



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

Abstract: In early 2009 the Palestinian Authority submitted a declaration under Article 12(3) of the Rome Statute recognizing the jurisdiction of the International Criminal Court 'for the purpose of identifying, prosecuting and judging the authors and accomplices of acts committed on the territory of Palestine since 1 July 2002.' In the first instance this paper argues that whereas the existence or otherwise of a state of Palestine remains moot at best for the purpose of international law and international relations broadly speaking, a compelling argument can be made that for the purposes of the Statute only, a determination by the Court that Palestine is a state that can engage with the Court would be valid and in line with the Court and the Statute's statutory requirements. The paper, drawing on the criteria being relied upon by the Office of the Prosecutor in order to decide whether the PA, as an institution established by the PLO, has the necessary 'capacity' to transfer its jurisdiction to the Court, then addresses the extent of the PA's jurisdiction over international crimes. It demonstrates that the PA can legitimately prosecute individuals responsible for crimes within the jurisdiction of the ICC regardless of the nationality of the individuals concerned and that the PA has the ability to enter into international agreements. It concludes by asserting that the ICC may validly consider Palestine to be a state for the purposes of Article 12(3) of the Rome Statute and may accept the transfer of jurisdiction from the PA to the Court in line with the Statute and the principles of international law.

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Background to the PA's Declaration

1. On 21 January 2009, Ali Al-Khashan, as Minister of Justice for the Government of Palestine, signed a declaration under Article 12(3) of the Rome Statute recognizing the jurisdiction of the International Criminal Court 'for the purpose of identifying, prosecuting and judging the authors and accomplices of acts committed on the territory of Palestine since 1 July 2002.' Article 12(3) allows a state that is not a party to the Statute to "accept the exercise of jurisdiction by the Court" by way of a declaration lodged with the registrar.¹ The declaration was lodged with the Registrar of the Court on 22 January,² and in a statement acknowledging his meeting with Al-Khashan, the Court's Prosecutor Luis Moreno-Ocampo stated that 'These are complex legal issues to assess'.³
2. The Palestinian approach to the ICC was in response to 'Operation Cast Lead', Israel's military assault on Gaza which lasted from 27 December 2008 until 18 January 2009. According to Al-Haq's research, 1409 Palestinians were killed during the assault. This figure includes 1172 civilians of whom 342 were children.⁴ The urgency of ensuring that those responsible for committing war crimes and crimes against humanity be held to account is paramount to a Palestinian community which can no longer tolerate the impunity which for so long has characterized Israel's military assaults in the occupied Palestinian territory.
3. On 9 January 2009 at the 9th special session of the Human Rights Council, convened to address "The Grave Violations of Human Rights in the Occupied Palestinian Territory including the recent aggression in the occupied Gaza Strip" a Resolution condemning Israel's assault on Gaza⁵ and calling for an end to the occupation of all Palestinian lands occupied since 1967,⁶ decided "to dispatch an urgent, independent international fact-finding mission, to be appointed by the President of the Council, to investigate all violations of international human rights law and international humanitarian law by the occupying power, Israel, against the Palestinian people throughout the Occupied Palestinian Territory, particularly in the occupied Gaza Strip, due to the current aggression".⁷

¹ Carsten Stahn, Mohamed M El Zeidy, Héctor Olásolo *The International Criminal Court's Ad Hoc Jurisdiction Revisited* 99 AJIL 2 (2005) 421-431.

² Acknowledgment of receipt of Declaration by Registrar of ICC, 2009/404/SA/LASS, 23 January 2009.

³ OTP Statement 22 January 2009 Visit of the Minister of Justice of the Palestinian National Authority: available at <http://www.icc-cpi.int/NR/exeres/4F8D4963-EBE6-489D-9F6F-1B3C1057EA0A.htm>. On 13 February Prosecutor Luis Moreno Ocampo met with Palestinian Minister for Foreign Affairs, Mr Riad al Malki, and Minister of Justice, Mr Ali Khashan, as well as with the Palestinian National Authority Ambassador to The Netherlands, Mrs Somaia Albarghouti, in the ICC headquarters in The Hague.

⁴ Al Haq '*Operation Cast Lead: A Statistical Analysis* August 2009, available at: <http://www.alhaq.org/pdfs/gaza-operation-cast-Lead-statistical-analysis%20.pdf>

⁵ Human Rights Council *The grave violations of human rights in the Occupied Palestinian Territory, particularly due to the recent Israeli military attacks against the occupied Gaza Strip* A/HRC/S-9/L.1 12 January 2009, para 2.

⁶ Human Rights Council *The grave violations* Para 4.

⁷ Human Rights Council *The grave violations* Para 14.

4. Acting upon this Resolution, on 3 April 2009, the President of the Human Rights Council established the United Nations Fact Finding Mission on the Gaza Conflict with the mandate “to investigate all violations of international human rights law and international humanitarian law that might have been committed at any time in the context of the military operations that were conducted in Gaza during the period from 27 December 2008 and 18 January 2009, whether before, during or after.” The President appointed Justice Richard Goldstone, former judge of the Constitutional Court of South Africa and former Prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda, to head the Mission.⁸
5. The Goldstone Report considered the alleged violations it investigated within the context of international humanitarian law, international criminal law, and international human rights law. Published in September 2009, the Report concluded that “what occurred in just over three weeks at the end of 2008 and the beginning of 2009 was a deliberately disproportionate attack designed to punish, humiliate and terrorize a civilian population, radically diminish its local economic capacity both to work and to provide for itself, and to force upon it an ever increasing sense of dependency and vulnerability”.⁹ The Report further asserted that “Whatever violations of international humanitarian and human rights law may have been committed, the systematic and deliberate nature of the activities described in this report leave the Mission in no doubt that responsibility lies in the first place with those who designed, planned, ordered and oversaw the operations.”¹⁰
6. With its emphasis on the necessity of identifying those most responsible for the crimes committed in Gaza, the Goldstone Report stressed the role which the International Criminal Court should play in the international community’s responsibility for ensuring accountability for the victims of ‘Operation Cast Lead’. The Fact Finding Mission recommended that the United Nations Human Rights Council formally submit their report to the Prosecutor of the International Criminal Court,¹¹ and that in the absence of good faith investigations by the parties to the conflict, the UN Security Council, acting under Chapter VII of the Charter of the United Nations, should refer the situation in Gaza to the Prosecutor of the International Criminal Court pursuant to Article 13 (b) of the Rome Statute.¹² To date, neither of these recommendations have been implemented. Addressing the Prosecutor of the ICC directly, the Report recommended that “With reference to the declaration under article 12 (3) received by the Office of the Prosecutor of the ICC from the Government of Palestine, the Mission considers that accountability

⁸ The other three appointed members were: Professor Christine Chinkin, Professor of International Law at the London School of Economics and Political Science, who was a member of the high-level fact-finding mission to Beit Hanoun (2008); Ms. Hina Jilani, Advocate of the Supreme Court of Pakistan and former Special Representative of the Secretary-General on the situation of human rights defenders, who was a member of the International Commission of Inquiry on Darfur (2004); and Colonel Desmond Travers, a former Officer in Ireland’s Defence Forces and member of the Board of Directors of the Institute for International Criminal Investigations. Report of the United Nations Fact-Finding Mission on the Gaza Conflict, A/HRC/12/48, 25 September 2009, para 2.

⁹ Report of the United Nations Fact-Finding Mission on the Gaza Conflict, A/HRC/12/48, 25 September 2009, para 1690.

¹⁰ Report of UN Fact-Finding Mission, para 1692.

¹¹ Report of UN Fact-Finding Mission, para 1765.

