's governmental functions have been deemed sufficient for the functioning of a State according to World Bank, the International Monetary Fund, and the Ad Hoc Liaison Committee.<sup>89</sup> Palestine formally boasts a constitutional parliamentary system, with executive, legislative and judicial branches of government. Its ministries cover education, finance, foreign affairs, health, interior, justice, labour, planning, and social affairs, among other portfolios. Its civil service now numbers in the tens of thousands, and includes security and police services." p. 13.

or any other concerned state refuses to investigate and prosecute, Palestine's ICC membership is the only clear route to avoiding impunity.

Also, it seems likely that any peace process or arrangement that is eventually negotiated would have to include elements of transitional justice, or accountability for past wrongs on both sides. Palestine's participation in the ICC as a State Party, and the possibility of constructive dialogue with Court by a future more peace-oriented Israeli government, provide one path to realizing transitional justice as a precondition to a peace deal that would lead to full external self-determination. As Teitel has suggested, international criminal justice "can support or even instigate transition."<sup>36</sup>

As the Prosecutor and others have noted, Palestine has been an effective and active participant in in the ICC as an institution since its accession. Lack of full external self-determination has not prevented Palestine from performing its responsibilities under the Rome Statute. Of course, the ICC preliminary examination and any subsequent investigation concerning conduct on the territory of Palestine would be impracticable or face serious obstacles if Palestine did not have a government and administration capable of gathering evidence, identifying witnesses and victims, and interaction with the Court in individual cases. So far, the preliminary investigation suggests that Palestine has the state attributes required to assure this functionality of the Court.

The memorandum of the Attorney General goes on page after page (paragraph 31 ff), citing a litany of respects in which Palestine does not exercise full sovereignty or external self-determination (lack of control over airspace, no establishment of telecommunications networks

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<sup>36</sup> Ruti Teitel, "Transitional Justice Genealogy," 16 *Harv. Hum. Rts. J.* 69 (2003), p. 89.

without Israeli consent, etc.). Yet the Attorney General of Israel provides no explanation whatever of why these matters *are at all relevant* to Palestine's discharge of its responsibilities under the Rome Statute, or the Court's legal capacity to investigate or prosecute conduct on the territory of Palestine.

A final point- there is no higher law framework, extrinsic to and above the Rome Statute, which *prohibits* a reading of the Statute that would consider Palestine a "State" for purposes of being a Party to the Statute (some critics of the Prosecutor maintain there is, but this is mere dogmatism-elevating norms that have been applied on issues of state recognition and external self-determination/sovereignty). The ICC Statute is a Treaty, and only jus cogens or inconsistency with the UN Charter would invalidate what would otherwise be a lawful application of a Treaty provision as between the States Parties. As already noted, the UN Charter has not defined "state" or "statehood" nor has UN practice done so.

### **The Role of the Assembly of States Parties**

Any interpretation of "state" based on the VCLT must also consider the subsequent practice of States Parties. As noted above, despite several States Parties submitting amicus briefs to the PTC, none has brought a dispute under Article 119 (2) of the Statute to challenge the interpretation of the Rome Statute on the basis of which Palestine has acceded as a State Party. It seems to me that 119 (2) constitutes an important safeguard against an accession determination by the UN authorities that does not accord with the expectations of all States Parties as to the lawful or proper interpretation of the ICC Statute. Not even the one state that formally objected at the time of Palestine's accession, namely Canada, brought a dispute under 119 (2). In the case of those States Parties that have filed amicus briefs in the matter before the PTC, the positions taken in these briefs appear generally not to challenge Palestine's accession as such as a "State

Party” but whether it is sufficiently a “state” for purposes of the Court’s exercise of territorial jurisdiction; this is a specious distinction, as will be explained in the next part of this paper.

Nevertheless, the point here is that subsequent practice of States Parties appears to have evolved uniformly in the direction of not per se challenging the interpretation of the Statute on which Palestine’s accession is based.<sup>37</sup>

In sum, the interpretation of “state” in the accession provisions of the Rome statute does not, on a proper application of the VCLT rules, lead to a restrictive definition that would exclude Palestine. Yet this does not exclude that, in different historical circumstances, a more restrictive interpretation might have been more appropriate. The contemporary context is one in which peace negotiations are not being pursued by the different sides of the conflict, where the path set out in the Oslo Accords seems indefinitely blocked, where instances are mounting of international crimes for which there is no real accountability in Israel’s civil or military justice systems,<sup>38</sup> where the demands of victims in Palestine are being unmet by any other process.<sup>39</sup>

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<sup>37</sup> A comprehensive analysis of these briefs is to be found in Imseis, supra n. 34. The States Parties in question are: Australia, Austria, Brazil, Canada, Czech Republic, Germany, Hungary, and Uganda. In the case of Canada, the submission was in the form of a non-public written communication to the Court, rather than under the intervention rules and process of the PTC.

