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# Should the ICC accept Taiwan's delegation of ad hoc criminal jurisdiction? A debate on Taiwan's functional Statehood in the context of Article 12(3) of the Rome Statute

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*This paper provides a comparative study of Taiwan (Republic of China) (ROC) and Palestine. It argues that Taiwan (ROC), while not recognised as a State and thus unable to ratify the Rome Statute, could still delegate criminal jurisdiction to the International Criminal Court (ICC) by means of an ad hoc Article 12(3) declaration. This is because Taiwan (ROC) practices and enforces an autonomous domestic criminal justice system and has the capacity to cooperate with the ICC under Part 9 of the Rome Statute. By carefully studying the jurisdictional decisions on Palestine, this paper argues that the door is still open for future Pre-Trial Chambers to consider the functional interpretation of 'State' under Article 12(3). However, the major challenge for Taiwan (ROC) is not one of impracticability but illegitimacy. A declaration would require consideration of why jurisdiction ought to be extended to Taiwan (ROC) but not to other contested entities. In this respect, the paper argues that the ICC should follow the mandatory non-recognition of contested entities created and sustained in violation of peremptory norms of international law. In addition, the paper argues that, as the 'interests of justice' clause under Article 53 would, in any event, serve as the final bar to filter out 'sham' declarations that intend to advance entities' Statehood before an investigation, political consequences alone should not prevent the ICC from accepting Article 12(3) declarations lodged by contested entities such as Taiwan (ROC) at the jurisdictional stage.*

**Keywords:** Statehood, International Criminal Court, international criminal jurisdiction, Rome Statute Article 12(3), contested territories, Taiwan, Palestine.

## 1 INTRODUCTION

In light of the increasing rivalries between China (People's Republic of China) (PRC) and the United States, Taiwan (Republic of China) (ROC) is now considered to be one of the most dangerous places on Earth.<sup>1</sup> With the Taiwanese people's continuing reluctance to accept any proposal of 'reunification' with China (PRC), there are suggestions that China (PRC) might potentially perform military strikes on key political and economic infrastructure in Taiwan (ROC) to force the authority of Taiwan (ROC) to accept Beijing's proposal.<sup>2</sup> With the threat of violence hanging in the air, it is important to consider whether Taiwan (ROC),<sup>3</sup> a territorial entity without any official status at the United Nations (UN), could delegate its criminal jurisdiction to the International Criminal Court (ICC) in response to potential international crimes committed in its territories.

In this regard, Palestine's path to the ICC provides Taiwan (ROC) with useful insights in relation to the status of contested entities within the framework of the Rome Statute.<sup>4</sup> In February 2021, upon the request of the Office of the Prosecutor (OTP) under Article 19(3),<sup>5</sup> Pre-

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<sup>1</sup> 'The Most Dangerous Place on Earth' *The Economist* (London, 1 May 2021) <<https://www.economist.com/leaders/2021/05/01/the-most-dangerous-place-on-earth>> accessed 31 August 2021.

<sup>2</sup> Keoni Everington, 'List of Taiwan's Targets for China's Bombers Revealed' *Taiwan News* (Taipei, 28 January 2021) <<https://www.taiwannews.com.tw/en/news/4113229>> accessed 31 August 2021.

<sup>3</sup> For the purposes of this article, Taiwan is referred to as Taiwan (ROC) to connote the de facto territorial entity controlling Taiwan, Kinmen, Matsu and Penghu.

<sup>4</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (Rome Statute).

<sup>5</sup> *Situation in the State of Palestine* (Prosecution Request Pursuant to Article 19(3) for a Ruling on the Court's Territorial Jurisdiction in Palestine) ICC-01/18-12 (22 January 2020) (Article 19(3) Request).

Trial Chamber I (PTC-I) decided that the ICC's territorial jurisdiction extended to the Occupied Palestinian Territories including Gaza, the West Bank and East Jerusalem (Article 19(3) Decision).<sup>6</sup> Prior to this decision, there was much academic debate concerning Palestine's ability to confer jurisdiction on the ICC pursuant to Article 12(3) of the Rome Statute.<sup>7</sup> While Palestine acceded to the Rome Statute in 2015, to date, there has been no judicial determination by the Chambers on the proper interpretation of 'State' under Article 12(3). Considering the impossibility for Taiwan (ROC) to accede to the Rome Statute, which adopts an 'all-State formula',<sup>8</sup> and the veto power of China (PRC) at the UN Security Council, this paper studies whether Taiwan (ROC) could delegate its criminal jurisdiction on an ad hoc basis to the ICC under Article 12(3) of the Rome Statute. The example of Taiwan (ROC), a territorial entity that has been excluded from the UN system, demonstrates how the functional approach towards 'Statehood' could enable the ICC to investigate a 'genuine cry for help' from contested entities,<sup>9</sup> without becoming a geopolitical battleground.<sup>10</sup>

This paper acknowledges the significant contextual differences between Taiwan (ROC) and Palestine. First, Palestine currently enjoys much wider international recognition than Taiwan (ROC).<sup>11</sup> This could be partly attributed to the fact that 'Taiwan' has consistently represented itself under the name of the 'Republic of China', an exiled government of the very State that claims sovereignty over all its territories. As of February 2022, 'Taiwan' has never unequivocally declared itself an independent State under its own name, unlike Palestine.<sup>12</sup> Rather, the recognition of Taiwan (ROC) remains deeply intertwined with the question of government representation in China: most States that have recognised the PRC as the sole legitimate government of China, prefer less explicit approaches towards Taiwan (ROC), in part as a reflection of the PRC's 'One China' policy. Secondly, Taiwan (ROC) operates in practice as an autonomous actor despite its lack of official status. A substantial part of the Palestinian territories, however, is occupied by Israel. Palestine's ability to act autonomously in exercising criminal jurisdiction and on a diplomatic level is also restrained by the Oslo Accords.<sup>13</sup> Thirdly, while the question of a recognised right to self-determination is settled in the case of Palestine,<sup>14</sup> the Taiwanese people's right to self-determination has not been officially recognised. Lastly,

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<sup>6</sup> *Situation in the State of Palestine* (Decision on the 'Prosecution Request Pursuant to Article 19(3) for a Ruling on the Court's Territorial Jurisdiction in Palestine', Pre-Trial Chamber I) ICC-01/18-143 (5 February 2021) (Article 19(3) Decision).

<sup>7</sup> For those who support a functional interpretation of the meaning of 'State' under Article 12(3) of the Rome Statute, see eg, Michael Kearney and Stijn Denayer, 'Al-Haq Position Paper on Issues Arising from the Palestinian Authority's Submission of a Declaration to the Prosecutor of the International Criminal Court under Article 12(3) of the Rome Statute' (2009) Al-Haq Position Paper <<http://ssrn.com/abstract=1523722>> accessed 31 August 2021; Alain Pellet, 'The Palestinian Declaration and the Jurisdiction of the ICC' (2010) 8 *Journal of International Criminal Justice* 981; Yuval Shany, 'In Defence of Functional Interpretation of Article 12(3) of the Rome Statute: A Response to Yaël Ronen' (2010) 8 *Journal of International Criminal Justice* 329; Andreas Zimmermann, 'Palestine and the International Criminal Court Quo Vadis?: Reach and Limits of Declarations under Article 12(3)' (2013) 11 *Journal of International Criminal Justice* 303; John Dugard, 'Take the Case' *New York Times* (New York, 22 July 2009) <<http://www.nytimes.com/2009/07/23/opinion/23iht-eddugard.html>> accessed 31 August 2021; William Thomas Worster, 'Functional Statehood in Contemporary International Law' (2020) 46 *Brooklyn Journal of International Law* 39. Cf Yaël Ronen, 'ICC Jurisdiction over Acts Committed in the Gaza Strip: Article 12(3) of the ICC Statute and Non-State Entities' (2010) 8 *Journal of International Criminal Justice* 3; Malcolm N Shaw, 'The Article 12(3) Declaration of the Palestinian Authority, the International Criminal Court and International Law' (2011) 9 *Journal of International Criminal Justice* 301; Steven Kay and Joshua Kern, 'The Statehood of Palestine and its Effect on the Exercise of ICC Jurisdiction' (Opinio Juris, 5 July 2019) <<http://opiniojuris.org/2019/07/05/the-statehood-of-palestine-and-its-effect-on-the-exercise-of-icc-jurisdiction>> accessed 31 August 2021.

<sup>8</sup> Art 125 of the Rome Statute permits accession by 'all States'.

<sup>9</sup> Steven Freeland, 'How Open Should the Door Be? – Declarations by Non-States Parties under Article 12(3) of the Rome Statute of the International Criminal Court' (2006) 75 *Nordic Journal of International Law* 211.

<sup>10</sup> See Shaw (n 7) 323; Ronen, 'ICC Jurisdiction' (n 7) 24.

<sup>11</sup> World Population Review, 'Countries that Recognize Palestine' <<https://worldpopulationreview.com/country-rankings/countries-that-recognize-palestine>> accessed 31 August 2021.

<sup>12</sup> 'Declaration of Independence' (18 November 1988) UN Doc A/43/827-S/20278/Annex3.

<sup>13</sup> 'The Israel-Palestine Interim Agreement on the West Bank and the Gaza Strip' (28 September 1995) UN Doc A/51/889 arts IX(5) and XIII(2) (The Israel-Palestine Interim Agreement).

<sup>14</sup> See eg *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 [118], [121]–[122] and [149] (*Wall Opinion*); Article 19(3) Decision (n 6) [121], fns 313–316.

Palestine was accorded ‘non-member observer State’ status by the UN General Assembly in 2012, whereas Taiwan (ROC) has been consistently denied entry by the UN. As a result, unlike Palestine after 2012, Taiwan (ROC) is unable to formally accede to the Rome Statute, which has adopted an ‘all-State formula’ following the practices of the UN Secretary-General (UNSG).<sup>15</sup> The contextual differences between the two entities will be further acknowledged and explained throughout this paper.

This paper begins by considering the status of Taiwan (ROC) under international law. Second, it discusses the functional approach to States, particularly in light of Palestine’s 2009 declaration under Article 12(3). It then turns to the decision on the scope of territorial jurisdiction under Article 19(3) with regard to Palestine. Finally, it considers the policy arguments in favour of the functional approach.