¹² Report of UN Fact-Finding Mission, para 1766.

for victims and the interests of peace and justice in the region require that the legal determination should be made by the Prosecutor as expeditiously as possible.”¹³

7. Although Judge Goldstone was invited to speak on behalf of the Fact Finding Mission to the 12th session of the Human Rights Council in September 2009, but on 1 October the Council decided to defer consideration of the Report. This was in response to the declared wishes of the PA, who, coming under serious political pressure from many states decided to withdraw its support for a Resolution endorsing the Report. This course of action was condemned immediately by human rights advocates and became a matter of significant public concern throughout the OPT and internationally. The popular call for an end to impunity saw the Human Rights Council reconvene on 15 & 16 October 2009 for its 12th special session, at which a Resolution endorsing the Goldstone Report was adopted.¹⁴ Just weeks later at the General Assembly a Resolution on the follow-up to the Report of the Fact Finding Mission was adopted by a majority vote, calling upon the parties to the conflict to conduct proper investigations, calling upon Switzerland to undertake the necessary steps as soon as possible to reconvene a Conference of High Contracting Parties to the Fourth Geneva Convention on measures to enforce the Convention in the Occupied Palestinian Territory, and requesting the Secretary-General to report to the General Assembly, within a period of three months, on the implementation of the present resolution, with a view to considering further action.¹⁵
8. In the annual report of the International Criminal Court to the UN (dated 17 September 2009), presented to the General Assembly by Judge Sang-Hyun Song, the President of the ICC, on 29 October 2009, the following commentary on action taken regards the Palestinian declaration is recorded:

¹³ Report of UN Fact-Finding Mission, para 1767.

¹⁴ HRC Res S-12/1. The human rights situation in the Occupied Palestinian Territory, including East Jerusalem, A/HRC/RES/S-12/1, 21 October 2009. Adopted by a recorded vote of 25 to 6, with 11 abstentions. The voting was as follows: In favour: Argentina, Bahrain, Bangladesh, Bolivia, Brazil, Chile, China, Cuba, Djibouti, Egypt, Ghana, India, Indonesia, Jordan, Mauritius, Nicaragua, Nigeria, Pakistan, Philippines, Qatar, Russian Federation, Saudi Arabia, Senegal, South Africa, Zambia; Against: Hungary, Italy, Netherlands, Slovakia, Ukraine, United States of America; Abstaining: Belgium, Bosnia and Herzegovina, Burkina Faso, Cameroon, Gabon, Japan, Mexico, Norway, Republic of Korea, Slovenia, Uruguay.

¹⁵ UNGA Res A/64/L.11 “Follow-up to the report of the United Nations Fact-Finding Mission on the Gaza Conflict”. Adopted by a recorded vote of 114 in favour to 18 against, with 44 abstentions, as follows: *Against*: Australia, Canada, Czech Republic, Germany, Hungary, Israel, Italy, Marshall Islands, Micronesia (Federated States of), Nauru, Netherlands, Palau, Panama, Poland, Slovakia, The former Yugoslav Republic of Macedonia, Ukraine, United States. *Abstain*: Andorra, Austria, Belgium, Bulgaria, Burkina Faso, Burundi, Cameroon, Colombia, Costa Rica, Croatia, Denmark, Estonia, Ethiopia, Fiji, Finland, France, Georgia, Greece, Iceland, Japan, Kenya, Latvia, Liberia, Liechtenstein, Lithuania, Luxembourg, Monaco, Montenegro, New Zealand, Norway, Papua New Guinea, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Samoa, San Marino, Spain, Swaziland, Sweden, Tonga, Uganda, United Kingdom, Uruguay.

See Al Haq’s response: Public letter to Sweden’s Minister for Foreign Affairs Mr Carl Bildt, Re: EU Position on respect for human rights, justice and the rule of law in the OPT, 12 November 2009, available at:

http://www.alhaq.org/pdfs/presidency_goldstone_12_nov_2009.pdf

Public letter to Mr Maxime Verhagen Minister for Foreign Affairs of the Kingdom of the Netherlands, Re: Dutch Position on respect for human rights, justice and the rule of law in the OPT, 12 November 2009, available at:

http://www.alhaq.org/pdfs/netherlands_goldstone_12_nov_2009.pdf

On 22 January 2009, the Palestinian National Authority lodged a declaration with the Registrar relating to article 12, paragraph 3, of the Rome Statute, which allows States not parties to the Statute to accept the Court's jurisdiction. Owing to the uncertainties of the international community with respect to the existence or non-existence of a State of Palestine, the Registrar accepted the declaration without prejudice to a judicial determination on the applicability of article 12, paragraph 3. Between 28 December 2008 and 30 June 2009, the Office of the Prosecutor received 358 article 15 communications related to the situation of Israel and the Palestinian territories. *The Office began to examine all issues related to its jurisdiction, including whether the declaration by the Palestinian Authority accepting the exercise of jurisdiction by the Court meets statutory requirements, whether crimes within the Court's jurisdiction have been committed and whether there are national proceedings in relation to alleged crimes.* The Office received a number of communications, including the Report of the Independent Fact-Finding Committee on Gaza: No Safe Place, which was presented to the League of Arab States on 30 April 2009 and which was sent to the Prosecutor by the Secretary-General of the League, Amre Moussa. The Palestinian National Authority indicated that it would send a supporting submission by September 2009.¹⁶

9. On 16 October 2009, shortly after the publication of the Goldstone Report, and while its passage through the Human Rights Council and General Assembly was headline news internationally, the Prosecutor of the ICC received a Palestinian delegation headed by Dr Ali Al-Khashan, Minister of Justice of the Palestinian National Authority, and which included the Palestinian Ambassador to the Netherlands, Nabil Abuznaid, and a team of legal experts including Vaughan Lowe QC, Professor of International Law at Oxford University. The Prosecutor also received members of the Independent Fact-finding Committee led by Professor John Dugard and members of the Arab League Secretariat, in the context of ongoing consultations concerning the declaration.¹⁷ Al-Khashan submitted documents concerning the declaration to the Prosecutor at this meeting.¹⁸

Palestine can be Considered a State for the Purposes of Art 12(3) Rome Statute

10. In The Hague, on 2-3 November 2009, Al-Haq participated in a meeting between representatives of the Court including the Office of the Prosecutor and Palestinian and international NGOs. The purpose of the meeting was to discuss various of the 'complex legal issues' arising from the Palestinian Declaration under Article 12(3) in January 2009 and to provide the NGOs with a sense of how the ICC operates. The OTP stated that it is

¹⁶ Report of the International Criminal Court to the United Nations for 2008/09, A/64/356, 17 September 2009, para 51. Emphasis added.

¹⁷ Press Release: 16.10.2009; ICC Prosecutor receives Palestinian Minister of Justice, Arab League and Independent Fact-Finding Committee, ICC-OTP-20091016-PR465.

¹⁸ Ma'an News Agency *Justice minister: PA prepping for ICC membership* 17 October 2009 available at: <http://www.maannews.net/eng/ViewDetails.aspx?ID=232793> Despite some suggestion that the PA were seeking to become a state party to the Rome Statute, this has not been the case, with the Palestinians limiting their approach to the article 12(3) procedure.

still in the first stages of preliminary investigations regarding the submissions to the Court concerning ‘Operation Cast Lead’, and that the first question to be determined, before that of admissibility, is the question of jurisdiction ie whether the declaration by the Palestinian Authority accepting the exercise of jurisdiction by the Court meets the necessary statutory requirements.

