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1. THE PRE-TRIAL CHAMBER I DECISION ON THE ICC'S TERRITORIAL JURISDICTION IN PALESTINE

1. Introduction: the Context and Scope of the 5 February 2021 Decision of the Pre-Trial Chamber

On 5 February 2021, more than one year after the filing of the Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine (hereinafter: Prosecution request), the Pre-Trial Chamber I (PTC I) of the International Criminal Court (ICC) issued the Decision on the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine' (PTC I decision). The Chamber (composed of Judges Péter Kovács of Hungary, Marc Perrin de Brichambaut of France, and Reine Adélaïde Sophie Alapini-Gansou of Benin) unanimously found that Palestine is a State Party to the Rome Statute; and held, by Majority: a) that Palestine qualifies as '[t]he State on the territory of which the conduct in question occurred' for the purposes of article 12(2)(a) of the Statute, and b) that the Court's territorial jurisdiction in the Situation in Palestine extends to the territories occupied by Israel since 1967, namely Gaza and the West Bank, including East Jerusalem – Judge Kovács dissenting on both conclusions, and thus appending a Partly dissenting opinion (Kovács DO). As the decision was not appealed, on 3 March 2021 the Prosecutor announced the opening of an investigation into the Situation in Palestine. Having clarified the context and the scope of the decision, in this comment I will provide an overview of the PTC I decision and of Judge Kovács' dissenting opinion. In the final section, I will share some thoughts on the Majority's reasoning, with regard to whether it was entitled to make a determination on the extent of the ICC's territorial jurisdiction in Palestine, and to the merits of such determination.

On 20 December 2019, the ICC Prosecutor, Fatou Bensouda, issued a Statement on the conclusion of the preliminary examination of the Situation in Palestine. In such statement, Bensouda announced that according to the Office of the Prosecutor (OTP), all the statutory criteria for the opening of an investigation into the situation in Palestine have been met. In particular, according to the Prosecutor there is a reasonable basis to believe that war crimes were committed: by members of the Israel Defense Forces (IDF), of Hamas, and of other Palestinian armed groups, in the context of the 2014 hostilities in Gaza; and in the context of Israel's occupation of the West Bank, including East Jerusalem (Prosecution request, paras.94-95). In addition, the Prosecution alleged that the scope of the situation

"could encompass an investigation into the 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" (para.96). Considering that the preliminary examination was based on a referral from the State of Palestine, under Article 53(1) of the Rome Statute of the ICC (ICC St.) there was no requirement to seek the Pre-Trial Chamber's authorization to open the investigation. However, "given the unique and highly contested legal and factual issues attaching to this situation, namely, the territory within which the investigation may be conducted", the Prosecutor decided to request from the Pre-Trial Chamber, pursuant to Article 19(3) ICC St., a "jurisdictional ruling" concerning the scope of the Court's territorial jurisdiction in the *Situation in Palestine*. By this request, the Prosecution sought confirmation "that the 'territory' over which the Court may exercise its jurisdiction under article 12(2)(a) comprises the West Bank, including East Jerusalem, and Gaza" (para.220).

Concerning the procedure, it is interesting to note that a first request had been rejected *in limine* and struck off the record by the PTC I on 21 January 2020, when the judges granted a page-limit extension and invited the OTP to file a new request – that is, the 22 January 2020 Prosecution request I will refer to in this comment. Between 28 January and 20 February 2020, the PTC I set the procedure and the schedule for the submission of observations on such question of jurisdiction; accordingly, by 31 March 2020 the Chamber received observations on behalf of the State of Palestine, 11 groups of victims, and 43 *amici curiae* (including States Parties to the ICC Statute, international organizations, the Office of Public Counsel for the Defence, several NGOs, international law professors, and associations of lawyers) – some of which I will refer to. Although it had been invited to submit observations, Israel decided not to participate in the proceedings.

