EUROPEAN CENTRE FOR LAW AND JUSTICE

7 February 2018

VIA OVERNIGHT DELIVERY SERVICE
& FIRST CLASS MAIL

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Prosecutor, International Criminal Court
Post Office Box 19519
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The Netherlands

RE: THE ISSUE OF ICC JURISDICTION: FACTUAL AND LEGAL ANALYSIS TO ASSIST THE PROSECUTOR IN DETERMINING WHETHER THE INTERNATIONAL CRIMINAL COURT MAY LAWFULLY ASSERT ITS JURISDICTION OVER NATIONALS OF THE STATE OF ISRAEL, A NON-CONSENTING, NON-PARTY STATE TO THE ROME STATUTE (PART 1)

Your Excellency:

By way of introduction, the European Centre for Law and Justice (ECLJ) is an international, Non-Governmental Organisation (NGO), dedicated, *inter alia*, to the promotion and protection of human rights and to the furtherance of the Rule of Law in international affairs. The ECLJ has held Special Consultative Status before the United Nations/ECOSOC since 2007[1]. As you will doubtless recall, the ECLJ has filed numerous documents with the OTP in the past to assist the ICC Prosecutor and the OTP staff in resolving contentious issues before you.

Like the International Criminal Court (ICC), the ECLJ is committed to the principle of bringing to justice those who commit the world's most serious crimes. At the same time, the ECLJ seeks to ensure that such undertakings be accomplished wholly in accordance with the Rule of Law. These same goals are echoed within the Preamble of the Rome Statute. In other words, in legal proceedings, the desire for justice does not—*and, indeed, must not*—justify unlawful or questionable means to achieve otherwise desirable ends. The ECLJ submits this legal brief to assist the Office of the Prosecutor (OTP) in carrying out its preliminary assessment of the situation involving alleged Article 5 violations vis-à-vis the State of Israel.

We at the ECLJ are encouraged by the progress that has been made as reflected in the OTP's latest status report on ongoing preliminary examinations[2], but we are dismayed that clear-cut legal arguments before the OTP regarding Israel have still not put an end to the

[1] *Consultative Status for the European Centre for Law and Justice*, U.N. DEP'T ECON. & SOC. AFF., http://esango.un.org/civilsociety/consultativeStatusSummary.do?profileCode=3010 (last visited 29 Jan. 2018).
[2] OFFICE OF THE PROSECUTOR, REPORT ON PRELIMINARY EXAMINATION ACTIVITIES (2017), ¶¶ 51–78 (4 Dec. 2017), https://www.icc-cpi.int/itemsDocuments/2017-PE-rep/2017-otp-rep-PE_ENG.pdf.

investigation. We ask that the OTP recall that lawful jurisdiction is the *sine qua non* of the Rule of Law that both authorises and legitimises a court's decisions. Any court lacking lawful jurisdiction over an accused is impotent to act on any matter brought before it regarding such accused (save only to acknowledge its lack of jurisdiction over the accused and to release the accused, if he/she is in custody).

In this legal brief, we contest the notion that the ICC may lawfully exercise jurisdiction over nationals of the non-Party State of Israel. Doing so without Israel's explicit consent thereto is a violation of the intent of the convening parties to the Rome Conference, the Rome Statute itself, and Customary International Law.

The ECLJ submits that the ICC lacks jurisdiction over the nationals of *all* non-consenting, third-party States that have declined to accede to the Rome Statute. And, specifically concerning Israel, the ICC lacks jurisdiction *inter alia* for the reasons listed and discussed below. The ECLJ further submits that each of the following reasons is individually sufficient to establish that the ICC lacks jurisdiction over Israeli nationals. Taken together—*since they all apply simultaneously to the State of Israel*—the following reasons overwhelmingly establish that the ICC lacks any and all jurisdiction over Israeli nationals.

- **First**, applying the terms of a treaty like the Rome Statute to the nationals of a non-consenting, non-party State like Israel violates the customary international law principle that no State is bound by the terms of a treaty to which it has not acceded, and any treaty term that purports to extend jurisdiction of such treaty over the nationals of non-consenting, non-party States is *ultra vires* and void *ab initio vis-à-vis* nationals of such States. At a minimum, the said treaty should be interpreted and applied in such a way that respects this fundamental principle;

- **Second**, according to the customary international law principle *uti possidetis juris*, when the State of Israel came into existence upon the departure of the British from Palestine in May 1948, Israel inherited ownership of, *and sovereignty over*, the entirety of the territory of the former Mandate for Palestine lying between the Jordan rift valley and the Mediterranean Sea, thereby (1) becoming the sole legitimate sovereign over all such territory, (2) extinguishing all competing claims thereto, and (3) as a non-party State to the Rome Statute, negating any ICC jurisdiction over its nationals and territory alleged by others who speciously claim title to the land or portions thereof;

- **Third**, the entity which has brought the charges against Israel, the so-called "State of Palestine", fails to meet the criteria to constitute a "State" under customary international law and is, thereby, precluded by the explicit terms of the Rome Statute from being able to accede to ICC jurisdiction and refer situations to the Court;

- **Fourth**, investigating Israeli nationals based on Palestinian allegations would unlawfully violate Article 98 of the Rome Statute, would reward the PA's strategy of using the ICC as a political weapon in the Palestinian struggle against Israel, and would entrench the Palestinian Authority's clear-cut breach of a number of agreements that the Palestinians entered into freely with Israel, agreements whose terms, *inter alia*, (1) negate all jurisdiction by PA officials over Israeli nationals; (2) significantly circumscribe the capacity of the PA to enter into international

agreements; (3) designate the specific means to be used—*to wit, bilateral negotiations between the parties*—to resolve outstanding issues like determining the boundaries of a future "State of Palestine", the future status of so-called "settlements", the future status of Jerusalem, as well as the ultimate disposition of "Palestinian refugees"; and (4) expressly prohibit the parties from taking unilateral steps to change the status of the West Bank and Gaza Strip pending the outcome of permanent status negotiations; and

- **Fifth**, the State of Israel has one of the most independent, sophisticated, effective, and just legal systems in the world today, employing jurists who have proven themselves not only able but also willing to investigate and, *if the evidence so warrants*[3], to try Israeli nationals who appear to have committed war crimes or crimes against humanity, thereby precluding admissibility of ICC proceedings against Israeli nationals, this in accordance with the Rome Statute principle of "complementarity"[4]. With respect to this latter point, we wish to emphasise the following: First, because Israel is a non-consenting, non-party State to the Rome Statute, under customary international law, the ICC has no lawful jurisdiction over Israel and its nationals irrespective of the effectiveness of the Israeli judicial system. Second, as a non-consenting, non-party State to the Rome Statute, Israel is under no obligation to prove to the OTP or anyone else that its judicial system fully meets the ICC's complementarity criteria (since such criteria do not—*and indeed cannot*—bind a non-party State without its consent). Nonetheless, ***we submit that an unbiased analysis of the Israeli judicial system should convince even the most skeptical that the conditions of complementarity are fully met by Israel's legal system and its handling of suspected violations by Israeli nationals.***

Our memo on the Israeli judicial system and how it easily satisfies the requirements of complementarity as understood in the Rome Statute will be submitted to your office in a separate filing.

As noted earlier, the ECLJ submits that each of the reasons cited above is sufficient *in and of itself* to preclude the ICC from exercising jurisdiction over any issues arising between Israelis and Palestinians. We further submit that the foregoing reasons taken together overwhelmingly establish that the ICC is precluded from exercising jurisdiction over Israeli

[3]It must be noted at the outset that any Israeli soldier accused of crimes by Palestinians or anyone else also enjoys the full panoply of rights that accrue to any criminal accused, to wit, the right to the presumption of innocence, the right to remain silent, the right to counsel, the right to confront one's accusers, and so on, as well as the right to have each element of the charged offence or offences proven beyond a reasonable doubt before guilt is established. It must also be recognised that wartime situations are inherently confusing and stressful, requiring split-second decision-making regarding whether to shoot or refrain from shooting. Mistakes inevitably happen in wartime, yet mistakes are not crimes. Further, urban warfare is among the most difficult situations for soldiers because of the constricted nature of the battlefield as well as the presence of large numbers of civilians. It also happens to be the favoured battleground for the Palestinians in the Gaza Strip. Finally, one must keep in mind that battlefields do not readily lend themselves to the timely collection of relevant evidence of crimes, making significantly more difficult the proving of an accused's guilt beyond a reasonable doubt. In other words, taken together, one cannot judge the efficacy of the Israeli judicial system based solely or primarily on the number of trials held and convictions obtained.

[4]The issue of complementarity does not, strictly speaking, involve "jurisdiction". Rather, it is described in the Rome Statute as an issue of "admissibility". Nonetheless, however it is described, if States are able and willing to investigate and prosecute (when the evidence so warrants) accuseds for Article 5 crimes, the ICC is precluded from intervening. *See, e.g.*, Rome Statute of the International Criminal Court pmbl. cl.10, art. 1, 5, 17 July 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute].

[redacted]

nationals. The first four reasons above will be discussed *seriatim* below, whereas, as indicated *supra*, the discussion of complementarity will be submitted to your office at a later date in a separate brief.

I. PRINCIPLES OF LAW WHICH PRECLUDE ICC JURISDICTION OVER THE STATE OF ISRAEL AND ITS NATIONALS

A. General Principles of International Law Applicable in This Matter

International law can be defined as "the system of rules, principles, and processes intended to govern relations at the interstate level, including the relations among states, organizations, and individuals"[5]. Article 38 of the Statute of the International Court of Justice (ICJ) lists three primary and several secondary sources of international law[6]. The three primary sources are: (1) "international conventions . . . establishing *rules expressly recognized by the contesting states*"[7] (commonly referred to as "conventional international law" and binding on the parties to the respective convention or treaty); (2) "international custom, as evidence of a general practice accepted as law"[8] (commonly referred to a "customary international law" and generally binding on all nations); and (3) "the general principles of law recognized by civilized nations"[9]. Secondary sources of international law include "judicial decisions," "teaching of the most highly qualified publicists of the various nations,"[10]

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[5]MARY ELLEN O'CONNELL ET AL., THE INTERNATIONAL LEGAL SYSTEM: CASES AND MATERIALS 3 (6th ed. 2010).

[6]Statute of the International Court of Justice, art. 38, 26 June 1945, U.S.T.S. 993 [hereinafter ICJ Statute]. *See also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 (AM. LAW. INST. 1986) [hereinafter RESTATEMENT], for sources of international law:

> (1) A rule of international law is one that has been accepted as such by the international community of states
> (a) in the form of customary law;
> (b) by international agreement; or
> (c) by derivation from general principles common to major legal systems of the world.
> (2) Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.
> (3) International agreements create law for the states parties thereto . . . .
> (4) General principles common to the major legal systems . . . may be invoked as supplementary rules of international law where appropriate.

Id.

[7]ICJ Statute, *supra* note 6, art. 38(1)(a) (emphasis added). Note especially the phrase, "establishing rules expressly recognized by the contesting states". Such rules need not be recognised by states which are *not* parties to the convention. Some jurists question whether treaties should even be considered as a source of international law. Sir Gerald Fitzmaurice, for example, has opined that "'treaties are no more a source of law than an ordinary private law contract that creates rights and obligations . . . . In itself, the treaty and "the law" it contains only applies to the parties to it'". INTERNATIONAL LAW: CASES AND MATERIALS 95 (Louis Henkin ed., 3d ed. 1993) [hereinafter HENKIN] (quoting Gerald Fitzmaurice, *Some Problems Regarding the Formal Sources of International Law*, *in* SYMBOLAE VERZIJL 153, 157–58 (Frederik M. van Asbeck et al. eds., 1958)).

[8]ICJ Statute, *supra* note 6, art. 38(1)(b). "The view of most international lawyers is that customary law is not a form of tacit treaty but an independent form of law; and that, when a custom satisfying the definition in Article 38 is established, it constitutes a general rule of international law which, subject to one reservation, applies to every state". HENKIN, *supra* note 7, at 87. That "one reservation" applies to the State which, "while the custom is in process of formation, unambiguously and persistently registers its objection to the recognition of the practice as law". *Id.*

[9]ICJ Statute, *supra* note 6, art. 38(1)(c); *see also* O'CONNELL, *supra* note 5, at 60. These include common principles of law and justice reflected in the legal systems of civilised states.

[10]ICJ Statute, *supra* note 6, art. 38(1)(d). Louis Henkin aptly notes that "[t]he place of the writer in international law has always been more important than in municipal legal systems. The basic systematisation of international law is largely the work of publicists, from Grotius and Gentilis onwards. . . . In the [civil law] systems reference

(commonly referred to as *opinio juris*) as well as principles of equity and fairness[11]. In this section, we will focus primarily on the relationship and interaction between conventional international law and customary international law as they apply to: (1) the Rome Statute; (2) the International Criminal Court (ICC), a specific creation of the Rome Statute; and (3) nationals of non-consenting, non-party States.

Conventional international law is found in conventions, treaties, and similar negotiated agreements between and among States as well as agreements between States and other international actors (like the United Nations or NATO), and it is binding on the parties to such agreements[12]. Accordingly, conventional international law is a consent-based legal regime.

Customary international law, on the other hand, is law based on custom that develops over an extended period of time and is considered binding on all States[13]. Although it is not necessarily *written* law, customary international law is nonetheless considered "law" because States generally comply with its requirements because they believe that they have a legal obligation to do so[14].

