Non-state entity’s ‘ability to lodge’ a declaration
pursuant to Article 12(3) of the ICC Statute

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1. Palestine’s ad hoc declaration accepting the jurisdiction of the International Criminal Court: The road so far

On 22 January 2009, the Palestinian National Authority (PNA) lodged a declaration under Article 12(3) of the ICC Statute, recognizing the jurisdiction of the International Criminal Court (ICC) for ‘the purpose of identifying, prosecuting and judging the authors and accomplices of acts committed on the territory of Palestine since 1 July 2002’. The day after, the ICC Registrar acknowledged receipt of the

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PNA ‘correspondence which refers itself to’ Article 12(3) of the Rome Statute, informing the PNA that ‘a declaration under Article 12 paragraph 3 has the effect of the acceptance of jurisdiction with respect to the crimes referred to in Article 5 of relevance to the situation and the application of the provisions of Part 9 and any rules thereunder, concerning States Parties, pursuant to Rule 44 of the Rules of Procedure and Evidence’.

In a Statement of 13 February 2009, the ICC Prosecutor maintained that it would have carefully examined all relevant issues related to the jurisdiction of the Court, ‘including whether the declaration by the [PNA] accepting the exercise of jurisdiction by the ICC meets statutory requirement; whether the alleged crimes fall within the category of crimes defined in the Statute, and whether there are national proceedings in relation to those crimes’. According to the Prosecutor, in fact, even in the case of a referral by the UN Security Council, ‘issues of jurisdiction had to be independently assessed in order to determine whether or not to open an investigation’. This determination has to be made by the Prosecutor applying ‘the same standard to all situation[s]’ that he/she is preliminary examining, in order to verify whether the criteria under the Rome Statute for opening a formal investigation are met. In particular the Prosecutor firstly examines the preconditions to the exercise of jurisdiction (Article 12 of the ICC Statute), and, if they are established, the other condition set out in Articles 13 and 53(1) of the ICC Statute.

Accordingly, in its Report on the ‘Updated Situation in Palestine’ of 3 April 2012, the Prosecutor proceeded to assess those preliminary criteria, and the basis of the jurisdiction as the primary precondition to the exercise of jurisdiction of the Court. The crucial issue to be dealt with

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4 Available at <www.icc-cpi.int/NR/rdonlyres/4CC08515-D0BA-454D-A594-446F0289EF2/280869/PNAMFA130209.pdf> (emphasis added).
5 The same statement was confirmed in the Letter by the Office of the Prosecutor to the UN High Commissioner on Human Rights, dated 12 January 2010, OTP/INCOM/PSE/OHCHR-1/JCD-ag, available at <www.icc-cpi.int/NR/rdonlyres/FF55CC8D-3E63-4D3F-B502-1DB2BC4D49FF/281439/LettertoUNHC1.pdf>.
by the Prosecutor was whether the Entity that filed the declaration was a ‘State’ provided that, in accordance with Article 12(1), only a ‘State’, which is not Party to the Rome Statute, can accept the exercise of the Court’s jurisdiction by an ad hoc declaration. In actual fact, the Prosecutor did not try either to establish this condition, or to determine the meaning of ‘State’ under the Rome Statute.

In accordance with Article 125 of the Statute, in fact, the instrument of accession of any State seeking to become a Party to the Statute must be deposited with the UN Secretary-General, who can rely on the ‘directives’ of the General Assembly in disputed cases. Therefore, in the Prosecutor’s view, it is for the former, under the guidance of the latter in controversial cases, to decide whether an acceding State or the Entity lodging an ad hoc declaration is a ‘State’, and, as a consequence, to interpret and apply the relevant rules of the Rome Statute. Residually, the Prosecutor held that the same competence can be exercised by the Assembly of States Parties (ASP) under Article 112(2)(g) of the Statute, which provides that it performs ‘any other function consistent with this Statute or the Rules of Procedure and Evidence’.

This paper aims at analysing the Non-state entity’s (hereinafter ‘Entity’) ‘ability to lodge’ an ad hoc declaration. Considering that the term ‘State’ in Articles 12(1)(3) and 125 of the Rome Statute are not ‘equivalent’ in meaning, the paper also intends to discuss which institution is entitled to determine the legal status of an acceding Entity, and to interpret the term ‘State’ within the meaning of Article 12(3) of the Statute, particularly when the Entity’s statehood is controversial (sections 3 and 5).

