ICC Jurisdiction over Acts Committed in the Gaza Strip

Article 12(3) of the ICC Statute and Non-state Entities

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Abstract

On 21 January the Palestinian Minister of Justice lodged with the ICC Registrar a 'Declaration Recognizing the Jurisdiction of the International Criminal Court' over acts committed on the territory of Palestine since 2002. This article concerns three issues regarding the admissibility of this declaration, all of which are linked to the question of statehood. It first argues that the ICC Prosecutor may not assume the existence of a Palestinian state because the Palestinians themselves do not make a claim to that effect. It then examines whether under a purposive interpretation of Article 12(3), declarations should also be admitted from quasi-states. Finally, it examines the consequences of the ICC Prosecutor engaging in questions concerning statehood and recognition.

1. Introduction

On 27 December 2008, Israel opened a three-week long military offensive in the Gaza Strip ('Operation Cast Lead').[1] During that period, Israel carried out

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1 The applicability of Art. 12(3) ICCSt. to the Palestinians has been discussed previously as a theoretical question: W. Schabas, *Introduction to the International Criminal Court* (3rd edn., Cambridge: Cambridge University Press, 2007), at 81.

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over 2,360 air strikes over Gaza,[2] as well as ground assaults. These attacks left 1,300 Palestinians dead and more than 5,000 wounded, a third of them children.[3] At the same time, Hamas and its associates bombed Israeli territory with 617 rockets and 178 mortar shells,[4] causing a total of three civilian fatalities, 182 wounded, and 584 persons suffering from shock and anxiety syndrome.[5] Nine Israeli soldiers were killed inside the Gaza Strip.[6]

The conflict was followed by numerous allegations of violations of the laws of armed conflict on the part of both Israel and Hamas,[7] and by calls to determine and enforce the responsibility for these violations, of state actors, non-state entities and individuals.[8] Most prominently, a United Nations Fact

2 D. Macintyre and K. Sengupta, 'Civilian casualties: Human rights groups accuse Israelis of war crimes', *The Independent on Sunday*, 15 January 2009, available online at http://www.independent.co.uk/news/world/middle-east/civilian-casualties-human-rights-groups-accuse-israelis-of-war-crimes-1366727.html (visited 15 December 2009).

3 Briefing to the UN Security Council based on data from Palestinian Ministry of Health, by Under-Secretary-General Holmes, UN Doc. S/PV. 6077, 27 January 2009, at 2.

4 Israel Ministry of Foreign Affairs, The Operation in Gaza — Factual and Legal Aspects, July 2009, available online at http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Terrorism+and+Islamic+Fundamentalism-/Operation.in.Gaza-Factual.and.Legal.Aspects.htm (hereafter 'Israel Ministry of Foreign Affairs, The Operation in Gaza), § 61 (visited 15 December 2009).

5 Data provided by the Israeli Ministry of Foreign Affairs, available online at http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Hamas+war+against+Israel/Israel.strikes.back.against.Hamas.terror.infrastructure.Gaza.27-Dec-2008.htm#statements (visited 15 December 2009). Israel justifies its action by reference to the continuous attacks from the Gaza Strip on civilian communities in Israel. In 2008 alone, nearly 3,000 rockets and mortars were fired at Israeli civilian targets, Israel Ministry of Foreign Affairs, The Operation in Gaza, *supra* note 4, § 3.

6 http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Hamas+war+against+Israel/IDF.soldiers.killed.Operation.Cast.Lead.htm (visited 15 December 2009).

7 E.g. UN Doc. S/PV.6061, 6 January 2009, and UN Doc. S/PV.6061 (Resumption 1), 7 January 2009; Statement by 31 international lawyers, 'Israel's bombardment of Gaza is not self-defence — it's a war crime', *The Sunday Times*, 11 January 2009, available online at http://www.timesonline.co.uk/tol/comment/letters/article5488380.ece (visited 15 December 2009); Israel Ministry of Foreign Affairs, The Operation in Gaza, *supra* note 4, 52–76; Human Rights Watch, 'Q&A: Accountability for Violations of International- Humanitarian Law in Gaza', 6 February 2009, available online at http://www.hrw.org/en/news/2009/02/06/qa--accountability-violations-international-humanitarian-law-gaza (visited 15 December 2009); Amnesty International, 'Growing calls for investigations and accountability in Gaza conflict', 14 January 2009, available online at http://www.amnesty.org/en/news-and-updates/news/growing-calls-investigations-and-accountability-gaza-conflict-20090114 (visited 15 December 2009).

8 General Assembly Demands Full Respect For Security Council Resolution 1860, UN Doc. GA/10809/Rev. 1, 16 January 2009 (Statement of Bolivia), available online at http://un.org/News/Press/docs/2009/ga10809.doc.htm (visited 15 December 2009); Human Rights Watch, 'Israel/Gaza: International Investigation Essential', 27 January 2009, available online at http://www.hrw.org/en/news/2009/01/27/israelgaza-international-investigation-essential (visited 15 December 2009); sixteen international lawyers in a letter entitled 'Find the truth about the Gaza war', 16 March 2009, available online at http://www.amnesty.org.uk/news.details.asp?NewsID=18109 (visited 15 December 2009); Amnesty International, 'Evidence of misuse of US-weapons reinforces need for arms embargo', 23 February 2009, available online at http://www.amnesty.org/en/for-media/press-releases/israeloccupied-palestinian-

Finding Mission on the Gaza Conflict appointed by the Human Rights Council[9] concluded in a September 2009 report (the 'Goldstone Report') that both the Israeli military and Palestinian armed groups had violated international humanitarian law by indiscriminately and intentionally targeting civilians.[10] Of the various enforcement mechanisms capable of responding to violations of the laws of war, international criminal law and recourse to the International Criminal Court specifically have been most forcefully advocated. The Goldstone Report called on the Security Council to demand of both Israel and the relevant authorities in the Gaza Strip to conduct good faith investigations that are independent and in conformity with international standards; and, if those are not undertaken, to refer the situation in Gaza to the ICC Prosecutor.[11] It also recommended invocation of state responsibility pursuant to the Fourth Geneva Convention. The Human Rights Council has endorsed the Mission's recommendations and called upon all concerned parties, including United Nations bodies, to ensure their implementation.[12]

On 21 January 2009 the Palestinian Minister of Justice lodged with the ICC Registrar a 'Declaration Recognizing the Jurisdiction of the International Criminal Court'.[13] The declaration, signed by the 'Government of Palestine' on 'Palestinian National Authority' (PNA) letterhead,[14] provides:

> In conformity with Article 12, paragraph 3 of the Statute of the International Criminal Court, the Government of Palestine hereby recognizes the jurisdiction of the Court for the

territories-evidence-misuse-us-weapons-reinfo (visited 15 December 2009); 'ACRI and Organizations: Investigate Israel's Attacks on Civilians', 20 January 2009, available online at http://www.acri.org.il/eng/story.aspx?id=602 (visited 15 December 2009); The ICC Prosecutor has received over 210 appeals from Palestinians and NGOs to investigate the Israeli–Palestinian conflict, Interview with Luis Moreno-Ocampo, ICC Prosecutor, on the *Riz Khan* show, 19 March 2009, Aljazeera Television, available online at http://english.aljazeera.net/programmes/rizkhan/2009/03/200931984142361861.html (visited 15 December 2009). These include complaints predating the Gaza Conflict, RNW International Justice, 'ICC starts analysis of Gaza war crimes allegations', 3 February 2009, available online at http://www.rnw.nl/internationaljustice/icc/theicc/090203-ICC-Gaza (visited 15 December 2009).

9 Human Rights Council Resolution S-9/1 on the Grave Violations of Human Rights in the Occupied Palestinian Territory, Particularly due to the Recent Israeli Military Attacks Against the Occupied Gaza Strip, UN Doc. A/HRC/S-9/L.1, 12 January 2009.

10 Report of the United Nations Fact Finding Mission on the Gaza Conflict, UN Doc. A/HRC/12/48, 25 September 2009 (hereafter 'Goldstone Report'), §§ 1886, 1891, 1921, 1950.

11 Goldstone Report, *supra* note 10, § 1969.

12 Human Rights Resolution S-12/1, The human rights situation in the Occupied Palestinian Territory, including East Jerusalem, UN Doc. A/HRC/RES/S-12/1 B, 16 October 2009, § 3.

13 Declaration recognizing the Jurisdiction of the International Criminal Court, available online at http://www.icc-cpi.int/NR/rdonlyres/4F8D4963-EBE6-489D-9F6F-1B3C1057EA0A/279764/20090122PalestinianDeclaration.pdf (visited 15 December 2009).

14 The Independent Fact Finding Committee appointed by the League of Arab States (hereafter 'Arab League Committee') criticized the ICC for exceeding its authority by 'changing the Government of Palestine into the PNA' in its response to the declaration. Given the fact that the declaration was submitted on PNA letter head, this assertion is puzzling. Report of the Independent Fact Finding Committee on Gaza: No Safe Place, Presented to the League of Arab States, 30 April 2009, § 594, available online at http://www.arableagueonline.org/las/picture_gallery/reportfullFINAL.pdf (visited 15 December 2009).

purpose of identifying, prosecuting and judging the authors and accomplices of acts committed on the territory of Palestine since 1 July 2002.