It is a foundational principle of customary international law that a State that has not become a party to a treaty or other international convention is not bound by the terms of such treaty or convention[15]. Accordingly, principles of customary international law constitute the default provisions governing the relationship between States, and they will always supersede contrary provisions of conventional international law as far as States not party to the respective convention are concerned. In other words, a non-party State to an international convention is not bound by the terms of such convention *without its consent*. As such, in general (and absent an intervening, bilateral agreement between them that modifies custom), *the relations between a State Party to a convention and a non-party State to that same convention are governed solely by customary international law related to resolving the matter between them.* Recognition of this principle is key when determining the legal reach of an

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to textbook writers and commentators is a normal practice, as the perusal of any collection of decisions of the German, Swiss or other European Supreme Courts will show". HENKIN, *supra* note 7, at 123.

[11] HENKIN, *supra* note 7, at 123.

[12] "Every treaty in force is binding upon *the parties to it* and must be performed *by them* in good faith". Vienna Convention on the Law of Treaties art. 26, 23 May 1969, 1155 U.N.T.S. 331 (emphasis added).

[13] There is one notable exception. A State may exempt itself from an international custom if that State is a persistent objector during the period that the custom develops. Curtis A. Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L.J. 202, 211 (2010). Additionally, customary law is frequently incorporated into treaties, thereby making it also binding as *conventional law* for the States Parties to the respective treaty.

[14] In that sense, customary international law differs from customary usage (such as ceremonial salutes between warships at sea or exempting diplomatic vehicles from certain parking regulations), since States recognise no legal obligation to do the latter:

> The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts, is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.

North Sea Continental Shelf (Ger. v. Den.), Judgement, 1969 I.C.J. 3, ¶ 77 (20 Feb.).

[15] *See, e.g.*, Vienna Convention, *supra* note 12, art. 34. There can be an exception here, too. Principles enshrined in treaties may evolve into custom over time if non-party States to the respective treaty begin to conform their activities to such principles because they believe that they have a legal obligation to do so. North Sea Continental Shelf, 1969 I.C.J. at 41, ¶ 71.

institution like the International Criminal Court (ICC), an institution created pursuant to the Rome Statute[16], a treaty to which a significant number of important States have not acceded (such as, the United States of America, the People's Republic of China, Russia, India, Pakistan, Israel, Iran, and Egypt, to name but a few[17]).

The Rome Statute exists solely because its States Parties (i.e., States that have signed and ratified the treaty) have negotiated and/or agreed to its terms. In certain circumstances, the Statute purports to permit the ICC to exercise jurisdiction over the nationals of non-consenting, non-party States[18]. *The grant of such jurisdiction violates customary international law*[19]. Indeed, this issue was one of the points of contention during the drafting of the Rome Statute, and ***many key State players in the international community were uncomfortable with a treaty which contravened international legal norms by purporting to bring within its scope nationals of otherwise non-consenting States***[20].

Despite the fact that the Rome Statute contains a provision that violates customary international law by subjecting nationals of non-consenting, non-party States to the terms of a treaty to which they have not acceded, attempts to bring nationals of such States before the ICC for investigation and possible trial—*via that very provision*—are ongoing. In 2009, for example, despite the fact that Israel was not a State Party to the Rome Statute, the Palestinian Authority (PA) submitted a declaration to the ICC Registrar, in which it purported to accede to the Rome Statute pursuant to Article 12(3)[21]. It did so in an attempt to bring Israeli soldiers and government officials within ICC jurisdiction, *inter alia*, for alleged Article 5 crimes committed in the Gaza Strip during the 2008–09 Israeli military incursion known as "Operation Cast Lead"[22]. More recently, the Union of the Comoros filed a referral with the ICC Prosecutor, requesting that the Office of the Prosecutor (OTP) investigate and the ICC (ultimately) try Israeli soldiers for their alleged Article 5 violations during the 2010 boarding of the Mavi Marmara, at the time a Comoros-flagged vessel, which was attempting to breach

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[16]Rome Statute, *supra* note 4. As of 29 Jan. 2018, 123 States have acceded to the Statute. *Chapter XVIII*, United Nations Treaty Collection, https://treaties.un.org/Pages/ShowMTDSGDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no=XVIII-10&chapter=18&lang=en (last visited 29 January 2018).

[17]*See The States Parties to the Rome Statute*, INT'L CRIMINAL. CT., https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last visited 29 Jan. 2018). Note that among the non-acceding States are the four most populous States in the world (i.e., China, India, the United States, and Indonesia). *Country Comparison: Population*, CENT. INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/rankorder/2119rank.html. As such, approximately one-half of the world's population lives in countries that have rejected the Rome Statute and ICC jurisdiction. Note, further, that many States in volatile regions of the world have also declined to accede to the Statute (e.g., Israel, Iran, Egypt, and Pakistan). *The States Parties to the Rome Statute*, *supra*.

[18]*See* Rome Statute, *supra* note 4, art. 12(2)(a) (authorizing the ICC to exercise jurisdiction even when only one State involved is a party to the Rome Statute or has accepted jurisdiction under paragraph 3).

[19]*Supra* note 15.

[20]*See generally* David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12 (1999).

[21]Article 12(3) permits a non-party "State" to accede to ICC jurisdiction by lodging a declaration with the ICC Registrar, *see* Rome Statute, *supra* note 4, art. 12(3), which the PA attempted to do, *see infra* note 22, even though it was not a State.

[22]Minister of Justice Ali Khashan, *Declaration Recognizing the Jurisdiction of the International Criminal Court*, PALESTINIAN NAT'L AUTH. (29 Jan. 2009), http://www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279777/20090122PalestinianDeclaration2.pdf. The ICC Office of the Prosecutor subsequently rejected this declaration because it recognised that the PA was not a State for purposes of the Rome Statute. Statement, Office of the Prosecutor, International Criminal Court, Situation in Palestine (3 Apr. 2012), https://www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf.

Israel's naval blockade of the Gaza Strip[23]. And, more recently still, Palestinian officials have once again sought to accede to the ICC in order to bring Israeli soldiers and government officials before the ICC to answer for alleged crimes committed during the 2014 Israeli military operation in the Gaza Strip called "Operation Protective Edge"[24].

Nonetheless, irrespective of the truthfulness or falsity of the allegations of criminal wrongdoing in the above examples, the ICC is not the proper forum when nationals of a non-consenting, non-party State to the Rome Statute, like Israel, are involved, absent such State's express grant of its consent thereto, consent which Israel has not granted (as is its right as a sovereign State).

B. Despite the Rome Statute's Stated Goal of Ensuring that the Perpetrators of the Most Serious International Crimes Not Go Unpunished[25], the ICC is Nonetheless a Court of *Limited* Jurisdiction

The ICC is, by the Rome Statute's own terms, a court of limited, not plenary, jurisdiction. ICC jurisdiction is expressly limited in a number of significant ways (*each of which, in some measure, works against the actual achievement of the Statute's stated goal of ensuring that the perpetrators of the most serious international crimes are brought to justice for their crimes*[26]). Accordingly, teleological arguments made to justify the expansion of ICC authority to investigate and try nationals of non-consenting, non-party States by claiming such expansion is required to ensure that perpetrators of the most serious crimes do not go unpunished ring especially hollow—*especially in light of the fact that the Statute allows nationals of States Parties to evade prosecution in certain circumstances denied to nationals of non-party States* (discussed more fully *infra*).

Among the explicit limitations on ICC jurisdiction are the following:

(1) The Rome Statute only permits "States"[27] to accede to ICC jurisdiction[28].

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[23]Referral of the Union of the Comoros with Respect to the 31 May 2010 Israeli Raid on the Humanitarian Aid Flotilla Bound for Gaza Strip to the International Criminal Court (May 14, 2013), http://www.icc-cpi.int/iccdocs/otp/Referral-from-Comoros.pdf.

[24]*See, e.g.*, William Booth, *Palestinians Press International Criminal Court to Charge Israel*, WASH. POST (25 June 2015), https://www.washingtonpost.com/world/middle_east/palestinians-press-international-criminal-court-to-charge-israel-with-war-crimes/2015/06/25/c0c85306-19d1-11e5-bed8-1093ee58dad0_story.html. The ECLJ submits that the OTP erred as a matter of law in allowing Palestine to accede to the ICC's jurisdiction based on the UN General Assembly's agreeing to change Palestine's status *at the UN* from "Entity" with observer status to "Non-member State" with observer status. Under the UN Charter, when Member States act collectively as part of the General Assembly, they are bound by the terms governing that body. Those terms limit the General Assembly to making "recommendations". *See, e.g.*, U.N. Charter arts. 10–14. Hence, the General Assembly could not create or recognise in any way, shape or form a Palestinian "State". Accordingly, no Palestinian "State" came into existence by the General Assembly's action.

[25]Rome Statute, *supra* note 4, pmbl. cls. 4–5.

[26]*Id.*

[27]The term "State", in UN and international practice, especially when capitalised, refers to recognised, sovereign nation-states. *See, e.g.*, G.A. Res. 25/2625, Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (24 Oct. 1970); LOUIS HENKIN, INTERNATIONAL LAW: POLITICS, VALUES AND FUNCTIONS 29–30 (1990); EMMERICH DE VATTEL, 3 THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW APPLIED TO THE CONDUCT AND TO THE AFFAIRS OF NATIONS AND OF SOVEREIGNS 3–6, 11 (Charles G. Fenwick trans., Carnegie Inst. of Wash. 1916) (1758).

[28]*See, e.g.*, Rome Statute, *supra* note 4, art. 12 (limiting accession to "States"); *id.* art. 14 (limiting referral of situations to "States"); *id.* art. 112 (limiting membership in Assembly of States Parties to "States"); *id.* art. 125 (limiting accession to the Statute to "States"). Moreover, Professor Otto Triffterer noted in his Commentary on

(2) The Statute limits ICC jurisdiction to the finite list of crimes found in Article 5: the crime of genocide, crimes against humanity, war crimes, and the crime of aggression[29]. The Statute further limits the ICC's jurisdiction over war crimes to those committed as "part of a plan or policy or as part of a large-scale commission of such crimes"[30]. Finally, "the Court shall determine that a case is inadmissible where . . . [t]he case is not of sufficient gravity to justify further action by the Court"[31].

(3) The Statute limits ICC jurisdiction by time. The ICC Prosecutor, for example, may only investigate and try crimes committed *after* the treaty came into force.[32] In addition to the time limit regarding when the treaty came into force, ICC jurisdiction may be deferred by the UN Security Council acting under Chapter VII of the UN Charter for an indefinite number of successive twelve-month periods[33]. Further, each State upon acceding to the Statute may declare that the treaty shall not apply to its territory or nationals regarding war crimes for up to seven years from the respective State's date of accession[34].

(4) The Statute permits ICC jurisdiction to be limited by a State Party's explicit rejection of the definition of aggression, once adopted, or of amendments to the other listed crimes[35]. Were a State Party to reject the definition of aggression or any amendment to other listed crimes, it would not be answerable for the crime of aggression or for the amended crimes. In the case of rejecting amendments to already listed crimes, the State Party would remain answerable, but only for the crimes as originally defined in the Statute[36].

(5) The Statute precludes prosecution of persons who may have committed Article 5 crimes when under the age of eighteen[37].

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the Rome Conference that, "[i]n accordance with normal modern practice for multilateral treaties, the [Rome] Statute [was] open for signature by all *States*". OTTO TRIFFTERER & KAI AMBOS, COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 1287 (1999) (emphasis added). The only exception would be a referral by the UN Security Council acting under Chapter VII of the UN Charter of a situation to the ICC. The Security Council alone has authority to refer a non-State entity to the ICC (as it did, for example, with respect to the Darfur region of Sudan). S.C. Res. 1593 (Mar. 31, 2005).

[29]Rome Statute, *supra* note 4, art. 5. Note that, with respect to the crime of aggression, "Article 121(5) gives States Parties the choice either to accept or not to accept any amendment to Article 5. This means that a State Party may exclude the jurisdiction of the Court with regard to the crime of aggression even when this crime should have been defined and accepted by seven-eighths of the States Parties as required by Article 121(4)". Hans-Peter Kaul, *Preconditions to the Exercise of Jurisdiction*, *in* 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, 583, 605 (Antonio Cassese et al. eds., 2002).

[30]Rome Statute, *supra* note 4, art. 8.

[31]*Id.* art. 17(1)(d).

[32]*Id.* art. 11. *See also id. art. 8bis* (regarding crime of aggression).

[33]*Id.* art. 16.

[34]*Id.* art. 124.

[35]*Id.* arts. 5(2),121(5). The definition of "aggression" was agreed to at the 2010 Kampala Review Conference in Uganda. It is to take effect in a State one year after it is adopted by thirty States Parties and after a decision made by the required majority of States on a date after 1 January 2017. International Criminal Court RC/Res.6, The Crime of Aggression (11 June 2010), https://treaties.un.org/doc/source/docs/RC-Res.6-ENG.pdf.

[36]Here again, States Parties to the Rome Statute could free themselves of jurisdiction from certain crimes, while non-party States could not. *One wonders how and from what source of law the States that negotiated the Rome Statute could impose harsher terms on nationals of States not a party to the Statute than on their own nationals.*

[37]Rome Statute, *supra* note 4, art. 26.

[redacted]

(6) The Statute precludes trials *in absentia*[38].

(7) The Statute limits the admissibility of ICC prosecutions to situations where national courts are either unwilling or unable to try and punish perpetrators for Article 5 crimes[39]. In other words, where national courts are willing and able to try and punish accused perpetrators, the ICC lacks the ability to act. This reflects the concept of "complementarity". According to Luis Moreno-Ocampo, the ICC's first Prosecutor, the ideal situation would be for the ICC never to have to try a case[40].

(8) The Statute precludes ICC jurisdiction to try alleged Article 5 perpetrators who are not nationals of a State Party to the Statute *and* who commit the crime in the territory of a non-Party State[41]. This generally reflects the consent-based nature of treaties.