11. Al-Haq’s investigations, and those of other NGOs, as well as the findings of the Goldstone Report, the OHCHR, the Independent Mission of the Arab League, and the Martin Report of the United Nations Board of Inquiry amongst others, have shown clear grounds to conclude that war crimes and crimes against humanity on a serious scale were committed by Israeli forces in Gaza, and by Palestinian armed groups launching rockets into southern Israel. Al-Haq has no doubt but that if the Court were to accept the declaration, then the evidence of international crimes committed in Gaza, along with the statements of the Israeli government and military to the effect that they will not be carrying out thorough investigations, should mean that questions of complementarity and gravity will not be any impediment to the initiation of ICC investigations and prosecutions.
12. At first glance, the primary issue to be established when considering whether the ICC has the necessary jurisdiction to accept the Palestinian Declaration is whether Palestine can satisfy the requirement that it be a ‘state’ as considered by the Statute. . Article 12(3) of the Rome Statute under which the declaration was submitted, reads 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.”¹⁹ Following submission of the declaration, Yigal Palmor, a spokesman for the Israeli Foreign Ministry, dismissed the move as “a good propaganda stunt”, stating that since “The ICC charter is adhered to by sovereign states, and the Palestinian Authority has not yet been recognized as one, so it cannot be a member”.²⁰ At the time of writing, senior figures in the Palestinian Authority and PLO have been making frequent statements regarding a unilateral declaration of Palestinian statehood, and their intention of requesting the UN Security Council to adopt a resolution recognizing such.²¹ While the EU has called such a move ‘premature’,²² Hamas has opposed such initiatives on the basis that it is necessary first to end the occupation.²³ It is difficult to discern whether the controversy is liable to have

¹⁹ Similarly, Article 4(2) of the Statute provides that “The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State.”

²⁰ Sebastian Rotella *International Criminal Court to consider Gaza investigation* Los Angeles Times 5 February 2009, available at: <http://articles.latimes.com/2009/feb/05/world/fg-court-palestinians5>. See also Daniel Benoliel & Ronen Perry *Israel, Palestine and the ICC* Electronic copy available at: <http://ssrn.com/abstract=1391963>.

²¹ Ma’an News *Abbas in Cairo: PA committed to seeking UN recognition* 17 November 2009 available at: <http://www.maannews.net/eng/ViewDetails.aspx?ID=240591> & Ma’an News *Russia courted by Israel, Palestine* 5 December 2009 available at: <http://www.maannews.net/eng/ViewDetails.aspx?ID=244363>

²² Ma’an News *Erekat: It’s time to recognize a Palestinian state* 17 November 2009 available at: <http://www.maannews.net/eng/ViewDetails.aspx?ID=240611>

²³ UPI *Hamas rejects Palestinian statehood push* 16 November 2009 available at: http://www.upi.com/Top_News/International/2009/11/16/Hamas-rejects-Palestinian-statehood-push/UPI-43461258375322/

significant effect for our purposes since Al-Haq's position, as set forth below, is that Palestine can be considered a state for the purposes of the Rome Statute only.

13. Responding to the Palestinian approach to the ICC, Professor John Quigley restated his opinion that Palestine should be regarded as a state relying upon the strong vote at the General Assembly in 1989 where a resolution was adopted acknowledging the proclamation of the state of Palestine by the Palestine National Council on 15 November 1988, and which decided that "the designation 'Palestine' should be used in place of the designation 'Palestine Liberation Organization' in the United Nations system."²⁴ One hundred and four states voted for this resolution, forty-four abstained; only the United States and Israel voted against. Quigley's analysis draws on the Palestinians' acknowledged right to self-determination and to an independent state in the OPT with East Jerusalem as its capital, and the principle that belligerent occupation in and of itself cannot affect the sovereignty that lies in the Palestinian people. He concludes that that since the breakup of the Ottoman empire, Palestine has been an international entity, denied for various reasons of the ability to practice the statehood which legitimately accrued to it, but which has nonetheless claimed to be a state, has been recognised as a state, and has acted to the best of its capacity, as a state.²⁵
14. Departing from the assumption that the Security Council would not refer the case of Palestine to the ICC as it has done previously with Darfur, former UN Special Rapporteur on human rights in the OPT John Dugard, writing in the New York Times in July 2009, suggested that since the Rome Statute fails to define a state, and as there is no international recognition board for aspirant states that it is not necessary for the Prosecutor:

to decide that Palestine is a state for all purposes, but 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.²⁶

In support of such an expansive interpretation Dugard cited the wide recognition of Palestinian statehood and the fact that the Palestinian entity satisfactorily meets the traditional benchmarks of statehood, namely population, territory, government and ability to conduct international relations. He further referred to the well developed Palestinian

²⁴ UNGA Res 43/177, UN GAOR, 43d Sess, UN Doc A/RES/43/177 (Dec. 15, 1988).

²⁵ John Quigley *The Palestine Declaration to the International Criminal Court: The Statehood Issue* 35 Rutgers Law Record (2009) available at: <http://www.lawrecord.com/files/35-rutgers-l-rec-1.pdf> See also: Francis Boyle *Creation of the State of Palestine* 1 EJIL 301; James Crawford *The creation of the State of Palestine: too much too soon?* 1 EJIL (1990) 307; James Crawford, *The creation of States in international law* (Oxford: Clarendon Press, 2006, 2nd ed) 435-442; R Lapidoth & N Calvo-Goller *Les éléments constitutives de l'État et la déclaration du Conseil National Palestinien du 15 novembre 1988* 96 Revue générale du droit international public (1992) 777; John Quigley *Palestine's Declaration of Independence: Self-Determination and the Right of the Palestinians to Statehood* 7 BU Int'l LJ 1 (1989). Cf Robert Weston Ash *Is Palestine a "State"? A Response To Professor John Quigley's Article, "The Palestine Declaration To The International Criminal Court: The Statehood Issue"* 36 Rutgers Law Record (2009) available at: <http://www.lawrecord.com/files/36-Rutgers-L-Rec-186.pdf>

²⁶ John Dugard *Take the Case* New York Times 22 July 2009, available at: <http://www.nytimes.com/2009/07/23/opinion/23iht-eddugard.html>

judicial system, before concluding that since the purpose of the Rome Statute, as proclaimed in its preamble, is to punish those who commit international crimes and to prevent impunity, when “an entity claiming to be a state, and recognized as such by a majority of states, makes a declaration under the I.C.C. statute that seeks to give effect to such goals, the I.C.C. should accept it as a state for the purpose of the I.C.C. statute.”²⁷

15. Both Professors Dugard and Quigley cited past practice to demonstrate that the international community has recognized statehood through admittance to the UN in cases where the government of the state in question has been particularly weak, such as some African states emerging from colonialism for whom statehood meant the promotion of self-determination, or as with Bosnia-Herzegovina, which when admitted in 1992 was in the throes of a civil war, and where recognition of statehood was considered a means of promoting international peace and security. It may also be pertinent to the immediate issue that Article 93(2) of the UN Charter makes provision for states who are non-members of the United Nations to become parties to the Statute of the International Court of Justice. Prior to becoming Members of the UN, Japan, Liechtenstein, San Marino, Nauru and Switzerland were parties to the Statute of the Court.²⁸
16. In the light of such considerations, and accepting that the existence or otherwise of a state of Palestine remains moot at best, attention must be given to the question of how a state may be understood for the purposes of Article 12(3) of the Rome Statute, and whether this may be different from the practice generally accepted under international law and international relations.
17. Since the entry into force of the Rome Statute in 2002 there have been several notable developments regarding its policy and practice that had not been countenanced during its drafting but which have been followed in order to give effect to its mandate as set forth in the Preamble. The most significant, and one which received much of its impetus from the OTP, has possibly been the self-referrals from Uganda, the Democratic Republic of the Congo and the Central African Republic each of which have led to the initiation of cases before the Court.²⁹
18. A further development of note is that of the Security Council’s referral of the situation in Darfur to the ICC on 31 March 2005, acting on the recommendation of the Report of the

²⁷ John Dugard *Take the Case* New York Times 22 July 2009, available at: <http://www.nytimes.com/2009/07/23/opinion/23iht-eddugard.html>

²⁸ As from 2 April 1954, 29 March 1950, 18 February 1954, 29 January 1988 and 28 July 1948 respectively. See: <http://www.icj-cij.org/jurisdiction/?p1=5&p2=1&p3=1&sp3=b>. The General Assembly Resolution on the Definition of Aggression likewise adopted an expansive notion of what it meant to be a state for the purposes of the Definition. Article 1 includes an explanatory note which provides that in the Definition of Aggression, the term ‘state’, “(a) Is used without prejudice to questions of recognition or to whether a State is a member of the United Nations; (b) Includes the concept of a “group of States” where appropriate.” Definition of Aggression UNGA Res 3314 (XXIX) (1974). Considering the facts re Indonesia’s military annexation of East Timor in 1976, Julius Stone found the explanatory note unhelpful since “it remains most obscure and debatable, even with Explanatory Note (a), whether and in what sense the definition is limited to state-to-state aggression.” Julius Stone *Hopes and Loopholes in the 1974 Definition of Aggression* 71 AJIL 224- 246 (1977) 231-3.

