הארגון הבינלאומי של עורכי-דין ומשפטנים יהודים
THE INTERNATIONAL ASSOCIATION OF JEWISH LAWYERS AND JURISTS

September 9, 2009

His Excellency Luis Moreno-Ocampo

Prosecutor, International Criminal Court

Post Office Box 19519

2500CM The Hague

The Netherlands

Via Courier

Dear Mr. Moreno-Ocampo,

I am writing to you on behalf of the International Association of Jewish Lawyers and Jurists ("**IAJLJ**"). IAJLJ is representing thousands Jewish Lawyers and Jurists from all over the world. In addition, IAJLJ has Category II Status as a non-governmental organization (NGO) at the United Nations as well as representation at the Council of Europe in Strasbourg. As an international body of lawyers and legal practitioners concerned with the advancement of international law and fair implementation of international treaties, the protection of human rights and the prevention and prosecution of war crimes in particular, we have followed the development of and continue to follow the work of the International Criminal Court with great interest.

We are writing to you regarding the declaration submitted by the Minister of Justice of the Palestinian Authority on 22 January 2009, to the Office of the Prosecutor. It is our legal view that the ICC does not have jurisdiction to entertain this declaration, and that this declaration should be rejected.

The jurisdiction of the ICC is established and circumscribed by the provisions of its Statute, most specifically in this case Article 12 (3), which deals with acceptance of the Court's jurisdiction by a non-party State. This Article unambiguously states that the acceptance of jurisdiction in such cases can only be effected by a State.

The Palestinian Authority cannot be qualified, at this point in time, as representing a State. As a matter of law, the Palestinian Authority was established as a provisional body with clearly defined and circumscribed powers, under a series of agreements between Israel and the PLO pending the conclusion of permanent status negotiations. Under these agreements, the PA lacks capacity in essential spheres universally recognized as necessary elements of statehood. As a matter of fact, the Palestinian Authority fails to meet the established criteria of statehood in the West Bank, where its control is partial, nor does it meet this criteria in Gaza, where it can scarcely be considered to be present at all given the *de facto* control of that territory by the Hamas organization.

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We note that the practice of the ICC, both in the conferences which led to its establishment and the meetings that have taken place since, has reflected the understanding that the Palestinian Authority or "Palestine" cannot be considered a State. Palestinian representatives have never participated as a State, but have consistently been registered under the heading of "other Organizations" or "observers".

We also note that the assertion that there is in fact a Palestinian state is inconsistent with repeated statements of the Palestinian leadership itself portraying this as a future goal. Similarly, numerous international initiatives and resolutions, supported by Israel and the Palestinians as well as the international community, discuss the fact that a Palestinian state is a step to be achieved at a future stage, and not a present reality.

In conclusion, we would also note that the issue of Palestinian statehood is a key element in a longstanding and complex political dispute. By involving itself in this issue the Court would necessarily be injecting itself into this dispute in a way that could both harm the Court and complicate Israeli-Palestinian relations and the prospects for progress towards peace.

Your Excellency, the efficacy of the ICC depends on the effective use of the authority that it has. But it depends no less on recognition of the limits of this authority. We urge you to respect the jurisdictional provisions clearly enshrined in the Court's Statute, and share with you our concern that overreaching in this case will seriously damage the standing of the Court, and play into the hands of those who seek to portray it as being guided by political considerations.

In view of the importance of the issue at hand, and as we are concerned with the implications of this question, we have also obtained a legal opinion from a highly respected international legal expert, Professor Malcolm Shaw QC, which addresses the key legal issues before you. As you will be able to see, Professor Shaw's clear conclusion is that, as a matter of law, the declaration made by the Palestinian Minister of Justice on 22 January 2009 is inconsistent with the Rome Statute and must, therefore, be rejected.

I attach a copy of Professor Shaw's opinion and hope it will be of assistance to your office in making its determination.

Sincerely,

Alex Hertman, Adv.

President

Attachment: Legal opinion – Professor Malcolm Shaw QC

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In the Matter of the Jurisdiction of the International Criminal Court with regard to the Declaration of the Palestinian Authority

OPINION

1. I have been asked to prepare a legal opinion with regard to the declaration of acceptance of the jurisdiction of the International Criminal Court ("the ICC") made by the Minister of Justice of the Palestinian National Authority and delivered to the Prosecutor of the ICC on 22 January 2009. The Office of the Prosecutor is currently conducting a preliminary analysis of the situation with regard to Palestine.[1]

2. It is no part of my brief to express a view on political matters concerning the Israel-Arab or Israel-Palestinian dispute. This opinion focuses solely upon what I regard as the key legal issue concerning the declaration made by the Palestinian Authority and within the international and constitutional legal framework of the ICC. In my view the essence of the situation is the jurisdictional question and this is the issue that must be considered first and as a priority matter. Consequential issues such as whether or not any crimes described in article 5 of the ICC Statute have been committed in the territories in question and whether or not the Israeli legal system is carrying out investigations and subsequently relevant prosecutions so as to render the whole matter inadmissible in the light of article 17 cannot in logic and in law be considered until a finding of jurisdiction has been made. Accordingly, I do not address such issues.

3. It is in short my conclusion that the ICC constitutionally only has jurisdiction, in the absence of a Security Council reference, where a State is involved. This may be a State Party to the Statute or a State, not being a Party to the Statute, that has made the necessary declaration under article 12 (3). In either case, it must be a State. The Palestinian Authority is not currently a State under international law nor is it to be

[1] http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/ In addition, the Office of the Prosecutor is also conducting a preliminary analysis of the situations in Chad, Kenya, Afghanistan, Georgia and Colombia, ibid, but see the rather different list given by the Deputy Prosecutor on 14 and 15 April 2009, see below, footnote 7.

treated as a State by virtue of an authorised interpretation or reinterpretation of the Statute.

4. The Report in March 2009 of an Independent Task Force convened by the American Society of International Law entitled US Policy Toward the International Criminal Court: Furthering Positive Engagement put the core issue as follows:

> "Yet another test for the ICC will be how it handles the declaration lodged, on January 22, 2009, by the Palestinian National Authority (PNA) pursuant to article 12 (3) of the Rome Statute with respect to 'acts committed on the territory of Palestine since July 1, 2002'. The matter raises issues about the authority of the Prosecutor, and of the ICC, to treat as a State an entity which is not generally recognised as a State and which is not a UN Member".[2]

A. The Declaration of the Palestinian Authority

5. On 22 January 2009, the Minister of Justice of the Palestinian National Authority, Mr Ali Khashan, visited the Prosecutor of the ICC and handed over a letter signed the previous day.[3] In this letter, on notepaper headed "The Palestinian National Authority", what is termed the "Government of Palestine" purported to accept the jurisdiction of the ICC "for the purpose of identifying, prosecuting and judging the authors and accomplices of acts committed on the territory of Palestine since 1 July 2002".[4] This declaration expressly stated that the acceptance of jurisdiction was being made "[i]n conformity with Article 12, paragraph (3) of the Statute of the International Criminal Court".

6. The Registrar, in a letter on 23 January 2009 addressed to Mr Ali Khashan, the Minister of Justice of the Palestinian National Authority, acknowledged receipt of the

[2] http://www.asil.org/files/ASIL-08-DiscPaper2.pdf at ppp. vii-viii of the Executive Summary (footnote omitted).
[3] http://www.icc-cpi.int/NR/rdonlyres/979C2995-9D3A-4E0D-8192-105395DC6F9A/280603/ICCOTP20090122Palestinerev1.pdf
[4] http://www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279777/20090122PalestinianDeclaration2.pdf

declaration,[5] and, "[d]ue to the uncertainties within the international community as to the existence or non-existence of a State of Palestine",[6] emphasised that such acknowledgment was:

> "Without prejudice to a judicial determination of the applicability of article 12, paragraph 3 to your correspondence, I wish to inform you that a declaration under article 12 paragraph 3 has the effect of acceptance of the jurisdiction with respect to the crimes referred to in article 5 of relevance to the situation and the application of the provisions of Part 9 and any rules thereunder, concerning States Parties, pursuant to Rule 44 of the Rules of Procedure and Evidence."