<sup>38</sup> See Imseis, supra n. 34 on “endemic impunity.” Adalah, supra n. 8, provides a comprehensive account of the systematic failure within the Israeli to achieve legal accountability for the potentially criminal conduct identified by the ICC Chief Prosecutor (Second and Third Sections of Part Two). In particular, Adalah notes: “In the State of Israel, the Military Attorney General (MAG) is charged with overseeing the military prosecution system. According to information released by the MAG Corps, it received 500 complaints relating to around 360 exceptional incidents alleged to have occurred during OPE. On 15 August 2018, the MAG published its Update #6,<sup>87</sup> which contains the most recent public information released by the MAG on the status of the complaints received and the decisions subsequently taken concerning OPE incidents. This section details the status of complaints into 28 specific incidents submitted by Adalah and Al Mezan to the MAG and the Israeli Attorney General (AG). It reveals Israel’s chronic failure to take appropriate measures in these grave cases<sup>88</sup> and its unwillingness to prosecute those responsible for the alleged crimes in question. The data provided by the MAG in Update #6 clearly indicates that Israel is not conducting any effective investigations or prosecuting perpetrators for grave ICL or IHL violations.... Most cases were closed without any investigation being conducted at all into incidents that resulted in the deaths of civilians and the massive destruction of civilian objects. Moreover, in the very few cases in which the MAG did order an investigation, there is no evidence that steps were taken with regard to any suspects in accordance with international law standards.” (pp. 28-29)

<sup>39</sup> Imseis refers to “endemic impunity as the prevailing context.” “The 2015 UN HRC report noted that “impunity prevails across the board for violations...allegedly committed by Israeli forces.”<sup>30</sup> Finally, the 2019 UN HRC independent report into protests at the Gaza border noted that “Israel has consistently failed to meaningfully



Israel has pursued policies of settlement in the occupied territories and of shooting unarmed civilians (the Gaza protests) that are unapologetic explicit declarations of its determination to violate established international norms, including those protected through criminalization of the conduct in question under the Rome Statute.

In these circumstances, Israel represents a clear and present danger to the accomplishment of the purpose and object of the Rome Statute, as stated in its preamble. The credibility of the ICC as an institution depends on its ability to impose responsibility for international crimes. At the present juncture, reading the Montevideo Convention flexibly to serve the object and purpose of the Rome Statute seems the best interpretative approach. That might not always have been the case. A more restrictive holistic interpretation considering all the elements in VCLT 31 might have veered away from an interpretation of Palestine as already a state for purposes of accession, for instance, if the parties to the conflict were on the cusp of a negotiated arrangement that would provide a definitive agreed status for Palestine as a self-determining political community. In such a case of imminent restructuring of territory and political authority, Palestine's relationship to statehood might be considered as sufficiently in flux that it ought not to be yet be deemed a "state" for purposes of accession This would be even more likely if the negotiated arrangement contained its own institutional mechanisms for accountability and non-impunity. The object and purpose of the Rome Statute might be served by waiting to see and understand the functioning of such mechanisms and their possible

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investigate and prosecute commanders and soldiers for crimes and violations committed against Palestinians", and that "paltry accountability measures...cast doubt over the State's willingness to scrutinize the actions of its military and civilian leaders." Imseis, *supra* n.34, pp. 4-5.

relationship to domestic and international criminal justice. But, sadly, the circumstances at the present moment are entirely other.<sup>40</sup>

### **Territorial Jurisdiction under 12 (2) of the Rome Statute Does Not Require a “Delegation” of Sovereignty in Addition to the Act of Accession**

In addition to raising the issue of the lawfulness of Palestine’s accession to the ICC, the Attorney General for Israel (and some of the intervenors) has presented arguments against the jurisdiction of the Prosecutor to investigate based entirely on considerations extrinsic to the text of the Statute. The argument is that, in *addition* to accession, there must be a valid delegation of domestic investigatory or prosecutorial authority from Palestine to the ICC for the ICC Prosecutor to be able to act: “a sovereign State that has delegated to the court its criminal jurisdiction” (Paragraph 16) Although none is to be found in the Rome Statute, the Attorney General of Israel simply asserts that there is a “substantive test of whether the entity is concerned is a sovereign state” that is separate from or additional to “mere accession or on the status of “State Party” alone.” (paragraph 20).