²⁹ William A Schabas ‘*Complementarity In Practice*’: *Some Uncomplimentary Thoughts* 19 Crim LF 5 (2008) 7.

International Commission of Inquiry on Darfur³⁰ which had been established by the UN Secretary-General pursuant to Security Council Resolution 1564. In Resolution 1593 (2005) the Security Council, acting under Chapter VII of the Charter of the United Nations, and “Determining that the situation in Sudan continues to constitute a threat to international peace and security”, decided to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the ICC. This was the first and only time the Security Council has referred a case of a non-state party, and while this mechanism is explicitly provided for in Article 13(b) of the Rome Statute, it highlights the possibility that the Court and its mechanisms have a central role not just in ensuring post-war accountability, but in influencing:

armed conflicts by stigmatizing those who are most responsible for war crimes, crimes against humanity and genocide, while the conflict is still going on. This approach will mostly target political and military leaders, which is likely to produce considerable effects on the character of the respective conflict.³¹

Similarly, the first declaration under Article 12(3) was lodged by Ivory Coast, a state that is not party to the Statute but which suffers from civil strife and internal conflict.³²

19. What is of particular import with regards the Security Council referral of 2005 is that it does not pertain to crimes committed anywhere in the state of Sudan, but rather to crimes that were committed in the *region* of Darfur, namely the Sudanese states of North Darfur, South Darfur, and West Darfur.³³ The Prosecutor is therefore barred from investigating crimes committed in any other of Sudan’s 23 regional states since the ICC has no jurisdiction there. This demonstrates 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. Alternatively, since the crimes set forth in the Statute ‘threaten the peace, security and well-being of the world’,³⁴ the Court may hold jurisdiction over a geographical area other than the state, including within a state, or an area falling within two or more states. This is in keeping with Condorelli & Villalpando’s observation that in general, the Security Council:

enjoys a wide discretion, based on its powers under Chapter VII of the Charter, in determining and delimiting the ‘situation’ to be referred to the Court. Thus the Security Council could refer in broad terms to a situation ongoing in a particular geographical zone, or it could identify more specifically the crimes that appear to have been committed and their authors.³⁵

³⁰ Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Geneva, 25 January 2005, para 584, available at: http://www.un.org/news/dh/sudan/com_inq_darfur.pdf

³¹ Philipp Kastner *The ICC in Darfur-Savior or Spoiler?* 14 ILSA J Int’l & Comp L 146 (2007-2008) 154.

³² Carsten Stahn, Mohamed M El Zeidy, Héctor Olásolo *The International Criminal Court’s Ad Hoc Jurisdiction Revisited* 99 AJIL 2 (2005) 422.

³³ Matthias Neuenner *The Darfur Referral of the Security Council and the Scope of the Jurisdiction of the International Criminal Court* 8 YB IHL (2005) 328.

³⁴ Statute, Preamble para 3.

³⁵ Luigi Condorelli and Santiago Villalpando *Referral and Deferral by the Security Council* in Cassese, Gaeta, Jones (eds) *The Rome Statute of the International Criminal Court Vol I* (NY, OUP: 2001) 633.

20. The Court has not been long in existence but it is clear from the cited examples that past precedent suggests a tendency to interpret the mechanisms of the Rome Statute expansively, while respectful of the rule of law, and in a manner which prefers fulfilment of the aims of the Statute over a narrow and unduly legalistic reading of international criminal law. It would be contrary to the purposes set forth in the Statute's Preamble to exclude from the scope of the Court's jurisdiction a geographical zone in which war crimes and crimes against humanity are perpetrated, on the sole premise that it is not generally recognized either as constituting a state, or a part of any state. Given the Preamble's affirmation "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 by taking measures at the national level and by enhancing international cooperation" and its determination "to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes", it is not unreasonable, indeed, it must be expected, that in interpreting the meaning of 'state' for the purposes of Article 12(3) of the Rome Statute, an expansive approach, divorced from the political considerations which otherwise tend to guide state recognition, and rooted firmly in the principles and purposes of the UN Charter, must be followed.

The Jurisdictional Capacity of the PA

21. 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 must consider what criteria the OTP can apply in making such a determination. At 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"³⁶ would not be decided on the question of whether Palestine 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.³⁷

22. It would therefore appear that the OTP will not make a determination on the basis of the existence or non-existence of a state of Palestine, but rather on the basis of whether the Palestinian entity, could be considered a state solely for the purposes of Article 12(3) of the Rome Statute. So far as Al-Haq is aware, the October document submitted by the Palestinians³⁸ provided an opinion on three questions placed by the OTP with the requirement that they be convincingly answered in the positive in order that the declaration can be considered as satisfying the statutory requirements. These questions, the final two of which are closely related, are:

³⁶ Report of the International Criminal Court to the United Nations for 2008/09, A/64/356, 17 September 2009, para 51.

³⁷ Minutes of Meeting with Al Haq and other NGOs November 2009, with Al Haq.

³⁸ Press Release: 16.10.2009; ICC Prosecutor receives Palestinian Minister of Justice, Arab League and Independent Fact-Finding Committee, ICC-OTP-20091016-PR465.

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?
23. What is clear from the substance of these questions is that if the answer to each is in the affirmative, the Prosecutor will act under the assumption that the PA therefore has the capacity to transfer such cases to the Court. This is in keeping with the purpose of the Court as an “international jurisdictional safety net”³⁹ which starts to work when national jurisdictions are unable or unwilling to deal with the crimes committed. What is left unaddressed in this approach is the question of territory and the territorial scope of PA jurisdiction in the OPT. The Palestinian declaration was not limited to a particular crime but accepted ICC jurisdiction over any crimes committed in Palestine from the date on which the ICC Statute entered into force, 1 July 2002. The declaration did not further identify the “territory of Palestine” but such territory would presumably include Gaza and the West Bank including East Jerusalem, ie all the territory occupied by Israel in 1967 over which the Palestinians have a recognized right to self-determination. Israel and the PLO have agreed that the West Bank and Gaza Strip form ‘a single territorial unit’ whose integrity is to be preserved pending the conclusion of permanent status negotiations.⁴⁰ The UN General Assembly, in a resolution condemning the territorial fragmentation of the West Bank by the construction of the Wall, stressed ‘the need for respect for and preservation of the territorial unity, contiguity and integrity of all of the OPT, including East Jerusalem.’⁴¹ Similarly, following ‘Operation Cast Lead’, the Security Council stressed that the Gaza Strip constitutes an ‘integral part’ of the self-determination unit comprised of the Palestinian territory occupied in 1967.⁴²
24. While the Court will have to delimit a particular territory over which it has jurisdiction in the case of accepting the Palestinian declaration, such a determination will not be of prejudice to the final status negotiations between Israel, the Palestinians, and the international community. Territorial delimitation by the Court should be regarded as strictly for the purposes of the investigation of the situation only and not as indicative of the borders of a Palestinian state for any broader purposes. As noted above, the Statute’s Preamble asserts the main function of the Court to be that of combating impunity, of ensuring accountability for the Crimes within its jurisdiction. Given that individual criminal responsibility lies at the core of the Court’s work, it is not necessary that the Court determine any state’s final and comprehensive borders, but that it delimit a territorial zone in as broad a sense as it deems necessary and possible, while respecting third states’ sovereignty, in order to conduct full investigations into the alleged crimes. 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

³⁹ M Cherif Bassiouni *The ICC-Quo Vadis?* 4 J Int’l Crim J 421 (2006) 422.