7. On 13 February, the Office of the Prosecutor, following a visit of the Ministers of Justice and of Foreign Affairs of the Palestinian National Authority, stated that it would carefully examine all issues related to the jurisdiction of the Court, including whether the declaration by the Palestinian National Authority accepting the exercise of jurisdiction by the ICC met statutory requirements; whether the alleged crimes fell within the category of crimes defined in the Statute of the ICC and whether there were national proceedings in relation to such crimes.[7]

8. Of the issues mentioned, the question of jurisdiction is the key preliminary matter. Logically and legally it is only once it has been determined that the ICC has jurisdiction that an analysis of the nature of the alleged crimes and the question of complementarity can seriously commence. This is particularly so with regard to the

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[5] http://www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C80710871102C/279778/20090123404SALASS2.pdf

[6] http://www.icc-cpi.int/menus/icc/structure%20of%20the%20court/registry/declarations?lan=en-GB

[7] http://www.icc-cpi.int/NR/rdonlyres/4CC08515-D0BA-454D-A594-446F30289EF2/280604/ICCOTP20090213Palestinerev1.pdf. Note, however, that in the Overview of Situations and Cases before the ICC by the Deputy Prosecutor on 14 and 15 April 2009, it was stated that the situations in five countries were under analysis (Colombia, Georgia, Kenya, Côte D'Ivoire and Afghanistan), while it was separately noted that the declaration from the Palestinian National Authority had been received and that: "The Office will examine all issues related to its jurisdiction, including whether the declaration by the Palestinian Authority accepting the exercise of jurisdiction by the ICC meets statutory requirements, whether crimes within ICC jurisdiction have been committed and whether there are national proceedings in relation to alleged crimes". http://www.icc-cpi.int/NR/rdonlyres/CF9DFD80-5E15-4AA8-BA0D-7E728F0D86DF/280265/140409Capetown.pdf at pages 7-8 and http://www.icc-cpi.int/NR/rdonlyres/243B605F-5940-4ADD-8E3A-530B371D696E/280280/20090414Pretoria.pdf at page 9-10.

Palestinian declaration in view of the enormous assumption that this declaration embodies.

9. By expressly and explicitly linking its acceptance of jurisdiction to article 12 (3), the Palestinian Authority has clearly based its declaration upon the assumption that it constitutes a State that is not a Party to the Statute. This assertion of statehood is thus critical to the claim of the Palestinian Authority.

B. The Jurisdiction of the ICC: Basic Principles

10. The ICC Statute lays down that the jurisdiction of the Court is limited to "the most serious crimes of concern to the international community as a whole", being the crime of genocide; crimes against humanity; war crimes; and the crime of aggression (once this has been defined).[8] However, such jurisdiction is constrained *ratione temporis* to crimes committed after the entry into force of the Statute itself (1 July 2002) or, where the State in question has become a party after the entry into force of the Statute, then after the date of entry into force for that State, unless a declaration has been made under article 12 (3).[9]

11. The Court may, by virtue of article 13, exercise its jurisdiction with respect to a crime referred to in article 5 if:

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

[8] See article 5 and articles 6 to 8.
[9] Article 11.

12. Since neither a State Party nor the Security Council has referred the situation in the Palestinian territories to the Prosecutor, only subsection (c) is relevant for present purposes.

13. Article 12 is entitled "Preconditions to the Exercise of Jurisdiction" and provides as follows:

> "1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.
> 2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
>
> (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
>
> (b) The State of which the person accused of the crime is a national.
>
> 3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9".

14. Thus, the essential basis for the jurisdiction of the ICC is either that the alleged crime took place within the territory of a State Party to the Statute or that the accused is a national of a State Party to the Statute. In this, the core provisions of jurisdiction under public international law were reflected.[10] Article 12 (3) allows for States that are not Parties to the Statute to accept the jurisdiction of the ICC by way of declaration. Rule 44 of the Rules of Procedure and Evidence requires the Registrar to inform a State making such a declaration that as a consequence of such a declaration, jurisdiction would extent to include crimes referred to in article 5 "of relevance to the

[10] See eg. M. Akehurst, "Jurisdiction in International Law," 46 BYIL, 1972-3, p. 145; F.A. Mann, "The Doctrine of Jurisdiction in International Law", 111 HR, 1964, p. 1; *Oppenheim's International Law* (eds. R.Y. Jennings and A.D. Watts), London, 9th ed., 1992, p. 456 and I. Brownlie, *Principles of Public International Law*, Oxford, 7th ed., 2008, p. 299.

situation". This means that the opt-in declaration in article 12 (3) has the effect of opening up "the situation" as a whole to the competence of the Court and would allow, for example, for relevant allegations against the declaring State to be considered. Conversely, it would prevent such declarations from being essentially self-serving by focusing upon only one crime or crimes extracted from a more complex overall situation, thereby excluding allegations of crimes committed by the State making the declaration.

15. There is one further point. Jurisdiction by way of article 12 (3) can only arise where either the alleged offender is a national of the State in question or where the alleged crime or crimes have been committed on the territory of that State.

16. Accordingly, the Palestinian Authority to come within article 12 (3) and make a valid declaration recognising the jurisdiction of the ICC must demonstrate that it is a State. The ICC Statute makes no explicit provision for a non-State entity of whatever kind to become a Party to the Statute, nor may such a provision be possibly or legitimately inferred from the terms of the Statute itself, the travaux préparatoires or subsequent practice.[11]

C. Requisite Rules and Standards Relative to the Initiation of an Investigation by the Prosecutor

17. The Prosecutor of the ICC has the competence under article 13 (c) to "initiate an investigation" in respect of a crime referred to in article 5 (genocide; crimes against humanity; war crimes; and the crime of aggression once this has been defined[12]) in accordance with article 15. Article 15 (1) provides that the Prosecutor may initiate investigations proprio motu "on the basis of information on crimes within the jurisdiction of the Court" and must "analyse the seriousness of the information received".[13] If the Prosecutor concludes that "there is a reasonable basis to proceed with an investigation", a request for an authorisation of an investigation, together with

[11] Note eg. that article 125 provides that only States may sign, ratify, accept, approve or accede to the Statute.
[12] See articles 5 (2), 121 and 123.
[13] Article 15 (2).

supporting material collected, shall be submitted to the Pre-Trial Chamber.[14] The Pre-Trial shall authorise the commencement of the investigation where it considers that there is a reasonable basis to proceed with an investigation and that the case appears to fall within the jurisdiction of the Court. Such authorisation, however, is without prejudice to subsequent determination by the Court with regard to the jurisdiction and admissibility of a case.[15]

18. Article 53 (1) requires the Prosecutor in deciding whether or not to initiate an investigation to consider whether the information available to him "provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed". Further, consideration must be given to whether the case would be admissible under article 17 and whether "[t]aking into account the gravity of the crime and the interests of the victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice".[16]

19. Regulation 27 of the Regulations of the Office of the Prosecutor provides that in examining information on crimes pursuant to article 15 (1) and (2), the Office "shall make a preliminary distinction between "information relating to matters which manifestly fall outside the jurisdiction of the Court"; information which appears to relate to a situation already under examination or investigation or forming the basis of a prosecution and information relating to matters which do not manifestly fall outside the jurisdiction of the Court and not related to situations already under analysis or investigation or forming the basis of a prosecution. [17]

20. Accordingly, the essential test for the Prosecutor in deciding whether or not to initiate an investigation is whether the information supplied provides a "reasonable basis to believe that a crime within the jurisdiction of the Court" has been or is being committed. In so considering the matter, the Prosecutor must first identify such

[14] Article 15 (3).
[15] Article 15 (4).
[16] See also Rules 48 and 104 of the Rules of Procedure and Evidence.
[17] ICC-BD/05-01-09, in force from 23 April 2009. See also Regulation 29, which requires the Office of the Prosecutor to produce an internal report analysing the seriousness of the information and considering the factors laid down in article 53 (1) as well as the interests of justice. This report is to be accompanied by a recommendation on where there is a reasonable basis to initiate an investigation.

information as relates to matters which manifestly fall outside of the jurisdiction of the Court. The reasonable basis test so described contains two elements: first, that a crime has been or is being committed and, secondly, that such a crime falls within the jurisdictional competence of the Court. The crime or crimes in question are, of course, restricted to those laid down in article 5, while the jurisdictional element refers to those matters discussed in articles 11, 12 and 13. However, an hierarchical approach has been adopted in, and as a necessary consequence of, Regulation 27 which requires that if the matters in question do fall clearly outside of the jurisdiction of the ICC, no further consideration is necessary and no investigation should be initiated.

21. The Office of the Prosecutor has summarised the position as follows:

> "Under the Statute, the Prosecutor is entrusted with a broad measure of discretion with respect to what additional steps should be taken in relation to information received. Indeed, in the light of its limited resources, the Office of the Prosecutor is required to set priorities, taking into account the limits and requirements set out in the Statute, the general policy of the Office and all other relevant circumstances, including the feasibility of conducting an effective investigation in a particular territory. In all cases the Office of the Prosecutor must first conduct an analysis of information in order to determine whether the statutory threshold to start an investigation is met: there must be "*a reasonable basis to proceed* ... the Prosecutor shall not seek to initiate an investigation unless he first concludes that there is a reasonable basis to proceed. In addition, when the Prosecutor acts *proprio motu*, he needs an authorization of the Pre-Trial Chamber to start an investigation. This means that he does not take the decision to investigate alone, but needs to convince the Pre-Trial Chamber that the threshold of a *reasonable basis* to proceed has been met (Article 15). The Chamber must be satisfied "that the case appears to fall within the jurisdiction of the Court", a determination that is "without prejudice to subsequent determinations by the Court with regard to the jurisdiction or admissibility of a case."(Article 15.4)".[18]

[18] Annex to the "Paper on some policy issues before the Office of the Prosecutor": Referrals and Communications, pp. 1-2, http://www.icc-cpi.int/NR/rdonlyres/278614ED-A8CA-4835-B91D-DB7FA7639E02/143706/policy_annex_final_210404.pdf

22. It is clear that a positive finding as to jurisdiction must be made before any further activity can be seriously undertaken.[19] The emphasis placed on the necessity to demonstrate jurisdiction is manifested by the fact that the Prosecutor, the Pre-Trial Chamber and the Court itself all have the competence and the duty to establish jurisdiction.