## 2 THE INDETERMINATE INTERNATIONAL LEGAL STATUS OF TAIWAN

### 2.1 Taiwan (ROC)’s current international status

The question of Taiwan (ROC)’s international legal status is one of the most enduring problems in international law.<sup>16</sup> According to James Crawford, the interrelationship between recognition and Statehood ‘is confronted with its most pertinent test in the case of Taiwan, which appears to comply in all respects with the criteria for statehood based on effectiveness but is universally agreed not to be a separate State and is recognized by no other State as such’.<sup>17</sup> In the absence of a well-recognised definition of ‘State’ within public international law, a division exists among scholars as to how States are created under international law. On the one hand, the prevailing school of thought (the declaratory school) believes that an entity automatically becomes a State following the fulfilment of certain normative criteria,<sup>18</sup> which are embodied in Article 1 of the 1933 Montevideo Convention on the Rights and Duties of States.<sup>19</sup> On the other hand, some scholars argue that the fulfilment of the objective normative criteria must also be accompanied by the recognition of other existing States (the constitutive school).<sup>20</sup> Palestine’s Article 19(3) proceeding was a golden opportunity for States to express their views (opinio juris) on the issue in the context of Palestine. With the exception of the Organization of Islamic Cooperation and the League of Arab States, most States’ submissions favoured the declarative school.<sup>21</sup>

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<sup>15</sup> Treaty Section of the Office of Legal Affairs, ‘Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties’ (1999) UN Doc ST/LEG/7/Rev.1 paras 81–83 (Summary of Practice).

<sup>16</sup> See eg Brad R Roth, ‘The Entity That Dare Not Speak Its Name: Unrecognized Taiwan as a Right-Bearer in the International Legal Order’ (2009) 4 East Asia Law Review 91.

<sup>17</sup> James Crawford, *The Creation of States in International Law* (2nd edn, OUP, Oxford 2007) 198.

<sup>18</sup> Cedric Ryngaert and Sven Sobrie, ‘Recognition of States: International Law or Realpolitik? The Practice of Recognition in the Wake of Kosovo, South Ossetia, and Abkhazia’ (2011) 24 Leiden Journal of International Law 467, 470.

<sup>19</sup> Montevideo Convention on the Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1934) 165 LNTS 19. The Convention is considered by some scholars to be customary international law. However, others have criticised the Montevideo criteria as outdated: see Crawford (n 17) 437; Judge Peters Kovács’ Partly Dissenting Opinion, Article 19(3) Decision (n 6) [120]–[121] (Kovács’ Dissent).

<sup>20</sup> Amy E Eckert, ‘Constructing States: The Role of the International Community in the Creation of New States’ (2002) 13 Journal of Public and International Affairs 19, 24.

<sup>21</sup> *Situation in the State of Palestine* (Observations by the **Federal Republic of Germany**) ICC-01/18-103 (16 March 2020) para 23; (Amicus Curiae Observations by the **Republic of Austria**) ICC-01/18-76 (15 March 2020) para 6; (Written Observations by **Hungary Pursuant to Rule 103**) ICC-01/18-89 (16 March 2020) para 38; (**Brazilian Observations on ICC Territorial Jurisdiction in Palestine**) ICC-01/18-106 (16 March 2020) para 17; (Observations of **Australia**) ICC-01/18-86 (16 March 2020) para 12; (The Observations of the Republic of **Uganda** Pursuant to Rule 103 of the Rules of Evidence and Procedure) ICC-01/18-119 (16 March 2020) para 16 (Observations of Uganda). Cf *Situation in the State of Palestine* (Submission of the Observations of League of Arab States Relative to the Situation in Palestine) ICC-01/18-122 (16 March 2020) para 25.

Considering Taiwan (ROC)'s fulfilment of the Montevideo criteria, Taiwan (ROC) undoubtedly possesses a permanent population, defined territory and an effective government.<sup>22</sup> In relation to Taiwan (ROC)'s international recognition, 13 out of 193 UN Member States (in addition to the Holy See) have established formal diplomatic relations with Taiwan under the name of the 'Republic of China'.<sup>23</sup> This distinguishes Taiwan (ROC) from Palestine, which has enjoyed recognition by 138 States. Nonetheless, as a result of the 'One China' policy stringently pushed forward by the PRC, States that have established formal diplomatic relationships with China (PRC) avoid recognising Taiwan (ROC) de jure, but favour the establishment of informal diplomatic relationships.<sup>24</sup> Taking into account implicit recognition, 57 UN Member States maintain unofficial relationships with Taiwan (ROC) via its representative offices, embassies and consulates,<sup>25</sup> among which 26 have signed bilateral investment treaties with Taiwan (ROC).<sup>26</sup> Taiwan's ability to act internationally is further reinforced by the implicit recognition of its effective Statehood by States in their judicial decisions<sup>27</sup> and legislative acts.<sup>28</sup> These examples demonstrate that Taiwan operates in practice as an autonomous international actor even in the absence of widespread official recognition.

Taiwan (ROC) is a member of various international organisations alongside the PRC.<sup>29</sup> However, Taiwan (ROC)'s entry into the UN has been consistently denied. On 25 October 1971, the UN General Assembly (UNGA) passed Resolution 2758 (XXVI), in which the UNGA '[d]ecide[d] to restore all its rights to the PRC and to recognise the representatives of its Government as the *only legitimate representatives of China to the United Nations*, and to expel forthwith *the representatives of Chiang Kai-shek* from the place which they *unlawfully occupy at the United Nations and in all the organizations related to it*'.<sup>30</sup> Resolution 2758(XXVI) has been consistently relied upon in practice as a basis to deny the entry of Taiwan into the UN system. For example, in the Final Clauses of Multilateral Treaties Handbook published by the UN's Legal Office, it is stated that 'regarding Taiwan, Province of China, the Secretary-General follows the General Assembly's guidance incorporated in resolution 2758 (XXVI) . . . Hence, instruments received from Taiwan, Province of China will not be accepted by the Secretary-General in his capacity as depositary'.<sup>31</sup>

The peculiarity of Taiwan (ROC)'s situation lies in the absence of any explicit and unequivocal claim of Statehood by 'Taiwan', as an independent State distinct from 'China'. This is partly because any declaration or action to such effect could trigger military action from China (PRC).<sup>32</sup> As a result, rather than aiming for an unequivocal declaration of the independence of 'Taiwan', Taiwan (ROC)'s governments have pursued a subtler approach by insisting on its separate and distinct existence under the name of the 'Republic of China'. From 1987 to 1991,

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<sup>22</sup> Crawford (n 17) 198; Roth (n 16) 97, 103 and 107; Björn Ahl, 'Taiwan' (Max Planck Encyclopedia of Public International Law, February 2020) para 1 <<https://opil.ouplaw.com/view/10.1093/law/epil/9780199231690/law-9780199231690-e1362>> accessed 31 August 2021.

<sup>23</sup> Ministry of Foreign Affairs of the Republic of China (Taiwan), 'Diplomatic Allies' <<https://www.mofa.gov.tw/AlliesIndex.aspx?n=167&sms=33>> accessed 24 February 2022.

<sup>24</sup> Roth (n 16) 110.

<sup>25</sup> Lawrence Chung, 'China-Lithuania Standoff: Why Do Taiwan's Missions Mostly Use the Name "Taipei"?' *South China Morning Post* (Hong Kong, 14 August 2021) <<https://www.scmp.com/news/china/diplomacy/article/3144997/china-lithuania-stand-why-do-taiwans-missions-mostly-use-name>> accessed 31 August 2021.

<sup>26</sup> UNCTAD, 'International Investment Agreements Navigator, Taiwan Province of China' <<https://investmentpolicy.unctad.org/international-investment-agreements/countries/205/taiwan-province-of-china>> accessed 31 August 2021.

<sup>27</sup> Pasha L. Hsieh, 'The Taiwan Question and the One-China Policy: Legal Challenges with Renewed Momentum' (2009) 84(3) *Die Friedens-Warte* 72.

<sup>28</sup> See eg Application to Taiwan of Laws and International Agreements 22 USC §3303.

<sup>29</sup> See eg Jana Sehnáková and Ondřej Kučera, 'Taiwan's Participation in International Organizations: Obstacles, Strategies, Patterns?' in Jens Damm and Paul Lim (eds), *European Perspectives on Taiwan* (Springer VS, Wiesbaden 2012) 147, 149 and 151–153.

<sup>30</sup> UNGA Res 2758 (XXVI) (25 October 1971) UN Doc A/RES/2758 (emphasis added).

<sup>31</sup> Treaty Section of the Office of Legal Affairs, *Final Clauses of Multilateral Treaties Handbook* (United Nations Publication, New York 2003) 15.

<sup>32</sup> The ability to take military action is codified in China (PRC)'s legislation, see eg Anti-Secession Law 2005, art 8.

the ROC government underwent a series of democratic reforms.<sup>33</sup> As a result, the ROC transformed from an authoritarian government led by the Chiang family into a government democratically accountable to an ‘essentially Taiwanese’ constituency.<sup>34</sup> The change of electoral constituency also transformed the ROC from a competing government of China to the de facto government of Taiwan. To reflect the subtle shift of power base, the first locally-born elected president, Lee Teng-hsui, began to campaign for the proposition that the ROC and the PRC constituted ‘two legal entities in the international arena, with each . . . entitled to represent the residents of the territory under its de facto control’.<sup>35</sup> Lee’s successor, Chen Shui-bian, sought to further detach Taiwan from the ROC, albeit with little success. In 2007, Taiwan first attempted to join the UN (instead of ‘re-join’ as the ROC) under the name ‘Taiwan’.<sup>36</sup> However, the bid was rejected by the Secretary-General, Ban Ki-moon, who stated that, according to Resolution 2758 (XXVI), ‘the government of China is the sole and legitimate government and the position of the United Nations is that Taiwan is part of China’.<sup>37</sup> However, nothing in Resolution 2758 (XXVI) explicitly supports the latter proposition. This is further supported by the fact that, while Japan renounced its title over Formosa and Pescadores in the Treaty of Peace with Japan,<sup>38</sup> no international treaty has assigned title to either of the two Chinese governments.<sup>39</sup> Notwithstanding its failure to gain wider recognition, from the 1990s to 2000s, Taiwan (ROC)’s rhetoric has gradually switched from considering itself ‘the sole legitimate government of China’ to a ‘sovereign and independent State comprising of the territories of Formosa, Pescadores, Kinmen and Matsu’, a position consistently adopted by the administrations of Ma Ying-jeou and Tsai Ing-wen.<sup>40</sup> In other words, Taiwan (ROC) has, since the 1990s, abandoned its claim to be the sole legitimate government of China. As a result of Taiwan’s democratisation, a paradigm shift transformed the ROC from being the Chinese government-in-exile (ROC *in* Taiwan) to a sovereign and independent State of the Taiwanese people (ROC *is* Taiwan).<sup>41</sup> Nonetheless, no unequivocal declaration of independence has ever been made under the name of ‘Taiwan’. This leads to a paradoxical question: whether a territorial entity, which effectively exists as a ‘State’, short of any declaration of independence, should be treated as a ‘State’ in international law based on its effective existence for the limited purpose of the Rome Statute.

## 2.2 The impossibility of Taiwan (ROC) acceding to the Rome Statute

According to Article 125(3) of the Rome Statute, the Statute is open to accession by ‘all States’, with instruments of accession to be deposited with the UNSG. The combination of the term ‘all States’ and the role of the UNSG as the depositary necessitates that the resolutions and practice of the UNGA be followed.<sup>42</sup> Following the UNSG’s treatment of Palestine, the status of ‘UN

<sup>33</sup> Rudolf Fürst, ‘Taiwan — A Maturing Chinese Democracy’ (2005) 24 *Perspectives* 42, 43–45.

