MEMORANDUM

To: Office of the Prosecutor, International Criminal Court
From: John Quigley, Professor of International Law
Date: May 20, 2010
Re: Posted submissions in regard to Palestine declaration

I am taking the liberty of sending this Memorandum to comment on the four submissions the Office has posted that oppose the validity of the Palestine declaration of January 21, 2009. These are the submissions sent to the Office by the European Centre for Law and Justice, by the International Association of Jewish Lawyers and Jurists, by Professors Daniel Benoliel and Ronen Perry, and by the Hoover Institution. The authors of the four submissions address a number of issues, but all of them address Palestine statehood and argue that Palestine is not a state. Their views on this topic are in opposition to the view I have previously expressed to the Office on Palestine statehood. My comments in this Memorandum relate only to those portions of the four submissions that address Palestine statehood. As will appear, I do not find the arguments made in the four submissions to cast doubt on the proposition that Palestine is a state. I consider each of the four submissions in turn.

European Centre for Law and Justice

The memorandum sent by the European Centre for Law and Justice cites statements by Palestinian officials in which they express an aim of establishing an independent state. These statements are taken in the memorandum as indicating that these officials do not regard Palestine as a state presently. These statements, however, do not reflect a view that Palestine is not presently a state. The gist of the statements is to call for implementation of Palestinian control on the ground. The statements express an aim of independence in the sense of ending Israel's occupation of Palestine territory. They call for cessation of infringement by Israel on the independence of the existing Palestine state.

The memorandum quotes Judge Elaraby in his separate opinion in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* and claims that he says that there is no Palestine state. The sentence quoted appears in a paragraph in which Judge Elaraby recounts that independence was declared in 1948 for a state of Israel and then continues: "The independence of the Palestinian Arab State has not yet materialized." [2004 I.C.J. at 251] Judge Elaraby was not saying there is no Palestine state. Sectors of Palestine were administered by Egypt and by Jordan after 1948, until they were occupied by Israel in 1967. Hence, "independence" has not "materialized" for Palestine.

The memorandum assesses Palestine under the Montevideo criteria for statehood and says that it does not qualify. One criterion on which it claims Palestine is lacking is the conduct of foreign relations, where it states that the PNA does not conduct

foreign relations. The memorandum does not mention the PLO, which does conduct the foreign relations of Palestine.

The memorandum argues that the prosecutor lacks discretion to initiate an investigation based on receipt of an Article 12(3) declaration lodged by a non-state. This section of the memorandum does not explain why Palestine is not a state but merely assumes that it is not.

International Association of Jewish Lawyers and Jurists

A letter from the International Association of Jewish Lawyers and Jurists asserts that Palestine is not a state, for failure to meet the accepted criteria for statehood, and for having ceded powers to Israel in the post-Oslo agreements. In support, the Association appends an opinion letter by Professor Malcolm Shaw QC. Shaw makes a number of points aimed at disputing Palestine statehood. Shaw recites the accepted criteria for statehood and says that there is an absence of control because the PNA does not control Gaza. Shaw does not explain why an absence of control over one portion only of a state's territory negates the element of control as a criterion for statehood. If there is control in one portion but not another, the control element is satisfied. With regard to the West Bank, Shaw focuses on the existence of two distinct entities – the PLO and the PNA – and suggests that this division of function reflects negatively on the control criterion. Shaw fails to explain why this division of functions matters, however, in regard to the control criterion. Such a division of functions is irrelevant on the control criterion.

Shaw argues that Palestinian administrative powers are circumscribed, in regard to the West Bank, by the post-Oslo agreements, and in particular by a clause that says that the PNA is not to exchange ambassadors with other states or to conduct diplomatic relations. Shaw ignores the fact that it is the PLO that conducts diplomatic relations for Palestine. Further, Shaw points to various ways in which the PNA lacks full control, for example, that under the post-Oslo agreements Israel controls the airspace. He says that the powers held by the PNA are powers ceded to it by Israel. Shaw omits mention of the fact that Palestine territory is under belligerent occupation, a fact that limits Palestine's ability to exercise control. The powers ceded by Israel are powers emanating not from sovereignty, but from force of arms. States whose territory is occupied are not able to exercise authority on issues on which the occupying power has imposed itself by force.