⁴⁰ See the 1993 Declaration of Principles on Interim Self-Government Arrangements, Article IV; and the 1995 Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, Article XI.1. For commentary, see Raja Shehadeh *From occupation to Interim Accords: Israel and the Palestinian Territories* (London: Kluwer, 1997) 35-37.

⁴¹ UN General Assembly Resolution 62/146, 18 December 2007.

⁴² UN Security Council Resolution 1860, 8 January 2009.

whole. This would be in keeping with the international community's consistent position that the West Bank including East Jerusalem and Gaza represent a single unit and respectful of the Palestinian right to self-determination and territorial integrity.⁴³

Q.1: Does the PA have the capacity to enter into international agreements?

25. Key to the question of whether the PA has the capacity to enter into international agreements, is the nature of its relationship with the PLO.⁴⁴ The Oslo Accords 'reflect the existence of two Palestinian entities, one (the PLO) with the power to engage in foreign relations but not to control territory, and the other (the PA) with the power to control and govern territory but not to engage in foreign relations.'⁴⁵ While this restriction of the PA's capacity to enter into international agreements will be considered in the next paragraph, it is essential to first emphasize here that there can be no doubt regarding the PLO's ability to enter into international agreements. The PLO, in its internationally-recognized capacity as the legitimate representative of the Palestinian people,⁴⁶ has not only entered into agreements with the Arab League, it has also entered into a number of binding bilateral international agreements, mostly with Arab States, but also, for instance, with the United States, as early as one year after Oslo I.⁴⁷ Moreover, the Oslo Accords themselves are binding international agreements between the State of Israel and the PLO, as a "subject of international law".⁴⁸

26. The Interim Agreement on the West Bank and the Gaza Strip (Oslo II) specifically excluded certain aspects of foreign relations from the authority of the PA. Oslo II provides that the PA 'will not have powers and responsibilities in the sphere of foreign relations', such as the establishment abroad of embassies, consulates or other types of

⁴³ An alternative option would be to accept a Palestinian state for the purposes of the Statute but to limit the 'situation' and the scope of the Court's territorial jurisdiction, to the Gaza Strip only, following the approach the Security Council previously took regarding Darfur. Unlike in the West Bank, the Gazan border is of far less controversy for the purpose of final status negotiations between Israel and the PA, with all parties essentially in agreement on where the border lies. To restrict the situation to Gaza only would allow the Court to investigate the core crimes set out in the Goldstone Report while avoiding having to become involved in making any form of determination as to the possible or probable borders of a Palestinian state. This would however exclude from the Court's jurisdiction those crimes committed in East Jerusalem and the rest of the West Bank since July 2002.

⁴⁴ The Accords created a Palestinian Interim Self-Government Authority styled 'the Council' in the agreement but generally called the Palestinian Authority (PA) that was to hold executive, legislative, and judicial authority. Chapter 3, Article XVII (3), The Interim Agreement on the West Bank and the Gaza Strip, September 1995, 36 International Legal Materials 551 (1995).

⁴⁵ Geoffrey Watson *The Oslo Accords: International Law and the Israeli-Palestinian Peace Agreements* (Oxford University Press, 2000) 245.

⁴⁶ See for example, GA Res 158, UN GAOR, 48th Sess, Supp NO 35, at 1, 5, UN Doc A/RES/48/158 (1994).

⁴⁷ See, Watson *The Oslo Accords* 98-99. Arguing that the "Agreement on Encouragement of Investment Between the United States of America and the Palestine Liberation Organisation for the Benefit of the Palestinian Authority Pursuant to the Agreement on the Gaza Strip and the Jericho Area" (11 Aug and 12 Sept 1994; State Dep. No. 94-233, KAV 4032) was 'strongly suggesting that both parties believed the Agreement was a legally binding international agreement', as Article 6 of the Agreement provides: 'This Agreement shall enter into force when signed by both Parties'.

⁴⁸ Watson *The Oslo Accords* 91-102; John Quigley *The Israel-PLO Interim Agreements: Are they Treaties?* 30 Cornell Int'l L J 717 (1997) 740.

foreign missions or permitting their establishment in the West Bank or the Gaza Strip. The PLO on the other hand, may conduct negotiations and sign economic agreements as well as cultural, scientific and educational agreements with states or international organizations ‘for the benefit’ of the PA.⁴⁹ The phrase ‘for the benefit’ was apparently chosen by Israel to avoid suggestion that the PLO was merely the agent or foreign-policy branch of the PA and to keep claims of Palestinian statehood, through the PA, at bay.⁵⁰ But this PLO-PA ‘division of labour’ with regards to foreign relations seems difficult to enforce given the overlap between the two organizations.⁵¹ 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. It has been noted by Israeli officials that: (1) the PLO representative in Egypt is designated as a PA official, in violation of Article IX(5)(a) of Oslo II; (2) that a PLO representative signed a protocol on security cooperation with Russia in the name of the PA, despite security cooperation arrangements not being listed in the various categories of international agreements which the PLO is permitted to sign for the PA under Article IX (5)(b), and; (3) the PA joined the International Airport Council *as the PA*,⁵² also in apparent violation or disregard for Article IX (5)(b).⁵³ More than violations of a treaty, these instances of foreign relations undertaken by the PA also signify that the Interim Agreement is part of a larger ongoing peace process, and that the restrictions on the foreign policy operations of the PA conflict with the inalienable right of the Palestinian people to self-determination, now a norm with a *nature* of *jus cogens*,⁵⁴ which includes a right to engage in international relations with other peoples.⁵⁵

27. The reality is indeed that the capacity and ability of the PLO and PA, to engage in foreign relations has consistently been recognised and interpreted broadly *in practice*. The EU’s reading of the Interim Agreement for instance allows the Palestinians, through the PLO to sign their own trade agreements with third parties (countries or entities), while Israel claims that the Agreement allows only economic cooperation agreements, not independent trade agreements.⁵⁶ The EU considers the PA evolved enough to disregard

⁴⁹ The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (Oslo II), 28 September 1995, art. IX 5(a) and 5(b).

⁵⁰ Watson *The Oslo Accords* 245; The capacity to enter into relations with other states is one of the four traditional requirements for statehood. Montevideo Convention on Rights and Duties of States, Dec 26, 1933, 165 LNTS 19, art. I.

⁵¹ Watson *The Oslo Accords* 245.

⁵² Available at: http://www.airports.org/cda/aci_common/display/main/aci_content07_c.jsp?zn=aci&cp=1-2-11^9527_666_2_/members_liste

⁵³ *Middle East Peace Process: Hearing Before the Committee on International Relations*, House of Representatives, 104th Congress, First Session, 20 September 1995, at 288-289. Available at: <http://ia311229.us.archive.org/3/items/middleeastpeacep00unit/middleeastpeacep00unit.pdf>; Sanford R. Silverberg *Diplomatic Recognition of States in Statu Nascendi: The Case of Palestine* 6 *Tulsa J Comp & Int’l L* 21 (1998) 39-40.

⁵⁴ Antonio Cassese *International Law* (Oxford, 2nd ed 2005) 65; Martin Dixon *International Law* (Oxford, 6th ed 2007) 164.