Although the Statute does not expressly confer authority to the Prosecutor, nor establishes a specific procedure to determine whether the Entity lodging an Article 12(3) declaration is or can be regarded as a ‘State’, the paper holds that such specific competence can be exercised by the Prosecutor while assessing the ‘primary’ preconditions to the exercise of ICC jurisdiction (ie, before starting to evaluate the available information in order to decide whether to initiate an investigation – Articles 15(1) and 53(1)). During this assessment, the determination of the meaning of the term ‘State’ under Article 12 of the Rome Statute is a

7 See, against the approach taken by the Prosecutor to follow the practice of the UN, rather than to make a determination on its own, Zimmermann (n 2) 305 ff.
question of interpretation and application, such as the interpretation of any other relevant provision of the Statute that the Prosecutor needs to apply in order to verify the other preliminary criteria. Moreover, even though the Statute does not provide the Prosecutor with authority for ‘adopt[ing] a method to define the term “State” under Article 12(3),’ a ‘method’ is not settled by Article 12(1) or Article 125. Nor can it be maintained that the competence rests, in the first instance, with the UN Secretary-General (under the guidance of UN General Assembly) in all the cases when a declaration under Article 12(3) is lodged by a UN Non-member State. On the contrary, it is for the Prosecutor to verify if the Entity lodging an Article 12(3) declaration can be qualified as, or regarded as equivalent to a ‘State’ for the purpose of accepting the exercise of jurisdiction by the Court, taking into account, on the one hand, the relevant rules of the Statute and international law, and, on the other hand, the practice of the ASP – if any – and, potentially, other international organizations, when the status of the accepting Entity is controversial or unclear. Should any dispute regarding the judicial functions of the Court or the interpretation and the application of the Statute arise in connection with the qualification as a ‘State’ of an entity or a UN Non-member State made by the Prosecutor, the dispute can be settled by a decision of the Court under Article 119(1) of the Statute or, in the case that it concerns two or more States Parties, can be referred to and solved by the ASP in accordance with Article 119(2).

Moreover, the paper seeks to identify which Entity can be considered to possess the ‘ability to lodge’ and, as a consequence, can confer jurisdiction to the Court with respect to crimes committed in its territory or by its nationals (section 4). Lastly, some final remarks address the

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9 RS Clark, ‘Article 119 – Settlement of Disputes’, O Triffterer (ed), Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article (2 edn, Hart Publishing 2008) 1729: ‘My understanding, from participating in the drafting process, is that, at the least, anything that could be said to have some relationship, however tenuous, to prosecution of an individual or a group of individuals on the basis of a concrete complaint of a breach of the Statute, would be included in the notion of judicial functions. In the absence of any definitive lists in the preparatory work of the issues to which this language might refer, I have gone through the Rome Statute and made some tentative suggestions […] On the judicial functions side of the line are probably: […] whether the preconditions to the exercise of jurisdiction have been met’ (emphasis added).
UN Security Council’s competence to provide jurisdiction to the Court, under Article 13(b), with respect to crimes committed on the territory of an Entity which is not a UN Member State, whether or not it has been granted the status of UN Observer or UN Non-Member Observer State (section 6).

2. *Everything, especially minds, can change even if nothing has changed*

On 29 November 2012, the UN General Assembly, by its Resolution 67/19 decided to accord to Palestine ‘Non-member Observer State’ status in the United Nations, considering also that (1) the World Bank, the United Nations and the International Monetary Fund had positively assessed Palestine’s readiness for statehood, (2) full membership is enjoyed by Palestine, inter alia, in the United Nations Educational, Scientific and Cultural Organization (UNESCO), (3) at that time, 132 UN Members States had accorded recognition to the State of Palestine, and (4) the Security Council Committee on the Admission of New Members, in its 2011 Report, suggested – as an intermediate step – to grant Palestine the status of ‘Observer State’, because it was unable to make a unanimous recommendation to the Security Council concerning the application of Palestine for admission to membership in the United Nations.

Having been finally qualified as a ‘State’ by UN institutions, on 2 January 2015, Palestine deposited with the UN Secretary-General, in his capacity as depositary, the instruments of accession to the Rome

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10 UN Doc A/RES/67/19 (4 December 2012).
11 Report of the Committee on the Admission of New Members concerning the application of Palestine for admission to membership in the United Nations, UN Doc S/2011/705 (11 November 2011).
12 Application of Palestine for admission to membership in the United Nations – Note by the Secretary-General, UN Doc A/66/371-S/2011/592 (23 September 2011).
13 UN General Assembly, by its resolution 43/177, UN Doc A/RES/43/177 (15 December 1988), acknowledged the proclamation of the State of Palestine by the Palestine National Council on 15 November 1988 and decided that the designation ‘Palestine’ should be used in place of the designation ‘Palestine Liberation Organization’ in the United Nations system, without prejudice to the observer status and functions of the Palestine Liberation Organization within the United Nations system.
Statute (as well as a number of other international treaties). On 6 January 2015, the Secretary-General gave notification that the Rome Statute would enter into force for the ‘State of Palestine’ on 1 April 2015, in accordance with Article 126(2), and the Agreement on the Privileges and Immunities of the International Criminal Court (APIC) would enter into force for the aforementioned State on 1 February 2015, in accordance with Article 35(2).

Moreover, on 31 December 2014, the Government of Palestine, acting under Article 12(3) of the Rome Statute, lodged a new declaration recognizing ‘the jurisdiction of the Court for the purpose of identifying, prosecuting and judging authors and accomplices of crimes committed in the occupied Palestinian territory, including East Jerusalem, since 13 June 2014’. The day after, the ICC Registrar not only confirmed receipt of the ‘declaration’ – on the previous occasion the Registrar made only reference to a ‘correspondence which refers itself to’ Article 12(3) of the ICC Statute – but also ‘accepted’ the declaration and transmitted it to the Prosecutor for further consideration. On 16 January 2015, the Prosecutor opened a preliminary examination of the situation in Palestine.