Shaw says that any assertion of statehood, as reflected in the Palestine declaration to the ICC, would violate a provision of the 1995 Interim Agreement (PLO-Israel) that stipulates that neither side shall change the status of Gaza or the West Bank pending agreement between them. Shaw omits mention of a clause in the same provision of the Interim Agreement (Article 31), that says that nothing in the Interim Agreement precludes either party from maintaining its positions on any issue. Given that Palestine statehood had been asserted before 1995, an assertion of Palestine statehood after that date is no violation of Article 31.

Shaw asserts that Palestine officials regard statehood as a matter for the future. He cites the same kinds of statements as did the European Centre for Law and Justice.

As indicated above, these statements do not reflect a view that Palestine is not presently a state.

Shaw refers to the fact that when the ICC Statute was being drafted, Palestine was invited to participate in a category of invitees labeled "entities, intergovernmental organizations and other bodies having received a standing invitation to participate as observers in the sessions and work of the [UN] General Assembly." This format was apparently chosen for the invitation in order to explain why particular entities should be invited. If they were observers at the UN, then they were thought to have an interest in the topic. No implications regarding statehood can reasonably be drawn.

Daniel Benoliel and Ronen Perry

Daniel Benoliel and Ronen Perry sent a draft article titled "Israel, Palestine, and the ICC," that as originally posted carried the notation that it was forthcoming in the *Boston University International Law Journal*. Later it appeared without that notation. Benoliel and Perry's draft article is devoted largely to criticizing points made in an earlier submission of mine to the OTP, titled "The Palestine Declaration to the International Criminal Court: The Statehood Issue" (also published in the *Rutgers Law Record*). Benoliel and Perry reject my assertion that an acknowledgment of Palestine statehood was reflected in UN General Assembly Resolution 43/177 of December 15, 1988, a resolution in which the General Assembly expressed approval of the Palestine statehood declaration of 1988. Benoliel and Perry say that my position was based on "a constitutive-state-recognition theoretical structure," by which they mean the concept that the General Assembly constitutes entities as states. This concept would involve attributing that role to the General Assembly, a role that is disputed among legal scholars. Other scholars hold to a so-called declaratory theory, under which states exist as a matter of fact, with recognition – either individual or collective – not being required.

My article, in fact, was not based on any particular theory of recognition. My position is that, under either theory, Palestine is a state. My article took the approbation of the Palestine declaration by such a large number of states as an indication that these states regard Palestine as a state. Proponents of a declaratory theory may say that Palestine exists and that these states simply noted that fact. Proponents of a constitutive theory may say that acceptance of Palestine by so many states made Palestine into a state. My theoretical basis is that if the states of the world interact with an entity on a basis that is explicable only if the entity is a state, then it must be so. I elaborate in relation to Palestine more fully in *The Statehood of Palestine: International Law in the Middle East Conflict*, to be published shortly by Cambridge University Press. Regardless of which theory about recognition one holds, the widespread acceptance of Palestine reflected in Resolution 43/177, taken together with further indications of acceptance in subsequent years, shows Palestine's statehood.

Benoliel and Perry cite the fact, which is true, that most western European states did not grant formal diplomatic recognition to Palestine in the wake of the 1988 Palestine declaration. They recite, as is also true, that some of the states that declined to

recognize "did so on the grounds that they wanted a more definite indication of Palestine's positive attitude towards Israel, such as an explicit act of recognition of Israel." Benoliel and Perry take this reticence to recognize Palestine as an indication of Palestine non-statehood. However, they miss the obvious implication of the position taken by these European states. If a state says that it will recognize a putative state if the latter takes a particular action that could be taken at any time, then the former must regard the entity as a state. Otherwise, it would make no sense to say that it will recognize upon performance of the desired action. The 1988-89 position of these western European states, far from showing that Palestine was not regarded as a state, shows that it was.