As noted in (3) and (4) above, despite its stated goal of ensuring that perpetrators of Article 5 crimes are to be brought to justice, in reality, the Rome Statute expressly permits nationals of *its own States Parties* to evade prosecution for certain crimes in certain circumstances, ***while not extending the same benefit to nationals of non-party States***. Hence, while application of the Statute's terms is permitted to vary among States Parties, nationals of non-party States are strictly subject to the Statute's terms, without exceptions and with immediate effect. ***We submit that this is an absurd and, therefore, untenable outcome.*** Specifically, Article 12(2)(a) states that the ICC may exercise jurisdiction over alleged perpetrators of Article 5 crimes committed on the territory of a State Party, *irrespective of the nationality of the accused*[42]. Such language purports to provide that nationals of non-consenting, non-party States may be brought before the ICC. Yet, the Rome Statute allows nationals *of its own States Parties* to evade ICC jurisdiction in certain instances[43] while

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[38] *Id.* art. 63.

[39] *Id.* pmbl. cl. 10; *id.* art. 1.

[40] *See Global Leaders—Luis Moreno Ocampo*, INT'L BAR ASS'N (1 Feb. 2013), http://www.ibanet.org/Article/Detail.aspx?ArticleUid=81213dcf-0911-4141-ad29-a486f9b03d37.

[41] Rome Statute, *supra* note 4, art. 12 (expressly delineating when the ICC may exercise jurisdiction, which does not include third-party nationals committing Article 5 crimes on third-party States' territory); *see also* Kaul, *supra* note 29, at 583, 612.

[42] Article 12(2) of the Rome Statute reads, in pertinent part, as follows:

> 2. In the case of article 13 [deals with Exercise of Jurisdiction], paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
>
> (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft ....

Rome Statute, *supra* note 4, art. 12(2)(a). Note that Article 12(2)(a) applies irrespective of the nationality of the perpetrator of the crime. Accordingly, nationals of non-party States are subject to ICC prosecution according to the Rome Statute. Note further that a non-party State may accede to ICC jurisdiction pursuant to Article 12(3).

[43] Such as by allowing newly acceding States to defer ICC jurisdiction over their nationals and territories for war crimes for up to seven years, *id.* art. 124, as well as by allowing States Parties to reject the definition of aggression (once adopted) or future amendments to other listed crimes, *id.* art. 121(5). ***None of this is allowed to non-consenting, non-party States. Instead, their nationals are liable to be tried for war crimes without any option of delay in application of such provisions. Further, whereas States Parties can reject the definition of the crime of aggression (and, thus, avoid its application to their nationals) as well as reject any definitional changes to existing crimes, non-consenting, third-party States do not have that option. Hence, the Rome Statute not only violates the third-party State's rights to reject the treaty altogether, it punishes the third-party***

simultaneously claiming the right of the ICC to try *non-party State nationals* for such crimes. ***In other words, under the Rome Statute, accused nationals of a State that has rejected the Rome Statute altogether have fewer rights and protections than the nationals of States that agreed to be bound by the Statute in the first place***[44]. ***That is a perverse and wholly unreasonable result in any legal system.*** *One wonders how the States that negotiated the Rome Statute could conceive that this accords with the Rule of Law, fundamental fairness, and principles of equity.* We submit that Article 12(2)(a) does not so accord, is wholly unlawful under customary international law, and, hence, is *ultra vires*.

A further issue is that language in the Rome Statute regarding the various Article 5 crimes reads as follows: "*For the purpose of this Statute*, [named crime] means . . ."[45]. To the extent that the meaning and/or elements of a specified Article 5 crime differ from descriptions and/or elements of similar crimes *as they currently exist in customary international law or other binding international conventions* (*like the Geneva Conventions of 1949*), the ICC claims the right to try accused nationals from non-consenting, third-party States for newly created "crimes" that may not actually exist under customary international law or applicable conventions. A prime example would be the language of the crime bearing on "settlements". The previous prohibition on "deporting and transferring" civilians into occupied territory[46] was changed at Arab insistence to also prohibit "indirect" transfer, thereby creating an entirely new offence, "which was designed to make a war crime out of voluntary and free movement of Jews into [the West Bank]"[47]. ***We submit that such a change to the traditional definition cannot be applied to Israel or any other non-consenting State without that State's prior consent.***

C. Article 12(2)(a) of the Rome Statute Which Asserts ICC Jurisdiction Over Nationals of Non-Consenting, Non-Party States Defies International Law and is, Therefore, *Ultra Vires*

The incorporation of Article 12(2)(a) into the Rome Statute stands in defiance of customary international law, to the extent that it concerns the nationals of non-consenting, non-party States. In support of this contention, we offer the following three points:

- **First**, Article 12(2)(a) disregards the well-established principle in customary international law requiring a State's consent in order for a treaty to bind that State's nationals.

- **Second**, other international tribunals have recognised and affirmed the consent-based nature of international law.

State by holding its nationals to a more stringent standard than it requires of the nationals of the States Parties themselves. That not only violates customary international law, it also violates common sense and rules of equity.

[44]JENNIFER ELSEA, INTERNATIONAL CRIMINAL COURT: OVERVIEW AND SELECTED LEGAL ISSUES 13, 13 n.68 (Cong. Research Serv. 2002) [hereinafter CRS REPORT] (noting that the ICC appears to have broader jurisdiction over war crimes committed by non-party nationals than by nationals of States Parties to the Statute).

[45]*See, e.g.*, Rome Statute, *supra* note 4, arts. 6, 7, 8.2 (emphasis added).

[46]Geneva Convention Relative to the Treatment of Prisoners of War art. 51, 12 Aug. 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

[47]Eugene Kontorovich, *Politicizing the International Criminal Court*, JERUSALEM CTR. FOR PUB. AFF., http://jcpa.org/politicizing_the_international_criminal_court/ (last visited 30 Jan. 2018).

- **Third**, asserting the existence of "universal jurisdiction" over Article 5 crimes (as some do[48] in order to ensnare nationals of non-party States) does not automatically or necessarily mean that the ICC, a court created by only a portion of the world community, may exercise lawful jurisdiction over the nationals of a non-consenting, non-party State from the world community at large[49].

When the government of a State exercises its sovereign will regarding the acceptance or rejection of a convention or treaty, the officials of that State are, in fact, acting as agents on behalf of that State's *nationals*[50]. We must recognise, for example, that the territorial entities we call "Nigeria" or "Jordan" or "Canada" do not—and, indeed, *cannot*—"do" anything. Only persons from such entities—to wit, "Nigerians" and "Jordanians" and "Canadians"—can act. Further, we cannot haul "Nigeria" or "Jordan" or "Canada" before the bar of any court; we can only haul "Nigerians" and "Jordanians" and "Canadians" before such a court. Accordingly, when one says that the State of Israel or the United States of America or the People's Republic of China "refuses to accede" to a treaty like the Rome Statute, what one is *really* saying is that actual persons—*the leaders of those States acting on behalf of their respective nationals*—are refusing to place their respective "States" (meaning *their respective nationals* and *territories*) under the authority, or within the jurisdiction, of a court created by other States pursuant to such treaty.

Thus, when international law states that "[a] treaty does not create either obligations or rights for a third *State* without its consent"[51], it is, in reality, referring to obligations and rights on the part of the third State's *nationals*. To paraphrase, a treaty does not create either obligations or rights for the *nationals* of a third-party State without the consent *of that State as embodied by its authorised representatives*. In truth, all actual *actors* in international law are real persons[52], and all decisions in international law affect real persons. Hence, when it is asserted that the purpose of the ICC is to punish "individuals" not "States"[53], although that is a *literally true* statement, it is, nonetheless, wholly banal, since it is impossible to punish

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[48]*See, e.g.*, Dapo Akande, *The Jurisdiction of the International Court over Nationals of Non-Parties: Legal Basis and Limits*, 1 J. INT'L CRIM. JUST. 618, 626 (2003).

[49]Note that the ICC was never intended to be a court of universal jurisdiction, but rather a court of limited jurisdiction as circumscribed by the Rome Statute. If the ICC purported to have universal jurisdiction, there would not be a requirement for a nexus to States Parties (territorial or personal). Thus, universal jurisdiction cannot be used as a catchall for claiming jurisdiction over non-nationals in defiance of international law principles.

[50]The Rome Statute claims the right to subject the nationals of third-party States who commit (or are alleged to have committed) Article 5 crimes in the territory of a State Party to the Rome Statute to investigation and/or trial by the ICC. Rome Statute, *supra* note 4, art. 12(2)(a). Yet, such a claim violates the right of that individual as determined by his State of nationality not to be transferred to and tried by a Court whose jurisdiction was created pursuant to a convention that his State of nationality rejected. *See* Vienna Convention, *supra* note 12, art. 34. That does *not* mean that such an individual is not subject to investigation and trial; he may be investigated and tried by the courts of the State on whose territory he allegedly committed the crime. *What is prohibited is his being turned over to a Court created by a treaty to which his State of nationality has refused to accede and, hence, does not recognise.*

[51]Vienna Convention, *supra* note 12, art. 34 (emphasis added). Article 34 simply incorporates the customary law principle into the treaty. This is a common practice, and doing so does not remove the principle from customary international law, although it does make it part of binding conventional law for those States which are a party to the treaty which incorporates the customary law principle.

[52]Even corporations, which enjoy legal "personality" and possess "nationality", act through real persons (to wit, their corporate officers and boards of directors), and, if "punished", it is real persons who pay the penalty (i.e., officers, directors, and shareholders).

[53]*See, e.g.*, CRS REPORT, *supra* note 44, at 5.

"States" as such. One can only punish individual persons in or from such States[54]. *Accordingly, the* ***"punish individuals, not States" argument is, in reality, a contrived argument that seeks to sidestep the inconvenient strictures of contrary customary international law in order to permit the ICC to bring within its jurisdictional reach otherwise unreachable persons.***

When "States" (meaning *the authorised representatives of the people in those States*) get together to negotiate a treaty, they are free to modify the application of customary international law principles *amongst themselves as they see fit pertaining to their respective nationals and territories* (provided that the agreement does not violate a *jus cogens* norm). This constitutes agreement based on mutual consent. Yet, such an agreement to modify customary international law *amongst the States Parties* to a treaty like the Rome Statute does not, and indeed cannot, change the law that applies to "States" (meaning *nationals* and *territories* of such States) that choose *not* to accede to the treaty. Such an imposition is not consent-based, and *no sovereign may lawfully impose a treaty-based burden on another sovereign without the latter's consent.* Neither may a creation or an agent of such sovereign or group of sovereigns (like the ICC) impose such a treaty-based burden on a third-party sovereign without the latter's consent.

In the final analysis, *a principle of customary international law takes precedence over a contrary principle contained in a treaty with respect to those States (meaning their respective nationals and territories) that are not parties to that treaty.* Hence, the fact that States Parties to the Rome Statute have agreed *amongst themselves* that the ICC shall have jurisdiction over the *nationals* of *non-consenting, non-party States* who are alleged to have committed an Article 5 crime on the soil of a State Party[55] does not—*and lawfully may not*—override the non-consenting, non-party State's sovereign rights under customary international law *not to be bound* in any way by the terms of a treaty to which it is not a party[56]. ***Accordingly, if no individual State or group of like-minded States may lawfully compel a third-party State to be bound by terms of a treaty to which the latter has not acceded, neither may a subordinate creation or agent of such individual State or group of States (such as the OTP, the ICC or a panel of ICC judges) lawfully do so.***

Each State Party to the Rome Statute has freely yielded part of its national sovereignty to the ICC, a specific creation of that treaty. As such, officials at the ICC—*not a sovereign entity itself*—have been granted authority to compel the States Parties, all of which *are* sovereign entities, to yield to the will of the ICC in certain circumstances as laid out in the Rome Statute. ICC officials have no such authority with respect to non-consenting, non-party States (meaning their *nationals* and *territories*)[57], in spite of what the Rome Statute may say, since States Parties to the Rome Statute lack the authority themselves to encroach upon the

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[54]For example, the sanctions regime aimed at "Iran" actually targets and punishes, not only the Iranian officials who may have been designated by name, but all other Iranians as well, irrespective of their roles and responsibilities for the Iranian nuclear program. The same is true of the U.S. sanctions regime against "Cuba"; it is individual Cubans who suffer as a result of the sanctions, not the entity "Cuba" *per se*.

[55]Rome Statute, *supra* note 4, art. 12(2)(a).

[56]Once again, that does not mean that the national from the third-party State may not be tried for the alleged offense. He may be tried in the courts of the State in which the alleged crime took place, pursuant to that State's law and legal procedures. What customary international law prohibits is the transfer of jurisdiction over the accused to the ICC, a court created by a treaty to which the non-consenting, third-party State has not acceded.

[57]*See, e.g.*, CRS REPORT, *supra* note 44, at 21 n.111 (noting that State practice does not support the assertion that universal jurisdiction over war crimes has reached the level of customary law binding all States).

rights of non-party States vis-à-vis the nationals and territories of those States[58]. That the Rome Statute purports to grant such authority[59] is a legal overreach in violation of customary international law. Such overreach is both *ultra vires* and *void ab initio*.

Accordingly, notwithstanding explicit language to the contrary in the Rome Statute, neither the ICC Prosecutor nor any ICC judge possesses any *lawful* authority to violate customary international law by asserting jurisdiction over a non-party State's nationals. As such, *neither the ICC Prosecutor nor any ICC judge may lawfully apply the provision of the Rome Statute (to wit, Article 12(2)(a)) that purports to compel nationals of non-consenting, non-party States to submit to ICC jurisdiction for alleged Article 5 crimes committed on the soil of a State Party to the Rome Statute*[60]. Were either to do so, he or she would be acting in clear violation of customary international law. In truth, such a decision would undermine the Rule of Law—ironically, the very value that the ICC Prosecutor or ICC judge would be claiming to uphold.

