EUROPEAN CENTRE FOR LAW AND JUSTICE

LEGAL MEMORANDUM IN RESPONSE TO THE AL-HAQ BRIEF AND OPPOSING THE PALESTINIAN AUTHORITY'S ATTEMPT TO ACCEDE TO ICC JURISDICTION

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INTRODUCTION

On 22 January 2009, in The Hague, Mr Ali Khashan, "Minister of Justice" for the Government of Palestine" (the "Palestinian Authority" or "PA"), lodged a Declaration with the Registrar of the International Criminal Court (the "ICC" or the "Court")[1]. The Declaration sought to "recognize[] the Jurisdiction of the International Criminal Court" over applicable crimes committed in "the territory of Palestine" retroactive to 1 July 2002[2] and cited Article 12, paragraph 3, of the Statute of the International Criminal Court ("Statute" or "Rome Statute") as the legal basis for recognising ICC jurisdiction[3]. Yet, "[d]ue to the uncertainties . . . as to the *existence or non-existence of a State of Palestine*", the Registrar responded cautiously with respect to the Declaration[4]. On 23 January 2009, the day after the PA Declaration was lodged, the Registrar "acknowledged receipt of the

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[1]Declaration Recognizing the Jurisdiction of the International Criminal Court from Ali Khashan, Minister of Justice, Palestinian Nat'l Auth., (21 Jan. 2009) [hereinafter "Declaration"], *available at* http://www2.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279777/20090122PalestinianDeclaration2.pdf.

[2]*Id.* Note that Article 11 of the Rome Statute limits ICC jurisdiction to "States" that become Parties after the Rome Statute came into force (i.e., 1 July 2002) to those crimes committed after entry of the new State Party, "unless that *State* has made a declaration under article 12, paragraph 3". Rome Statute of the Int'l Criminal Court, Conference of Plenipotentiaries on the Establishment of an Int'l Criminal Court, art. 11(2), U.N. Doc. A/CONF.183/9 (17 July 1998) [hereinafter "Statute or Rome Statute"] (emphasis added), *reprinted in* 37 I.L.M. 998 (1998), *available at* http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf. Note also that Article 12 limits access to "States". In spite of the "State" limitation, the Palestinian Authority (PA) submitted a declaration for retroactive application of jurisdiction pursuant to Article 12(3). *Id.* art. 12(3).

[3]Declaration, *supra* note 1. Article 12 is entitled "Preconditions to the exercise of jurisdiction". Rome Statute, art. 12. Article 12, paragraph 3, reads, in pertinent part, as follows: "If the acceptance of a *State* which is not a Party to this Statute is required under paragraph 2, that *State* may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question . . .". *Id.* art. 12(3) (emphasis added). Note the repetitive and exclusive use of the term "State". Paragraph 2, referred to in the foregoing quotation, is also limited solely to "States". *Id.* art. 12(2).

[4]Int'l Criminal Court, Structure of the Court, Registry, Declarations Art. 12(3), http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Registry/Declarations.htm (last visited 7 July 2010).

[D]eclaration", but noted that such receipt was "'without prejudice to a judicial determination on the applicability of Article 12 paragraph 3' to the [D]eclaration"[5], meaning that the Registrar declined to affirm the validity of the lodging under Article 12(3). The Registrar's concerns centred on the explicit language of Article 12(3) restricting accession to ICC jurisdiction to "States"[6] and on the fact that the "Palestinian territories" are widely recognised as a non-State entity[7]. Mr Luis Moreno-Ocampo, ICC Prosecutor, took the PA Declaration under advisement (where it currently remains).

Since then, numerous individuals and organisations, including this organisation, have submitted legal memoranda expressing opinions on the question of Palestinian statehood and/or sovereignty and the implications for ICC jurisdiction[8]. As one of our memoranda explained, the "Palestinian territories" do not meet the criteria for statehood as set forth in the widely accepted Montevideo Convention[9].

Others, however, including the Palestinian Non-Governmental Organisation ("NGO") Al-Haq, argue that the ICC should nonetheless exercise jurisdiction because the Palestinian entity can be considered a "State", *if only for the purposes of the Rome Statute*, by virtue of inherent authority or authority granted under the 1993 Oslo Accords and the 1995 Interim Agreement on the West Bank and the Gaza Strip[10]. As this memorandum

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[5] *Id.*

[6] Note that each subparagraph of Article 12 restricts itself to "States". Rome Statute, art. 12.

[7] *See infra* Section I.

[8] OFFICE OF THE PROSECUTOR, SITUATION IN PALESTINE, SUMMARY OF SUBMISSIONS ON WHETHER THE DECLARATION LODGED BY THE PALESTINIAN NATIONAL AUTHORITY MEETS STATUTORY REQUIREMENTS, ANNEX: LIST OF SUBMISSIONS (3 May 2010), *available at* http://www.icc-cpi.int/NR/rdonlyres/D3C77FA6-9DEE-45B1-ACC0-B41706BB41E5/281989/PALESTINEFINAL2_2_.pdf.

[9] The very term "Palestinian territories" is itself subject to differing definitions. The PA claims that the term includes *all* territories in the former Mandate of Palestine occupied by Israel during the Six-Day War in 1967, whereas UN Security Council Resolution 242 only requires Israeli withdrawal from "territories", not "the" or "all" territories occupied in 1967. As such, the UN Security Council expected territorial adjustments (meaning, adjustments of borders) to ensure that Israel had "defensible" borders. Hence exactly what constitutes "Palestinian territories" is not currently defined and is subject to final peace negotiations between Israel and the PA. *See infra* Section V(F).

[10] *See Infra* Section IV. Al-Haq Paper, *infra* note 12, ¶¶ 14, 20. The "Oslo Accords" and "Interim Agreement" (collectively, the "Interim Agreements"). Israeli Palestinian Interim Agreement on the West Bank and the Gaza Strip, 28 Sept. 1995, 36 I.L.M. 551 (1997) [hereinafter "Interim Agreement"]; Oslo

details, those arguments have no foundation in fact, law or custom and must fail for this reason, including the obvious fact that an entity simply cannot transfer authority it never possessed.

Furthermore, unlike other organisations, including Al-Haq, that have submitted briefs to this Court, the European Centre for Law and Justice ("ECLJ") does not claim that it can judge what took place during Operation Cast Lead or whether certain actions constitute war crimes or crimes against humanity. Such restraint is simply due to the fact that no ECLJ personnel were present during Operation Cast Lead. Hence, no ECLJ personnel witnessed the events or could possibly know *with necessary certainty* what transpired. The ICC should note that in reaching their conclusions in this regard, other organisations have largely failed to adhere to basic International Fact-Finding standards and have relied on gross factual and legal speculation[11]. Moreover, conclusions such as Al-Haq's, that there exist "clear grounds to conclude that war crimes and crimes against humanity on a serious scale were committed by Israeli forces"[12], or that the "Palestinian community . . . can no longer tolerate the impunity which for so long has characterized Israel's military assaults in the occupied Palestinian territory"[13] point to the bias and political motivation of these organisations—and their legal opinions. The ICC is not the forum for such political disputes, which is why the ECLJ has limited its analysis to the facts and to the law as written.

Accords, Declaration of Principles on Interim Self-Government, 13 Sept. 1993, 32 I.L.M. 1525 (1993) [hereinafter "Oslo Accords"].

[11] In particular, the Court should take note of the ECLJ's *Legal Memorandum in Opposition to Erroneous Allegations and Flawed Legal Conclusions Contained in the UN Human Rights Council's Goldstone Report*, which was filed with the UN Human Rights Council on 23 January 2010. In it, the ECLJ details the myriad ways in which the Goldstone Report, and other similar reports issued by organisations such as Amnesty International and Human Rights Watch, fail to adhere to the widely accepted Lund-London Guidelines on International Fact-Finding. None of these organisations was present during Operation Cast Lead. Rather than acknowledging the limitations of any possible knowledge about what transpired, their authors have instead chosen to construct a narrative based upon speculation and political preferences.

[12] Al-Haq Position Paper on Issues Arising from the Palestinian Authority's Submission of a Declaration to the Prosecutor of the International Criminal Court under Article 12(3) of the Rome Statute, ¶ 11 (14 Dec. 2009) [hereinafter "Al-Haq Paper"].

[13] *Id.* ¶ 2.

INTERESTS OF AMICUS

The ECLJ is a public interest law firm and UN-accredited NGO located in Strasbourg, France. The ECLJ shares the commitment to eradicate international crimes and atrocities that shock the human conscience. However, the ECLJ remains equally committed to the principle that legitimacy demands that applicable law—in this instance the express limitations on ICC jurisdiction established by the Rome Statute—be respected when considering allegations of such crimes and atrocities. The ECLJ is concerned that the Prosecutor's allowing the PA to accede to jurisdiction of the ICC will seriously offend the rule of law by violating the express terms of the Rome Statute, by arrogating to the Prosecutor prerogatives expressly designated in the Statute solely for the UN Security Council, by exceeding the Prosecutor's discretion, and by politicising the Court.

The ECLJ is further concerned that the Prosecutor's refraining to date from rejecting the PA Declaration—which violates Article 12(3) of the Statute on its face since no Palestinian "State" currently exists—will give rise to states (including perhaps even current States Parties to the Statute) calling into question the scope of the Prosecutor's discretion to determine who may be haled before the Court. This is due to the danger that the Prosecutor's actions in this instance will be perceived as politicising the investigatory and judicial function of the Court. Such a perception would also make current non-party states less likely to recognise ICC jurisdiction in the future, an outcome that will undermine the long-term credibility of the Court and its effectiveness in bringing the world's worst criminal offenders to justice. Finally, any exercise of ICC jurisdiction in this case could open the floodgates to a multitude of peoples seeking "self-determination" and using the Court to further their political agendas.

SUMMARY OF ARGUMENT

The ICC lacks both jurisdiction and the legal basis to find jurisdiction against Israelis because the "Palestinian territories" constitute neither a *de facto* nor a *de jure* State capable of acceding to the Court's jurisdiction under the Rome Statute. Nothing in the Oslo Accords or Interim Agreement acts to confer statehood or quasi-statehood sovereignty on the "Palestinian territories". To the contrary, the Interim Agreements, especially when considered in the context of the region's history, clearly demonstrate that there is still no sovereign Palestinian entity that is capable of fully governing its own internal affairs or transferring criminal jurisdiction to the ICC. In fact, the Interim Agreements factually and legally curtail the PA's authority. Any alteration of that status must come through negotiations between the parties or else will constitute a violation of those agreements, which would constitute a violation of international law (whereby one is obligated to honour international agreements).

The history of the region demonstrates that, to date, the Arab Palestinian people have not achieved the type of sovereign authority that would permit a referral of authority to the ICC. As such, the only way that the ICC could *legitimately* entertain any jurisdiction over the situation in the "Palestinian territories" would be through a UN Security Council referral[14]. In addition, any exercise of jurisdiction by the ICC over Israel would contravene customary international law and the *Monetary Gold*[15] line of cases, which establishes the *principle that international courts lack jurisdiction over a state that does not defer to its jurisdiction*, as Israel has refrained from doing with regard to the ICC. Finally, any exercise of jurisdiction over Israel would conflict with the terms of the Rome Statute itself, specifically Article 98(2), which stipulates that states are not to take actions

[14]Although, even a Security Council referral could only be done pursuant to Article VII of the UN Charter and would not release the Prosecutor from the requirements of the complementarity provisions of the Rome Statute.

[15]*See infra* note 103 and accompanying text.

that would violate other international agreements[16]. As such, were the ICC to decide to exercise jurisdiction—a decision the ECLJ believes would contravene international law—it would sanction the PA's violation of international agreements into which the PA has freely entered.

ARGUMENT

I. THE "PALESTINIAN TERRITORIES" DO NOT MEET THE LEGAL CRITERIA FOR STATEHOOD, A PREREQUISITE FOR ICC ACCESSION.

Article 12 of the Rome Statute sets forth plain and irreducible "[p]reconditions to the exercise of jurisdiction" by the Court[17]. The "Palestinian territories" do not meet them. Article 12 states unequivocally that acceptance of the Court's jurisdiction is limited to "States"[18]. Becoming a State Party to the Statute constitutes automatic acceptance of ICC jurisdiction for the crimes listed in Article 5, when such crimes were either committed on the State Party's territory or by one of the State Party's nationals[19]. Further, non-party "*States*" may also accede to ICC jurisdiction over their territory and nationals, either in general or for specific situations[20].

Article 125 of the Statute notes that only a "State" is eligible for "[s]ignature, ratification, acceptance, approval or accession" to the Rome Statute[21]. Article 12 speaks of "acceptance" of the jurisdiction of the Court, and, in particular, Article 12(3) invites the retrospective "acceptance" of jurisdiction by a non-party *State*[22]. Professor Otto Triffterer

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[16]*See infra* Section II(B).
[17]Rome Statute, art. 12.
[18]*Id.* Article. 31(1) of the 1969 Vienna Convention on the Law of Treaties provides: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose". Vienna Convention on the Law of Treaties, 23 May 1969, art. 31(1), 1115 U.N.T.S. 331, *reprinted in* 8 I.L.M. 679. The term "State", in UN and international practise, especially when capitalised, refers to recognised, sovereign nation-states. Convention on the Rights and Duties of States, art. 1, 26 Dec. 1933, 49 Stat. 3097 [hereinafter "Montevideo Convention"], *available at* http://avalon.law.yale.edu/20th_century/intam03.asp.
[19]Rome Statute, art. 12(2).
[20]*Id.* arts. 11(2), 12(3).
[21]*Id.* art. 125.
[22]*Id.* art. 12(3) (emphasis added).

noted in his Commentary on the Rome Conference that, "[i]n accordance with normal modern practice for multilateral treaties, the [ICC] Statute [was] open for signature by all *States*"[23].

Article 13 provides that, where statutory jurisdiction is otherwise well-founded under Article 12, the ICC *may* investigate and prosecute the crimes listed in Article 5 in three circumstances:

> (a) A situation in which one or more of such crimes appears to have been committed is *referred to the Prosecutor by a State Party* in accordance with article 14;
>
> (b) A situation in which one or more of such crimes appears to have been committed is *referred to the Prosecutor by the Security Council* acting under Chapter VII of the Charter of the United Nations; or
>
> (c) The *Prosecutor has initiated an investigation* in respect of such a crime in accordance with article 15[24].

There is no provision in the Rome Statute that permits *non-state entities* to accede to ICC jurisdiction. The only provision in the Statute that extends ICC jurisdiction to reach non-state entities is Article 13(b). This is only because the UN Security Council is not constrained by any territorial or nationality limitations with respect to the referral of Article 5 crimes to the Prosecutor[25]. Yet, even the Security Council is constrained in that it must be "acting under Chapter VII of the [UN] Charter"[26]. As such, unless the "Palestinian territories" constitute a "State" or the UN Security Council has referred the matter under Chapter VII of the UN Charter, the Prosecutor has no authority to entertain jurisdiction. The UN Security Council has not referred any Chapter 5 crime to the Prosecutor, and, according to international law, and as evidenced by the official positions of Palestinian leaders and other organisations, the "Palestinian territories" clearly do not

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[23]OTTO TRIFFTERER & KAI AMBOS, COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 1287 (1999) (emphasis added).
[24]Rome Statute, art. 13 (emphasis added).
[25]*Id.* art. 13(b).
[26]*Id.*

constitute a State, notwithstanding Al-Haq's astonishing remark that the issue of statehood "remains moot at best"[27].

A. The Fact That the "Palestinian Territories" Do Not Meet the Four Basic Statehood Requirements Set Forth in the Montevideo Convention Confirms That the "Palestinian Territories" Are Not a "State" as Commonly Understood in the International Community.

Article 1 of the Montevideo Convention established four prerequisites to statehood:

(a) a permanent population;
(b) a defined territory;
(c) a government; and
(d) a capacity to enter relations with other states[28].

These criteria are prime indicia of statehood, and the Palestinians' failure to meet a number of them precludes a claim to statehood. Pursuant to a series of agreements between Israel and the PLO, the PA was specifically formed as a provisional body with clearly delineated limits to its authority until PA status negotiations were completed[29].

Under the terms of the Interim Agreement between Israel and the PLO, for example, the PA agreed to forego a general capacity to enter into diplomatic relations with other states[30]. Specifically, under Article 9(5), with the exception of the PLO's ability to negotiate "economic agreements", "agreements with donor countries", "cultural, scientific and educational agreements", and the like, the PA does "not have powers and responsibilities in the sphere of foreign relations . . . and the exercise of diplomatic functions"[31]. Moreover, Article 9(5)(c) of the Interim Agreement expressly declares that

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[27]Al-Haq Paper, *supra* note 12, ¶ 16.
[28]Montevideo Convention, *supra* note 18.
[29]Note that the PA was *not* created by Palestinians acting independently; rather, the PA was established by virtue of a series of Israeli-Palestinian agreements (the Oslo Peace Process) as an *initial step* to an eventual two-state solution. Palestine Facts, Israel 1991 to Present: PA Origins, What is the Palestinian Authority and How Did it Originate?, http://www.palestinefacts.org/pf_1991to_now_pa_origin.php (last visited 7 July 2010).
[30]*See* Interim Agreement. *supra* note 10, art. IX(5).
[31]*Id.* art. IX(5)(a)-(b).

dealings between PA officials and foreign officials "*shall not be considered foreign relations*"[32].

It is also questionable to what degree the PA can effectively govern and control "Palestinian territory", however defined[33]. John Dugard, who chaired the Arab League's "Report of the Independent Fact Finding Committee on Gaza", and who has encouraged the Court to exercise jurisdiction, conceded that there is an "absence of a fully effective government" in the "Palestinian territories"[34].

To demonstrate effective government, a state should have "a government or a system of government in general control of its territory, to the exclusion of other entities . . ."[35]. Of particular importance on this point are the agreements between Israel and the PLO[36]. Were the PA to change the political status of the West Bank and Gaza Strip prior to completing negotiations of a permanent agreement, which acceding to ICC jurisdiction would do, the PA would openly violate its international obligations under the Interim Agreements[37].

Further, under the Interim Agreement, the West Bank is divided into three types of Areas, designated A, B, and C[38]. The degree of PA control varies in each area, with the most control in Areas A and the least control in Areas C[39]. Even in Areas A, where the PA exercises the most control, the PA has no control over individual Israelis, and it does not control airspace or external security[40]. Taken together, Areas A and B constitute approximately 40% of the entire West Bank; Areas C constitute the remainder, which remains under virtually total Israeli control.

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[32] *Id.* art. IX(5)(c) (emphasis added).
[33] *See supra* note 9.
[34] John Dugard Op-Ed, *Take the Case*, N.Y. TIMES, 22 July 2009, http://www.nytimes.com/2009/07/23/opinion/23iht-eddugard.html.
[35] JAMES R. CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 59 (2d ed. 2006).
[36] *See* Interim Agreement, *supra* note 10, art. XXXI(7).
[37] *Id.*
[38] *See id.* arts. III(1), XI(2).
[39] *See id.*
[40] *See id.* Annex I, arts. V(2)(a), VIII(1)(a), XIII(4).

Additionally, the Gaza Strip is currently under complete Hamas control (not PA control), and Hamas leaders who govern Gaza openly oppose the PA and its authority[41]. PA governance in Gaza is, therefore, nonexistent.

In general, there is also a lack of complete territorial control in the "Palestinian territories" on the part of Palestinian authorities. The Oslo Accords specify that "[t]he withdrawal of the military government will not prevent Israel from exercising powers and responsibilities not transferred to the Council"[42] and that, "subsequent to the Israeli withdrawal, Israel will continue to be responsible for external security, and for internal security and public order of settlements and Israelis"[43]. This language indicates that the Oslo Accords, while transferring precise powers and responsibilities to the Palestinians, did not transfer full and complete authority or control to them.

The Interim Agreement also specified that "Israel shall continue to carry the responsibility for external security, as well as the responsibility for overall security of Israelis for the purpose of safeguarding their internal security and public order"[44] and that

> Israel shall continue to carry the responsibility for defense against external threats, including the responsibility for protecting the Egyptian and Jordanian borders, and for defense against external threats from the sea and from the air, as well as the responsibility for overall security of Israelis and Settlements . . . *and will have all the powers to take steps necessary to meet this responsibility*[45].

In describing the Palestinian Police, the Interim Agreement specified that the PA "shall be responsible for handling public order incidents in which only Palestinians are involved"[46]. Finally, the parties agreed on the "issues that will be negotiated in the permanent status

[41]Erlanger, *infra* note 72.
[42]Oslo Accords, *supra* note 10, Art. VII(5).
[43]*Id.* Annex II.
[44]Interim Agreement, *supra* note 10, art. X(4).
[45]*Id.* art. XII(1) (emphasis added).
[46]*Id.* art. XIII(2)(b)(2).

negotiations: Jerusalem, settlements, specified military locations, Palestinian refugees, borders, foreign relations and Israelis"[47].

The fact that Israel has responsibilities and jurisdiction in Israeli settlements that are within what is commonly referred to as "Palestinian territories", that Israel retains control over external security, and that the parties agreed that they still must negotiate Palestinian borders, unequivocally confirms the assertion that the Palestinians lack the complete territorial control and governmental capacity that accompanies statehood or sovereignty.

Various courts have confirmed that the PA (or its parent organisation, the PLO) lack one or more of the Montevideo Convention's indicia of sovereignty. The British House of Lords has insisted that, in order to qualify as a state, an entity exercising some administrative authority must exercise "all the functions of a sovereign government in maintaining law and order, instituting and maintaining courts of justice, adopting or imposing laws regulating the relations of the inhabitants of the territory to one another and to the government"[48]. According to the British Foreign Office, "the new regime should not merely have effective control over most of the state's territory, but . . . it should, in fact, be firmly established"[49]. The PA fails that test, since it does *not* completely control most of the territory that it claims to be part of the "Palestinian territories", as evidenced by the factional divisions between the PA and Hamas in Gaza, which has resulted in violence between the two bodies, and also by the lack of PA control in many parts (especially Areas C) of the West Bank.

Applying a similar analysis, courts of the United States have emphasised that the PLO and PA have lacked both "defined territor[ies]" and "permanent population[s] under

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[47] *Id.* art. XVII(1)(a).
[48] The Arantzazu Mendi, [1939] A.C. 256 (H.L.) (U.K.).
[49] 485 Parl. Deb., H.C. (5th Ser.) (1951) (2410–11).