23. Accordingly, the Prosecutor must reach a conclusion as to whether or not the Palestinian declaration is a valid recognition of the competence of the ICC and such a conclusion must be reached in conformity with the test of reasonableness, that is there is a logical and legal justification for the belief based on the information submitted, even if it does not reach the criminal law test of beyond reasonable doubt.[20] To put it another way, in order to show that the ICC has competence with regard to the situation in Palestine,[21] it must be established as a matter of evidence and on the basis of a reasonable application of law and the weighing of the relevant materials that a State of Palestine exists.

D. Is Palestine a State?

24. In view of the very clear wording of article 12 (3), the essential question with regard to jurisdiction for present purposes, therefore, is to determine whether or not Palestine is currently a State under general international law or as a matter of interpretation of the Statute. The ICC Statute contains no definition of the term "State". Accordingly, the analysis of article 12 (3) must focus on whether Palestine is a State under international law which the Statute must simply acknowledge or whether indeed as a process of legitimate interpretation of the provisions of the Statute the term "State" is to be understood as having an additional or expanded meaning for the purposes of the

[19] See eg. the Office of the Prosecutor's Policy Paper on the Interests of Justice, September 2007, p. 2, http://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPInterestsOfJustice.pdf

[20] See eg. O. Triffterer, *Commentary on the Rome Statute of the International Criminal Court*, Verlag C.H. Beck, 2nd ed., 2008, pp. 588-9 and 1069-70.

[21] In the absence, of course, of Israel becoming a Party to the Rome Statute or making a declaration under article 12 (3).

ICC. In so doing, the applicable law is essentially the provisions of the Statute plus, where appropriate, the principles of international law.[22]

i) Under General International Law

a) The Traditional Criteria

25. The criteria of statehood as laid down in international law are well established and any aspirant for the status of a State must comply at least with these requirements.

26. Article 1 of the Montevideo Convention on Rights and Duties of States, 1933[23] lays down the most widely accepted formulation of the traditional criteria of statehood in international law and constitutes an accurate reflection of customary international law, which is binding on all States.[24] It notes that the State as an international person should possess the following qualifications: "(a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States". The Arbitration Commission of the European Conference on Yugoslavia[25] in Opinion No. 1 declared that "the State is commonly defined as a community which consists of a territory and a population subject to an organised political authority" and that "such a State is characterised by sovereignty".[26] Statehood as a concept is a composite of law and fact. Without a consistent adherence to the factual requirements

[22] Article 21. This provides that: "The Court shall apply: (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence; (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict; (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards".

[23] 165 LNTS 19.

[24] See *Blagojevic et al.*, International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, decision of 22 July 2002, IT-02-60-PT, p. 587, para. 50. In the *Milosevic, Decision on Motion for Judgement for Acquittal*, case, the Trial Chamber felt sufficiently confident to rely on the Montevideo Convention criteria as "reflecting well-established core principles for the determination of statehood", IT-02-54-T , 16 June 2004, para. 86.

[25] Established pursuant to the Declaration of 27 August 1991 of the European Community: see Bull. EC, 7/8 (1991).

[26] Note that *Oppenheim's International Law* (eds. Jennings and Watts), Longmans, 9th ed., 1992, p. 120, provides that "a State proper is in existence when a people is settled in a territory under its own sovereign government".

recognised by the Montevideo Convention at the least, statehood cannot exist and the legal consequences of statehood cannot cohere.

27. The need for a permanent population is clear and unambiguous. That there is such a population within the Palestinian territories is uncontroversial. The requirement for a defined territory does not mean that the boundaries of such territory have to be delineated and settled, nor that there be an absence of frontier disputes,[27] but it does necessitate that there be at the minimum a consistent band of territory which is undeniably controlled by the government of the alleged State. This is an indispensable factual necessity. The concept of government as enumerated in the Montevideo Convention may be seen as the requirement for a foundation of effective control. It would seem to necessitate that the undisputed authority of that putative State should exercise a degree of overall control over most of the territory it claims. For this reason at least, therefore, the "State of Palestine" purportedly declared in November 1988 at a conference in Algiers cannot be regarded as a valid State. The Palestinian organisations did not control any part of the territory that was claimed.[28]

28. Where a significant part of this territory is outside of the control of the asserted government, only widespread international recognition, up to and including membership of the United Nations, might, depending on the precise circumstances, serve to establish statehood. This is of particular relevance to the current Palestinian situation, where the lack of control by the internationally recognised Palestinian Authority with regard to the Gaza Strip is manifest. Indeed, this absence of central control is compounded by the fact that it is not simply contested in a civil struggle but has been effectively totally replaced in practice by the Hamas organisation. Gaza

[27] See eg. the *Monastery of Saint Naoum, Advisory Opinion*, PCIJ, Series B, No. 9 at p. 10 (1924) and the *North Sea Continental Shelf* cases, ICJ Reports, 1969, pp. 3, 32.

[28] See *Keesing's Record of World Events*, p. 36438 (1989). See also General Assembly resolution 43/77; R. Lapidoth and K. Calvo-Goller, "Les Eléments Constitutifs de l'Etat et la Déclaration du Conseil National Palestinien du 15 Novembre 1988", AFDI, 1992, p. 777 and J. Crawford, "The Creation of the State of Palestine: Too Much Too Soon?" 1 EJIL, 1990, p. 307. Crawford noted that "Applying the Montevideo Convention in accordance with its terms, Palestine before 1993 could not possibly have constituted a State. Its whole territory was occupied by Israel which functioned as a government there and claimed the right to do so until further agreement. The PLO had never functioned as a government there and lacked the means to do so, given strong Israeli opposition", *The Creation of States in International Law*, Oxford, 2nd ed., 2006, p. 437.

operates *de facto* as a separate entity from the Palestinian Authority in the West Bank.[29]

29. There is one further relevant issue in considering the criterion of effective government. There is a clear distinction or division of competences on the Palestinian side between the Palestine Liberation Organisation ("PLO") and the Palestinian Authority. The former constitutes an internationally recognised "national liberation movement" accepted as representing externally the Palestinian people[30] and the party with Israel to the various agreements commencing with the Declaration of Principles, 1993.[31] Under the Interim Agreement, 1995, in addition, it has authority to negotiate and enter into agreements for the benefit of the Palestinian Authority in certain limited circumstances.[32] On the other hand, the Palestinian Authority, as will be seen in the following paragraphs, exercises within the West Bank and Gaza a number of powers and responsibilities expressly transferred from Israel. The two institutions are not identical. Thus, what might be termed governmental functions are split between the two bodies.[33] This must impact upon any conclusion as to whether the criterion of effective government has in fact been complied with.

30. The fourth criterion laid down in the Montevideo Convention is the capacity to enter into relations with other States. This requirement needs to be carefully refined since a range of non-State entities may now conduct relations with other international legal persons. What is the key here is the extent of such capacity, both internally in the sense of an effective government and internationally in the sense of independence. It is the latter which is particularly important for present purposes. Independence is critical to statehood[34] and amounts to a conclusion of law in the light of particular circumstances. It is a formal statement that the State is subject to no other sovereignty and is unaffected either by factual dependence upon other States or by submission to

[29] See eg. International Crisis Group, *Gaza's Unfinished Business*, 23 April 2009.
[30] See eg. General Assembly resolution 3210 (XXIX).
[31] See below, para. 31 and following.
[32] See below, para. 34.
[33] See eg. Crawford, *Creation of States*, pp. 444-5 and O. Dajani, "Stalled Between Seasons: The International Legal Status of Palestine During the Interim Period", 26 Denv. J. Int'l L & Pol'y, 1997-8, pp. 27, 79-80.
[34] Crawford writes that "[i]ndependence is the central criterion for statehood", *Creation of States*, p. 62.

the rules of international law.[35] Judge Huber in the *Island of Palmas* arbitration emphasised in particular that independence constituted a principle of "the exclusive competence of the State in regard to its own territory".[36] While this does not mean that international law requires that no putative State may rely in fact upon assistance from States even if that aid is critical nor that internationally sanctioned and agreed arrangements cannot be made that have the effect of circumscribing the new State's freedom of action in certain areas,[37] it does mean that constitutional limitations upon the basic functioning of such an entity in the sense of subjugation to the authority of another State in key areas would preclude statehood as a matter of principle.[38]

31. In this respect, attention needs to be paid to the arrangements concerning the establishment of the Palestinian Authority and its powers, duties and limitations as agreed between Israel and the PLO. Such agreements, which are still in force, circumscribe and define the legal situation as between the parties and until such time as a final settlement has been concluded. To the best of my knowledge, neither side has denounced the relevant agreements nor has said that they are not valid or in force for whatever reason. Accordingly, both Israel and the PLO (and thus the Palestinian Authority) continue to be bound by them.[39]

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[35] See *Austro-German Customs Union* case, (1931) PCIJ, Series A/B, No. 41, pp. 41 (Court's Opinion) and 57–8 (Separate Opinion of Judge Anzilotti); 6 AD, pp. 26, 28. See also Crawford, *Creation of States*, p. 62 and following.