⁵⁵ Watson *The Oslo Accords* 245.

⁵⁶ Marshall J Breger & Shelby R Quast *International Commercial Arbitration: A Case Study of the Areas Under Control of the Palestinian Authority* 32 *Case Western Reserve J Int’l L* 185 (2000) 241; *Reading the EU*, The Jerusalem Post, May 22, 1998, 16.

many of the Interim Agreement restrictions regarding its capacity to enter foreign relations. The Euro-Mediterranean Interim Association Agreement on trade and cooperation was signed between the European Community and the PLO (on behalf of the PA) in 1997.⁵⁷ On 20 April 2005, the European Union Coordinating Office for Palestinian Police Support was formally established by an exchange of letters between the Palestinian Prime Minister Ahmed Qurei and the EU Special Representative to the Middle East Peace Process Marc Otte, and it was on the explicit written invitation of the PA that the Council of the European Union established the EU Police Mission in the Palestinian Territories (EUPOL COPPS) in November of the same year under the European Security and Defence Policy.⁵⁸ The PA is now also seeking observer status at the World Trade Organization, 'as a preparation for statehood'.⁵⁹

28. In summary, while it is the PA that has submitted the declaration to the ICC, it remains a body that is subsidiary to the PLO. In this respect while the PLO enjoys observer status at the UN, and has the power to dissolve the PA, when acting in the international arena the PA is implicitly acting on behalf of the PLO. Under Oslo the PA's ability to undertake foreign relations and to enter into international agreements (through the PLO) is limited to the spheres of economics, culture, science and education with states and international organizations, while the PLO is the body that can enter into international agreements proper. Nonetheless, state practice over the past decade has demonstrated that the limits placed on the PA in this regard by Oslo are no longer recognised or considered legitimate by the international community and as such the question whether the PA presently has the ability to enter into international agreements can only be answered positively.

Q.2: Does the PA have the capacity to try Palestinians on criminal charges?

29. Similarly with the second question, there is no doubt that the Palestinian Authority presently has the capacity to try Palestinians on criminal charges at the national level. In the Pre-Oslo era, the Local Courts serving the Palestinians in the West Bank were usurped of many of their powers: Jewish settlers were not subject to the jurisdiction of these courts and neither could the activities of the Israeli military be reviewed.⁶⁰ Whereas the Israeli authorities seriously undermined the independence of the West Bank judicial system guaranteed under Jordanian law,⁶¹ the Military Courts established in the West Bank also gradually expanded their jurisdiction at the expense of the Local Courts, and cases involving traffic and drug offences were tried, as well as cases of murder and other serious crimes committed by Palestinians against other Palestinians.⁶²

⁵⁷ Official Journal of the European Communities, 16.7.97, No L 187/3.

⁵⁸ Council Joint Action 2005/797/CFSP of 14 November 2005 on the European Union Police Mission for the Palestinian Territories.

⁵⁹ John Zarocostas *Palestinian Seek Observer Status at WTO* The Washington Post, 27 September 2009. (quoting Palestinian economy minister Bassim Khoury).

⁶⁰ Raja Shehadeh *Occupier's Law: Israel and the West Bank* (Institute for Palestine Studies, Washington DC, 1985) 76.

⁶¹ "A Committee composed of military officers makes the appointments, decides on transfers, promotions and salaries of judges and all other court employees." Shehadeh *Occupier's Law* 77.

⁶² Shehadeh *Occupier's Law* 85.

30. In the 1990s, the Oslo Accords restored to a certain extent Palestinian civil and criminal jurisdiction over the West Bank and Gaza. With regards to criminal jurisdiction, Oslo II clearly states that the criminal jurisdiction of the Palestinian Authority covers all offences committed by Palestinians and/or non-Israelis in the Gaza Strip and Areas A and B of the West Bank as defined by the Agreement, excluding the settlements and military locations there.⁶³ As such, Israel retained sole criminal jurisdiction over offences committed by Israelis.⁶⁴ In Area C of the West Bank, the Palestinian Authority has criminal jurisdiction under Oslo II over Palestinians and non-Israelis who have committed offences “against Palestinians or their visitors”, provided that these offences are “not related to Israel’s security interests”.⁶⁵ Beyond these security-related limitations, the general thrust of the Accords is clear, and as such these limitations can cast no doubt over the general capacity of the PA to try Palestinians on criminal charges at the national level.

Q.3: Does the PA have the capacity to try Israeli citizens on criminal charges?

31. A prima facie response to this question would be to acknowledge that the 500,000 or so Israeli citizens residing in the OPT in settlements are excluded from PA jurisdiction as a result of the Oslo Accords and therefore the Palestinian legal system has no jurisdiction, civil or criminal, over any Israeli citizens.⁶⁶ Under Oslo Israel retained exclusive personal jurisdiction in criminal matters over Israelis, including offences committed in Areas A and B, as well as C.⁶⁷ Article XVII (1) of the Interim Agreement provided that the PA would have jurisdiction over the West Bank and Gaza Strip territory as a single territorial unit, but excluded in para (a) “issues that will be negotiated in the permanent status negotiations: Jerusalem, settlements, specified military locations, Palestinian refugees, borders, foreign relations and Israelis”, subsequently confirming at para (c), that “The territorial and functional jurisdiction of the Council will apply to all persons, except for Israelis, unless otherwise provided in this Agreement.”⁶⁸

⁶³ Protocol Concerning Legal Affairs, Annex IV to The Interim Agreement on the West Bank and the Gaza Strip, September 1995, art. I 1(a).

⁶⁴ Ibid. art. I 2(2).

⁶⁵ Ibid. art. I 1(b); In similar vein, the Interim Agreement makes clear that in Area B of the West Bank, Israel shall retain “the overriding responsibility for security for the purpose of protecting Israelis and confronting the threat of terrorism”. The Interim Agreement on the West Bank and the Gaza Strip, September 1995, 36 International Legal Materials 551 (1995), art. XIII 2(a).

⁶⁶ The Oslo Accords comprise: The Declaration of Principles on Interim Self-Government Arrangements, September 1993, (1993) 32 International Legal Materials 1525; the Gaza-Jericho Agreement, May 1994, (1994) 33 International Legal Materials 622; The Interim Agreement on the West Bank and the Gaza Strip, September 1995, (1995) 36 International Legal Materials 551; Protocol on Redeployment in Hebron, January 1997, (1997) 36 International Legal Materials 650; Wye River Memorandum, October 1998, (1998) 37 International Legal Materials 1251, and the Sharm El-Sheikh Memorandum, September 1999, (1999) 38 International Legal Materials 1465. The latter two documents were focused on securing the compliance of the parties to implement prior agreements. These accords were preceded by Letters of Mutual Recognition in 1993.

⁶⁷ HSRC *Occupation, Colonialism, Apartheid? A Re-assessment of Israel’s practices in the occupied Palestinian territories under international law* (Cape Town, 2009) 71-81, available at: <http://www.hsrb.ac.za/Document-3227.phtml>

⁶⁸ The Interim Agreement on the West Bank and the Gaza Strip, September 1995, 36 International Legal Materials 551 (1995).