Further, given the numerous exceptions to jurisdiction already written into the Rome Statute that, by their nature, deny a remedy to victims of unspeakable crimes (see generally Section I.B., *supra*), the argument frequently raised that failure to allow the ICC to exercise jurisdiction pursuant to Article 12(2)(a) would leave victims of Article 5 crimes without a remedy is disingenuous in the extreme. It also fails to acknowledge that the national courts of States Parties to the Rome Statute have concurrent jurisdiction over Article 5 crimes and that the UN Security Council can refer situations to the OTP for investigation, as recognised under Article 13(b) of the Rome Statute and pursuant to its authority under Chapter VII of the UN Charter.

D. Other International Courts Recognise and Have Rightly Affirmed the Consent-Based Limitation to Their Jurisdiction Under Customary International Law

The principle of customary international law that "[a]n international agreement does not create either obligations or rights for a third-party state without its consent"[61] is well-established and has been recognised by other international courts. In fact, this principle has been expanded upon by international tribunals.

The Statute of the International Court of Justice (ICJ), for example, specifically requires that parties consent to its jurisdiction before the ICJ will adjudicate a matter[62]. The ICJ's case law has affirmed this principle throughout its history. The first time the ICJ had cause to make such a determination came in the 1954 case, *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and*

[58] *See supra* note 15.
[59] *See* Rome Statute, *supra* note 4, art. 12(2)(a).
[60] Even when the UN Security Council, acting under Chapter VII of the UN Charter, refers a situation concerning a non-party State's nationals to the ICC Prosecutor, the Council is acting under its authority as found in the UN Charter, not on any article found in the Rome Statute, since the Council (as a non-State entity) is not—and cannot be—a party to the Rome Statute. Further, compliance by the third-party State is based on its being a party to the UN Charter (which obligates it to obey certain Security Council decisions), not on any obligation that it owes to the Rome Statute or any right claimed by ICC officials. **When the Security Council refers a situation to the ICC Prosecutor regarding a non-party State to the Rome Statute, the Council is, in effect, *incorporating by reference* the appropriate provisions of the Rome Statute into its decision, thereby obligating the UN Member State to comply with those provisions.**
[61] *See* Vienna Convention, *supra* note 12, art. 34; RESTATEMENT, *supra* note 6, § 324(1).
[62] ICJ Statute, *supra* note 6, arts. 34(1), 36(2)–(3).

United States of America) ("*Monetary Gold*")[63]. That case centred around an incident that occurred in 1943, in the midst of World War II, when the German Army removed a large amount of gold from Rome[64]. When the war ended, both Albania and Italy claimed the gold and submitted competing claims to international arbitration[65].

While waiting for the outcome of the arbitration proceeding, the governments of France, the United Kingdom, and the United States signed an agreement to hold the gold in escrow in the United Kingdom so that it could retain the gold "in partial satisfaction of the [j]udgment in the Corfu Channel case"[66] in the event that the gold was found to belong to Albania. After the arbitrator found in favour of Albania, Italy filed an action with the ICJ against France, the United Kingdom, and the United States. In its application, Italy argued (1) that France, the United Kingdom, and the United States should deliver the gold to Italy, and (2) that its right to the gold superseded the United Kingdom's right to partial satisfaction of damages sustained during the Corfu Channel incident[67].

Before proceeding to the merits of Italy's first claim, the ICJ stated that it "must [first] examine whether . . . jurisdiction [conferred by Italy, France, the United Kingdom, and the United States] is co-extensive with the task entrusted to it"[68]. As mentioned above, however, integral to this dispute was the claim of Albania—an unnamed party—to the gold. Indeed, the ICJ stated that, "[i]n order . . . to determine whether Italy is entitled to receive the gold, it is necessary to determine whether Albania has committed any international wrong against Italy, and whether she is under an obligation to pay compensation to [Italy]; and, if so, to determine also the amount of compensation"[69]. Therefore, the ICJ held that it "cannot decide such a dispute without the consent of Albania"[70]. The ICJ's explanation of that ruling is particularly telling: "To adjudicate upon the international responsibility of Albania without her consent would run counter to a *well-established principle of international law* embodied in the [ICJ's] Statute, namely, that the [ICJ] can only exercise jurisdiction over a State with its consent"[71]. That well-established principle remains a vital part of customary international law to this day.

In a more recent case concerning East Timor, the ICJ once again applied the principle that an international tribunal cannot decide a case involving the legal rights of a third party without that party's consent[72]. In 1989, Australia, understanding that the island of East Timor was under Indonesian control, signed a treaty with Indonesia regarding use of East Timor's continental shelf[73]. Yet, Portugal, which had controlled East Timor exclusively from the sixteenth century until 1975[74], claimed that any treaty executed without its consent was invalid[75]. Thus, "the fundamental question in the . . . case [wa]s ultimately whether, in 1989, the power to conclude a treaty on behalf of East Timor in relation to its continental shelf lay

[63]Monetary Gold Removed from Rome in 1943 (It. v. Fr., U.K., & U.S.), Judgment, 1954 I.C.J. 19 (15 June).
[64]*Id.* at 19.
[65]*Id.*
[66]*Id.* at 21.
[67]*Id.* at 22. The ICJ found that a provision in the agreement signed by France, the United Kingdom, and the United States amounted to acceptance of ICJ jurisdiction; therefore, it had been duly authorised by all named parties to adjudicate the matter. *See id.* at 31.
[68]*Id.* at 31.
[69]*Id.* at 32.
[70]*Id.*
[71]*Id.* (emphasis added).
[72]East Timor (Port. v. Austl.), Judgment, 1995 I.C.J. 90 (30 June).
[73]*Id.* at 101–02.
[74]*See id.* at 95–96.
[75]*Id.* at 94–95.

with Portugal or with Indonesia"[76]. Like the *Monetary Gold* case, in which the ICJ refused to make a legal determination that would affect the legal rights of a non-consenting third party (Albania), the ICJ in the *East Timor* case refused to rule because Indonesia had not accepted its jurisdiction[77]. It further refined the *Monetary Gold* standard by stating that the necessity of determining third-party rights did not necessarily preclude it from exercising jurisdiction[78]. However, when a State's "rights and obligations . . . constitute the very subject-matter of . . . a judgment", the ICJ may not exercise jurisdiction without that State's consent[79].

The ICJ is not the only international tribunal that has upheld the *Monetary Gold* principle. The Permanent Court of Arbitration (PCA) in The Hague, The Netherlands, applied this principle in its 2001 decision, *Larsen v. Hawaiian Kingdom*[80]. In that case, Larsen refused to pay fines associated with traffic citations[81]. Instead of registering his automobile as required by state law, Larsen argued that as a citizen of the Hawaiian Kingdom, he was not subject to U.S. law[82] and that Hawaii was in violation of its obligations under an 1849 treaty between the Hawaiian Kingdom and the United States by allowing U.S. municipal law to govern[83]. The PCA held that because the interests of the United States were "a necessary foundation for the decision between the parties", it could not rule on the dispute at hand[84]. Moreover, even though both parties to the arbitration proceeding argued that the *Monetary Gold* principle should apply only to ICJ proceedings, *the PCA held that the principle must be applied by all international tribunals*, stating that,

> [a]lthough there is no doctrine of binding precedent in international law, it is only in the most compelling circumstances that a tribunal charged with the application of international law and governed by that law should depart from a principle laid down in a long line of decisions of the International Court of Justice[85].

Indeed, "[t]he *principle of consent in international law* would be violated if [the PCA] were to make a decision at the core of which was a determination of the legality or illegality of the conduct of a non-party"[86]. ***The ICC, as an international tribunal bound by international law, must likewise refrain from invoking jurisdiction to determine the relative rights of nationals of non-consenting, non-party States as well as the legality or illegality of the non-party State's conduct.*** Note that determining the relative rights of nationals of the non-consenting, non-party State of Israel as well as the legality or illegality of Israel's actions is exactly what the Palestinians are seeking to do by referring their allegations to the ICC. This is a clear violation of the principle of consent in international law and must be refused.

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[76] *Id.* at 102.
[77] *Id.* at 105.
[78] *Id.* at 104.
[79] *Id.* at 105. Such would be the case with Israel concerning Operation Cast Lead, the enforcement of the naval blockade of the Gaza Strip, and Operation Protective Edge, since those matters implicate Israel's inherent right to self-defence in a situation of armed conflict.
[80] *Larsen v. Hawaiian Kingdom*, Award, (Perm. Ct. Arb. 2001), https://pcacases.com/web/sendAttach/123.
[81] *Larsen v. Hawaiian Kingdom, Memorial of Lance Paul Larsen*, ¶¶ 48–52 (Perm. Ct. Arb. 2000), http://www.alohaquest.com/arbitration/memorial_larsen.htm.
[82] *Id.* ¶ 47.
[83] *Larsen v. Hawaiian Kingdom*, Award, ¶ 2.3.
[84] *Id.* ¶ 11.23.
[85] *Id.* ¶ 11.21.
[86] *Id.* ¶ 11.20 (emphasis added).

As in the *East Timor* case and *Larsen v. Hawaiian Kingdom*, where the ICJ and PCA, respectively, refused to exercise jurisdiction *because third-party rights constituted the very subject matter of the proceedings*, the ICC must refuse to exercise jurisdiction over *nationals of non-consenting, non-party States*. Such action would directly contravene the well-established customary international legal principle articulated in the *Monetary Gold* case and subsequently—both in the ICJ and in other international tribunals—that an *international tribunal may not determine the legal rights of a third-party State without its consent if such rights go to the very subject matter of the proceedings*. Because the ICC is an international tribunal akin to the ICJ and the PCA, the ICC should be bound by the *Monetary Gold* principle in accordance with customary international law. In short, absent a referral by the UN Security Council under Chapter VII of the UN Charter, the ICC must decline to exercise jurisdiction over nationals of non-consenting, non-party States.

E. Asserting the Existence of "Universal Jurisdiction" Over Article 5 Crimes Does Not Automatically or Necessarily Require that Nationals of a Non-Consenting, Non-Party State Must Submit to the Jurisdiction of a Court, Like the ICC, Established by Other Sovereigns and Not Recognised by the Non-Consenting State

Some argue that the ICC may investigate and try nationals of non-consenting, non-party States under the principle of universality[87]. That argument is built upon a number of assumptions, some of which appear to be highly questionable when applied to non-consenting, third-party States. For example, "[t]he universality approach starts from the assumption that, under current international law, all States may exercise universal jurisdiction over these core crimes [i.e., Article 5 crimes]"[88]. The first assumption is followed by the argument "that States must be entitled to do collectively what they have the power to do individually"[89]. The argument that States may do collectively what each may do individually is reasonable—***up to a point***. *A problem arises when that argument is interpreted to suggest that mutual agreement amongst a select group of States can create legal obligations for non-consenting States outside that group. Such an assertion violates the sovereign rights of the States not a party to the agreement. As such, mutual agreement amongst a number of States does not affect in any way the rights of States not a party to such agreement.* From the foregoing statements, the argument continues as follows:

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[87] *See, e.g.*, Akande, *supra* note 48, at 626 (arguing that "it would be extraordinary and incoherent if the rule permitting prosecution of crimes against the [world's] collective interest by individual states . . . simultaneously prevented those states from acting collectively in the prosecution of these crimes" and further that collective action "should be encouraged"). There is nothing fundamentally wrong with encouraging collective action against such crimes. States Parties to the Rome Statute are free, *amongst themselves*, to resort to the ICC as they see fit. Further, other States that agree with what the Rome Statute provides are free to accede to the Statute and accept its terms. ***Where Akande and other proponents of the ICC go astray is by attempting to force—contrary to Customary International Law—the terms of the Rome Statute on States that do not agree with its terms as is their sovereign right under international law.*** This is especially true where the treaty redefines what constitutes a crime, thereby creating a new offence that did not exist before.

[88] Kaul, *supra* note 29, at 583, 587. *But see* CRS REPORT, *supra* note 44, at 21 n.111 (noting that State practice does not support the assertion that universal jurisdiction over war crimes has reached the level of customary law binding all States). ***Further, to the extent that the definitions and/or elements of crimes in the Rome Statute differ from similarly named and/or defined crimes found in customary international law or other treaties (like the Hague or Geneva Conventions), they are in reality "new" crimes, not binding on third-party States.***

[89] Kaul, *supra* note 29, at 583, 587.

> Therefore, States may agree to confer this individual power on a judicial entity they have established and sustain together and which acts on their behalf[90]. Thus a State which becomes a party to the Statute thereby accepts jurisdiction with respect to the international core crimes. *As a consequence, no particular State—be it State Party or non-State Party—must give its specific consent to the exercise of this jurisdiction in a given case*. This, in essence, is the regime that follows from an approach based on the principle of universal jurisdiction[91].

The first sentence in the above quotation is legally valid. The second sentence actually overstates the reach of the ICC even with respect to States Parties. For example, although the States Parties to the Rome Statute all agreed to accept jurisdiction of the ICC *in certain circumstances*, they nonetheless incorporated a not insignificant number of exceptions to jurisdiction (as laid out in detail in Section I.B., *supra*), including the concept of complementarity, which serves as a means of absolutely precluding ICC jurisdiction in favour of national courts. Hence, States Parties' acceptance of ICC jurisdiction with respect to Article 5 crimes is intentionally not automatic[92]. The portion of the foregoing quotation in *italics* is only partly correct vis-à-vis non-party States and is, in fact, a *non-sequitur* as stated. Whilst it is true that a non-party State need not give its consent to the exercise of jurisdiction *in some cases* (to wit, cases having nothing whatsoever to do with the non-party State), *it is not true with respect to a case involving that State's nationals or other interests*. Under customary international law, a *non-universal* treaty (i.e., a treaty to which only part of the international community has acceded) that creates a court that claims universal jurisdiction over a host of offenses does not, *and cannot*, bind a non-consenting, non-party State[93]. To assert otherwise is neither logical nor lawful.