Article 12 (1) explicitly provides that it is the act of becoming a State Party to the Rome Statute that *constitutes* that party’s “acceptance” of the jurisdiction of the Court. It is clear, therefore, that *if* an entity is a state for the purposes of accession is it is a state for purposes of accepting the Court’s jurisdiction. This acceptance, *through* accession, is, as the language of 12 (2) indicates, a necessary and sufficient basis for territorial jurisdiction: “the Court may exercise its jurisdiction *if* one or more of the following *States are Parties to this Statute ...: (a) The State on the territory of which the conduct in question occurred.*” (emphasis added). Since 12 (1) and

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<sup>40</sup> See Mark Kersten, “No Justice Without Peace, But What Peace is on Offer?”, *Journal of International Criminal Justice* (2020),

12 (2), whether read separately or together, clearly base territorial jurisdiction on sole fact of conduct having occurred on the territory of a “state” that has acceded to the Rome Statute. It would defy the logic of Article 12 and introduce confusion and uncertainty into the concept of territorial jurisdiction to have any additional test for statehood than that which applies to accession.

As with the Attorney General of Israel’s VCLT arguments, the introduction of tests and criteria with no basis in the Rome Statute seem not so much aimed at the PTC as at delegitimizing any effort by the OTP to investigate or prosecute Israeli nationals as somehow contrary to basic notions or intuitions of the international legal community.

As a conceptual matter, the delegation theory risks painting a misleading picture of the source of the Court’s jurisdiction. That source is not the *transfer*, in whole or part, of domestic legal functions. *Rather the source is the capacity of states under international law to establish independent international institutions through consent to a treaty in the form of a constitutive instrument.* As Dan Sarooshi observes: “The International Court of Justice has affirmed that a constituent treaty can act as a mechanism for conferrals by States of express powers on an organization. In the WHO Advisory Opinion case, the Court observed: ‘The powers conferred on international organizations are normally the subject of an express statement in their constituent instruments.’”<sup>41</sup>

Thus, the PTC explained in a preliminary ruling on jurisdiction in the *Bangladesh/Myanmar* case: “... more than 120 States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to

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<sup>41</sup> Dan Sarooshi, *International Organizations and their Exercise of Sovereign Powers* (Oxford: Oxford university Press, 2005), p. 18.

bring into being an entity called the “International Criminal Court”, possessing objective international personality, and not merely personality recognized by them alone, together with the capacity to act against impunity for the most serious crimes of concern to the international community as a whole and which is complementary to national criminal jurisdictions. Thus, the existing of the ICC is an objective fact. In other words, it is a legal-judicial-institutional entity which has engaged and cooperated not only with State Parties, but with a large number of States not Party to the Statute as well, whether signatories or not. Having said that, the objective legal personality of the Court does not imply either automatic or unconditional *erga omnes* jurisdiction ... ,In general, Article 12(2)(a) of the Statute is the outcome of the compromise reached by States at the Rome Conference that allows the Court to assert “jurisdiction over the most serious crimes of concern to the international community as a whole” on the basis of approaches to criminal jurisdiction that are firmly anchored in international law *and* domestic legal systems.”<sup>42</sup>

The Attorney General of Israel plays on the fact that, not uncommonly, delegation is used as a *description* of the act of *consent of states* to the creation of international institutions, granting the institutions various kinds of authority. The description of the granting of authority by states as “delegation” is sometimes employed to connote the notion that such institutions do not have any powers other than those conferred on them through state consent.

In their seminal article “The Concept of International Delegation”, Curtis Bradley and Judith Kelley propose “a definition of international delegation as a grant of authority by two or more states to an international body to make decisions or take actions.”<sup>43</sup> Thus understood,

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<sup>42</sup> ICC-01/19-27, *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar*, para. 56, Nov. 14 2019.

<sup>43</sup> Curtis A. Bradley & Judith G. Kelley, “The Concept of International Delegation”, 71 *Law and Contemporary Problems* 1-36 (2008). Available at: [https://scholarship.law.duke.edu/faculty\\_scholarship/2164](https://scholarship.law.duke.edu/faculty_scholarship/2164), p. 2.

“delegation” simply refers to the endowment of an international institution or body with authority through the consent of states, which typically (though not always) operates by treaty. In the case of the ICC, the act of consent is accession to the ICC Statute, which establishes the authority of the organs of the Court.

Bradley and Kelley observe: “Adjudicative authority, whether it is granted to courts, tribunals, or ad hoc internal bodies, may cover interstate disputes, disputes between a state and an international organization, disputes between institutions within an international organization, disputes between private parties and states, or disputes between private parties and international organizations.”<sup>44</sup> This set of examples puts the lie to the Attorney General of Israel’s notion that “delegation” implies that the delegating states’ domestic institutions or authorities have parallel or the same powers as an international court or tribunal. *Domestic* institutions generally lack the power to decide interstate disputes, and certainly to decide disputes within international organizations. Not only are such powers not available under domestic law but their exercise by domestic authorities would be in significant measure incompatible with international law (sovereign immunity and immunity of international organizations). And yet as Bradley and Kelley indicate, states have had no difficulty endowing such powers on international courts and tribunals through consent among them. Indeed, the power of the ICC to investigate or prosecute where the relevant domestic court is unwilling or unable obviously has no close analogue or parallel with domestic jurisdiction. The ordinary competences of domestic investigatory or judicial institutions remain unimpeded by such jurisdiction, generally speaking.