[their] control"[50]; they have specifically pointed to the fact that the PLO has not been admitted as a State by the UN, despite the UN's general support for Palestinian self-governance[51]. U.S. courts have also noted that the Israel-PLO agreements creating the Palestinian Authority "expressly denied the PA the right to conduct foreign relations", making it "transparently clear that the PA has not yet exercised sufficient governmental control over Palestine [to achieve statehood]"[52], and again demonstrating that the "Palestinian territories" do not even remotely qualify as a State.

Further, there are no defined territories that would comprise a Palestinian State. While the West Bank and Gaza Strip are considered the geographic areas from which a future Palestinian State would arise, the exact boundaries are nonetheless unsettled. The UN adopted Resolution 181 in November of 1947, setting forth a Partition Plan that recommended establishing a Jewish State and a separate Arab State[53]. While the Jews accepted the Plan, the Arab Higher Committee rejected it[54]. Since the UN partition plan was predicated on acceptance by both parties, its rejection by Arab Palestinians—coupled with the Arab attack on the nascent State of Israel in May 1948—effectively abrogated its terms. As a result, Israel gained additional territory during the fighting from 1948–49. Hostilities ended in 1949 with a series of armistice agreements which, *at Arab insistence*, established armistice lines—not settled boundaries—between the recognized State of Israel and the foreign Arab armies continuing to occupy portions of the Mandate of Palestine (i.e., West Bank and the Gaza Strip). That solution—i.e., an independent State

[50]*See, e.g., Knox v. PLO*, 306 F. Supp. 2d 424, 434–36 (S.D.N.Y. 2004).
[51]*See, e.g., Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 48 (2d Cir. 1991).
[52]*See, e.g., Ungar v. Palestinian Authority*, 402 F.3d 274, 291–92 (1st Cir. 2005) (citing D.J. HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 226 (5th ed. 1998); GEOFFREY R. WATSON, THE OSLO ACCORDS: INTERNATIONAL LAW AND THE ISRAELI-PALESTINIAN PEACE AGREEMENTS 68–72 (2000)).
[53]Future Government of Palestine, G.A. Res. 181 (II), U.N. Doc. A/RES/181 (29 Nov. 1947).
[54]United Nations Palestine Commission Communication From the Representative of the Arab Higher Committee for Palestine, U.N. Doc. A/AC.21/6 (19 Jan. 1948), http://domino.un.org/pdfs/AAC216.pdf.

of Israel and foreign Arab occupation of the West Bank and the Gaza Strip—remained until the 1967 Six-Day War, when Israel assumed control of both areas[55].

Some advocates of an Arab Palestinian State argue that UN Security Council Resolution 242[56], adopted after the Six-Day War of 1967, essentially dictated the boundaries of a future Palestinian State by insisting upon a return to the pre-war borders. However, such an interpretation belies the language of Resolution 242. As we explain further below, Resolution 242 contemplates a "withdrawal . . . from territories occupied in the recent conflict", not a withdrawal from *the territories* or *all territories*, proposed language that had been considered and rejected[57]. As such, the actual boundaries of a future Arab Palestinian State are merely hypothetical, further undermining the notion that a Palestinian State or sovereign currently exists, since the "defined territory" prong of the Montevideo test is not met.

Given that the Palestinians lack a permanent population, a clearly defined territory, a stable and coherent government, the ability to enter into foreign relations, jurisdiction over all persons in their "territories", and other aspects of functioning states, clearly no Arab Palestinian "State" exists. Even the Al-Haq position comports with this view as indicated by its argument that Palestine can be considered a state if only for the purposes of the Rome Statute[58].

B. The Official Palestinian Position Explicitly Acknowledges That a Palestinian "State" Does Not Exist and Never Has.

Of prime importance concerning whether a Palestinian State exists is the position consistently taken by PA officials themselves. Such statements of PA officials reflect their position that there is currently no Palestinian State—*a fact which by itself should put*

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[55]Israel also assumed control of the Sinai Desert and Golan Heights, but this is irrelevant for our purposes here.
[56]S.C. Res. 242, U.N. Doc. S/RES/242, (22 Nov. 1967), *available at* http://unispal.un.org/unispal.nsf/0/7D35E1F729DF491C85256EE700686136.
[57]*Id.* ¶ 1(i).
[58]Al-Haq Paper, *supra* note 12, ¶¶ 12, 14, 20.

the issue to rest. If Palestinian leaders admit that no Palestinian State currently exists, there is no reason for the international community—or the ICC Prosecutor—to disbelieve them, ponder the issue further, or try to construct novel or nuanced arguments for considering it a "State". With respect to the January 2009 PA Declaration, because Article 12(3) requires that a "State" lodge such a Declaration, it would have been in the PA's interest to claim statehood when lodging its Declaration; yet, it did not do so. Moreover, as recently as 4 February 2009 (i.e., *after* the 22 January 2009 lodging of the PA Declaration with the ICC Registrar), PA President Mahmoud Abbas accused Israel of "preventing [the Palestinian] people from attaining their ultimate goal: an end to occupation, gaining freedom and the right to self-determination and the *establishment of an independent Palestinian state*"[59].

One day later, on 5 February 2009, President Abbas emphasised the need for international support for "the Arab peace initiative which calls for *the two state solution*"[60]. Prime Minister Brown continued: "I believe the Arab peace initiative does point the way forward. I believe that the general terms of an agreement are well known to everyone: an Israel that is secure within its own borders, *a Palestinian state that is viable . . .*"[61]. Taken together, the President and Prime Minister's statements refute any notion that an independent Palestinian "State" currently exists (or existed when the PA Declaration was lodged with the ICC Registrar in January 2009).

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[59]Press Release, European Parliament, Mahmoud Abbas at the European Parliament (4 Feb. 2009) (emphasis added), *available at* http://www.europarl.europa.eu/news/expert/infopress_page/030-48165-033-02-06-903-20090203IPR48164-02-02-2009-2009-true/default_en.htm (last visited 7 July 2010). Some argue, unconvincingly, that the focus of such statements should be on obtaining the "independence" of an already existing Palestinian State. *See, e.g.*, John Quigley, *Palestinian Statehood: A Rejoinder to Professor Robert Weston Ash*, 36 RUTGERS L. REC. 2, 257 (2010), *available at* http://www.lawrecord.com/files/36-Rutgers-L-Rec-257.pdf. Such an argument seems to be quite a stretch. It suggests that a "non-independent" state of Palestine currently exists, but that would seem to presuppose a prior-existing State which exhibited the characteristics of an independent State at some point in time. History belies such an argument—there simply has never existed an independent Arab Palestinian State in the so-called "Palestinian territories".

[60]Mahmoud Abbas, Palestinian Nat'l Auth. President, Press Conference with British Prime Minister Gordon Brown and Palestinian National Authority President Mahmoud Abbas (5 Feb. 2009) (emphasis added), *available at* http://www.number10.gov.uk/Page18253 (last visited 7 July 2010).

[61]*Id.* (emphasis added).

Even PLO Chairman Yasser Arafat, during his tenure in office, publicly recognised that Palestinian statehood remained a future goal. At the Arab Summit in Beirut in March 2002, for example, Mr Arafat said the following: "We are all confident in the inevitability of victory. as well as in the inevitability of achieving our national and Pan-Arab goals . . . including the right of return, the right to self-determination and the *establishment of the independent state of Palestine*, with holy Jerusalem as its capital"[62].

On 22 June 2009, Palestinian Prime Minister Salam Fayyad "called for the *establishment of a Palestinian state within two years*"[63]. In the same speech, he called on all Palestinians to "help create the institutions that will 'embody' *the future state*"[64].

One final example should suffice to demonstrate that President Abbas (representing the PA in general) has no illusions that a Palestinian "State" currently exists. In a letter sent to Mayor Alemanno postponing a meeting with Israeli President Shimon Peres in Rome, Mr Abbas continued to express his vision and hope for a *future* Palestinian "State" as he thanked Italy for its "solidarity with [the Palestinian] people on its way to freedom and independence and to the *creation of a Palestinian State*"[65]. Further, "[President Abbas] insisted that he still believed in the peace talks which began in the early 1990s, *even though they have failed to create a Palestinian state*"[66].

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[62]Yasser Arafat, Palestine Liberation Org. (PLO), Address at the Arab summit in Beirut (27 Mar. 2002) (emphasis added), *available at* http://www.al-bab.com/arab/docs/league/arafat02.htm (last visited 7 July 2010). Once again, nowhere do we find the existence of a prior independent State of Palestine. Hence, relying on the word "independent" is too weak a reed to carry the argument that a State of Palestine already exists.

[63]Howard Schneider, *Palestinian Premier Sets 2-Year Statehood Target*, WASH. POST, 23 June 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/06/22/AR2009062202962.html (emphasis added). It is obvious that one does not call for establishing *a* state "within two years" (or any other time limit) when such a state already exists. Note, too, the lack of any reference to an "independent" State.

[64]*Id.* (emphasis added).

[65]*See Mideast: Mayor Rome, Meeting Shimon Peres-Abu Mazen Postponed*, ANSAMED, 16 Apr. 2010, http://www.ansamed.info/en/news/ME.XAM19185.html. Abu Mazen is an alias of Mahmoud Abbas. *See* Answers, Biography of Abu Mazen, http://www.answers.com/topic/abu-mazen (last visited 21 July 2010). In the portion of the quotation replaced by the ellipsis, Mr Abbas discussed using resistance to achieve Palestinian independence. Since that was a possible *means* to the end sought, it did not refute the fact that Palestinian statehood has not yet been achieved.

[66]Rory McCarthy, *Fatah Holds First Party Conference for 20 Years*, GUARDIAN.CO.UK, 4 Aug. 2009,http://www.guardian.co.uk/world/2009/aug/04/fatah-conference-abbas-west-bank (emphasis added).

In addition, Palestinian leaders have consistently maintained that statehood is an aspirational goal, and they have acknowledged publicly *since the Declaration filed with the ICC* that they were considering a unilateral declaration of statehood[67]. This is additional evidence that a Palestinian "State" does not currently exist and that the 1988 Palestinian National Council's declaration of statehood was legally inconsequential. Obviously, if the 1988 declaration truly had legal effect and resulted in statehood, or if subsequent events made statehood a reality, then there would be no need for Palestinians to consider (once again) a unilateral declaration of statehood.

In addition to the many public admissions by Palestinian leaders that no Palestinian State currently exists, there are a number of similar admissions on the official website of the PLO Negotiations Affairs Department[68], confirming that Palestinian statehood remains a future prospect. For example, The PLO Negotiations Affairs Department has published a "Negotiations Primer" that describes the purpose of Palestinian negotiations as a means "to realize Palestinian national rights of self-determination *and statehood*"[69] as well as to achieve "the end of Israeli occupation and the *establishment of a sovereign and independent Palestinian state*"[70].

Interestingly, Hamas, which is the ruling faction in Gaza, has thus far *opposed* a unilateral declaration[71]. This further demonstrates that the PA's claim of sovereign capacity is extremely suspect, especially since the PA, which is the entity that lodged the

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In a letter addressed to the same conference, Saudi King Abdullah likewise acknowledged the absence of a Palestinian state: "I can honestly tell you, brothers, that even if the whole world joins to found a Palestinian independent state, and if we have full support for that, this state would not be established as long as the Palestinians are divided". Khaled Abu Toameh, *'Palestinian Rift Worse Than Israel'*, JERUSALEM POST, 5 Aug. 2009, http://www.jpost.com/Home/Article.aspx?id=150914. Such a statement clearly shows that the Saudi king (a prominent figure in the greater Arab community) also acknowledges that Palestine is not a State.

[67] Al-Haq Paper, *supra* note 12, ¶ 12.

[68] *See* PLO Negotiations Affairs Department, http://www.nad-plo.org/ (last visited 7 July 2010).

[69] PLO NEGOTIATIONS AFFAIRS DEP'T, NEGOTIATIONS PRIMER 4 (2009) (emphasis added), *available at* http://www.nad-plo.org/news-updates/magazine.pdf.

[70] *Id.* at 12 (emphasis added).

[71] *Id.*

Declaration with the ICC, possesses no authority whatsoever in Gaza[72]. This also undermines any notion that the PA could purport to transfer criminal jurisdiction to the ICC for events which took place in Gaza.

Moreover, extremely hostile relations between Hamas and Fatah, including Hamas assassinations of Fatah representatives, illustrate that the Palestinians still lack basic features of stable, sovereign governing bodies[73]. In fact, the PA may very well have lodged the Declaration with the Court for the primary purpose of bringing enhanced scrutiny on Hamas and potentially subjecting its members to legal repercussions. When one considers the brutality of relations between Hamas and PA, this motivation is quite plausible. No matter what the motivation, however, even if there were an entity that could claim sovereignty in Gaza for the purposes of acceding to ICC jurisdiction over events in Gaza, it would not be the PA, but Hamas, since Hamas has control over the area in which the events occurred[74]. This all constitutes further evidence against the notion of a Palestinian "State" or a sovereign entity.

C. The Fact That the "Palestinian Territories" Are Not Considered a "State" by Key International Bodies Negates the Claim That a Palestinian "State"—Nuanced or Otherwise—Currently Exists.

Although it is true that Palestinian officials actively participate in activities at the UN in New York and elsewhere, *Palestinian representatives enjoy only observer status at the UN.* The PA is not a member of the UN General Assembly, and, hence, its

[72]Steven Erlanger, *Hamas Seizes Broad Control in Gaza Strip*, N.Y. TIMES, 14 June 2007, at A1, *available at* http://www.nytimes.com/2007/06/14/world/middleeast/14mideast.html; *see also Hamas Says Gaza Now Under Control*, BBC NEWS, 15 Aug. 2009, http://news.bbc.co.uk/2/hi/middle_east/8203713.stm (detailing Hamas' restoration of order following an insurrection in southern Gaza).

[73]Human Rights Watch, *Turning a Blind Eye. Impunity for Laws-of-War Violations during the Gaza War*, 11 Apr. 2010, at 6–7, 62, *available at* http://www.unhcr.org/refworld/country,,,,ISR,,4bc42e772,0.html. *See also* Al Jazeera English, *Hamas Accused of Killing Rivals*, 21 Apr. 2009, *available at* http://english.aljazeera.net/news/middleeast/2009/04/20094207432486013 3.html; Human Rights Watch, *Under Cover of War: Hamas Political Violence in Gaza*, at 5, 20 Apr. 2009, *available at* http://www.hrw.org/en/reports/2009/04/20/under-cover-war-0.

[74]Erlanger, *supra* note 72.

representatives are not permitted to vote. Only *States* may become UN members[75]. Unlike the Holy See (which is an internationally-recognised state), the Palestinians are not included or seated in the category of "Non-member *State*[*s*] having received a standing invitation to participate as observer in the sessions and the work of the General Assembly and maintaining permanent observer mission at Headquarters"[76]. Instead, they are listed under "*Entities* having received a standing invitation to participate as observers in the sessions and the work of the General Assembly"[77]. Except for the General Assembly decision in 1988 to change designations from the "Palestine Liberation Organization" to "Palestine"[78], no change in status at the UN has occurred since 1974[79].

Moreover, the Palestinians were not credentialed as a participating "State" at the Rome Conference in 1998 that resulted in the creation of the ICC. The official roster of "Participating States" at the Conference includes the names of 163 states; it does not include the PA or "Palestine" as a "State". Rather, the Palestinian entity was placed under the category of "Other Organizations" in the diplomatic roster of the Conference[80]. Further, two Palestinian delegates[81] were listed as representing an "Organization[]", *not* a "State"[82]. In subsequent meetings of the ICC Preparatory Commission, the PA was present in the category of "Entities, intergovernmental organizations and other bodies

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[75]U.N. Charter art. 4, ¶ 1 (noting that membership is available to "peace-loving *states*" (emphasis added)).
[76]Executive Office of the Sec'y-General, Protocol & Liaison Serv., *Publication of Permanent Missions to the United Nations*, at 301, U.N. Doc. ST/SG/SER.A/299 (Mar. 2009) (emphasis added), *available at* http://www.un.int/protocol/bluebook/bb299.pdf.
[77]*Id.* at 302 (emphasis added).
[78]G.A. Res. 43/177, ¶ 3, GAOR, 43d Sess., U.N. Doc. A/RES/43/177 (15 Dec. 1988), *available at* http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/531/56/IMG/NR053156.pdf?OpenElement.
[79]The *PLO* began enjoying observer status in 1974. Observer Status for the Palestine Liberation Organization, G.A. Res. 3237 (XXIX), U.N. Doc A/RES/3237 (22 Nov. 1974). The important thing to note is that, throughout its history, the PLO and "Palestine" have never been regarded as anything but "entities" by the UN.
[80]United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 15 June to 17 July 1998, *Official Records*, at 5, 44, U.N. Doc. A/CONF.183/13 (vol. II) (2002) [hereinafter "UN Conference on Establishment of the ICC"], *available at* http://untreaty.un.org/cod/diplomaticconferences/icc-1998/vol/english/vol_II_e.pdf.
[81]These delegates were the PA General Delegate to Italy, Mr Nimer Hammad, and the Counselor of the Permanent Observer Mission of Palestine to the United Nations, Mr Marwan Jilani.
[82]UN Conference on Establishment of the ICC, *supra* note 80.

having received a standing invitation to participate as *observers* in the sessions and the work of the General Assembly"[83].

The ICC has consistently treated—and still treats—the PA as an organisation and not as representing a "State". A prominent example of this took place on 13 February 2009 at the ICC States Parties meeting in New York City, where Palestinians were grouped with "Entities, intergovernmental organizations, and other entities"[84]. That the ICC States Parties treat the PA as an "Entity" and not a "State" is especially significant in this matter. Since the Prosecutor's authority derives from the text of the Rome Statute, how the States Parties treat the Palestinians reflects the States Parties' continuing interpretation of the agreed-upon text.

Finally, the 2004 International Court of Justice ("ICJ") Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories (Advisory Opinion)* also concluded that no Palestinian State existed[85]. In fact, that conclusion formed the basis for the ICJ's opinion that Article 51 of the UN Charter affords only a right of self-defence *against an external state*, which the ICJ concluded the Palestinian body was not[86].

D. Arguing for a "Nuanced Definition" of the Word "State" is Itself a Concession that the "Palestinian Territories" Do Not Constitute a "State" for the Purposes of the Rome Statute.

The mere fact that organisations must argue for a "nuanced definition" of statehood in order for the "Palestinian territories" to meet the Statehood criteria of Article

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[83] *See* United Nations Preparatory Commission for the International Criminal Court, New York, 8–19 Apr. 2002, *List of Delegations*, at 10, U.N. Doc. PCNICC/2002/INF/6 (30 Apr. 2002) (emphasis added), *available at* http://unbisnet.un.org:8080/ipac20/ipac.jsp?session=124267251TD72.61417&profile=bibga&uri=full%3D3100001~!677148~!1&booklistformat=#focus (Follow hyperlink to preferred language).

[84] *See* International Criminal Court, Assembly of States Parties, New York, 9–13 Feb. 2009, *Delegations to the second resumption of the seventh session of the Assembly of States Parties to the Rome Statute of the International Criminal Court*, at 50, U.N. Doc. ICC-ASP/7/INF.1/Add.2 (26 Mar. 2009), *available at* http://www.icc-cpi.int/iccdocs/asp_docs/ICC-ASP-7-INF.1-Add.2.pdf.

[85] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 194 (9 July 2004), *available at* http://www.icj-cij.org/docket/files/131/1671.pdf.

[86] *Id.*

12(3) for the purposes of the Rome Statute is proof positive that the "Palestinian territories" lack the requisite criteria for Statehood. While arguing in the alternative does not typically indicate concession of a primary position, it is important to distinguish that general rule in this case. The proponents of a nuanced definition of statehood are not actually arguing in the alternative, but rather are using their nuanced argument as the *primary* justification for Palestinian accession to the ICC[87]. In fact, the very reason for briefing the legality of quasi-statehood is because it is clear to all parties involved that the Palestinian entity is not a "State" under any acceptable definition of the word. This is why proponents of ICC jurisdiction based on the PA Declaration have had to construct such a contrived standard of statehood.

In its position paper arguing that "Palestine *can* be considered a state for the purposes of the *Rome Statute only*", Al-Haq explains the reasons for the lack of Palestinian statehood as follows[88]. Al-Haq points out the immediate negative reactions of Hamas and the European Union to a suggested unilateral declaration of independence by the PA or PLO[89]. *Al-Haq thus implicitly acknowledges lack of statehood by arguing that it is "difficult to discern whether the controversy [concerning the internal and external resistance to statehood]" will have an effect on its argument, since it is pursuing a nuanced interpretation of statehood "for the purposes of the Rome Statute only"*[90]. Therefore, even the proponents of Palestinian accession admit that under the typical interpretation of the term "State" in the Rome Statute, the ICC would not be able to accept jurisdiction[91].

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[87] *See* Al-Haq Paper, *supra* note 12, at ¶ 12.
[88] *Id.* (emphasis added).
[89] *Id.*
[90] *Id.* (emphasis added).
[91] *See Id. See also* Al-Haq Paper, *supra* note 12, at ¶¶ 16, 21–24, 40, 43. These paragraphs include more examples of Al-Haq's concession that "Palestine" is *not* a State, and assertions that the OTP should base its decision to accept accession on the argument for a nuanced quasi-state standard.

If, however, the Office of the Prosecutor ("OTP") were to indulge this line of analysis, it would betray actual States Parties by unilaterally repudiating standards for ICC jurisdiction that each State Party agreed to when it signed the Rome Statute[92]. Such a course of action would be an unabashed rejection of the Court's limited jurisdiction upon which member States Parties agreed, since even proponents of Palestinian accession to the ICC use an argument based on the fact that the "Palestinian territories" do not constitute a "State"[93]. States Parties spent an extended period of time negotiating the terms of the Rome Statute[94]. Had the States Parties intended for non-state entities to be allowed to accede to jurisdiction, there was ample opportunity for them to have included language to that effect in the Rome Statute[95]. They failed to do so.