The present article examines the capacity of the Palestinian declaration to provide the ICC with jurisdiction based on a territorial nexus, focusing on three issues regarding the admissibility of the Palestinian declaration under Article 12(3), all of which are linked to the question of statehood. Following a brief review in part 2 of the need to rely on territorial jurisdiction, part 3 addresses the question whether the Palestinian declaration can be admitted[15] as that of a state. There is already a wealth of scholarly literature on the question whether a state of Palestine merits recognition, in particular by reference to the factual requisites for statehood and to the right to self-determination.[16] This article does not purport to arbitrate among the various views; it argues that regardless of the normative arguments regarding the existence and recognition of a Palestinian state,[17] the ICC Prosecutor may not assume the existence of a Palestinian state because the Palestinians themselves do not make a claim to that effect. Part 4 examines a more nuanced question: whether under a purposive interpretation of Article 12(3), declarations should also be admitted from quasi-states such as the PNA. Part 5 focuses on institutional considerations, examining the consequences of the ICC Prosecutor engaging in questions concerning statehood and recognition. A separate issue, not analysed here, is the geographical areas which are

15 The present article uses the term 'admission' to distinguish admissibility of the declaration from acceptance of jurisdiction within the declaration.

16 E.g. A. Boyle, 'Creation of the State of Palestine', 1 *European Journal of International Law* (*EJIL*) (1990) 301, and response by J. Crawford, 'The Creation of the State of Palestine: Too Much Too Soon?' 1 *EJIL* (1990) 307; J. Quigley, 'Competing Claims to the Territory of Historical Palestine', 59 *Guild Practitioner* (2002) 76. The same arguments are essentially reproduced in his 'the Palestine Declaration to the International Criminal Court: The Statehood Issue', 35 *Rutgers Law Record* (2009) 1 (hereafter 'Quigly, *ICC*'); J.L. Prince, 'The International Legal Implications of the November 1988 Palestinian Declaration of Statehood', 25 *Stanford Journal of International Law* (1989) 681; S.R. Silverberg, 'Diplomatic Recognition of States *in Statu Nascendi*: The Case of Palestine', 6 *Tulsa Journal of Comparative and International Law* (1998–1999) 21; K.M. McKinney, 'The Legal Effect of the Israeli–PLO Declaration of Principles Toward Statehood for Palestine', 18 *Seattle University law Review* (1994–1995) 93; P.J.I.M. de Waart, 'Self-Rule Under Oslo II: The State of Palestine Within a Stone's Throw', 8 *Palestinian Yearbook of International Law* (1994–1995); T. Becker, 'Self-Determination in Perspective: Palestinian Claims to Statehood and the Relativity of the Right to Self-Determination', 32 *Israel Law Review* (1998) 301; Y.Z. Blum, A. Gerson, J. Quigley and I. Nakhleh in 'Self Determination: The Case of Palestine', 82 *Proceedings of the American Society of International Law* (1988) 335. M.G. Kohen, 'Introduction' in M.G. Kohen (ed.), *Secession, International Law Perspectives* (Cambridge: Cambridge University Press, 2006) 1, at 13; J. Goldsmith, 'The Self-Defeating International Criminal Court', 70 *University of Chicago Law Review* (2003) 89, at 94, ft 18, considers the question briefly specifically in the context of Art. 12(3) ICCSt. To the issues raised traditionally, one may add certain challenges that have emerged in the last few years, such as the legal and practical consequences of Israel's disengagement from the Gaza Strip, and the implications of the political rift between the West Bank and the Gaza Strip.

17 Cf. Quigley, *ICC*, *supra* note 16, at 9, who considers the question of statehood in the same context as the present article but only relates to that context in the penultimate paragraph of the conclusion.

covered by the declaration, and specifically whether the territory of 'Palestine' that is governed by the PNA extends to the Gaza Strip.[18]

While this article concludes that the ICC Prosecutor should not admit the declaration as a basis for jurisdiction, it should be emphasized that ICC proceedings are only one element in the international community's endeavour to secure accountability for violations of international law, in general and with respect to the Gaza Strip specifically. The ICC is not the only mechanism for accountability, even if it is the most structured and visible one. Moreover, its mandate is by definition limited to individual conduct, and does not extend to violations of the laws of armed conflict that do not amount to criminal acts.[19] In the circumstances, accountability could more usefully be pursued through other mechanisms, such as the exercise of universal jurisdiction by individual states, effective incentives for involved parties to enforce the law within their domestic systems, and invocation of state responsibility.

2. Preconditions for ICC Jurisdiction

The ICC may only exercise its jurisdiction over genocide, crimes against humanity and war crimes if the accused is a national of a state which has accepted the jurisdiction of the ICC; if the crime took place on the territory of a state which has accepted ICC jurisdiction; or if the United Nations Security Council refers the situation to the Prosecutor, irrespective of the nationality of the accused or the location of the crime.[20] In the circumstances of the Gaza Strip, none of the preconditions for ICC jurisdiction (a territorial or nationality nexus, or a Security Council referral) are met in a manner which offers a straightforward basis for ICC jurisdiction. Indeed, according to media reports the ICC Prosecutor has initially announced that he was unable to open investigations into alleged Israeli violations of the laws of armed conflict during the Gaza Conflict, because the Court lacked jurisdiction.[21] The nationality nexus is not directly applicable with respect to Israelis, because Israel is not party to

18 On the one hand, there is an international commitment to the unity of the two areas as a single political entity. On the other hand, since June 2007, when Hamas took over control of the Gaza Strip, the PNA has lost control over that area. One may argue that a state of Palestine asserted by the PNA must be limited to the West Bank; alternatively, if the Gaza Strip constitutes a sovereign state, its government is not the PNA but the Hamas, which has not lodged any declaration with the ICC. Resolution of this issue requires an analysis of the relationship between the PNA and Hamas, which is outside the scope of this article.

19 See 'OTP response to communications received concerning Iraq', available online at http://www.icc-cpi.int/NR/rdonlyres/04D143C8-19FB-466C-AB77-4CDB2FDEBEF7/143682/OTPletter.to.senders.re.Iraq.9.February_2006.pdf (visited 15 December 2009).

20 Acceptance can be effected by accession to the ICC Statute or by an ad hoc declaration, Arts 13, 12(3) ICCSt.

21 RNW International Justice, *supra* note 8; M. Simons, 'Palestinians Press for War Crimes Inquiry on Gaza' *New York Time*, 11 February 2009, at A13, available online at http://www.nytimes.com/2009/02/11/world/middleeast/11hague.html?r=1 (visited 15 December 2009).

the ICC Statute.[22] It may be possible to bring Israeli nationals before the ICC if they are also nationals of other states that are parties to the ICC Statute.[23] Even the fact that a person is a national of one state when the alleged crime was committed in his or her capacity as an organ of another state is no bar to jurisdiction, in view of the distinction underlying international criminal justice between individual and state responsibility.[24] Nonetheless, reliance on multiple nationalities as the basis for initiating an investigation raises various challenges and difficulties. One is whether the fact that an individual in a particular conflict is a national of an ICC state party means that the Court now has jurisdiction to investigate the entire 'situation'.[25] Another is whether the nationality nexus hinges on a formal or on an effective link with a second state of nationality.[26] Particularly with respect to members of military forces, the link with the state party may be only formal: service in the military forces of another state ordinarily accompanies permanent residence in it (or even the possession of its nationality) and allegiance to it, which often run counter to an effective link with the state of nationality. Accordingly, multiple nationality may afford a nexus only if a formal link is considered sufficient. A third problem is that prosecutions based on individuals' multiple nationality are likely to be available randomly rather than according to the gravity of the individuals' crimes. The 'interests of justice' might therefore suggest that the ICC Prosecutor should not give priority to investigating cases where jurisdiction is based on multiple nationality.[27] The practice of the ICC Prosecutor to date indicates a reluctance to rely on multiple nationality as a nexus in instances involving large contingencies of military and other persons who act on behalf of non-party states.[28]

22 On Israel's position towards the ICC see Y. Shany, 'The Entry into force of the Rome Statute: What are its implications for the State of Israel', 15 *Hamishpat* [in Hebrew] (2003) 28; R.J. Goldstone, 'Israel and the International Criminal Court', 15 *Hamishpat* [in Hebrew] (2003) 12; D.A. Blumenthal, 'The Politics of Justice: Why Israel Signed the International Criminal Court Statute and What the Signature Means', 30 *Georgia Journal of International and Comparative Law* (2002) 593.

23 According to the press, the ICC Prosecutor 'is considering' taking such a step against an Israeli reserve officer who is also a national of South Africa. D. Ephron, 'ICC Prosecutor may Charge Israeli with War Crimes', *Newsweek*, 21 September 2009, available online at http://blog.newsweek.com/blogs/wealthofnations/archive/2009/09/21/icc-prosecutor-may-charge-israeli-with-war-crimes.aspx (visited 15 December 2009).

24 See also D. Akande, 'The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits', 1 *Journal of International Criminal Justice* (*JICJ*) (2003) 618, at 634–635.

25 Art. 13 ICCSt.

26 Z. Deen-Racsmany, 'The Nationality of the Offender and the Jurisdiction of the International Criminal Court', 95 *American Journal of International Law* (*AJIL*) (2001) 606, at 611–612.