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<sup>44</sup> Bradley and Kelley, *supra* n. 43, p. 11.

In sum, there would be no difficulty *describing* the Rome Statute as a “delegation” of authority to the organs of the ICC. If one wants, one can also use the term ‘delegation’ to describe Palestine’s accession to the Rome Statute, and thereby its acceptance of the authority of the Court, By the same token, contrary to the suggestion of the Attorney General of Israel, invoking the word “delegation” here does not magically create some *additional* hoop that has to be jumped through to establish the jurisdiction of the Court.

Although the Rome Statute is not one of them, there *are* treaties that explicitly require States Parties to surrender or transfer domestic jurisdiction in whole or in part to an international court or tribunal. This is generally set out in some specificity, because in such cases performing the treaty usually involves implementing changes in domestic law to facilitate the transfer or “delegation” of authority. This is “delegation” in a stronger sense than the general definition offered by Bradley and Kelley. Treaty provisions of this kind will typically require that, to implement the treaty, States Parties take adequate steps to remove, to the extent required, jurisdiction from domestic authorities and transfer it to the international court or tribunal. *This* kind of “delegation” of domestic sovereignty is not required for the ICC to exercise its authority because, the ICC does so only if domestic instances are unwilling or unable. The ICC’s jurisdiction to investigate and prosecute is shaped by the principle of complementarity: no case is admissible before the ICC unless a State that has jurisdiction is unwilling or unable to investigate or prosecute. The jurisdiction of the ICC does not remove from domestic courts matters that would be otherwise before them. Hence, the Rome Statute lacks provisions of this kind to delegate domestic jurisdiction (despite all the efforts of the Attorney General of Israel to imply-or invent-them).

As Sarooshi points out, delegation is not exclusive.<sup>45</sup> The delegator may continue to exercise powers that it delegates, which by logic includes the power to make additional delegations to other authorities. Thus, when Palestine under the Oslo Accords arguably conferred on Israel the power to investigate and prosecute crimes of Israel nationals on the territory of Palestine, this did not preclude Palestine also conferring powers of investigation and prosecution on the ICC, subject of course to their being no conflict between the two acts of delegation.

In the *Singapore* case, the European Court of Justice drew a distinction between international tribunals that operate through the transfer of domestic jurisdiction from domestic authorities (investor-state arbitral tribunals) and those that do not (such as WTO dispute settlement).<sup>46</sup> In the NAFTA (and continuing in its successor agreement the USMCA) there is a provision that replaces review of domestic agency decisions in trade remedy cases (Anti-Dumping for instance) with review by a binational arbitral panel. Here there is a preclusive effect on domestic proceedings, and thus it is appropriate to understand the nature of the treaty obligation as a transfer or delegation of the powers of *domestic courts* to the binational panels. Originally, when the NAFTA was being brought into force, this naturally required changes to domestic legislation to enable this delegation (as well as provoking a constitutional challenge in the United States, as Bradley and Kelley note).

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<sup>45</sup> “The State can exercise powers on a unilateral basis even while the conferral to the organization remains in force. An example of this is provided by the conferrals by UN Member States of treaty-making powers on the UN: Member States did not restrict their rights to conclude treaties outside the confines of the Organization, and, accordingly, authoritative commentators such as Parry contend that UN Member States still retain their powers to conclude treaties independent of the UN and even in the same areas as the Organization.” Sarooshi, *supra* n. 41, p. 59.

<sup>46</sup> Opinion 2/15 of the Court 16 May 2017, paragraph 292 (emphasis added) “Such a regime which removes disputes from the jurisdiction of the courts of the Member States...cannot be established without the Member States’ consent.”

In claiming that Palestine cannot delegate jurisdiction to the ICC, the Attorney General relies heavily on commitments that Palestine undertook in the Oslo Accords.<sup>47</sup> In light of the longstanding breakdown of the peace process, there are serious doubts about whether and what normative force the Oslo Accords may have at present in international law.<sup>48</sup> Still the Oslo Accords might be relevant anyhow if they can be shown to be a recognition or admission that Palestine does not possess some of the requisite state-like control of the administration of justice to fully participate in the ICC, for example.