Moreover, even if one were to accept the fact that "all States may exercise universal jurisdiction" over certain crimes, that does not mean that one must also accept that the court created by and agreed-to by *some States* (to wit, the Rome Statute's States Parties) must bind non-consenting, third-party States. ***Accepting the principle of "universal jurisdiction" most assuredly does not automatically—or necessarily—mean that one must also agree that a non-consenting, non-party State to a specific treaty has no say about whether its nationals have to submit themselves to the jurisdiction of a court like the ICC, a court agreed to and established in a treaty negotiated by other States.*** That is simply a *non-sequitur*. Such "other States" have no authority to decide such matters for a non-party State, and doing so violates the objecting State's rights under international law to appeal to another sovereign on behalf of its nationals when they are being tried by the other sovereign's courts[94]. Further, under the

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[90] *Id.* In the case of the Rome Statute, the "States" to which Kaul refers are the States Parties to the Statute. The States Parties are a large, but finite, group of States. That finite group of States created the ICC (the "judicial entity" referred to in the sentence) which they sustain together and which acts on their behalf.

[91] *Id.* (emphasis added).

[92] *See* Section I.B., *supra*.

[93] *See* Vienna Convention, *supra* note 12, art. 34.

[94] It is clearly recognised in customary international law that a national of one State may be tried by another State's courts for criminal acts committed on the latter State's soil. That is well-settled and not controversial. In such a case, leaders of the accused's State of nationality may deal on an equal basis with leaders of the State whose courts are trying the accused. Means developed over time exist for the accused's State to monitor the trial and, if necessary, to appeal to and seek redress from the trying State's leaders. That right is violated when an accused is tried by a court whose jurisdiction is not recognised by the accused's State of nationality and whose very creation was rejected by that State. State-to-State relations are of ancient vintage and have been the means to resolve interstate issues for millennia. The ICC is a newcomer on the world scene and does not enjoy developed relations with many of the world's states. Moreover, to whom would the sovereign of an objecting third-party State appeal on behalf of its nationals in the case of the ICC? The ICC Prosecutor is answerable to no

Rome Statute, some offences have been redefined, thereby creating new offences previously unknown. Such redefinitions may not be lawfully imposed on non-consenting States. *It is also doubtful that such redefined offences fall into the category of offences subject to "universal jurisdiction" since they were created and agreed to solely by States Parties to the Statute and not by the world community at large.*

Universal jurisdiction does not inevitably lead to the conclusion that nationals of non-consenting, non-party States are triable either by a court created pursuant to a treaty like the Rome Statute or for new offences previously unknown in international law[95]. The inherent *sovereignty* of the non-consenting, non-party *State* takes precedence over *other States'* grant of authority to such a court. **In short, a *non-sovereign entity* like the ICC has no authority under customary international law to assert jurisdiction over nationals of a non-consenting, non-party, *sovereign State.***

II. PURSUANT TO *UTI POSSIDETIS JURIS*, UPON BRITAIN'S DEPARTURE FROM PALESTINE IN MAY 1948, THE STATE OF ISRAEL BECAME THE SOLE LEGITIMATE TITLE HOLDER AND SOVEREIGN OVER ALL TERRITORY OF THE MANDATE FOR PALESTINE LYING BETWEEN THE MEDITERRANEAN SEA AND THE JORDAN RIFT VALLEY

A. *Uti Possidetis Juris* is the Customary International Law Principle That Determines Who Accedes to Sovereignty Over Territory Previously Ruled by a Colonial or Mandatory Power

Uti possidetis juris is the customary international law doctrine that serves to determine the borders of newly emerging states. This doctrine evolved during the period of decolonisation in Latin America and is generally accepted today as the customary international law principle that applies in establishing the borders of newly emerging states[96]. "Simply stated, *uti possidetis* [*juris*] provides that states emerging from decolonization shall presumptively inherit the colonial administrative borders that they held at the time of independence"[97]. The principle is no longer limited to situations of decolonisation. *Uti possidetis juris* now applies "to all cases where the borders of new states have to be determined, and not just in its original context of decolonization"[98]. It has been applied, for example, to states emerging from former mandates[99] (including the Middle East Mandates created out of the former Ottoman territories) as well as to the break-up of previously existing states, like Yugoslavia[100], Czechoslovakia[101], and the Soviet Union[102]. As the International

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foreign sovereign and need not deal with an objecting third-party sovereign, rendering that sovereign impotent to fulfill its sovereign duty *vis-à-vis* its own nationals.

[95] Further, in the specific case of the Palestinians, under the Oslo Accords, the Palestinians have no criminal jurisdiction over Israelis. Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, Annex 4, arts. 1.2, 2.2, 2.3, 2.6, 2.7, 28 Sept. 1995, [hereinafter Israeli-Palestinian Interim Agreement] http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/the%20israelipalestinian%20interim%20agreement.aspx. Accordingly, they cannot cede to the ICC jurisdiction they do not possess in the first place.

[96] *See* Frontier Dispute (Burk. Faso v. Mali), Judgment, 1986 I.C.J. 554, 565–67 (22 Dec.).

[97] Abraham Bell & Eugene Kontorovich, *Palestine, Uti Possidetis Juris, and the Borders of Israel*, 58 ARIZ. L. REV. 633, 635 n.7 (2016).

[98] *Id.* at 635 n.8.

[99] *Id.* at 635.

[100] *Id.* at 635 n.11.

[101] *Id.* at 635 n.10.

[102] *Id.* at 635 n.9.

Court of Justice (ICJ) noted in *The Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali)*,

> the principle of *uti possidetis* [*juris*] seems to have been first invoked and applied in Spanish America, inasmuch as this was the continent which first witnessed the phenomenon of decolonization involving the formation of a number of sovereign States on territory formerly belonging to a single metropolitan State. Nevertheless the principle is not a special rule which pertains solely to one specific system of international law. *It is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs.*[103]

Accordingly, as a long-standing, well-established "general principle" of international law, *uti possidetis juris* also applied to the emergence of the State of Israel in May 1948.

As noted above, *uti possidetis juris* establishes the borders and sovereign rights of the State that emerges from a previously non-independent condition, whether from decolonisation, the termination of a Mandate, or the break-up of a previously-existing State. Sometimes—*as was the case with Israel vis-à-vis the so-called West Bank and the Gaza Strip*—the emerging State is unable at the onset of independence to exercise full control over all portions of the territory to which it has attained lawful sovereignty. For example, for 18 years, from 1949 to 1967, the West Bank and the Gaza Strip were under the belligerent military occupation of the Jordanian and the Egyptian armed forces, respectively. Notwithstanding the 18-year belligerent military occupation of Israeli territory by foreign armies, pursuant to *uti possidetis juris*, the occupied territories remained the continuing sovereign possession of the State of Israel, the only State that emerged upon the departure of the British in 1948[104]. In other words,

> where the colonial administrative lines, and the exercise of colonial authority within those lines, were clear, the lines would serve as the boundaries of the new state even where the new state did not actually possess the territory. Therefore, a state that acquired territorial sovereignty over territory through *uti possidetis juris* would not lose sovereignty simply because another state possessed and administered part of that territory[105].

B. Significance of *Uti Possidetis Juris* for Emerging States in General

The importance of *uti possidetis juris* cannot be overstated. Twentieth Century examples of the concept in practice can be seen in sub-Saharan Africa. During the colonial period in Africa, foreign powers carved up the continent, establishing arbitrary borders based on spheres of influence and taking little to no account of how such borders would affect the indigenous peoples of the continent. Accordingly, traditional tribal territories were often divided so that portions of the same tribal group actually lived in different colonies, thereby fracturing the indigenous society. Tribal members often ended up living in neighbouring colonies created by European powers speaking different languages and using different legal and administrative systems. It is hard to find anyone today willing to defend how such borders

[103] Burk. Faso v. Mali, 1986 I.C.J. at 565, ¶ 20 (emphasis added).
[104] Bell & Kontorovich, *supra* note 97, at 642 (citing Burk. Faso v. Mali, 1986 I.C.J. at 566).
[105] *Id.* Note, once again, that the principle of *uti possidetis juris* is not limited to the process of decolonisation. It also applies to the dissolution of Mandates and the break-up of previously existing States. *See supra* notes 98–103 and accompanying text.

were created, as they almost always operated against the best interests of the indigenous peoples of the region. However, as African colonies began to attain their independence, it became clear that the only way to avoid even more conflict and bloodshed than had already been experienced was to retain and recognise the existing artificial colonial borders as the international borders of the newly emerging States. In essence, as damaging as the colonial borders had been to indigenous peoples, their dissolution would have caused far more harm than adjusting and rationalising the borders could possibly achieve. Emerging African States recognised early on the dangers of trying to rationalise the colonial borders and opted to apply the principle of *uti possidetis juris* instead to the States emerging from colonialism[106].

Although such a decision seems at odds with another customary international law principle, to wit, the principle of self-determination of peoples, *uti possidetis juris* takes precedence over the principle of self-determination of peoples when the two are in conflict[107]. That point is important to remember when considering Palestinian claims to territory in the former Mandate for Palestine, since Palestinian claims are overwhelmingly premised on the principle of self-determination of peoples[108].

In addition to decolonisation in Africa, *uti possidetis juris* has also been applied to the dissolution of previously existing States like Yugoslavia and the USSR. In each case, the administrative boundaries that existed at the time the new State emerged became the new, internationally-recognised borders of the emerging State. Sadly, that process did not always happen peacefully. For example, the conflicting desires of the populations of Serbs, Croats, and Muslims in Bosnia-Herzegovina led to a bloody civil war as ethnic groups sought to sever their communities from a united Bosnia-Herzegovina to join their fellows in emerging, more ethnically pure, neighboring States, such as Serbia or Croatia. Such attempts were rejected by the international community which, pursuant to *uti possidetis juris*, did not recognise the proposed new borders. Hence, despite the civil war, the borders of Bosnia-Herzegovina remain today essentially as they were when the State achieved its independence upon the break-up of Yugoslavia[109].

Similarly, when the Soviet Union collapsed and former Soviet republics became independent, the administrative boundaries in being at the time of independence were recognised as the new international borders of the emerging States. Once again, that process did not occur without violence. For example, although the Crimean Peninsula had historically been a component part of Russia since the 1700s, when the Ukraine achieved its independence in 1991, the Crimea had been part of the Ukrainian Soviet Socialist Republic since 1954[110]. Hence, pursuant to *uti possidetis juris*, the Crimean Peninsula was allocated as part of the Ukraine upon its independence[111]. Although Russia seized the Crimea militarily in 2014, the

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[106] *African Union Border Programme (AUBP)—Uniting and Integrating Africa Through Peaceful, Open and Prosperous Borders*, AFRICAN UNION PEACE AND SECURITY (8 June 2017), http://www.peaceau.org/en/page/27-au-border-programme-aubp.

[107] Bell & Kontorovich, *supra* note 97, at 635.

[108] *Id.* at 684.

[109] STEVEN WOEHREL, BOSNIA AND HERZEGOVINA: CURRENT ISSUES AND U.S. POLICY 2 (Congressional Research Service 2013).

[110] Julie Kliegman, *Historical Claim Shows Why Crimea Matters to Russia*, PUNDITFACT (2 Mar. 2014), http://www.politifact.com/punditfact/statements/2014/mar/02/david-ignatius/historical-claim-shows-why-crimea-matters-russia/.

[111] Bell & Kontorovich, *supra* note 97, at 685.

Russian action has been condemned by the international community[112], and the Russian claim to the Peninsula has been widely rejected. According to *uti possidetis juris*, the legal boundary of the Ukraine continues to encompass the Crimean Peninsula.

In both the Bosnia-Herzegovina and Crimean Peninsula situations, appeals to the self-determination of peoples had been made by Serbs and Croats in Bosnia-Herzegovina and by Russians in the Crimea, but such appeals have been rejected[113]. *Uti possidetis juris* continues to take precedence over self-determination when the two are in conflict[114].

C. *Uti Possidetis Juris* Has Also Been Applied to the Emergence of States From the Former Ottoman Territories That Had Been Designated as Mandates by the League of Nations

Further, not only was *uti possidetis juris* the guiding principle that was applied as the States in Latin America emerged as independent States in the 19th Century, as the numerous States in Africa emerged from decolonisation in the 20th Century as well as to the States that emerged from the break-up of the former Yugoslavia, the former Czechoslovakia, and the former Soviet Union, it was also applied to the States in the Middle East that emerged from the former Mandates carved out of the former Ottoman Empire—the Mandates for Mesopotamia (Iraq), Syria (including Lebanon), and Palestine[115].

The Mandate for Mesopotamia (Iraq) was the first of the three Middle East Mandates to achieve its independence. In 1932, Iraq obtained its independence from Great Britain, the Mandatory for Mesopotamia. At the time Iraq became independent, there was an ongoing border dispute between the British Mandatory and Turkey over the oil-rich region around Mosul[116]. There were also self-determination claims raised by the Kurds for the same region[117]. Although disagreements over the border led to periodic hostilities with both Kurds and Turks while the border was being negotiated, upon Iraq's independence, pursuant to *uti possidetis juris*, the Mandatory borders as they existed when Iraq emerged as an independent State (borders which included Mosul as part of Iraq) became the internationally recognised borders of Iraq and Turkey[118]. They remain so today.