27 Art. 53(2)(c) ICCSt.

28 In February 2006 the ICC Prosecutor made public his reasons not to initiate investigations on the basis of the nationality nexus with respect to crimes allegedly committed on the territories of Iraq and Venezuela, both non-parties to the ICC Statute. 'OTP response to communications received concerning Iraq', *supra* note 19, and 'OTP response to communications received concerning Venezuela', available online at

Referral of the situation to the Prosecutor by the Security Council acting under Chapter VII of the UN Charter[29] is also an unlikely scenario: the United States, despite its gradual warming towards the ICC,[30] is likely to veto any attempt to pass the necessary resolution.[31] This is probably the background for the Fact Finding Mission's proposal that the General Assembly have recourse to Resolution 377(V), 'Uniting for Peace',[32] as a means of initiating criminal prosecutions, even though this approach is unprecedented. However, as a matter of UN law, the use of this Resolution to situations where there is no immediate urgency is controversial.[33] Moreover, it is difficult to see how it can be used for international criminal law purposes. The Resolution concerned situations where the Security Council fails to exercise its responsibility to maintain international peace and security due to aggression, breach of the peace or a threat to the peace.[34] Prima facie, this responsibility does not include prevention of impunity.[35] Finally, the Resolution authorizes the General Assembly to make recommendation to states on collective action.[36] This raises the question whether a referral made collectively should be regarded as multiple referrals or as a referral from an international organization, which the ICC Statute does not permit.

The territorial basis for jurisdiction, which requires acceptance of ICC jurisdiction by the state on the territory of which the alleged crimes were

http://www.icc-cpi.int/NR/rdonlyres/4E2BC725-6A63-40B8-8CDC-ADBA7BCAA91F/143684/OTP_letter_to_senders_re_Venezuela_9_February_2006.pdf (visited 15 December 2009).

29 Art. 13(b) ICCSt.

30 For a review of US policy towards the ICC see ASIL Independent Task Force, 'U.S. Policy Toward the International Criminal Court: Furthering Positive Engagement', March 2009, available online at http://www.asil.org/files/ASIL-08-DiscPaper2.pdf, at 5–17 (visited 15 December 2009).

31 JTA (Washington), 'White House: Official "misspoke" on Goldstone report', 23 September 2009, available online at http://jta.org/news/article/2009/09/23/1008097/us-pledges-to-quash-goldstone (visited 15 December 2009). Previously, the US did not oppose the referral of the situation in Sudan to the ICC (SC Res. 1593(2005), 31 March 2005). At the same time, the statement of the US Permanent Representative to the UN, *supra* note 7) does not offer much prospect for the US acquiescing in a referral of the Gaza Conflict to the ICC.

32 Goldstone Report, *supra* note 10, § 1971. The Arab League Committee also suggested that if the Security Council fails to refer the situation to the ICC, the League of Arab States should request the General Assembly to 'endorse Palestine's declaration', in a meeting constituted in terms of the Uniting for Peace Resolution, GA Res. 377(V)(A), 3 November 1950.

33 D. Zaum, 'The Security Council, the General Assembly and War: The Uniting for Peace Resolution', in V. Lowe, A. Roberts and J. Welsh (eds), *The United Nations Security Council and War* (Oxford: Oxford University Press, 2008) 155, at 160–161

34 GA Res. 377(V), *supra* note 32, § 1.

35 But see the International Criminal Tribunal for Rwanda stating that international peace and security cannot be said to be re-established adequately without justice being made, thus rejecting the claim that establishment of the ad hoc Tribunal was in excess of the Security Council powers under Chapter VII of the UN Charter. Decision on the Defence Motion on Jurisdiction, *Kanyabashi* (ICTR-96-15-T), Trial Chamber, 18 June 1997, § 27. This does not mean that any individual measure in the context of the international criminal tribunals is mandated under Chapter VII.

36 *Supra* note 32, § 1.

committed, does not provide a simple basis for ICC jurisdiction either.[37] The crimes are alleged to have been committed in the Gaza Strip, which is not under the sovereignty of any state presently party to the ICC Statute. The Palestinian declaration is an attempt to provide the territorial nexus necessary for jurisdiction. It invokes ICC Statute Article 12(3), which provides that where 'the acceptance of a State which is not a Party' to the Statute is required for the ICC to have jurisdiction over a crime, that state may accept the exercise of jurisdiction by the Court by lodging a declaration with the ICC Registrar. The purported acceptance of jurisdiction is not limited to acts committed during the December 2008–January 2009 conflict, but extends retroactively to 1 July 2002, the date of entry into force of the ICC Statute and the earliest date regarding which the Court may exercise jurisdiction. The prevalent view is that a declaration under Article 12(3) only provides jurisdiction but does not constitute a referral,[38] and must therefore be followed either by a referral by a state party or by the Prosecutor's initiation of an investigation *proprio motu*. The ICC Prosecutor responded to the Palestinian declaration by announcing that he 'will carefully examine all relevant 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 meets statutory requirements; whether the alleged crimes fall within the category of crimes

37 Neither Jordan nor Egypt, both of which had previous territorial links to the Palestinian territories, can be considered the territorial states. Jordan, an ICC state party, purported to annex the West Bank in 1950. Only two states have ever recognized this annexation. In 1988, Jordan renounced its legal and administrative claims to the West Bank (Jordan: Statement concerning Disengagement from the West Bank and Palestinian Self-Determination, 31 July 1998, 28 *International Legal Materials* (*ILM*) (1988) 1637). Reliance on a territorial nexus to Jordan is therefore weak because it is based on a disputed claim that has voluntarily been terminated 22 years ago. It may also be contrary to the peremptory obligation to respect the right of the Palestinians to self-determination within (at least) the West Bank and Gaza Strip (*East Timor* Case *(Portugal v. Indonesia)*, International Court of Justice, 30 June 1995, ICJ Reports (1995) 90, at 120, § 29; ILC Draft Articles on State Responsibility for Internationally Wrongful Acts, UN Doc. A/56/19 (2001), 113, commentary to Art. 40, § 5). Finally, the Jordan territorial link does not cover the Gaza Strip. The latter had been from 1948 until 1967 under Egyptian military rule. Egypt (not an ICC state party) held the Gaza Strip under occupation from 1948 to 1967, never claiming sovereignty over it. In an era of post-conflict state-building occupation, the notion that an occupying power as representing the interests of the population, including through delegation of jurisdiction to the ICC, is not unthinkable. But a leap of logic would be required to regard Egypt as the relevant occupying power rather than Israel, which is either the current occupant or the most recent occupant.

38 S.A. Williams and W.A. Schabas, 'Article 12', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (2nd edn., C.H. Beck, Hart, Nomos: München, 2008) 547, at 569 marginal 15; C. Stahn, M.M. El Zeidy and H. Olásolo, 'The International Criminal Court's Ad Hoc Jurisdiction Revisited', 99 *AJIL* (2005) 421, at 423. For a critique of this view see S. Freeland, 'How Open Should the Door Be — Declarations by Non-States Parties under Art. 12(3) of the Rome Statute of the International Criminal Court', 75 *Nordic Journal of International Law* (2006) 211, at 224.

defined in the Statute, and whether there are national proceedings in relation to those crimes'.[39]

Against this background, the potential significance of the Palestinian declaration under Article 12(3) becomes apparent. Yet since Article 12(3) speaks of a declaration by a *state* not party to the ICC Statute, prima facie, the declaration is inadmissible. The following analysis considers three aspects of this question.

3. Admission of the Palestinian Declaration as that of a Full-fledged State

Under a straightforward, literal interpretation of Article 12(3), for the Palestinian declaration to be admitted under Article 12(3) it must be regarded as having been issued by a state. In 1988 the PLO issued a proclamation from Algiers declaring the independence of the state of Palestine. According to the Palestinian Ministry of Foreign Affairs, 94 states have subsequently recognized the statehood of Palestine,[40] although as argued below, this was not recognition of an established Palestinian statehood. Palestine is a member state of the Organisation of the Islamic Conference[41] and the Non-Aligned Movement.[42] It participates in the Arab League on the same footing as member states, although its admission followed a special procedure to allow it to participate in the League's work 'until that country enjoys actual independence', since '[h]er existence and her independence among the nations can, therefore, no more be questioned *de jure* than the independence of any of the other Arab States'.[43]

The 1988 proclamation of independence had a profound political impact, but its legal significance should not be overstated. First, the proclamation appears to have been largely a symbolic gesture, as implied by the call 'upon the

39 ICC Office of the Prosecutor Press Release, 'Visit of the Minister of Justice of the Palestinian National Authority, Mr. Ali Khashan, to the ICC (22 January 2009)', 6 February 2009, available online at http://www.icc-cpi.int/menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/visist%20of%20the%20minister%20of%20justice%20of%20palestine?lan=en-GB (visited 15 December 2009). The ICC Prosecutor has announced that if he finds that he can investigate the Gaza situation on the basis of a territorial nexus, he will examine the conduct of both sides, interview with Luis Moreno-Ocampo, *supra* note 8. This statement is in line with Rule 44(2) ICC RPE, which is intended to prevent an interpretation of Art. 12(3) ICCSt., which allows a one-sided declaration aimed at the adversary while sheltering the declaring state. Williams and Schabas, *supra* note 38, at 559. In the circumstances, the problem does not seem to arise as the declaration is drafted in a general manner. For doubt as to the effectiveness of rule 44(2) see J. Goldsmith, *supra* note 16, at 92 ft 11.

40 http://www.pna.gov.ps/Government/gov/recognition_of_the_State_of_Palestine.asp (broken link).

41 Palestine has been a member of the OIC since the establishment of the organization in 1969, http://www.oic-oci.org/member_states.asp (visited 15 December 2009).