<sup>34</sup> Crawford (n 17) 215.

<sup>35</sup> ROC, ‘Taiwan’s White Paper on Cross-Strait Relations’ (5 July 1994) in Shirley A Kan, ‘China/Taiwan: Evolution of the “One China” Policy—Key Statements from Washington, Beijing, and Taipei’ (Congressional Research Service, 10 October 2014) 54 <<https://fas.org/sgp/crs/row/RL30341.pdf>> accessed 31 August 2021.

<sup>36</sup> ROC’s Executive Yuan, ‘Position Paper Regarding the Referendum on Joining the United Nations under the Name of Taiwan’ (7 September 2007) <<https://www.mac.gov.tw/public/Data/9111015321771.pdf>> accessed 5 March 2022.

<sup>37</sup> Charles Snyder, ‘Ban Defends Rejecting Taiwan’s UN Bid’ *Taipei Times* (Taipei, 29 July 2007) <[www.taipetimes.com/News/front/archives/2007/07/29/2003371704](http://www.taipetimes.com/News/front/archives/2007/07/29/2003371704)> accessed 31 August 2021.

<sup>38</sup> Treaty of Peace with Japan (adopted 8 September 1951, entered into force 28 April 1952) 136 UNTS 45, art 2(b).

<sup>39</sup> Crawford (n 17) 200.

<sup>40</sup> ROC’s Executive Yuan, ‘The Government’s Position Paper on Ma Ying-jeou’s Stance about “Taiwan’s Pledge of Not Seeking Independence in Exchange for China’s Commitment of Not Using Force against Taiwan”’ (3 November 2006) <[https://www.mac.gov.tw/en/News\\_Content.aspx?n=8A319E37A32E01EA&sms=2413CFE1BCE87E0E&s=29600D783244FF86](https://www.mac.gov.tw/en/News_Content.aspx?n=8A319E37A32E01EA&sms=2413CFE1BCE87E0E&s=29600D783244FF86)> accessed 5 March 2022. For the current position of Taiwan (ROC), see Kelvin Chen, ‘Taiwan Shuts Down Beijing’s Dreams of Unification Following Xi Jinping Speech’ *Taiwan News* (Taipei, 9 October 2021) <<https://www.taiwannews.com.tw/en/news/4310580>> accessed 2 February 2022.

<sup>41</sup> Governmental Portal of the Republic of China (Taiwan), ‘Politics and Diplomacy’ <<https://www.taiwan.gov.tw/politics.php>> accessed 31 August 2021.

<sup>42</sup> Summary of Practice (n 15) paras 81–83.

non-member observer State' seems to have become the minimum bar for 'contested entities' to accede to treaties.<sup>43</sup>

There is, however, one exception. The Cook Islands, a territory in free association with New Zealand, without UN membership or observer status,<sup>44</sup> successfully acceded to the Rome Statute in 2008 without acquiring fully-fledged Statehood.<sup>45</sup> On one hand, the successful accession of the freely associated territory demonstrated that a territorial entity could choose to be a 'State' for the limited purpose of the Rome Statute. On the other hand, the Cook Islands, whose autonomous existence has never been disputed, is clearly distinguishable from 'contested' entities. For instance, the UN Summary of Practice suggests that the UNSG's decision to accept the Cook Islands' accession to the Rome Statute was based on its membership of the World Health Assembly,<sup>46</sup> and its subsequent admittance to other specialised agencies without any specifications or limitations.<sup>47</sup> More importantly, the accession of the Cook Islands to the Rome Statute is atypical in that it was not opposed by any State.<sup>48</sup> The absence of any strong opposition is, however, unimaginable for contested entities such as Palestine or Taiwan (ROC). As a result, it is argued that the only possible way for Taiwan (ROC) to voluntarily delegate its criminal jurisdiction to the ICC would be pursuant to Article 12(3) of the Rome Statute. This Article allows a 'State which is not party to the Rome Statute' to accept the exercise of jurisdiction by the ICC through an ad hoc declaration. The question then is whether Taiwan (ROC) could qualify as a 'State' under Article 12(3) of the Rome Statute.

### 2.3 Taiwan (ROC) as a contested entity in international law

The question surrounding Taiwan (ROC) can be summarised as follows: whether an entity (Taiwan) that has satisfied all the Montevideo criteria but continues to operate under the name of another existing State (China) could still be regarded as a separate 'State' under public international law. Many scholars believe that Taiwan (ROC) constitutes a State even in the absence of an unequivocal declaration of independence,<sup>49</sup> but some hold contrary views. Both Crawford<sup>50</sup> and Yaël Ronen<sup>51</sup> have treated Taiwan as an 'entity that can be a State but does not claim to be'.<sup>52</sup> However, Crawford's analysis of Taiwan (ROC), which introduced an additional criterion of 'unequivocal declaration of Statehood', was criticised by Brad Roth as departing from the prevailing theory of an objective theory of Statehood, which Crawford himself sought to reaffirm.<sup>53</sup> In addition to the principle of effectiveness, Lung-chu Chen supports Taiwan's Statehood based on its effective exercise of self-determination through successive democratic elections.<sup>54</sup> Chen also argues that Taiwan's application for separate membership at the UN in

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<sup>43</sup> Article 19(3) Decision (n 6) [98], citing UN Office of Legal Affairs, 'Interoffice Memorandum: Issues Related to General Assembly Resolution 67/19 on the Status of Palestine in the United Nations' (21 December 2012) para 15 <<https://palestineun.org/wp-content/uploads/2013/08/012-UN-Memo-regarding-67-19.pdf>> accessed 5 March 2022 (Interoffice Memorandum).

<sup>44</sup> Summary of Practice (n 15) para 85.

<sup>45</sup> Ibid.

<sup>46</sup> Ibid para 86.

<sup>47</sup> Ibid.

<sup>48</sup> See Article 19(3) Request (n 5) para 123.

<sup>49</sup> See eg Claude S Philips Jr, 'The International Legal Status of Formosa' (1968) 10 *The Western Political Quarterly* 276; Christopher J Carolan, 'The "Republic of Taiwan": A Legal-Historical Justification for a Taiwanese Declaration of Independence' (2000) 75 *New York University Law Review* 429; Tay-Sheng Wang, 'The Legal Development of Taiwan in the 20th Century: Toward a Liberal and Democratic Country' (2002) 11 *Pacific Rim Law and Policy Journal* 531, 537; Olufemi A Elias, 'The International Status of Taiwan in the Courts of Canada and Singapore' (2004) 8 *Singapore Year Book of International Law* 93, 95.

<sup>50</sup> Crawford (n 17) 218.

<sup>51</sup> Yaël Ronen, 'Entities That Can Be States but Do Not Claim to Be' in Duncan French (ed), *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law* (CUP, Cambridge 2015) 23, 26–27.

<sup>52</sup> Ibid.

<sup>53</sup> Roth (n 16) 95.

<sup>54</sup> Lung-chu Chen, 'Taiwan's Current International Legal Status' (1998) 32 *New England Law Review* 675.

2007 could constitute a de facto declaration of independence.<sup>55</sup> However, as noticed by Ronen, Taiwan's 2007 application 'had been drafted sufficiently vaguely so as to avoid a charge that it constituted a claim of statehood'.<sup>56</sup> It suffices to say that there are substantial doubts as to whether Taiwan (ROC) could acquire Statehood without an unequivocal declaration of independence.

In conclusion, following the democratic reforms in Taiwan and the State-to-State relations advocated by Taiwan (ROC), the debate surrounding Taiwan's international status is no longer an issue of competing government representation of China, but one of Taiwan's Statehood. It is not clear whether international law as it now stands recognises the Statehood of a territorial entity that does not claim to be a State but operates autonomously as if it were a State. Thus, Taiwan (ROC)'s international status is best understood as indeterminate.<sup>57</sup> As a result, Taiwan (ROC) is referred to as a 'contested entity' rather than a 'State' in this paper. In light of the indeterminacy of Taiwan's international status, the decision to recognise Taiwan (ROC) cannot be a purely legalistic exercise, but would ultimately involve the balancing of policy choices, between the prohibition on the use of force and the right to self-determination for example.<sup>58</sup> Policymakers, rather than international judges at the ICC, are arguably better equipped to make such a determination.<sup>59</sup> Nonetheless, the situation of Palestine has demonstrated that it is still theoretically and practically possible for the judges of the ICC to attribute Statehood to a contested entity for the very limited purpose of the Rome Statute without conducting a fully-fledged Statehood determination.

### 3 THE FUNCTIONAL APPROACH AND PALESTINE'S 2009 DECLARATION

Like Taiwan, Palestine's Statehood is one of the most hotly debated topics in international law. Under the name of the Palestinian National Authority, Palestine first attempted to lodge an ad hoc declaration under Article 12(3) of the Rome Statute in 2009 (the 2009 Declaration).<sup>60</sup> Although the OTP rejected Palestine's 2009 Declaration based on the practice of the UNSG under the 'all States' formula in 2012 (the 2012 Determination),<sup>61</sup> the precedent of the ICC's treatment of Palestine's 2009 Declaration, and the scholarly discussion arising out of this context, provide very useful guidance on whether Taiwan (ROC) could qualify as a 'State' under Article 12(3) of the Rome Statute.

#### 3.1 The functional approach to the meaning of 'State' under Article 12(3)

Subsequent to its determination, the OTP invited submissions on whether Palestine's 2009 Declaration met the statutory requirements for jurisdiction.<sup>62</sup> On the interpretation of Article 12(3), the submissions can be summarised in terms of two opposing schools of thought.

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<sup>55</sup> Lung-chu Chen, 'The U.S.-Taiwan-China Relationship and the Evolution of Taiwan Statehood' (Opinio Juris, 16 May 2016) <<https://opiniojuris.org/2016/05/16/the-u-s-taiwan-china-relationship-and-the-evolution-of-taiwan-statehood/>> accessed 31 August 2021.

<sup>56</sup> Ronen, 'Entities' (n 51) 48.

<sup>57</sup> Roth (n 16) 122.

<sup>58</sup> Ibid.

<sup>59</sup> See eg *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 403 (*Kosovo Advisory Opinion*). The majority judges, by reframing the issue as the legality of Kosovo's unilateral declaration of independence, dodged the question of Kosovo's Statehood.

<sup>60</sup> Palestine National Authority, 'Declaration Recognizing the Jurisdiction of the International Criminal Court' (21 January 2009) <[www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279777/20090122P\\_alestinianDeclaration2.pdf](http://www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279777/20090122P_alestinianDeclaration2.pdf)> accessed 31 August 2021.