[36] 2 RIAA, pp. 829, 838 (1928). See also C. Rousseau, "L'Indépendance de l'Etat dans l'Ordre International", 73 HR, pp. 171, 220, referring to the "exclusivité de la competence".

[37] See eg. minority treaties with regard to a number of Central and East European new States after 1919, see eg. P. Thornberry, *International Law and Minorities*, Oxford, 1991, p. 38 and following; the 1960 Constitution of the Republic of Cyprus as agreed by the representatives of the Greek and Turkish Cypriot authorities incorporated the Treaties of Alliance and Guarantee signed by Greece, Turkey and the UK., Crawford, *Creation of States*, p. 241 and following; and the Dayton Peace Agreement 1995, Annex 10 with regard to limitations upon the power of the Bosnian Government. It should be particularly noted that these arrangements were not only internationally sanctioned, but also agreed as between the relevant parties.

[38] See eg. Crawford, *Creation of States*, p. 66 and following. Brownlie notes that, "[t]he question is that of foreign *control* overbearing the decision-making of the entity concerned on a wide range of matters of high policy and doing so systematically and on a permanent basis", *Principles of Public International Law*, Oxford, 7th ed., 2008, p. 72 (emphasis in original".

[39] The International Court described the situation as follows: "a number of agreements have been signed since 1993 between Israel and the Palestine Liberation Organisation imposing various obligations on each party. Those agreements *inter alia* required Israel to transfer to Palestinian authorities certain powers and responsibilities exercised in the Occupied Palestinian Territory by its military authorities and civil administration. Such transfers have taken place, but, as a result of subsequent events, they remained partial and limited", *Construction of a Wall*, ICJ Reports, pp. 136, 167.

32. The Israel–PLO Declaration of Principles on Interim Self-Government Arrangements was signed in Washington on 13 September 1993 ("the Declaration of Principles").[40] By virtue of this Declaration, the PLO team in the Jordanian–Palestinian delegation to the Middle East Peace Conference was accepted as representing the Palestinian people. It was agreed to establish a Palestinian Interim Self-Government Authority as an elected Council for the Palestinian people in the West Bank and Gaza (occupied by Israel since 1967) for a transitional period of up to five years leading to a permanent solution. Its jurisdiction was to cover the territory of the West Bank and Gaza, save for issues to be negotiated in the permanent status negotiations. Upon the entry into force of the Declaration, a transfer of authority was to commence from the Israel military government and its civil administration. The Cairo Agreement of 4 May 1994[41] provided for the immediate withdrawal of Israeli forces from Jericho and the Gaza Strip and transfer of authority to a separately established Palestinian Authority. This Authority, distinct from the PLO, was to have certain specified legislative, executive and judicial powers. A further transfer of further powers and responsibilities was effected by the Protocol of 27 August 1995.

33. Of considerable and particular importance is the Interim Agreement on the West Bank and Gaza of 28 September 1995 ("the Interim Agreement"), under which an additional range of powers and responsibilities was transferred to the Palestinian Authority pending the election of the Council and arrangements were made for Israeli withdrawal from a number of cities and villages on the West Bank.[42] Several provisions of this key agreement are of particular resonance for current purposes.

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[40] 32 ILM, 1993, p. 1525. Note that letters of mutual recognition and commitment to the peace process were exchanged between the Prime Minister of Israel and the Chairman of the PLO on 9 September 1993. See e.g. K. Calvo-Goller, 'L'Accord du 13 Séptembre 1993 entre L'Israël et l'OLP: Le Régime d'Autonomie Prévu par la Déclaration Israël/OLP', AFDI, 1993, p. 435; E. Benvenisti, "The Status of the Palestinian Authority" in E. Cotrain and C. Mallat (eds.), *Arab-Israeli Accords: Legal Perspectives,* The Hague, 1996; E. Benvenisti, "The Israeli-Palestinian Declaration of Principles: A Framework for Future Settlement", 4 EJIL, 1993, p. 542 and P. Malanczuk, "Some Basic Aspects of the Agreements Between Israel and the PLO from the Perspective of International Law", 7 EJIL, 1996, p. 485.

[41] 33 ILM, 1994, p. 622.

[42] Note that the Interim Agreement superseded the Gaza-Jericho Agreement, the Agreement on Prepatory Transfer of Powers and Responsibilities of 29 August 1994 and the Protocol of 27 August 1995. See e.g. M. Benchikh, 'L'Accord Intérimaire Israélo-Palestinien sur la Cisjordanie et la bande de Gaza du 28 September 1995', AFDI, 1995, p. 7, and *The Arab–Israeli Accords: Legal Perspectives* (eds. E. Cotran and C. Mallat), The Hague, 1996.

First, Israel transferred particular powers and responsibilities as detailed in the agreement, but article 1 (1) specifically provided that "Israel shall continue to exercise powers and responsibilities not so transferred". Accordingly insofar as powers and responsibilities with regard to the Palestinian territories were not specifically and expressly transferred to the Palestinian Authority,[43] they were to be retained by Israel. Secondly, the Palestinian Council (the Palestinian Authority)[44] was to have those powers and responsibilities that were laid down in the Declaration of Principles and the Interim Agreement and its legislative, executive and judicial functions were to be expressly and explicitly limited to those provided for in these agreements and exercised strictly in accordance with such agreements.[45]

34. It is to be particularly noted that article IX (5) a provides that:

> "In accordance with the DOP [the Declaration of Principles], the Council will not have powers and responsibilities in the sphere of foreign relations, which sphere includes the establishment abroad of embassies, consulates or other types of foreign missions and posts or permitting their establishment in the West Bank or the Gaza Strip, the appointment of or admission of diplomatic and consular staff, and the exercise of diplomatic functions",

while article IX (5) b provides that the PLO may conduct negotiations and sign agreements with States or international organisations for the benefit of the Authority/Council only in the following cases:

> (1) economic agreements, as specifically provided in Annex V of the Interim Agreement;
> (2) agreements with donor countries for the purpose of implementing arrangements for the provision of assistance to the Authority/Council;

[43] Technically to an elected Council, termed the Palestinian Interim Self-Government Authority, but until such time as this was inaugurated, the Council was to be construed to mean the Palestinian Authority created under the Gaza-Jericho Agreement.
[44] See previous footnote.
[45] Articles III and IX of the Interim Agreement.

(3) agreements for the purpose of implementing the regional development plans detailed in Annex IV of the Declaration on Principles in agreements entered into in the framework of the multilateral negotiations, and

(4) cultural, scientific and educational agreements. Dealings between the Authority/Council and representatives of foreign States and international organisations, as well as the establishment in the West Bank and the Gaza Strip of representative offices other than those described in subparagraph 5.a, for the purpose of implementing the agreements referred to in subparagraph 5.b, were not to be considered foreign relations.

35. Article XI (2) of the Interim Agreement provides that: "West Bank and Gaza Strip territory, *except for issues that will be negotiated in the permanent status negotiations*, will come under the jurisdiction of the Palestinian Council in a phased manner, to be completed within 18 months from the date of the inauguration of the Council" (emphasis added).[46] Permanent status negotiations were deemed in the Declaration of Principles to cover issues such as "Jerusalem, refugees, settlements, security arrangements, borders, relations and cooperation with other neighbours, and other issues of common interest".[47] In the Interim Agreement, it is provided that permanent status negotiations would cover: "Jerusalem, settlements, specified military locations, Palestinian refugees, borders, foreign relations and Israelis".[48]

36. The essential point is that critical functions seen as indispensable to statehood in international law have by agreement between the relevant parties been recognised as matters subject to Israeli control. This includes what is termed the capacity to enter into relations with foreign States in the Montevideo Convention. This competence in the Interim Agreement is clearly reserved to Israel, apart from certain minor areas, as noted in article IX (5) a and b noted above. It also includes the exercise of effective

[46] Article XVII concludes that the jurisdiction of the Council/Authority includes the West Bank and Gaza Strip as a single unit, excluding permanent status matters and powers and responsibilities not transferred to the Council/Authority.