42 http://www.nam.gov.za/background/members.htm (visited 15 December 2009).

43 Pact of the League of Arab States, Annex on Palestine (emphasis added).

members of the Arab nation for their assistance in achieving its de facto emergence'.[44] More importantly, a proclamation of independence, even with limited recognition subsequently, does not suffice to create a state. While statehood is no longer exclusively a factual matter, it is still dependent primarily on fulfilment of factual requisites, namely effective governmental control over a population in a specified territory. Yet until 1994 at the earliest, the Palestinians did not fulfil the factual requisites of statehood, as they had no control over the territory they claimed.[45] Without even a minimum foundation of control, recognition of Palestinian statehood was or would have been premature and legally incorrect.[46]

Although there are precedents of recognition of statehood being extended on the basis of the right to self-determination before effective control was exercised by the aspirant government over the entire territory it claimed, in the other instances such early recognition either envisaged the attainment of effective control within the foreseeable future (Congo in 1960), or was extended when effective control was already being exercised over at least part of the territory claimed (Guinea-Bissau in 1973,[47] Bosnia and Herzegovina in 1992[48]). An exceptional case is that of Namibia, where the United Nations Council for Namibia (UNCN)[49] was appointed to govern Namibia despite the fact that the territory was wholly controlled by South Africa, and there was no expectation of a change of control in the then-foreseeable future. UNCN acceded to various treaties and joined certain international organizations on behalf of Namibia,[50] and issued Decree No. 1, prohibiting cooperation with South Africa in exploitation of Namibian natural resources.[51] Yet even UNCN, whose controversial status has never been judicially determined, did not assume any function premised on a fiction of effective control. In fact, Decree No. 1 was passed in order to minimize the consequences of South Africa's acknowledged exclusive effective control over Namibia. In short, the notion of statehood based exclusively on entitlement without realization of the factual criteria has not been accepted in international practice.[52]

In accordance with this principle, the majority of states responding to the Palestinian proclamation qualified their so-called recognition, referring to

44 Letter dated 18 November 1988 from the Permanent Representative of Jordan to the United Nations addressed to the Secretary-General, UN Doc A/43/827-S/20278, 18 November 1988, § 16.

45 O. Dajani, 'Stalled Between Seasons: The International Legal Status of Palestine During the Interim Period', 26 *Denver Journal of International Law and Policy* (1997) 27, at 48–49.

46 V. Lowe, *International Law* (Oxford: Oxford University Press, 2007), at 164.

47 N. MacQueen, 'Belated Decolonization and UN Politics against the Backdrop of the Cold War: Portugal, Britain, and Guinea-Bissau's Proclamation of Independence, 1973–1974', 8 *Journal of Cold War Studies* (2006) 29.

48 D.A. Raič, *Statehood and the Law of Self-determination* (The Hague: Kluwer Law International, 2002), at 414–415.

49 GA Res. 2248(S-V), 19 May 1967, GA Res. 2372(XXII), 12 June 1968.

50 Namibia was not admitted to the UN until South Africa withdrew from its territory in 1990.

51 Decree No. 1 (1974), UN Doc. A/9624/Add.1.

52 J. Crawford, *The Creation of States in International Law* (2nd edn., Oxford: Oxford University Press, 2006), at 447–448.

Palestinian independence as a legitimate aspiration rather than an existing reality.[53] Contrary to popular contentions,[54] the UN has not recognized the state of Palestine as a state. Following the Algiers proclamation the General Assembly Resolution merely 'acknowledges the proclamation of the State of Palestine by the Palestine National Council on 15 November 1988', and substitutes the designation 'Palestine' for the designation 'Palestine Liberation Organisation' (PLO). It expressly stipulates that this change was 'without prejudice to the observer status and functions of the Palestine Liberation Organization within the United Nations system'.[55] The UN Secretariat's book of Permanent Missions to the United Nations lists 'Palestine' as an 'entity having received a standing invitation to participate as observer' in the work of the General Assembly.[56] While the PLO, in its designation as Palestine, enjoys a status that is higher than that of other non-state observers to the UN,[57] it remains the representative of a non-state entity.

Since the first transfer of autonomous government power to the Palestinians in 1994 they may have acquired sufficient control to substantiate a claim of effective control.[58] Here the normative aspect of statehood comes into play: statehood is a claim of right and not only of fact.[59] Even if the PNA has in fact acquired extensive control over the population in the territory, effective control and recognition cannot consolidate the statehood of an entity which does not claim such status.[60] Yet neither the PLO nor the

53 Dajani, *supra* note 45, at 60.

54 Quigley, *ICC*, *supra* note 16, at 4 and Boyle, *supra* note 16, at 302.

55 GA Res. 43/177, 15 December 1988, §§ 1, 3.

56 Permanent Missions to the United Nations No. 295, April 2006, last updated with ST/SG/SER.A/295/Add.5, 3 October 2006. For a detailed description of Palestine's status in the UN see Dajani, *supra* note 45, at 53–56.

57 The PLO's observer status, granted in GA Res. 3237(XXIX), 22 November 1974, was upgraded in GA Res. 43/160A, 9 December 1988, §§ 1, 2. The same privilege was only ever granted to SWAPO, in the same resolution. Palestine's rights were expanded in GA Res. 52/250, 7 July 1998. Palestine is invited under Rule 37 of the Security Council provisional Rules of Procedure and permitted to participate in Security Council debates with the same rights of participation as those conferred upon a UN member state which is not a member of the Security Council. M. Shaw, *International Law* (6th edn., Cambridge: Cambridge University Press, 2008), at 246. In the proceedings on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court, taking into account Palestinian's special status and that it was co-sponsor of the draft resolution requesting the advisory opinion, permitted Palestine to submit to the Court a written statement on the question within the time limit fixed for member states. It also permitted it to participate in the oral hearings. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Order of 19 December 2003, [2003] ICJ Reports (2003) 428, at 429. The OIC and the Arab League — clearly non-state entities — were later given the same permission, ICJ Press Releases Press Release 2004/1 (14 January 2004) and 2004/2 (22 January 2004), respectively.

58 But see Dajani, *supra* note 45, at 82–89, who rejects this proposition in so far as concerns the situation prevailing in 1997.

59 Crawford, *supra* note 52, at 211.

60 D.P. O'Connell, 'The Status of Formosa and the Chinese Recognition Problem', 50 *AJIL* (1956) 405, at 415; Restatement (Third) of the Foreign Relations Law of the United State, Section 201. Cf. Crawford, *supra* note 52, at 211 and Lowe, *supra* note 46, at 165, who see the absence of an

PNA[61] claims that a state of Palestine already exists. Instead, they continue to *demand* the establishment of a sovereign and independent state.[62] The agreements that the PLO has signed with Israel[63] and the rhetoric of the PNA all indicate that independence is regarded as a goal rather than a status already achieved.[64] This is more than a political stance; the Palestinians argued before the ICJ that as a matter of law, a state of Palestine does not yet exist, expressly stating that 'Israel and Palestine are not two States Members of the United Nations', that '[t]he people of Palestine have an unfulfilled right to self-determination',[65] and that the court is 'not asked to determine the boundaries of a *future* Palestinian State'.[66] That the Palestinians demand to exercise

unequivocal claim of statehood as the only bar to recognition of Taiwan as an independent state. Roth criticizes this approach both in principle and on factual grounds, indicating certain equivocal statements and practice on the part of the Taiwanese leadership. B.R. Roth, 'The Entity that Dare not Speak its Name: Unrecognized Taiwan as a Right-Bearer in the International Legal Order', 4 *East Asia Law Review* (2009) 91.

61 The term 'PNA' is not mentioned in any of the Israeli–PLO agreements. It is the term used by the Palestinians to indicate the collective of institutions which, as acknowledged by the Palestinians, were established in the framework of the agreements. Website of the Permanent Observer Mission of Palestine to the UN, available online at http://www.un.int/palestine/thepaintro.shtml (visited 15 December 2009). The relationship between the PNA and the PLO is a question which exceeds the scope of this article.

62 E.g. Palestine Liberation Organization, Negotiations Affairs Division, 2009 Negotiations Primer, at 12, available online at http://www.nad-plo.org/news-updates/magazine.pdf ('The PLO's primary goals in engaging in direct negotiations with Israel are … fulfilment of the Palestinian right to self-determination through the establishment of an independent and sovereign Palestinian state in the West Bank and Gaza Strip with East Jerusalem as its capital …'); A/63/PV.57, 24 November 2008, at 9, 11 ('Moreover, the Palestinian people and their leadership remain convinced that … the international community will ultimately fulfil its responsibilities by upholding international law and the Charter of the United Nations so as to achieve a peaceful settlement that will give our people the freedom for which they have waited so long and allow them to take their rightful place among the nations of the world …' and 'We also call for their help in realizing the Palestinian people's inalienable rights, including their right to self-determination and to their independent State of Palestine …').

63 Declaration of Principles on Interim Self-Government Arrangements, 13 September 1993, 32 *ILM* 1525 (1993); Agreement on the Gaza Strip and the Jericho Area, 4 May 1994, 33 *ILM* (1994) 622. Israeli–Palestinian Interim Agreement on the West Bank and the Gaza Strip, signed 28 September 1995, 36 *ILM* 557 (1997) (hereinafter 'Interim Agreement'); Dajani, *supra* note 56, at 90 notes that the Declaration of Principles and Interim Agreement elicited the support of the Palestinian population only insofar as they were transitional.