<sup>61</sup> The Office of the Prosecutor, 'Report on Preliminary Examination Activities (2012)' (ICC, 22 November 2012) paras 200–201 <<https://www.icc-cpi.int/NR/rdonlyres/C433C462-7C4E-4358-8A72-8D99FD00E8CD/285209/OTP2012ReportonPreliminaryExaminations22Nov2012.pdf>> accessed 31 August 2021 (2012 Determination).

<sup>62</sup> The Office of the Prosecutor, 'Summary of Submissions on Whether the Declaration Lodged by the Palestinian National Authority Meets Statutory Requirements' (ICC, 3 May 2010) <<https://www.un.org/unispal/document/auto-insert-196237/>> accessed 31 August 2021 (Summary of Submissions).

The functionalist school suggested that, in the absence of an ordinary meaning of ‘State’ in the context of the Rome Statute or under general international law,<sup>63</sup> the term ‘State’ under Article 12(3) should, according to Article 31 of the Vienna Convention on the Law of Treaties (VCLT),<sup>64</sup> be examined in light of the object and purpose of the Rome Statute.<sup>65</sup> They argued that a contested entity should be treated *as if* it were a ‘State’, based on its ability to exercise sovereign criminal jurisdiction and its possession of a limited international personality.<sup>66</sup> To hold otherwise would create a zone of impunity defeating the ultimate objective of the Rome Statute, as well as of Article 21(3).<sup>67</sup>

There were also scholars who worried that an expansive interpretation of ‘State’ under Article 12(3) might render the ICC a battleground for contested entities.<sup>68</sup> They argued that ‘the express wording of Article 12(3) under the rules of treaty interpretation limits the acceptance of the jurisdiction of the Court to a “State” in accordance with the ordinary meaning of the term’.<sup>69</sup> Referring to Article 31(4) of the VCLT, they noted that there was no intention for the parties to give a specific meaning to the term ‘State’ in Article 12(3) and thus, there was no basis to infer the inclusion of entities that do not qualify as States under public international law.<sup>70</sup> For example, M Cherif Bassiouni, the Chairman of the Diplomatic Conference’s Drafting Committee, ‘attest[ed] to the fact that referrals under Article 12(3) were intended to be by States only’.<sup>71</sup> He also argued that the meaning of ‘States’ excludes Palestine, which had withdrawn its stance on Statehood following the 1993 Oslo Accords: ‘[T]he Palestinian Authority’s declaration of 21 January 2009 does not claim that Palestine is a state. It is clear that if a given entity does not claim the status of statehood, that status cannot be ascribed to it, notwithstanding the existence of all necessary conditions for statehood.’<sup>72</sup> Lastly, as a procedural point, some argued that the *Monetary Gold* principle, which prohibits the International Court of Justice (ICJ) from deciding a case when the legal interest of a non-consenting State forms the very subject matter of the dispute,<sup>73</sup> would similarly preclude the ICC from deciding upon the validity of Palestine’s declaration without involving Israel.<sup>74</sup>

In the legislative history of the ICC considered by Bassiouni, there was indeed no discussion by the drafting parties on the meaning of ‘State’ under Article 12.<sup>75</sup> However, the absence of discussion does not logically support the assumption that there was a uniform, presumptive ‘ordinary meaning’ of ‘State’ generally shared by the drafting parties.<sup>76</sup> This is particularly important in light of the unresolved debates between theories of constitutive and declarative Statehood. For example, Malcolm Shaw’s position seems to take the constitutive

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<sup>63</sup> Hyeyoung Lee, ‘Defining “State” for the Purpose of the International Criminal Court: The Problem Ahead after the Palestine Decision’ (2016) 77 *University of Pittsburgh Law Review* 345, 366–367. Lee’s study was also cited by the OTP to argue for a different meaning of ‘State’ under Article 12(2) from other areas of the Rome Statute: Article 19(3) Request (n 5) fn 382.

<sup>64</sup> Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

<sup>65</sup> Pellet (n 7) 981; Shany (n 7) 329; Zimmermann (n 7) 303; Dugard (n 7); Kearney and Denayer (n 7) paras 20–22.

<sup>66</sup> Pierre-Marie Dupuy, ‘L’unité de l’ordre juridique international: cours général de droit international public’ (2002) 297 *Recueil des Cours* 108, 108–109.

<sup>67</sup> Pellet (n 7) 995; Summary of Submissions (n 62) para 24.

<sup>68</sup> Summary of Submissions (n 62) para 29; Ronen, ‘ICC Jurisdiction’ (n 7) 24; Shaw (n 7) 323.

<sup>69</sup> Summary of Submissions (n 62) para 4. See also Ronen, ‘ICC Jurisdiction’ (n 7) 18.

<sup>70</sup> Summary of Submissions (n 62) para 26.

<sup>71</sup> M Cherif Bassiouni, ‘Comment on the Gaza Question: Does the Prosecutor of the ICC Have the Authority to Open an Investigation into Alleged Crimes Committed in the 2008-2009 Gaza Conflict?’ (ICC Forum, 1 October 2010) <<http://uclalawforum.com/forum/permalink/859>> accessed 31 August 2021.

<sup>72</sup> *Ibid.*

<sup>73</sup> *Monetary Gold Removed from Rome in 1943 (Italy v France, United Kingdom of Great Britain and Northern Ireland and United States of America)* (Preliminary Questions) [1954] ICJ Rep 19 [17].

<sup>74</sup> Summary of Submissions (n 62) para 28.

<sup>75</sup> Mahmoud Cherif Bassiouni, ‘Article 12: Preconditions to the Exercise of Jurisdiction’ in M Cherif Bassiouni and William A Schabas (eds), *The Legislative History of the International Criminal Court*, vol 2 (2nd edn, Brill, Leiden 2016) 134, 146.

<sup>76</sup> Ronen, ‘ICC Jurisdiction’ (n 7) 18; Lee (n 63) 382; Shaw (n 7) 312.

school for granted.<sup>77</sup> However, as demonstrated by the written submissions of States before the Article 19(3) proceedings, many States hold contrary views.<sup>78</sup>

### 3.2 The OTP's 2012 determination: deferral to the UN

Against the context of ongoing academic debate, the Prosecutor was reported to have suggested in 2009 that Palestine should be accepted as a State if Palestine had the ability (1) to enter into international agreements and (2) to exercise criminal jurisdiction over Israeli nationals.<sup>79</sup> However, the OTP decided in 2012 not to proceed with Palestine's 2009 Declaration without referring to any of the criteria stated previously.<sup>80</sup> Contrary to expectations, the OTP endorsed neither the functionalist nor the textual approach. Rather, the OTP decided to defer the determination of Statehood to the relevant practices of the UNSG as the depositary of the Rome Statute. In doing so, the OTP equated the meaning of 'State' under Article 12(3) with that of treaty accession under Article 125(3) and the term 'a State which becomes a Party' under Article 12(1), without justification.<sup>81</sup> By equating these, the 2012 Determination argued that it is 'for the relevant bodies at the United Nations or the Assembly of States Parties to make the legal determination whether Palestine qualifies as a State for the purpose of acceding to the Rome Statute'.<sup>82</sup> In the absence of any recommendation from the UNSG and the ICC's Assembly of States Parties, the OTP argued that Palestine did not qualify as a 'State' and thus, there was no judicial basis to proceed with the 2009 Declaration.

### 3.3 No basis to equate the meaning of 'State' in Article 12(3) with Article 125

Nonetheless, the OTP's 2012 Determination suffers from two major problems. First, there is no basis for the OTP to equate the meaning of 'State' in Articles 12(3) and 125. The provision for ad hoc declarations under Article 12(3), and the accession regime under Article 125 (through which a 'State' can become a 'party to the Statute' for the purposes of Article 12(1)), serve two different institutional purposes. For example, Article 125(3) requires the instruments of accession to be deposited with the UNSG. However, Article 12(3) merely requires the declaration to be lodged with the Registrar. Andreas Zimmermann argues that this demonstrates '*a contrario*' exclusion of external influence under Article 12(3).<sup>83</sup> Given that the *raison d'être* of Article 12(3) is to encourage non-States Parties to cooperate with the ICC, in the aftermath of the rejection of universal jurisdiction originally proposed by Germany,<sup>84</sup> it is a *sui generis* mechanism under the Rome Statute framework that should not be compared to the standard treaty accession clause under Article 125.<sup>85</sup> As the Article 12(3) mechanism and the regime of accession serve different policy objectives with different institutional gatekeeping mechanisms, they in turn require different competencies from 'States'. Thus, the contextual reading of Article 12(3) arguably requires a unique understanding of 'State' in its context.

### 3.4 No authority for the OTP to interpret Article 12(3) without involving the Chambers

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<sup>77</sup> Shaw (n 7) 313.

<sup>78</sup> See (n 21).

<sup>79</sup> Michael Kearney, 'The Situation in Palestine' (Opinio Juris, 5 April 2012) <<http://opiniojuris.org/2012/04/05/the-situation-in-palestine>> accessed 31 August 2021.

<sup>80</sup> 2012 Determination (n 61) paras 196–203.

<sup>81</sup> *Ibid* paras 200–201.

<sup>82</sup> *Ibid* para 201.

<sup>83</sup> Zimmermann (n 7) 306.

<sup>84</sup> Williams Schabas and Giulia Pecorella, 'Article 12(3)' in Otto Triffterer and Kai Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (3rd edn, C H Beck, Munich 2016) 672, 677.

<sup>85</sup> Roger S Clark, 'Article 125' in Otto Triffterer and Kai Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (3rd edn, C H Beck, Munich 2016) 2318.

Secondly, it remains doubtful whether the OTP had the authority to conclusively decide the meaning of ‘State’ in its 2012 Determination without consulting the judicial organ of the ICC. The wording of Article 12(3) of the Rome Statute does not require any action of the OTP per se, contrary to the preliminary examination triggered by Articles 13, 14 and 15. Although the OTP is responsible for deciding whether the statutory requirement has been met prior to opening an investigation, the Rome Statute is silent as to whether the OTP’s decision regarding the validity of an Article 12(3) declaration could be reviewed by the Chambers.<sup>86</sup> However, the OTP observed that there were two contrasting views as to how the term ‘State’ could be interpreted under Article 12(3). As suggested by the chapeau of Article 12, the validity of an Article 12(3) declaration is one of the preconditions that the ICC has to be satisfied with prior to the exercise of any jurisdiction.<sup>87</sup> A dispute concerning the interpretation of ‘State’ under Article 12(3) arguably forms a dispute concerning the judicial function of the Court, because determining the proper interpretation of jurisdictional preconditions is undoubtedly ‘judicial’.<sup>88</sup> Article 119(1) states that a ‘dispute . . . shall be settled by the decision of the Court’. The use of the mandatory word ‘shall’ seems to suggest that only a judicial decision of the Court, rather than a policy paper by the OTP, would settle the ‘dispute’. This reading coincides with an early Questions and Answers document issued by the Registrar, which explicitly stated that a conclusive determination on the applicability of Article 12(3) to the declaration would have to be made by ‘the judges at an appropriate moment’.<sup>89</sup>

As a result, in the absence of any judicial determination by the Chambers, the OTP’s 2012 Determination should be treated as nothing more than the view of the then-Prosecutor’s office of the interpretation of Article 12(3). It should not form any legally binding precedent denying the validity of every Article 12(3) declaration lodged by contested entities without ‘UN non-member observer’ status. From this perspective, the ‘functional Statehood’ theory is not yet dead. If the OTP filed an Article 19(3) request to the Pre-Trial Chamber (PTC), the door is still open for the Chambers to consider a functional interpretation of Article 12(3). This possibility is well-demonstrated by the Article 19(3) Decision, albeit in a different context, where PTC-I decided to interpret the term ‘State’ under Article 12(2)(a) for the limited purpose of the Rome Statute without conducting a fully-fledged analysis on the Statehood of Palestine. While this decision dealt specifically with the meaning of ‘State’ under Article 12(2), the following rulings, reasoning techniques and observations made by PTC-I are also relevant in the context of an Article 12(3) declaration. However, this paper also acknowledges that if a future PTC decides in favour of a narrower interpretation of ‘State’ in Article 12(3), the arguments presented in this paper necessarily fail on their own terms.