States Parties also rely on ICC precedent, which has consistently placed the PA in its correct classification as an entity and not a State[96]. It would exceed the Prosecutor's authority to change this established non-State classification without express approval of the States Parties, and it would contravene international law. The Vienna Convention on the Law of Treaties states: "[T]he consent of a State to be bound by part of a treaty is effective *only if the treaty so permits or the other contracting States so agree*"[97]. The same principle applies here. Interpreting the meaning of the term "State" in the Rome Statute to permit a non-State entity to be bound by part of the treaty can only be effective if the treaty itself so permits or the other contracting states so agree. Absent explicit authority given in the governing documents of the ICC to allow non-States to accede to ICC jurisdiction, the Prosecutor may not recognise the PA Declaration without the

[92] *See* Rome Statute, arts. 11(2), 12(3).
[93] *See* Al-Haq Paper, *supra* note 12, at ¶¶ 16, 21–24, 40, 43.
[94] *See* ROY S. LEE, THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 4–5 (1999) (stating how the initial preparatory stage alone required many meetings of the committee and over 19 weeks to complete).
[95] Since there were Palestinians at the Rome Conference, they could have raised the issue there at the time.
[96] *See supra* Section I(C).
[97] Vienna Convention, *supra* note 18, art. 17 (emphasis added).

agreement of all the States Parties[98]. Moreover, the only valid ground for changing the status of Palestinian territories without such approval by all parties would be the legitimate establishment of an internationally recognised independent Palestinian State that meets the same criteria as other States Parties to the Rome Statute. Therefore, it is critical that the OTP identify the inherent flaws of the arguments for a quasi-state standard for the "purposes of the Rome Statute only"[99] and reject any attempt by the non-State "Palestinian territories" to accede to ICC jurisdiction.

II. THE ICC SHOULD NOT EXERCISE JURISDICTION BECAUSE DOING SO WOULD CONTRAVENE BOTH CUSTOMARY INTERNATIONAL LAW AND CONVENTIONAL LAW AND WOULD CONDONE A PALESTINIAN VIOLATION OF INTERNATIONAL AGREEMENTS.

A. The ICC Would Defy International Legal Precedent if it Attempted to Exercise Jurisdiction Over Israelis.

It is a well-established principle of customary international law that "[a]n international agreement does not create either obligations or rights for a third party state without its consent"[100]. This principle was enshrined in the 1969 Vienna Convention on the Law of Treaties[101].

The principle is taken even further by international tribunals. For example, the ICJ Statute specifically requires that parties consent to its jurisdiction before the ICJ will adjudicate a matter[102]. The ICJ's case law has affirmed this principle throughout its history. The first time the ICJ had cause to make such a determination came in the 1954 case, *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of*

[98]The word "State" appears over 400 times in the Rome Statute and the only entities permitted to become parties have been States—there were 160 States who participated in the drafting of the Rome Statue and Palestine was listed as an *organisation*. *See generally* Rome Statute, *supra* note 2; Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Annexes II. III, U.N. Doc. A/CONF.183/10 (17 July 1998), *available at* http://www.un.org/icc/iccfnact.htm.
[99]Al-Haq Paper, *supra* note 12, at ¶ 12.
[100]RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 324(1) (1987).
[101]*See* Vienna Convention, *supra* note 18, art. 34. *But see* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 324 cmt. e ("This section does not preclude the possibility that an agreement among a large number of parties may give rise to a customary rule of international law binding on non-party states".).
[102]Statute of the International Court of Justice, arts. 34(1), 36(2)–(3), 26 June 1945, 59 Stat. 1055.

Great Britain and Northern Ireland and United States of America) ("*Monetary Gold*")[103]. That case centred around an incident that occurred in 1943, in the midst of World War II, when the German Army removed a large amount of gold from Rome[104]. When the war ended, both Albania and Italy claimed the gold and submitted competing claims to international arbitration[105]. While waiting for the outcome of the arbitration proceeding, the governments of France, the U.K., and the U.S. signed an agreement to hold the gold in escrow in the United Kingdom so that it could retain the gold "in partial satisfaction of the [j]udgment in the Corfu Channel case"[106] in the event that the gold was found to belong to Albania. After the arbitrator found in favour of Albania, Italy filed an action with the ICJ against France, the U.K., and the U.S. In its application, Italy argued (1) that France, the U.K., and the U.S. should deliver the gold to Italy, and (2) that its right to the gold superseded the U.K.'s right to partial satisfaction of damages sustained during the Corfu Channel incident[107]. The first claim is the most relevant to the ICC's consideration of jurisdiction in the Israeli-Palestinian situation.

Before it could proceed to the merits of Italy's first claim, the ICJ stated that it "must [first] examine whether . . . jurisdiction [conferred by Italy, France, the United Kingdom, and the United States] is co-extensive with the task entrusted to it"[108]. As mentioned above, however, integral to this dispute was the claim of Albania—an unnamed party—to the gold. Indeed, the ICJ stated that, "[i]n order . . . to determine whether Italy is entitled to receive the gold, it is necessary to determine whether Albania has committed any international wrong against Italy, and whether she is under an obligation to pay

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[103]Monetary Gold Case (It. v. Fr., U.K., & U.S.), 1954 I.C.J. 19.
[104]*Id.*
[105]*Id.*
[106]*Id.* at 21.
[107]*Id.* at 22. The ICJ found that a provision in the agreement signed by France, the United Kingdom, and the United States amounted to acceptance of ICJ jurisdiction; therefore, it had been duly authorized by all named parties to adjudicate the matter. *See id.* at 31.
[108]*Id.* at 31.

compensation to [Italy]; and, if so, to determine also the amount of compensation"[109]. Therefore, the ICJ held that it "cannot decide such a dispute without the consent of Albania"[110]. The ICJ's explanation of that holding is particularly telling: "To adjudicate upon the international responsibility of Albania without her consent would run counter to a *well-established principle of international law* embodied in the [ICJ's] Statute, namely, that the [ICJ] can only exercise jurisdiction over a State with its consent"[111].

In a more recent case concerning East Timor, the ICJ once again applied the principle that an international tribunal cannot decide a case involving the legal rights of a third party without that party's consent[112]. In 1989, Australia, believing that the island of East Timor was under Indonesian control, signed a treaty with Indonesia regarding use of East Timor's continental shelf[113]. Yet, Portugal, which had controlled East Timor exclusively from the sixteenth century until 1975[114], claimed that any treaty executed without its consent was invalid[115]. Thus, "the fundamental question in the . . . case [wa]s ultimately whether, in 1989, the power to conclude a treaty on behalf of East Timor in relation to its continental shelf lay with Portugal or with Indonesia"[116]. Like the *Monetary Gold* case, in which the ICJ refused to make a legal determination that would affect the legal rights of a non-consenting third party (Albania), the ICJ in the *East Timor* case refused to rule because Indonesia had not accepted its jurisdiction[117]. It further refined the *Monetary Gold* standard by stating that the necessity of determining third party rights did not necessarily preclude it from exercising jurisdiction[118]. However, when a state's "rights

[109] *Id.* at 32.
[110] *Id.*
[111] *Id.* (emphasis added).
[112] Case Concerning East Timor (Port. v. Austl.), 1995 I.C.J. 90.
[113] *Id.* at 101–02.
[114] *See id.* at 95–96.
[115] *Id.* at 94–95.
[116] *Id.* at 102.
[117] *Id.* at 105.
[118] *Id.* at 104.

and obligations . . . constitute the very subject-matter of . . . a judgment", the ICJ may not exercise jurisdiction without that state's consent[119].

The ICJ is not the only international tribunal that has adhered to the *Monetary Gold* principle. The Permanent Court of Arbitration ("PCA") in The Hague, The Netherlands, applied this principle in its 2001 decision, *Larsen v. Hawaiian Kingdom*[120]. In that case, Larsen refused to pay fines associated with traffic citations[121]. Instead of registering his automobile as required by state law, Larsen argued that as a citizen of the Hawaiian Kingdom, he was not subject to U.S. law[122] and that Hawaii was in violation of its obligations under an 1849 treaty between the Hawaiian Kingdom and the United States by allowing U.S. municipal law to govern[123]. The PCA held that because the interests of the U.S. were "a necessary foundation for the decision between the parties", it could not rule on the dispute at hand[124]. Moreover, even though both parties to the arbitration proceeding argued that the *Monetary Gold* principle should apply only to ICJ proceedings, the PCA held that the principle must be applied by all international tribunals, stating that,

> [a]lthough there is no doctrine of binding precedent in international law, it is only in the most compelling circumstances that a tribunal charged with the application of international law and governed by that law should depart from a principle laid down in a long line of decisions of the International Court of Justice[125].

Indeed, "[t]he principle of consent in international law would be violated if [the PCA] were to make a decision at the core of which was a determination of the legality or illegality of the conduct of a non-party"[126]. The ICC, as an international tribunal bound by international law, should likewise refrain in this matter from determining the relative

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[119] *Id.* at 105.
[120] Award in the case of *Larsen v. Hawaiian Kingdom*, 119 I.L.R. 594 (Perm. Ct. Arb. 2001), [hereinafter "Award"] *available at* http://www.pca-cpa.org/upload/files/LHKAward.PDF.
[121] *Larsen v. Hawaiian Kingdom, Memorial of Lance Paul Larsen* ¶ 48–52 (Perm. Ct. Arb. 2000) *available at* http://www.alohaquest.com/arbitration/memorial_larsen.htm.
[122] *Id.* ¶ 47.
[123] Award, *supra* note 120, ¶ 2.3.
[124] *Id.* ¶ 11.23.
[125] *Id.* ¶ 11.21.
[126] *Id.* ¶ 11.20.

rights of a non-consenting third party—Israel—and should reject any Palestinian request to conduct an investigation.

Any exercise of jurisdiction over the Israeli-Palestinian situation would directly contradict these well-established principles of customary international law. First, the treaty under which the ICC was formed, the Rome Statute, has never been signed by Israel[127]. Thus, pursuant to customary international law, the Rome Statute confers no rights *or obligations* on Israel without its consent[128]. Indeed, if the ICC were to exercise jurisdiction over the Israeli-Palestinian situation, Israel would be compelled to adhere to the myriad of obligations delineated in the Rome Statute, which would constitute a direct violation of international law. For example, Israel would presumably be required to open up its investigatory and prosecutorial processes to the ICC Prosecutor so that he could determine their efficacy (e.g., so that he could determine whether he should apply the principle of complementarity and forego further prosecutions)[129]. Additionally, because the ICC would be required to analyse whether Israeli commanders properly relied on information and intelligence when making decisions to attack certain objectives, Israel would be forced to produce such informational and intelligence records[130]. Compelling such intrusive disclosure would violate Israel's sovereignty when Israel has not acceded to the very treaty requiring these actions.

The ICC would also be required to decide whether Israel's actions were governed under the principles of international humanitarian law *or* international human rights law. To make that determination, the ICC would be required to determine whether the Israel-

[127]*See generally* Int'l Criminal Court, The States Parties to the Rome Statute, http://www.icc-cpi.int/Menus/ASP/states+parties/ (last visited 7 July 2010) (listing the current signatories to the Rome Statute by region).
[128]*See supra* notes 100–101 and accompanying text.
[129]*See* Rome Statute, art. 18.
[130]*See id.* art. 28.

Palestinian situation constituted a wartime scenario[131]. Therefore, the ICC would necessarily have to decide such issues as (1) the legal grounds on which Israel decided to apply armed force in the Gaza Strip; (2) whether Israel employs an "occupying" force; and (3) whether Israel is entitled to the right of self-defence. Such determinations would constitute the very subject matter of any proceedings and would directly affect Israel's legal rights as a sovereign state and a non-party to the Court.

Much like the *East Timor* case and *Larsen v. Hawaiian Kingdom*, where the ICJ and PCA, respectively, refused to exercise jurisdiction *because third party rights constituted the very subject matter of the proceedings*, the ICC should refuse to exercise jurisdiction over the Israeli-Palestinian situation for the same reason. Any attempt to try Israeli citizens before the ICC would directly contravene the well-established customary international legal principle articulated in the *Monetary Gold* case and subsequently—both in the ICJ and in other international tribunals—that an *international tribunal may not determine the legal rights of a third party state without its consent if such rights go to the very subject matter of the proceedings*. Because the ICC is an international tribunal akin to the ICJ and the PCA, the ICC should be bound by the *Monetary Gold* principle in accordance with customary international law. Therefore, given that Israel is a non-party, non-consenting State, absent a referral by the UN Security Council under Chapter VII of the UN Charter, the ICC must decline to exercise jurisdiction over Israelis.

[131] Indeed, international humanitarian law ("IHL") applies only to nations during wartime. INT'L COMM. OF THE RED CROSS, INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW: SIMILARITIES AND DIFFERENCES 1 (2003), *available at* http://www.ehl.icrc.org/images/resources/pdf/ihl_and_ihrl.pdf. IHL instruments include the Geneva Conventions and their applicable protocols, while the IHRL is embodied in the International Covenants of Civil and Political Rights and on Economic, Social, and Cultural Rights as well as in the Conventions on Genocide, Racial Discrimination, Discrimination Against Women, Torture, and Rights of the Child. *Id.* at 1–2. *Because these instruments implicate different obligations depending on whether a nation is at war*, the ICC would be required to make such an initial determination in order to institute the proper standard of review and, if necessary, the proper penalty.

B. Exercising Jurisdiction Over Israelis Would Place the Palestinians in Violation of International Agreements in Contravention of Article 98(2) of the Rome Statute.

Even if the ICC were to assume that the "Palestinian territories" were a State, whether generally or solely for the purposes of the Rome Statute (a decision that the ECLJ would consider to be wrong as a matter of both customary and conventional international law), the ICC should still refrain from exercising jurisdiction over Israelis since doing so would require the PA to violate its international commitments under the Interim Agreements in contravention of Article 98(2) of the Rome Statute.

Article 98(2) of the Rome Statute reads as follows:

> The Court may not proceed with a request for surrender which would *require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court*, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender[132].

Under the terms of the Interim Agreements, which clearly constitute "international agreements"[133], the PA is prohibited from exercising jurisdiction over Israelis in the "Palestinian territories"[134]. Since Israel is not a member of the ICC and has chosen not to accede to its jurisdiction in the "situation" involving Israel and the Gaza Strip, the ICC would likely proceed with a request for surrender of Israeli nationals through the PA. This would require the PA to directly violate the terms of its international agreements by causing it to attempt to exercise jurisdiction, or quasi-jurisdiction at the very least, over Israelis in violation of the Interim Agreements, the terms upon which the PA voluntarily agreed.

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[132]Rome Statute, art. 98(2) (emphasis added).

[133]Such agreements are inter-"national" agreements, only because the following actual States are involved: Israel, the U.S., Russia, and the nations of the European Union. The participation by the foregoing States alone makes such agreements "international agreements". It does not thereby make the PA, the PLO, or the "Palestinian territories" a "State", any more than a treaty between a UN member State and the United Nations makes the UN a "State".

[134]Interim Agreement, *supra* note 10, art. XVII(1)(a).

As even Al-Haq acknowledges, the PA can only transfer jurisdiction if it is able to assert that jurisdiction in the first place and then purport to transfer it to the Court[135]. Even if we assume *arguendo* that the Palestinians somehow have an inherent right to exercise jurisdiction over Israelis in the "Palestinian territories" that they relinquished in the Interim Agreements, or that their obligations to investigate war crimes internally confer an obligation to investigate Israelis as well, the *Rome Statute specifically sought to avoid situations where exercising jurisdiction would otherwise cause violations of international law*[136]. That is precisely what would occur here, given the Interim Agreements' specific restrictions. That fact is undeniable, and any attempt by Palestinians to exercise or transfer jurisdiction over Israelis would clearly violate the language and spirit of Article 98(2) of the Statute, given that it would require the Palestinians to violate international commitments withholding that very authority from them (unless, of course, Israel agreed to cooperate with a request for surrender, which it surely would not). Moreover, merely filing its Declaration violates the Interim Agreements, and so the PA should not be rewarded for an obvious violation of obligations to which it freely agreed.

III. THERE IS NO PRECEDENT JUSTIFYING AN EXPANSIVE READING OF THE ROME STATUTE THAT WOULD RENDER JURISDICTION PROPER.

Even Professor John Quigley, a well-known advocate of Palestinian statehood, concedes that "only a *state* that is *sovereign* in a particular territory can confer jurisdiction on the ICC in that territory"[137]. Al-Haq and others argue, however, that the ICC should take an expansive reading of the Rome Statute and recognise a Palestinian State, *even if only for the purposes of the Rome Statute*[138]. John Dugard, who chaired the Arab

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[135]*See* Al-Haq Paper, *supra* note 12, ¶ 23.
[136]*See* Rome Statute, art. 98(2).
[137]John Quigley, *The Palestinian Declaration to the International Criminal Court: The Statehood Issue*, 35 RUTGERS L. REC. 1, 3 (2009) (emphasis added), *available at* http://www.lawrecord.com/files/35-rutgers-l-rec-1.pdf.
[138]Al-Haq Paper, *supra* note 12, ¶¶ 12, 14, 20 (emphasis added).

League's "Report of the Independent Fact Finding Committee on Gaza" and wrote a July 2009 op-ed in the New York Times, urged the ICC to recognise Palestinian statehood

> *only for the purpose of the court.* In so deciding, Mr Moreno-Ocampo should not adopt a restrictive approach that emphasizes the absence of a fully effective government, but rather an expansive approach that gives effect to the main purpose of the I.C.C.[139].

The Prosecutor should take neither an expansive nor a restrictive approach to the Rome Statute; instead, he should take an approach that faithfully gives effect to the words of the Statute according to their ordinary meaning[140]. As explained above, the "Palestinian territories" do not meet either the traditional legal criteria for statehood according to the widely accepted Montevideo Convention, by virtue of recognition by other states, or according to some other *de facto* standard. While Professor Dugard's attempt to push his solution may be well-intentioned, it is without legal authority, and it does not comport with the object and purpose of the Rome Statute, which intentionally created a court of limited jurisdiction. It also violates the very treatment deemed appropriate by States Parties to the Statute (as evidenced by how they recognise Palestinian participants at periodic ICC gatherings).

Similarly, Al-Haq argues that, because of the Rome Statute's Preamble, which states "that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured . . ."[141] and affirms its desire "to put an end to impunity"[142], the intent of the Statute justifies an expansive interpretation[143]. This so-called teleological approach was summarized by the OTP as follows: that the ICC, "in the light of [the Court's] inherent power to determine

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[139]Dugard, *supra* note 34 (emphasis added). Note that Dugard's op-ed admits that the Palestinians lack a fully effective government.

[140]*See* Vienna Convention, *supra* note 18, art. 31(1) ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose").

[141]Rome Statute, pmbl. (emphasis added).

[142]*Id.*

[143]Al-Haq Paper, *supra* note 12, ¶¶ 12, 14, 20.

the scope of its own jurisdiction and competence, should interpret the meaning of the term 'State' in a manner that will enable the treaty to fullfil its objectives"[144].

First, given that the ICC's authority is based on ratification by States Parties of the Rome Statute, it is extremely presumptuous to claim that the ICC has inherent authority to determine its own jurisdiction, especially when asserting an expansive approach using nuanced and novel interpretations. *The ICC's jurisdiction is based solely on the consent of States Parties.* Moreover, Al-Haq's argument fails to consider how such an interpretation would actually undermine the terms and purpose of the Statute. The first words of the Preamble refer to "[t]he *State Parties* to this Statute"[145], an indication that the Statute's reach is limited to—and by—the States that have acceded to it.

Further, the notion that the "object and purpose" of the Rome Statute justify a novel, expansive interpretation of jurisdiction belies other purposes of the Court. This is especially pronounced in the context of the Prosecutor's *proprio motu* authority to initiate an investigation under Article 15 of the Statute. In the Pre-Trial Chamber's recent *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, the Chamber stated that

> insofar as *proprio motu* investigations by the Prosecutor are concerned, both proponents and opponents of the idea feared the risk of politicizing the Court and thereby undermining its "credibility". In particular, they feared that providing the Prosecutor with such 'excessive powers' to trigger the jurisdiction of the Court might result in its abuse[146].

The Pre-Trial Chamber, in addressing the "reasonable basis to proceed with an investigation" standard under Article 15, stated that such standard

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[144]OFFICE OF THE PROSECUTOR, SITUATION IN PALESTINE, SUMMARY OF SUBMISSIONS ON WHETHER THE DECLARATION LODGED BY THE PALESTINIAN NATIONAL AUTHORITY MEETS STATUTORY REQUIREMENTS, ¶ 21 (23 Apr. 2010).

[145]Rome Statute, pmbl. (emphasis added).

[146]Situation in the Republic of Kenya, Case No. ICC-01/09, Decision Assigning the Situation in the Republic of Kenya to Pre-Trial Chamber II, at ¶ 18 (31 Mar. 2010), *available at* http://www.icc-cpi.int/iccdocs/doc/doc854287.pdf (forwarding the Prosecutor's request to Pre-Trial Chamber II for consideration).

> must be understood within the context in which it operates. The standard should be construed and applied against *the underlying purpose of the procedure in article 15(4) of the Statute, which is to prevent the Court from proceeding with unwarranted, frivolous, or politically motivated investigations that could have a negative effect on its credibility*[147].

This statement highlights that the Court's underlying object and purpose is intentionally constrained, which is consistent with the notion of an international court that is complementary to national legal systems and whose jurisdiction depends on the consent of States Parties. As such, the argument that the Court should seek to expand jurisdiction to prevent impunity ignores a central element of the Court's underlying purpose. Moreover, such situations were explicitly contemplated and addressed through the provision that allows for UN Security Council referrals.

Al-Haq cites several non-applicable, easily distinguishable cases that it alleges justify a broader interpretation of the Court's jurisdiction. For instance, it notes that Article 93(2) of the UN Charter allows *states* that are non-members of the UN to join the Statute of the ICJ[148]. The ICJ, however, is a different court governed by a wholly different legal document whose express terms are not binding on the ICC (unless, of course, they reflect customary international law)[149]. Second, the referenced provision of the UN Charter only applies *to states* (albeit states that have yet to join the UN), and has nothing to do with non-state entities like the PA.

Al-Haq also notes self-referrals to the Court from Uganda, the Democratic Republic of the Congo, and the Central African Republic (all of which are *actual* states, not non-state entities like the PA), as well as the UN Security Council's referral of the

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[147] *Id.* ¶ 32 (emphasis added).