2. Preliminary Issues: the PTC's Authority to Rule and the Legal Basis of the Decision

I will now turn to the overview of the 5 February 2021 decision and of Judge Kovács' dissenting opinion. In the first part, the PTC I dealt with three preliminary issues: two of which concerning the Court's authority to rule, and one concerning the legal basis of the decision. First, the judges unanimously rejected the argument raised by some *amici curiae* – including the Republic of Brazil (Brazilian Observations on ICC Territorial Jurisdiction in Palestine, paras.10, 33) and the Republic of Uganda (The observations of the Republic of Uganda pursuant to rule 103 of the Rules of Procedure and Evidence, para.5 – Uganda AC) – according to which a decision on the Prosecutor's request would constitute a political decision and potentially affect the Court's legitimacy. In this regard, the PTC I found that the Prosecutor "addressed a legal issue to the Chamber … that is capable of a legal answer based on the provisions of the Statute", and highlighted that the fact that the decision "might entail political consequences shall not prevent the Chamber from exercising its mandate" (PTC I decision, paras.56-57). A second argument had been raised, according to which in light of the so-called *Monetary Gold* principle, the request could not be entertained as in so doing, the Court would rule on the rights and obligations of a third party – Israel – which had not consented to the exercise of its jurisdiction (see, among others, Uganda AC, paras.8-9; and Amicus Curiae Observations of Prof. Laurie Blank et alii, para.30). The PTC I unanimously found that the *Monetary Gold* principle was not applicable as the ICC does not have jurisdiction over States but solely over natural persons (PTC I decision, para.59), and that in any case the decision "does not entail any determination on the border disputes

between Palestine and Israel" (para.60). In this regard, the judges noted that even national criminal courts "sometimes have to determine the extent of the territory of States in order to identify the extent of their territorial jurisdiction, without constituting a determination on the actual scope of that State's territory" (para.61). However, considering that as recognized by the Permanent Court of International Justice in the *Lotus* case and in the 6 September 2018 Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute" (PTC I decision on Myanmar), the territoriality of criminal law "is not an absolute principle of international law and by no means coincides with territorial sovereignty" (PTC I decision on Myanmar, para.66), the present decision "has no bearing on the scope of Palestine's territory" (PTC I decision, para. 62). Finally, the Pre-Trial Chamber found that in this case it was in a position to rule on the applicability of Article 19(3) ICC St., as it constitutes the legal basis of the decision. The Majority – Judge de Brichambaut appending a separate opinion on this issue – held that a ruling on a question of jurisdiction "may be sought and issued before a case emanates from a situation" (PTC I decision, para.68). For the purpose of this comment, suffices it to say that Judges Kovács and Alapini-Gansou agreed that Article 19 distinguishes between three distinct procedural mechanisms regulating different situations, and that paragraph 3 shall be interpreted as vesting the Prosecutor with the power to seek a ruling in order to be assured that an investigation proceeds on a sound jurisdictional basis, including when the investigation results from the referral by a State Party (*see* PTC I decision, paras.73, 78-79, 82). As to Judge de Brichambaut, he basically argued that in his view, as he had already highlighted in the partially dissenting opinion he had appended to the decision on the 9 April 2018 request, a jurisdictional ruling pursuant to Article 19(3) can only be requested *after* potential cases are identified – including, as in the present circumstances, at the end of the preliminary examination stage.

3. The Core of the Ruling: a) Palestine can be Considered as a "State" for the Purpose of Article 12(2)(a) of the ICC Statute

The most contentious and interesting findings are those concerning the core of the Prosecution request. According to the judges, the request entailed two different assessments, concerning: a) whether Palestine can be considered "[t]he State on the territory of which the conduct in question occurred" within the meaning of article 12(2)(a) ICC St.; and b) the extent of the Court's territorial jurisdiction in the situation under scrutiny (PTC I decision, para.87).

A first, interesting finding concerns the applicable sources of law. In the Majority's view – Judge Kovács dissenting (see below) – given that both issues "primarily rest on, and are resolved by, a proper construction of the relevant provisions of the Statute, including in particular articles 12(2)(a), 125(3) and 126(2) of the Statute", the Chamber did not need to resort to subsidiary sources of law under Article 21(1)(b) and (c) of the Statute, nor to article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT) (PTC I decision, para.88).