The Oslo Accords provide for the administration of criminal justice by Palestine within Palestinian territory *except for* conduct in Palestine by Israeli nationals: “The territorial and functional jurisdiction of [the Palestinian Authority] will apply to all persons, except for Israelis...” The most plausible reading of this provision is as follows: Palestine possesses inherent plenary jurisdiction over criminal justice -but Palestine has accepted voluntarily *an exception or carve out* in the case of Israeli nationals.

Because no case will be admissible before the ICC where Israel is willing and able to prosecute, Palestine’s acceptance of the ICC’s jurisdiction does not hinder Israel’s exercise of its jurisdiction to investigate or prosecute Israeli nationals for crimes in Palestinian territory. Thus, Palestine’s acceptance of ICC jurisdiction is entirely compatible with Palestine’s commitment to Israel under the Oslo Accords.

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<sup>47</sup> *Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip*, Article SVII (2) (1995).

<sup>48</sup> The PTC requested Israel and Palestine to make submissions on the current legal status of the Oslo Accords. Only Palestine responded, to the effect that annexation would permanently void the Oslo Accords. Since annexation has been suspended this simply leaves up in the air to some extent the on-going validity of the Oslo Accords.



Assuming for the sake of argument that the Oslo Accords are to be regarded in the same manner as a treaty, in that they create genuine international obligations, it is a basic canon of interpretation to read treaties in such a way as to avoid conflicts of obligation, or to put it more positively, to interpret both instruments in such a way that both sets of international obligations can be performed.<sup>49</sup> Only if it is impossible to do this, such that the performance of obligations under one agreement requires the actual violation of the other (and vice versa) is there a real conflict.

What the Attorney General of Israel wants to do is to read into Palestine's Oslo commitments a grant to Israel of a power to exclude *any* non-Israeli law enforcement body or court from investigating or prosecuting conduct of Israeli nationals in Palestine even where Israel itself chooses not to exercise its own jurisdiction to investigate or prosecute. Yet neither Palestine nor Israel nor any other state possesses such a power to exclude *international* justice. Indeed, the allocation of law enforcement authority between the Israeli and Palestinian governments in the Oslo Accords in no way speaks to arrangements for international criminal justice. Clearly, the trial by one side in the Israel/Palestine conflict of nationals of the other side raises sensitive issues about fairness and possible bias. These issues are not present in the case of a trial before an independent international tribunal. This simply underlines that the Oslo arrangements speak to issues that are unconnected to international criminal justice.

The Attorney General for Israel suggests that requirement that the conduct *occur* on the territory of a State Party implies that the State Party must be able to exercise *sovereign authority*

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<sup>49</sup> "States are assumed not to derogate from their previous obligations... Where a number of apparently contradictory instruments are simultaneously applicable, international case law and academic opinion endeavor to construe them in such a way as to coordinate their effects and avoid any opposition between them." UNAIDS/World Health Organization/UNDP, International Guidelines on Human Rights and Drug Policy, March 2019.

over the territory where the conduct takes place. This is nothing more than a cryptic or surreptitious means of re-introducing the idea that Palestine cannot really be a State for purposes of the ICC because it does not exercise full sovereignty or self-determination or total control over territory. But the principle of complementarity explicitly contemplates the exercise of jurisdiction by the ICC even and especially where the relevant state is *unable* to investigate and/or prosecute. Despite its repetition numerous times in the memorandum of the Attorney General of Israel, there is never an attempt to explain *why* full sovereignty or control over territory is needed for Palestine to exercise its responsibilities under the Rome Statute, or for the Court to exercise properly its mandate with respect to Palestine.

In the *Bashir* case, the ICC Appeals Chamber noted “the different character of international courts when compared with domestic jurisdictions. *While the latter are essentially an expression of a State’s sovereign power, which is necessarily limited by the sovereign power of the other States, the former, when adjudicating international crimes, do not act on behalf of a particular State or States.* Rather, international courts act on behalf of the international community as a whole.”<sup>50</sup> Of course, the Rome Statute requires a link between either the offence or the nationality of the offender and a State Party of the ICC. But the concept of territory here is not concerned with delimiting the sovereign powers of states in relation to one another.

This is explained by the PTC in the *Bangladesh/Myanmar* case. In that case, Bangladesh sought to invoke the jurisdiction of the ICC, of which it is a State Party, in respect of acts by the government and military of Myanmar, a non-State Party against the Rohingya population. Because some of these acts entailed the dislocation of some of the Rohingya into Bangladeshi

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<sup>50</sup> *Judgment in the Jordan Referral re Al-Bashir Appeal*, No. ICC-02/05-01/09 OA2 Date: 6 May 2019, paragraph 115. (emphasis added).