[148] Al-Haq Paper, *supra* note 12, ¶ 15.

[149] An example of an ICJ opinion which reflects customary international law is the *Monetary Gold* principle. *See supra* Section II(A). The fact that the principle has been followed by numerous international courts, *see, e.g.*, *supra* Section II(A), reflects the idea that international courts consider the principle to be customary international law. "Customary international law is defined as 'a general practice accepted as law'". Major Mark R. Ruppert, USAF, *Criminal Jurisdiction Over Environmental Offenses Committed Overseas: How to Maximize and When to Say "No"*, 40 A.F. L. REV. 1, 2 n.4 (1996) (quoting J. L. BRIERLY, THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE (6th Ed. 1963)).

situation in the Darfur region of the Sudan to the Court, as though they too justify an expansive reading of the Statute[150]. These examples, as well as a declaration under Article 12(3) by the Ivory Coast, the first non-party state (*but a state nonetheless*) to refer a case to the ICC, are apparently intended by Al-Haq to support the notion that the ICC should not be bound by a literal interpretation of jurisdiction *over states*. For instance, the Security Council's referral of crimes committed within the Darfur region justifies the conclusion, according to Al-Haq's position, that the "Statute, as well as the Security Council, does not consider the sovereign state as being the absolute and only unit of territory over which the Court may have jurisdiction"[151].

These examples, including the Darfur situation, however, are inapposite and provide no legal or analogous justification for interpreting the "Palestinian territories" as a State under the terms of the Statute or as even an entity over which the ICC can accept jurisdiction. The situation in Darfur (aside from the substance of the alleged crimes being very different[152]) is much different from the Israeli-Palestinian situation precisely because the Security Council referred the situation to the Court, *as it is authorized to do under the terms of the Rome Statute*[153]. Jurisdiction was not based on a unilateral recognition of jurisdiction by a non-state. If the Security Council were to refer the Israeli-Palestinian issue to the ICC, the argument would be different[154]. We do not dispute the observation by Condorelli and Villalpando, cited by Al-Haq, that the Security Council "enjoys a wide

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[150] *Id.* ¶¶ 17–18.

[151] *Id.* ¶ 19.

[152] The Court is addressing alleged widespread and indiscriminate mass murder in Darfur, which the ICC's Prosecutor thought sufficient to warrant charges of genocide against Sudan President Omar al-Bashir. Israel launched a targeted military invasion in response to rocket attacks against its country by a terrorist organisation and evidently expended great effort to minimise civilian casualties. Sudan is incapable of rendering justice in its own country due to the impunity with which its President operates and because it lacks a properly functioning judiciary and court system. This is most certainly not the case in Israel. To compare these respective situations would be morally misguided, to say the least.

[153] *See infra,* Section VI.

[154] It should be noted, however, that the complementarity principle applies even in the case of a Security Council referral. Articles 17 and 19 provide no exception for a Security Council referral. *See* OFFICE OF THE PROSECUTOR, THE PRINCIPLE OF COMPLEMENTARITY IN PRACTICE 21 (2003), *available at* http://www.icc-cpi.int/iccdocs/doc/doc654724.pdf.

discretion, based on its powers under Chapter VII of the Charter, in determining and delimiting the 'situation' to be referred to the Court"[155]. *However, the Security Council has not referred the situation to the Court and the lack of Security Council action does not entitle the Prosecutor to act in its stead.*

Further, even in the case of Darfur[156], the Security Council referred to the OTP the situation regarding incidents in the Sudan, a recognised "State". The fact that the Security Council limited investigations to certain areas within that state is of no consequence to the particular legal question now before the Court. Were it to choose to do so, the Security Council could theoretically refer to the OTP a situation in the Gaza Strip, as opposed to Israel or the "Palestinian territories".

The theme of the Al-Haq Paper is focused on a "broad" reading of the purpose of the ICC, which would allow it to entertain jurisdiction over a referral from the PA under a "statehood-light" view—since the "Palestinian territories" do not constitute a State. Yet, contrary to Al-Haq's assertion that "precedent suggests a tendency to interpret the mechanisms of the Rome Statute expansively"[157], there is nothing that justifies such a conclusion other than the authors' personal preferences. Nothing—including the language of the Statute, the legal standards for statehood, the history of the ICC, and any other international legal precedent—warrants an expansive reading that would justify accession to ICC jurisdiction by the PA or "Palestinian territories". In fact, the suggested "expansive" reading would itself undermine the Court's object and purpose as set forth in the Rome Statute.

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[155] *Id.*

[156] *See* Al-Haq Paper, *supra* note 12, ¶ 19. *See also* Amnesty International USA, Darfur and International Criminal Court: Frequently Asked Questions, http://www.amnestyusa.org/international-justice/international-criminal-court/darfur-and-the-international-criminal-court-faqs/page.do?id=1041203 (last visited 7 July 2010).

[157] *Id.* ¶ 20.

IV. THE "PALESTINIAN TERRITORIES" LACK THE AUTHORITY IN LAW AND IN PRACTICE, AS WELL AS BY VIRTUE OF THE INTERIM AGREEMENTS AND INHERENT POWERS, TO ACCEDE TO ICC JURISDICTION.

As recently as 12 January 2010, the ICC's OTP informed the UN Deputy Commissioner for Human Rights that the OTP was analysing the Court's jurisdiction over alleged crimes committed as part of Operation Cast Lead and provided a summary of arguments raised to date[158]. Then, in a document dated 23 April 2010, the OTP summarised in greater detail the various legal arguments. Among the arguments was that Palestinians possess inherent authority to transfer jurisdiction to the Court, which the Interim Agreements do not abrogate[159]. Palestinian NGO, Al-Haq, has been one of the main proponents of the argument that the Palestinian entity can be considered a State *if only for purposes of Article 12(3) of the Rome Statute*[160]. Leaving aside the substance of the criminal allegations—and the speculative, unreliable methodology used to reach such conclusions—as well as the ways in which this interpretation would violate the Rome Statute, there are no solid legal or factual grounds to adopt this line of analysis.

A. The Palestinian Authority Does Not Possess the Capacity to Accede to ICC Jurisdiction by Virtue of Inherent Authority or the Interim Agreements.

Al-Haq argues that the ICC should accept jurisdiction pursuant to the PA's Declaration because the PA possesses adequate governmental capacity to transfer jurisdiction to the Court. As an initial matter, it is both interesting and puzzling that Al-Haq asserts that,

> [a]t the November NGO meeting in The Hague, it was confirmed that a determination as to whether "the declaration by the Palestinian Authority accepting the exercise of jurisdiction by the Court meets statutory requirements" would not be decided on the question of whether Palestine

[158]Letter from the Int'l Criminal Court, The Office of the Prosecutor, to the UN Deputy High CommissionerComm'r for Human Rights (12 Jan. 2010), *available at* http://www.icc-cpi.int/NR/rdonlyres/FF55CC8D-3E63-4D3F-B502-1DB2BC4D45FF/281439/LettertoUNHC1.pdf.
[159]*Id.* ¶¶ 13(c), (e), 14.
[160]Al-Haq Paper, *supra* note 12, ¶¶ 13–21.

> was generally recognized as a state, but rather on the basis of whether the Palestinian Authority could satisfy the requirements of the Statute by demonstrating that they possess adequate "government capacity" to transfer jurisdiction to the Court[161].

First, it is interesting in that *such an argument is a tacit admission by Al-Haq that the PA does not meet the generally recognised criteria for statehood.* As such, one cannot help but wonder if Al-Haq was merely stating its preference that jurisdiction be decided on this "government capacity" standard. It is puzzling because at a 1 April 2010 meeting with the ECLJ, the Prosecutor of the Court, Mr Luis Moreno-Ocampo, indicated that he assured Palestinians and various advocates of their cause of nothing more than that he would consider their arguments and make a decision after they had presented their case *on the basis of the law as written.*

Second, the following statement contained in the Al-Haq brief is presumptuous in the extreme: "Accepting therefore that the meaning of a state for the purposes of the Rome Statute may legitimately differ from the definition of a state for international law more generally, we consider what criteria the OTP can apply in making such a determination"[162]. *No authority or law is cited whatsoever for this seriously flawed argument.* Al-Haq simply states it as such and apparently expects it to be accepted at face value. Paradoxically, the Al-Haq brief argues that the ICC should "respect[] third states' sovereignty"[163], yet the whole brief argues for an end that directly infringes on Israel's sovereignty.

[161] *Id.* ¶ 21. The Al-Haq memorandum contains a direct quote but does attribute the source of that quote.
[162] *Id.*
[163] *Id.* ¶ 24.

Al-Haq's argument is premised on three questions, which it claims the Prosecutor posed for a response[164]. Al-Haq answers all three of these questions in the affirmative[165], despite the fact that two of the three clearly warrant different answers, as explained below.

In reality, neither inherent authority, nor the Interim Agreements, nor any other set of facts leads to the conclusion that the PA has the capacity to transfer jurisdiction to the ICC. The Al-Haq brief attempts to invent standards for accession that have no basis in precedent or in the language of the Statute, which specifically refers to statehood and says nothing about "government capacity"—merely one factor in assessing statehood[166].

While the Al-Haq brief makes repeated reference to the Interim Agreements to argue that the PA and PLO have capacity to transfer jurisdiction to the ICC, its discussion of those agreements shifts when convenient. On the one hand, Al-Haq references them to argue that they confer a governmental capacity on the PA and PLO, including power over criminal courts, that makes transfer of jurisdiction plausible[167]. On the other hand, Al-Haq seems to imply that the Interim Agreements are antiquated and do not reflect reality or practice, as Al-Haq states that the PA's jurisdiction has expanded since the agreements, notwithstanding explicit limitations in those agreements[168]. It cannot be both. The Palestinians cannot claim that the Interim Agreements are the source of governing capacity *and,* at the same time flout them as no longer binding or as merely reflective of a temporary Palestinian resignation of inherent rights that can be reclaimed at any time[169].

This doublespeak is commonplace in the arguments supporting a *de facto* recognition of Palestinian statehood. It is also argued, as in the Al-Haq brief, that the

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[164] *Id.* ¶ 22. The three questions posed are as follows: "1. Does the PA have the capacity to enter into international agreements? 2. Does the PA have the capacity to try Palestinians on criminal charges? 3. Does the PA have the capacity to try Israeli citizens on criminal charges?"
[165] *Id.* ¶ 23–38.
[166] *See* Montevideo Convention, *supra* note 18.
[167] Al-Haq Paper, *supra* note 12, ¶¶ 25–28.
[168] *Id.* ¶ 26.
[169] *Id.* ¶¶ 26, 28.

"Palestinian territories" are "occupied" by Israel[170]. However, they then make a directly contradictory argument that the "Palestinian territories" constitute a sovereign body that exercises governmental capacity and have the independent authority to transfer criminal jurisdiction to the Court. Again, it cannot go both ways.

1. The PA and PLO do not have the capacity to enter into foreign relations, contrary to the Al-Haq brief's conclusions.

Al-Haq claims that either the PA or the PLO has the power to enter into international agreements on behalf of the Palestinian people, and, therefore the PA, acting as a subsidiary body to the PLO, has the power to transfer jurisdiction to the Court[171]. First, it is notable that the Al-Haq brief poses a question, namely, whether the PA can enter into "international agreements". It appears this question is deliberately formulated to avoid the relevant legal test, which is whether the PA has the actual ability to engage in foreign relations. Whether an entity can engage in foreign relations is one of the Montevideo tests for statehood[172]. The Al-Haq brief, in apparent recognition of the fact *that the Interim Agreements clearly deny the Palestinians that right (a provision explicitly agreed to by Palestinian officials)*, instead employs the similar-sounding, yet irrelevant test of, whether they can enter into international agreements.

Whether a representative of the Palestinian people has the capacity to engage in foreign relations is but one factor in determining whether "Palestinian territories" could be considered a State. The Montevideo Convention lists other conditions that are also not met, including a permanent population, a defined territory, and a government[173]. Defined territory, in particular, represents an unfulfilled precondition (as the boundaries of a hypothetical, future, Arab Palestinian State are not set), which is enshrined in the Interim Agreements and in the UN Security Council Roadmap explicitly contemplating future

[170] *Id.* ¶ 23.
[171] *Id.* ¶¶ 27–28.
[172] Montevideo Convention, *supra* note 18.
[173] *Id.*

permanent resolution of territorial boundaries by negotiations between the parties[174]. The permanent population issue is also unsettled, as it is not clear whether Israeli settlements would be included as part of a future Palestinian State and to what extent populations in and around Jerusalem and in neighboring Arab countries would be included[175]. Finally, although the PA controlled areas of the West Bank have a functioning government to some extent, Gaza (where the alleged crimes occurred) is highly dysfunctional, ruled by a terrorist group (Hamas), and characterised by an absence of the rule of law[176]. The PA also has no governmental control over Gaza whatsoever[177].

What is abundantly clear, however, is that the PA and PLO have agreed to forego engaging in foreign relations under the Interim Agreement. Under the Interim Agreement between Israel and the PLO, *the PA explicitly agreed to forego a general capacity to engage in diplomatic relations with other states*[178]. Specifically, under Article 9(5), with the exception of "economic agreements", "agreements with donor countries", "cultural, scientific and educational agreements", and the like, the PA does "not have powers and responsibilities in the sphere of foreign relations . . . and the exercise of diplomatic functions", which includes "the establishment abroad of embassies, consulates or other types of foreign missions and posts or permitting their establishment in the West Bank or the Gaza Strip, the appointment of or admission of diplomatic and consular staff, and the exercise of diplomatic functions"[179]. Additionally, Article 9(5)(c) of the Interim Agreement expressly declares that dealings between PA officials and foreign officials

[174]Interim Agreement, *supra* note 10, art. XVII(1)(a); *see infra* Section IV(C)(2).
[175]Interim Agreement, *supra* note 10, art. XVII(1)(a).
[176]*See infra* note 206 and accompanying text.
[177]*See infra* Section IV(A)(2).
[178]*See* Interim Agreement, *supra* note 10, art. IX(5).
[179]*Id.* art. IX(5)(a)–(b).

"shall not be considered foreign relations"[180]. The PLO's authority with respect to international relations is also "for the benefit" of the PA[181].

These limitations restrict the PLO from anything resembling full power in the diplomatic and international sphere, and the phrase "for the benefit", as Al-Haq acknowledges, was intended to prevent any claim to statehood[182]. Nonetheless, Al-Haq argues that the PLO and PA are, in effect, the same entity, despite the fact that they were deliberately separated[183]. Al-Haq states that,

> this PLO-PA "division of labour" with regards to foreign relations seems difficult to enforce given the overlap between the two organizations. Since the Oslo Accords the distinction has been exponentially blurred in practice, and the reality is that the PA has entered into various agreements with international organizations and states[184].

Additionally, international law scholars have interpreted exactly what it means to have the "capacity to conduct foreign relations". One writer has suggested that the term "capacity" must be interpreted as "legal competence"[185]. Another explains that legal independence is necessary, which enables a government to make such arrangements as it wishes to make with other states and to implement them when necessary[186]. Another says it is the capacity to enter into the full set-up of international relations, with the government being capable of and authorized to represent the state, and to subordinate it legally and politically in relationships with additional bodies that are subject to international law[187].

Clearly the PA and PLO do not satisfy these different factors. Even if the distinction between the PA and PLO were "blurred in practice"[188], it is widely accepted by scholars, practitioners, and statesmen that an entity will not be recognised as a state if its

[180] *Id.* art. IX(5)(c).
[181] Al-Haq Paper, *supra* note 12, ¶ 26.
[182] *Id.*
[183] *Id.*
[184] *Id.*
[185] NII LANTE WALLACE-BRUCE, CLAIMS TO STATEHOOD IN INTERNATIONAL LAW 55 (1994).
[186] Colin Warbrick, *States and Recognition in International Law*, *in* INTERNATIONAL LAW 229 (Malcolm D. Evans ed., 1st ed. 2003).
[187] DAVID RAIČ, STATEHOOD AND THE LAW OF SELF-DETERMINATION 73–74 (2002).
[188] Al-Haq Paper, *supra* note 12, ¶ 26.

creation was tainted by illegality[189] or in "violation[] of a treaty"[190]. The Interim Agreements between the State of Israel and the PLO explicitly stipulate that "[n]either side shall initiate or take any step that will change the status of the West Bank and the Gaza Strip pending the outcome of the permanent status negotiations"[191]. As such, *any claim that the PA can enter into foreign relations, that they represent a State, or even that they constitute a sovereign authority with jurisdiction over Israelis that can be transferred to the ICC would illegally contravene the terms of the PA's existing agreements.* In this sense (and in many others that are detailed at greater length below), the situation is very different from other previously unsettled geopolitical scenarios, like that of Kosovo, for instance[192].

So, while the Oslo Accords and the Interim Agreement may indeed just be part of "a larger ongoing peace process"[193], to conclude, as the Al-Haq paper does, "that the restrictions on the foreign policy operations of the PA conflict with the inalienable right of the Palestinian people to self-determination"[194], is to ignore the fact that the Palestinians voluntarily entered into the Interim Agreements and that they prohibit a change in status without a subsequent agreement between the parties. Even if the Interim Agreements no longer reflect the "true" practice between the two sides, they certainly do not justify the much larger logical leap that *therefore* the Palestinians are able to enter into foreign relations and transfer jurisdiction to the ICC. In fact, if anything, they would imply only the opposite, that the Interim Agreements *transferred* from the State of Israel to the PA

[189] CRAWFORD, *supra* note 35, at 132.
[190] Al-Haq Paper, *supra* note 12, ¶ 26.
[191] *See* Interim Agreement, *supra* note 10, art. XXXI(7); *see also* S.C. Res. 1850, U.N. Doc. S/RES/1850 (16 Dec. 2008) (calling on Israel and the Palestinians to refrain from taking steps that might influence the results of the negotiations).
[192] *See infra* Section VI.
[193] Al-Haq Paper, *supra* note 12, ¶ 26.
[194] *Id.*

certain powers and authority that the Palestinians had not previously possessed—which is widely understood and accepted.

Under the Interim Agreements, PA representatives have been able to enter into a limited number of agreements with foreign states, but that fact certainly does not render "Palestinian territories" a State or a quasi-State, since the PA was able to act solely due to Israel's express agreement. A number of those agreements were peace arrangements to which Israel and the Palestinians were the only parties[195]. In instances involving third parties, the PA was acting according to the power *conferred* by the Interim Agreement[196]. For instance, the Greater Arab Free Trade Agreement ("GAFTA"), which the PA signed in 1998, is validated by the Interim Agreement because GAFTA is an "economic agreement"[197].

Further, Al-Haq is mistaken in its assertion that "the right to engage in international relations with other peoples" is somehow a protected right, even to the level of *jus cogens*[198]. The "right to engage in international relations", if there is such a right, is

[195] *E.g.*, Wye River Memorandum, Isr.-PLO, Oct. 23, 1998, 37 I.L.M. 1251; Interim Agreement, *supra* note 10; The Agreement on Gaza and Jericho, Isr.-PLO, May 4, 1994, 33 I.L.M. 622; Oslo Accords, *supra* note 10.

[196] The Interim Agreement specifically allows the Palestinians to sign and negotiate agreements pertaining to economics, education, regional development, science, and culture. Interim Agreement, *supra* note 10, art. 9(5).

[197] *Id.*

[198] *Id.* Al-Haq refers to page 65 of *International Law* by Antonio Cassese, for support. Here, Cassese refers to the "self-determination of peoples" as a "general rule[] protecting specific human rights", which has "had the nature of [a] peremptory norm[] ascribed to [it] in official statements by government representatives". ANTONIO CASSESE, INTERNATIONAL LAW 65 (2d ed. 2005). Because "the principle on *respect for fundamental human rights* belongs to the category of *jus cogens*", *id.*, now "self-determination" is a "norm with a *nature* of jus cogens". Al-Haq Paper, ¶ 26. First, *jus cogens* constitutes a select category of principles from which no derogation is permitted. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. k (1987). Therefore, a principle is either part of that classification or not—there is no grey area. The fact that a principle has the "nature" of *jus cogens* carries no weight, for many principles have the "nature" of *jus cogens*, but are not *jus cogens*. The very reason the category is so small is that it is highly selective and very limited: indeed, there are very few principles on which all nations can agree that no derogation should be permitted. Second, Cassese seems to err by equating specific rights under *jus cogens* with all rights of a certain "character". This is not accurate, for *jus cogens* consists of a list of enumerated protections, not all protections of a certain type. Third, Cassese gives credibility to the statements of leaders as conferring peremptory norm status. But what gives it this status is the fact that it inherently *has* this status, not that individuals attribute this status to it. The attribution is only indicative of its actual status. Additionally, in the same context, Cassese refers to a quote by Eleanor Roosevelt, in which she states that "the principle of self-determination given unrestricted application would result in chaos". *Id.*

certainly not an *individual* right, even if a group of individuals claims to hold it. This "right", more correctly referred to as a norm of international law, attaches to a *state* as the *representative* of a people and to certain other international actors such as organisations (e.g., UN, ICRC, etc.). Moreover, the evidence upon which Al-Haq relies simply confirms numerous PA and PLO *violations* of agreements with Israel[199]—evidence that suggests that the PA is not yet ready to assume the obligations of responsible statehood in the community of nations.

2. It is questionable how much governmental control the PA even possesses, particularly in light of its inability to exercise jurisdiction over Israelis.

It is also questionable to what degree the PA effectively exercises governmental capacities in the "Palestinian territories". Under the Interim Agreement, Israel retains control over external defence of the West Bank and Gaza Strip:

> Israel shall continue to carry responsibility for defence against external threats, including the responsibility for protecting the Egyptian and Jordanian borders, and for defence against external threats from the sea and from the air, as well as the responsibility for overall security of Israelis and settlements, for the purpose of safeguarding their internal security and public order, and will have all the powers to take steps necessary to meet this responsibility[200].

This is further evidence that the "Palestinian territories" do not constitute a State: first, because they clearly do not exercise full control over a defined territory, and, second, because they do not exhibit the type of control indicative of a sovereign with the capacity to transfer criminal jurisdiction[201]. Moreover, the Interim Agreement, as well as historical

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at 64. This goes to show that self-determination must be restricted by the actions of states, governments, or other bodies of authority.

[199]Al-Haq Paper, *supra* note 12, ¶¶ 26, 27.