As to the first issue, Judges Perrin de Brichambaut and Alapini-Gansou adopted a formalistic approach, holding that even though "the Statute, the Rules of Procedure and Evidence, and the Regulations of the Court do not provide a definition of 'State'" (para.92), the Chamber could answer the question, pursuant to Article 31(1) VCLT, by interpreting Article 12(2)(a) ICC St. "in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of the object and purpose of the Statute" (para.91). If the reference to "State" in Article 12(2)(a) was taken to mean *a State fulfilling the*

criteria for statehood under general international law, it would in fact "exceed the object and purpose of the Statute and, more specifically, the judicial functions of the Chamber to rule on the individual criminal responsibility of the persons brought before it" (para.106), as the ICC "is not constitutionally competent to determine matters of statehood that would bind the international community" and such determination "is not required for the … general exercise of the Court's mandate" (para.108). Therefore, the Majority argued that the term "State" in Article 12(2)(a) has to be read in connection with the chapeau of Article 12(2) and in light of the more general context of the Statute – that is to say, "in keeping with the outcome of the accession procedure pursuant to articles 12(1), 125(3) and 126(2) of the Statute, and subject to the settlement of a dispute regarding the accession of an entity by the Assembly of States Parties under Article 119(2)" (para.111). In other words, the Majority seems to agree with the Prosecution's argument that following the deposit of its instrument of accession, Palestine qualified as a "State on the territory of which the conduct in question occurred" for the purposes of article 12(2)(a) because "a 'State' for the purposes of articles 12(1) and 125(3) should also be considered a 'State' under article 12(2) of the Statute" (Prosecution request, para.103). The judges underlined that Article 125(3) prescribes that the Statute "shall be open to accession by all States", and that no other criteria or conditions have to be met in order to be granted accession to the Statute. Therefore in discharging its function as depositary of the Statute, the United Nations Secretary-General had correctly followed the determination of the United Nations General Assembly (UNGA) concerning Palestine's statehood, as contained in its Resolution 67/19 adopted on 29 November 2012 (UNGA Res.67/19). As a result, the Chamber would neither be endowed with the power to review the outcome of the accession procedure, nor to challenge the validity of UNGA Res.67/19 (para.99). However the Majority proceeded to review the circumstances of Palestine's accession in order to ascertain whether Palestine followed the correct and ordinary procedure (paras.100-102). In doing so, a particular weight was given to the fact that no State Party – including the seven States that submitted observations arguing that Palestine could not be considered a State for the purposes of article 12(2)(a) – had activated the dispute settlement mechanism set forth in Article 119(2), as this would be the only manner of challenging the automatic entry into force of the Statute *vis-à-vis* Palestine. In this regard, the judges recalled that following its accession, Palestine had developed an active role in the work of the Assembly of State Parties (ASP) as a State Party to the Statute, including by being added to the list of State Parties' delegations, being elected to the Bureau, requesting items to be included in the provisional agenda of ASP's session in 2018, contributing to the Court's budget, and participating in the adoption of ASP's resolutions. Finally, the Majority argued that based on the principle of effectiveness, it would be contradictory to allow Palestine to become a State Party while limiting the Statute's inherent effects over it. On the one hand, the only exemption to the jurisdiction of the Court granted by the Statute was the opt-out clause concerning war crimes (Article 124); and on the other, denying the automatic entry into force for a particular acceding State Party "would be tantamount to a reservation in contravention of Article 120" (para.102). According to the Majority, as it confirms that Article 12(2)(a) "is confined to determining whether or not 'the conduct in question' occurred on the territory of a State Party for the purpose of establishing individual criminal responsibility for the crimes within the jurisdiction of the Court" (para.103), the conclusion that the Statute automatically enters into force for a new State Party is also coherent with the object and scope of the Rome Statute. In light of the above, the Chamber concluded – Judge Kovács dissenting – that "the reference to '[t]he State on the territory of which the conduct

in question occurred' in article 12(2)(a) of the Statute must be interpreted as a reference to a State Party to the Statute" (para.109), and that "Palestine is therefore a State Party to the Statute, and, as a result, a 'State' for the purposes of article 12(2)(a) of the Statute" (para.112).