territory, the PTC held that at least one legal element of the offense (the impact on victims) occurred in Bangladesh. However, the perpetrators who acted to produce this impact remained within Myanmar's borders, under the sovereign control of Myanmar—a non-State Party, which had not accepted the jurisdiction of the ICC. The PTC found that there is a “wide margin of discretion” to define the kind of territorial link required by Article 12 (2) of the Rome Statute (Paragraph 56). The PTC held: “provided that part of the *actus reus* takes place within the territory of a State Party, the Court may thus exercise territorial jurisdiction within the limits prescribed by customary international law.”<sup>51</sup>

In sum, the inquiry demanded by in Article 12 (2) does not concern the degree of sovereign control by a State Party over the territory. Instead, the focus is on whether at least part of the *actus reus* occurred on the territory of a State Party. This will include (as on the facts in *Bangladesh/Myanmar*) the part of the *actus reus* that operates through effects on victims.

### **The Rome Statute Empowers the Organs of the ICC to Determine the “Territory” of Palestine For the Purposes of Jurisdiction**

A final tack taken by the Attorney General of Israel is to claim that “the scope of the territory [of Palestine] is undefined.” (paragraph 49). This means that the territorial delimitation is in abeyance until it can be defined in a settlement to which Israel agrees. In effect, the ICC is invited to embrace an Israeli veto on any definition of the territory of Palestine for purposes of giving effect to the provisions of the Rome Statute. Reminding us of the Netanyahu government's position at odds with the rest of the international community (save the outgoing Trump Administration in the United States), the Attorney General reaffirms “Israel has a long-standing claim to the West Bank and the Gaza Strip ,...” (Paragraph 41)

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<sup>51</sup>Supra n. 50, Paragraph 61.

The notion that a non-State Party has a veto over an international institution's interpretation of its constitutive instrument is nothing less than absurd arrogance.<sup>52</sup> The Chief Prosecutor in her Request has invoked a definition of the territory of Palestine as encompassing the West Bank, Gaza and East Jerusalem.<sup>53</sup> As Pertile indicates, "The vast majority of international actors, including individual states, groups of states, international organizations, technical bodies and judicial institutions consistently identify the West Bank, Gaza and East Jerusalem as Palestinian territory, ..." <sup>54</sup>

The PTC noted in the *Bangladesh/Myanmar* case that the States Parties have provided the ICC with all the powers necessary to achieve the purposes for which the authority was granted to the organization." (Paragraph 60) Since one of the fundamental grounds of jurisdiction in the Rome Statute is territorial, competent organs of the ICC must have the power to determine the bounds of the relevant "territory" of a State Party, albeit this determination is only for purposes of the Statute.

A tribunal may, and must, resolve matters within its jurisdiction, even if the matters in question overlap with a broader international controversy or dispute, which the tribunal does not have the authority to address comprehensively. When the Ukraine brought a case against Russia in the International Court of Justice for violation of *the International Convention on the Suppression of Financing of Terrorism* and the *Convention on the Elimination of All Forms of*

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<sup>52</sup> A slightly more sophisticated version of this notion is to be found in Yael Ronen, "Palestine in the ICC: Statehood and the Right to Self-determination in the Absence of Effective Control," *Journal of International Criminal Justice* (2020), p. 16.

<sup>53</sup> Prosecutor's Request, *supra* n. 8, paragraph 220.

<sup>54</sup> Marco Pertile, "The Borders of the Occupied Palestinian Territory are Determined by Customary Law", *Journal of International Criminal Justice* (2020), p. 8. See also, UN Security Council, Report of the Committee on the Admission of New Members concerning the application of Palestine for admission to membership in the United Nations, para. 10, (Nov. 11, 2011): "With regard to the requirements of a permanent population and a defined territory, the view was expressed that Palestine fulfilled these criteria. It was stressed that the lack of precisely settled borders was not an obstacle to statehood."

*Racial Discrimination*, Russia objected to jurisdiction on the grounds that Ukraine was asking the ICJ to resolve its dispute with Russia over “the status of Crimea,” which would have involved other norms of international law. The ICJ easily dismissed this objection, noting that “The fact that the dispute before the Court forms part of a complex situation that includes various matters, however important” that are the subject of ongoing international disagreement did not prevent it from exercising the jurisdiction that it otherwise had (Paragraph 28).