Benoliel and Perry miss the distinction between acknowledgment of statehood on the one hand, and diplomatic recognition on the other. The fact that a state does not recognize a putative state does not necessarily mean that it does not regard the latter as a state. Diplomatic recognition often is based on other factors, as exemplified by the position Benoliel and Perry reference of the European states that conditioned their possible recognition of Palestine on action they wanted it to take.

Benoliel and Perry make the same error in their reference to the Performance-Based Road Map to a Permanent Two-State Solution to the Israeli-Palestinian Conflict (2003). They take the Road Map as indicating that a Palestine state will come into being only at the end of a process of negotiation. It is true, to be sure, that the Road Map envisages a negotiation process resulting in two states – Israel and Palestine – coexisting peacefully. But that aim does not bespeak any particular view as to Palestine's present status. Benoliel and Perry overlook the detail in the Road Map. Issued on April 30, 2003, the Road Map called for the major powers to begin asking other states to recognize a Palestine state as early as June 2003. Hence, the Road Map contemplated (although this was not in the event carried out) practically immediate diplomatic recognition of Palestine. If the major powers intended to begin recommending formal diplomatic recognition of a Palestine state within a few weeks, they could not but have considered it to be a state as of April 30, 2003. Hence, the Road Map, far from showing a view of the international community that Palestine is not a state, shows the contrary.

Benoliel and Perry argue that even if it can be said that the UN General Assembly, by its Resolution 43/177 in 1988, acknowledged Palestine statehood, the United Nations has subsequently called for a two-state solution (they cite a General Assembly of the year 2000 to this effect), and therefore that the General Assembly retrenched from its 1988 view. But calling for a two-state solution is not, as already indicated, inconsistent with a view that Palestine is presently a state. Further, if the members of the General Assembly regarded Palestine as a state in 1988, it is hard to believe that they would no longer regard it as a state in 2000. Benoliel and Perry refer to differing levels of control exercised by the PNA over this period. But fluctuations in levels of control do not bear on statehood when the territory is under belligerent occupation. Moreover, in the course of making this point about a supposed retrenchment, Benoliel and Perry assert that the UN "abandoned its earlier constitutive

recognition of the State of Palestine." They thus acknowledge that the General Assembly acknowledged Palestine as a state in 1988.

Any implication that the General Assembly retrenched between 1988 and 2000 on considering Palestine to be a state is, moreover, belied by the General Assembly's action of adopting Resolution 52/250, on July 7, 1998, Benoliel and Perry omit mention of this resolution. Titled "Participation of Palestine in the Work of the United Nations," it accorded Palestine a series of parliamentary privileges that are accorded only to states members of the United Nations, in particular, the right to participate in the general debate of the General Assembly, and the right to reply to statements made by delegates of member states. Far from retrenching, the General Assembly was reaffirming its view of Palestine as a state by admitting it to participation on a par with states.

Benoliel and Perry argue that the 1988 Palestine declaration of statehood is somehow ineffective because, they say, there have been two other declarations of Palestine statehood. The first that they mention dates from 1948 and was issued in the name of the All-Palestine Government, which sought to establish a government for Palestine in the wake of Britain's withdrawal. The second dates from 2009 and was issued by an anti-Hamas leader who declared an Islamic republic in Gaza. Benoliel and Perry characterize these two acts as "competing" claims, that is, competing with the 1988 declaration. They suggest that the 1948 and 2009 acts in some fashion nullify the 1988 declaration, although they do not explain why.

Benoliel and Perry attempt to refute the argument made in my article that the statehood declared in 1988 was not of a new state, but of a state that already existed. They dispute the position taken in my article that Palestine, as a Class A mandate under the League of Nations, was constituted as a state. However, they cite no sources showing the practice of the states of that era in relation to Palestine. That state practice demonstrates that Palestine, while administered by Great Britain under the mandate system, was accepted as a state. In particular, Benoliel and Perry omit mention of the 1923 Treaty of Lausanne, the treaty in which Turkey gave up its territories in the Arab world. The Treaty of Lausanne more than once refers to these territories, all of which became Class A mandates (Iraq, Syria, and Palestine), as "states detached" from Turkey. The Treaty of Lausanne, to which the World War I allies were parties, thus reflected an understanding that the Class A mandate territories, including Palestine, were "states."