17 Available at <www.icc-cpi.int/iccdocs/press/Palestine_A_12-3.pdf>.
19 ICC Registrar’s 2009 Communication (n 3).
What has really changed since the 2009 ad hoc declaration, apart from the different determinations of the Prosecutor in 2012 and in 2015, respectively? Two things have changed: the status of Palestine in the United Nations and the Palestinian authorities that lodged the ad hoc declaration has also changed. In 2009, the declaration was submitted by the PNA – the interim Government of the Palestinian territories created under the 1993 Oslo Accords –, whereas, in 2014, it was submitted by the State of Palestine, but de facto by the Palestine Liberation Organization (PLO), which is the entity that: (a) adopted the Declaration of Independence of the State of Palestine in 1988 that was subsequently acknowledged by the General Assembly in the same year; (b) was recognized by the Government of the State of Israel on 9 September 1993; (c) is recognized as the sole legitimate representative of the Palestinian people at the international level; (d) filed the ‘Application of the State of Palestine for admission to membership in the United Nations’ in 2011. Nevertheless, even if the PNA and the PLO are considered to be two separate and autonomous legal entities, from a substantive point of view, it can be easily argued that both declarations were lodged by the same entity, namely the Government of Palestine. In fact, the declarations were submitted on behalf of the ‘Government (of the State) of Palestine’. Moreover, the PLO never challenged or sought to unrecognize the 2009 PNA declaration; and the PNA has been de facto absorbed and replaced by the State of Palestine since 2003. Lastly, the Prosecutor did not actually address the point in 2012 and 2015, but considered that both declarations concerned Palestine and its status in the United Nations.

It is interesting to note, instead, what consequences are produced by the UN General Assembly decision granting Palestine the status of ‘Non-member Observer State’: changing the signifier, changes the signified, even if the substance of things remains unchanged.

Firstly, at the end of 2012 Palestine became a ‘State’ only pursuant to the decision of the General Assembly, as ‘suggested’ by the Security Council Committee on the Admission of New Members the year be-

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22 UN Doc A/43/827-S/20278 (18 November 1988).
23 UN Doc A/RES/43/177 (n 13).
25 Shany (n 2) 333 ff.
fore. However, while the General Assembly acknowledged the proclamation of the State of Palestine since 1988, and was aware that Palestine had been accorded recognition by a significant number of UN Member States and that it was admitted to UNESCO as a full member in 2011, the Security Council Committee was unable to decide whether to establish if Palestine were a ‘State’ for the purposes of acceding to the United Nations.

Secondly, in early 2015, in the Registrar’s view, the Palestinian ‘correspondence which refers itself to’ Article 12(3) of the ICC Statute became an ‘official’ declaration, which deserved to be ‘accepted’, but the day after the UN Secretary-General gave notification of the accession of Palestine to the ICC Statute. On the previous occasion, the Registrar was completely silent on this point. In fact, after the acceptance of the 2014 declaration, on 16 January 2015, the Prosecutor opened a preliminary examination into the situation in Palestine, in order to determine whether there was a reasonable basis to initiate an investigation pursuant to Article 53(1) of the Rome Statute, namely whether (a) there is a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed; (b) the case is or would be admissible under Article 17 of the Rome Statute; (c) there are substantial reasons to believe that an investigation would not serve the interests of justice.

Lastly, according to the Prosecutor, the ‘invalid’ and ‘invalidly lodged’ 2009 declaration became the ‘valid’ 2014 declaration because it was filed by a ‘State’ – Palestine – that had acquired the necessary standing as UN Observer State in 2012, thus being entitled to accede to the Rome Statute. Moreover, according to a 2015 Press Release of the


29 See on temporal (retroactive) effects of the 2009 ad hoc Declaration after the General Assembly decision on Palestine’s status within the UN in 2012, see Zimmermann (n 2) 306 ff.
Office of the Prosecutor (OPT), the ‘acceptance of the ICC’s jurisdiction differs from an act of accession to the Rome Statute’. As a consequence, the Palestinian 2014 declaration could be dealt with by the Registrar even before the UN institutions had finished reviewing the documents transmitted by Palestine relating to its accession to the Rome Statute. This means that the accession to the Rome Statute and the ad hoc acceptance of the Court jurisdiction are under two different legal regimes.

3. Are the terms ‘State’ under Articles 12(1) and Article 12(3) and 125 of the Rome Statute ‘equivalent’ in meaning? Who is entitled to determine the legal status of an acceding Non-state entity and to interpret the term ‘State’ within the meaning of Article 12(3) of the Rome Statute?