64 Quigley, *ICC*, *supra* note 16, at 7 argues that Israel's demand in 1993 that the PLO recognize it implied Israel's recognition of a Palestinian state, since only states may recognize others. Since an existing state does not require recognition from a new state (although Quigley does suggest (at 8–9) that post-1988 Palestine is identical to post-Ottoman Palestine, essentially claiming that the mandate territory constituted a state and disregarding events since 1948), Israel's demand had purely political objectives. It therefore makes no sense to attach any implicit legal significance to it. Israel's demand in 1993 was political in the same sense that today it demands that Hamas recognize its right to exist, without in any way implying that it is the government of a state in the Gaza Strip.

65 Both statements in *Legal Consequences of the Construction of a Wall (Advisory Opinion)*, Oral Proceedings CR 2004/1, 23 February 2004, § 22.

66 *Ibid.*, § 33 (emphasis added).

the right to self-determination is undeniable — but the demand itself towards an addressee apparently capable of enabling that exercise indicates that the Palestinians themselves are at least ambivalent as to whether they exercise the requisite territorial control, and at any rate do not yet wish to be regarded as independent. Ironically, pronouncing that a Palestinian state exists despite the absence of a Palestinian claim to this effect may even amount to a violation of the Palestinian right to self-determination, because it would impose a political status on the Palestinian people which they have not yet asserted.

One might argue that the deposit of the declaration is itself an implicit claim of statehood. However, claims to statehood cannot be inferred from statements or actions short of explicit declaration.[67] Moreover, the ambiguity of the Palestinian declaration precludes the conclusion that it implicitly asserts statehood. In particular, the term 'PNA' invokes a governmental apparatus which was established by an Israeli–PLO agreement, premised on the non-sovereignty of the PNA. Since this term acknowledges a non-state status, its use is irreconcilable with a claim to statehood.[68]

The absence of a Palestinian assertion of statehood as an already-established status is not surprising. Such an assertion at the present time might be interpreted internationally as a Palestinian acquiescence in the existing state of things vis-à-vis Israel, in particular as regards the breadth of territory claimed by Palestine and the right of Palestinian refugees to return to homes within Israeli territory. It may also weaken the Palestinian demands by making them a matter of post-conflict resolution between formally equal sovereign states rather than a condition for the resolution of the conflict on the basis of a legal entitlement to the exercise of self-determination. In the immediate term, an assertion of Palestinian statehood would also undermine the claim that Israel remains an occupying power in the Gaza Strip even after its disengagement.[69] Statehood and occupation are of course not mutually exclusive,

67 Crawford, *supra* note 52, at 211. As demonstrated by the Taiwanese applications for participation in the work of the UN, even a request to perform a function reserved for states can be drafted sufficiently vaguely so as to avoid a claim of statehood or even that the request itself implies a claim of statehood. Mainland Affairs Council, Position Paper Regarding the Referendum on Joining the United Nations Under the Name of Taiwan, 7 September 2007, available online at http://www.mac.gov.tw/english/english/un/02e.pdf (visited 15 December 2009).

68 The mention of the PNA alongside the 'Government of Palestine' may have been intended to enable the ICC Prosecutor to interpret the declaration as claiming statehood without being explicit about it. Alternatively, it may serve to emphasize that the PNA is the only legitimate executive arm of government for all of Palestine, and avoids any charge of illegitimacy that may be claimed if it is attributed in any way to Hamas.

69 Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967 UN Doc A/62/275, 17 August 2007, §§ 9–10; Goldstone Report, *supra* note 10, § 279; A/HRC/RES/S-12/1 C preambular § 5 (21 October 2009); S. Bashi and K. Mann, *Disengaged Occupiers: The Legal Status of Gaza*, Gisha, The Legal Center for Freedom of Movement, January 2007; Report of the Arab League Committee, *supra* note 14, § 15; I. Scobbie, 'An Intimate Disengagement: Israel's withdrawal from Gaza, the Law of Occupation and of Self-Determination' 11 *Yearbook of Islamic and Middle Eastern Law* (2004–2005) 3. The official Palestinian position is unclear. PNA President Mahmoud Abbas referred in his speeches in the UN exclusively to 'siege' and 'blockade' over the Gaza Strip, UN Doc A/63/PV.11,

in the sense that occupation of a state does not extinguish sovereignty despite the loss of effective control by the ousted sovereign.[70] But since the West Bank and Gaza Strip were not under independent sovereignty prior to their occupation by Israel, the claim can be, at best, that independence *emerged from under* occupation, namely that non-sovereign territory has become independent *in the face of* occupation.[71] Since both occupation and independence assume effective control by opposing parties, independence implies that the occupant has been repelled, even if only partially.[72] Thus, in order to claim independence the Palestinians must indicate some area over which they already exercise effective control to the exclusion of Israel. The likely candidate territory is the Gaza Strip, where Israel has far less control than in the West Bank. While the question whether the territory is occupied depends on objective facts rather than on the parties' claims, the Palestinians cannot argue that the territory is both independent and occupied at the same time. Indeed, some of the Palestinian arguments on why the declaration should be accepted as that of a state reportedly rely on Israel's denial of its status as an occupying power.[73] As noted earlier, a claim of statehood would also raise the question of the relationship between the West Bank and Gaza Strip, given that each area is controlled by a different authority.[74]

In conclusion, the main obstacle to regarding the Palestinian declaration of 21 January as a valid acceptance of ICC jurisdiction under ICC Statute Article 12(3) is the absence of a Palestinian claim of statehood, which is a prerequisite for the exercise of the power under Article 12(3).

4. Admission under Article 12(3) of a Declaration by a Quasi-state

Absence of a full-fledged state does not mean that the PNA has no international status.[75] For many years, it has been referred to as *in statu nascendi*,[76]

26 September 2008, at 38, S/PV.6061, 6 January 2009, at 5. But see also statements of Palestine referring to the Gaza Strip as occupied territory and to Israel as the occupying power in it in the context of the 2008–2009 offensive, e.g. S/PV.6201, 14 October 2009, at 6, S/PV.6216 (Resumption 1), 11 November 2009, at 20, 21.

70 Crawford, *supra* note 52, at 73.

71 For present purposes it does not matter whether this took place in 1988 or through the implementation of the Interim Agreement, *supra* note 63.

72 E.g. the case of Guinea-Bissau, MacQueen, *supra* note 47.

73 C. Philp and J. Hider, 'Prosecutor looks at ways to put Israeli officers on trial for Gaza "war crimes"', *Times Online*, 2 February 2009, available online at http://www.timesonline.co.uk/tol/news/world/middle.east/article5636069.ece (visited 15 December 2009).

74 *Supra* note 18.

75 Crawford, *supra* note 52, at 219. This is by no means a novel notion: R. Roxburgh (ed.), L. Oppenheim, *International Law: a Treatise*, Vol. I (3rd edn., London, New York: Longman, Green and Co., 1921), at 128, 133.

76 E.g. T. Giegrich, 'The Palestinian Autonomy and International Human Rights Law: Perspectives on an Ongoing Process of Nation-Building', in A. Shapira and

although the rights that attach to this status remain controversial. Against this background, the question arises whether the term 'state' in Article 12(3) should be interpreted more widely, so as to encompass quasi-states, namely territorial entities in which a governmental authority exercises control but which fall short of full-fledged statehood. For this, it must be demonstrated that the mechanism currently available under the ICC Statute, which reflects a carefully achieved balance of interests, is inadequate.

From a normative perspective, the question is whether there is indeed justification to single out ICC jurisdiction as a matter which justifies expansion of the term 'state'. The entire framework of international criminal law and of the ICC mechanism within it is premised on the interest in ending impunity being an international, communal one, rather than that of individual states.[77] Arguably, this communal interest should not be constrained, in the context of the ICC Statute and more specifically of Article 12(3), by limitations of the traditional meaning of statehood, which makes status subject to political, subjective stances on assertion and recognition of statehood. This is particularly true with respect to the Palestinian territories, which are unique in being neither claimed by any existing state nor recognized as belonging to one. Admission of an Article 12(3) declaration by the PNA would therefore not encroach on any state's sovereignty, and not jeopardize the basic tenets of the ICC mechanism.

It could be suggested by advocates of admitting the Palestinian declaration that expanding the interpretation of the term 'state' in Article 12(3) is the only way to prevent a vacuum in criminal accountability insofar as the territory of the PNA is concerned. But the Palestinian territories are not in a legal jurisdictional vacuum. The ICC provides a mechanism that can cover them, namely a referral by the Security Council. Had the situation been one where jurisdiction could not be granted to the Court under any existing mechanism, one might have argued that new, innovative measures are called for. But there is no such situation, in the Palestinian territories or elsewhere, since the Security Council's power to grant jurisdiction is territorially and personally unlimited. If the Council refuses to exercise its power, it is acting on the political prerogative which the ICC Statute drafters knew it to possess and have agreed to tolerate.[78] Moreover, the inapplicability of a statute of limitations to international crimes is designed to overcome political impediments to accountability in the short term. This leaves open, at least in theory, the possibility of a future referral by the Security Council. The fact that at a specific moment in time, with respect to a specific situation, none of the three bases for jurisdiction (territory, nationality or a Security Council referral) has successfully led to acquisition of jurisdiction does not mean that the rules on jurisdiction are inadequate, but merely demonstrates that the ICC is not omnipotent.

M. Tabory (eds), *New Political Entities in Public and Private International Law* (The Hague: Kluwer Law International, 1999) 183, at 195.