What Benoliel and Perry do say about the Palestine of the mandate period is that it was being "reserved exclusively for the Jewish people to establish a future independent state." That statement inaccurately reflects the status of Palestine during the mandate period. It ignores the fact that Britain's commitment, as reflected in the Balfour Declaration of 1917, and as incorporated into the League's mandate for Palestine, was to foster only a "national home" (not a state), and that the "national home" was to be "in" Palestine, meaning not necessarily in the entirety of its territory. Moreover, the Balfour Declaration committed Britain at the same time to protecting the rights of the existing population, hence the promotion of a state exclusively for the Jewish people would have been a clear violation.

But even if the statement of Benoliel and Perry about a state exclusively for the Jewish people were accurate, it misses the point in regard to Palestine's status in the mandate period. Palestine's status had nothing to do with the question of Arab rights versus Jewish rights. The legal literature of the mandate era on the question of the status of Palestine is silent on issues of Jew versus Arab. A legal characterization of Palestine's status under the mandate turns on analysis of key documents and state practice. The League of Nations Covenant and the Treaty of Lausanne both made clear that Palestine was a state then and there. During the mandate period, the states of the international community dealt with Palestine on the basis of its being a state. They accepted Palestine passports. They concluded treaties with Palestine. When Palestine's status came up as an issue in international proceedings, as it did a number of times, Palestine was found to be a state. Palestine was not, to be sure, "independent," while under British administration, but it was regarded by the states of the international community as a state, and that is what matters.

While they concede that the United Nations has endorsed Palestine statehood, Benoliel and Perry challenge the organization's "legitimacy" to do so, by saying that the United Nations was not the lawful successor to the League of Nations. "[E]ven if it is argued." they say, "that the League of Nations was bound by an Arab Palestinian state on the former Mandate of Palestine, the United Nations would not be bounded by it consecutively." They appear to have taken the argument in my article to be that the Palestine state of the mandate period was an "Arab" state (which they then dispute, saying it was to be a Jewish state). My article did not characterize the Palestine of the mandate period in ethnic terms. States are not defined in ethnic terms in international law. Palestine under British mandate was simply a state.

In any event, the issue of succession between the League of Nations and the United Nations, the issue Benoliel and Perry find important, is irrelevant. What is important is how Palestine was regarded, and by Article 80 of the UN Charter a large segment of the international community (the states that adopted the Charter) said that the rights of both states and communities as those rights existed under the Covenant of the League of Nations would continue in force. Palestine statehood thus was preserved. Whether the UN was the successor to the League is beside the point.

Benoliel and Perry reply to the point made in my article that one cannot expect a state to be in control of its territory (arguably a prerequisite for statehood) when its territory is occupied by a foreign army. They reply by saying that independence is required. Of course, independence was not required by the international community for Palestine to be a state during the mandate period, so their insistence of the necessity of independence flies in the face of clear international practice. But even if independence a requirement as a general matter, independence is not demanded when territory is occupied, at least if by "independence" one means the actual ability to control the territory independently from any other state. By the logic of Benoliel and Perry, Denmark would have ceased to be a state when occupied by Germany during World War II.

Benoliel and Perry assert that the supposed independence criterion for statehood is present only in the event of "the nonexistence of exercise of power by an alternative state – or even the absence of a right, vested in another state, to actualize such governing power." They thus seem to challenge Palestine statehood on the basis of what they view as a right held by Israel to "actualize" power in the territory claimed by Palestine. Here they refer, as if it were a fact, to "Israel's sovereignty claim over practically most of the land and key areas in the West Bank with reference to its borders, airspace and underground water resources," and, they add, to the "settlement blocs," to "Israeli nationalized allotments," to Palestinian land that has been purchased by Israelis, to the Jordan valley, to the old city of Jerusalem, and to the border with Jordan.