In his partly dissenting opinion, Judge Kovács contested the Majority's reasoning, analysis, and conclusion(s) with regard to the first issue. First, he argued that "the focal point of the discussion is not the validity of the accession but rather the legal character of the territory falling (potentially) under the jurisdiction of the ICC" (Kovács DO, para.15). In Kovács' view, the Majority incorrectly framed the issue at hand based on two main, incorrect presumptions. First, that the exercise of the power "to clarify what should be understood by 'State' in the formula 'State on the territory of which' with respect to Palestine" would amount to an *a posteriori* review of Palestine's accession (para.34). Second, that the fact that the ICC "is not constitutionally competent to determine matters of statehood *that would bind the international community*" implied that the Court is not competent to determine matters of statehood when this is "necessary to adjudicate a case or in other terms *if the determination is required for the specific purposes of the present proceedings*" (paras.35-36). Therefore he argued that "it is within the competence of the Chamber to assess 'matters of statehood' *hic et nunc, in concreto*, and within the limits of the case *sub judice*" (para.37) – as the PTC I did, for instance, in its "Decision on the Prosecutor's request for authorization of an investigation" issued on 27 January 2016, where it found that "South Ossetia is to be considered as part of Georgia, as it is generally not considered an independent State and is not a Member State of the United Nations" (para.38). In other words, pursuant to the principle of *Kompetenz-Kompetenz* the ICC could – and should – carry out all those assessments that are necessary to determine the limits of its own jurisdiction, including whether in the specific circumstances of the case it is entitled to exercise its jurisdiction *ratione loci, personae, temporis,* and *materiae.* As "the crucial issue raised in the Request relates to the existence or non- existence of the 'territory', or more precisely, the 'territory of the State' [of Palestine]", the Chamber should assess "the existence or non-existence of … the 'territory of the State' [of Palestine] as understood under contemporary international law" (paras. 53-54). In addition, Judge Kovács did not agree with the finding that the issues at stake can be addressed by making recourse to Article 31(1) VCLT alone, in light of Article 21(1)(a) ICC St. In particular, he argued that Articles 21(1)(b) and (c) should also be considered, as the issues before the Chamber were so complex that they could not be answered having recourse only to Articles 12(2)(a), 21(1)(a), and 125(3) of the Statute (para.119). Therefore, he proceeded to assess the issue of the existence or non-existence of the territory of Palestine, on the basis of Articles 21(1)(b) and (c) ICC St. and Article 31(1)(c) VCLT, in light of the criteria of statehood laid down in Article 1 of the Montevideo Convention (paras.120-160) and the practice and jurisprudence of international institutions (paras.161-183); …and concluded that Palestine was in a peculiar situation. In fact, provided that the fact that an entity is a State "does not mean that its borders are absolutely settled", the judge argued that it could be said that "at this time, Palestine's actual boundaries are uncertain" and that "defining them is by no means the task of this Court" (para.189). As to UNGA Res.67/19 (whose content and impact are thoroughly analyzed at paras.191-267), Judge Kovács argued that "no conclusion can be drawn that the 'Non-Member Observer State' status … should … mean that its holder is a sovereign State" (para.219), and that the resolution "cannot be referred to as proof as far as alleged perfect statehood, precise borders or territory are concerned" (para.232). In conclusion, Judge Kovács found that the fact that Palestine is a State Party to the ICC Statute "does not mean

that its 'statehood' has been achieved, that the issue of its territory as 'territory of the State' has been settled, or that its 'borders' can be conceived as State boundaries" (para.267).