77 Preambular § 5 ICCSt.

78 M. Bergsmo and J. Pejić, 'Article 16' in Triffterrer, *supra* note 38, 595, at 598.

One might argue that given the political constraints on Security Council action, reliance on its powers to reject innovative alternatives is overly formalistic. But the ICC is nothing but a formal mechanism: it is aimed to fill an institutional gap so as to enable implementation of international legal norms that for the most part already exist under substantive international law. Its structure may have no other advantage over alternative ones other than having been agreed upon. Since it is this agreement that gives it legitimacy and enables it to fill the prior institutional gap, there is merit in a strict adherence to it.

To conclude, while it is not unthinkable that the meaning of the term 'state' for the purposes of the Article 12(3) be different than its meaning for the purposes of customary international law,[79] the ICC Statute should be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.[80] The object and purpose of the ICC Statute do not call for any digression from this ordinary meaning. It is worth noting that the status of the Palestinian territories as non-sovereign territory under control of a non-state entity never arose during the drafting of the Statute. Arguably, given the prominence of the territories in other aspects of the negotiations, the absence of territorial nexus can hardly be considered an oversight; rather, it seems that the drafters were content to accept the consequences of the limits of that nexus.

Doctrinally, to apply Article 12(3) to non-state entities it is essential that the entity in question be capable of fulfilling the functions envisaged by the Statute, in this case the delegation of criminal jurisdiction.[81] The requisites for this are possession of jurisdiction over criminal matters (a requisite also underlying the principle of complementarity) and delegation of that jurisdiction to the ICC.[82] The requirement of possessing jurisdiction should be read strictly, as it is not merely a procedural requirement but a substantive one. Without such jurisdiction, an entity might be unable later to cooperate with the ICC under Part 9 of the Statute. For example, one might ask how 'Palestine' would surrender a person arrested in the Gaza Strip to the court without the consent and cooperation of Israel which controls the borders of the Palestinian territories. Different opinions have been proffered as to whether the PNA enjoys criminal jurisdiction in the territories under its control, generally and specifically over Israelis. These usually focus on the regulation of the matter under the Israeli–PLO Interim Agreement[83] and on the validity

79 Kirgis, *supra* note 81, at 220. Kirgis' example, however, is unsatisfactory: he notes divergence of meaning between domestic US law and international law.

80 Vienna Convention on the Law of Treaties (adopted May 23, 1969, entered into force 27 January 1980) 1155 UNTS 331 (hereafter 'VCLT') Art. 31.

81 F.L. Kirgis Jr., 'Admission of "Palestine" as a Member of a Specialized Agency and Withholding the Payment of Assessments in Response' 84 *AJIL* (1990) 218, at 221.

82 H-P. Kaul, 'Preconditions to the Exercise of Jurisdiction', in A. Cassese, P. Gaeta and J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I (Oxford: Oxford University Press, 2002) 583, at 607–610, Akande, *supra* note 24.

83 Interim Agreement, *supra* note 63, Annex IV (Protocol Concerning Legal Affairs) Art. 1.

of this Agreement.[84] However, whether the Palestinians have criminal jurisdiction over the Gaza Strip for the purpose of delegating that jurisdiction to the ICC is not a matter which is governed by the Interim Agreement, which is a bilateral instrument, and its effect as against third parties is limited. Rather, the criminal jurisdiction of the PNA for the purpose of its delegation to a third party depends on the PNA's status in the territory, which in turn hinges on the objective status of the territory itself that is applicable *erga omnes*. The same holds true with regard to the delegation of jurisdiction. If Israel continues to be held an occupying power, it must be regarded as continuing to have criminal jurisdiction.[85] If, on the other hand, the occupation of the Gaza Strip has ended by virtue of Israel's disengagement from it in 2005, jurisdiction may well have passed into the hands of the Palestinians.[86] Yet since June 2007, it is also not the PNA who is in effective control over the Gaza Strip but Hamas. In short, the governmental authority lodging the declaration is not the one exercising criminal jurisdiction.

Reliance on the absence of sovereignty raises additional difficulties: in the West Bank, Israel does not claim sovereignty (except over East Jerusalem) but still claims and exercises criminal jurisdiction over Israelis. If the justification for expanding the term 'state' is the absence of competing claims, does it apply to a situation where there are (apparently, in light of the Palestinian declaration) competing claims of jurisdiction over criminal matters, but not of sovereignty? A similar question arises with respect to situations of competing

84 Under the Interim Agreement criminal jurisdiction over Israelis remains with Israel. The Interim Agreement was foreseen to exist for a period of five years, until an agreement was concluded on the permanent status of the West Bank and Gaza Strip. Such agreement was never concluded, leaving the continued validity of the Interim Agreement since 1999 a matter of controversy. Israel maintains that the Interim Agreement continues to govern relations between Israel and the PNA and therefore the PNA does not have jurisdiction over Israelis. Another view is that the Interim Agreement has expired by its own terms in 1999. This may imply either that Israel's occupation has then ended, provided that the PNA continued to exercise at least the powers and responsibilities allocated to it under the Agreement (E. Benvenisti, 'The Israeli–Palestinian Declaration of Principles: A Framework for Future Settlement' 4 *EJIL* (1993) 542, at 551), or that any powers and responsibilities delegated to the PNA reverted in 1999 to Israel: J. Singer, 'The Declaration of Principles on Interim Self-Government Arrangements: Some Legal Aspects' 1 *Justice* (1994) 4. This leads to a further question, whether at any time since 1999 Israel has ceased to be the occupying power in the Gaza Strip. According to a third view, even if the Interim Agreement continues to exist, Israel's disengagement from the Gaza Strip and its designation of the Gaza Strip as 'hostile entity' imply the lapse of its claim, under the Interim Agreement, to exclusive criminal jurisdiction over Israelis for acts committed within the Gaza Strip. By default, such jurisdiction now lies with the PNA, which may also delegate it to the ICC (Report of the Arab League Committee, *supra* note 14, §§ 601, 604). Since the Report emphasizes that Palestine is a state unconstrained by the Israeli–PLO agreements (§ 602), it is not clear why the question of its criminal jurisdiction was treated separately.

85 In this respect the view taken by the Arab League Committee is inconsistent, as it claims both that Israel continues to be the occupying power, and that the Palestinians have criminal jurisdiction.

86 See sources *supra note* 69; for a contrary view see Y. Shany, 'Faraway, So Close: the Legal Status of Gaza after Israel's Disengagement', 8 *Yearbook of International Humanitarian Law* (2005) 369.

claims of both sovereignty and jurisdiction which do not parallel each other. With respect to Kosovo, for example, Serbia claims sovereignty but concedes that it lacks territorial jurisdiction, which is in the hands of the UN through UNMIK.[87]

Re-interpreting the term in Article 12(3) may have a destabilizing effect on the interpretation of other provisions of the Statute applicable to states not parties, such as those concerning the principle of complementarity and challenges to jurisdiction.[88] There may also be a spillover effect to other terms used in the Statute. For example, it might be suggested that the term 'national' in Article 12(2)(b) includes permanent residents.[89] In the context of the laws of armed conflict the International Criminal Tribunal for Yugoslavia has already expanded the term, ruling that the term 'national' in Article 4 of the Fourth Geneva Convention should be interpreted as relating to ethnicity rather than to formal bonds and purely legal relations.[90] However, that interpretation was given 'within the context of the changing nature of the armed conflicts since 1945, and in particular of the development of conflicts based on ethnic or religious grounds'.[91] If the immense legal and political changes that the world has undergone during over half a century permit a purposive interpretation of the Fourth Geneva Convention, the same cannot yet be said for the ICC Statute, adopted only a decade ago. Moreover, unlike the Fourth Geneva Convention, the ICC Statute is a criminal code which is subject to principles of interpretation applicable within penal law. These call for a strict reading of terms, less amenable to policy considerations. An exceptionally liberal interpretation of the Statute that departs from this interpretative standard also risks deterring other states still not party to the ICC Statute from joining,

87 Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (*Request for advisory opinion submitted by the General Assembly of the United Nations*), International Court of Justice, CR 2009/24, statement by Serbia § 44.

88 Arts 17, 19 ICCSt. It would probably be unrealistic to suggest that a question on the meaning of 'state' would arise with respect to the right to accede to the Statute ICC (Art. 125(3) ICCSt.).

89 Indeed, there is a trend of increasing assimilation of permanent residents to nationals in terms of the state's human rights obligations towards them. At present this trend seems limited to domestic implementation. States still distinguish between nationals and permanent residents for purposes of international protection. One may argue in favour of such an assimilation along lines similar to those put forward with respect to states: permanent residence is a sufficiently stable relationship with a state so as to justify the imposition on the individual of certain obligations without putting the individual at an unexpected detriment. Moreover, since non-accession of a state to the ICC Statute does not confer immunity on its nationals, such residence-based jurisdiction does not encroach on the state of nationality's sovereignty. On the other hand, interpreting the Statute in this way would be clearly contrary not only to the ordinary meaning of the term but also to the intention of the drafters (VCLT, *supra* note 80, Art. 32).

90 Judgment, *Tadić* (IT-94-1), Appeals Chamber, 15 July 1999 § 168; Judgment, *Delalić et al.* (IT-96-21), Appeals Chamber, 20 February 2001, §§ 56–73.