In 2009, the Prosecutor stated that, on the one hand, the admission to the UN as a Member State ‘has no direct link with the declaration lodged by Palestine’, but, on the other hand, this process ‘informs the current legal status of Palestine for the interpretation and application of Article 12’. However, in 2015 the Prosecutor held that, since Palestine was granted UN Observer State status by the General Assembly, ‘it must be considered a “State” for the purposes of accession to the Rome Statute (in accordance with the “all States” formula)’. Therefore, ‘the term “State” employed in Article 12(3) of the Rome Statute should be interpreted in the same manner as the term “State” used in Article 12(1). Thus, a State that may accede to the Rome Statute may also lodge a declaration validly under Article 12(3)’. In other words, pending the admission to the UN, any Entity, whose statehood is controversial or unclear, cannot be qualified as a ‘State’ for the purpose of accepting the exercise of jurisdiction by the ICC, and its status cannot be assessed by the Prosecutor in accordance with the relevant provisions of the Statute and of general international law. Furthermore, according to the Prosecutor, the ad hoc declaration of an Entity, which is designated as UN Observer, but which has not been granted the status of UN Non-member Observer State, is ‘invalid’ and ‘not validly lodged’. Hence,

there is ‘no basis on which to pursue the preliminary examination further’. 31

Therefore, the interpretation and application of Article 12 of the Statute de facto does depend on the UN legal status of the Entity, which lodges a declaration under Article 12(3) or deposits an instrument of accession in accordance with Article 125. No matter if the Entity is a UN Member State: the Prosecutor also assumes that a UN Member is a ‘State’ within the meaning of Article 12(1) and (3) (and of Article 125) of the Statute. 32 Accordingly, in the case that a declaration is lodged by a ‘UN Non-member State’ or by an Entity, which has not yet been granted the status of ‘UN Non-member Observer State’, but which has already submitted its instrument of accession to the UN Charter, the determination of the term ‘State’ within the meaning of Article 12(3) of the Statute depends on the recommendation of the Security Council and the decision of the General Assembly under Article 4(2) of the UN Charter. If an instrument of accession to the Statute is deposited by a ‘UN Non-member State’ or an Entity, which has not yet been granted the status of ‘UN Non-member Observer State’, the meaning of the term ‘State’ within Article 12(1) of the Statute depends on the determinations of the UN Secretary-General, under the guidance of UN General Assembly in disputed cases, 33 and, in due course, of the ASP. Nevertheless, in the case that an ad hoc declaration is lodged by an Entity or a State – whether or not its statehood is disputed at international level – that has never submitted an instrument of accession to the UN Charter and/or to the ICC Statute, what is the institution entitled to determine the legal status of the accepting Entity or State for the purpose of enabling the exercise of jurisdiction by the Court? 34 What is the institution

31 ICC Prosecutor’s 2013 Report (n 27), para 236.
32 Press Release 16 January 2013, ICC-OTP-20150116-PR1083 (n 21): ‘The Prosecutor […] concluded in April 2012 that Palestine’s status at the United Nations (UN) as an “observer entity” was determinative, since entry into the Rome Statute system is through the UN Secretary-General (UNSG), who acts as treaty depositary’. 33 Ibid: ‘The Palestinian Authority’s “observer entity”, as opposed to “non-member State” status at the UN, […] meant that it could not sign or ratify the Statute. As Palestine could not join the Rome Statute […] the Prosecutor concluded that it could also not lodge an article 12(3) declaration bringing itself within the ambit of the treaty either, as it had sought to do’ (emphasis added).
34 Shany (n 2) 338.
that the Prosecutor can rely upon in order to interpret and apply Article 12(3) of the Statute?

The entry into force of the Rome Statute for a ‘State’, within the meaning of Articles 125, 126 and 12(1), implies not only the acceptance of ‘the jurisdiction of the Court with respect to the crimes’ within the jurisdiction of the Court (Article 5), but also the acceptance of all other mutual rights and obligations governed by the Statute. Nevertheless, a ‘State’ or an Entity, which lodges an ad hoc declaration under Article 12(3), accepts ‘the exercise of the Court jurisdiction with respect to’ the crime(s) mentioned in the declaration and assumes the obligation to cooperate with the Court pursuant to Part 9 of the Statute. In fact, the Prosecutor’s determination on the ability of an Entity to lodge does not affect the definition of the term ‘State’ under Article 12(1) and 125 of the Statute, which can be at variance with that established for the only purpose of enabling the exercise of jurisdiction by the Court under Article 12(3). As this determination is being directed to define what constitutes a ‘State’ for the purpose of acceding to the Rome Statute, it rests, in the first instance, with the UN Secretary-General who, while performing depositary functions, is guided by: (a) the provisions of the Rome Statute; (b) the practice of the General Assembly; (c) international law, including customary international law, and, in the second instance, with the ASP.