[200]Interim Agreement, *supra* note 10, art. XII.

[201]While these facts clearly exhibit a limitation of Palestinian authority, they do not correspondingly imply "occupation" by Israel given that no physical presence is necessarily required by this provision of the Interim Agreement.

precedent[202] in the region, indisputably curtails any Palestinian authority over Israelis in the "Palestinian territories".

Al-Haq claims that the Palestinians have the capacity to try Palestinians and Israelis[203]. But the PA's attempt to involve the ICC undercuts that assertion. Thus far, to the best of ECLJ's knowledge, there have been no attempts to try alleged offenders from Operation Cast Lead in Palestinian courts. Also, it seems unlikely such trials could ever take place given that the PA lacks control in Gaza, which is ruled by Hamas. Hence, the chances of the PA's trying Hamas suspects are remote, at best, demonstrating a lack judicial capacity to do anything about this situation—the very reason the PA is trying to get the ICC involved.

Although the PA has criminal jurisdiction in most cases over Palestinians in the West Bank and its internal courts were *given* limited authority by the Interim Agreements, the PA has no criminal authority over Israelis, clearly answering in the negative the third question allegedly posed by the OTP and discussed by Al-Haq ("Does the PA have the capacity to try Israeli citizens on criminal charges?"[204]). As Al-Haq concedes, Palestinian courts do not have jurisdiction over Israelis anywhere in the "Palestinian territories", which is further evidence that the PA does not have the capacity to transfer jurisdiction over Israelis to the ICC[205].

As additional evidence that the "Palestinian territories" lack not only jurisdiction over Israelis but also the basic functionality necessary to assert sovereign capacity, a 2008 PA report seeking international funding conceded that there was an "absence of the rule of law and lack of respect for judicial independence" in PA-controlled areas[206].

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[202]*See infra* Section V.
[203]Al-Haq Paper, *supra* note 12, ¶ 23.
[204]*Id.* ¶ 22.
[205]*Id.* ¶ 30.
[206]Palestinian Nat'l Auth., Justice Sector Strategy (May 2008), at 7 [hereinafter "Justice Sector Strategy"], *available at* http://pdf.usaid.gov/pdf_docs/PNADR157.pdf. *See also* Tamer Maliha, *No Secret That*

Several scholars, including Dr. Tal Becker, have noted that stability, including possession of governmental capacity, is a prerequisite to meeting the conditions for statehood[207]. Without a degree of stability, the entity will not be durable and capable, in practical terms, of meeting the international obligations for which it has accepted responsibility[208]. The durable nature of a state ensures its ability to effectively perform its obligations[209].

Even John Dugard, who has been publicly agitating for the ICC to accept jurisdiction, has conceded that there is an "absence of a fully effective government"[210] in the "Palestinian territories". In truth, the Palestinians lack many of the basic functioning institutions that states possess, which only undermines the argument on behalf of the view that quasi-State authority can be transferred.

To deal with these inconvenient facts, the Al-Haq brief proposes two results-oriented lines of analyses that supposedly justify jurisdiction. The first is that Palestinians somehow possess the inherent right to try Israelis, but that they waived that right merely as consideration in the Interim Agreements, and can reassert such a right at any moment[211]. The argument in favor of an inherent right to try Israelis in "Palestinian territories" is a far stretch, however, as such a right (or power) has never before been recognised or exercised in any way. It is not as though Palestinian courts possessed such powers but relinquished

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Palestinian Judicial System in Need of Improvement: Will EU Project Help or Hinder?, PALESTINIAN NEWS NETWORK, 3 Sept. 2009, http://english.pnn.ps/index.php?option=com_content&task=view&id=4922&Itemid=1. Similarly, it was reported that in April of this year, Hamas executed two Palestinians "convicted" of aiding Israel. Fares Akram, *Hamas Executes Two Accused of Aiding Israel*, N.Y. TIMES, 15 Apr. 2010, at A11, *available at* http://www.nytimes.com/2010/04/16/world/middleeast/16gaza.html. The executions failed to comply with Palestinian law, which requires that the PA approve of any execution first. James Hider, *Hamas Executes Palestinian 'Collaborators,'* TIMES ONLINE, 16 April 2010, http://www.timesonline.co.uk/tol/news/world/middle_east/article7099074.ece. Human Rights Watch concluded that the sentence violated fair trial standards. Human Rights Watch, Gaza: Do Not Resume Executions: Hamas Threatens First Use of Death Penalty in Gaza in 5 Years, Despite Unfair Trials, http://www.hrw.org/en/news/2010/04/06/gaza-do-not-resume-executions (last visited 7 July 2010).

[207]TAL BECKER, INTERNATIONAL RECOGNITION OF A UNILATERALLY DECLARED PALESTINIAN STATE: LEGAL AND POLICY DILEMMAS 31–32, *available at* http://www.jcpa.org/art/becker2.htm.

[208]H. Blix, *Contemporary Aspects of Recognition*, 130 RECUEIL DES COURS 589, 635 (1970).

[209]P.K. MENON, THE LAW OF RECOGNITION IN INTERNATIONAL LAW: BASIC PRINCIPLES 39 (1994).

[210]Dugard, *supra* note 34.

[211]Al-Haq Paper, *supra* note 12, ¶ 32.

them as part of the Interim Agreements. Instead, the Interim Agreements actually strengthened Palestinian courts[212], rather than weakened them. The main objective of the peace process was, and still is, to determine when and under what conditions the Palestinians will become a sovereign people, and in what territories they will exercise such sovereignty.

As such, there can be no inherent authority to transfer jurisdiction to the ICC because no such authority has ever existed. Hence, there is nothing to transfer. The Interim Agreements merely provided a framework in which to negotiate the possible creation of an Arab Palestinian State. They did not constitute either a transfer or temporary suspension of authority on the part of the Palestinians that could be reasserted at any time.

In its second results-oriented line of analysis, the Al-Haq brief argues that crimes over which the ICC has jurisdiction, including grave breaches of the Geneva Conventions, war crimes, and crimes against humanity[213], are of such a nature that they fall under universal jurisdiction, are regulated by customary international humanitarian law, and come within the inherent jurisdiction of the PA[214]. Even assuming *arguendo* that some crimes justify the exercise of universal jurisdiction, the Rome Statute and the ICC are not the vehicle for effectuating universal jurisdiction. In the ICC's case, expanding jurisdiction beyond States Parties and willing non-party States resides in the UN Security Council[215]. Indeed, *the Rome Statute explicitly provides a means for the Court to exercise jurisdiction in areas that may not be states, and it is not through a unilateral extra-statutory accession by a non-state, non-party, but by action of the Security Council.* Under the approach contained in the Al-Haq brief, however, there would be no need for a

[212]*See* Interim agreement, *supra* note 10, art. VIII.
[213]Rome Statute, art. 5.
[214]Al-Haq Paper, *supra* note 12, ¶ 33.
[215]Rome Statute, art. 13(b).

carefully drafted and extensively negotiated statute like the Rome Statute, as universal jurisdiction would be proper anywhere and anytime, so long as a serious crime was alleged and one party thought it worthy of referral to the Court. *Such an approach would eviscerate the Statute.*

Finally, any suggestion that the ICC should claim jurisdiction *over Gaza* is untenable, since it presumes the PA has the requisite governmental capacity over the territory to transfer[216]. In reality, the PA has no control whatsoever over Gaza; Hamas exercises sole control there. Therefore, the PA must be purporting to transfer authority on behalf of a third party, namely Hamas, which would be unlikely to accede to the ICC given its numerous, publicly documented, illegal acts.

It is well known that Hamas has engaged in brutal tactics to eliminate rivals in the PA's political arm, Fatah[217], and it has even been reported that PA President Mahmoud Abbas actually encouraged Israel to destroy Hamas during Operation Cast Lead[218]. This demonstrates how fractured and dysfunctional government authority is in the "Palestinian territories" and is also a strong indication that the PA lacks the basic features of stability that could plausibly support an argument in favor of "governmental capacity". Moreover, the standard of "adequate governmental capacity" is a term without any legal basis, for which the only authority cited in the Al-Haq brief is the minutes of a meeting with other NGOs, authority that cannot be verified and carries no legal significance. Furthermore, even if we were to apply this standard and find that the PA possesses "adequate

[216]Al-Haq Paper, *supra* note 12, ¶ 24 n.43 ("Al-Haq would recommend that the Court in this instance would hold its territorial jurisdiction in case of acceptance of the PA declaration as applying to the OPT as a whole".); *see also id.* ¶¶ 12 n.23, 36 (admitting that the PA has lost authority to Hamas).
[217]*See, e.g., Hamas 'Planned to Murder Abbas,'* BBC, 16 Jan. 2007, http://news.bbc.co.uk/2/hi/6265241.stm.
[218]Tzvi Gen Gedalyahu, *Abbas Urged Israel to Topple Hamas in Cast Lead, Says Lieberman*, ISRAEL NATIONAL NEWS, 3 Mar. 2010, http://www.israelnationalnews.com/News/News.aspx/136793.

government capacity"[219], its governmental authority is over the West Bank and not Gaza, which, as the Al-Haq brief admits[220], is the site of the alleged crimes at issue.

B. The Goldstone Report's Call for Palestinians to Conduct Investigations Does Not Confer Jurisdiction Over Israelis that Can be Transferred to the ICC.

While the Goldstone Report has been relied upon by those who claim that war crimes were committed and that international prosecutions are necessary, the Al-Haq brief may be the first to assert that the Report's call for Palestinians to investigate Hamas war crimes also justifies ICC jurisdiction over Israelis[221]. The brief makes the torturous argument that, because the *Goldstone Report* called on both Israelis and Palestinians to investigate respective internal wrongdoing, it implicitly recognised Palestinian authority to investigate and prosecute Israelis, as well as transfer such authority to the ICC[222]. Al-Haq states that, because international standards require investigations of persons regardless of nationality, the PA's duty to investigate itself also confers the duty to investigate Israelis and the power to turn that authority over to another entity[223].

There is no dispute that Israel has an obligation to investigate and prosecute, where appropriate, illegal activity that occurred during combat (if indeed illegal acts occurred for which there exists credible and actionable *evidence*). As a practical matter, the Goldstone Report would not call on Israelis to investigate criminal activity without calling on Palestinians to do the same, especially in light of widely reported Hamas practices of targeting civilians, using human shields, and operating from densely populated civilian areas[224]. But the Goldstone Mission was created to engage in *fact-finding*, not to make

[219] *See* Al-Haq Paper, *supra* note 12, ¶ 21.
[220] *Id.* ¶ 24 n.43.
[221] *Id.* ¶ 34.
[222] *Id.* ¶¶ 34–35.
[223] *Id.* ¶¶ 33–38.
[224] *E.g.*, DENNIS ROSS & DAVID MAKOVSKY, MYTHS, ILLUSIONS, & PEACE: FINDING A NEW DIRECTION FOR AMERICA IN THE MIDDLE EAST 243–44 (2009) (describing Hamas's efforts to terrorise the Gazan populous in late 2008 and early 2009 by using civilians as human shields, stockpiling arms in civilian areas, etc.); Jessica Gusman, *Hamas Murder Campaign in Gaza Exposed: Human Rights Group*, THE HUFFINGTON

legal pronouncements on the PA's ability to conduct investigations into Israeli behavior. Moreover, as Chairman Goldstone himself publicly acknowledged, *the Goldstone Report did not establish anything as a legal matter*[225]. Further, nowhere did the Goldstone Report imply that there is a Palestinian "State" or that the PA has the capacity to prosecute Israelis. The Al-Haq brief argues that "[t]he exclusion of Israelis from PA jurisdiction as provided for in the Interim Agreement cannot legitimately be considered as extending to the international crimes of war crimes and crimes against humanity as to do so would be incompatible with international law"[226]. That is incorrect. Leaving aside debates about whether states that claim to possess universal jurisdiction actually have authority over non-consenting states, since the "Palestinian territories" are not a "State", they cannot exercise universal jurisdiction.

Al-Haq also cites Article 146(2) of the Fourth Geneva Convention, which states that each *High Contracting Party* "'shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, *regardless of their nationality*, before its own courts'"[227]. Although that general principle is true, this argument fails initially because the "Palestinian territories" are not a State and are therefore ineligible to be a High Contracting Party under the Geneva Convention. There is no disputing this. In 1989, the PLO submitted Geneva Convention ratification documents, *but they were rejected by the Government of Switzerland, custodian of the Conventions, since the Swiss could not*

POST, 13 Feb. 2009, http://www.huffingtonpost.com/2009/02/13/hamas-murder-campaign-exp_n_16686 8.html (citing *Amnesty International*, ironically, as a source detailing atrocities Hamas committed against its own people); YouTube, Hamas Admits It Uses Human Shields, http://www.youtube.com/watch?v=RTu-AUE9ycs (last visited 7 July 2010).

[225]Gal Beckerman, *Goldstone: 'If This Was a Court of Law, There Would Have Been Nothing Proven,'* THE JEWISH DAILY FORWARD, 7 Oct. 2009, http://www.forward.com/articles/116269/ (emphasis added).

[226]Al-Haq Paper, *supra* note 12, ¶ 36.

[227]*Id.* ¶ 34 (quoting Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 146(2), 12 August 1949, 6 U.S.T. 3517, 75 U.N.T.S. 251 [hereinafter "Fourth Geneva Convention"] (emphasis added), *available at* http://www.icrc.org/ihl.nsf/FULL/380?OpenDocument.

conclude that a Palestinian "State" existed[228]. As such, there is no Palestinian authority which may investigate and/or subject Israelis to its jurisdiction. Further, there is no Palestinian authority with power to transfer such authority to some other body.

Similarly, Al-Haq cites Article 47 of the Fourth Geneva Convention to assert that protected persons in occupied territories cannot be deprived of the benefits of the Convention, including by agreement between the parties[229]. Assuming *arguendo* that the West Bank and Gaza Strip are occupied, Article 47 applies to *protected persons* in those territories, *not to powers of the governing body within such occupied territory to prosecute extra-territorial persons*. Further, if the "Palestinian territories" are considered "occupied", then this would necessarily preclude the possibility of the PA's exercising sovereign authority in those territories, thus further ruling out the possibility of accession to the Court via a transfer of authority that the PA does not possess. The PA and its advocates cannot have it both ways, arguing that Israel is an occupier and that the PA possesses sovereign authority that an occupied entity could not possibly possess.

The Al-Haq brief also states that the PA has been recognised by the international community as having the responsibility and capacity to investigate Palestinians, and therefore, that it has both responsibility and capacity with respect to Israelis[230]. It is highly questionable, however, whether the PA has the capacity to investigate Palestinian criminal activity in Gaza. First, it has yet to do so, and second, the ECLJ is unaware of prior legitimate internal investigations.

Indeed, the PA has done very little to even attempt to investigate wrongdoing. On 5 November 2009, the UN Secretary General requested that the Israelis and Palestinians both submit written reports by 29 January 2010 explaining what steps they have taken to

[228]ICRC, Intn'l Humanitarian Law – Treaties & Documents, Geneva Conventions of 12 Aug. 1949, http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P (last visited 7 July 2010).
[229]Al-Haq Paper, *supra* note 12, ¶¶ 37–38 (citing Fourth Geneva Convention, art. 47, 6 U.S.T. 3517, 75 U.N.T.S. 251, *available at* http://www.icrc.org/ihl.nsf/FULL/380?OpenDocument).
[230]*Id.* ¶ 36.

investigate whether war crimes were committed[231]. Israel issued a 60-plus page report explaining its system for reviewing misconduct[232], its investigations of alleged violations of the law of armed conflict[233], and specific complaints accusing them of violations of the law of armed conflict[234]. The Palestinians, on the other hand, issued a seven page report, consisting of an introductory letter[235], an attachment explaining that they formed a commission to follow up on the Goldstone Report[236], and a report providing the Investigation Commission's credentials[237]. The Palestinian "report" did not include a single instance or description of any actual progress in conducting genuine investigations[238].

The U.N. Human Rights Council created a Committee of Independent Experts "to monitor and assess any domestic, legal or other proceedings undertaken by both the Government of Israel and the Palestinian side, in the light of General Assembly resolution 64/254, including the independence, effectiveness, genuineness of these investigations and their conformity with international standards"[239]. In the Committee's report of 21 September 2010, it reviews the response of the "Palestinian side" by separately considering both the "de facto Gaza authorities" and the "Palestinian Authority"[240]. The Committee concluded that the first report issued by the "de facto Gaza authorities" "makes no serious effort to address the allegations detailed in the FFM [Fact Finding

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[231]U.N. Human Rights Council [UNHRC], *Follow-up to the Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, ¶¶ 1–2, U.N. Doc. A/64/651 (4 Feb. 2010) (*report of the* Secretary-General) (citing G.A. Res. 64/10, ¶¶ 4–6, U.N. Doc. A/RES/64/10 (1 Dec. 2009)).
[232]*Id.* Annex I, ¶ 11.
[233]*Id.* Annex I, ¶ 41.
[234]*Id.* Annex I, ¶ 89.
[235]*Id.* Annex II.
[236]*Id.* Annex II, Attachment I.
[237]*See id.* Annex II, Attachment II, ¶¶ 1–5.
[238]*See id.* Annex II, Attachment II (last paragraph of Attachment II).
[239]U.N. Human Rights Council [UNHCR], *Report of the Committee of independent experts in international humanitarian and human rights laws to monitor and assess any domestic, legal or other proceedings undertaken by both the Government of Israel and the Palestinian side, in the light of General Assembly resolution 64/254, including the independence, effectiveness, genuineness of these investigations and their conformity with international standards*, ¶ 1, U.N. Doc. A/HRC/15/50 (21 Sept. 2010).
[240]*Id.* at ¶¶ 96–101.

Mission] report against the de facto authorities in Gaza; it focuses primarily on the allegations directed against Israel"[241]. The Committee further determined that the subsequent submissions by the "de facto Gaza authorities" have been just as unproductive, stating that, "[o]n the basis of the information before it, the Committee cannot conclude that credible and genuine investigations have been carried out by the de facto authorities in the Gaza Strip"[242]. In review of the actions taken by the PA, the Committee concluded that, while the PA "has laid the groundwork for the commencement of proceedings against the perpetrators and other measures suited to provide redress to the victims[,] . . . the Committee is unaware of any criminal proceedings that may have been initiated since the Commission filed its report"[243].

Finally, the Al-Haq brief's suggestion that potential Palestinian war crimes confer some form of universal jurisdiction over Israelis is a *non sequitur*. If that line of analysis were adopted, it would mean that an entity (in this case, the PA) could actually enhance its own power and authority over another people (in this case, the Israelis) through wrongdoing by its own constituents. This would defy the legal maxim that a party should not benefit from its own wrongdoing. Logically, it would also mean that all the non-states of the world possess universal jurisdiction—a scenario that is simply absurd.

C. Various International Agreements, from the Interim Agreements Between Israel and the Palestinians to the Quartet Roadmap Endorsed by the UN Security Council, Clarify that a Palestinian State or Sovereign Does Not Exist.

International legal documents, such as the Oslo Accords and the Interim Agreement, which were entered into by the parties at issue (Israel and the Palestinians), as well as the 2003 "Roadmap", which was endorsed by the UN Security Council, clarify that

[241] *Id.* at ¶¶ 100–101.
[242] *Id.*
[243] *Id.* at 98.

there is no Palestinian "State" or other Palestinian political entity with capacity to transfer jurisdiction to the ICC.

1. The Interim Agreements transferred certain powers to the PA that it previously lacked and denied it the very powers it is now seeking to assert.

The Interim Agreement specified that "Israel shall *transfer* powers and responsibilities as specified in this Agreement . . ."[244], meaning that the PA received powers that it did not previously possess, thereby undermining the notion of inherent powers that can simply be reclaimed at any time. Moreover, the Interim Agreement never conveyed to any Palestinian bodies legal jurisdiction over Israelis. In fact, just the opposite was enshrined in this agreement. Yet legal jurisdiction over Israelis is precisely the power that the PA is attempting to transfer to the ICC.

The following constitute additional grounds—and the list is not exhaustive—for rejecting any claim of Palestinian sovereignty or ability to transfer criminal jurisdiction.

- The Oslo Accords refer to the "*Government* of the *State* of Israel" versus the "P.L.O. team"[245] and the "Palestinian people representatives"[246], an indication that one party represents a sovereign State and one party does not.
- The Oslo Accords called for a "transitional period not exceeding five years, leading to a permanent settlement based on Security Council Resolutions 242 and 338"[247]. The fact that a permanent settlement has not been reached could just as easily support a rollback to pre-Oslo authority for the PA as much as an expansion or preservation of authority.
- The Oslo Accords talk about "remaining issues, including: Jerusalem, refugees, settlements, security arrangements, borders, relations and cooperation with other neighbors, and other issues of common interest"[248]. The reference to borders, in particular, indicates that the Palestinian territories lack definitive borders or a defined territory, a factor in assessing statehood.
- The Oslo Accords state that "authority will be transferred to the Palestinians on the following spheres: education and culture, health, social welfare, direct taxation, and tourism"[249]. The word "transferred" indicates

[244]Interim Agreement, *supra* note 10, pmbl. (emphasis added).
[245]Oslo Accords, *supra* note 10, pmbl. (emphasis added).
[246]*Id.* art. V.
[247]*Id.* art. I.
[248]*Id.* art. V.
[249]*Id.* art. VI.

that the authority did not previously exist with the Palestinians but depended upon the consent of Israel. Further, the lack of transfer in certain spheres, like foreign relations, as well as explicit language stating that "the two parties may negotiate the transfer of additional power and responsibilities, as agreed upon"[250], indicates that this agreement explicitly denied a transfer of sovereignty.

- The Oslo Accords "establish[ed] a strong police force, while Israel will continue to carry responsibility for defending against external threats, as well as the responsibility for overall security of Israelis for the purpose of safeguarding their internal security and public order"[251]. The language confirms that the Palestinians lacked a strong police force before the Accords and that Israel maintained basic security functions that indicate lack of Palestinian sovereignty.
- The Interim Agreement likewise "transfer[red] powers and responsibilities as specified in this Agreement from the Israeli military government and its Civil Administration to the Council in accordance with this Agreement"[252]. Israeli consent was required for the transfer, and the language clearly indicates that the Interim Agreement only transferred authority as specified.
- The Interim Agreement states that the "Palestinian Police shall be responsible for handling public order incidents in which only Palestinians are involved"[253], a clear denial of jurisdiction over Israelis. Likewise, the "territorial and functional jurisdiction of the Council will apply to all persons, except for Israelis, unless otherwise provided in the Agreement"[254].
- The Interim Agreement provides that "[n]either side shall initiate or take any step that will change the status of the West Bank and the Gaza Strip pending the outcome of the permanent status negotiations"[255].