4. …b) the Extent of the Court's Territorial Jurisdiction in the Situation in Palestine

Concerning the second issue – the delimitation of the territory of Palestine for the purpose of defining the Court's territorial jurisdiction –, the Majority provided a very concise reasoning. The judges noted that this issue was "inextricably linked" to the first, and that it was the accession procedure which would also provide, in the specific circumstances of the case, "the relevant indications as to the extent of the Court's territorial jurisdiction" (para.114). Having reiterated that "disputed borders have never prevented a State from becoming a State Party to the Statute and, as such, cannot prevent the Court from exercising its jurisdiction" (para.115), Judges Perrin de Brichambaut and Alapini-Gansou turned to UNGA Res.67/19 with the aim of assessing whether the Court's territorial jurisdiction in the *Situation in Palestine* extended to the territories occupied by Israel since 1967. Thus they noted that in according non-member observer State status in the UN to Palestine, UNGA Res.67/19 had reaffirmed "the right of the Palestinian people to self-determination and to independence in their State of Palestine *on the Palestinian territory occupied since 1967*" (para.116); and recalled, among other things, that Palestinian people needed to be enabled to exercise their sovereignty over such territory, whose status remained one of military occupation (para.117). On this basis, the Majority concluded that "the Court's territorial jurisdiction in the *Situation in Palestine* extends to the territories occupied by Israel since 1967, namely Gaza and the West Bank, including East Jerusalem" (para.118). Such conclusion would be in line with Article 21(3) ICC St., where it provides that the application and interpretation of law "must be consistent with internationally recognized human rights" (para.119) – that is, with the right to self-determination within the Occupied Palestinian Territory which had been explicitly recognized to Palestinians by several international bodies, including the International Court of Justice, the UNGA, and the UN Security Council (paras.120-123). For the sake of completeness, the Majority decided to also briefly address the issue whether the Oslo Accords were pertinent to the proceedings (paras.124-129). In this regard, the judges recalled that in its 5 March 2020 Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan (AC's judgment on investigation into Afghanistan), the Appeals Chamber held (at para.44) that the effect of pre-existing treaty obligations and other international obligations is not a matter for consideration in relation to challenges to the authorization of an investigation. Similarly, the Oslo Agreements would not be pertinent to the resolution of the issue of the scope of the Court's territorial jurisdiction over Palestine, as they "may be raised by interested States based on article 19 of the Statute, rather than in relation to a question of jurisdiction in connection with the initiation of an investigation" (PTC I decision, para.129). Although the wording of this paragraph could leave some room for a different interpretation, I believe that the Majority intended to clarify that *other* challenges to the jurisdiction of the Court could be made at a later stage on the basis of the Oslo Accords. In other words: provided that they are not pertinent to the resolution of the issue of the scope of the Court's territorial jurisdiction in Palestine, those agreements may have an impact in relation to obligations arising from Part 9 of the Statute – that is: in relation to the cooperation States shall grant to the Court. In particular, obligations undertaken by the Palestine Liberation Organization *vis-à-vis* Israel may be characterized as "a pre-existing treaty obligation undertaken with respect

to another State" or "obligations under international agreements" for the purposes of Articles 97 and 98(2) of the Statute.