According to the ‘Practice of the Secretary-General as Depositary of Multilateral Treaties’, the Secretary-General ‘must’ ascertain whether a ‘State’ may become a party to a treaty deposited with him. When a treaty is open to ‘all States’, the Secretary-General considers that it is outside his competence to determine, on his own initiative, whether or not the Entity that deposit an instrument of accession, whose status is unclear or controversial, is a ‘State’. In this case, the Secretary-General deems it necessary to receive from the General Assembly explicit direc-

35 Cimiotta (n 2) 687.
36 Shany (n 2) 336 ff.
38 Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, prepared by the UN Treaty Section of the Office of Legal Affairs, ST/LEG/7/Rev.1, (2009) para 73.
tives on the entity coming within the ‘all States’ formula.\textsuperscript{39} With reference to ‘entities other than independent States’, the Secretary-General considers that such entities, ‘which are not fully responsible for their own international relations’, are therefore ‘not fully sovereign independent States and accordingly do not fall within the purview of the ‘all State’ clause and cannot participate in treaties open to ‘States’.\textsuperscript{40} Finally, as far as liberation movements are concerned, the Secretary-General maintains that he cannot fulfil his depositary functions in ‘the absence of recognition accorded by the members of the international community, that is to say action taken by a political organ of the United Nations or one of the specialized agencies’, because he has ‘no authority to grant recognition to a Government’.\textsuperscript{41}

The legal regime and the practice that governs the UN membership and the depositary functions of the Secretary-General are different from the rules that govern the determination of the status of an accepting State pursuant to Article 12(3) of the Rome Statute. Therefore, the possibility for a ‘State’ or an Entity, which is not a Party to the Statute, to accept the jurisdiction of the Court cannot be denied by a discretionary determination of the Prosecutor based on the assumption that (a) the acceptance of the Court jurisdiction and the accession to the Statute are under the same legal regime, and/or (b) when an \textit{ad hoc} declaration is lodged by an Entity, whose status is disputed at international or UN level, it is necessary to wait for the assessment of UN institutions on the UN membership or status in order to determine whether or not to accept the declaration.\textsuperscript{42}

Moreover, considering the differences between: (a) the rights, the obligations and the effects for the acceding State by the entry into force of the Statute and on the accepting State/Entity by an \textit{ad hoc} declaration; (b) the criteria to be established in order to accede to the Statute or to accept the exercise of the Court’s jurisdiction of the Court; and (c) the institutions – the UN Secretary-General and the ICC Prosecutor, respectively – entitled to verify whether the acceding or the accepting

\textsuperscript{39} ibid para 81.
\textsuperscript{40} ibid para 97.
\textsuperscript{41} ibid para 100.
\textsuperscript{42} Press Release 16 January 2015, ICC-OTP-20150116-PR1083 (n 21): ‘The UNGA Resolution 67/19 is therefore determinative of Palestine’s ability to accede to the Statute pursuant to article 125, and equally, its ability to lodge an article 12(3) declaration’.
criteria and requirements are met, it is hard to maintain that the term ‘State’ within Articles 12 and 125 has to be determined in the same sense. The term ‘State’ may have a plurality of meanings depending on the different socio-political, cultural and also legal context in which it is used. As a consequence, this term can be considered ‘polyseme’ in its connotations when it is interpreted not only in accordance with its ‘ordinary meaning’ but also taking into account its ‘context’ and the ‘object and purpose’ of an international treaty, such as the Rome Statute.

The legal determination necessary to establish whether an Entity can be qualified as a ‘State’, or – even better – regarded as equivalent to a ‘State’ for the purpose of accepting the exercise of jurisdiction by the Court under Article 12(1) differs from the determination needed to establish whether the instrument of accession to the Statute deposited with the Secretary-General by a ‘State’ can be accepted and the Statute can enter into force for that ‘State’.

When an ad hoc declaration is lodged, the competence to determine whether the Entity can be qualified as a ‘State’ within the meaning of Article 12(3) rests with the Court and has to be exercised, in the first instance, by the Prosecutor while establishing the precondition to the exercise of the jurisdiction, and, in the second instance, by the Chambers under Article 119(1), or by the ASP under Article 119(2), when judicial functions and/or the interpretation or application of the Statute are respectively disputed. The same can be maintained even when the statehood of the Entity that filed the ad hoc declaration is controversial. Otherwise, an ad hoc declaration lodged by a UN Non-Member State, a UN Non-observer State, or any other Entity, which have never applied for the UN membership, and whether or not they had been granted the status of UN “Observer”, could not be dealt with by the Secretary-General nor by the Prosecutor.

\[^{43}\] Shany (n 2) 988 ff.
\[^{44}\] Zimmermann (n 2) 306: ‘under Article 34(c) of the Statute, the OTP is considered to form part of the Court, implying that decisions by the OTP may be covered by Article 119(1)”.
\[^{45}\] Shany (n 2) 338. See also Pellet (n 2) 984, note 7: ‘a Court’s determination of the effects of the Palestinian declaration is an exercise of the Kompetenz-Kompetenz principle”, and at 988: ‘It is for the ICC to define its jurisdiction and the limits imposed on its exercise of jurisdiction, based on its interpretation of the provisions of the Statute, in accordance with the Kompetenz-Kompetenz principle’. 
4. Have Non-state Entities the ‘ability to lodge’ an ad hoc declaration and thereby enable the exercise the Court’s jurisdiction with respect to the crime committed in its territory or by its nationals?