2. The Quartet "Roadmap" also clarifies that there has been no change in Palestinian legal status since the Interim Agreements.

The Quartet Roadmap, which was adopted by the United States, the European Union, Russia, and the UN, and which was explicitly endorsed by the UN Security Council through Resolution 1515[256], states that

> [a] two-state solution to the Israeli-Palestinian conflict will only be achieved through an end to violence and terrorism, when the Palestinian people have a leadership acting decisively against terror and willing and able to build a practicing democracy based on tolerance and liberty, and through Israel's readiness to do what is necessary for a democratic

[250] *Id.*
[251] *Id.* art. VIII.
[252] Interim Agreement, *supra* note 10, art. I.
[253] *Id.* art. XIII.
[254] *Id.* art. XVII.
[255] *Id.* art. XXXI(7).
[256] *See* S.C. Res. 1515, U.N. Doc. S/RES/1515 (19 Nov. 2003).

> Palestinian state *to be established*, and a clear, unambiguous acceptance by both parties of the goal of a negotiated settlement as described below[257].

The full title of the Roadmap itself[258], as well as the above paragraph, could not more clearly demonstrate that the international community considers a two-state scenario to be *aspirational*, not reflective of current reality.

Not to belabor the point—although it is crucial given how problematic any attempted exercise of jurisdiction on statehood or quasi-statehood grounds would be—but the Roadmap continues as follows: "A settlement, negotiated between the parties, will result in the emergence of an independent, democratic, and viable Palestinian state living side by side in peace and security with Israel and its other neighbors"[259]. Again, the reference to the "emergence" of a Palestinian State demonstrates that such a State does not currently exist.

These passages within the Roadmap—*endorsed by the UN Security Council*—undermine Al-Haq's argument that the Interim Agreements reflect an antiquated state of legal affairs. Clearly the international community, and most importantly, the UN Security Council, still regards a Palestinian State as non-existent.

In discussing the steps that need to be taken to bring about a resolution of the conflict, the Roadmap specifies that "Palestinians undertake comprehensive political reform *in preparation for statehood* . . ."[260]. It also urges that the "Israeli leadership issue[] [an] unequivocal statement affirming its commitment to the two-state vision of an independent, viable, *sovereign* Palestinian state . . ."[261]. Again, it is phrased as a future possibility because a sovereign Palestinian "State" does *not* currently exist.

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[257] A Performance-Based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict, 30 Apr. 2003, [hereinafter "Roadmap"] (emphasis added).
[258] *See id.*
[259] *Id.*
[260] *Id.* (emphasis added).
[261] *Id.* (emphasis added).

In describing the Phase II implementation, the Roadmap states, "[i]n the second phase, *efforts are focused on the option of creating an independent Palestinian state* with provisional borders and attributes of sovereignty, based on the new constitution, as a way station to a permanent status settlement"[262]. This, again, demonstrates that the UN Security Council, as well as the United States, the European Union, and Russia recognise that no current sovereign Palestinian entity exists. It also reflects that a future Palestinian "State" lacks even provisional borders, a factor in assessing statehood under the Montevideo test. Further, the Roadmap states that once the Palestinian leadership acts against terror and implements true democratic institutions, "the Palestinians will have the active support of the Quartet and the broader international community in establishing an independent, viable, state"[263]. In other words, support from the international community for a Palestinian State does not exist—or, at least, certainly did not fully exist as of the adoption of the Roadmap.

Finally, the Roadmap also called for, "[a]s part of this process, implementation of prior agreements . . ."[264]. This reaffirmed the continuing effect of the Interim Agreements, *notwithstanding arguments to the contrary contained in the Al-Haq brief.*

The Roadmap called for a permanent status agreement by 2005[265]. Clearly this has not occurred. Palestinian advocates doubtless argue that the failure to implement the Roadmap is due to Israel's breach of its obligations. *Assuming arguendo* that such claims were true, they are nonetheless irrelevant to the legal question before the ICC. The real issue before the ICC is whether the Palestinian entity that attempted to accede to the Court's jurisdiction in January 2009, constitutes a "State" or whether it can be considered

[262] *Id.* (emphasis added).
[263] *Id.*
[264] *Id.*
[265] *Id.*

as such for purposes of the Rome Statute. The answer, as highlighted throughout the language of the Roadmap, unquestionably, is that it cannot.

V. THE HISTORY OF THE REGION DEMONSTRATES THAT, TO THIS VERY DAY, NO *ARAB* PALESTINIAN "STATE" (NUANCED OR OTHERWISE) HAS EVER EXISTED, THEREBY MAKING IT IMPOSSIBLE FOR THE PA (OR ANY OTHER ARAB PALESTINIAN ENTITY) TO CLAIM THE AUTHORITY TO TRANSFER CERTAIN POWERS OR AUTHORITY TO THE ICC.

While the conventional wisdom is that the ultimate resolution of the Israeli-Palestinian problem will require dividing the territory of the smaller, western portion of the original Palestinian Mandate[266] into two independent states (one Jewish and one Arab), it must nonetheless be emphasised that no independent *Arab Palestinian State* currently exists in such territory and none has ever existed there previously. As such, arguing that *Arab* Palestinians[267] have possessed—much less currently possess—the legal capacity to transfer criminal jurisdiction to the ICC is baseless. One simply cannot transfer authority that one does not possess and never has possessed. A brief history follows for the avoidance of doubt on this matter:

A. In the Aftermath of the First World War, the League of Nations Selected the United Kingdom to Become the Mandatory for Palestine, Which Included Trans-Jordan.

The modern history of Palestine began in the aftermath of World War I. At the end of the First World War, the area known as Palestine encompassed what we generally know

[266]The general understanding of what we mean by the Mandate of Palestine today is limited to the territories of the original Palestinian Mandate generally west of the Jordan River (i.e., it excludes the 78% of the original territory of the Palestinian Mandate which the British re-named Trans-Jordan and which ultimately became the Hashemite Kingdom of Jordan). The 78% that became the Hashemite Kingdom of Jordan is, in fact, an Arab "Palestinian State", since it was created out of the original Mandate of Palestine, but that is of no moment to the issue under consideration here.

[267]Here, we use the term "Arab Palestinians" because until the Mandate ended in 1948, all inhabitants of Palestine—both Jews and Arabs—enjoyed Palestinian citizenship and were called "Palestinians". Until Israel declared its independence in 1948, there was no separate Israeli identity. Hence, it is simply incorrect to refer to Jews living in Palestine prior to 1948 as "Israelis". They were Palestinians. It is also incorrect to refer to the pre-1948 inhabitants as Jews and Palestinians—they were all Palestinians.

today as the State of Israel, the West Bank, the Gaza Strip, a slice of the Golan Heights[268], and the Hashemite Kingdom of Jordan[269]. For approximately four hundred years, those territories had been part of the Ottoman Empire. At the end of World War I, Palestine was occupied and controlled by the armed forces of the United Kingdom. As part of the Treaty of Sèvres[270] and, later, the Treaty of Lausanne[271], the Turks renounced all prior claims to non-Turkish territories in the Middle East, including Palestine.

The then newly established League of Nations ("LON"), in turn, decided that peoples living in certain territories formerly under Ottoman sovereignty—*including Palestine*—were not yet ready for independence and, hence, had to be guided by more advanced and stable societies until they were deemed capable of self-rule[272]. The LON selected the United Kingdom to become the Mandatory for Palestine and Iraq and the French Republic to become the Mandatory for Syria and Lebanon[273].

In 1921, shortly after assuming authority as Mandatory in Palestine, the United Kingdom divided the Mandate of Palestine into two parts: (1) a large, eastern portion

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[268]MARTIN GILBERT, THE ROUTLEDGE ATLAS OF THE ARAB ISRAELI CONFLICT 8 (9th ed. 2008) [hereinafter "ROUTLEDGE ATLAS"]. Britain ceded the territory on the Golan Heights in 1923 to the French Mandate of Syria. *Id.*

[269]*Id.* The British created Trans-Jordan (the precursor to the Hashemite Kingdom of Jordan) in 1921 and immediately closed the entire area to Jewish settlement. *Id.*

[270]Treaty Between the Allied and Associated Powers and Turkey Signed at Sèvres, 10 Aug. 1920, *reprinted in* 1 THE TREATIES OF PEACE, 1919–1923, at 789 (The Lawbook Exch. 2007) (Lawrence Martin ed., 1924). Of special note is how the Treaty referred to the territories of Syria, Mesopotamia (Iraq), and Palestine. Article 94 of the Treaty stated that the High Contracting parties agreed "that Syria and Mesopotamia shall . . . be provisionally recognised as *independent States* . . . until such time as they are able to stand alone". *Id.* at 816 (emphasis added). Article 95, on the other hand, refers solely to Palestine and makes no mention of the word "state" at all. *Id.* at 816–17. Instead, the emphasis is on the Mandatory's responsibility to put into effect "the declaration originally made on November 2, 1917, by the British Government . . . in favour of the establishment in Palestine of a national home for the Jewish people" (to wit, the Balfour Declaration). *Id.* Similarly, when referring to the Hedjaz (today known as Saudi Arabia), the Treaty recognizes the Hedjaz "as a *free and independent State*". *Id.* at 817 (emphasis added). Even the Treaty of Sèvres does not provide a historical basis for claiming Palestinian statehood, since nowhere is the word "state" associated with Palestine in that Treaty.

[271]Treaty of Peace with Turkey Signed at Lausanne, 24 July 1923, *reprinted in* 1 THE TREATIES OF PEACE, *supra* note 270, at 957. The Treaty of Lausanne ultimately replaces the Treaty of Sèvres. In Article 16 of the Treaty, Turkey renounces its claims to all territories "outside the frontiers [for Turkey] laid down in the present Treaty". *Id.* at 966.

[272]*The Covenant of the League of Nations*, 1 League of Nations O.J. 3, 10 (1920) (Article 22 states, in part, "peoples not yet able to stand by themselves under the strenuous conditions of the modern world . . . such peoples should be entrusted to advanced nations . . . as Mandatories on behalf of the League").

[273]*British Mandate for Palestine*, 3 League of Nations O.J. 1007 (1922) [hereinafter "*British Mandate*"]; *French Mandate for Syria and the Lebanon*, 3 League of Nations O.J. 1013 (1922).

(generally located east of the Jordan River and known today as the Hashemite Kingdom of Jordan), which the British renamed "Trans-Jordan", and (2) a small, western portion (generally located between the Jordan River and the Mediterranean Sea and encompassing the territories currently in contention between Israelis and Arab Palestinians), which the British continued to call "Palestine"[274]. Hence, when one refers to "Palestine" or "Palestinian territories" *today*, one is referring solely to certain territories in the smaller, western portion of the original Palestinian Mandate, the portion consisting of the present-day State of Israel, the West Bank, and the Gaza Strip.

B. The Mandate for Palestine Incorporated the Terms of the Balfour Declaration Regarding Establishment in Palestine of a Jewish National Home.

Incorporated by the LON into the British Mandate for Palestine was the exact language of the Balfour Declaration, requiring the Mandatory to pursue "the establishment in Palestine of a national home for the Jewish people"[275]. The same language was also included in the Treaty of Sèvres[276]. The Preamble to the British Mandate also explicitly noted "the historical connection of the Jewish people with Palestine and the grounds for reconstituting their *national home* in that country"[277]. The language of the Mandate for Palestine was very clear:

> The Mandatory shall be responsible for placing the country under such political, administrative and economic conditions as will *secure the establishment of the Jewish national home*, as laid down in the preamble, and the development of self-governing institutions, and also for safeguarding the civil and religious rights of all inhabitants of Palestine, irrespective of race and religion[278].
>
> . . . .
>
> The Administration of Palestine, while ensuring that the rights and position of other sections of the population are not prejudiced, shall facilitate Jewish

[274] ROUTLEDGE ATLAS, *supra* note 268, at 8.
[275] *British Mandate for Palestine*, *supra* note 273, at 1007 (pmbl.).
[276] Treaty Between the Allied and Associated Powers and Turkey Signed at Sèvres, 10 Aug. 1920, *reprinted in* 1 THE TREATIES OF PEACE, *supra* note 270, at 817.
[277] *British Mandate for Palestine*, *supra* note 273, at 1007 (pmbl.) (emphasis added).
[278] *Id.* at 1007 (art. 2) (emphasis added).

> immigration under suitable conditions and *shall encourage, in co-operation with the Jewish agency . . . close settlement by Jews on the land, including State lands and waste lands not required for public purposes*[279].

In light of such explicit directions to implement the Balfour Declaration and allow Jewish settlement in Palestine, it is ironic that Great Britain acted as it did, splitting the Mandate into two parts, called "Palestine" and "Trans-Jordan", respectively. It is especially ironic, since it was the *smaller* part that retained the name Palestine and since it was only within the *smaller* part that Jewish settlement was permitted.

C. The Findings of the Peel Commission Confirmed that the Primary Purpose of the Mandate was to Promote the Establishment of a Jewish National Home in Palestine.

Following Arab riots in 1936, a royal commission (the Peel Commission) was appointed to investigate the causes of the riots and propose possible changes to the Mandate to ensure that they were not repeated. The Peel Commission made several significant findings. First,

> the acceptance by the Allied Powers and the United States of the policy of the Balfour Declaration made it clear from the beginning that Palestine would have to be treated differently from Syria and Iraq, and that this difference of treatment was confirmed by the Supreme Council in the Treaty of Sèvres and by the Council of the League [of Nations] in sanctioning the Mandate[280].
>
> [Second,] [t]he [Palestinian] Mandate is of a different type from the Mandate for Syria and the Lebanon and the draft Mandate for Iraq. These latter, which were called for convenience "A" Mandates, accorded with the fourth paragraph of Article 22. . . . Article 1 of the Palestine Mandate, on the other hand, vests "full powers of legislation and of administration" within the limits of the Mandate, in the Mandatory[281].
>
> . . . .
>
> Unquestionably . . . the *primary purpose of the* [*Palestinian*] *Mandate, as expressed in its preamble and its articles, is to promote the establishment of the Jewish National Home*[282].
>
> . . . .

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[279] *Id.* at 1008 (art. 6) (emphasis added).
[280] Palestine Royal Commission Report, July 1937, at 38.
[281] *Id.*
[282] *Id.* at 39 (emphasis added).

> Articles 4, 6 and 11 provide for the recognition of a Jewish Agency "as a public body for the purpose of advising and co-operating with the [Mandatory] Administration" on matters affecting Jewish interests. *No such body is envisaged for dealing with Arab interests*[283].

The Palestinian Mandate specifically referred to a Jewish homeland and explicitly encouraged Jewish immigration and settlement. It "facilitate[d] the acquisition of Palestinian citizenship by Jews who take up their permanent residence in Palestine"[284]. Notably, no other specific group was mentioned *by name*. The Mandate specifically called for establishment of a Jewish agency that

> shall be recognised as a public body for the purpose of advising and co-operating with the Administration of Palestine in such economic, social and other matters as may affect the establishment of the Jewish national home and the interests of the Jewish population in Palestine, and, subject always to the control of the Administration, to assist and take part in the development of the country[285].
>
> . . . .
>
> The Administration may arrange with the Jewish agency . . . to construct or operate, upon fair and equitable terms, any public works, services, and utilities, and to develop any of the natural resources of the country, in so far as these matters are not directly undertaken by the Administration . . .[286].

Clearly, the entire area that became known as Palestine (i.e., the area currently encompassing the State of Israel, the West Bank, and the Gaza Strip) was to be available for establishing a future Jewish national home.

D. Following World War II, the United Kingdom Notified the UN of Its Intent to Depart From Palestine in 1948, Thereby Triggering the UN Initiative to Partition Palestine.

The United Kingdom remained the Mandatory for Palestine through the Second World War and into the immediate post-war period. As clashes between Palestinian Jews and Arabs increased in number and ferocity in the post-war era, the United Kingdom

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[283] *Id.* (emphasis added).
[284] *British Mandate*, *supra* note 273, at 1008 (art. 7).
[285] *Id.* (art. 4).
[286] *Id.* at 1009 (art. 11).

notified the United Nations, the successor organisation to the LON, that all British forces would be withdrawn from Palestine in 1948.

In response to the British notification, the UN formed the United Nations Special Committee on Palestine ("UNSCOP") to make recommendations regarding how to resolve the evolving conflict in Palestine. UNSCOP ultimately recommended that Palestine be partitioned into three parts: (1) a Jewish State, (2) an Arab State, and (3) limited territory (around Jerusalem) to remain under international control[287]. The partition plan was later enshrined in UN General Assembly Resolution 181[288]. The Jewish Agency, representing the Palestinian Jews, accepted the plan; the Arab Higher Committee, representing the Palestinian Arabs, rejected it[289]. Ultimately, the decision to partition Palestine, as proposed by UNSCOP and enshrined in Resolution 181, was approved by the UN General Assembly on 29 November 1947, by the following vote: 33 states voted in favour of the plan; 13 states voted against the plan; and 10 states abstained[290].

E. Jewish Palestinians Accepted the Grant of Sovereign Statehood From the UN; the Arab Palestinians Rejected the Grant in Favour of Trying to Win All of Palestine by Force of Arms.

In the aftermath of the UN vote, Palestinian Jews prepared to assume sovereignty over territories allotted to the proposed Jewish State by the UNSCOP plan. In contrast, Arab Palestinians made plans for war instead and actively collaborated with surrounding Arab regimes to destroy the Jewish State at its birth. Despite the threats from their Arab neighbours, on 14 May 1948, Jewish Palestinian leaders proclaimed the independence of the Jewish State in Palestine, to be called the State of Israel[291]. The very next day, the

[287]ROUTLEDGE ATLAS, *supra* note 268, at 36.
[288]G.A. Res. 181 (II), U.N. Doc. A/Res/181(II) (29 Nov. 1947).
[289]ROUTLEDGE ATLAS, *supra* note 268, at 36.
[290]U.N. GAOR, 2nd Sess., 128th plen. mtg., U.N. Doc. A/PV.128 (29 Nov. 1947).
[291]State of Israel: Proclamation of Independence, 14 May 1948, *reprinted in* THE ISRAEL-ARAB READER: A DOCUMENTARY HISTORY OF THE MIDDLE EAST CONFLICT, at 81 (Walter Laqueur & Barry Rubin eds., 7th ed. 2008) (1969).

newly proclaimed State of Israel was attacked by its Arab neighbours[292]. Fierce fighting continued into 1949, when a series of armistice agreements was signed between Israel and various Arab countries[293]. *At Arab insistence*, none of the armistice lines was recognised as a national or political boundary separating Israel from its Arab neighbours[294]. Hence, *to this very day*, the lines separating Israel from the West Bank and the Gaza Strip remain armistice lines, *not recognised national boundaries.* As such, national boundaries between the State of Israel and a future Arab Palestinian State are not currently fixed and remain to be negotiated between the Parties at the final peace talks.

Further, the 1948–49 Arab-Israeli war led to a different land distribution than originally proposed by UNSCOP. *When Palestinian Arabs rejected the UNSCOP partition plan and instead allied themselves with neighbouring Arab armies seeking to destroy the nascent State of Israel, the terms of the UNSCOP plan were abrogated and no longer binding on either party, including Israel.* Consequently, during the war with its neighbours, Israel actually gained additional territory beyond that originally allocated to her in the partition plan.

Yet, Israel did not capture all of Palestine. At the time of the armistice agreements, the so-called West Bank (including the territories around Jerusalem meant by UNSCOP to have remained under international control) and the Gaza Strip remained under the control of Arab military forces from neighbouring countries. Egypt retained control of the Gaza Strip, and Jordan retained control over the West Bank. *Such lands could have been returned to the control of Arab Palestinians to form the nucleus of an Arab Palestinian State, but that did not occur.* Instead, both Egypt and Jordan continued to occupy their

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[292]ROUTLEDGE ATLAS, *supra* note 268, at 45.
[293]*Id.* at 50 (General Armistice Agreement between Israel and Egypt, 24 Jan. 1949; General Armistice Agreement between Israel and Lebanon, 23 Mar. 1949; General Armistice Agreement between Israel and the Hashemite Kingdom of Jordan, 3 Apr. 1959; General Armistice Agreement between Israel and Syria, 20 July 1949).
[294]*Id.*

respective portions of Palestinian territory. Hence, it was Egypt and Jordan—*not Israel*—that were responsible for the fact that no Arab Palestinian State was formed in 1949. In fact, from 1949 until the end of the Six-Day War in 1967, the Gaza Strip and the West Bank remained under continuous[295] foreign military occupation by the armed forces of Egypt and Jordan, respectively. No independent, sovereign Arab Palestinian State came into existence during that 18-year span—in fact, no Arab Palestinian State *of any description*—nuanced or otherwise—came into existence during that time.

F. No Arab Palestinian State Has Come into Existence Since Israeli Forces Captured the West Bank and Gaza Strip in 1967.

As a result of the 1967 Six-Day War, Israel captured the Gaza Strip and the West Bank[296]. When the Israeli armed forces captured the Gaza Strip and the West Bank, there had never been a single day since the defeat and collapse of the Ottoman Empire when an *Arab Palestinian* "State" or other political entity had existed anywhere in Palestine (due, in large part, to three key historical events: (1) the creation by the LON of the Mandate of Palestine which placed the United Kingdom in control of Palestine; (2) the Arab Palestinian rejection of the UN offer of statehood via the UNSCOP partition plan; *and* (3) the subsequent 18-year foreign military occupation of the Gaza Strip and the West Bank by Egypt and Jordan, respectively). Hence, when Israel captured the Gaza Strip and the West Bank in 1967, it remained the only *Palestinian* State to have emerged from the western portion of the original Palestinian Mandate. The newly captured territories had never been ruled for a single day by an *Arab* Palestinian government or political entity that could claim anything close to independence or sovereignty[297]. As such, there is absolutely

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[295]The Gaza Strip was occupied by Israel for a short period during the 1956 Sinai campaign. ROUTLEDGE ATLAS, *supra* note 268, at 61–62.