[47] Article V.

[48] Article XVII (1). Under article XXXI (5), permanent status negotiations would cover issues such as "Jerusalem, refugees, settlements, security arrangements, borders, relations and cooperation with other neighbours, and other issues of common interest".

control with regard to external threats. This is emphasised in article XII, which, while providing for the establishment of a Palestinian police force, stipulates that:

> "Israel shall continue to carry the responsibility for defence against external threats, including the responsibility for protecting the Egyptian and Jordanian borders, and for defence against external threats from the sea and from the air, as well as the responsibility for overall security of Israelis and settlements, for the purpose of safeguarding their internal security and public order, and will have all the powers to take the steps necessary to meet this responsibility".[49]

37. The Interim Agreement also provides that control of the airspace, a key element of statehood,[50] over the West Bank and Gaza is retained by Israel. Article XIII (4) of Annex I of the Interim Agreement which deals with Redeployment and Security Arrangements provides that, "[a]ll aviation activity or use of the airspace by any aerial vehicle in the West Bank and the Gaza Strip shall require prior approval of Israel".

38. Even with regard to internal security and public order, the Interim Agreement constrained the competence of the Palestinian Council/Authority. Three different categories of areas were established with varying degrees of control allocated to the Palestinian Council/Authority.[51] Area A was to consist of six named cities[52] in which the Palestinian Council/Authority would have full responsibility for internal security and public order, as well as full responsibility for civil affairs. Area B was to consist of Palestinian towns and villages in the West Bank, containing some 68 percent of the Palestinian population in which full civil authority was granted, as in Area A. The maintenance of public order was for the Palestinian Council/Authority, while Israel would have overriding security authority to safeguard its citizens and to combat terrorism, this responsibility taking precedence over the Palestinian responsibility for

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[49] See also article VIII of the Declaration of Principles. Note also that under article XVII (4), it is provided that: "(a) Israel, through its military government, has the authority over areas that are not under the territorial jurisdiction of the Council, powers and responsibilities not transferred to the Council and Israelis; (b) To this end, the Israeli military government shall retain the necessary legislative, judicial and executive powers and responsibilities, in accordance with international law. This provision shall not derogate from Israel's applicable legislation over Israelis in personam"..

[50] See eg. article 1of the Chicago Convention on International Aviation, 1944.

[51] Annex I of the Interim Agreement.

[52] Jenin, Nablus, Tulkarem, Kalkilya, Ramallah and Bethlehem and the city of Hebron, minus the Old City of Hebron, the Jewish Quarter, and everything linked from there to Kiryat Arba and the Tomb of the Patriarchs.

public order. Further, the movement of Palestinian police was to be coordinated and confirmed with Israel. In Area C, the largest geographical area comprising the unpopulated areas of the West Bank, Israel was to retain full responsibility for security and public order with civil responsibilities not related to territory, such as economics, health, education and so forth being given to the Palestinian Council/Authority.

39. The constraints on legislative competence are clearly defined in article XVIII (4) a, which provides that, "[l]egislation, including legislation which amends or abrogates existing laws or military orders, which exceeds the jurisdiction of the Council or which is otherwise inconsistent with the provisions of the DOP, this Agreement, or of any other agreement that may be reached between the two sides during the interim period, shall have no effect and shall be void ab initio".

40. Finally, article XXXI (7) provides as follows:

> "Neither side shall initiate or take any step that will change the status of the West Bank and the Gaza Strip pending the outcome of the permanent status negotiations".

41. The following points are clear from a perusal of the Interim Agreement.[53] First, both the parties, and presumably the witnesses, accepted that the requisite legal framework was that of the gradual transfer of powers and responsibilities from Israel to the Palestinian Authority. Secondly, such powers and responsibilities as were not unequivocally transferred to the Palestinian Authority were explicitly retained by Israel. Thirdly, such retention unequivocally included issues to be tackled during permanent status negotiations and such issues were deemed to cover a range of matters including *inter alia* borders and foreign relations. Fourthly, expressly excluded from the jurisdiction of the Palestinian Authority were powers and

[53] It is to be noted that this agreement was witnessed by the United States; the Russian Federation; the Arab Republic of Egypt; the Hashemite Kingdom of Jordan; the Kingdom of Norway; and the European Union. Following the Interim Agreement, an accord concerning Hebron was signed on 17 January 1997 and the Wye River agreement followed in 1998. Both concerned further Israeli redeployments. The Sharm el Sheikh memorandum and a later Protocol of 1999 concerned safe-passage arrangements between the Palestinian Authority areas in Gaza and the West Bank.

responsibility in the sphere of foreign relations and responsibility for external defence and the protection of the internationally recognised external borders of the Palestinian Authority with Egypt and Jordan respectively. Fifthly, Israel retained responsibility with regard to Israelis and Israeli settlements in the West Bank and Gaza and "all the powers to take the steps necessary to meet this responsibility".[54] Sixthly, the West Bank and Gaza were divided into three Areas, in each of which the degree of control exercised by Israel with regard to internal security and public order, as well as civic affairs, varied. Finally, both parties agreed to take no steps to change the status of the West Bank and Gaza Strip pending the outcome of the permanent status negotiations.

42. Since such permanent status negotiations are still pending and since the Interim Agreement is still in force, it is a legal obligation that no action be taken to alter the legal status of these territories. Accordingly, any declaration or assertion of statehood by the Palestinian Authority would constitute a violation of the Interim Agreement. Such a violation would refer not only to the obligation not to change unilaterally the legal status of the West Bank and Gaza, but also to the substantive provisions of the agreement with regard to those powers and responsibilities remaining outside of the jurisdiction of the Palestinian Authority.

43. Indeed, it may be argued that any assertion of statehood by the Palestinian Authority in these circumstances would ground such a proposed State upon illegality, that is the breach of an international agreement witnessed by leading members of the international community.

44. Further, it is abundantly clear that the range and nature of the powers and responsibilities that were agreed (and witnessed as such) as remaining outside of the jurisdiction of the Palestinian Authority include many that are critical to any claim to statehood, as being of the very essence of sovereignty. These include control of external borders, control of airspace, control of foreign relations, jurisdiction with regard to Israeli nationals and settlements within the territory of the West Bank and Gaza, and indeed elements of internal security and public area control depending

[54] Article XII (1).

upon the particular Area involved. Constitutionally, and as internationally agreed, the only powers and responsibilities that the Palestinian Authority may exercise are those that have been expressly transferred by Israel by way of the Interim Agreement and other relevant agreements. Accordingly, such an entity, subject to this high degree of control from a foreign State, simply cannot conform with the basic requirements in international law of statehood.

45. This is not to deny that the Palestinian Authority can legitimately be regarded as possessing some form of international personality.[55] Such personality, however, derives from the agreements between Israel and the PLO and exists subject to the constraints laid down in them. Such international personality does not, and cannot, amount to statehood in the absence of a permanent status settlement between the relevant parties.

b) The Criterion of Legality

46. In addition to the essentially factual criteria of statehood discussed above, it is also now part of the international consensus that the emergence of a new State must not take place upon the basis of illegality.[56] This may be seen as reflective of the general principle of *ex injuria non oritur jus*.[57] Judge El-Araby, for instance, in his separate opinion in the *Construction of a Wall* advisory opinion, emphasised that: "[t]he general principle that an illegal act cannot produce legal rights - *ex injuria non oritur jus* – is well recognised in international law".[58] The question, therefore, is whether an entity whose competence is delineated in, and thus constrained by virtue of, valid and continuing international legal instruments, especially when these have been witnessed by leading members of the international community, may legitimately claim statehood in contravention of these legal agreements. The better view would be that any

[55] See e.g. K. Reece Thomas, 'Non-Recognition, Personality and Capacity: The Palestine Liberation Organisation and the Palestinian Authority in English Law', 29 *Anglo-American Law Review*, 2000, p. 228; *New Political Entities in Public and Private International Law With Special Reference to the Palestinian Entity* (eds. A. Shapiro and M. Tabory), The Hague, 1999, and C. Wasserstein Fassberg, 'Israel and the Palestinian Authority', 28 *Israel Law Review*, 1994, p. 319.

[56] See eg. generally, Crawford, *Creation of States*, chapter 3.

[57] See eg. the *Gabcikovo-Nagymaros (Hungary v Slovakia)* case, ICJ Reports, 1997, p. 76, para. 133.