In order to interpret the term ‘State’ under Article 12(3) of the Rome Statute in accordance with the ordinary meaning to be given to this term, even without taking into account the other relevant rules of interpretation provided by the 1969 Vienna Convention on the Law of Treaties, it should be considered that the Statute does not help to establish the meaning of the term “State”, and that, in international law, there is no exact and commonly accepted definition of this term either. Some criteria can be found – for instance – in Article 1 of the Montevideo Convention on the Rights and Duties of States of 1933, which sets the requirements that the State ‘as a person of international law should possess […]: a. permanent population; b. a defined territory; c. government; and d. capacity to enter into relations with other States’. Nevertheless, those criteria are not exhaustive and are not sufficient to determine whether or not an Entity can be qualified as ‘a person of International Law’. Other requirements may be relevant and may be considered when, as in the case of international multilateral treaties open to ‘all States’ or ‘any State’, the Secretary-General must ascertain whether a ‘State’ may become a party to a treaty deposited with him (ie, to determine which entities are ‘States’). Therefore, in controversial situations, when the ‘any State’ or ‘all States’ formula is adopted, the Secretary-General follows ‘the practice of the [General] Assembly in implementing such a clause and, whenever advisable, [requests] the opinion of the [General] Assembly before receiving a signature or an instrument of ratification or accession’.

In its 2013 Report on Preliminary Examination Activities, the Prosecutor explained, indeed, that the criteria to be established are whether or not the accepting State or Entity has the ‘the ability to […] lodge’ an ad hoc declaration, and affirmed that her ‘consideration of jurisdiction

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46 Pellet (n 2) 988: ‘In this instance, the context and the object and purpose of the Statute and of its Article 12 are of particular importance due to the ‘variable geometry’ of the very concept of the state, which makes it difficult to keep to a single unambiguous meaning, and, therefore to an ‘ordinary meaning’.

47 Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties (n 38) para 82.
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does not involve any determination on [the accepting Entity] statehood per se. 48 Therefore, as any question related to the statehood per se can be left aside, 49 and a functional approach to statehood can be embraced, 50 the Prosecutor’s determination on accepting Entity’s ‘ability to lodge’ an ad hoc declaration should be aimed at establishing on a case-by-case basis 51 whether or not that Entity: (a) has an effective de iure or de facto control over the territory where the conduct in question occurred and the population, to which the person accused of the crime belongs (Article 12); (b) it exercises the political and public powers and authority normally exercised by a sovereign State (e.g., in Palestine, apart from the situation of East Jerusalem, no State claims sovereignty on the Palestinian territories); (c) has, inter alia, criminal jurisdiction with respect to the crimes referred to in Article 5 of the Statute. 52 The domestic criminal jurisdiction of the accepting Entity can be assessed not only in the case its jurisdiction is substantially exclusive and independent, but also when its jurisdiction is limited, as, for instance, with Palestine criminal jurisdiction over Israeli nationals 53 or settlements situated within Palestine’s territories. 54 According to the so called ‘delegation-based

48 ICC Prosecutor’s 2013 Report (n 27), para 238.
49 Pellet (n 2) 983 ff and 998. Contra Ronen (n 2) 26-27: ‘[I]t would be premature for the ICC Prosecutor or Court to recognize the Palestinian declaration as that of a state, even for the limited purpose of Article 12(3). Interpreting Article 12(3) more widely to include entities effectively governing non-sovereign territory also seems unwarranted, as such interpretation flies in the face of the ICC Statute’s wording and the intention of its drafters. Any involvement in issues of recognition risks exposing the Prosecutor and the Court to accusations of politicization and subjectivity’.
50 Shany (n 2) 334 ff; Pellet (n 2) 983 ff.
51 Shany (n 2) 338.
52 ibid 330: ‘[A]lthough the PNA should in principle have been allowed to refer the Gaza situation to the ICC, its actual ability to delegate jurisdiction is limited by the Oslo Accords concluded between Israel and the Palestine Liberation Organization (PLO). These agreements deprive the PNA of jurisdiction over crimes committed by Israeli nationals in the Palestinian territories and seriously limit the PNA’s ability to conduct foreign relations’.
53 ibid 339 ff; Pellet (n 2) 994.
54 See, on the exercise of ICC jurisdiction over Israeli settlements, E Kontorovich, ‘Israel/Palestine – The ICC’s Uncharted “Territory”’ (2013) 11 J Int’l Criminal Justice 979-999; and, on the scope ratione loci of the (re-confirmed/new) Palestinian declaration under Article 12(3) of the Rome Statute after the General Assembly decision on Palestine’s status in the UN, Zimmermann (n 2) 328-329: ‘[T]he geographical scope of any Palestinian acceptance of the jurisdiction of the ICC with regard to crimes committed in Palestine is therefore not limited by the fact that
32 QIL 20 (2015), 17-37

approach’, the Prosecutor could interpret the relevant provision of the Statute and legally determine that the accepting Entity: (a) can be qualified as or can be considered equivalent to a ‘State’ within the meaning of Article 12(3) of the Statute; (b) has the ‘ability to lodge’ an *ad hoc* declaration for the purpose of enabling the exercise of jurisdiction by the Court; (c) can confer jurisdiction to the Court with respect to the crimes referred to in Article 5 of the Statute when they are committed on its territory or by its nationals, within the limits of the criminal jurisdiction that it can exercise at the domestic level. This legal determination does not imply either the recognition and the assessment of the statehood of the accepting Entity, or its capacity to accede to the Rome Statute as a ‘State’.