The indicated areas are areas in which Israel may hope to gain rights under an agreement with Palestine, but Israel has made no claim of sovereignty, except perhaps with respect to Jerusalem. Benoliel and Perry concede as much when they refer to "high expectations within Israeli negotiation teams that portions of the occupied territories in the West Bank will be ceded to Israel." Cession of territory is an act between states. If the specified areas may be "ceded to Israel," they would be "ceded" by Palestine, hence they must presently be part of its territory as a state. So again, Benoliel and Perry implicitly concede the Palestine statehood they claim not to exist.

Benoliel and Perry assert that if a peace treaty is negotiated that leaves some territory in the West Bank out of Israel's sovereignty, such a treaty might be invalid on the grounds of having been procured by military aggression. They are thus saying that even if an Israel-Palestine peace is signed, it may not be binding on Israel. This is a position that the Israeli government itself does not assert and, realistically, could not, because it would be entering negotiations with Palestine saying that whatever it may sign will not be valid. Despite the irreality of their scenario, Benoliel and Perry say that the only peace treaty that would be valid is one that would give the entirety of the West Bank to Israel.

They rely in this argument on Article 52 of the Vienna Convention on the Law of Treaties, which says that a treaty is void if its conclusion has been procured by threat or use of force in violation of the UN Charter. They assert that Jordan committed aggression against Israel in 1967, hence that an Israeli-Palestinian peace treaty would have been procured by unlawful use of force. They further rely on Article 75 of the Vienna Convention on the Law of Treaties, which says that treaty obligations are "without prejudice to any obligation in relation to a treaty which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State's aggression."

The purpose of Article 75 is to make clear that the powers of the Security Council under the UN Charter are superior to rights or obligations that may be found in a treaty. With regard to the 1967 hostilities, the Security Council has not found Jordan to be the aggressor. Thus, the reference by Benoliel and Perry to Article 75 is misplaced. Moreover, Benoliel and Perry say nothing to substantiate their assertion that Jordan was the aggressor in 1967, which in fact it was not.

Benoliel and Perry react to the point in my article that Israel, by demanding recognition from the PLO, as Israel did in 1993, tacitly acknowledged that the PLO represents a state, since recognition is done between states. They again raise the constitutive theory of recognition and claim that my point about recognition is embedded in it. Why it matters on what theory of recognition my point is based they do not make clear. My point was not in any event based on any particular theory of recognition. My point was simply that Israel's demand reflected an assumption of Palestine's statehood. The same point was made by Benjamin Netanyahu on the floor of the Knesset in 1993. Netanyahu opposed Prime Minister Yitzhak Rabin's rapprochement with the PLO. Netanyahu criticized Rabin by saying that Israel, by entering into the contemplated relationship, was recognizing Palestine as a state. Netanyahu was correct.

Finally, Benoliel and Perry make two arguments that they believe negate Palestine statehood, but which do not. They dispute Israel's 1993 acceptance of Palestine as a state by saying that whatever negotiations occurred at the early stages were not to prejudice final status negotiations. While that is so, it is irrelevant to whether Israel did or did not tacitly recognize Palestine in 1993. They also argue that the Palestinian concept of a state has changed over time in terms of the territory claimed. It is true that the territory claimed has changed, but that fact is irrelevant to statehood itself.

Hoover Institution letter

The letter signed by two fellows of the Hoover Institution at Stanford University, plus four international law professors, challenges the validity of the Palestine declaration by arguing that the Palestinian National Authority is not a state, and that even if it were, it did not have jurisdiction over Gaza. By posing the issue as being that of whether the PNA is a state, the authors confuse the concept of "government" with the concept of "state." The PNA is not a state, but an organ of governance of a state.