#### 4 THE ARTICLE 19(3) DECISION AND THE INTERPRETATION OF ‘STATE’ FOR A LIMITED PURPOSE

##### 4.1 Palestine’s accession to the Rome Statute and the 2014 declaration

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<sup>86</sup> Carsten Stahn, Mohamed M El Zeidy and Héctor Olásolo, ‘The International Criminal Court’s Ad Hoc Jurisdiction Revisited’ (2005) 99 *The American Journal of International Law* 421; James Chan, ‘Judicial Oversight over Article 12(3) of the ICC Statute’ (2013) FICHL Policy Brief Series No 11 <<https://www.toaep.org/pbs-pdf/11-chan>> accessed 31 August 2021.

<sup>87</sup> Hans-Peter Kaul, ‘Preconditions to the Exercise of Jurisdiction’ in Antonio Cassese, Paola Gaeta and John R W D Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, vol 1 (1st edn, CUP, Cambridge 2002) 583, 610.

<sup>88</sup> See Summary of Submissions (n 62) para 21.

<sup>89</sup> ICC Registry, ‘Questions and Answers’ (ICC, 11 February 2009) 1 <<https://www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279787/QARegistryArticle14.pdf>> accessed 31 August 2021.

On 4 December 2012, UNGA Resolution 67/19 accorded Palestine the status of ‘non-member observer State’.<sup>90</sup> The UN Office of Legal Affairs subsequently indicated by way of an interoffice memorandum that Palestine would be able to become party to any treaties that were open to ‘any State’ or ‘all States’ deposited with the Secretary-General.<sup>91</sup> In 2014, the ‘State of Palestine’ lodged an Article 12(3) declaration with the Registrar of the ICC.<sup>92</sup> In January 2015, the ‘State of Palestine’ also deposited an instrument of accession to the Rome Statute with the UNSG.<sup>93</sup> The 2014 declaration arguably sought to extend the ICC’s temporal jurisdiction to crimes committed between 13 June 2014 and 1 April 2015, following the precedent set by Uganda.<sup>94</sup> Given the controversial nature of the scope of the ICC’s jurisdiction in Palestine, the OTP decided to request PTC-I to rule on the scope of the Court’s territorial jurisdiction over the situation in Palestine pursuant to Article 19(3) (the Article 19(3) Request).<sup>95</sup> Specifically, the OTP sought confirmation that the ‘State on the territory’ over which the Court may exercise its jurisdiction under Article 12(2)(a) is comprised of the West Bank, East Jerusalem and Gaza.<sup>96</sup>

In the Article 19(3) Request, the OTP advanced two positions. First, given Palestine’s successful accession to the Rome Statute, the OTP argued that Palestine had already been recognised as a ‘State for the purpose of Article 12(2)(a)’. Thus, PTC-I was not required to conduct a separate assessment of Palestine’s Statehood.<sup>97</sup> Alternatively, should PTC-I have found it necessary to conduct such an assessment, the OTP argued that the term ‘State’ could be given a functional understanding ‘for the purposes of the Rome Statute under relevant principles and rules of international law’.<sup>98</sup> However, contrary to the functional interpretation as advanced by scholars from 2009 to 2012, the functional understanding of Palestine as advocated by the OTP was not based on the satisfaction of certain normative criteria, but rather the Palestinian people’s right to self-determination.<sup>99</sup> This was arguably a strategic choice resulting from the limitations imposed by the Oslo Accords, which restricted Palestine’s criminal jurisdiction to try Israelis in Areas A and B, as well as its ability to conduct diplomatic activities.<sup>100</sup>

## 4.2 The Article 19(3) Decision: the majority judgment and dissenting opinion

On 5 February 2021, PTC-I rendered the Article 19(3) Decision. As the OTP neither mentioned nor asserted its jurisdiction *ratione temporis* in its Article 19(3) Request,<sup>101</sup> only the meaning of ‘State’ under Article 12(2) is addressed in the Article 19(3) Decision.<sup>102</sup> The majority of judges decided in favour of the OTP’s primary position without addressing the OTP’s alternative position. By relying on Palestine’s accession to the Rome Statute, the majority of judges considered Palestine a ‘State’ under Article 12(2)(a).<sup>103</sup> As PTC-I treated Palestine’s accession to the Rome Statute as determinative for the purposes of Article 12(2)(a), it did not conduct a

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<sup>90</sup> UNGA Res 67/19 (4 December 2012) UN Doc A/RES/67/19 para 2.

<sup>91</sup> Interoffice Memorandum (n 43).

<sup>92</sup> President of the State of Palestine, ‘Declaration Accepting the Jurisdiction of the International Criminal Court’ (31 December 2014) <[www.icc-cpi.int/ICCdocs/PIDS/press/Palestine\\_A\\_12-3.pdf](http://www.icc-cpi.int/ICCdocs/PIDS/press/Palestine_A_12-3.pdf)> accessed 31 August 2021.

<sup>93</sup> ICC, ‘The State of Palestine Accedes to the Rome Statute’ (7 January 2015) <[https://www.icc-cpi.int/Pages/item.aspx?name=pr1082\\_2](https://www.icc-cpi.int/Pages/item.aspx?name=pr1082_2)> accessed 31 August 2021.

<sup>94</sup> Ling Yan, ‘Non-States Parties and the Preliminary Examination of Article 12(3) Declarations’ in Morten Bergsmo and Carsten Stahn (eds), *Quality Control in Preliminary Examination*, vol 2 (Torkel Opsahl Academic EPublisher 2018) 441, 467–468.

<sup>95</sup> Article 19(3) Request (n 5).

<sup>96</sup> *Ibid* para 5.

<sup>97</sup> *Ibid* paras 53–67.

<sup>98</sup> *Ibid* para 9.

<sup>99</sup> *Ibid*.

<sup>100</sup> *Ibid* paras 183–189.

<sup>101</sup> Daphné Richemond-Barak, ‘Of temporal jurisdiction and power struggles in the ICC’s Palestine Investigation’ (EJIL: Talk!, 22 January 2020) <<https://www.ejiltalk.org/of-temporal-jurisdiction-and-power-struggles-in-the-ICCs-palestine-investigation/>> accessed 31 August 2021.

<sup>102</sup> Article 19(3) Decision (n 6).

<sup>103</sup> *Ibid* paras 109–113.

fully-fledged assessment of Palestine's Statehood.<sup>104</sup> In addition, PTC-I proceeded to delineate the ICC's territorial jurisdiction as covering the West Bank, East Jerusalem and Gaza.<sup>105</sup> One could also argue that PTC-I implicitly recognised some flexibility in applying the Montevideo criteria of a defined territory and effective governmental control in the context of Article 12(2)(a) of the Rome Statute, when the right to self-determination of the aspiring State's people has been well recognised. While the delineation of the ICC's scope of territorial jurisdiction in Palestine is no less controversial than the existence of Palestine's Statehood, the former was the only issue that was explicitly addressed by PTC-I.

While the majority of judges did not address the OTP's alternative argument, in his partly dissenting judgment, Judge Péter Kovács favoured the alternative position. According to Judge Kovács, 'Palestine's status can eventually be addressed under the concept of "State for the purposes of the Statute under international law" . . . [an approach] substantiated by remarkable doctrinal support'.<sup>106</sup> It is worth noting that, to support his view, Judge Kovács cited Alain Pellet's consideration of Palestine's 2009 Declaration,<sup>107</sup> where he had called for a functional interpretation of 'State' under Article 12(3), a position supported by 38 other scholars.<sup>108</sup> As above, Pellet and other scholars called for a functional interpretation of 'State' based on the factual qualities that an entity possessed rather than its people's right to self-determination or the successful accession of an entity to the Rome Statute. Thus, it is believed that Judge Kovács himself would favour the traditional 'functional interpretation', developed in the context of Article 12(3), rather than the OTP's modified functional understanding developed in the context of Article 12(2)(a), which resulted from its strategic choices to circumvent the Oslo Accords. As we can see from the Article 19(3) Decision, the discussion over 'functional interpretation' remains very much alive even after the OTP's 2012 Determination. While the OTP emphasised that the situation of Palestine is unique,<sup>109</sup> given the remarkable doctrinal support recognised by Judge Kovács, there is no reason why the same theory of interpretation could not benefit other territorial entities that are willing and able to assist the Court through Article 12(3).

### 4.3 Functional Statehood is not yet dead in the context of the Rome Statute

Although the majority of judges of the PTC-I in the Article 19(3) Decision favoured the primary position proposed by the OTP, there are similarities between the line of reasoning adopted by the majority judges in the Chamber and the functional interpretation of 'State' in Article 12(3).

First, both approaches allow the Chamber to interpret the term 'State' for the limited purpose of establishing individual criminal responsibility without jeopardising any diplomatic settlement of territorial disputes in the future.<sup>110</sup> While the functional interpretation of 'State' in Article 12(3) relied on normative criteria such as the effective exercise of criminal jurisdiction and the capacity to cooperate with the ICC under Part 9, the majority approach in the Article 19(3) Decision relied on Palestine's successful accession to the Rome Statute. As stated above, this merely reflects the strategic choice of the OTP, as the fulfilment of functional criteria is not the strongest possible argument available for the OTP in the context of Palestine. It cannot be argued that the functional approach based on Palestine's accession to the Rome Statute in the context of Article 12(2) would bind any future interpretation of another subparagraph under Article 12. As Part 5 of this paper will show, Taiwan (ROC) might have an even stronger claim than Palestine in satisfying all the functional criteria as pushed forward by scholars from the functional school.

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<sup>104</sup> Ibid paras 87 and 99.

<sup>105</sup> Ibid paras 122–123.