Judge Kovács disagreed also with this reasoning and conclusion. First, he contended that the condemnation of the occupation did not "automatically and *ipso facto* mean the confirmation of Palestine's legal title over the occupied territory and … the whole territory according to the 1967 lines", and that the reference to the Palestinian people's right to self-determination "is not helpful in determining an *existing and recognized legal state-boundary* in 2021" since – as the Prosecutor pointed out in the Report on Preliminary Examination Activities 2019 (2019 PE Report) – a State's territory "should be understood as 'areas under the sovereignty of the State'" (Kovács DO, para.277 – quoting from para.47 of the Report). Conversely, according to Kovács the Oslo Accords could not only be considered "applicable treaties for the purposes of the Statute under article 21(1)(b) of the Statute" (para.308), but even "the key to adequately answering the question … concerning the geographical scope of the Court's jurisdiction" (para.320). In fact, the judge noted that such agreements have not been considered as invalid due to the violation of the *jus cogens* norm on the right to self-determination (para.342), and that they would be compatible with the "special agreements rule" contained in Geneva Convention IV (paras.343-356). As to the 5 March 2020 judgment of the Appeals Chamber, its *dictum* would not be applicable to the present situation since while the agreements it dealt with were contracted between two sovereign States (Afghanistan and the United States of America) and their content is related to agreements falling under Article 98 ICC St., the Oslo Accords "deal with the transfer and repartition of competences between a sovereign State and Palestine, a special entity" (para.360). Conversely, the judge argued that PTC I finding that the ICC can "exercise its jurisdiction pursuant to article 12(2)(a) of the Statute in the same circumstances in which States Parties would be allowed to assert jurisdiction over such crimes under their legal systems" (PTC I decision on Myanmar, para.70) would entail "that the Prosecutor may exercise her investigative competences under the same circumstances that would allow Palestine, as a State Party, to assert jurisdiction over such crimes under its legal system, namely by duly taking into account the repartition of competences according to the Oslo Accords" (Kovács DO, para.370). Therefore, according to Judge Kovács the geographical scope of the Court's jurisdiction in the Situation in Palestine should cover the territories of the West-Bank, East-Jerusalem and the Gaza strip but "subject to due consideration of the different legal regimes applied in areas A, B, C and East Jerusalem" according to Israeli-Palestinian agreements (para.372). Such solution would be in compliance with the general principles of international law which he relied upon on the basis of Article 21(1)(c) ICC St., including those of *nemo plus iuris transferre potest quam ipse habet* and *pacta tertiis nec nocent, nec prosunt* (para.375). In light of the above, Kovacs concluded that the Prosecutor may only proceed to investigate with regard to Areas A and B, while an Article 12(3) declaration from Israel would be needed to investigate conduct occurred in Area C and East-Jerusalem (see the "explanations" he provided "from a practical point of view" at para.374).

5. Few Thoughts on the PTC I's Decision

The most important outcome of the 5 February 2021 decision – and one which could not be taken for granted, considering that no less than 22 *amici curiae* (including 7 States Parties) had a different conclusion in this regard in their respective briefs – is that the PTC I has unanimously found that the ICC can exercise its jurisdiction in the *Situation in Palestine* in

accordance with, and for the purposes of the Rome Statute. At the same time, it is worth noting that in the final paragraph of the decision, the Majority emphasized that "the Chamber's conclusions pertain to the current stage of the proceedings, namely the initiation of an investigation by the Prosecutor" and that "the Chamber will be in a position to examine further questions of jurisdiction" which may arise at a later stage, including in relation to a Prosecutor's application for the issuance of a warrant of arrest or summons to appear or to a challenge to jurisdiction submitted under Article 19(2) ICC St. by a State or a suspect (PTC I decision, para.131). In other words: no finding in the decision has to be considered as "final", as the Pre-Trial Chamber may reach different conclusions at a later stage, with regard to cases arising from the situation. Should such opportunity arise, it would be particularly interesting in my view to see whether the judges may reconsider their reasoning and the conclusion concerning the second issue.