The Hoover letter seeks, in any event, to demonstrate that the PNA is not a state by saying that the United Nations does not accept it as such. Like Benoliel and Perry, the Hoover letter focuses on the action of the UN General Assembly in 1988 in response to the Palestine declaration of that year. They say that the UN General Assembly merely acknowledged the declaration but that "no attempt was made to recommend U.N. membership for Palestine." It is true that no proposal was made for UN membership, but there is no indication that the lack of a move in that direction bespoke a negative view of the member states about Palestine statehood. Any effort to begin a process for UN membership for Palestine would have been futile. A membership application must be approved by the UN Security Council, where the United States holds the power of veto. At that period the United States was adamantly trying to exclude the PLO from any political role.

Contrary to the argument made by the Hoover letter, the General Assembly's positive response to the 1988 declaration did indicate that the membership regarded Palestine as a state. The General Assembly responded to the 1988 declaration by deciding that the observer mission it had earlier accepted for the "Palestine Liberation

Organization" should be re-designated as the observer mission of "Palestine" [General Assembly Resolution 43/177, December 15, 1988]. Now that the PLO was proclaiming statehood, the General Assembly was saying that the observer mission should be that of "Palestine," namely, an observer mission of the state that was being proclaimed. This change in terminology makes no sense unless the member states considered Palestine to be a state.

The Hoover letter cites the 2003 Road Map as reflecting a view that a Palestine state was something to be brought about only in the future, hence that Palestine was not then and there a state. Here the Hoover letter makes the same error as Benoliel and Perry, by failing to understand that the Road Map means precisely the opposite.

The Hoover letter claims that the UN Security Council, by a 2009 resolution [Resolution 1860, January 8 2009], indicated that Palestine is not a state when it said, in reference to Gaza, that Gaza "will be part of the Palestinian state." The Hoover letter takes this reference to a Palestinian state in the future tense as a negation of present statehood. This phrase appears in a preamble clause in which the Security Council "stress[es] that the Gaza Strip constitutes an integral part of the territory occupied in 1967 and will be a part of the Palestinian state." The resolution was adopted while Israel's military offensive in Gaza was ongoing, hence the purpose of the clause was to make clear that Israel had no rights there, and that Gaza and the West Bank constitute a single territorial unit. The reference to a Palestinian state in the future tense hardly can be taken as an expression of view against present Palestine statehood. The phrase refers to "the" Palestinian state," rather than "a" Palestinian state. The latter would have been the more logical formulation had there been an intent to say that a Palestine would be a state only in the future. Use of the definite article suggests that Palestine already exists. Moreover, as in other international documents that have addressed this matter, mention of Palestine in the future tense refers to a withdrawal by Israel that would bring complete local control.

Regardless of what the Security Council may or may not have meant by the 2009 resolution, the Security Council has consistently treated Palestine as a state – a fact that the Hoover letter does not mention. Like the General Assembly, the Security Council allows the participation of Palestine in its proceedings on a par with member states of the United Nations. In particular, the Council accepts Palestine as a participant in debate at its sessions, a privilege that under Security Council rules attaches only to member states.

The Hoover letter seeks to counter an argument I made that the International Court of Justice considers Palestine to be a state. My argument is based on the fact that when the Court received a request for an advisory opinion about the legality of the wall that Israel was erecting in the West Bank, it invited Palestine to participate in the judicial proceedings. That invitation, I argued, showed that the Court considers Palestine a state, because under the Court's Statute only states are so invited. The Hoover letter counters by saying that whereas in contentious proceedings only states participate, it is otherwise in advisory proceedings. The Hoover letter here averts to the fact that when the Court is considering a request for an advisory opinion, it must, under Article 66 of its Statute,

notify both states entitled to appear before the Court or any relevant "international organization" that they may file a written statement or participate in oral argument. The Hoover letter supplies no documentation but suggests that the "international organization" could be a non-state entity. However, "international organizations" here refers to organizations of states. [See Shabtai Rosenne, *The Law and Practice of the International Court, 1920-2005: Volume III: Procedure* (Leiden: Martinus Nijhoff 2006) at 1674] While the Court may receive unsolicited written statements from NGOs, it does not notify NGOs of the opportunity to submit. Only states or organizations of states, per Article 66, are so notified. [Rosenne, at 1672-1673] Moreover, Palestine could hardly be characterized as an "international organization," so even if the Hoover letter were correct that invitations may be sent to NGOs, the invitation to Palestine could not have fallen within this category. To the contrary, the invitation to Palestine could have been issued only on the premise that Palestine is a state. The Court clearly treated Palestine as a state.