<sup>106</sup> Kovács' Dissent (n 19) [244].

<sup>107</sup> Alain Pellet, 'The Effects of Palestine's Recognition of the International Criminal Court's Jurisdiction' in Chantal Meloni and Gianni Tognoni (eds), *Is there a Court for Gaza? A Test Bench for International Justice* (T M C Asser Press, The Hague 2012) 409, 425.

<sup>108</sup> Kovács' Dissent (n 19) [244] fn 314.

<sup>109</sup> Article 19(3) Request (n 5) para 9.

<sup>110</sup> Article 19(3) Decision (n 6) [104]–[106]; Summary of Submissions (n 62) para 23.

Secondly, both approaches adopt purposive interpretations of the Rome Statute. By citing the preamble, both approaches stress the importance of interpreting the Statute in line with the overall objective of punishing international crimes.<sup>111</sup> Similarly, both lines of reasoning seek to give appropriate effect to the provisions under the Rome Statute rather than rendering them inoperative towards contested entities.<sup>112</sup> In this regard, neither approach sees the drafting intent, or rather the absence of any specific legislative intent, as conclusive, or rules out any functional interpretation of contested entities under Article 12.<sup>113</sup>

Last but not least, PTC-I rejected the application of the *Monetary Gold* principle in the jurisdictional stages.<sup>114</sup> In the Article 19(3) Decision, PTC-I distinguished international criminal proceedings from State-to-State proceedings at the ICJ, as the former has a specific context of establishing individual criminal responsibility. Also, PTC-I stressed that Israel had already been given a fair chance to submit its observations in the proceedings.<sup>115</sup> This ruling has important implications for any future attempt by Taiwan (ROC) to submit an Article 12(3) declaration: so long as China (PRC) has been given the chance to submit written observations, it would not be able to rely on its non-participation to prevent the ICC from entering a valid ruling on its territorial jurisdiction concerning Taiwan (ROC).<sup>116</sup>

Having established that it is legally possible for the ICC to consider a functional interpretation of ‘State’ under Article 12(3), it is important to see if there is any policy justification supporting such an approach.<sup>117</sup> This question is particularly controversial, as the attribution of Statehood even in a limited sense might confer legitimacy to a contested entity contrary to the intention of some contracting States. This might further compromise the legitimacy of the Rome Statute as a consent-based system.<sup>118</sup> Thus, it is important to develop a way to ensure that the exercise of the ICC’s jurisdiction over contested entities would be a rational and justifiable response to potential international crimes committed in disputed territories. Otherwise, it might open the floodgates to all contested entities to advance their claims of Statehood and jeopardise the ICC’s support from States Parties that suffer from ethnic secessionism.

## 5 POLICY ARGUMENTS IN FAVOUR OF ATTRIBUTING FUNCTIONAL STATEHOOD TO TAIWAN (ROC)

### 5.1 Bridging the gap between effective control and enforcing criminal responsibility

According to Ronen, ‘a guiding principle in applying a functional approach is that with power comes responsibility’.<sup>119</sup> It has been recognised that non-State actors with effective territorial control have obligations to respect peremptory norms,<sup>120</sup> including the positive duty to prevent and punish international crimes.<sup>121</sup> Negative duties have already been consistently imposed on entities with quasi-State features.<sup>122</sup> In this respect, Taiwan (ROC) has vowed to act *positively* in

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<sup>111</sup> Article 19(3) Decision (n 6) [104]; Summary of Submissions (n 62) paras 3 and 22–23.

<sup>112</sup> Article 19(3) Decision (n 6) [106]; Summary of Submissions (n 62) paras 24–25.

<sup>113</sup> Article 19(3) Decision (n 6) [89]–[113]; Summary of Submissions (n 62) para 25.

<sup>114</sup> Article 19(3) Decision (n 6) [58]–[60]. See also Observations of Uganda (n 21) para 9.

<sup>115</sup> Article 19(3) Decision (n 6) [59].

<sup>116</sup> See eg the effect of China (PRC)’s non-participation in *The South China Sea Arbitration (The Republic of Philippines v The People’s Republic of China)* (Award) PCA Case 2013-19 (12 July 2016) [45]–[55].

<sup>117</sup> Ronen, ‘Entities’ (n 51) 54.

<sup>118</sup> *Ibid* 58.

<sup>119</sup> *Ibid* 54.

<sup>120</sup> Yaël Ronen, ‘Human Rights Obligations of Territorial Non-State Actors’ (2013) 46 *Cornell International Law Journal* 21, 37, fn 74.

<sup>121</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43 [166]–[169] (on the crime of genocide).

<sup>122</sup> Human Rights Council, ‘Report of the High Commissioner for Human Rights on the Implementation of Human Rights Council Resolution 7/1’ (6 June 2008) UN Doc A/HRC/8/17 paras 6–9 (on Hamas); Human Rights Council, ‘Report of the Independent International Commission of Inquiry on the Syrian Arab Republic’ (22 Feb 2012) UN Doc A/HRC/19/69 paras 106–107 (on the Free Syrian Army); UNSG, ‘Report of the Panel of the Secretary-General’s Panel of Experts on Accountability in Sri Lanka’ (31 March 2011) para 188

compliance with extensive human right treaties despite its absence of recognised Statehood.<sup>123</sup> The voluntary commitment of Taiwan (ROC) to act in accordance with international human rights law and its general compliance with this commitment mitigates the concerns over the intra-divisibility of international law,<sup>124</sup> and the possibility of contested entities cherry-picking international obligations.<sup>125</sup> The attribution of Statehood to Taiwan (ROC) for the limited purpose of the Rome Statute allows Taiwan (ROC) to request assistance from the ICC in punishing international crimes by providing it with a reciprocal right under Article 12(3) similar to that of a State. Since State-like attributes have already been ascribed to Taiwan (ROC), and given the international legal obligation to prevent and punish international crimes, an interpretation of Article 12(3) in light of its object and purpose to help ‘put an end to the impunity of the perpetrators of such crimes and contribute to their prevention’<sup>126</sup> should not render Taiwan (ROC)’s right to request ICC’s assistance in fulfilling its pre-existing obligations conditional upon its unequivocal claim of Statehood. Given that Article 21(3) requires interpretation of the Rome Statute, including Article 12(3), to be consistent with internationally recognised human rights, there is no legitimacy concern for the ICC if it decides to accept Taiwan (ROC)’s Article 12(3) declaration, as compared to the cases of other contested entities, which might seek to benefit from the provisions of the Rome Statute without accepting or acting in accordance with fully-fledged international human rights obligations applicable to all States.

## 5.2 Taiwan (ROC)’s unrestrained criminal jurisdiction and international personality

If the functional understanding of ‘State’ is to be adopted, it would merely require contested entities to hold internationally recognised ‘natural jurisdiction’, meaning that the entities must be able to exercise effective territorial control and enforce criminal jurisdiction in their controlled territories.<sup>127</sup> In this regard, Taiwan (ROC) (1) has established a legal system invested with territorial jurisdiction over criminal offences and (2) enjoys an international legal personality that permits it to interact, to some extent, with States and international organisations including the ICC.<sup>128</sup> The signing of mutual legal assistance agreements between Taiwan (ROC) and several recognised States could be seen as international recognition of Taiwan (ROC) as having ‘natural jurisdiction’ over crimes committed in the territories of Formosa, Pescadores, Kinmen and Matsu.<sup>129</sup> In the cross-strait context, while China (PRC) has claimed both prescriptive and enforcement jurisdiction over the entire territory effectively controlled by Taiwan (ROC), it has tacitly recognised ROC’s exercise of criminal jurisdiction in the Cross-Strait Joint Crime Fighting and Judicial Mutual Assistance Agreement.<sup>130</sup> In Article 5, ‘[t]he Parties agree to exchange information concerning involvement in the commission of the crimes, to help apprehend and repatriate criminals and criminal suspects, and when necessary to cooperate in assisting the

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<<https://www.securitycouncilreport.org/atf/cf/%7B65BF96FF9%7D/POC%20Rep%20on%20Account%20in%20Sri%20Lanka.pdf>> accessed 31 March 2021 (on the Liberation Tigers of Tamil Eelam); United Nations Mission in the Republic of South Sudan, ‘Conflicts in South Sudan: A Human Rights Report’ (8 May 2014) para 18 <[https://unmiss.unmissions.org/sites/default/files/unmiss\\_conflict\\_in\\_south\\_sudan\\_-\\_a\\_human\\_rights\\_report.pdf](https://unmiss.unmissions.org/sites/default/files/unmiss_conflict_in_south_sudan_-_a_human_rights_report.pdf)> accessed 31 March 2021.

<sup>123</sup> Office of the President ROC, ‘President Ma Attends Press Conference Unveiling English Version of Taiwan’s First National Human Rights Report under the ICCPR and ICESCR’ (18 December 2012) <<https://english.president.gov.tw/NEWS/4059>> accessed 31 August 2021.

<sup>124</sup> Ronen, ‘Entities’ (n 51) 56.

<sup>125</sup> Ibid 57.

<sup>126</sup> Rome Statute (n 4) Preamble.

<sup>127</sup> Shany (n 7) 333; Kearney and Denayer (n 7) paras 29–38.

<sup>128</sup> Shany (n 7) 338; Kearney and Denayer (n 7) para 22.

<sup>129</sup> Shany (n 7) 333. See also Republic of China’s Ministry of Justice, ‘Law and Agreements (or Arrangements)’ (31 August 2021) <<https://www.moj.gov.tw/2832/2833/2916/2928/2929/>> accessed 30 August 2021.

<sup>130</sup> ROC (Taiwan)’s Mainland Affairs Council, ‘Cross-Strait Joint Crime-Fighting and Judicial Mutual Assistance Agreement’ (22 May 2009) <[http://ws.mac.gov.tw/001/Upload/OldFile/public/MMO/MAC/crossstraitagreementscc3\\_ag1.pdf](http://ws.mac.gov.tw/001/Upload/OldFile/public/MMO/MAC/crossstraitagreementscc3_ag1.pdf)> accessed 2 February 2022.

conduct of criminal investigation and detection'.<sup>131</sup> While the Agreement is not deemed an international treaty, and is thus not legally binding on both parties, both governments have acted pursuant to the Agreement, treating it as an informal framework of criminal cooperation.<sup>132</sup>

In Palestine, a substantial portion of its territory is subject to Israeli military occupation,<sup>133</sup> and the Palestinian National Authority also has only a limited ability to enter into international agreements and to exercise criminal jurisdiction against Israeli nationals under the Oslo Accords.<sup>134</sup> However, the ability of Taiwan (ROC) to exercise criminal jurisdiction within its territories and to represent the territories internationally is unrestrained by any international agreement or domestic constitution.<sup>135</sup> The bilateral investment agreements and mutual legal assistance agreements between Taiwan (ROC) and other recognised States demonstrate that Taiwan (ROC) is capable of entering into international agreements to facilitate its cooperation with the ICC under Part 9 of the Rome Statute. Thus, it is argued that, if the ICC decides to accept Taiwan (ROC)'s Article 12(3) declaration, there are even fewer practical concerns regarding the practicability of criminal cooperation with Taiwan (ROC).