[296]Israel also captured the Sinai Desert and the Golan Heights, but, because Israel's capture and occupation of the Sinai Desert and the Golan Heights are not germane to the current discussion regarding whether an Arab *Palestinian* state currently exists, they are irrelevant and will not be discussed further. *Id.*

[297]It is noteworthy that UN Security Council Resolution 242 never once mentioned Palestinians or the existence of an Arab Palestinian State, although it did call for creating internationally recognised and

no basis to the claim that there is a current Arab Palestinian political entity of any sort with authority (inherent or otherwise) to transfer jurisdiction to the ICC.

Following the 1967 war, the UN Security Council adopted Resolution 242[298]. Resolution 242 is noteworthy for a number of reasons. First, the Resolution makes no mention whatsoever of "Palestinians" or their cause. The Resolution merely calls for Israeli withdrawal "from territories occupied in the recent conflict"[299]. Second, the absence of the words "the" or "all" before the word "territories" in the previous sentence is material[300]. According to Lord Caradon, chief architect of the resolution,

> [i]t would have been wrong to demand that Israel return to its positions of June 4, 1967, because those positions were undesirable and artificial. After all, they were just the places where the soldiers of each side happened to be on the day the fighting stopped in 1948. They were just armistice lines. That's why we didn't demand that the Israelis return to them[301].

Finally, note the call for "secure and recognized boundaries"[302], language aimed at protecting Israel against future acts of aggression[303].

Any authority that the PA currently exercises over any territories of the former Palestinian Mandate it exercises solely at the sufferance of the State of Israel and only as a concession granted by Israel, *a concession granted only pursuant to specific terms and limitations explicitly agreed to in advance by Palestinian officials and still binding upon*

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defensible boundaries in the region, an obvious reference to Israel and its security needs. *See* S.C. Res. 242, U.N. Doc. S/RES/242 (22 Nov. 1967).

[298] *Id.*

[299] *Id.* ¶ 1(i).

[300] *See* Eugene V. Rostow, *The Future of Palestine*, Inst. for Nat'l Strategic Stud., Nov. 1993, at 6–8; LEONARD J. DAVIS, MYTHS AND FACTS 1985: A CONCISE RECORD OF THE ARAB-ISRAELI CONFLICT 44 (Near East Research 1984) (quoting Arthur J. Goldberg, U.S. Ambassador to the U.N., 1965–68).

[301] BEIRUT DAILY STAR, 12 June 1974, excerpt *reprinted in* DAVIS, *supra* note 300, at 44.

[302] *See* S.C. Res. 242, ¶ 1(ii), U.N. Doc. S/RES/242 (22 Nov. 1967).

[303] U.S. Ambassador to the U.N. Arthur J. Goldberg stated that total withdrawal would not be required because "Israel's prior frontiers had proved to be notably insecure". DAVIS, *supra* note 300, at 44. Likewise, George Brown, British Secretary of State for Foreign and Commonwealth Affairs, stated: "The proposal said, 'Israel will withdraw from territories which were occupied,' and not from 'the' territories which means that Israel will not withdraw from all the territories". Gerald E. Marsh, *Desert Diplomacy: No End in Sight to the Israeli-Palestinian Conflict*, USA TODAY MAG., July 2006, *available at* http://findarticles.com/p/articles/mi_m1272/is_2734_135/ai_n26925909/.

them[304]. The Israeli concessions were never intended to—*and did not*—confer either sovereignty or statehood upon Arab Palestinians. Such results must await final peace negotiations between the Parties, which have yet to occur.

* * * * *

In conclusion, to this very day, there has been *no historically recognisable political entity in any Palestinian territory between the Jordan River and the Mediterranean Sea that could be described as an Arab Palestinian "State"*. The only State to have emerged from the British Mandate of Palestine is the *Jewish* Palestinian State of Israel. Therefore, the argument that the PA or any other Palestinian entity possesses authority to confer jurisdiction to the ICC, is entirely without foundation.

VI. THE SITUATION IN THE "PALESTINIAN TERRITORIES" IS UNLIKE THE GEOPOLITICAL SITUATION IN KOSOVO.

Some have suggested that Kosovo's declaration of independence in 2008 provides instruction on whether the "Palestinian territories" possess the requisite sovereignty to transfer jurisdiction to the Court[305]. Neither the geopolitical situation in the Balkans, nor Kosovo's declaration of independence, nor the ICJ's recent advisory opinion on the *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*[306] provides support for an expansive interpretation of Palestinian governmental capacity.

There are a number of factors that distinguish Kosovo from the "Palestinian territories", and the ICJ's recent decision does not in any way justify concluding that the "Palestinian territories" constitute a "State" or meet some lower standards of sovereignty.

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[304]*See generally* Oslo Accords, *supra* note 10.

[305]This line of analysis was specifically suggested by Rod Rastan, Legal Advisor to the Prosecutor, during our meeting of 1 Apr. 2010 at The Hague.

[306]Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. General List No. 141, at ¶ 51 (22 July 2010), [hereinafter "Kosovo Advisory Opinion"] *available at* http://www.icj-cij.org/docket/files/141/15987.pdf.

A. There are a Number of Factors that Distinguish the Situation in Kosovo from that in the "Palestinian Territories".

The history of Kosovo is complex but warrants a brief summary. After World War II, Kosovo, along with Vojvodina, was a province within Serbia[307], which was one of six republics that comprised the former Yugoslavia[308]. Kosovo's status has long been the subject of discussion, as it had enjoyed dual legal status, both as an autonomous part of the Serbian republic and with specific constitutional status within the greater Yugoslavia[309]. In 1974, the former Yugoslavia adopted a new constitution as the Socialist Federal Republic of Yugoslavia ("SFRY")[310]. Kosovo, while remaining part of Serbia, was a "direct participant[] in federal institutions virtually on par with the six republics, and held almost complete jurisdiction over [its] own internal affairs"[311]. The "Constitution referred to the 'sovereign rights' of both nations and nationalities and stated that all Yugoslavia's nations and nationalities had joined together on a free and equal basis"[312]. Kosovo also controlled its educational system, judiciary, tax system, and internal security[313]. It had the right to block changes to the federal and Serbian constitutions that would impact the province[314] as well as the ability to participate in international affairs to a certain extent[315]. Kosovo, along with Vojvodina, participated equally with the other six republics in the

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[307]Written Statement of the United States of America to the International Court of Justice in the Request of an Advisory Opinion on the Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo. Apr. 2009, at 5, [hereinafter "Written Statement of the U.S. to the ICJ"], *available at* http://www.icj-cij.org/docket/files/141/15640.pdf.
[308]*Id.*
[309]*Id.*
[310]*Id.* at 6.
[311]*Id.*
[312]*Id.*
[313]*Situation of Human Rights in the Territory of the Former Yugoslavia,* Periodic Report submitted by Elisabeth Rehn, Special Rapporteur of the Commission on Human Rights. U.N. Doc. E/CN.4/1997/8 (1996), at ¶ 32 [hereinafter "*Situation of Human Rights*"], *available at* http://unbisnet.un.org:8080/ipac20/ipac.jsp?session=Q27844JS38607.25700&profile=bibga&uri=full=3100001~!413610~!6&ri=12&aspect=subtab124&menu=search&source=~!horizon#focus (follow link to preferred language).
[314]CONST. OF THE SOCIALIST FED. REPUBLIC OF YUGOSLAVIA, art. 398, [hereinafter "SFRY CONST."]; 1974 SERBIAN CONST., art. 427; 1974 KOSOVO CONST., art. 301.
[315]*Id.* at art. 271.

representation in the collective Presidency[316]. Federal constitutional courts also had jurisdiction over disputes between Kosovo and the republics[317].

During the 1980s, the delicate status of Kosovo became increasingly unstable. Serbia sought to reassert more control over Kosovo and succeeded in pressuring the Kosovo Assembly into relinquishing much of its sovereignty. The Assembly eventually rescinded that decision and restored the prior status in June of 1990[318]. By 1991, Yugoslavia, as formerly constituted, ceased to exist after four of the republics declared independence, leaving Serbia and Montenegro to form the Federal Republic of Yugoslavia ("FRY") in April 1992[319]. The new constitution referred only to Serbia and Montenegro as republics with federal status[320].

The stability of Kosovo continued to deteriorate as Serbia asserted more control over the province. Then, in 1997, the UN Security Council adopted Resolution 1160 pursuant to Chapter VII of the UN Charter, which encouraged discussions between FRY/Serbia and Kosovo and called for "enhanced status for Kosovo which would include a substantially greater degree of autonomy and meaningful self-administration"[321]. This was followed by a series of negotiations in which the status of Kosovo was discussed.

In January 1999, U.S. Ambassador Christopher Hill conducted negotiations with representatives from FRY/Serbia and Kosovo during which it was determined that Kosovo's status would be revisited after a three-year interim period[322]. In the following weeks, the parties continued negotiations in Rambouillet, France, led by the Contact Group consisting of the U.S., the U.K., France, Germany, Italy, and Russia, resulting in an

[316] *Situation of Human Rights*, *supra* note 313, at ¶ 14.
[317] SFRY CONST., art. 375(5).
[318] Written Statement of the U.S. to the ICJ, *supra* note 307, at 8.
[319] *Id.*
[320] *Id.* at 9.
[321] S.C. Res. 1160, ¶ 5, U.N. Doc. S/RES/1160 (31 Mar. 1998).
[322] Written Statement of the U.S. to the ICJ, *supra* note 307, at 15.

outline for an "Interim Agreement for Peace and Self-Government in Kosovo"[323]. That text left open Kosovo's final status, but called for increasing self-government in the interim while it remained part of FRY[324]. The parties then reconvened the following month, but talks broke down and ended without a final agreement[325]. Fighting broke out shortly thereafter, forcing NATO to intervene with military force on 24 March 1999[326]. In June of 1999, the UN Security Council adopted Resolution 1244, which called for establishment of an international administration in Kosovo, provisional self-government, and a political process that would eventually resolve Kosovo's status[327].

The Secretary General created the positions of Special Representative of the Secretary General ("SRSG") and UN Interim Administration Mission in Kosovo ("UNMIK") to help transition Kosovo to self-government[328]. Although Resolution 1244 left Kosovo's final status unresolved, Kosovo's drive for independence increasingly became a *fait accompli*. In 2006 and 2007, representatives from Serbia and Kosovo continued their attempts to negotiate a final resolution of Kosovo's status to the parties' mutual satisfaction[329]. They were unable to do so, however, as Kosovo insisted on independence and Serbia refused[330].

In March 2007, UN Special Envoy Martii Ahtisaari sent the UN Secretary General a plan recommending independence for Kosovo after a supervised period[331]. The plan noted that,

> [f]or the past eight years, Kosovo and Serbia have been governed in complete separation . . . . Serbia has not exercised any governing authority over Kosovo . . . . Autonomy of Kosovo within the borders of Serbia—

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[323] *Id.* at 16.
[324] Interim Agreement for Peace and Self-Government in Kosovo, Rambouillet, 23 Feb. 1999, ch. 8, art. I(3).
[325] Written Statement of the U.S. to the ICJ, *supra* note 307, at 17.
[326] *Id.*
[327] S.C. Res. 1244, ¶¶ 11(a)–(c), U.N. Doc. S/RES/1244 (10 June 1999).
[328] Written Statement of the U.S. to the ICJ, *supra* note 307, at 20.
[329] *Id.* at 26.
[330] *Id.* at 27.
[331] The Special Envoy, *Report of the Special Envoy of the Secretary-General on Kosovo's Future Status, delivered to the Secretary General*, U.N. Doc. S/2007/168 (26 Mar. 2007).

> however notional such autonomy may be—is simply not tenable . . . . While UNMIK has made considerable achievements in Kosovo, international administration of Kosovo cannot continue[332].

After the UN Secretary General endorsed the Ahtisaari Plan and another round of negotiations failed to produce an agreement, Kosovo officially declared independence on 17 February 2008[333]. Almost immediately, the U.S., along with most members of the European Union, recognised Kosovo's independence, and by the following month, 57 countries had recognised it as well[334].

The U.S. statement to the ICJ regarding the ICJ's Advisory Opinion on Kosovo's declaration of independence summarised the four primary reasons behind the U.S.'s recognition of Kosovo's independence. First, there were a number of similarities between Kosovo's situation and the other republics that had declared independence from Yugoslavia, including the erosion of constitutional checks and balances[335]. Second, and perhaps most significantly, Kosovo met the criteria for statehood as defined in the Montevideo Convention, including the ability to conduct foreign relations and a defined territory[336]. Third, there was no viable alternative to independence. Finally, Kosovo committed itself to protecting all communities within Kosovo and to establishing institutions based on the rule of law[337].

For the most part, it appears that Kosovo has quickly established and developed the institutions necessary for self-governance, including ministries of foreign affairs and a security apparatus[338]. According to the UN Secretary General, when Kosovo declared

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[332] *Id.* ¶ 7.
[333] Written Contribution of the Republic of Kosovo to the International Court of Justice in the Request of an Advisory Opinion on the Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo, 17 Apr. 2009, at 109.
[334] Written Statement of the U.S. to the ICJ, *supra* note 307, at 33.
[335] *Id.* at 34.
[336] *Id.*
[337] *Id.*
[338] *Id.* at 36.

independence, Kosovo also had, thanks to UN assistance, a "functional justice system"[339], and it had also adopted a constitution and laws that protected minority communities, all of which are represented in Kosovo's Assembly[340].

These facts are important because they represent a stark contrast to the situation in the "Palestinian territories". Significantly, the "Palestinian territories" do not meet the criteria for statehood according to the Montevideo Convention. Moreover, Palestinians are prohibited from conducting foreign affairs, and they lack full control over any territory (as evidenced by the fact that they have virtually no control and no jurisdiction in Areas C in the West Bank and absolutely no control in Gaza, which is controlled by Hamas; by the fact that Israel controls all airspace and external border security in Areas A, B, and C; and by the fact that they lack many governmental capacities, such as jurisdiction over Israelis anywhere in the "Palestinian territories", full military control, or functioning courts)[341]. In Kosovo, a much more compelling case exists that the criteria for statehood are met.

Further, under Resolution 1244,

> [t]here was no requirement that the future status be 'agreed,' only an authorization for the international civil presence to facilitate a political process[342] . . . . The reference to the Rambouillet Accords in Resolution 1244, and the background of the Accords, underscore that the result of the future status process was left open and that its outcome was not made dependent upon the consent of Belgrade[343].

This is in contrast to the Israeli-Palestinian situation, in which the Interim Agreement specifically provides that "[n]either side shall initiate or take any step that will change the status of the West Bank and the Gaza Strip pending the outcome of the permanent status negotiations"[344]. *Any assertion of statehood, sovereignty, or power to transfer criminal jurisdiction to the ICC would be in clear violation of an international agreement.* That

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[339] *Id.* at 64.
[340] *Id.* at 37.
[341] *See supra* Section I(A).
[342] Written Statement of the U.S. to the ICJ, *supra* note 307, at 63.
[343] *Id.* at 68.
[344] Interim Agreement, *supra* note 10, at XXXI(7).

same Interim Agreement also denies the Palestinian representatives the ability to conduct foreign relations, one of the four Montevideo factors. This contrasts with the situation in Kosovo, which was not denied the ability to conduct foreign relations.

The "Palestinian territories", particularly in Gaza, also lack other factors that distinguish it from the situation in Kosovo prior to its declaration of independence. For instance, whereas Kosovo pledged protection and representation of minority communities, Hamas, which governs the Gaza Strip, pledges in its Charter to seek the destruction of Israel[345] and has engaged in the murder of members of Fatah[346]. As a 2008 PA Report conceded, the "Palestinian territories" also generally lack respect for judicial independence and the rule of law[347].

With respect to Kosovo, the UN emphasised a policy of "standards before status"[348], whereby Kosovo would need to have functioning institutions and respect for human rights in place prior to achieving sovereignty. The PA (and Hamas) have yet to achieve a minimal level of development and respect for human rights compared to Kosovo, which is evidenced by factional divisions between Hamas and the PA, support for terrorism within the "Palestinian territories", and internal intimidation of the Palestinian population (especially, but not solely, by Hamas).

The overall geopolitics of Kosovo, Serbia, and the former Yugoslavia were also much different than those in the Middle East. Yugoslavia was comprised of semi-autonomous republics, and Kosovo was a semi-autonomous province within one of those republics. When four of the republics broke away and declared independence in the early

[345]Hamas Charter: The Covenant of the Islamic Resistance Movement (18 Aug. 1988), *available at* http://www.mideastweb.org/hamas.htm ("Israel will exist and will continue to exist until Islam will obliterate it, just as it obliterated others before it".).
[346]*See supra* note 73 and accompanying text.
[347]Justice Sector Strategy, *supra* note 206.
[348]Press Release, U.N. Security Council, Implementing 'Standards Before Status' Policy Core Political Project for UN Kosovo Mission (2 June 2004), *available at* http://www.un.org/News/Press/docs/2004/sc7999.doc.htm.

1990s, those events established a precedent for bodies within the region to assert their own statehood and sovereignty. Further, as the U.S. State Department observed, no viable alternative to Kosovo independence existed[349]. This was due in large part to the fact that Serbia demanded that Kosovo remain a part of Serbia.

The Israeli-Palestinian dispute is different in numerous respects. First, it is generally understood that an Arab Palestinian State remains a future possibility, not a current reality. Additionally, Israel does not claim that all of the West Bank and the Gaza Strip is or should be part of Israel. The final delineation of boundaries and territories is to be determined by negotiations between the parties. Absent the creation of a sovereign Arab Palestinian State, the alternative is the status quo. Although this is not ideal, it is a viable option, if by no other standard than the historical reality. The "Palestinian territories" have existed as non-sovereign, non-independent territories since 1948. While they achieved a greater degree of self-governance with the Oslo Accords and Interim Agreement of the 1990s, those agreements still stopped far short of conferring sovereignty or independence and specifically prohibited acquisition of such statuses without further agreement between the parties.

B. The ICJ's Decision on the Accordance with International Law of Kosovo's Unilateral Declaration of Independence was Narrowly Tailored and in No Way Implies that the "Palestinian Territories" Should be Considered a State or a Sovereign Entity.

There are a number of distinguishing facts that differentiate the political and legal considerations in Kosovo from those in the "Palestinian territories", but, notwithstanding those differences, the ICJ's advisory opinion on the *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* was extremely limited and should not be construed as a general endorsement of declarations of statehood—to the contrary, the ICJ's opinion merely concluded that Kosovo's unilateral declaration of

[349]Written Statement of the U.S. to the ICJ, *supra* note 307, at 34.

independence was not *per se* illegal[350]. The question put forth to the ICJ and answered—in a non-binding advisory opinion—was "narrow and specific"[351]. As the ICJ's opinion made clear, the General Assembly asked "for the Court's opinion on whether or not the declaration of independence is in accordance with international law. It does *not* ask about the legal consequences of that declaration"[352].

The ICJ merely opined on whether the UN Security Council's prior Resolution 1244, and international law generally, would explicitly prohibit a declaration of independence[353]. The Court reached a negative conclusion while explicitly stating that "it does not ask whether or not Kosovo has achieved statehood. Nor does it ask about the validity or legal effects of the recognition of Kosovo by those States which have recognized it as an independent State"[354].

Indeed, the Court made clear that,

> the task which the Court is called upon to perform is to determine whether or not the declaration of independence was not in accordance with international law. The Court is not required by the question it has been asked to take a position on whether international law conferred a positive entitlement on Kosovo unilaterally to declare its independence or, *a fortiori*, on whether international law generally confers an entitlement on entities situated within a State unilaterally to break away from it. Indeed, it is entirely possible for a particular act – such as a unilateral declaration of independence – not to be in violation of international law without necessarily constituting the exercise of a right conferred by it. The Court has been asked for an opinion on the first point, not the second[355].

The ICJ repeatedly emphasised that its decision did not opine on the overall legal effects of a declaration of independence, pointing out that historically, "there were numerous instances of declarations of independence, often strenuously opposed by the State from which independence was being declared. Sometimes a declaration resulted in

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[350]Kosovo Advisory Opinion, *supra* note 306. at ¶ 122.
[351]*Id.* at ¶ 51.
[352]*Id.* (emphasis added).
[353]*Id.* at ¶ 78.
[354]*Id.* at ¶¶ 51–56.
[355]*Id.*

the creation of a new State, at others it did not"[356]. In other words, the act of declaring independence is not legally dispositive and does not necessarily result in statehood. Statehood status depends on questions of fact, and the ICJ's opinion only acknowledged that international law does not have blanket prohibitions on declaring statehood that governed the particular case of Kosovo.

The ICJ's opinion also addressed Security Council Resolution 1244, which the Court said "form[ed] part of the international law which is to be considered in replying to the question posed by the General Assembly"[357]. But while the Security Council's resolution comprised part of the universe of international law that would govern whether Kosovo's unilateral declaration of independence was illegal, according to the ICJ's view, it ultimately concluded that resolution 1244 did not prohibit such a declaration given the circumstances[358].

The conclusion depended on the ICJ's view that the authors of the declaration were not acting under the Provisional Institutions of Self-Government within the Constitutional Framework, which was part of the interim administration overseen by the UN, but simply as representatives of the people of Kosovo[359]. In addition, the ICJ also concluded that resolution 1244 did not reserve to the Security Council exclusive authority to construct a final resolution of the political conflict in Kosovo and "remained silent on the conditions for the final status of Kosovo"[360], notwithstanding language recognising the "sovereignty and territorial integrity of the Federal Republic of Yugoslavia"[361] and the establishment of the Interim Administration Mission in Kosovo[362]. Again, the ICJ merely stated that

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[356] *Id.* at ¶ 79.
[357] *Id.* at ¶ 93.
[358] *Id.* at ¶ 114.
[359] *Id.* at ¶ 109.
[360] *Id.* at ¶ 114.
[361] S.C. Res. 1244 *supra* note 327, Pmble.
[362] Kosovo Advisory Opinion, *supra* note 306, at ¶¶ 95–97.

nothing prohibited a declaration of independence, not that the declaration was sanctioned by international law.