The Hoover letter makes one other point to try to show that the Court's invitation was not based on Palestine statehood. The letter puts its argument thus: "Although Palestine was allowed to participate in arguments before the ICJ, it was not as a State. Indeed the court referred to its observer status at the United Nations." The Hoover letter thus seeks to juxtapose "state" to "observer," implying that the Court, by calling Palestine a UN "observer" put it in a category other than "state." As indicated, however, Article 66 does not call for invitations to non-state entities. The Court referred to Palestine's observer status, along with its having co-sponsored the resolution requesting an advisory opinion, as a way of providing a rationale for its invitation. The Court did not refer to Palestine as an observer in order to distinguish it from a state.

The Hoover letter recounts that several courts in the United States have decided, in cases in which the status of Palestine was at issue, that Palestine was not a state. The letter points to the rationale of these decisions as being that Palestine did not satisfy the Montevideo criteria. The letter fails to point out that these courts uniformly overlooked the fact that Palestine's territory was under belligerent occupation. Their decisions were simply in error on this basic issue.

The Hoover letter points out that when the PLO applied in 1989 for membership for Palestine in the World Health Organization and UNESCO, those organizations decided to defer action. The letter takes these deferrals as evidence that Palestine is not a state. The letter fails to point out the argumentation in these two organizations when the Palestine application was being considered. The United States threatened financial reprisals that might have led to the demise of the organizations. The US Congress passed legislation saying that no US funds could go to any international organization that admitted Palestine. The question of Palestine's statehood did receive mention, but the overwhelming reason for the deferrals was financial.

The Hoover letter mentions as well the Swiss Government's decision not to accept as valid the ratification documents that Palestine tendered, also in 1989, for the Geneva conventions of 1949. That episode signified little in regard to Palestine's statehood, being an act by a single government, which happened to be the depositary

body for these conventions. Moreover, the Swiss Government did not say that it was declining on the ground that Palestine was not a state. Rather, it said that the UN General Assembly was actively addressing the issue, as it was at that period. The Swiss Government said that it considered that that forum should decide the matter.

The Hoover letter makes much of the split of authority between the West Bank and Gaza. To show a Palestine failure on the Montevideo criteria, it says that "the PA has neither internal nor external control over the Gaza territory," and that Gaza is controlled by Hamas, which "openly opposes the authority of the PA." Framing the issue in this fashion mis-construes what is at stake. First, the issue is not whether the "PA" is a state. The "PA," as already indicated, is a governing authority, not a "state." If there is a state, it is "Palestine," not the "PA." Second, the split in authority between the West Bank and Gaza is not relevant to the question of Palestine statehood. Despite the animosity between the governing authorities in the two sectors, the two do not claim to be separate in terms of statehood. Hamas has not sought to represent Palestine at the international level but acquiesces in this activity being conducted by the PLO.

Finally, the Hoover letter challenges the validity of the Palestine declaration on the grounds that it was filed by the PA, whereas the entity that represents the Palestinian people at the international level is the PLO. The PLO was declared to be the government of Palestine in the 1988 Palestine declaration. The PA was set up by the PLO in 1993 to administer territory on the basis of the Oslo agreements. It matters not which one submits a document of this sort. The Palestine declaration to the ICC implicates issues that the PNA, in its governance role, might handle, such as the rendition of suspects to the custody of the ICC. It would be the PNA that would need to interact with the ICC at a practical level.

Conclusion

In their discussions of Palestine statehood, the authors of the four submissions seek in a variety of ways to negate Palestine statehood. But they omit facts inconsistent with their opinion. They also, in my view, misconstrue the applicable law. They provide no valid arguments against the proposition that Palestine is a state.