Contrary to the claims by Ronen,<sup>136</sup> it is argued that the Article 12(3) mechanism is a reciprocal regime: a declaring State enjoys the benefit of the ICC's assistance in adjudicating and punishing international crimes, and in return, the declaring State is bound to cooperate with the ICC under Part 9 of the Rome Statute. In the case of Taiwan (ROC), where the contested entity is clearly capable of cooperating,<sup>137</sup> the reason for denying the contested entity's corresponding right to delegate its criminal jurisdiction to the ICC is not one of impracticality but potential illegitimacy. While China (PRC) is currently not, and is unlikely to become, a State Party to the Rome Statute, opposition could still be raised by the PRC's allies or even Western States facing secessionism. The following section argues that, while politics are inevitable in the process of international criminal adjudication, such controversies could be minimised if some bar could be maintained through the doctrine of mandatory non-recognition.

### 5.3 Mandatory non-recognition: the floodgate against illegitimacy

The most powerful argument against accepting an Article 12(3) declaration from Taiwan (ROC) is that such a ruling might open the floodgates to all kinds of contested entities. It could potentially jeopardise the ICC's integrity and even trigger withdrawal by some existing members. In this respect, Taiwan (ROC) and other entities such as South Ossetia, Abkhazia, Transnistria, Somaliland and the Turkish Republic of Northern Cyprus have been cited as potential contested entities that might utilise Article 12(3) to advance their claims of Statehood.<sup>138</sup> Given that the Rome Statute is a treaty based on State consent, Ronen has argued that the acceptance of functional Statehood would upset the delicate balance of political power and disrupt the conceptual foundation of the regime to which States Parties subscribed.<sup>139</sup>

However, with the exception of Kosovo,<sup>140</sup> Taiwan (ROC) and Somaliland, there are allegations that the creation of the above-mentioned entities resulted from a prior violation of international law.<sup>141</sup> For example, PTC-I has in the past refused to recognise South Ossetia as a

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<sup>131</sup> Ibid art 5. See also arts 6 and 11.

<sup>132</sup> Margaret K Lewis, 'Creative Contacts: Taiwan's Quest for International Law Enforcement Cooperation' (2019) 36 Chinese (Taiwan) Yearbook of International Law and Affairs 94, 95–98.

<sup>133</sup> Ronen, 'ICC Jurisdiction' (n 7) 16–17; Shaw (n 7) 317.

<sup>134</sup> The Israel-Palestine Interim Agreement (n 13).

<sup>135</sup> Crawford (n 17) 210; Roth (n 16) 98.

<sup>136</sup> Ronen, 'Entities' (n 51) 54–55.

<sup>137</sup> Kearney (n 79).

<sup>138</sup> Shaw (n 7) 323–324; Ronen, 'ICC Jurisdiction' (n 7) 24.

<sup>139</sup> Ronen, 'Entities' (n 51) 55–56.

<sup>140</sup> *Kosovo Advisory Opinion* (n 59) [122].

<sup>141</sup> Enrico Milano, *Unlawful Territorial Situations in International Situations in International Law: Reconciling Effectiveness, Legality and Legitimacy* (Brill, Leiden 2006) 133 and 142–149; Venice Commission, 'Opinion on the Law on Occupied Territories of Georgia' (17 March 2009) paras 8 and 42–43 <[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2009\)015-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2009)015-e)> accessed

‘State’ based on its absence of recognition at the UN.<sup>142</sup> However, there is one important distinction between the non-recognition of Taiwan (ROC) and South Ossetia by the UN. As confirmed by PTC-I, South Ossetian forces were under the ‘overall control’ of Russia.<sup>143</sup> Nonetheless, there is currently no foreign military presence in Formosa, Pescadores, Kinmen or Matsu. Upon the termination of the 1954 Sino-American Mutual Defence Treaty (SAMDT),<sup>144</sup> all US armed forces withdrew from Taiwan on 1 May 1979.<sup>145</sup> There is no suggestion that the ROC government is currently constrained by the overall or effective control of third States. Thus, Taiwan (ROC) should not be seen as a ‘puppet regime’ of another State created to sustain an illegal territorial situation. While the recognition of South Ossetia’s de facto existence would be tantamount to recognising the illegal territorial situation created and sustained by Russia, the same analogy could not be applied to Taiwan (ROC).

This paper argues that, in addition to considering the satisfaction of the factual criteria, the ICC should also apply the doctrine of mandatory non-recognition under international law to filter out de facto ‘State’ entities that were created to sustain illegal territorial situations. This proposition also reflects the general principle of good faith. The mandatory non-recognition of illegal territorial situations has also been recognised under the law of State responsibility.<sup>146</sup> The application of this doctrine at the level of the ICC helps to preserve the positions of several signatories to the Rome Statute, such as Georgia and Cyprus, as well as Ukraine, a non-signatory that has submitted to the ICC’s ad hoc jurisdiction, which are similarly facing the problem of ethnic secessionism assisted by non-Member States of the Rome Statute. While any recognition of Taiwan (ROC) would indeed be heavily opposed by China (PRC) for violating the ‘One China’ policy, there is no suggestion that the recognition of Taiwan (ROC) is prohibited by international law per se.<sup>147</sup>

#### 5.4 Functional Statehood as a shield against unwarranted politicisation

Should Taiwan (ROC) decide to lodge an Article 12(3) declaration, the ICC would also face competing sovereign claims over its territories. Central to the arguments favouring the acceptance of Palestine’s declarations is the fact that Israel has not officially claimed territorial sovereignty over the Occupied Palestinian Territories, except for East Jerusalem.<sup>148</sup> China (PRC) however considers the entire territory of Taiwan (ROC) to be Chinese sovereign territory. While there is uncertainty over the retrocession of title over Formosa and Pescadores, Kinmen and Matsu were never ceded to Japan and there is no doubt that both islands belong to ‘China’. Kinmen and Matsu have been consistently administered by Taiwan (ROC) under the Province of Fujian,<sup>149</sup> and they were not covered by the SAMDT.<sup>150</sup> Unlike Palestine, Taiwan (ROC) would not fall into a legal

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24 February 2022; Gaiane Nuridzhanian, ‘(Non-)Recognition of De Facto Regimes in Case Law of the European Court of Human Rights: Implications for Cases Involving Crimea and Eastern Ukraine’ (EJIL:Talk!, 9 October 2017) <<https://www.ejiltalk.org/non-recognition-of-de-facto-regimes-in-case-law-of-the-european-court-of-human-rights-implications-for-cases-involving-crimea-and-eastern-ukraine/>> accessed 24 February 2022.

<sup>142</sup> *Situation in Georgia* (Request for Authorization of an Investigation Pursuant to Article 15) ICC-01/15-4 (13 October 2015) para 6.

<sup>143</sup> *Ibid* para 27.

<sup>144</sup> Sino-American Mutual Defence Treaty (ROC-United States) (adopted 2 December 1954, entered into force 3 March 1955, expired 31 December 1979) 6 UST 433 (SAMDT).

<sup>145</sup> Michael C M Louis, ‘Dixie Mission II: The Legality of a Proposed U.S. Military Observer Group to Taiwan’ (2021) 22(2) *Asian-Pacific Law and Policy Journal* 75, 79.

<sup>146</sup> ‘Responsibility of States for Internationally Wrongful Acts’ UNGA Res 56/83 (12 December 2001) annex, art 41(2).

<sup>147</sup> Cf Crawford (n 17) 211. However, this view ignores the fact that, even if Taiwan was considered a part of China in 1952, the Taiwan Strait was still classified as an international strait where the freedom of navigation applied. See Keyuan Zou, ‘Redefining the Legal I Status of the Taiwan Strait’ (2000) 15 *International Journal of Marine and Coastal Law* 245, 250.

<sup>148</sup> Pellet (n 7) 993; Shany (n 7) 337; Kearney and Denayer (n 7) para 40.

<sup>149</sup> Kinmen Country Government, ‘About Kinmen’ (8 Dec 2017) <<https://www.kinmen.gov.tw/en/cp.aspx?n=22D15C7FFDA4350D#>> accessed 23 February 2022.

<sup>150</sup> SAMDT art VI.

black hole.<sup>151</sup> This is because, in theory, China (PRC) can either accede to the Rome Statute or lodge an Article 12(3) declaration to provide the ICC with the necessary criminal jurisdiction to try crimes committed in Formosa, Pescadores, Kinmen and Matsu.

Taking into consideration the fact that China (PRC) does not want to accede to the Rome Statute, partly because of the Taiwanese, Tibetan and East Turkestan issues,<sup>152</sup> the ICC's unilateral acceptance of Taiwan (ROC)'s Article 12(3) declaration could be seen by China (PRC) as committing a crime against sovereignty and further estrange it from the Court. On the other hand, if the ICC decided not to accept Taiwan's Article 12(3) declaration based on Chinese territorial claims, it is equally likely to be seen as bowing to China (PRC)'s diplomatic pressure by certain Western States. For example, following the rejection of Taiwan (ROC)'s bid to join the UN in 2007, several Western States were reported to have strongly protested this decision to the UNSG.<sup>153</sup> In other words, concerns relating to political consequences and geopolitical considerations are unavoidable, and perhaps inevitable, in the exercise of international criminal jurisdiction over geopolitical 'hotspots'. The only question is whether such a decision could also be justified on legal instead of purely political grounds. In this regard, it is worth recalling that only East Jerusalem is subject to competing sovereignty claims between Palestine and Israel, whereas all territories controlled by Taiwan (ROC) are also claimed by China (PRC). While the status of East Jerusalem as a part of the Occupied Palestinian Territories was recognised by UNGA Resolution 67/19, the position of the international community over Taiwan and Pescadores is far from clear.<sup>154</sup> Thus, the acceptance of Taiwan (ROC)'s Article 12(3) declaration by the ICC per se would carry the consequence of implicitly recognising one entity's claim over the other. The ambiguous position adopted by Taiwan (ROC) itself, as well as by many other UN Member States, also points towards the absence of a clear international consensus that the ICC could rely upon.<sup>155</sup> As a result, in deciding whether to accept Taiwan (ROC)'s declaration, the ICC would arguably be required to face more political controversies than it did when dealing with Palestine's jurisdiction. The danger for the ICC to overstep its mandate is much higher in the case of Taiwan than of Palestine.