There were a number of border disagreements regarding the Syrian Mandate as well. Some focused internally on where to draw the line to delineate Lebanon from Syria[119] while another key area of dispute concerned the Hatay/Alexandretta (Hatay) region, an area lying along the eastern Mediterranean Sea and of great interest to Turkey because of the large number of ethnic Turks living there[120]. The Hatay dispute provides considerable insight into how *uti possidetis juris* functions *vis-à-vis* determination of an emerging State's borders. In 1936, France, the Mandatory for Syria, had announced that it would be giving Syria (which, at

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[112] *Ukraine Crisis: Putin Signs Russia-Crimea Treaty*, BBC NEWS (18 Mar. 2014), http://www.bbc.com/news/world-europe-26630062.
[113] *See* WOEHREL, *supra* note 109, at 4–5; Bell & Kontorovich, *supra* note 97, at 685; Brad Simpson, *Self-Determination in the Age of Putin* (21 Mar. 2014), http://foreignpolicy.com/2014/03/21/self-determination-in-the-age-of-putin/.
[114] Bell & Kontorovich, *supra* note 97, at 635.
[115] *Id.* at 647.
[116] *Id.* at 648.
[117] *Id.*
[118] *Id.* at 650.
[119] *Id.* at 653–54.
[120] *Id.* at 654.

the time, included the Hatay region) independence in a few years[121]. Then, as French concerns about Hitler grew, France became more accommodating to Turkey *vis-à-vis* Hatay and decided to cede Hatay to Turkey as a means to thwart rising German influence in the region. France's formal transfer of the region to Turkey was completed in June 1939 in clear violation of Article 4 of the Syrian Mandate that explicitly forbade placing territory from the Mandate under the control of a foreign power without the approval of the League of Nations[122]. France's decision to transfer Hatay to Turkey was criticised by the League's Mandates Commission, but the outbreak of World War II prevented the League from taking any action[123]. In April 1946, the Syrian Mandate was terminated, and Syria emerged as an independent State. Pursuant to *uti possidetis juris*, the borders of the newly independent State of Syria excluded Hatay, since that region was—*albeit in violation of the express terms of the Syrian Mandate*—no longer part of the Mandate at the emergence of the newborn State of Syria[124]. The Hatay episode is significant because, pursuant to *uti possidetis juris* and despite Syrian complaints about the illegality of the land transfer, the international community has recognised the finality of *uti possidetis juris* in determining an emerging State's borders (despite the illegality of the land transfer in question) and, hence, does not dispute Turkish sovereignty over Hatay[125].

The Mandate for Palestine likewise confirms the role played by *uti possidetis juris* in establishing an emerging State's borders. When one speaks of the "Palestinian Mandate" today, one often thinks only of the territory lying generally between the Mediterranean Sea and the Jordan rift valley. Yet, the original Mandate for Palestine also included what we know today as the Hashemite Kingdom of Jordan. Although the primary purpose of the Mandate for Palestine was to implement the terms of the Balfour Declaration in Palestine, Article 25 of the Mandate gave Great Britain the authority to limit Jewish settlement in the area of the Mandate to the east of the Jordan rift valley[126]. Britain exercised that authority in September 1922[127]. Although there was no formal split of the Mandate at that time into two separate Mandates, Britain renamed the eastern portion Transjordan and retained the name Palestine for the smaller, western portion. Britain was not authorised to divide the mandate in two[128]. Nonetheless, in 1946, Britain recognised the independence of Jordan and terminated the Mandate in the east[129]. Pursuant to *uti possidetis juris* and despite the fact that Britain had no authority to divide the Mandate into two parts, the prior administrative border between the two parts of the Mandate for Palestine became the recognised western international boundary of the emerging State of Jordan.

From 1946 to 1948, the Mandate was limited to the smaller, western portion of the original Mandate stretching from the Jordan rift valley to the Mediterranean Sea. When Britain withdrew its forces in May 1948, only one State emerged from the remaining portion of the Mandate for Palestine—the State of Israel[130]. The nascent State of Israel was immediately attacked by its Arab neighbours. The war raged into 1949, when it was ended by a series of

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[121] *Id.* at 655.
[122] Bell & Kontorovich, *supra* note 97, at 655–56.
[123] *Id.* at 656
[124] *Id.* at 656 n.147.
[125] *Id.* at 656.
[126] League of Nations, Mandate for Palestine art. 25 (Dec. 1922).
[127] Bell & Kontorovich, *supra* note 97, at 673.
[128] *Id.* at 674.
[129] *Id.*
[130] *See* Joel Beinin & Lisa Hajjar, *Primer on Palestine, Israel and the Arab-Israeli Conflict*, MIDDLE EAST RESEARCH AND INFO. PROJECT, http://www.merip.org/primer-palestine-israel-arab-israeli-conflict-new (last visited 5 Feb. 2018).

armistice agreements between Israel and various Arab neighbours[131]. Although its Arab enemies controlled the Gaza Strip and West Bank from 1949 to 1967,

> [t]he doctrine of *uti possidetis juris* . . . rejects possession as grounds for establishing title, favoring instead legal entitlement based upon prior administrative borders. And it is clear that the relevant administrative borders of Palestine at the time of Israel's independence were the boundaries of the Mandate . . . . Israel was the only state that emerged from Mandatory Palestine, and it was a state whose identity matched the contemplated Jewish homeland required of the Mandate and that fulfilled a legal Jewish claim to self-determination in the Mandatory territories. There was therefore no rival state that could lay claim to using internal Palestinian district lines as the basis for borders. . . . Thus, it would appear that *uti possidetis juris* dictates recognition of the borders of Israel as coinciding with the borders of the Mandate as of 1948[132].

Accordingly, pursuant to *uti possidetis juris*, it is Israel that inherited title to, and sovereignty over, the entirety of the remaining portion of the Mandate for Palestine. As such, Israel is the legitimate holder of title to the entirety of the territory Britain left behind in 1948.

D. Significance of *Uti Possidetis Juris* With Respect to Israel, the Palestinians, and the ICC

Applying *uti possidetis juris* to the Mandate for Palestine means that Israel, as the only State to emerge from the Mandate for Palestine upon the departure of the British Mandatory, attained sovereignty over the entirety of the territory of the Mandate within the borders as they existed on 15 May 1948 (to wit, over the entire territory between the Mediterranean Sea and the Jordan rift valley, including the so-called "West Bank" (with east Jerusalem) and the Gaza Strip). Accordingly, any and all other claimants to any territory within the borders of the Mandate as they existed on 15 May 1948 have no legitimate territorial claims.

Yet, having established Israeli sovereignty over the entirety of the Mandate's territory pursuant to *uti possidetis juris* does not mean that Israel may not acquiesce in relinquishing its sovereignty over some of its territory to allow formation of an eventual Arab Palestinian State, a goal that successive Israeli governments have agreed in principle to do via bilateral negotiations between the parties. *What it does mean, however, is that Israel, as the sovereign over all such territory, may not be compelled to yield territory for such a purpose. Nor may Israel be compelled to yield specific territory that the Palestinians may prefer or demand.*

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[131]General Armistice Agreement, Isr.-Syria, 20 Jul. 1949, https://peacemaker.un.org/sites/peacemaker.un.org/files/IL%20SY_490720_Israeli-Syrian%20General%20Armistice%20Agreement.pdf; General Armistice Agreement, Isr.-Jordan, 3 Apr. 1949, https://peacemaker.un.org/sites/peacemaker.un.org/files/IL%20JO_490403_Hashemite%20Jordan%20Kingdom-Israel%20General%20Armistice%20Agreement.pdf; General Armistice Agreement, Isr.-Leb., 23 Mar. 1949, https://peacemaker.un.org/sites/peacemaker.un.org/files/IL%20LB_490323_IsraeliLebaneseGeneralArmisticeAgreement.pdf; General Armistice Agreement, Isr.-Egypt, 24 Feb. 1949, https://peacemaker.un.org/sites/peacemaker.un.org/files/EG%20IL_490224_Egyptian-Israeli%20General%20Armistice%20Agreement.pdf.

[132]Bell & Kontorovich, *supra* note 97, at 681–82. Note that UN attempts to divide Palestine into three parts—a Jewish State, an Arab State, and an area around Jerusalem under international control—were rejected outright by the Arab States and Arab Palestinians. As such, the proposed borders never enjoyed political legitimacy and have no validity today, despite some attempts by the Palestinians to resurrect them.

Regarding notional ICC jurisdiction over Israel as requested by PA officials, given that the customary international law principle *uti possidetis juris* establishes Israel's absolute right to—*and sovereignty over*—all territory of the Mandate for Palestine as it existed in May 1948, the issues of borders of a future Palestinian State, the status of so-called "settlements", the status of Jerusalem, the issue of the so-called "refugees", etc., ***all fall outside the jurisdictional reach of the ICC, given that such issues solely concern sovereign Israeli territory and the fact that Israel is not a party to the Rome Statute.*** The fact that successive Israeli governments have agreed in principle to "resolve" such issues with the Palestinians via good-faith, bilateral negotiations does not change the fact that the ICC has no jurisdiction. Israel is sovereign over all such territory and will remain so until negotiations between the parties are concluded and the issues resolved between them. Until such time, the issues raised with the OTP by the PA all occurred on the sovereign territory of the State of Israel and outside the jurisdictional reach of the ICC. Accordingly, *the ICC lacks jurisdiction over all issues submitted by PA officials.*

III. BECAUSE NO "STATE OF PALESTINE" EXISTS TODAY AND BECAUSE NO SUCH "STATE" HAS EXISTED PREVIOUSLY, THE ROME STATUTE PRECLUDES ANY ATTEMPT BY THE PALESTINIANS TO ACCEDE TO ICC JURISDICTION

A. Prior Palestinian Attempts to Accede to ICC Jurisdiction

The Palestinian Authority (PA) lodged its first Article 12(3) Declaration seeking to accede to ICC jurisdiction in January 2009. To be successful, such an attempt had to presuppose that the PA was then a "State". In response to that attempt, the previous ICC Prosecutor correctly determined that, according to the Rome Statute's clear terms, accession to the Rome Statute was restricted to "States" and that the PA did not then constitute a "State"[133]. The previous Prosecutor also aptly noted that the "Rome Statute provides no authority for the Office of the Prosecutor to adopt a method to define the term 'State' under article 12(3) which would be at variance with that established for the purpose of article 12(1)"[134]. He then added, however, that *he* believed that confirmation of Palestinian statehood by the UN would suffice to establish Palestinian statehood for purposes of acceding to ICC jurisdiction. *As explained more fully in Section III.C. below, the ECLJ submits that this conclusion was wholly incorrect as a matter of law.*

In 2011, based on the previous Prosecutor's opinion that UN recognition would suffice for purposes of Article 12(3) accession, the PA turned to the UN Security Council[135] in a bid to achieve statehood recognition and admission to the United Nations. They did so in complete disregard of their own undertakings in previous agreements (made under the auspices of the international community) whereby such issues would be settled through negotiations with Israel[136]. That effort failed.

After failing to achieve its desired ends at the Security Council, the PA adopted a different approach and sought to achieve a change in its status designation at the UN via the UN General Assembly. That attempt succeeded. In November 2012, the General Assembly

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[133] INT'L CRIMINAL COURT, SITUATION IN PALESTINE, http://www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf.
[134] *Id.*
[135] U.N. Secretary-General, Application of Palestine for Admission to Membership in the United Nations: Note by the Secretary-General, U.N. Doc. A/66/371-S/2011/592 (23 Sept. 2011).
[136] Israeli-Palestinian Interim Agreement, *supra* note 95.

overwhelmingly agreed to change the PA's designation *at the UN* from an "Entity" enjoying Observer status to that of a "Non-member State" with Observer status[137].

B. Legal Significance and Reach of the UN General Assembly's Adoption of the PA Resolution Labelling "Palestine" as a "Non-Member *State*" With Observer Status

The General Assembly is an organ of the United Nations whose authority to act is laid out in the UN Charter, Section IV. Article 10 of the UN Charter, for example, gives the General Assembly the following powers: to "discuss any questions or any matters within the scope of the present Charter" as well as the right to "make recommendations . . . on any such questions or matters." Such functions primarily involve *discussions of policy*. Yet, according to the Charter's explicit terms, the General Assembly is not a policy-*making* body. Its authority is severely curtailed. Although it often debates and adopts resolutions on hot issues of the day, General Assembly resolutions are not legally binding, and they seldom, if ever, include detailed legal analysis or particular attention to the requirements of international law. Critically, the UNGA does not have the authority to make determinations on questions of international law.

The ICC, on the other hand, is a *judicial* body that, by its very nature, *must analyse and comply with the requirements of international law as well as by the explicit jurisdictional terms set forth in the Rome Statute.* To act pursuant to political decisions made by the UN General Assembly, *without evaluating the extent to which they comport with or divert from international law*, would convert the ICC from a judicial body into a political body, and fear of ICC politicisation was one of the primary reasons so many key States have declined to accede to the Rome Statute. Accordingly, the ICC, as a *judicial* body, must studiously avoid simply acquiescing in political decisions and must accept and apply such decisions *only* when they comport with international law.

Under the Rome Statute, for example, the ICC has jurisdiction only in the following five specific "situations"[138]:

(1) Where the alleged Article 5 crimes[139] were committed on the territory of a State Party to the Statute (or on an aircraft or vessel registered in that State)[140];
(2) Where the person accused of committing Article 5 crimes is a national of a State Party to the Statute[141];
(3) Where the alleged Article 5 crimes were committed in the territory of a *State* that is not a Party to the Statute (or on an aircraft or vessel registered in that

[137]U.N. Gen. Assembly, Dep't of Pub. Information, *General Assembly Votes Overwhelmingly to Accord Palestine 'Non-Member Observer State' Status in United Nations*, U.N. (29 Nov. 2012) [hereinafter Dep't of Pub. Information], https://www.un.org/press/en/2012/ga11317.doc.htm.
[138]The Rome Statute refers to both "situations" and "crimes". *See, e.g.*, Rome Statute, *supra* note 4, arts. 13(a)-(b), 14(1). The term "situation" is used to guide the Prosecutor to investigate a conflict generally so that anyone who may have committed one of the "crimes" identified in Article 5 may be prosecuted, irrespective of which side he may have fought on. As such, it is conceivable that individuals from both sides of a conflict could be tried for having committed Article 5 crimes.
[139]*See* Rome Statute, *supra* note 4 and accompanying text.
[140]*Id.* art. 12(2)(a).
[141]*Id.* art. 12(2)(b).