On the contrary, the capacity of the accepting Entity to ‘cooperate with the Court without any delay or exception in accordance with Part 9’ of the Statute cannot be considered as a ‘primary’ precondition to be assessed in order to establish the ability to lodge an *ad hoc* declaration. Firstly, the obligation to cooperate with the Court arises only after the *ad hoc* declaration has been accepted, and it supposes the ‘ability to lodge’ of the accepting Entity, and therefore – apart from its capacity to have rights – its ability to enter into relations with other subjects and assume obligations under international law, including international treaties, from which the duty to fulfil these obligations in good faith and to co-operate with other subjects arises. Secondly, the obligation to cooperate with the Court is an obligation of means, and not an obligation of results. Therefore, the capacity to fulfil the duty to cooperate with the Court cannot be evaluated *in abstracto*, but with reference to a concrete

Palestinian authorities are not able to exercise full and effective control over the whole of the West Bank, and, in particular, the Israeli Settlements [...] Article XVII of the Israeli-Palestinian Interim Agreement, which precludes Palestinian authorities from exercising criminal jurisdiction over Israelis does not preclude the ICC from exercising its jurisdiction on the basis of a Palestinian acceptance of jurisdiction under Article 12(3) ICC Statute *vis-à-vis* Israeli nationals even when the alleged crimes were committed in the C-Areas of the West Bank'. *Contra* see, on the ‘limitations on Palestine’s capacity to delegate territorial jurisdiction with respect to the territory in which the settlements are situated’ and the fact that ‘for the ICC to assert jurisdiction over the territory of the settlements would be both unadvisable as a matter of policy and impermissible as a matter of law’, Y Ronen, ‘Israel, Palestine and the ICC – Territory Uncharted but Not Unknown’ (2014) 12 J Intl Criminal Justice 7-25.

55 ibid 331 ff.
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and specific action when the Entity is asked by the Court to cooperate. Lastly, the capacity to cooperate with the Court does not impinge upon the statehood of the Parties to the Rome Statute, and, accordingly, the ability of a State to accede to the Statute or to lodge an ad hoc declaration. So, there is no reason for which the capacity to cooperate with the Court under Part 9 of the Statute should impinge upon the ability of an acceding Entity to lodge an ad hoc declaration.

5. Is the Prosecutor being left alone in determining the Non-state entity’s ‘ability to lodge’ an ad hoc declaration?

The legal determination of the accepting Entity’s ability to lodge an ad hoc declaration needs to be made by the Prosecutor – on his/her own initiative – while assessing the primary precondition to the exercise of jurisdiction. In some cases, the highly political and disputed character of the situation should be taken into consideration by the Prosecutor. Moreover, according to his 2012 Report, the assessment of the accepting Entity’s ability to lodge an Article 12(3) declaration is made by the Prosecutor ‘in accordance with Article 15 of the Rome Statute’, namely after the commencement of the preliminary examination in order to determine whether there is a reasonable basis to believe that ‘a crime within the jurisdiction of the Court has been or is being committed’ and to proceed with an investigation (Articles 15(1) and 53(1) of the Statute). Consequently, if the Prosecutor does not wish to determine – on his/her own initiative – whether the accepting Entity, whose status is unclear or controversial, has the ‘ability to lodge’ an ad hoc declaration, he/she may seek a ruling from the Pre-Trial Chamber regarding a question of jurisdiction in accordance with Article 19(3) and (6) of the Statute. The Pre-Trial Chamber’s decision may be appealed to the Appeals Chamber in accordance with Article 82 of the Statute.

Nevertheless, considering the legal reasoning followed in the Prosecutor’s Reports and statements, it seems that the determination on Palestine’s ‘ability to lodge’ and thereby on its statehood was made before

56 See supra n 37.
57 ICC Prosecutor’s 2012 Report (n 6) para 2.
58 Cimiotta (n 2) 689 ff.
the commencement of the official preliminary examination aimed at analysing ‘the seriousness of the information received’ on crimes within the jurisdiction of the Court (Article 15(2)) and to establish whether ‘there is a reasonable basis to proceed with an investigation’ (Articles 15(1) and 53(1)). This assumption seems to find confirmation in the 2015 OPT Press Release, according to which the Prosecutor’s decision to open a preliminary examination into the situation in Palestine, in accordance with Regulation 25(1)(c) of the OPT Regulations, ‘follows the Government of Palestine’s accession to the Rome Statute’ in 2015 and its 2015 ‘valid’ declaration, lodged under Article 12(3) of the Rome Statute. According to the aforementioned Regulation, the Prosecutor’s ‘preliminary examination and evaluation of a situation … may be initiated’ on the basis of Article 12(3) declaration, whose ‘validity’ (i.e., inter alia, the ability to lodge of the accepting ‘State’) has already been assessed in a previous phase. In this case, if the Prosecutor does not wish to determine – on his/her own initiative – whether the accepting Entity, whose status is unclear or controversial, has the ‘ability to lodge’ an ad hoc declaration under Article 12(3), he/she may seek a ruling from the Chambers regarding a question of jurisdiction in accordance with Article 19(3), read in conjunction with Article 119(1) of the Statute, or can ask the ASP for some guidance on the interpretation and application of Article 12(3) of the Statute, in accordance with art. 112(2)(g) read in conjunction with Article 119(2) of the Statute.