[58] ICJ Reports, 2004, p. 254, para. 3.1.

assertion of statehood by the Palestinian Authority in violation of the relevant agreements cannot be legally effective to create a new State in international law.

c) Absence of any Formal Claim to Statehood

47. There is one further point in the context of statehood. It may seem self-evident, but it is nevertheless a key issue, that in order for a new State to be created (and indeed recognised thereafter by the international community), the entity in question must actually assert a claim to statehood. A new State cannot arise implicitly or incidentally by way of circumstances or by way of inference. It may only be established as a concrete and explicit act of will. The *US Restatement of the Foreign Relations Law* notes that, "[w]hile the traditional definition does not formally require it, an entity is not a State if it does not claim to be a State".[59] Crawford concludes that, "[s]tatehood is a claim of right. Claims to statehood are not to be inferred from statements or actions short of explicit declaration".[60]

48. In the case of the Palestine, not only has no formal claim to statehood been made,[61] but statements have been made continually declaring that the aim of the peace process is to establish a State of Palestine. This goes hand in hand with the explicit nature of the many instruments signed from the Declaration of Principles in 1993 onwards between the relevant parties, and witnessed by leading members of the international community, and indeed with the whole tenor of international documents.

49. It is interesting to note that the text of the declaration submitted by the Palestinian Authority on 22 January 2009 did not contain any assertion of statehood or any reference to Palestine being a State. It simply left it to the Prosecutor and the ICC to make such an assumption or draw the necessary conclusion. Nevertheless, it has been

[59] St. Paul, 1987, p. 73, para. 201, Comment f.

[60] *Creation of States*, p. 211. It is for this reason that a separate State of Taiwan has not come into being, ibid., p. 206 and following. See also T. Grant, "Defining Statehood: The Montevideo Convention and its Discontents", 37 Colum. J. Transnat'l L., 1998-9, pp. 403, 439.

[61] Apart from that of 1988 which failed to comply with the basic criteria of statehood and was effectively withdrawn with the instruments signed with Israel commencing with the Declaration of Principles in 1993. above para. 26.

a consistent feature of Palestinian Authority and PLO practice, particularly since 1993, to argue for a Palestinian State to be created. No authoritative statement was made, to my knowledge, that declared that such a State was in existence and only consequential issues remained to be settled with Israel. A few examples may suffice to demonstrate the consistent approach of the Palestinian Authority that a Palestine State was to be, but had not yet been, created.

50. On 22 January 1999, the Permanent Observer of Palestine to the United Nations stated at a symposium of the Centre for Policy Analysis on Palestine that, "the Palestinian side has succeeded in making the Palestinian State an inevitable, coming reality for all the parties concerned. In actuality, part of the current struggle is taking place over the terms for the creation of that State".[62] The newly inaugurated President of the Palestinian Authority, Mahmoud Abbas, in February 2005, referred in his speech made at a summit meeting in Sharm el-Sheikh, Egypt, to: "Peace that means the establishment of a Palestinian state, or the state of -- the democratic state of independent Palestine along the State of Israel, as mentioned in the road map plan".[63]

51. In his speech to the UN General Assembly on 26 September 2008, President Abbas called for maximum efforts to bring about a genuine and comprehensive peace that "will decades of occupation and hostilities and result in the attainment of the two-State solution – the State of Palestine living alongside the State of Israel".[64] On the same day, he gave a speech before the Security Council in which he referred to the "need to recognize the outlines of the West Bank, the Gaza Strip and the Palestinian territory on which we hope to establish an independent, viable Palestinian State living side by side with an Israeli State in harmony, peace and stability. That is the point of departure allowing us to understand all the aspects of the question we are seized with today".[65]

52. On 24 November 2008, President Abbas in a message to the United Nations on the International Day of Solidarity with the Palestinian People, referred to "the aspirations

[62] http://www.un.int/palestine/documents/mission 5_i.html
[63] http://edition.cnn.com/2005/WORLD/meast/02/08/transcript.abbas/index.html
[64] http://www.un.int/palestine/abbas63ga.pdf, p. 4.
[65] http://www.un.int/palestine/abbasSC08.shtml

of our people for freedom and independence and the establishment of their State, which would live in peace and security and mutual respect with its neighbours" and called Jerusalem "the capital of our future independent State".[66] And on 4 February 2009, the President addressed the European Parliament and referred to the "ultimate goal" of the Palestinian people as follows: "an end to occupation, gaining freedom and the right to self-determination and the establishment of an independent Palestinian state."[67]

53. This clear approach has been recently reaffirmed by the Prime Minister of the Palestinian Authority, Salam Fayyad. On 22 June 2009, he called for the establishment of a Palestinian State "within two years",[68] while on 25 August 2009, he stated in an interview with the (London) Times that, "The Palestinian Authority intends to bypass failing peace talks and establish its own de facto state within two years."[69] This is consistent with official documents produced by the Palestinian Authority. In a Report published on 17 December, 2007, entitled *Building a Palestinian State: Towards Peace and Prosperity*, for instance, the opening statement by the Prime Minister declares that, "This document sets out a strategy for implementing a vision of the future Palestinian State; a vision that can be implemented if reinforcing steps are quickly taken in the spirit of the understandings reached at Annapolis".[70]

54. Such authoritative views expressed by the Palestinian leadership chime ill with the declaration of 22 January. Statements calling for the future establishment of a Palestinian State, including those made after the deposit of the declaration, are hardly consistent with the, admittedly opaque, terms of the

[66] http://www.un.int/palestine/AbbasSolidarity08.shtml

[67] http://www.europarl.europa.eu/sides/getDoc.do?language=EN&type=IM-PRESS&reference=20090203IPR48164

[68] The Washington Post, 23 June 2009, http://pqasb.pqarchiver.com/washingtonpost/access/1756748641.html?dids=1756748641:1756748641&FMT=ABS&FMTS=ABS:FT&fmac=&date=Jun+23,+2009&author=Howard+Schneider&desc=Palestinian+Premier+Sets+2-Year+Statehood+Target;+Speech+Calls+for+Unity,+Institution-Building

[69] http://www.timesonline.co.uk/tol/news/world/middle_east/article6808557.ece

[70] http://siteresources.worldbank.org/INTWESTBANKGAZA/Resources/PRDP.pdf, p. 4.

declaration which depend upon an assumption of statehood. Article 12 (3) is only open to States, Palestinian leaders argue for a future State but at the same time proceed (at least in this instance) upon the basis that they already have a State. It may be argued that an estoppel in law is created, whereby the Palestinian Authority are precluded from maintaining, either explicitly or by implication, that a State of Palestine is already in existence. At the very least, it constitutes a remarkable inconsistency.

55. Nevertheless, whatever the legal reality of this facing of two ways at the same time, it is very clear that obligations and commitments accepted by the Palestinian Authority run counter to any assertion of an existing statehood. The Roadmap to Peace in the Middle East, presented to, and accepted by, Israel and the Palestinian Authority in 2003 by the Quartet (UN, US, Russia and the EU) calls for a final and comprehensive settlement of the Israeli-Palestinian conflict and declares that:

> "A two State solution to the Israeli-Palestinian conflict will only be achieved through an end to violence and terrorism, when the Palestinian people have a leadership acting decisively against terror and willing and able to build a practicing democracy based on tolerance and liberty, and through Israel's readiness to do what is necessary for a democratic Palestinian State to be established, and a clear, unambiguous acceptance by both parties of the goal of a negotiated settlement".[71]

56. Further, Phase I of the Roadmap includes the requirement that: "Palestinians undertake comprehensive political reform *in preparation for statehood*, including drafting a Palestinian constitution, and free, fair and open elections upon the basis of those measures", while in Phase II, "efforts are focused on the option of *creating an independent Palestinian state* with provisional borders and attributes of sovereignty, based on the new constitution, as a way

[71] http://www.un.org/news/dh/mideast/roadmap122002.pdf

station to a permanent status settlement" and that with a leadership acting against terror and building democracy and reformed civil and security structure, "the Palestinians will have the active support of the Quartet and the broader international community *in establishing an independent, viable, State*". In due course, an international conference would be held in order to "launch a process, *leading to establishment of an independent Palestinian state* with provisional borders" (emphases added).[72] The International Court has indeed acknowledged that the Roadmap "constitutes a negotiating framework for the resolution of the Israeli-Palestinian conflict".[73]

57. Crawford has concluded in response to claims to current Palestinian statehood[74] that: "[t]he essential point is that a process of negotiation towards identified and acceptable ends is still, however precariously, in place. That being so, it misrepresents the reality of the situation to claim that one party already has that for which it is striving. It may also be counterproductive".[75]

d) Palestine and the United Nations

58. In a situation of an increasing number of States in the international community and in the fact of a number of controversial entities claiming statehood, a critical benchmark today of such status is considered to be membership of the UN. Under article 4 of the Charter, only States may be members, thus acceptance of a candidate to membership by the organisation is conclusive evidence of the status of that applicant as a State. It is therefore significant to observe that Palestine is not a member of the UN. Its status has been discussed during many years and has been the subject of modification, but this has stopped well short of membership, and thus recognition of statehood.