Amongst all the options available, it seems that only a functional interpretation of 'State' under Article 12(3) allows the ICC to not expressly take a side on the question of an entity's Statehood. Under the functional approach, it is not sovereignty over Taiwan but the capacity of the contested entity to exercise criminal jurisdiction and to cooperate with the ICC under Part 9 of the Rome Statute that is considered in the necessary jurisdictional question. This could be answered by referring solely to objectively ascertainable criteria, being the ability of Taiwan (ROC) to enforce criminal jurisdiction and to cooperate with the ICC. Once the Court is satisfied that Taiwan (ROC) is not subject to mandatory non-recognition in international law, the questions of sovereignty, Taiwan's Statehood or the Taiwanese people's right to self-determination are irrelevant at the jurisdictional stage.<sup>156</sup> This departure from the unitary concept of Statehood could be justified by the principle of effectiveness, supported by the rich practice of States, international organisations and international courts towards contested entities,<sup>157</sup> which have implicitly recognised and treated contested entities 'as if' they were States according to their relevant objectives and purposes.

In the Article 19(3) Decision, the majority judges of PTC-I emphasised that the political consequences arising out of the decision should not affect the ICC in delineating its jurisdiction

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<sup>151</sup> Shany (n 7) 337. Cf Article 19(3) Decision (n 6) para 118, in which PTC-I confirms that Gaza falls within the territorial jurisdiction of Palestine.

<sup>152</sup> Jingren Xiao and Xin Zhang, 'A Realist Perspective on China and the International Criminal Court' (2013) FICHL Policy Brief Series No 13, 3 <<https://www.toaep.org/pbs-pdf/13-xiao-zhang>> accessed 31 August 2021.

<sup>153</sup> Michael J Cole, 'UN Told to Drop "Taiwan is a Part of China": Cable' *Taipei Times* (Taipei, 6 September 2011) <<http://www.taipetimes.com/News/front/archives/2011/09/06/2003512568>> accessed 31 August 2021.

<sup>154</sup> See Section 2.1.

<sup>155</sup> Cole (n 153). While the UN treated Taiwan as a 'Province of China', this position was opposed by the United States and other Western States.

<sup>156</sup> Shany (n 7) 338; Kearney and Denayer (n 7) para 24.

<sup>157</sup> *Kosovo Advisory Opinion* (n 59) [51]; *Wall Opinion* (n 14) [162]; Pellet (n 7) 986–987. See also Sehnáková and Kučera (n 29) 151–153.

for the purpose of establishing individual criminal responsibility.<sup>158</sup> On one hand, compared to an interpretation based on the meaning of ‘State’ under general public international law, the functional approach precludes the ICC from determining the fully-fledged claim of Taiwan’s Statehood, as this is outside its mandate.<sup>159</sup> On the other hand, compared to the OTP’s 2012 Determination, which defers to determinations by UN organs, the functional approach also preserves the institutional independence of the ICC by allowing it to determine independently whether an entity satisfies the jurisdictional preconditions.

### 5.5 The ‘interests of justice’ as the final gatekeeper

Even if the ICC decided to confirm Taiwan (ROC)’s Article 12(3) declaration, this merely means that one of the preconditions for the exercise of jurisdiction by the ICC has been satisfied. After the satisfaction of all the jurisdictional preconditions, the OTP could still refuse to initiate possible investigations if such an investigation is contrary to ‘the interests of justice’ under Article 53(1)(c) of the Rome Statute. In this case, the OTP would not require authorisation to investigate under Article 15(4), but rather would be required to notify the PTC promptly in writing and with reasons for the conclusion pursuant to Rule 105(4) of the ICC’s Rules of Procedure and Evidence.<sup>160</sup> The power of the PTC to review the OTP’s decision pursuant to Article 53(3)(b) would then be triggered. The drafting history of the ‘interests of justice’ clause suggest that this provision mirrors prosecutorial discretion in domestic judicial systems.<sup>161</sup> Yuval Shany, for example, favours the use of the ‘interests of justice’ clause under Article 53(1)(c) as the final vetting mechanism when competing sovereignty claims are involved.<sup>162</sup>

By deferring the final gatekeeping function to ‘the interests of justice’, the purposes and objectives of the Rome Statute would indeed be better served. First, under Article 53(1)(c), the OTP is required to balance different interests in making its assessment on whether to proceed to initiate an investigation. The wording of Article 53(1)(c) requires the OTP to consider the gravity of the crime and the interests of victims. Thus, a delicate balancing exercise between the idealistic and pragmatic concerns would be performed in the pre-investigation stage.<sup>163</sup> This is a task that is already performed by the OTP on a regular basis in its selection of situations.<sup>164</sup> Shany argues that the OTP could, for instance, decide not to proceed to the investigation when a declaration is more likely than not a ‘sham’ to advance an entity’s Statehood in the international arena.<sup>165</sup> This corresponds to a broad interpretation of Articles 53(1)(c) and (2)(c), which permits the OTP to consider political ramifications, and more particularly, the ICC’s viability, as substantial reasons that an investigation would not serve the interests of justice.<sup>166</sup>

Secondly, the presence of judicial oversight by the PTC on the OTP’s decision to not proceed with an investigation would put a further constraint on the discretionary power of the OTP. Compared to the OTP’s unilateral determination of Palestine’s inability to lodge a declaration under Article 12(3) in 2012, the decisions made by the OTP under Article 53(1)(c) are subject to review by the PTC under Article 53(3)(b). If the OTP decides not to proceed with the investigation of the situation in Taiwan (ROC), the PTC could for instance consider (1) whether there were substantial grounds to believe that the political controversies surrounding

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<sup>158</sup> Article 19(3) Decision (n 6) para 108.

<sup>159</sup> Ibid paras 54 and 108.

<sup>160</sup> International Criminal Court, *Rules of Procedure and Evidence* (2002) ICC-ASP/1/3.

<sup>161</sup> Gilbert Bitti, ‘The Interests of Justice- Where Does That Come From? Part I’ (EJIL:Talk!, 13 August 2019) <<https://www.ejiltalk.org/the-interests-of-justice-where-does-that-come-from-part-i/>> accessed 2 February 2022.

<sup>162</sup> Shany (n 7) 338.

<sup>163</sup> Phil Clark, ‘Law, Politics and Pragmatism: The ICC and Case Selection in the Democratic Republic of Congo and Uganda’ in Nicholas Waddell and Phil Clark (eds), *Courting Conflict? Justice, Peace and the ICC in Africa* (Royal African Society, London 2008) 37, 39.

<sup>164</sup> William Schabas, ‘Victor’s Justice: Selecting “Situations” at the International Criminal Court’ (2010) 43 *John Marshall Law Review* 535, 549.

<sup>165</sup> Shany (n 7) 338.

<sup>166</sup> See Cale Davis, ‘Political Considerations in Prosecutorial Discretion at the International Criminal Court’ (2015) 15 *International Criminal Law Review* 170, 179.

the Taiwan (ROC) investigation would lead to the alienation of the ICC from vital cooperation partners or result in de-ratification by existing Member States<sup>167</sup> and (2) whether such a cost would be justified taking into account the interests of the victims and the gravity of the offences in question. The consideration of political consequences is frequently conducted by the Chambers under Article 17(2) of the Rome Statute in determining whether States are unwilling or unable to investigate potential international crimes.<sup>168</sup> Thus, it is argued that the PTC are well-equipped to carry out such political assessments.

Finally, while the exact content of the ‘interests of justice’ is not defined in the Statute, this does not mean that the OTP could avoid an investigation by invoking arbitrary grounds.<sup>169</sup> For instance, to invoke ‘the interests of justice’ ground, the OTP would have to show ‘substantial reasons’ instead of just a ‘reasonable basis’ under Article 53(1)(a)–(b). In addition, Article 53(1)(c) expressly subjects prosecutorial discretion to the mandatory consideration of the ‘gravity of the crime and the interests of the victims’. Finally, the OTP’s decision not to proceed based on ‘the interests of justice’ must be confirmed by the PTC under Article 53(3)(b) in order to be effective. Thus, it is argued that the apparently vague wording of the ‘interests of justice’ does not provide the OTP with unfettered discretion. Rather, the exercise of prosecutorial discretion is subject to a well-regulated framework of judicial assessment exercisable by the PTC, which ensures the protection of legality and predictability before the ICC.

As a result, this paper argues that any political assessment of the consequences of an Article 12(3) declaration should not be decided at the stage of jurisdiction. At the stage of jurisdiction, the PTC should only consider whether the contested entity possesses sufficient capacity to enforce criminal jurisdiction and to cooperate with the ICC. Political considerations should be deferred to the pre-investigation stage, where there is an established framework under the Rome Statute to balance out the pragmatic and idealistic visions of the ICC. Under this approach, the OTP and PTC need to consider whether the interests of victims and the gravity of the violations are sufficiently great to justify the initiation of an investigation into the situation of Taiwan (ROC). The politicisation argument could thus be well addressed with Article 53(1)(c) without resorting to the all-or-nothing approach of rejecting all politically controversial Article 12(3) declarations lodged by contested entities.

## 6 CONCLUSION

It is submitted that the indeterminate status of Taiwan (ROC) should not strip it of its right to cooperate with and request assistance from the ICC. Rather, the Rome Statute was conceived for the protection of all individuals, including small and marginalised peoples, from the commission of international crimes. In cases when Taiwan (ROC) would require assistance from the ICC, it would be for the ICC, an international court structurally independent from the UN, to answer its genuine request for assistance.

This paper argues that the ICC should in the future revisit the functional approach to Statehood under Article 12(3), because such an approach provides inherent flexibility to the ICC when dealing with potential international crimes committed on the territories of contested entities without necessarily becoming a battleground for their claims of Statehood. It is argued that the ICC should only recognise Article 12(3) declarations where these are lodged by contested entities that (1) enforce effective criminal jurisdiction in their territories; (2) possess sufficient international personality to fulfil the obligations under Part 9 of the Rome Statute and (3) are not subject to mandatory non-recognition. From a preliminary view, contested entities satisfying all three criteria are arguably limited to Taiwan (ROC), Kosovo and Somaliland. It is argued that the admission of Taiwan’s declaration would not result in opening the floodgates to every contested

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<sup>167</sup> Ibid 182.

<sup>168</sup> Ibid 186.

<sup>169</sup> Giulia Turone, ‘Powers and Duties of the Prosecutor’ in Antonio Cassese, Paola Gaeta and John R W D Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, vol 2 (1st edn, CUP, Cambridge 2002) 1137, 1159–1162.

entity and thus jeopardise the ICC's integrity as an impartial and independent judicial institution based on State consent. As the 'interests of justice' clause would in any event serve as the final gatekeeper, the meaning of 'State' under Article 12(3) should be interpreted broadly to encompass any contested entity which is able and willing to assist the Court, including Taiwan (ROC). By allowing the ICC to react to genuine cries for help from areas that are otherwise excluded from international society, the functional interpretation of 'State' under Article 12(3) would ultimately serve the object and purpose of the ICC 'to put an end to impunity' for all those who commit unimaginable atrocities that deeply shock the conscience of humanity.<sup>170</sup>

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<sup>170</sup> Rome Statute (n 4) Preamble.