32. On this basis it would appear that the capacity required by the OTP in order for the PA to submit a valid declaration is not satisfied since Israelis responsible for criminal acts in the occupied Palestinian territories do not fall under PA jurisdiction. Al-Haq believe that in order to overcome this prima facie obstacle, the PA submission to the OTP argued that in concluding an interim, that is, a temporary agreement with Israel to exclude Israelis from the scope of their criminal jurisdiction in the West Bank and Gaza, the PA temporarily waived an inherent right which as the bearers of the right to self-determination and to an independent state in the West Bank and Gaza, they continue to hold. Such a waiver was conceived of along with many other compromises – such as the continued presence of the settlements – not as acceptance of any Israeli claim or otherwise but as part of a bona fide effort to secure an end to the conflict and to see two states living side by side. By this reckoning, the current situation vis-à-vis PA jurisdiction over Israelis may be reversed should they choose to unilaterally withdraw from the Accords. This latent capacity to exercise criminal jurisdiction over any individual within their control is of course theoretical, since due to the occupation, should the PA attempt to put such a course of action into practice by detaining or prosecuting an Israeli they would be liable to immediate and overwhelming military assault.⁶⁹
33. Al-Haq would suggest that an additional, more persuasive argument can be made to establish the requisite levels of capacity, by reference to the customary nature of the grave breaches regime of international humanitarian law. Specifically, crimes over which the ICC has jurisdiction, including grave breaches of the Geneva Conventions, crimes against humanity, and genocide are crimes under customary international law, and many are widely recognised as being subject to universal jurisdiction. There is an obligation upon all states to enact effective penal sanctions in domestic law and an obligation to search for and to try or extradite persons suspected of grave breaches on the basis of universal jurisdiction, regardless of the nationality of the perpetrator. With 194 states parties, the Geneva Conventions of 1949 and the grave breaches regime, as confirmed in 1996 by the International Court of Justice in its advisory opinion on the threat or use of nuclear weapons, form part of customary international law.⁷⁰ With respect to the principle of *aut dedere aut iudicare*, Jean-Marie Henckaerts has correctly observed that:

the obligation to search and try or extradite persons suspected of grave breaches is not a purely technical aspect of the Geneva Conventions. It is submitted that [it] is fundamental for the protection of the human person and, as such, has become part of customary international law through extensive and virtually uniform practice, including universal ratification of the Geneva Conventions. It is also inherent in the recognition of the grave breaches as crimes under international law that states must act to ensure that suspects do not enjoy impunity.⁷¹

⁶⁹ For example on the night of 19/20 November 2009 Israeli forces detained six Palestinians from Nablus and Salbit overnight including the commander and four officers of the Palestinian Authority Intelligence Services. Ma'an News US, *Israeli officials keep mum on PA intel arrests* 20 November 2009, available at: <http://www.maannews.net/eng/ViewDetails.aspx?ID=241372>

⁷⁰ Legality of the Threat or Use of Nuclear Weapons, ICJ, Advisory Opinion, 8 July 1996, ICJ Reports (1996) 257, § 79.

⁷¹ Jean-Marie Henckaerts *The grave breaches regime as customary international law* 7 J Int'l Crim J 4 (2009) 697.

At this point it is worth noting Palestinian intentions to be bound by the Geneva Conventions. In June 1989, the PLO submitted to the Government of Switzerland ratification documents for the Geneva Conventions but the Swiss refrained from deciding upon the validity or otherwise of such a ratification on the grounds that it was “not in a position to decide whether this communication can be considered as an instrument of accession in the sense of the relevant provisions of the Conventions and their additional Protocols.”⁷²

34. The grave breaches of the Geneva Conventions documented in the Goldstone Report are alleged to constitute war crimes and possibly crimes against humanity. The General Assembly resolution that endorsed the Report, urged:

in line with the recommendation of the Fact-Finding Mission, the undertaking by the Palestinian side, within a period of three months, of investigations that are independent, credible and in conformity with international standards into the serious violations of international humanitarian and international human rights law reported by the Fact-Finding Mission, towards ensuring accountability and justice.⁷³

This represents an acknowledgement by the international community that, whether there exists a Palestinian state or not, ‘the Palestinian side’ not only has the ability to investigate and prosecute international crimes but also that it has the duty to do so. Such investigations, to be in conformity with international standards must be directed against all those responsible for the alleged crimes and not discriminate on grounds of nationality. Article 146(2) of the Fourth Geneva Convention is explicit in stating 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”.⁷⁴

35. It is clear from the language and tone of the Goldstone Report itself, as well as from the deliberations at the United Nations, that the primary expectation of the international community is that Palestinians and Israel would focus their investigations on individuals within their own political, legal, and military structures. It is impermissible however to create distinctions on the grounds of nationality in the duty to investigate and prosecute any individual allegedly responsible for grave breaches.
36. The 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. As an entity acknowledged by the international community as having both the capacity and responsibility for investigating and prosecuting serious violations of international human rights and humanitarian law the PA must therefore be acknowledged as having the

⁷² Note of Information, Government of Switzerland, Berne, Sept. 13, 1989.

⁷³ UN General Assembly Resolution A/RES/64/10, 2 November 2009.

⁷⁴ Emphasis added. This obligation is repeated at GCII, Art. 50(2) & GCIII, Art. 129(2).

capacity and responsibility for investigating Israelis suspected of being responsible for such actions. This must be so even if given the realities of the occupation, the threat of Israeli military force being used in response to any efforts by the Palestinians in this regard renders it a practical impossibility. Similarly, despite the disjoint between the political leadership in Gaza where Hamas are the acting government, and in the West Bank where Fatah are the acting government, both parties continue to support the PA as an institution whose jurisdiction continues to extend to both the West Bank and to Gaza. On this basis, internal political differences, subject to ongoing unity negotiations cannot be held as denying the PA's jurisdiction in all of the OPT.

37. Furthermore, international humanitarian law recognises that protected persons, those 'who at any given moment and in any manner whatsoever, find themselves, in cases of a conflict or occupation in the hands of a Party to the conflict or Occupying Power of which they are not nationals',⁷⁵ could come under immense pressure to forfeit the protections guaranteed them under the Fourth Geneva Convention. The drafters, conscious of the experience during the Second World War when national governments struck agreements with occupying powers that were 'represented to those concerned as an advantage, but in the majority of cases involved drawbacks which were sometimes very serious',⁷⁶ addressed this potentiality in Article 8 which asserts that:

protected persons may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention and by the special agreements referred to in the foregoing Article.

The drafters also wanted to ensure that states could not take 'refuge behind the will of the protected persons' to justify their failure to comply with the provisions of the Convention. In this spirit, the drafters further emphasised the 'cardinal importance'⁷⁷ of the non-derogability of the Convention's protections, and Article 47 states:

Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.

38. In sum, Articles 8 and 47 affirm that belligerents cannot conclude agreements which derogate from or deny to protected persons the safeguards of the Fourth Geneva Convention. Nor can any renunciation of rights by protected persons have legal effect. On this basis it cannot be countenanced in law that the Interim Agreement can be

⁷⁵ Article 4, Fourth Geneva Convention. This provision extends to all who are not of the nationality of the occupying state: Pictet, Commentary to Geneva Convention IV, 46, n 4. HSRC *Occupation, Colonialism, Apartheid? A Re-assessment of Israel's practices in the occupied Palestinian territories under international law* (Cape Town, 2009) 71-81, available at: <http://www.hsrb.ac.za/Document-3227.phtml>

⁷⁶ Pictet, Commentary to Geneva Convention IV, 69-70.

⁷⁷ Pictet, Commentary to Geneva Convention IV, 75.

regarded as having excluded from the jurisdiction of the PA, the obligation set forth in Article 146 (2) to prosecute any individual allegedly responsible for grave breaches.