59. The General Assembly in resolution 3237 (XXIX), 1974, granted the PLO observer status and in resolution 43/177, 1988, decided that the term "Palestine" could be used

[72] The Roadmap was endorsed in Security Council resolution 1515 (2003) and reaffirmed in the Annapolis agreement on 27 November 2007, http://www.timesonline.co.uk/tol/news/world/middle_east/article2956790.ece
[73] The *Construction of a Wall* case, ICJ Reports, 2004, pp. 136, 160.
[74] Made by J. Quigley, "The Israel-PLO Interim Agreements: Are They Treaties", 30 Cornell ILJ, 1997, p. 717.
[75] *Creation of States*, p. 446.

instead of "Palestine Liberation Organisation" in the UN system. Additional rights and privileges of participation were granted to Palestine in General Assembly resolution 52/250, 1998. According to the *Permanent Missions to the United Nations*, published most recently by the Executive Office of the Secretary General, Protocol and Liaison Service in March 2009, Palestine appears in a special category after member States and after non-member States having a standard invitation to participate in the work of the General Assembly (the Holy See). The category in which Palestine is placed is termed "Entities having received a standing invitation to participate as observers in the sessions and the work of the General Assembly and maintaining permanent observer missions at Headquarters".[76] In other words, Palestine, while recognised as having a status higher than that of "Intergovernmental organizations having received a standing invitation to participate as observers" is clearly not accepted as a State.

e) Palestine and the International Committee of the Red Cross

60. On 21 June 1989, the Permanent Observer of Palestine to the United Nations Office at Geneva wrote to the Swiss Federal Department of Foreign Affairs stating that, "the Executive Committee of the Palestine Liberation Organization, entrusted with the functions of the Government of the State of Palestine by decision of the Palestine National Council, decided, on 4 May 1989, to adhere to the Four Geneva Conventions of 12 August 1949 and the two Protocols additional thereto". However, on 13 September 1989, the Swiss Federal Council declared that it was not in a position to decide whether the letter from the Permanent Observer of Palestine constituted an instrument of accession, "due to the uncertainty within the international community as to the existence or non-existence of a State of Palestine".[77]

[76] The "Blue Book", No. 299, ST/SG/SER.A/299 (as updated on 24 August 2009), http://www.un.int/protocol/bluebook/bb299.pdf, p. 306.

[77] http://www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf, p. 6.

f) Palestine and the ICC

61. At the Rome Conference leading to the establishment of the ICC, Palestine was placed under the heading of "Other Organisations" in the list of delegations, separate from the list of participating States and UN bodies and after the category of "Intergovernmental Organisations and other entities having a standing invitation to participate in the sessions and work of the General Assembly".[78] Similarly, in the work of the ICC Preparatory Commission, Palestine was placed in the category entitled "Entities, intergovernmental organizations and other bodies having received a standing invitation to participate as observers in the sessions and the work of the General Assembly",[79] while at the second resumption of the seventh session of the Assembly of States Parties in New York in February 2009, for example, Palestine was placed in the category entitled "Entities, intergovernmental organisations and other entities".[80]

62. Accordingly, in the very institution in which Palestine is currently claiming, if indirectly, to be a State, this has not been accepted. It would thus put the Prosecutor in the curious position, were he to accept Palestine as a State pursuant to article 12 (3), of acting in a manner inconsistent with the Assembly of States Parties and contrary to the unambiguous pattern of the negotiating processes.

ii) Under the Rome Statute

63. Having established that Palestine is currently not a State under the general rules and principles of public international law, the question is raised as to whether it might be argued that the concept of "State" in the Rome Statute has a special meaning over and above that traditionally accepted in international law.

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[78] United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, June 15 to July 17, 1998, Official Records, vol. II, U.N. Doc. A/CONF.183/13 (vol. II) (2002) at pp. 5 and 44.

[79] *See* United Nations, Preparatory Commission for the International Criminal Court, New York, 8–19 April 2002, List of Delegations, U.N. Doc. PCNICC/2002/INF/6, 2002, p. 10.

[80] ICC-ASP/7/INF.1/Add.2 (26 Mar. 2009), http://www2.icc-cpi.int/iccdocs/asp_docs/ICC-ASP-7-INF.1-Add.2.pdf, p. 50.

64. As the Rome Statute is an international treaty, to which currently 110 States are parties,[81] the normal rules and principles of treaty interpretation apply. This was underlined in one of the earliest decisions of the Appeal Chamber. In the *Situation in the Democratic Republic of Congo* case, it was declared that:

> "The interpretation of treaties, and the Rome Statute is not exception, is governed by the Vienna Convention on the Law of Treaties (23 May 1969), specifically the provisions of articles 31 and 32. The principal rule of interpretation is set out in article 31 (1) that reads:
>
> > 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'."[82]

65. This indeed was consistent with the approach adopted by the International Criminal Tribunal for the Former Yugoslavia, which in the *Milutinovic* case, for example, noted that, "[i]t is the general rule in the jurisprudence of the International Tribunal that the rules of treaty interpretation in international law apply to the Statute of the International Tribunal".[83]

66. This approach was recently confirmed by Pre-Trial Chamber III of the ICC in the Decision Adjourning the Hearing pursuant to Article 61 (7) (c) (ii) of the Rome Statute in the *Bemba* case. The Chamber held that in the process of interpreting the article in question:

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[81] http://www.icc-cpi.int/Menus/ASP/states+parties/ (as of 29 July 2009).

[82] ICC-01/04. Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, para. 33 (footnote omitted) and paras. 6 and 40. See also the *Lubanga* case, 01/04-01/06 (OA 7), Appeal Chamber, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Décision sur la demande de mise en liberté proviso ire de Thomas Lubanga Dyilo", 13 February 2007, para. 15.

[83] IT-05-87-AR 108 Bis.1, Decision on Request of the North Atlantic Treaty Organisation for Review, 15 May 2006, para. 8. See also *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment, 15 July 1999, paras. 282-286.

"having due regard to articles 21(l)(b) and 21(3) of the Statute, the Chamber is guided by established principles of treaty interpretation in international law as reflected in the 1969 Vienna Convention on the Law of Treaties".[84]

67. The Chamber further emphasised that:

"The Statute, being a multilateral treaty, is governed by the principles of treaty interpretation set out in article 31 (1) of the VCLT [Vienna Convention on the Law of Treaties] according to which '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose'."[85]

68. In addition, article 32 of the Vienna Convention provides that:

"Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(*a*) leaves the meaning ambiguous or obscure; or

(*b*) leads to a result which is manifestly absurd or unreasonable".

69. Of particular importance is the provision in article 31 (4), which provides that:

"A special meaning shall be given to a term if it is established that the parties so intended."

68. There is in the Rome Statute no definition of a "State". There is, therefore, no express provision by which it may be stated or indeed inferred that the concept of a "State" for the purposes of the Statute (or more particularly article 12 (3)) is to include entities of a controversial nature or standing of whatever description that are not internationally

[84] ICC-01/05-01/08, 3 March 2009, para. 21.

[85] Ibid., para. 30. See also generally W. Schabas, *An Introduction to the International Criminal Court*, Cambridge, 3rd ed., 2007, p. 200.

accepted as States under the rules of international law. Since by virtue of article 31 (4), any special meaning to a provision in a treaty must be shown to have been so intended by the parties, it must be concluded that the term "State" as it appears in the Rome Statute is to have the same meaning as it has in general international law.

69. This contrasts, for example, with the situation concerning the International Criminal Tribunal for the Former Yugoslavia. Rule 2 of the Rules of Procedure and Evidence[86] defines a "State" as follows:

> "(i) A State Member or non-Member of the United Nations;
> (ii) an entity recognised by the constitution of Bosnia and Herzegovina, namely, the Federation of Bosnia and Herzegovina and the Republic Srpska; or
> (iii) a self-proclaimed entity de facto exercising governmental functions, whether recognised as a State or not".

70. Had Rule 2 (iii) been replicated in the Rome Statute or the Rules of Procedure and Evidence of the ICC (or indeed other relevant documents), the situation with regard to the status of the Palestinian Authority may have been different (assuming, of course, that it factually fulfilled the necessary criteria).[87] The fundamental question here, however, is whether in the absence of express statement, such stipulation can simply be inferred and the answer to this must on general principle, and in the light of the Vienna Convention on the Law of Treaties, clearly be in the negative. The very fact that Rule 2 of the ICTY Rules of Procedure and Evidence was introduced demonstrates that a "special meaning" of the term "State" was intended and that without that provision it could not have been applied as such by the ICTY.

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[86] IT/32/Rev. 43, 24 July 2009.