91 *Ibid.*

making a novel interpretation of the term 'state' untimely as well as legally dubious.[92]

5. Institutional Considerations

Given the indeterminate status of the PNA, any pursuit of its declaration by the ICC Prosecutor would constitute at least an implicit recognition of the international status of that entity, whether as a full-fledged state or as a state for the purpose of Article 12(3). In addition to the substantive objections to admission of the Palestinian declaration under Article 12(3), there are also institutional considerations militating against such admission.

Although recognition of statehood is commonly regarded as a declaratory act and not as a constitutive requisite for statehood,[93] in borderline cases such as that of the PNA it may constitute a step toward consolidating an indeterminate general legal status.[94] For this reason, a determination by a legal body such as the ICC (the prosecutor and, at a later stage, the Court) that a state of Palestine exists (either generally or for the purpose of Article 12(3)) would carry significant weight.

Recognition of an entity as a state is a political act, traditionally within the prerogative of states. There is nothing in international law precluding an international actor such as the ICC Prosecutor or Chambers from extending recognition to a state, but such an act would constitute exceptional practice. An example occurred in July 2008 when the International Monetary Fund (IMF) received an application for admission to membership from the Republic of Kosovo. The IMF's management determined that Kosovo has seceded from Serbia to form a new independent state.[95] Subsequently, the IMF board of governors, where all IMF members (states) are represented, voted to invite Kosovo to join the IMF.[96] This case is unique in that it was the IMF

92 A matter which is no longer an issue with respect to the Geneva Conventions, in which membership is universal.

93 Opinion no. 1 § 1 of the Badinter Arbitration Committee, appendix to A. Pellet, 'The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples', 3 *EJIL* (1992) 178; T.D. Grant, *The Recognition of States: Law and Practice in Debate and Evolution* (Westport: Praeger, 1999) ch 2.

94 E.g. the cases of Croatia and Bosnia and Herzegovina, which were recognized while not yet in effective control over most of their territories. R. Rich, 'Recognition of States: The Collapse of Yugoslavia and the Soviet Union', 4 *EJIL* (1993) 36, at 49; D. Türk, 'Recognition of States: A Comment', 4 *EJIL* (1993) 66, at 69.

95 Statement on Membership of the Republic of Kosovo in the IMF, Press Release no 08/179, 15 July 2008, available online at http://www.imf.org/external/np/sec/pr/2008/pr08179.htm (visited 21 December 2009), Reuters, 'IMF recognizes Kosovo, begins to weigh membership', 15 July 2008, available online at http://www.reuters.com/article/newsMaps/idUSN1528175520080715. A request for an advisory opinion on the status of Kosovo is currently before the International Court of Justice, GA Res. 63/3, 8 October 2008.

96 Transcript of a Press Briefing by David Hawley, Senior Advisor, External Relations Department, International Monetary Fund, Washington, DC, 7 May 2009, available online at http://www.imf.org/external/np/tr/2009/tr050709.htm (visited 21 December 2009).

bureaucracy — and not member states, individually or collectively — which took a position on Kosovo's status, leaving to member states only the subsequent decision on admission. Ordinarily, however, international organizations and their organs do not recognize states. Their treatment of entities as states is only a consequence of the prior recognition by member states of those entities' statehood. Even individual states are reluctant to extend recognition of statehood when acting in their capacity as institutional organs. For example, when the PLO attempted to accede to the Geneva Conventions and their Additional Protocols on behalf of the state of Palestine, the depositary Swiss Federal Council informed the states parties that it was not in a position to decide whether the letter 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'.[97] It is noteworthy that the depositary in that event, the Swiss Federal Council, was undoubtedly capable and authorized to take a decision as to its own recognition of the applicant.[98]

Thus, if the Prosecutor, or later the Pre-Trial Chamber, determines that the Palestinian declaration fulfils the requirements of Article 12(3), they would be assuming an almost unprecedented competence, which incurs onto the political sphere which is the traditional prerogative of states. The converse would not be unprecedented: a determination that the PNA has not established itself universally as a state would not exceed the ordinary powers of a non-state actor.[99]

Importantly, unlike organs of other international institutional organs such as treaty depositaries, the ICC Prosecutor cannot refer the decision elsewhere. He alone is mandated with the power and responsibility to make the preliminary decision whether to initiate an investigation.[100] Although the Court will

97 Embassy of Switzerland, Note of Information sent to States parties to the Convention and Protocol, 13 September 1989. On 21 June 1989 the Swiss Federal Department of Foreign Affairs received a letter from the Permanent Observer of Palestine to the UN informing the Swiss Federal Council

> 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.

The 1989 attempt at accession is also indicative of the lack of international recognition of a Palestinian state at the time. This is particularly blatant when contrasted with the practice in the case of accession by the Provisional Government of Algeria in the 1960s, see S. Talmon, *Recognition of Governments in International Law* (Oxford: Clarendon Press, 1998), at 123–125.

98 According to a news report, the Palestinians are pursuing membership in the ICC through accession to the Statute. Ma'an News Agency, 'Justice minister: PA prepping for ICC membership', 17 October 2009, available online at http://www.maannews.net/eng/ViewDetails.aspx?ID=232793 (visited 15 December 2009). The report suggests that these efforts are made vis-à-vis the ICC Prosecutor. However, accession is done by deposition of the relevant instrument with the UN Secretary-General, who is the ICC Statute's depositary.

99 See *Loizidou v. Turkey (Merits)*, ECtHR, 18 December 1996, Reports of Judgments & Decisions 1996-VI 2216, § 23.

100 Arts 15(1), 15(4) and 42 ICCSt.

always make the final determination as to jurisdiction, even the Prosecutor's initial decision to investigate could be deemed an act of recognition, thereby politicizing the functions of his office. The Pre-Trial Chamber will have automatic power of judicial review over the Prosecutor's decision if the Prosecutor decides that the ICC has and should exercise jurisdiction. If the Prosecutor decides in the negative, the review by the Pre-Trial Chamber is dependent on a request by the state making the referral.[101] Should the PNA attempt to request such a review, the Pre-Trial Chamber would have to determine whether 'Palestine' constitutes a state capable of making a request for a review by the Pre-Trial Chamber.

With respect to recognition of statehood, the Assembly of States Parties (ASP) is a possible forum from which the ICC Prosecutor may wish to take guidance. In view of the administrative and managerial character of the specific tasks allocated to the ASP,[102] it is doubtful whether the drafters intended for this power to extend to political questions that have a direct effect on the jurisdiction of the Court, which has been so rigorously negotiated;[103] yet the ASP may engage in any function necessary or essential for the Court and consistent with the Statute.[104] The ASP also has authority to settle disputes between states parties as to interpretation or application of the Statute.[105] This may include interpretation of the term 'state' for the purpose of Article 12(3) or even recognition of statehood. How the ASP's decisions on such matters will affect the powers of the Prosecutor's and pre-Trial Chamber remains unclear.

It may be argued that the consequences of admission of the Palestinian declaration as that of a state should not be overstated. The direct effect of such admission would be only to grant jurisdiction to the ICC with respect to a specific situation. It would neither determine status for general purposes, nor even for other provisions of the ICC Statute. Interestingly, the concept of Palestinian statehood for a limited purpose was recently embraced by no other than Israeli courts: the Jerusalem District Court has in two cases enquired whether the PNA was recognized (by Israel) as a state for the purpose of state immunity, notwithstanding the clear absence of recognition by Israel of Palestinian statehood in general. Although the cases resulted in different conclusions both on the facts and on the courts' power to decide the issue of statehood (in one case, later confirmed by the Supreme Court, the Court ruled

101 Art. 53(3) ICCSt.

102 Art. 112(2) ICCSt. A notable exception is the transitional power in Art. 112(2)(a) ICCSt. to adopt recommendations of the Preparatory Commission, among which are proposals on aggression.

103 M.H. Arsanjani, 'The Rome Statute of the International Criminal Court; Exceptions to the Jurisdiction', in M. Politi and G. Nesi (eds), *The Rome Statute of the International Criminal Court, a challenge to impunity* (Aldershot: Ashgate, 2001) 49, at 50.

104 A. Bos, 'From the International Law Commission to the Rome Conference (1994–1998)', in Cassese, Gaeta and Jones, *supra* note 82, at 308.

105 Art. 119(2) ICCSt.

that it must defer to the determination by the executive whether the PNA is a state;[106] in the other, later reversed by the Supreme Court, it found that the PNA qualified as a state for the purpose of state immunity[107]), of interest is the willingness of the judges to engage in examination of the notion of 'statehood for the purpose of state immunity'.[108]

However, the notion that a determination by the ICC Prosecutor or Court can be isolated and restricted to the specific context of ICC territorial jurisdiction is largely illusory.[109] Statehood is for the most part a package deal. Where non-states have been granted rights and obligations which ordinarily attach only to states, this was usually not through ad hoc recognition or limited statehood but through express extensions of those rights and obligations to non-state entities[110] or through the gradual expansion of international law to non-state entities.[111] There are few and remote precedents of an entity being regarded under international law as a state for some purposes but not for others.[112] Thus, it would be naïve to expect that recognition by a legal organ of an international organization which brings together over half of the worlds' states would have no repercussions outside the immediate context in which such recognition was made.

