To: Office of the Prosecutor, International Criminal Court
From: John Quigley
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As I have continued to explore the issue of Palestine statehood, I have become aware that that views contrary to those I expressed in the piece that I sent recently are reflected in the 2006 book, THE CREATION OF STATES IN INTERNATIONAL LAW (J. Crawford). In my opinion, the analysis in that book reflects serious errors of analysis, in particular in regard to four issues. It occurs to me that it may be helpful to identify these issues. It is in that spirit that I seek the Office's indulgence in regard to the two pages that follow.

1. I suggested that there is broad recognition of Palestine as a state in the international community. THE CREATION OF STATES IN INTERNATIONAL LAW acknowledges that Palestine was recognized by over a hundred states but says that "it has never commanded anything like the level of quasi-unanimous support that would be required to establish a particular rule of international law to the effect that Palestine is a State." THE CREATION OF STATES IN INTERNATIONAL LAW cites as authority [note 247] the phrase "the vast majority of the members of the international community" from the advisory opinion of the International Court of Justice in *Reparation for Injuries Suffered in the Service of the United Nations* [p. 438, citing *Reparation*, 1949 ICJ at 185.] I have argued that there is in fact "quasi-unanimous support" for a Palestine state, but I do not think that such is required, and the citation to the *Reparation* case does not substantiate that view. The phrase quoted from the *Reparation* case has nothing to do with recognition of states. The issue before the ICJ was not recognition of a state but the status of the United Nations, and whether it was a legal personality that could bring a legal claim. The UN mediator had been assassinated in Jerusalem, and the question was whether the UN could bring a claim against Israel. The Court used the phrase "the vast majority of the members of the international community" to describe the states that brought the United Nations into being. The sentences in which this phrase appears read: "Accordingly, the question is whether the Organization has capacity to bring a claim against the defendant State to recover reparation in respect of that damage or whether, on the contrary, the defendant State, not being a member, is justified in raising the objection that the Organization lacks the capacity to bring an international claim. On this point, the Court's opinion is that fifty states, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective legal personality, and not merely personality recognized by them alone, together with capacity to bring international claims" [1949 ICJ at 185]. The Court's use of this phrase thus has no relevance to the issue of how many states are required for recognition of a state.

2. I cited UN General Assembly Res. 43/177 as representing significant international consensus that Palestine is a state. THE CREATION OF STATES IN INTERNATIONAL LAW [pp. 440-442] analyzes Res. 43/177 from the perspective of whether the General Assembly has the authority to recognize states [pp. 440-441]. The question of the General Assembly's authority, however, is not the relevant consideration. What is relevant is that

104 states took a position that a declaration of Palestine statehood was justified, and that 44 others (the abstainers) did not take a position that it was not justified.

3. I suggested that, during the mandate period, sovereignty rested with the population of Palestine and that Palestine was a state. THE CREATION OF STATES IN INTERNATIONAL LAW says that during the mandate period Palestine constituted a self-determination unit entitled to statehood but that "the people of Palestine were not then 'sovereign' with respect to their territory." [p. 428]. THE CREATION OF STATES IN INTERNATIONAL LAW does not, however, explain this conclusion, and its only substantiation is a citation to another author [at note 206]. Its conclusion is contradicted by a position taken at p. 427, where it is stated that Israel came into existence by secession from Palestine. If Israel was formed by secession from Palestine, then Palestine must have been a state. Secession can only be from a state. THE CREATION OF STATES IN INTERNATIONAL LAW refers to secession as separation "from a State" [p. 388] and defines secession as "the creation of a State by the use or threat of force without the consent of the former sovereign" [p. 375]. As regards secession by Israel, the only possible "former sovereign" was Palestine.

4. THE CREATION OF STATES IN INTERNATIONAL LAW states that assertion of Palestine statehood is inconsistent with Israel-PLO agreements that followed the 1993 Declaration of Principles (Oslo). It refers to an assertion of Palestine statehood as a "unilateral action" and states that the "parties have agreed that unilateral action must not be taken in the meantime to change the status quo" [p. 448]. In substantiation of this view, the Quartet Performance-Based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict is cited, without citation to any particular provision of the Roadmap. Further substantiation is said to be provided by the ICJ in its advisory opinion *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 ICJ 136, with citation to paragraph 162 of the advisory opinion. The characterization of an assertion of Palestine statehood as "unilateral action" is, however, inaccurate. The assertion of Palestine statehood does not change the status quo, since Palestine statehood was asserted prior to commencement of the Oslo process. Moreover, the post-Oslo agreements specifically reserved to the parties their positions on basic issues like status: "Neither Party shall be deemed, by virtue of having entered into this Agreement, to have renounced or waived any of its existing rights, claims or positions." [Interim Agreement on the West Bank and the Gaza Strip, 28 September 1995, Article 31(6)]. The Quartet Roadmap says nothing that would preclude an assertion of Palestine statehood. It identifies, in fact, the following as an action that the Quartet members are to undertake: "Quartet members promote international recognition of Palestinian state, including possible UN membership." The ICJ, in paragraph 162 of its advisory opinion, said nothing to suggest that an assertion of Palestine statehood is unlawful. In the sentences of paragraph 162 to which THE CREATION OF STATES IN INTERNATIONAL LAW refers, the ICJ stated: "The Court would emphasize that both Israel and Palestine are under an obligation scrupulously to observe the rules of international humanitarian law, one of the paramount purposes of which is to protect civilian life. Illegal actions and unilateral decisions have been taken on all sides, whereas, in the Court's view, this tragic situation can be brought to an end only through implementation in good faith of al1 relevant Security Council resolutions, in particular resolutions 242 (1967) and 338 (1973)." The ICJ did not specify

what "unilateral decisions" it had in mind, but the implication is that the ICJ was referring to decisions relating to the implementation of humanitarian law. In sum, THE CREATION OF STATES IN INTERNATIONAL LAW provides no reason to conclude that the assertion of Palestine statehood is inconsistent with any international undertaking.