Second, I would like to draw attention on the PTC I's finding that the Oslo Agreements would not be pertinent to the resolution of the issue of the scope of the Court's territorial jurisdiction over Palestine. In his *amicus curiae* brief, Professor Schabas argued that the notion of delegated jurisdiction (*nemo plus iuris transferre potest quam ipse habet*) – which Judge Kovács relied on – would not be particularly helpful in determining the extent of the territory of a State for the purposes of applying Article 12(2)(a), as the latter prescribes that jurisdiction over the territory of a State Party is an automatic consequence of ratification or accession by such State Party (Opinion in Accordance with Article 103 of the Rules of Procedure and Evidence, para.26 – hereinafter: Schabas AC). A similar approach was taken in another brief, recalling that "States routinely assert jurisdiction over criminal offences on an 'objective territoriality' basis, and they concurrently view these exercises of jurisdiction as being lawful" (Members of the Canadian Partnership for International Justice, Amicus Curiae Observations on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", para.26). As underlined by Beth Van Schaack, there are several objections to the claim that upon ratification of the Rome Statute, States Parties delegate to the ICC "jurisdiction over crimes that they could otherwise prosecute" (B. Van Schaack, *Can the Int'l Criminal Court Try US Officials? – The Theory of "Delegated Jurisdiction" and Its Discontents (Part II)*, in *JustSecurity*, 9 April 2018, available here; see also, *ex plurimis*, C. Stahn, *Response: The ICC, Pre-ExistingJurisdictional Treaty Regimes, and the Limits of the* Nemo Dat Quod Non Habet Doctrine—*A Reply to Michael Newton*, in *Va. Jour. Transn. Law*, 2016, pp.443-454). In fact, the Prosecution made recourse to one of such arguments when it argued, in the request for authorization to open an investigation into the *Situation in Afghanistan*, that while a State may decide not to exercise its enforcement jurisdiction and even relinquish such jurisdiction to another State by means of an international agreement, such an agreement would not affect the ICC's jurisdiction since it "does not extinguish a State's prescriptive and adjudicative jurisdiction, which serve as inherent attributes of State sovereignty" (Public redacted version of "Request for authorisation of an investigation pursuant to article 15", 20 November 2017, ICC-02/17-7-Conf-Exp, 20 November 2017, para.46 and fn.47). Unfortunately, the judges of the PTC I followed the same line of reasoning of the Appeals Chamber's decision in the *Situation in Afghanistan* (AC's judgment on investigation into Afghanistan, para.44), missing another opportunity to provide a clarification with regard to the legal basis for the exercise of the ICC's jurisdiction.

Third, and most importantly, it seems to me that the Majority did not properly entertain the assessment concerning the territorial reach of the ICC's jurisdiction, in light of the Prosecution request. As correctly highlighted by the Majority, the ICC "is not

constitutionally competent to determine matters of statehood that would bind the international community" (PTC I decision, para.108; in the same spirit, *see* also A. Pellet, *The Palestinian Declaration and the Jurisdiction of the International Criminal Court*, in *Jour. Crim. Just.*, 2010, p.983 – arguing that "it is not for the Court to substitute itself for states in recognizing or not Palestine as a state; the ICC is only called upon to pronounce on whether or not the conditions for exercising its statutory jurisdiction are fulfilled"). In fact, the issue under scrutiny is *not* the statehood of Palestine, but whether and to what extent the ICC can exercise its jurisdiction over the territory of Palestine (arguments against this conclusion were presented by many *amici curiae* – *see*, among others, the briefs submitted by Czech Republic (paras.3-7), the Federal Republic of Germany (paras.17-25), and Hungary (paras.34-45) – and scholars – *see*, among others, K. Ambos, *"Solid jurisdictional basis"? The ICC's fragile jurisdiction for crimes allegedly committed in Palestine*, in *EJIL: Talk!*, 2 March 2021, available here). In the specific circumstances of the case, the Prosecution requested the PTC I to confirm "that the 'territory' over which the Court may exercise its jurisdiction under article 12(2)(a) comprises the West Bank, including East Jerusalem, and Gaza" (Prosecution request, para.220). As to its substance, this was neither an unusual request, nor a request that the Court could not entertain.