A further argument against the Prosecutor undertaking a decision as to the status of the PNA is that this would create a precedent for use of the ICC as a forum from which non-state actors could publicly assert political independence from their parent states. It would be an invitation to aspirant entities of diverse types, such as Kosovo, Taiwan, South Ossetia, Abkhazia, Transdnistria, Somaliland and the Turkish Republic of Northern Cyprus, which have not managed to garner sufficient international support for a status they claim, to try to advance their goals through the ICC. Regardless of the prospects of success, the existence of a new, international forum which recognizes states by reference to non-classical considerations (i.e. criminal jurisdiction and capacity

106 *Norwich et al. v. the Palestinian Authority and Yasser Arafat*, Jerusalem District Court Civil Case 2538/00, Judgment, 30 March 2003, § 11, confirmed in *Palestinian Authority v. Dayan et al.*, Request of Right to Appeal 4060/03, High Court of Justice, Judgment, 17 July 2007, § 4.

107 *Elon Moreh College v. State of Israel*, Jerusalem District Court, Judgment on Civil Case Request 1008/06, 24 June 2006, § 12, reversed by *Elon Moreh College v. State of Israel et al.*, Judgment on Civil Appeal 5093/06, 6 August 2008.

108 The possibility of granting immunity to a 'political entity that is not a state' has since been made available in the 2008 Foreign States Immunity Law, Art. 20.

109 M.R. Brubacher, 'Prosecutorial Discretion within the International Criminal Court', 2 *JICJ* (2004) 71, at 83.

110 E.g. Art. 305(1) of United Nations Convention on the Law of the Sea, Art. XII(1) of the Agreement establishing the WTO.

111 Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Tadić* (IT-94-1), Trial Chamber, 2 October 1995, § 70 ('an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State').

112 Examples of exceptions were 'A' Mandated territories which were treated as states for the purpose of nationality but were much less certainly states for other purposes. The Free City of Danzig was a state for the purposes of Art. 71(2) of the Rules of the Permanent Court, but whether it was a state for all purposes has been doubted, Crawford, *supra* note 52, at 31.

to delegate it to the ICC) invites its abuse. For example, if crimes were committed in Kosovo by nationals of states not parties to the ICC Statute, could the Prosecutor or Court rely on a Kosovar declaration under Article 12(3)?[113] Similarly, Polisario, the internationally recognized representative of the Saharawi people[114] and governing body of the aspirant Saharawi Arab Democratic Republic (SADR),[115] might lodge a declaration with respect to crimes perpetrated by nationals of non-party states in the territory it controls. Another case in point may be that of Taiwan. China is not a party to the Statute (nor is Taiwan, of course). Could the ICC Prosecutor assert ICC jurisdiction over these crimes on the basis of a Taiwanese declaration under Article 12(3)? In all these cases, the answer would depend on whether the Prosecutor and later Court consider the aspirant entities to be states.

Arguably, the ICC can be prevented from becoming the fighting ground over status claims if Article 12(3) is interpreted as allowing declarations to be lodged only by non-state entities governing territories over which there is no competing territorial claim. This would bar potential declarations by Kosovo or Taiwan, for example. Should the SADR lodge a declaration, the situation would be more complicated: although Morocco claims Western Sahara as sovereign territory, the ICC Prosecutor would be hard put to take account of this claim, because this may be interpreted as contrary to the findings of the ICJ in its advisory opinion, and consequently to the international commitment to the right to self-determination of the Saharawi people.[116] But more generally, as argued above, there is no situation which cannot be addressed by the Security Council and which requires additional means of granting the ICC jurisdiction. Under these circumstances, any permissive criterion would be suspect of reflecting a political desire to apply special criteria to the PNA rather than an objective policy.[117]

In theory, barring Article 12(3) declarations by quasi-states would not prevent issues relating to jurisdiction over disputed territory from arising in the ICC. For example, if an established state (e.g. Serbia, China or Morocco) asserts that its consent to jurisdiction provides a territorial nexus to territory under

113 The same scenario would be applicable to South Ossetia and Georgia. Even if jurisdiction is based on the territorial nexus with a member state, Serbia, the problem may arise with respect to the decision on admissibility, when the question might arise whether '[t]he case is being investigated or prosecuted by a State which has jurisdiction over it' (Art. 17(1)(a) ICCSt.).

114 GA Res. 34/37, 21 November 1979, § 7.

115 The SADR claims to be a state. For present purposes, it is taken as an example of a non-state entity in effective control over territory and population.

116 The ICJ found that at the time of Spanish colonization, neither Morocco's nor Mauritania's ties to Western Sahara were of territorial sovereignty. *Western Sahara* Advisory Opinion, International Court of Justice, Reports (1975) 12, § 162; GA Res. 63/15, 18 December 2008, preamble.

117 If the existence or absence of a territorial claim is taken as a criterion for admitting a declaration under Art. 12(3) ICCSt., Israel could theoretically block admission of a Palestinian declaration simply by making a claim to the territory of the Gaza Strip and the West Bank. This is nonetheless an improbable scenario, given Israel's policy in the last 42 years and its formal disengagement from the Gaza Strip in 2005.

the aspirant entity's administration, the ICC Prosecutor would still have to take a decision on territorial jurisdiction in light of the status of the competing claim by the aspirant state. However, in practice such a scenario is not likely to occur. For example, it seems unlikely that China or Morocco would lodge a declaration under Article 12(3) with respect to acts committed in Taiwan or Western Sahara, respectively. This is because non-party states are unlikely to put their territorial status under international legal scrutiny in order to secure accountability of a handful of individuals. If they do lodge such declarations, this will more likely be in furtherance of their own territorial claims. Such use of the Court should not be encouraged any more than declarations by non-state entities. The likelihood that territorial disputes arise through referral by other states is even less likely, simply because states that are not directly involved have so far demonstrated reluctance to engage in referrals, even in territorially-undisputed situations.[118] Finally, a referral by the Security Council obviates the question of territorial nexus. Thus, the potential admission of an Article 12(3) declaration by quasi-states holds the greatest risk for politicizing the ICC in this context.

In conclusion, a decision by the ICC Prosecutor granting status under the ICC Statute to a non-state entity would be an irregular event in the practice of international organizations, the merit of which would be seriously outweighed by negative costs to both the ICC as an institution and to the discipline of international criminal justice more broadly.

6. Conclusion

The present article considers the possibility of ICC jurisdiction over crimes allegedly committed in the Gaza Strip based on a territorial nexus asserted by the PNA. From the analysis it appears that creating such a nexus has no legal ground and is politically precarious. There is no doubt that the PNA is very close to becoming a state; in fact, the only bar may be the absence of declaration of statehood on its part, as the requisites of effectiveness may have already been fulfilled at least to a minimal level that together with the right to self-determination can create a presumption of statehood. However, at present the Palestinian leadership does not assert statehood. Thus, it would be premature for the ICC Prosecutor or Court to recognize the Palestinian declaration as that of a state, even for the limited purpose of Article 12(3). Interpreting Article 12(3) more widely to include entities effectively governing non-sovereign territory also seems unwarranted, as such interpretation flies in the face of the ICC Statute's wording and the intention of its drafters. Any

118 Jordan is reported to have been contemplating submitting a referral of the Gaza situation to the ICC Prosecutor, K. Malkawi, 'House approves action to Sue Israel' *Jordan Times*, 5 March 2009, available online at http://www.jordantimes.com/?news=13888 (visited 15 December 2009).

involvement in issues of recognition risks exposing the Prosecutor and the Court to accusations of politicization and subjectivity.

The ICC's goal of ending impunity is channelled through a state-centred mechanism. Despite being an international tribunal, the ICC is more restricted than states since it does not have original, universal jurisdiction. Undoubtedly, the ICC mechanism sometimes leaves justice hostage to political forces. In particular, involvement in unresolved political conflicts may entangle it in questions exceeding its mandate as envisaged by its founders.[119] Extricating the ICC from these entanglements should be done through careful, measured tugs at the limits of the delicate balance achieved between accountability and sovereignty. These limitations of the ICC have been candidly admitted by the former president of the ASP and head of the Jordanian delegation to the ASP, His Royal Highness Prince Zeid Raad Al-Hussein, who noted, with regard to the Palestinian declaration, that '…whenever we believe injustice has intruded upon our lives in the Middle East we scream for the International Criminal Court and yet many of us never seem to read the Statute properly, and in particular articles 12 and 13. If more of us read those articles, we would be more understanding of how the Court — rightly or wrongly — was designed to operate'. [120]

The ICC is not and should not be regarded as a panacea. Its limits should not be disregarded, as this would jeopardize the Court's legitimacy and effectiveness. Yet accountability should be ensured. It should be sought in other international institutions. Some address themselves directly to individual criminal responsibility, such as the principle of universal jurisdiction. Others address themselves to the responsibility of states, such as the principles of state responsibility for wrongful acts under international law. Others still may exist that concern the international responsibility of states, e.g. under international human rights law, to ensure individual accountability under its domestic law. These and other institutions may be preferable to resorting to the ICC, for example, where they cast a wider net of accountability, or provide an effective incentive for policy changes that further peace, security and wellbeing.[121] They should not be discarded in favour of the ICC, simply because it is the newest addition to the architecture of international adjudication.

119 The seminal commentary on the ICC Statute does not even mention the issue of non-state entities in the context of Art. 12, Williams and Schabas, *supra* note 38.

120 ASP Newsletter Special Edition #1 (May 2009), at 8, available online at http://www.icc-cpi.int/NR/rdonlyres/027351FC-E588-4440-AD59-340593F49A3A/0/NewsletterASP1ENGweb.version.pdf (visited 15 December 2009).

121 Preamble, ICCSt.