Several ICJ judges dissented from the majority opinion on grounds that the declaration was authored within the confines of the Provisional Institutions of Self-Government of Kosovo, and, therefore, was illegal since the act was *ultra vires* from the authority granted the provisional government of Kosovo and precluded by resolution 1244 and UNMIK regulation 1999/1[363]. Nonetheless, the dissent also acknowledged that "[i]nternational law is not created by non-State entities acting on their own. It is created with the assent of States"[364]. Despite the majority's conclusion that the declaration of independence did not contravene international law, both the majority and dissent agreed that international law did not provide an endorsement of the declaration and that its true legal effect was uncertain, at best.

Clearly, the ICJ's opinion has no bearing on the statehood or sovereign implications of the "Palestinian territories". In addition to the obvious fact that there has been no recent declaration of statehood by the Palestinians—although there has been some discussion of it by the Palestinian Authority—even if there were a declaration, the ICJ's opinion would only stand for the notion that, in the absence of another international agreement to the contrary, international law, generally, does not regulate whether a declaration of statehood actually results in statehood status.

Whereas the ICJ majority opinion explicitly held that the UN Security Council's resolution 1244 and UNMIK regulation 1999/1 did not prohibit a declaration of independence by representatives of Kosovo, in the case of the Israeli-Palestinian conflict, there are international agreements in place which, under the reasoning of the ICJ advisory opinion, constitute international law and would prohibit a declaration of statehood by the

[363]Dissenting Opinion of Judge Koroma, Advisory Opinion, 2010 I.C.J. at ¶¶ 17-18 (22 July 2010), *available at* http://www.icj-cij.org/docket/files/141/15991.pdf.
[364]*Id.* at ¶ 8.

Palestinian authorities. Notably, the Interim Agreement specifically prevents the parties from unilaterally changing the status agreed to in those agreements pending the outcome of final status negotiations[365].

Moreover, the aforementioned distinguishing factors between the circumstances surrounding Kosovo's declaration and the situation in the "Palestinian territories" provide a stark contrast between the two cases. The ICJ's opinion made it clear that "[t]he declaration of independence of 17 February 2008 must be considered within the factual context which led to its adoption"[366]. There are a few very basic and pertinent factual contexts that should be pointed out, namely that the declaration was made by leaders in Kosovo[367], which as a territory had developed "substantial autonomy and self-government"[368]. This established presence with the immediate capacity for control provides an imperative factual context upon which Kosovo distinguished itself from situations like that of the "Palestinian territories". When the Palestinian leaders declared independence in 1988, they had to do so from temporary exile in Algiers, not from the "Palestinian territories" where they had no presence[369]. Moreover, they had not developed successful governing institutions in the region, which as a result left them far removed from the ability for immediate sovereign control.

Finally, the ICJ explicitly referenced the UN Security Council's Special Envoy's conclusion that "the negotiations' potential to produce any mutually agreeable outcome on Kosovo's status is exhausted. No amount of additional talks, whatever the format, will

[365]Interim Agreement, *supra* note 10, art. XXXI(7).
[366]Kosovo Advisory Opinion, *supra* note 306, at ¶ 57.
[367]*Id.* at ¶ 76.
[368]*Id.* at ¶ 75. This was the language used in Security Council Resolution 1244 (1999) describing the duty of the Interim Administration Mission in Kosovo (UNMIK). It is clear that such objectives were satisfactorily achieved as of March 2007 according to the recommendation of United Nations Secretary-General to transfer all vested authority in the UNMIK to the governing authorities of Kosovo. *Id.* at ¶ 69–72.
[369]The Palestinian National Council Declaration of Independence, 14 November 1988, *available at* http://www.jewishvirtuallibrary.org/jsource/Peace/pncdec.html.

overcome this impasse"[370], which apparently furthered the ICJ's position that the declaration of independence did not inherently conflict with UN resolutions on the matter. In stark contrast, the UN Security Council explicitly endorsed the Quartet Roadmap through Resolution 1515 in 2003[371], which stated that a precondition to the "two-state solution to the Israeli-Palestinian conflict" is

> an end to violence and terrorism, when the Palestinian people have a leadership acting decisively against terror and willing and able to build a practicing democracy based on tolerance and liberty, and through Israel's readiness to do what is necessary for a democratic Palestinian state *to be established*, and a clear, unambiguous acceptance by both parties of the goal of a negotiated settlement . . .[372].

Given its stated preconditions for Palestinian statehood, the Security Council cannot view a Palestinian "State" as ripe for existence (negotiations, perhaps), not to mention the other standards for statehood and sovereignty that the Palestinians have yet to realize.

VII. THE ROME STATUTE EXPRESSLY RESERVES TO THE UN SECURITY COUNCIL, NOT THE PROSECUTOR, THE EXCLUSIVE AUTHORITY TO EXTEND THE ICC'S REACH BEYOND THE TERRITORIAL AND NATIONALITY LIMITATIONS SET FORTH IN ARTICLE 12.

Proponents of the ICC's exercising jurisdiction over the Gaza situation have advanced the argument that, if the ICC does not do so, Palestinian victims who have suffered harm will have no remedy. That is simply not true. Remedy can come through the UN Security Council, as explicitly contemplated in the Rome Statute. The role that the UN would play in the ICC was a significant source of discussion when the Statute was negotiated[373].

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[370] *Id.* at ¶ 59.

[371] *See* S.C. Res. 1515, U.N. Doc. S/RES/1515 (19 Nov. 2003).

[372] Roadmap, *supra* note 257 (emphasis added).

[373] LEE, *supra* note 94, at 127.

> The group of Articles [12 to 16] . . . gave rise to some of the most difficult negotiations at the Rome Conference. This was only to be expected, since these Articles were complex in nature and touched political nerves, dealing as they did with matters affecting state sovereignty and the Security Council. . . . and were among the very last to be settled at the Conference.

Id.

Article 13 provides that

> [t]he Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:
>
> . . .
>
> (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations[374].

This provision represents the "catch-all" mechanism for the Court to exercise jurisdiction and prosecute crimes within the scope of the Court when they otherwise do not fall within the Court's jurisdiction. The drafters of the Rome Statute understood that accession to the Court was voluntary but that *there should still be a way to bring criminal offenders to justice*. The UN Security Council was the mechanism that the States Parties decided upon.

Yet, even a UN Security Council referral would not automatically confer jurisdiction on the ICC. The issue of complementarity would still have to be addressed, and the referral would have to be made under Chapter VII of the UN Charter. Nonetheless, a Security Council referral satisfies one of the initial questions of jurisdiction and, according to the Statute, the method of handling such situations. As a result, those who claim that Palestinian victims are without recourse or remedy if the Prosecutor does not accept the PA's Declaration are simply mistaken.

The States Parties to the Rome Statute were not ignorant of the possibility that offenses defined in the Statute might occur in situations falling outside the consent-based jurisdiction of the Court. Yet, their solution to the concern that this would contribute to impunity for serious violations of international law was *not* to vest the Prosecutor with the discretion to effectively expand the jurisdiction of the Court. Instead, they included Article 13(b), which permits the Court to exercise jurisdiction in situations "in which one or more of such crimes appear[ing] to have been committed [are] referred to the

[374]Rome Statute, art. 13.

Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations"[375]. *This provision reflects the clear intent of the States Parties that only the Security Council shall be competent to place before the Court allegations of violations of the Statute that are otherwise barred by the nationality and territoriality limitations on jurisdiction established by Article 12.*

Recognising the Security Council's competence to refer such situations to the Court reflected an evolution of a process that began with the creation of the International Criminal Tribunal for the Former Yugoslavia ("ICTY")[376]. That Tribunal was created pursuant to the authority vested in the Security Council by Chapter VII to authorise measures for the restoration and maintenance of international peace and security[377]. This legal basis was subsequently validated by the ICTY Appeals Chamber in *Prosecutor v. Tadic*[378]. As a result, at the time of the drafting of the Rome Statute, it was well accepted that Chapter VII of the UN Charter authorised the Security Council to direct the creation of *ad hoc* tribunals to address allegations of serious violations of international law in the context of armed conflicts.

Including within the Statute a provision that permits the Court to exercise jurisdiction over situations referred by the Security Council acting pursuant to its Chapter VII enforcement authority was considered an efficient alternative to the periodic creation of future *ad hoc* tribunals by the Security Council to deal with threats to international peace and security[379]. It reflected the *determination of States Parties that impunity for serious violations of international law could, in the future, as it had in the past, be*

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[375]Rome Statute. art. 13(b).
[376]*See* Lionel Yee, *The International Criminal Court and the Security Council: Articles 13(b) and 16, in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 143, 146 (Roy S. Lee ed., 1999).
[377]*Id.* at 147.
[378]Prosecutor v. Tadic, Case No. IT-94-1-AR72. Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 27–29 (2 Oct. 1995).
[379]Yee, *supra* note 376, at 148; *see also* Luigi Condorelli & Santiago Villalpando, *Referral and Deferral by the Security Council, in* 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, at 627–37 (2005).

considered by the Security Council as a threat to international peace and security, and that efficient investigation and prosecution of such crimes could be important factors in the restoration of peace and security[380]. It also reflected a compromise between a purely consent-based jurisdiction paradigm and a cause-based jurisdiction paradigm[381].

This compromise, however, involved a delicate balance between the desire to prevent impunity for the most serious violations of international law, the authority of the Prosecutor, and the protection of state sovereignty[382]. Certainly, if preventing impunity were the only concern of the States Parties, they could have vested the Prosecutor with authority to investigate and refer to the Court not only situations falling within the consent-based jurisdiction of the Statute, but any other situation that he believed justified such action. Of course, such an approach would constitute an invalid intrusion into the sovereignty of those states choosing not to submit to the jurisdiction of the Court. Instead, the *States Parties chose to place two significant limits on the ability to extend the jurisdiction of the Court beyond the consent limitations established by Article 12: first, that the situation constitutes a threat to international peace and security; and second, that only the collective judgement of the Security Council can authorise such an extension*[383]. Vesting the Security Council with this authority was, therefore, adopted by the States Parties as an effective method for balancing the sovereign interests of states with the need to extend jurisdiction to certain situations beyond the consent jurisdiction of the Court. By linking such an extension to the collective security mechanism of the United Nations, the Statute vitiates any legitimate objection to non-consensual jurisdiction[384].

It is, therefore, clear that the States Parties to the Rome Statute were not simply attempting to extend the jurisdiction of the Court to states that chose not to accede to the

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[380] Yee, *supra* note 376, at 147.
[381] *See* Condorelli & Villalpando, *supra* note 379, at 627–29.
[382] *Id.* at 629–34.
[383] *Id.*
[384] *Id.* at 627–29.

treaty. Instead, they acknowledged the *exclusive authority of the Security Council to impose non-consensual jurisdiction* on states as an enforcement measure pursuant to Chapter VII of the UN Charter. The significance of this link between non-consensual jurisdiction and the enforcement authority of the Security Council was so profound that even a proposal to authorise a Security Council referral pursuant to Chapter VI of the Charter was rejected[385].

In light of this recognition, it is clear that only the Security Council, acting pursuant to the authority granted by the community of nations through Chapter VII of the UN Charter, may refer a situation to the ICC that is otherwise beyond the consent-based jurisdictional limits of the Statute. This is an immense responsibility because it involves extremely complex and delicate matters of international law, diplomacy, and state sovereignty[386]. The States Parties concluded that only the Security Council—*not the Prosecutor*—possessed the requisite competence and authority to address these competing concerns. By intruding into this realm of authority to authorise enforcement measures in response to threats to international peace and security, the Prosecutor's action has the potential to destabilise a complex and delicate process established by the community of nations.

Clearly the drafting and ratifying parties to the Court fully contemplated just how much discretion they should vest with the Prosecutor, and indeed, they gave the OTP significant latitude to initiate investigations *proprio motu*—one of the more contentious issues related to the negotiation and adoption of the Rome Statute[387]. The decision of the States Parties to endorse a measured grant of *proprio motu* authority was based on the

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[385]Yee, *supra* note 376, at 148–49.

[386]*See generally* Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, (2 Oct. 1995); *see also* Condorelli & Villalpando, *supra* note 379, at 627–34.

[387]*See generally* Silvia A. Fernandez de Gurmendi, *The Role of the International Prosecutor, in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE, *supra* note 376, at 172; *see also* John R.W. Jones, *The Office of the Prosecutor, in* 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 269.

expectation that the Prosecutor would exercise his discretion properly and respect the jurisdictional limitations imposed on the Court by the Statute. It is crucial, therefore, that the Prosecutor reject the submission of the PA, lest he should appear to be exceeding the limits of this discretion. Otherwise, he is, in effect, unilaterally transforming his limited authority into plenary authority to investigate allegations of war crimes.

Article 13 specifies the circumstances in which the ICC has jurisdiction over the crimes listed in the Rome Statute, one of which is when "[t]he Prosecutor has initiated an investigation in respect of [an Article 5] crime in accordance with Article 15"[388]. Article 15(1) states, "[t]he Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes *within the jurisdiction of the Court*"[389]. Article 12(2) provides that, if the Prosecutor initiates an investigation, the ICC has jurisdiction if either the alleged crime was committed on the territory of a State Party to the Statute or the accused is a national of a State Party to the Statute[390].

Any abuse of prosecutorial discretion is problematic, whether at the national or international level. This very fact was a major source of controversy during the ICC negotiations process[391]. As a result, the States Parties purposely limited prosecutorial discretion by permitting the Prosecutor to undertake *preliminary* investigations on his own initiative and to seek and receive evidence from all "reliable sources that he . . . deems appropriate"[392]. If, at some point, the Prosecutor believes that an initial investigation has merit, he must submit "a request for authorization of an investigation", with supporting evidence, to the Pre-Trial Chamber for its concurrence before he may proceed[393]. The

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[388]*See* Rome Statute, art. 13(c).
[389]*Id.* art. 15(1) (emphasis added).
[390]*See id.* art. 12(2).
[391]*See* Fanny Benedetti, *A Report on the Negotiations for the Creation of an International Criminal Court*, 5 HUM. RTS. BRIEF 51 (1997).
[392]Rome Statute, art. 15(1)–(2). Such sources include information from States, UN organs, intergovernmental organisations, NGOs, and the like. *Id.* art. 15(2).
[393]*Id.* art. 15(3).

Pre-Trial Chamber, in turn, must determine that "the case appears to fall within the jurisdiction of the Court" before it may authorise the Prosecutor to commence a formal investigation[394].

As the ultimate "ministers of justice", prosecutors bear a unique responsibility to ensure justice is served for all parties involved in a dispute. *The first element of justice is respect for the principle of legality, which requires respect for the jurisdictional limits established by law.* Jurisdiction is the first principle of legitimate judicial power and jurisdictional limits on the exercise of prosecutorial discretion cannot be ignored or waived simply because a prosecuting authority becomes aware of substantive facts that he believes establish probable cause that a crime has occurred. Disregarding jurisdiction is clearly an abuse of discretion and nullifies the limitations explicitly imposed on the Prosecutor by the Rome Statute itself.

The Prosecutor's office acknowledged these limitations in its 14 January 2009 statement. Regarding Gaza, Reuters quoted the Prosecutor as asserting, since Israel had not consented to ICC jurisdiction, "the ICC lacks such jurisdiction"[395]. Reuters continued: the "prosecutor said crimes committed in other situations can come before the ICC if the relevant non-party state voluntarily accepts the jurisdiction of the Court on an *ad hoc* basis or *if the United Nations Security Council refers a situation*"[396]. The foregoing statement vividly confirms that the Prosecutor understands that he has no authority to extend the ICC's reach to accommodate declarations by non-state entities (like the PA) and that such authority resides solely in the Security Council.

Therefore, in this instance, the Prosecutor does not have authority to initiate an investigation *proprio motu* under the consent-based jurisdiction limits established by the

[394] *See id.* art. 15(4).
[395] Aaron Gray-Block, *ICC Prosecutor Says Has No Jurisdiction in Gaza*, REUTERS, 14 Jan. 2009, http://www.reuters.com/article/newsMaps/idUSTRE50D5MM20090114.
[396] *Id.* (emphasis added).

Statute (that the conduct occurred in the territory of a *State* Party or that the individual suspected of a crime is a national of a *State* Party)[397]. Accordingly, the Prosecutor's appropriate response to the application must be to reject the same.

Additionally, the Prosecutor does not have authority to initiate an investigation *proprio motu* under the non-consensual jurisdiction limits established by the Statute. The Statute expressly reflects the decision of the States Parties to reserve to *the Security Council* the option of invoking the jurisdiction of the Court to address situations where there is otherwise no jurisdiction by virtue of the consent of a state of nationality or a state where events have occurred. There can be no doubt that the Security Council is willing to exercise its authority to refer a situation to the Court when necessary. In 2005, the Security Council passed Security Council Resolution 1593, by which the Council, "acting under Chapter VII of the United Nations Charter, . . . decided to refer the situation prevailing in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court"[398]. The Security Council knows how to refer a matter to the ICC; it has done so in the past, *but it has not done so here*. By considering non-consensual jurisdiction beyond the bounds established by the Statute, the Prosecutor may be usurping the role expressly reserved for the Security Council, thereby exceeding the bounds of his discretion.

There are also numerous practical concerns that explain the Rome Statute's refusal to allow non-state entities like the PA to avail themselves of ICC jurisdiction. Most troubling is that doing so would open a Pandora's Box vis-à-vis other, potential, non-state claimants like Taiwan, northern Cyprus, or even Kurdistan. Many groups claim that their territory is "occupied" and seek to establish their own states, and some aim to secede from

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[397]*See, e.g.*, Rome Statute, art. 12(2).

[398]*See* Press Release, Security Council, Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court, U.N. Doc. SC/8351 (31 Mar. 2005), *available at* http://www.un.org/News/Press/docs/2005/sc8351.doc.htm; *see also* Amnesty International USA, Darfur and International Criminal Court: Frequently Asked Questions, http://www.amnestyusa.org/international-justice/international-criminal-court/darfur-and-the-international-criminal-court-faqs/page.do?id=1041203 (last visited 7 July 2010).

states that are not parties to the Rome Statute. If the PA Declaration were accepted, it might soon be followed by other declarations by non-state entities, thereby creating or aggravating significant international political problems around the world. In fact, there are at least forty-four national movements for self-determination that face varying degrees of opposition—some armed—from non-ICC member states (a list is attached hereto as Appendix A). If the ICC were to grant the Palestinians the status they seek, this could encourage other groups to seek similar determinations, forcing the ICC to decide which requests have merit and which do not, decisions that would be widely viewed as unacceptable meddling in politics.

Such potential political problems do not belong in the ICC. By adhering to the clear language of the Statute, the Prosecutor can sidestep such issues[399]. Acceding to the PA request, despite express language in the Statute against accession by non-state entities, would contribute to confusion and instability in the Court.

In sum, it is clear that the remedy for non-states parties (like the Palestinians) alleging violations is to seek a UN Security Council referral. It is the Security Council, not the OTP, that is solely authorized to refer such situations to the ICC.

CONCLUSION

Only the most serious attention should be paid to allegations of war crimes or crimes against humanity. We share the ICC's goal of eliminating the most serious international crimes, including those committed during warfare. However, regardless of the parties involved, it is important that politics not trump law and that preferences not trump procedure. There are clear procedures and statutory guidance for determining whether the ICC has jurisdiction in particular situations. Again, they require no expansive or restricted reading, just an honest one. The "Palestinian territories" do not constitute a

[399] *See supra* notes 96–99 and accompanying text.

State and never have. They do not meet the criteria for statehood, nor do they possess the authority to transfer jurisdiction over Israelis, which they have never held, to an international body. The Security Council would have such authority, but the PA certainly does not. If the OTP were to claim jurisdiction over the "Palestinian Territories", it would violate customary international law and the very terms of the Rome Statute. Such a decision would only serve to politicise the Court, lessen its prestige, and make its rulings less credible in the international community. For all these reasons, it must be avoided.

Respectfully Submitted,

Dated this 4th day of October, 2010.

Grégor Puppinck
European Centre for Law and Justice
Signing for Concerned Party

APPENDIX A

	Groups Seeking Self Determination	Affected State
1	Abkhazia	Georgia*
2	Aboriginal Australians	Australia*
3	Afrikaners	South Africa*
4	Assyrians	Iraq
5	Balochistan	Pakistan
6	Basque Country	Spain*
7	Batwa	Rwanda
8	Biafra	Nigeria*
9	Buryatia	Russia
10	Cabinda	Angola
11	Catalonia	Spain*
12	Chechnya	Russia
13	Chin	Myanmar
14	Chittagong	Bangladesh
15	Circassia	Russia
16	Cordillera	Philippines
17	Crimean Tatars	Ukraine
18	East Turkestan	China
19	Gilgit Baltistan	Pakistan
20	Greeks in Albania	Albania
21	Hawaii	USA
22	Hmong	Laos
23	Hungarians in Romania	Romania
24	Inner Mongolia	China
25	Karenni	Myanmar
26	Kashmir	India
27	Khmer Krom	Vietnam
28	Kosovo	Serbia*
29	Kurdistan	Turkey, Iraq, Syria & Iran
30	Maasai	Kenya* & Tanzania*
31	Mapuche	Argentina* & Chile*
32	Mon	Myanmar
33	Montagnards	Vietnam
34	Nagalim	India & Myanmar
35	Nagorno Karabakh	Azerbaijan
36	Ogaden	Ethiopia
37	Ogoni	Nigeria*
38	Oromo	Ethiopia
39	Pattani	Thailand
40	Puerto Rico	USA
41	Rehoboth Basters	Namibia*
42	Sanjak	Serbia* & Montenegro*
43	Scania	Sweden*
44	Sindh	Pakistan

45	Somaliland	Somalia
46	South Island	New Zealand*
47	South Ossetia	Georgia*
48	Southern Azerbaijan	Iran
49	Southern Cameroons	Cameroun
50	Southern Sudan	Sudan
51	South Moluccas	Indonesia
52	South Yemen	Yemen
53	Tamils	Sri Lanka
54	Taiwan	China
55	Tibet	China
56	Tshimshian	Canada*
57	Tuva	Russia
58	Udmurt	Russia
59	Vhavenda	South Africa*
60	Western Sahara	Morocco
61	West Papua	Indonesia
62	Zanzibar	Tanzania*
		***ICC Member State**
		Disputes involving ICC member States - **18**
		Disputes involving non-ICC member States - **44**