As recognized by the PTC I, criminal courts may have to determine the extent of the territory of States in order to identify the extent of their territorial jurisdiction (PTC I decision, para.61). The Court has already performed such assessment. When confronted with the issue of the ICC's territorial reach in the *Situation in Georgia*, the PTC I ruled that the Prosecutor could proceed with an investigation of crimes committed in and around South Ossetia because "South Ossetia is to be considered as part of Georgia" (Decision on the Prosecutor's request for authorization of an investigation, 27 January 2016, para.6). As recalled by Professor Schabas, should the opportunity arise, the Court would need to rule on the same issue with regard to other States Parties – such as Cyprus (whose territory is partially occupied by Turkey) and Argentina (that protested the announcement made by the United Kingdom that it was extending the Court's jurisdiction to the Falkland Islands) (Schabas AC, paras.18-20). Furthermore, a determination concerning the territory of a State is not only required in relation to the preconditions to the exercise of the Court's jurisdiction. This determination can also be required in relation to the material element of the war crime of transfer by the occupying power of parts of its civilian population into the territory it occupies, or of the crime of aggression, pursuant to Articles 8(2)(b)(viii) and 8*bis*(2)(a)-(f) ICC St. respectively.

As noted above, the PTC I's conclusion on the territorial jurisdiction appears to be predicated on a rather cursory analysis of the UNGA Res.67/19, which refers to "the right of the Palestinian people to self-determination and to independence in their State of Palestine *on the Palestinian territory occupied since 1967*" (paras.116-117). The PTC I failed to explain to which extent UNGA Res.67/19 was the adequate instrument to define the territory of the State of Palestine. In so doing, the judges seem to contradict the finding that "in keeping with article 21(1)(a) … the issues under consideration primarily rest on, and are resolved by, a proper construction of the relevant provisions of the Statute" (PTC I decision, para.88), as UNGA Res.67/19 should be considered a source to be applied *in the second place*, in accordance with Article 21(1)(b). The Statute and the other legal instruments of the Court have not introduced an *autonomous* definition of "territory" for the sole purposes of the Statute. Thus, I believe that in performing such determinations, the judges could not rely on the sources identified by Article 21(1)(a) of the Statute – namely, the Statute, the Elements

of Crimes, and the Rules of Procedure and Evidence. This conclusion is consistent with the practice of the OTP. In the 2019 PE Report, the OTP made recourse to the law of the sea to ascertain whether crimes allegedly committed in the South China Sea fell within the territorial jurisdiction of the Court (2019 PE Report, paras.44-51). Against this background, the reliance on UNGA Res.67/19 to determine the territorial reach of the ICC's jurisdiction sounds problematic. In my view the Majority should have found that if the territorial reach of the Court's jurisdiction could not be determined by making recourse to primary sources, the Chamber had to ground such assessment on subsidiary sources, in accordance with Article 21(1)(b) and (c) of the Statute.

In conclusion, while on the one hand I agree with the PTC I that it was entitled to assess whether *for the purposes of the Statute* the areas identified at paras.94 to 96 of the Prosecution request were part of Palestine, on the other I believe that in so doing, they should have made recourse to all the relevant UN instruments, the applicable treaties, the principles and rules of international law, and the general principles of law derived from national laws. Having adopted this approach, and having analyzed *all* the applicable (subsidiary) sources, the Majority could have reached opposite conclusions. On the one hand, had the judges taken into account – as suggested by dr. Heinsch and dr. Pinzauti in their brief – that under the law of belligerent occupation Israel cannot be vested with the sovereign right of jurisdiction over territory which it occupies (*see* "Submissions Pursuant to Rule 103 (Robert Heinsch & Giulia Pinzauti)", paras.64-65; and R. Heinsch, G. Pinzauti, *To Be (a State) or Not to Be? The Relevance of the Law of Belligerent Occupation with regard to Palestine's Statehood before the ICC*, in *Jour. Crim. Just.*, 2020, pp.935-937), they could have confirmed that the "territory" over which the Court may exercise its jurisdiction comprises the West Bank, including East Jerusalem, and Gaza. Conversely, had the Majority agreed with Professor Malcolm Shaw that the principle of self-determination can only "assuage" the effects of deficiencies in effective control and that Israel may assert sovereign rights over Palestine on the basis of a variety of agreements (*see* Submission of Observations to the Pre-Trial Chamber Pursuant to Rule 103, paras.28-33), the PTC I could have concluded that the Court may not exercise its jurisdiction over (some of) the above-mentioned areas.

LUIGI PROSPERI