State), and that *State* has acceded to ICC jurisdiction with respect to alleged crimes and situations in question, through the procedure set forth in Article 12(3) of the Statute[142];

(4) Where the person accused of committing Article 5 crimes is not a national of a State Party, but his *State* of nationality has accepted ICC jurisdiction with respect to alleged crimes and situations in question, through the procedure set forth in Article 12(3) of the Statute[143]; or

(5) Where a situation in which one or more of the crimes set forth in Article 5 of the Statute appear to have been committed is referred to the ICC Prosecutor by the UN Security Council, acting under Chapter VII of the UN Charter[144].

Article 12 of the Rome Statute sets forth plain and irreducible "[*p*]*reconditions* to the exercise of jurisdiction" by the Court[145]. It states unequivocally that acceptance of the Court's jurisdiction is limited to "States"[146]. According to Mahnoush Arsanjani, formerly with the UN Office of Legal Affairs, "Article 12 sets a broad jurisdiction for the Court in accordance with which the Court may exercise jurisdiction when it has the consent of the *State* of the territory where the crime is committed *or* the consent of the *State* of the nationality of the accused"[147]. Becoming a State Party to the Statute constitutes automatic acceptance of ICC jurisdiction for the crimes listed in Article 5, when such crimes were either committed on the State Party's territory or by one of the State Party's nationals. Further, non-Party *States* may also accede to ICC jurisdiction over their territory and nationals, either in general or for specific situations[148].

Article 125 of the Statute notes that only a "State" is eligible for "[s]ignature, ratification, acceptance, approval or accession" to the Rome Statute[149]. Article 12 speaks of "acceptance" of the jurisdiction of the Court, and, in particular, Article 12(3) invites the retrospective "acceptance" of jurisdiction by a non-Party *State*[150]. Professor Otto Triffterer noted in his Commentary on the Rome Conference that, "[i]n accordance with normal modern practice for multilateral treaties, the [ICC] Statute [was] open for signature by all *States*"[151].

Article 13 provides that where statutory jurisdiction is otherwise well-founded under Article 12, the ICC *may* investigate and prosecute the crimes listed in Article 5 in three circumstances:

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[142] *Id.* art. 12(2)(a), 12(3).

[143] *Id.* art. 12(2)(b), 12(3).

[144] *Id.* art. 13(b). The U.N. Security Council is the only entity that may extend the reach of the ICC beyond the territory and nationals of a State Party (or a consenting non-party "State") to the Rome Statute. *See* Kaul, *supra* note 29, at 612.

[145] Rome Statute, *supra* note 4, art. 12 (emphasis added).

[146] *Id.* Article 31(1) of the 1969 Vienna Convention on the Law of Treaties provides: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose". Vienna Convention, *supra* note 12, art. 31(1). The term "State", in international practice, refers to an entity that meets four qualifications. These qualifications are "a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states". Convention on the Rights and Duties of States art. 1, 26 Dec. 1933, 49 Stat. 3097 [hereinafter Montevideo Convention], http://avalon.yale.edu/20th_century/intam03.asp.

[147] Mahnoush H. Arsanjani, *The Rome Statute of the International Criminal Court: Exceptions to the Jurisdiction, in* MAURO POLITI & GIUSEPPE NESI, THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A CHALLENGE TO IMPUNITY 51 (2002) (first and third emphases added); *see also* Rome Statute, *supra* note 4, art. 12(2).

[148] *See* Rome Statute, *supra* note 4, arts. 11(2), 12(3).

[149] *Id.* art. 125.

[150] *Id.* art. 12(3).

[151] TRIFFTERER & AMBOS, *supra* note 28, at 1287 (emphasis added).

(a) A situation in which one or more of such crimes appears to have been committed is *referred to the Prosecutor by a State Party* in accordance with article 14;
(b) A situation in which one or more of such crimes appears to have been committed is *referred to the Prosecutor by the Security Council* acting under Chapter VII of the Charter of the United Nations; or
(c) The *Prosecutor has initiated an investigation* in respect of such a crime in accordance with article 15[152].

There is no provision in the Rome Statute that permits *non-State entities* to accede to ICC jurisdiction. The only provision in the Statute that can extend ICC jurisdiction to reach *non-State entities* is Article 13(b), since the UN Security Council is not constrained by any territorial or nationality limitations with respect to the referral of Article 5 crimes to the Prosecutor. The only constraint in the Statute on the Security Council is that the Council must be "acting under Chapter VII of the [UN] Charter"[153]. Consequently, unless "Palestine" is currently a "State" *in fact* or the UN Security Council has referred the matter under Chapter VII of the UN Charter, the ICC may not entertain any Palestinian Declarations. *The key issue, then, is whether a Palestinian "State" currently exists.*

C. Adoption of the PA Resolution by the UN General Assembly Did Not—*and Indeed Could Not*—Determine that "Palestine" Was a State *in Fact*; It Could Only Determine that, Henceforth, *at the UN*, the UN Would Deal With "Palestine" as It Deals With "Non-Member States" Rather Than How It Deals With Non-State "Entities"

Despite the General Assembly vote which purported to change the PA's status at the UN from "Entity" with Observer status to "Non-Member State" with Observer status, no *legal* (or actual) change actually occurred with respect to the creation or existence of a Palestinian "State" for the following reasons:

First, under the UN Charter, the General Assembly has no lawful authority whatsoever to create or recognise a "State". *The UN does not officially recognise states or declare statehood*; such actions are the responsibility of individual governments:

> The recognition of a new State or Government is an act that *only other States and Governments may grant or withhold.* It generally implies readiness to assume diplomatic relations. The United Nations is neither a State nor a Government, and therefore does not possess any authority to recognize either a State or a Government[154].

Further, when the States of the world gather together to make decisions as members of the UN General Assembly, they are bound by the explicit terms of the UN Charter as to what they may do. Hence, were the General Assembly to attempt to either create or recognise a "State", its actions would exceed its authority under the Charter and would be *ultra vires*. As a consequence, *to have any legal meaning at all*, the General Assembly decision to change the

[152] Rome Statute, *supra* note 4, art. 13 (emphasis added).
[153] *Id.* art. 13(b).
[154] *Member States: About UN Membership*, UNITED NATIONS, http://www.un.org/en/sections/member-states/about-un-membership/index.html (last visited 31 Jan. 2018) (emphasis added).

PA's status at the UN could be, *at most*, simply an internal, administrative decision whose reach is limited to how the PA will henceforth be dealt with *at the UN*—and nothing more—*else it would be an unlawful act on the part of the General Assembly*.

As U.S. Permanent Representative Susan Rice correctly noted at the time, in response to those asserting that the General Assembly resolution did in fact convey statehood to the Palestinians, "[n]o [General Assembly] resolution can create a state where none exists"[155]. Even States that voted for the resolution stated at the time that they were not formally recognising a "State of Palestine" *per se*. For instance, the Permanent Representative from Georgia aptly stated: "*The resolution adopted today could be understood as conferring privileges and rights in line with those of Non-Member Observer States; it did not imply an automatic right for Palestine to join international organizations as a State*"[156]. Similarly, the Finnish Permanent Representative noted that "the Assembly's vote did not entail formal recognition of a Palestinian State. Finland's national position on the matter would be considered at a later date"[157]. Moreover, the States that abstained also raised clear concerns. The United Kingdom's representative, for example, expressed grave concern "about the action the Assembly had taken, saying that 'the window for a negotiated solution was rapidly closing'. Israel and Palestine must return to credible negotiations to save a two-State solution. The Palestinian leadership should, without precondition, return to the table"[158]. Germany's representative expressed similar concern by stating that Palestinian statehood could only be achieved through "direct negotiations"[159]. Hence, to conclude that the GA resolution recognised Palestinian statehood *per se* is simply incorrect.

In reality, the adopted resolution merely gave the Palestinians the *rights and privileges* of a Non-Member Observer State at the UN (like the Holy See) without actually conferring or recognising Palestinian statehood *per se*. Accordingly, the ICC continues to lack jurisdiction, since, *legally*, the PA remains a non-State entity which, by the Rome Statute's explicit language, is incapable of acceding to ICC jurisdiction.

Most troubling to the ECLJ is that it appears that the OTP was willing to accept ***as binding*** the political determinations of the UN General Assembly (despite clear evidence that many States voting for the status change explicitly noted that they were not voting to recognise a Palestinian "State" *per se*) while ***eschewing objective indicia of statehood*** found in customary international law. Without suggesting bad faith on the OTP's part, in our view, the OTP decision inexplicably acquiesced in a political decision taken by the General Assembly that clearly did not comport with well-established requirements for statehood found in customary international law.

Second, the General Assembly has no lawful authority to determine the borders, the territorial extent, or the capital city of *any* state, much less those of an entity whose very existence as a "State" is easily disproven under international law. Despite a clear lack of lawful authority to do so, the status change resolution adopted by the General Assembly nevertheless explicitly incorporated the PA's view concerning borders, territory, and national

[155] Joe Lauria et al., *U.N. Gives Palestinians 'State' Status: Member Nations Upgrade Territories' Standing, in Diplomatic Defeat for U.S., Israel; Abbas Issues Warning on Settlements*, WALL ST. J. (29 Nov. 2012), http://online.wsj.com/article/SB10001424127887323751104578149193307234514.html.
[156] Dep't of Pub. Information, *supra* note 137 (emphasis added).
[157] *Id.*
[158] *Id.*
[159] *Id.*

capital of a future Palestinian "State"[160] while totally disregarding not only Israel's well-established counterclaims but also the explicit means—*to wit, bilateral negotiations*—previously agreed to by both Palestinians and Israelis (under the auspices of the international community) for resolving such disputes as well as explicit language in prior Security Council resolutions.

Moreover, the OTP must take cognisance that the four indicia of statehood set forth in the Montevideo Convention[161] are considered to reflect the *requirements for statehood* under customary international law[162], requirements that the PA has *never* met (i.e., either *before* or *after* adoption of the status change resolution by the General Assembly). In light of the fact that the PA fails to meet the Montevideo criteria[163], Palestine simply cannot be a "State", *no matter how many UN Member States assert that it is or would like it to be and notwithstanding the UN Secretary-General's contrary position when he forwarded the Palestinian document of accession to the ICC Registrar*. In order to be a "State", certain facts on the ground must exist; such facts are wholly lacking in the case of Palestine. Consequently, under customary international law, no Palestinian "State" currently exists, once again precluding ICC jurisdiction. That was confirmed by former PA spokesman Ghassan Khatib who aptly noted concerning Palestine, "[w]e have too many symbols of a state, what we lack is attributes of a state"[164]. This sentiment was echoed by PA Prime Minister Fayyad's assertion that the General Assembly resolution constituted "powerful *symbolism*"[165] as opposed to actual statehood.

As a judicial body, the OTP is obligated to examine the Montevideo criteria closely to determine whether a Palestinian State exists *in fact* under law. Simply accepting the General

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[160]We say "future" state for a number of reasons: First, because even PA President Mahmoud Abbas described what occurred at the General Assembly as being the "birth certificate" of Palestine, *id.*; and second, because the entity known as Palestine utterly fails to meet the four indicia of statehood recognised and required under customary international law. Montevideo Convention, *supra* note 146.

[161]Under the convention, a state "should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with other states". *Id.* art. 1.

[162]*See, e.g.*, JOSHUA CASTELLINO, INTERNATIONAL LAW AND SELF-DETERMINATION 77 (2000) (citing D.J. HARRIS, CASES AND MATERIALS OF INTERNATIONAL LAW 102 (5th ed. 1997)) ("The Montevideo Convention is considered to be reflecting, in general terms, the requirements of statehood in customary international law".); Pamela Epstein, *Behind Closed Doors: "Autonomous Colonization" in Post United Nations Era—The Case for Western Sahara*, 15 ANN. SURV. INT'L & COMP. L. 107, 119 (2009) (internal citation omitted) ("Although the Montevideo Convention was created as a regional treaty, it has developed into customary international law and the criteria have become a touchstone for the definition of a state . . .".); Tzu-Wen Lee, *The International Legal Status of the Republic of China on Taiwan*, 1 UCLA J. INT'L L. & FOREIGN AFF. 351, 392 n.70 (1997) ("[The Montevideo] Convention is regarded as representing in general terms the criteria of statehood under customary international law".).

[163]Palestine fails to meet the criteria of the Montevideo Convention for a variety of reasons. For instance, three political bodies claim the right to control Palestine—Israel, Hamas, and the PA. In addition, the PA "is subject to the Oslo Accords, which explicitly stipulated that this body is not independent and that its actual control of the area and ability to enter into relations with other states are not absolute, but rather subject to various limitations." Amichai Cohen, *U.N. Recognition of a Palestinian State: A Legal Analysis*, THE ISRAEL DEMOCRACY INST. (29 Nov. 2012), http://en.idi.org.il/analysis/articles/un-recognition-of-a-palestinian-state-a-legal-analysis-updated/. Moreover, Palestine lacks a defined territory and a permanent population because "the location of the borders and the size of the population of the [potential] Palestinian state are at the center of a controversy that has been the subject of negotiations . . . for years". *Id.*

[164]Joshua Mitnik, *Palestinians Adopt Name to Show Off New 'State' Status*, WALL STREET J. (6. Jan. 2013), http://online.wsj.com/article/SB10001424127887323482504578225523760483386.html.

[165]*Now What? The State of Palestinian Statehood*, NPR (1 Dec. 2012), https://www.npr.org/programs/all-things-considered/2012/12/01/166261876/ (interviewing PA Prime Minister Salam Fayyad). "Symbolism", no matter how "powerful", is not the same as actual statehood.