The Court, moreover, may review the legal determination of the Prosecutor in any subsequent occasion when it is: (a) ruling on the decision adopted by the Prosecutor to open an investigation under Article 53 of the Statute; (b) authorizing the commencement of the investigation (Article 15(4)); (c) ascertaining its jurisdiction in the case brought before it or, on its own motion, determining the admissibility of a case in accordance with Article 17 (Article 19(1)); (d) ruling on challenges to its jurisdiction and on questions of the admissibility of a case (Article 19(2)-(3)). In the latter case, the Prosecutor’s legal determination can be reviewed by the Court while ruling on challenges to its jurisdiction made by: a) the State – whether or not it is Party to the Statute – that, denying the ‘ability to lodge’ and thereby the statehood of the accepting

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59 ibid 698.
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Entity, pretends to have jurisdiction with respect to the crime(s) and/or the territory where the conduct occurred (Article 19(2)(b) and (c)); b) or by an accused or a person for whom a warrant of arrest or a summons to appear has been issued under Article 58 (Article 19(2)(a)).

6. Some final remarks on what role the UN Security Council can play with reference to crimes committed on the territories of Non-state entities

As argued above, in the case of an ad hoc declaration, the only legal determination that the Prosecutor cannot make is to consider ‘invalid’ or ‘invalidly lodged’ that declaration on the sole basis of an unproven statement of equivalence between the undetermined terms ‘State’ within the meaning of Articles 12(1)-(3) and 125 of the Rome Statute, in the wake of the United Nations institutions recognition of the accepting Entity statehood (Member State or, as an intermediate step, Non-member Observer State), as it happened in the Palestinian case.

In its 2012 Report, moreover, the Prosecutor stated that he ‘could in the future consider allegations of crimes committed in Palestine, […] should the Security Council, in accordance with Article 13(b), make a referral providing jurisdiction’.

The Prosecutor seems to assume that, pending the definition of the status of Palestine – or any other Entity whose statehood is controversial or unclear – before the UN institution, the jurisdiction of the Court could be extended to Palestine by the Security Council acting under Chapter VII of the Charter of the United Nations in accordance with Article 13(b) of the Statute. However, the empowerment of the Security Council to refer a situation to the Prosecutor under Article 13(b) of the Statute appears to be quite limited because it depends, firstly, on a preliminary finding that international peace and security have been threatened or breached or an act of aggression has occurred, and, secondly, on the international status of the Entity.

When dealing with the latter point, the basic assumption is to consider the case of an Entity that is not a UN Member State, and consequently that is not bound by the Security Council’s decision under

61 ICC Prosecutor’s 2012 Report (n 6) para 8.
Chapter VII of the UN Charter, while it is irrelevant to take into account whether or not the Entity has been granted the status of ‘Observer’ or ‘Observer State’ in the United Nations. Accordingly, on the one hand, if the Entity exercises political and public powers and authority, including in criminal matters, and has an effective and independent control over a territory and a population (e.g., Palestine until 2015; Kosovo—presuming that it is a ‘State’—after the modification and the reconfiguration of UNMIK’s mandate in 2008), it can be held that the Security Council cannot refer the situation to the Court and to extend its judicial reach under Article 13(b) of the Rome Statute. On the other hand, if the Entity can be considered incapable of either exercising any of the public authority and powers that normally are exercised by a State, and having an effective and independent control over a territory and a population, it can be argued that the Security Council can refer to the Prosecutor the situation in which crimes under the jurisdiction of the Court appears to have been committed in the following cases. Firstly, when the State, on the territory of which the Entity is acting or fighting for its self-determination, or the State, which de facto governs the territory or exercises the authority and control on the Entity, is a UN Member (e.g., Morocco with regard to Western Sahara; Cyprus or—according to ECtHR case-law—Turkey with regard to Northern Cyprus; Moldova or—considering the ECtHR case-law—Russia with regard to Transnistria; Georgia with regard to Abkhazia; Georgia or Russia with regard to South Ossetia). Secondly, when a State or an Entity is still in the embryo stage, but its territory is directly administered by the United Nations, namely, for instance, UNMIK in Kosovo until 2008, and UNTAET in East Timor until 2004.

As far as the aforementioned situations are concerned, it is important to take into account that the role of the Security Council cannot be established a priori and in abstracto, but in concreto and on a case-by-case basis.

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62 Cimiotta (n 2) 692.
63 ECtHR, Cyprus v Turkey App no 25781/94 ([GC] Judgment 10 May 2001) para 76.
64 ECtHR, Catan and Others v Moldova and Russia, App no 43370/04, 18454/06, 8252/05 (Judgment 19 October 2012) para 102 ff.
case basis, as it depends on the changing situations of the *status* of the territories concerned, on the evolution of the self-determination movement and, above all, on the effective governmental authority and control that the Entity is capable of exercising *de iure* or *de facto* on its territory and its population.