[87] The International Court of Justice has permitted the written and oral participation of certain non-State entities in the context of providing an advisory opinion requested by the General Assembly, although with a status clearly differentiated from that of States, see the *Construction of a Wall* case, ICJ Reports, 2004, p. 136 (Palestine) and the *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*, Order of 17 October 2008 (Provisional Institutions of Self-Government of Kosovo). However, the question of participation consistent with constitutional instruments cannot be confused with the question of jurisdiction. In both the ICJ advisory opinions noted, jurisdiction was provided by the General Assembly resolutions pursuant to the ICJ Statute.

71. The argument that the term "State" as used in article 12 (3) includes, or might be interpreted to include, non-State entities of whatever kind is simply contrary to the ordinary meaning of the term "State". The context of the provision is constituted by the Rome Statute as a whole and here the term "State" appears in a number of articles and in circumstances which offer no support to the possibility that non-State entities are to be included.[88] Further, the very structure and terminology of article 12 (3) suggests that the relevant non-Party State in question must mean a State that can become a Party to the Statute and this is by article 125 restricted to States. Reference in article 31 of the Vienna Convention on the Law of Treaties to the object and purpose of the treaty in question also provides no support for the view that would essentially transform the meaning of "State". It is no part of the Rome Statute to confer unrestricted or universal jurisdiction on the ICC. The structure and system agreed by the States Parties was in the form of restricted jurisdiction (ie. in the absence of Security Council reference, limited to the territory or nationals of States Parties plus those making the *ad hoc* declaration under article 12 (3)). Accordingly, using the relevance of the object and purpose of the Rome Statute in order to defeat the ordinary meaning of "State" and permit non-State entities to accept the jurisdiction of the ICC, is bound on legal grounds to fail.

E. Some Possible Consequences of Accepting Palestine as a State

72. There are a number of implications to acceptance of Palestine as a State for the purposes of article 12 (3) of the Rome Statute. First, it would be seen as going far beyond the meaning of the term "State" and thus not in conformity with the accepted principles of treaty interpretation, thus threatening the stability of other provisions. Secondly, it would be seen by many as a violation of the Statute. Thirdly, it would necessarily be seen as an interference in, and complication of, the Middle East peace process, founded as it currently is upon the Roadmap and its aim of establishing a Palestinian State next to Israel as part of a package deal. Fourthly, it would open the door to other putative States to making similar declarations. To argue that Palestine is

[88] Eg. articles 4, 7-9, 11-15, 17-19, 21, 25, 36, 44, 46, 48 and 51.

a *sui generis* case is a difficult argument to make both logically and legally and attempts in this sense are highly likely to fail. There is currently a whole range of non-State entities seeking or asserting statehood and to note some of them will underscore the highly controversial legal and political nature of the step that the ICC would be taking. Such entities would doubtless include the claimed republic of Nagorno-Karabakh, the "Turkish Republic of Northern Cyprus", Transnistria, Abkhazia, South Ossetia, the Saharan Arab Democratic Republic and Somaliland. In addition, the position of entities such as Taiwan could become an issue before the Court. Accordingly, the ICC could well find itself embroiled in a series of sensitive international political crises. It would, at the least, constitute a severe distraction of attention and resources.

73. Fifthly, it may well generate a sense of unease amongst current State Parties who fear the politicisation of the Court that would be manifested and doubtless encouraged by the acceptance of the Palestinian declaration or who may feel more particularly that their vital interests in terms of opposing secessionist movements are being challenged or undermined. Sixthly, it may well serve as a discouragement to non-Party States from a serious consideration of whether or not to accede to the Statute. Finally, it might cause tension with other judicial institutions, whether of a national or international character, who might be concerned at the status thereby given to non-State entities.

F. Conclusions

74. I have, therefore, reached the following conclusions:

i) The ICC only has jurisdiction with regard to the crimes laid down in article 5 of the Rome Statute;

ii) The ICC may exercise its jurisdiction only where the alleged crimes have been committed either on the territory of a State Party or by a national of a State Party or, under article 12 (3), where a non-Party

State has accepted the jurisdiction of the Court; or following a Security Council referral.

iii) The ICC may exercise its jurisdiction in the absence of a State Party or Security Council referral only where the Prosecutor initiates an investigation;

iv) In initiating such an investigation, the Prosecutor must be satisfied in the light of information supplied, that there is a reasonable basis to proceed;

v) Where this is so, the Prosecutor must apply to the Pre-Trial Chamber for authorise to commence the investigation;

vi) The Pre-Trial Chamber must be satisfied that there is a reasonable basis to proceed with an investigation and that the case appears to fall within the jurisdiction of the Court. Such authorisation, however, is without prejudice to subsequent determination by the Court with regard to the jurisdiction and admissibility of a case;

vii) Since Palestine is not a State Party to the Rome Statute, the ICC would only have jurisdiction if the requirements of article 12 (3) were satisfied and the terms of this provision clearly apply only to non-Party States;

viii) Accordingly, the ICC can only have jurisdiction in this matter if it were decided that there was a reasonable basis to conclude that Palestine constitutes a State;

ix) In interpreting article 12 (3), the applicable law is the Statute (and other relevant documents of the ICC) and, where appropriate, international law;

x) As there is no definition of "State" in the Statute or other relevant ICC documents, recourse to the international legal criteria of statehood is required;

xi) In the light of an examination of such criteria, it is clear that Palestine cannot currently be regarded as a State in international law. This is for the following reasons;

xii) First, it is difficult to regard the Palestinian Authority as an effective government in view of the division of functions between it and the PLO and in view of the *de facto* complete control of the Gaza Strip exercised by Hamas;

xiii) Secondly, the Palestinian Authority does not comply with the requirement of capacity to enter into relations with foreign States, or independence, which essentially means the absence of formal or constitutional subjugation to an external authority;

xiv) This is demonstrated by the fact that under valid and continuing agreements between Israel and the PLO, the Palestine Authority only possesses such powers and responsibilities as have been expressly transferred to it by Israel. All other powers and responsibilities are explicitly retained by Israel;

xv) In addition, the key Interim Agreement of 1995 expressly excludes such critical relevant items as external defence, exercise of foreign relations and jurisdiction over Israeli nationals and settlements in the West Bank and Gaza from the competence of the Palestine Authority;

xvi) Accordingly, critical functions seen as indispensable to statehood in international law have by agreement between the relevant parties been recognised as matters subject to Israeli control;

xvii) Any claim to statehood by the Palestinian Authority would thus violate these agreements and it may well be vitiated by such illegal activity;

xviii) In order for an entity to become a State, it must expressly and formally assert such a claim. Statehood cannot arise incidentally or implicitly. Palestine has made no such claim since the series of agreements with Israel commenced in 1993. Therefore, statehood by virtue of a declaration, itself making no such formal claim, recognising the jurisdiction of the ICC, cannot arise;

xix) Indeed, a consistent pattern of conduct is evident on the part of the Palestinian Authority to the effect that the establishment of a Palestinian State has not yet been accomplished and is an aspiration;

xx) Such practice may amount to an estoppel, but in any event, is totally inconsistent with an indirect claim to statehood asserted by the declaration;

xxi) Further, the Palestinian Authority has undertaken obligations under the Roadmap, reaffirmed in the Annapolis agreement, to work towards a composite and comprehensive settlement, one element of which is the establishment of a Palestinian State;

xxii) Palestine has a special status at the UN, but this falls far short of membership, which is only attainable by States;

xxiii) Palestine was recognised as no more than a non-State entity at the Rome Conference and at the Preparatory Commission sessions and at those sessions of the Assembly of States Parties that it has attended;

xxiv) It would, therefore, be curious for the Prosecutor to recognise a status for Palestine which is inconsistent with that accepted by the relevant negotiating bodies of the ICC;

xxv) It cannot be maintained that the reference to the term "State" in article 12 (3) is to be interpreted in a manner inconsistent with international law so as to include claimant or putative States. Unlike the case of the ICTY, there is no definition of the term "State" in any relevant document of the ICC. Under the Vienna Convention on the Law of Treaties, which applies to the ICC instruments. a special meaning of a term must be demonstrated to have been intended by the parties to the treaty in question and there is a complete absence of any evidence of any such intention;

xxvi) Accordingly, the term "State" in article 12 (3) can have no meaning other than that recognised in general international law, so that it may be concluded that Palestine is not in international law a State;

xxvii) Serious consequences may be envisaged were the declaration of the Palestinian Authority to be accepted by the ICC, and thus Palestine recognised in practice as a State. Controversial non-State entities claiming statehood would doubtless seek to make article 12 (3) declarations and this would exacerbate international political tensions as well as discouraging prospective States Parties and possibly undermining the position of a number of current State Parties;

xxviii) It is, therefore, my conclusion as a matter of law and for all the reasons noted above, that the declaration made by the Palestinian Authority on 22 January 2009 is inconsistent with the Rome Statute and must, therefore, be rejected by the Prosecutor.

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30 August 2009