Assembly resolution as dispositive of Palestinian statehood for purposes of acceding to ICC jurisdiction does not suffice. Moreover, wishful thinking, no matter how sincere or widely held, is insufficient to establish statehood under law.

Third, the General Assembly has no authority to set aside or supersede the terms of existing treaties, other international agreements and documents, or Security Council resolutions. Because the PA had freely entered into a series of agreements with Israel[166] whose terms explicitly ruled out "unilateral" actions, determining when a Palestinian "State" will come into existence and what territories it will encompass continues to depend on the results of direct, bilateral negotiations between Palestinian and Israeli officials (*negotiations which have not yet occurred*), as called for in the prior agreements between them. The terms of such agreements continue to bind the Palestinians.

Further, Security Council Resolution 242 (1967) anticipated territorial adjustments as part of the peace process, adjustments which were to be negotiated between the parties[167]. As Lord Caradon, the chief architect of Resolution 242, aptly noted,

> [i]t would have been wrong to demand that Israel return to its positions of June 4, 1967, because those positions were undesirable and artificial. After all, they were just the places where the soldiers of each side happened to be on the day the fighting stopped in 1948. They were just armistice lines. That's why we didn't demand that the Israelis return to them[168].

One must also recognise that UN Security Council Resolution 242 did not mention a Palestinian entity at all. Moreover, no Palestinian representative was invited to address the Security Council at the time. The reason for this was that the Palestinians were not actual actors in the ongoing events. They had no State. And no one was claiming that the areas of the former Mandate for Palestine which had been under Egyptian and Jordanian belligerent military occupation for the previous 18 years belonged to "the Palestinians". Current Palestinian territorial claims are of relatively recent vintage. Only in 1988 did the Palestinians even "declare" their independence. That was 40 years after the State of Israel came into existence and occurred while the PLO leadership was in exile in Tunisia. Despite the excitement in some circles surrounding the 1988 declaration, the PLO did not then govern one

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[166]Israeli-Palestinian Interim Agreement, *supra* note 95.

[167]S.C. Res. 242 (22 Nov. 1967).

[168]BEIRUT DAILY STAR, 12 June 1974, excerpt *reprinted in* LEONARD J. DAVIS, MYTHS AND FACTS 1985: A CONCISE RECORD OF THE ARAB-ISRAELI CONFLICT 44 (Near East Research 1984); *see also* MacNeil/Lehrer Report, (PBS television broadcast 30 Mar. 1978), https://www.pbs.org/newshour/show/the-macneil-lehrer-report-from-nov-30-1983 (Lord Caradon: "***We didn't say there should be a withdrawal to the '67 line; we did not put the 'the' in, we did not say 'all the territories' deliberately.*** We all knew that the boundaries of '67 were not drawn as permanent frontiers, they were a cease-fire line of a couple of decades earlier. . . . We did not say that the '67 boundaries must be forever" (emphasis added).); Proceedings of the 64th Annual Meeting of the American Society of International Law 894–96 (1970) (Eugene Rostow:

> [T]he question remained, 'To what boundaries should Israel withdraw'? On this issue, the American position was sharply drawn, and rested on a critical provision of the Armistice Agreements of 1949. Those agreements provided in each case that the Armistice Demarcation Line 'is not to be construed in any sense as a political or territorial boundary, and is delineated without prejudice to rights, claims or positions of either party to the Armistice as regards ultimate settlement of the Palestine question'. . . . These paragraphs, *which were put into the agreements at Arab insistence*, were the legal foundation for the controversies over the wording of paragraphs 1 and 3 of Security Council Resolution 242, of November 22, 1967.

(emphasis added)).

square centimetre of territory in the former Mandate for Palestine—*and never had*; Israel governed it all.

Following the 1973 Arab-Israeli War, Security Council Resolution 338 (1973) reaffirmed that Resolution 242 was to serve as the basis for achieving a lasting peace between Israel and its Arab neighbours[169]. Accordingly, final resolution of the issues between the Palestinians and Israelis, including the issue of Palestinian statehood (and all that that entails), awaits final determination via bilateral negotiations (*which, once again, have not yet occurred*).

In addition, pursuant to *uti possidetis juris*[170] (discussed in Section II *supra*), when the British departed Palestine in May of 1948, the State that emerged upon withdrawal of the British inherited the territory bounded by the former Mandatory's administrative borders, which, in this case, included the entirety of the Mandate for Palestine west of the Jordan rift valley. Israel was the only state to emerge out of the Mandate for Palestine upon British withdrawal. Hence, pursuant to *uti possidetis juris*, Israel inherited the entirety of the territory between the Jordan rift valley and the Mediterranean Sea. Further, even quite apart from *uti possidetis juris*, the Jews have a legitimate, *continuing* right to settle throughout Palestine, based on the Mandate for Palestine[171], which was sanctioned in international law in the 1920s *and which has arguably never been superseded*[172] (at least colourably with respect to the West Bank and Gaza Strip), thereby establishing an additional, legally cognisable Israeli counterclaim to Palestinian claims. Accordingly, all of the territory that the Palestinians claim to be theirs is, *at best*, *disputed* territory whose ownership must be determined via negotiations between the parties (as had already been agreed to *in principle* by both Israelis and Palestinians[173]).

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Irrespective of any General Assembly resolution touting Palestinian "statehood", the ICC lacks jurisdiction, since the PA remains *in fact* a non-State entity, which exercises no sovereign authority over any of the territory of the former Mandate for Palestine—*and never has*. Nothing changed on the ground by virtue of the General Assembly resolution. The previous Prosecutor recognised that no state of Palestine existed when the Palestinians attempted to accede to the Rome Statute in 2009, and the situation on the ground remained unchanged following the General Assembly resolution in 2012. To assert the rise of a Palestinian "State" from the General Assembly resolution is wholly unsupported by law or fact. Moreover, it would mean that the OTP, a judicial body, would accept as binding the politically motivated decisions of some members of the General Assembly whilst eschewing objective indicia of statehood articulated under customary international law.

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[169] S.C. Res. 338 (22 Oct. 1973).
[170] *See* Section II, *supra*.
[171] *See* League of Nations, Mandate for Palestine art. 6 (Dec. 1922).
[172] *See, e.g.*, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.J.C. 53 (21 June), http://www.icj-cij.org/files/case-related/53/053-19710621-ADV-01-00-EN.pdf (noting, concerning League of Nations mandates, that "[s]ince [the Mandate's] fulfillment did not depend on the existence of the League of Nations, [it] could not be brought to an end merely because this supervisory organ ceased to exist. Nor could the right of the population to have the Territory administered in accordance with these rules depend thereon").
[173] Israeli-Palestinian Interim Agreement, *supra* note 95, art. XI.

IV. ICC JURISDICTION IS ALSO PRECLUDED PURSUANT TO TERMS OF EXISTING AGREEMENTS BETWEEN THE PALESTINIANS & ISRAEL

A. Until the Borders of a Future "State of Palestine" are Determined via Bilateral Negotiations, it is Simply Impossible to Determine Over Which Territory the ICC Might Be Able to Exercise Jurisdiction

By entertaining the current Palestinian charges about alleged Israeli crimes committed on so-called "occupied Palestinian territory", the ICC is allowing itself to be dragged into the long-standing political quagmire of the Israeli-Palestinian conflict and is being asked to predict—***before agreed-to bilateral negotiations have even been convened***—how the outstanding Israeli-Palestinian political issues—*including the issues of borders, settlements, and the status of Jerusalem*—will ultimately be resolved between the parties (as already agreed-to by the Palestinians[174]). Moreover, resolution of such ***political*** matters is simply outside the ability of any judicial body, including the OTP and the ICC.

It is a simple fact that determination of the borders of a future Palestinian State is required before any court can consider and resolve contentious legal issues between the parties. For example, until the ultimate borders of a future Palestinian state are determined via negotiations, there is no valid judicial means to determine whether any of the alleged offences even occurred on territory belonging to a notional "State of Palestine". Likewise, until such borders are negotiated, there is no valid judicial means to determine whether a so-called illegal "settlement" lies within notional "Palestinian territory". The same is true concerning the status of Jerusalem. Accordingly, even assuming *arguendo* that the ICC could lawfully assert jurisdiction over these matters ***at some point*** (which the ECLJ submits it may not do *vis-à-vis* Israel absent Israel's prior consent without violating customary international law and the Rule of Law), *legal matters* regarding such issues of dispute between Israelis and Palestinians are currently not yet ripe for judicial resolution, as the OTP must surely recognise. Accordingly, the OTP should, *as an absolute minimum*, dismiss the Palestinians' allegations as being unripe for adjudication until the parameters of a future Palestinian State are established pursuant to bilateral negotiations between the parties.

Moreover, until the boundaries of a future Palestinian State are determined via bilateral negotiations, no Palestinian State actually exists[175]. Once bilateral negotiations are completed and a Palestinian State actually comes into existence *in fact*, only then will Palestinians have sovereign authority to accede to the Rome Statute. Further, only once there is a Palestinian State *in fact* will the Palestinians be able to confer authority to the ICC. Yet, even then, ***such a future State of Palestine will be able to convey such authority only***

[174]Israeli-Palestinian Interim Agreement, *supra* note 95, *passim* (referring repeatedly to "issues that will be negotiated in the permanent status negotiations"). Despite being the most popular game in town, even the two-state solution itself is not a foregone conclusion. Accordingly, the OTP cannot base legal decisions on a projected, hypothetical reality.

[175]The ECLJ expresses its concern once again about how the OTP determined that "Palestine" was a "State" for purposes of acceding to the Rome Statute. Rather than looking to objective, legal indicia of statehood as found in customary international law (such as, the Montevideo Convention criteria), which one would expect a judicial body to do, a "State of Palestine" was recognised based on the decision of the UN General Assembly to change the status of "Palestine" *at the UN* from "Entity" with observer status to "Non-member State" with observer status. This was done despite the fact that many UN Member States expressly stated that their votes to change the designation at the UN were not meant to signify that they recognised that "Palestine" was in fact a "State" and that absolutely nothing changed politically or otherwise on the ground in the area in question. Accordingly, we submit that the OTP made a grave error of judgement by opting for a politicised position over a legal one.

retroactive to the date that the State actually comes into existence, and, as of today, that date remains a future event[176]. Hence, to date, given that no Palestinian State currently exists *in fact*, the entity called "Palestine" lacks the legal competence to accede to the Rome Statute, and its allegations against Israel are wholly outside the jurisdiction of the ICC. *In light of the foregoing, that the OTP is even entertaining Palestinian allegations demeans the reputation of the OTP and regrettably casts doubt on its fidelity to the Rule of Law.*

B. Pursuant to Article 98(2) of the Rome Statute, the PA May Not Surrender Israeli Nationals to the ICC

Quite apart from the terms of previously cited agreements between the Palestinians and Israelis that explicitly disallow the PA from taking the actions that it has been taking in violation of those same agreements, the Rome Statute itself includes terms to protect the integrity of prior agreements that in effect preclude ICC jurisdiction.

Article 98(2) of the Rome Statute reads as follows:

> The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

Pursuant to the terms of the 1995 Israeli-Palestinian Interim Agreement, Palestinian officials lack all authority over Israeli nationals in all geographic areas where Israel has agreed to grant Palestinians incipient authority to rule over their fellow Palestinians[177]. Israel has retained to itself authority over all Israeli nationals as recognised and agreed to by the Palestinians. Accordingly, the PA lacks all authority over Israeli nationals and cannot convey authority it does not possess to any person or organisation. Because Israel, as a non-party State to the Rome Statute, has already rejected the Rome Statute, it is highly unlikely to consent to allowing its nationals to be surrendered to a court created by the Rome Statute, a court that it fundamentally mistrusts and believes to be politicised.

CONCLUSION

The stated goals of the Rome Statute are laudable. Ensuring that perpetrators of the most serious international crimes do not go unpunished is clearly a worthy goal with which all people of good will and conscience can agree. However, as demanded by the Rule of Law and in the interests of justice, one must only use lawful means to achieve such ends. We respectfully submit that subjecting the nationals of any non-consenting, third-party State to the Rome Statute violates customary international law; is, therefore, *ultra vires*; and makes those who attempt to do so lawbreakers themselves. We also urge the OTP to recognise the

[176]Moreover, a future Palestinian state will likely have self-imposed restrictions such as some measure of demilitarisation. There may also be some form of limited jurisdiction over Israelis as is the case today under the Oslo Accords. Right now, it is impossible to know what will be decided.
[177]Israeli-Palestinian Interim Agreement, *supra* note 95.

significance of *uti possidetis juris* as absolutely establishing Israeli sovereignty over the entirety of the territory of the Mandate for Palestine within the borders of Palestine as they existed in May 1948 when Israel emerged as the only State upon the departure of the British. We respectfully urge the OTP to recognise that the UN General Assembly wholly lacks authority to create or recognise a "State" and that the so-called "State of Palestine" so created fails to meet the basic criteria for actual statehood, thereby precluding its ability to accede to the Rome Statute and submit complaints for consideration by the OTP. Finally, we urge the OTP to recognise that the issues before it *vis-à-vis* Israel are essentially political issues not yet fit subjects for judicial resolution and violate Article 98 of the Rome Statute.

Accordingly, we strongly and respectfully urge Your Excellency, as ICC Prosecutor, to recognise every non-party State's—*including Israel's*—sovereign right to withhold permission from the ICC to assert jurisdiction over its nationals. Further, we also strongly and respectfully urge Your Excellency to discontinue ongoing investigations of every non-party State's—*including Israel's*—nationals and to direct OTP staff personnel to do the same.

And, finally, as we have done in the past, the ECLJ pledges to continue, when we deem appropriate, submitting letters and legal memoranda regarding this and related topics to assist you and the OTP as you deal with these important issues. In the coming weeks, we will send you our companion brief dealing with the issue of Complementarity and why it also precludes ICC jurisdiction over Israel and its nationals.

Respectfully submitted,

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