In another dispute that Ukraine brought against Russia, this time at the WTO, the WTO arbitral panel (presided by Judge George Abi-Saab) found it had jurisdiction to decide whether Russia’s restrictions on transit violated WTO rules, including whether they could be justifiable under the national security exception in the relevant WTO treaty. The arbitral panel carefully noted, however, that its ruling was “not relevant to this determination which actor or actors bear international responsibility for the existence of this situation to which Russia refers. Nor is it necessary for the Panel to characterize the situation between Russia and Ukraine under international law in general.” (paragraph 7.121)

The ICC and other post-Nuremberg international criminal tribunals were designed to operate during on-going conflicts and to contribute to limiting the violence and facilitating peace.<sup>55</sup> The ICC’s role is not limited to post-bellum or post-conflict accountability, where disputes over territory and sovereignty may have already been solved by peace agreements or other arrangements. Indeed, most of the situations where the ICC has investigated or prosecuted involve on-going conflicts. Many international crimes occur in the context of violent struggles over territorial control, and at times where a final peaceful consensual resolution of those conflicts may seem very distant indeed. It is inconceivable, given the purposes of the ICC, that

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<sup>55</sup> Teitel, *supra* n. 36, pp. 89-90.

the drafters intended to exclude all such situations from the ICC's jurisdiction. Among the war crimes over which the ICC has jurisdiction under Article VIII of the statute is "The transfer, directly or indirectly, by the Occupying Power of part of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory." The explicit inclusion of this offense among those over which the Court has subject matter jurisdiction indicates that it is within the Court's normal mandate to consider matters of "occupation" and "territory."

Contrary to the suggestion of the Attorney General of Israel, this does not entail the ICC becoming a "forum to resolve territorial disputes." (footnote 119). Such findings apply only to the investigation and prosecution of a crime within the jurisdiction of Court and in no way prejudice the determination of "sovereign title" through negotiations or an interstate forum for dispute resolution, for example the International Court of Justice. That perspectives of criminal and state responsibility can lead to different approaches to similar factual situations is evident, for example, from the treatment of the decisions of the International Criminal Tribunal for the Former Yugoslavia by the International Court of Justice in the *Bosnia v. Serbia* case.<sup>56</sup>

The perspective of the Rome Statute is that of accountability for international crimes: anti-impunity. This includes a special responsibility toward the victims, who may play an independent part in trials before the ICC and may have a claim of compensation under the Statute.<sup>57</sup> The territorial scope for the investigation as defined by the Chief Prosecutor has proven effective, so far, in facilitating the cooperation of the Palestinian authorities in the

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<sup>56</sup> See the discussion in Robert Howse and Ruti Teitel, Cross-Judging: Tribunalization in a Fragmented but Interconnected Global Order Symposium - The Normalizing of Adjudication In Complex International Governance Regimes: Patterns, Possibilities, and Problems 41 N.Y.U. J. Int'l L. & Pol. 959 (2008-2009), p. 976.

<sup>57</sup> Adalah, *supra* n. 16 : "The main goal of international criminal law practice today is the defense of victims, regardless of whether the actor is a sovereign State or quasi-State."

collection of evidence and the identification of witnesses. It has also proven to be workable for the Court's outreach to victims. In sum, in addition to being consistent with general international legal and political practice, the Chief Prosecutor's understanding of the scope of the territory of Palestine serves well the purposes and functions of the ICC.

Certainly, the Attorney General for Israel offers no evidence to the contrary. The Attorney General provides no examples of how the Prosecutor's understanding could lead to unfairness toward the accused or result in criminal responsibility where none is warranted under the principles of international justice. The Attorney General has provided not even a hint of how the arcane questions of how authority is delimited between Israel and Palestinian authorities in different parts of the occupied territories and East Jerusalem are relevant to the enterprise of the ICC with respect to Palestine.

In the *Bangladesh/Myanmar* case, the PTC has clarified that only one element of the offense needs to be situated within the State Party's territory. This has important implications for the question of ICC jurisdiction in the case of Palestine. It should allay concerns that disputed or uncertain borders or territorial lines of authority could make it problematic to determine the scope of the ICC's actual jurisdiction based on the territorial principle. The scope of the ICC's investigation can be defined by the possibility that *any* element of the offense may have occurred on the territory of Palestine. The territorial link reflects concern for victims among the Palestinian people, indeed all victims on its territory.<sup>58</sup> An important and widely noted aspect of

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<sup>58</sup> "Victims' observations on the Prosecutor's request for a ruling on the Court's territorial jurisdiction in Palestine," Pre-Trial Chamber, Situation in Palestine, March 2020.

the ICC Prosecutor's preliminary examination was sustained effort of outreach to *victims* in Palestine.<sup>59</sup>

## **Conclusion**

The current (and intensely fought) dispute over the ICC's jurisdiction in Palestine raises, as explored above, some interesting doctrinal and theoretical issues. Once one places the ICC properly within the broader universe of international legal order and understands the specific institutional complexity of the ICC itself, the puzzles tend to dissolve, and objections to jurisdiction that seem at first glance powerful, such as that Palestine is not really a State, are revealed to be on quite shaky ground. If the PTC does find that the Prosecutor has jurisdiction to open an investigation more difficult challenges, and legal questions, will lie ahead.

I have already alluded to the fundamental importance of complementarity. If the conduct in question and/or the individuals in question have been investigated or are being investigated by Israel, then the only way that the ICC could still proceed is by concluding that the investigation was or is a sham. I am persuaded by Adalah, Breaking the Silence and other activists who have shown many instances where civilian and military accountability in Israel has failed or been intentionally blocked in the case of the conduct of Israeli personnel in Palestinian territory that may be considered to violate human rights or even constitute an international crime. But there will also be questions of gravity and of the "interests of justice." To be admissible, a case must

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<sup>59</sup> See ICC-01/18-131, Prosecution Response to the Observations of Amicus Curiae, "Legal Representatives of Victims and States, para. 42 (April 30, 2020) the Prosecutor citing Aeyal Gross, *The Writing on the Wall: Rethinking the International law of Occupation* (2017): "traditionally, sovereignty had been attached to the state that had held title to the territory prior to occupation[.] [c] urrently, the focus has shifted to the rights of the population under occupation."



concern offenses that rise to a certain threshold of gravity, as set out in 17(1)(d) of the ICC Statute. In addition, even where the elements of jurisdiction and admissibility are otherwise present, Article 53 allows the Prosecutor not to proceed if there are “substantial reasons to believe that an investigation would not serve the interests of justice.” While the meaning of the “interests of justice” is far from clear from existing ICC jurisprudence, it would arguably include situations where prosecution might endanger delicate peace negotiations, or arrangements for alternative accountability mechanisms such as truth commissions, or forms of sanction that are not conventional criminal convictions and punishments.

And then there is forensic certainty. It is far from clear whether all the requisite elements of each offense could be proven, given the complexities of humanitarian law and the legitimate scope for soldiers to use force, sometimes force that turns out to be lethal against civilians, or non-combatants. I am particularly concerned that Palestine, or some Palestinian activists, may be seeing ICC prosecutions as a substitute for a just negotiated solution of the Israel/Palestine conflict, which has been blocked for a long time and will remain blocked most certainly unless there are major political changes in both Israel and Palestine. Much of the injustice of the occupation is constituted by forms of daily oppression and brutality (border checks, random raids on homes, and so forth) that do not fall so easily within the ICC’s model of international crimes. One must be very moderate in one’s expectations about the capacity of the ICC to bring about peace and justice, as opposed to responding to specific atrocities and giving victims some hope of accountability. Even where there are clear breaches of international law, challenging the core elements of the occupation through the ICC is a risky strategy; many internationally wrongful acts are not crimes. Thus, investigation in the case of Palestine may well lead to bitter disappointment with the Court among those who are seeking international criminal justice as a

remedy for the occupation and its ills. The failure of criminal charges against core elements or practices of the occupation would also doubtless be used by Israel as a way of continuing to defend or legitimize its' conduct of the occupation in the broader political debate.

This does not mean that seeking to hold Israeli officials and soldiers accountable in this way is simply futile. Certainly, facing an ICC investigation, Israel may be less likely to continue assiduously unwritten policies like the shooting, with live ammunition, of unarmed protesters at the Gaza border by snipers safely on the Israeli side of the barrier. Based on complementarity, Israel may be inclined to reopen some inquiries that are closed or open investigations where nothing was previously done, as well as tighten command responsibility for respecting humanitarian law in operations that involve putting civilians at risk. These would all be good things.

But let us say, contrary to what the legal analysis in this essay predicts, the PTC rules that the Prosecutor does not have the jurisdiction to open an investigation. The predominant narrative will be that, while Israelis clearly have blood on their hands in Palestine, some mix of political pressure and legal technicalities is blocking accountability. In fact, one of Israel's leading political journalists, Noa Landau, broke a story recently that Israel's own government agencies have been keeping a list of Israelis who may be vulnerable to ICC prosecution, if the Prosecutor's jurisdiction is upheld.<sup>60</sup> Ultimately, if a narrative of Israeli guilt (but unaccountability) further permeates global public opinion, one might expect domestic investigations and prosecutions based on universal jurisdiction. Since the major limitation on the permissiveness of international law toward such domestic criminal jurisdiction is, as noted, the

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<sup>60</sup> Landau, *supra* n. 22.

*Lotus* proviso that the exercise of domestic criminal jurisdiction cannot infringe the territorial sovereignty of another State (e.g. abduction of suspects), as well as the apparent disallowance of trial in absentia, domestic prosecutions will only occur if Israeli soldiers or former soldiers travel. Still, it might be easier to deal with the ICC and its complementarity principle than domestic authorities determined to pursue a narrative of Israeli guilt for international crimes.

Perhaps therefore one would say that, in different senses, both the passionate advocates of ICC involvement and the passionate opponents of jurisdiction may have reason to beware of what they wish for.