Summary

39. The international community, represented by the United Nations, bears a special responsibility in respect to Palestine, initially as a result of the Mandate and the Partition Resolution, but also through the role it has assumed with the Quartet, and especially as the trustee of the international legal framework for the protection and promotion of human rights and the maintenance of international peace and security. This responsibility has been described by the General Assembly as “a permanent responsibility [...] until the question is resolved in all its aspects in a satisfactory manner in accordance with international legitimacy.”⁷⁸ The need to confront impunity for the crimes detailed in the Goldstone Report amongst others demands that international law be brought to bear in ensuring accountability for the victims of international crimes, as well as in bringing an end to the occupation.
40. By accepting the PA’s declaration as valid, the ICC will not be undermining the statist foundations of international law. To the contrary, the PA is in many respects operating as a state, is being held to international legal obligations typically binding upon states, and has an internationally recognised aspiration to full statehood. Due to the occupation this aspiration continues to be frustrated and clear arguments have been made to the extent that in light of Israel’s policies and practices in the OPT which can be considered as constituting violations of international law’s prohibitions of apartheid and colonialism, combined with the prolonged nature of the occupation, the unlawful annexation to Israel of East Jerusalem, the illegality of the construction of the Wall, and the manifold violations by the occupying forces of the international humanitarian and human rights law, the occupation itself should be considered unlawful.⁷⁹ While we await an authoritative finding to this effect, it remains the case that the international community abhors the situation of prolonged occupation and supports the Palestinian aspiration to statehood. Furthermore, other than the Palestinians themselves, no other state except for the belligerent occupier Israel, maintains any form or claim of sovereignty over the territory of the occupied West Bank and Gaza. To deny Palestinians recourse to international law and justice on the basis of their being subject to Israeli military occupation would be contrary to the spirit of international law.
41. In considering whether international law (and the international community) should engage non-state armed groups, thereby “giving them inevitably a certain international standing (but with the advantage of being able to require them to comply with certain international standards)” or whether they should simply be ignored, Sassòli compellingly

⁷⁸ General Assembly, resolution 57/107 of 3 December 2002.

⁷⁹ Orna Ben-Naftali, Aeyal M Gross & Keren Michaeli *Illegal Occupation: Framing the Occupied Palestinian Territory* 23 Berkeley J Int’l L 551 (2005). HSRC *Occupation, Colonialism, Apartheid? A Re-assessment of Israel’s practices in the occupied Palestinian territories under international law* (Cape Town, 2009) 278-9, available at: <http://www.hsrb.ac.za/Document-3227.phtml>

argues that indeed such actors should be engaged with by international law and its mechanisms.⁸⁰ This is truly the only viable course of action with regards the entity of Palestine which is far more developed and structured than what is typically considered within the ambit of 'non-state actors'. International reality is less and less state-centric, and as the PA is an important international player it cannot be non-existent for international law. In this respect it is salient to note that the PA initiated the GA Resolution which submitted the question on the legal consequences of Israel's construction of the Wall in the OPT,⁸¹ and participated in the proceedings.⁸² In the Wall advisory opinion, the ICJ treated Palestine's statehood as having not yet been established, noting that the Court itself had the duty:

to draw the attention of the General Assembly, to which the present Opinion is addressed, to the need for these efforts to be encouraged with a view to achieving as soon as possible, on the basis of international law, a negotiated solution to the outstanding problems and the establishment of a Palestinian State, existing side by side with Israel and its other neighbours, with peace and security for all in the region.⁸³

This is in keeping with the ICJ's repeated emphasis of the significance of the right to self-determination, which it has held as being "one of the essential principles of contemporary international law",⁸⁴ and in the Wall AO, the ICJ affirmed that self-determination is a right erga omnes, whose realisation all UN member States, as well as all states parties to the international covenants on human rights, have the duty to promote.⁸⁵ While it has been demonstrated that it is open to the Court to investigate a geographical region regardless of state or other territorial boundaries, the context in which the Palestinian declaration is made, that of an occupation in which the protected Palestinian people, are as a whole, unprotected, and reliant on the international community to facilitate their self-determination, and also considering that the Goldstone Report investigated grave breaches in both the West Bank and Gaza, we would submit that any investigation by the Court must extend to the entirety of the occupied Palestinian territory.

⁸⁰ Marco Sassòli *The Implementation of International Humanitarian Law: Current and Inherent Challenges* 10 YB IHL (2007) 45-73, 63

⁸¹ UNGA RES/ES-10/14 adopted 8 December 2003 at the 23rd Meeting of the Resumed Tenth Emergency Special Session (90 votes in favour, 8 against, 74 abstentions).

⁸² Written Statement Submitted by Palestine, 30 January 2004 available at: <http://www.icj-cij.org/docket/files/131/1555.pdf>

⁸³ Legal consequences of the construction of a wall in occupied Palestinian territory, ICJ Advisory Opinion of 9 July 2004, ICJ Rep, 2004, para 162.

⁸⁴ East Timor case (Portugal v. Australia), ICJ Rep, 1995, 90 at 102, para 29.

⁸⁵ Wall Advisory Opinion, ICJ Rep, 2004, 171-172, para.87-88; see also 199, paras. 155-156. Similarly, the International Law Commission has concluded that self-determination also has jus cogens status and is peremptory states cannot derogate from its exigencies in their international relations. International Law Commission, Report of the work of its 53rd session, UN Doc.A/56/10, Commentary to Article 40 of its 2001 Articles on Responsibility of States for Internationally Wrongful Acts, ibid 282 at 284, para. 5, available at:

<http://www.un.org/law/ilc/reports/2001/english/chp4.pdf> : See also HSRC *Occupation, Colonialism, Apartheid? A Re-assessment of Israel's practices in the occupied Palestinian territories under international law* (Cape Town, 2009) 278-9, available at: <http://www.hsrc.ac.za/Document-3227.phtml>

42. The Rome Statute's preamble asserts "that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes" and emphasizes "that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions". The PA also shares this duty to exercise its national criminal jurisdiction in such a manner, and to act in accordance with international law, and therefore should be recognized as a state for the purposes of Article 12(3) of the Rome Statute. In accepting the declaration the Court will be promoting the principles and purposes of the UN by ensuring that no-one is excluded from the writ of international justice nor from the protection of international law.
43. Relying on the above analysis, our examination concludes that a cumulative set of findings makes a clear case, in law and in policy, for the declaration to be valid:
- a. The existence of a state of Palestine, although controversial, is nonetheless a reality in the opinions of many states.
 - b. The PA satisfies many of the basic criteria of statehood and effects many of the duties and responsibilities of states.
 - c. The Palestinians have an internationally recognised right to self-determination and to an independent state.
 - d. The Palestinians in the OPT are living under a foreign military occupation which is frustrating their ability to effectively exercise their right to self-determination through an independent state.
 - e. The PA has the ability to enter into international agreements.
 - f. The PA has the capacity to exercise criminal jurisdiction over Palestinians and other non-nationals.
 - g. The PA as a party bound by customary international law to investigate and prosecute grave breaches of international humanitarian law has the duty to prosecute anyone alleged to have committed such crimes, a duty which cannot discriminate on grounds of nationality, and which therefore brings Israeli nationals within the scope of PA jurisdiction.
 - h. The ICC may decide what constitutes a state for the purposes of the Rome Statute by criteria different from what is used for other purposes in international relations and international law.
 - i. For the purposes of the Rome Statute, Palestine can legitimately considered to be a state with the capacity to submit a valid Art 12(3) declaration.

Given the PA's ability to enter into international agreements, its jurisdictional capacity, and duty, to prosecute Palestinians, Israelis, and other nationalities for international crimes, and the ICC's competence to interpret the meaning of 'state' for the purposes of Article 12(3) of the Rome Statute, then there can be no doubt but that the declaration by the Palestinian Authority accepting the exercise of jurisdiction by the Court meets statutory requirements.

Conclusion

44. The questions posed to the PA by the OTP should not be considered as the only possible grounds by which the Court can make a decision as to the validity of the PA's Declaration, but since they are the grounds that have been proposed, and on which proceedings are reliant, the necessity of their being answered in the positive is crucial for the PA application to succeed. That the OTP may decide subsequently not to investigate alleged crimes committed on Palestinian territory on grounds of complementarity or gravity is a matter for another day. That the Prosecutor may decide not to make any decision is also another matter. What is clear at this point is that the questions posed by the OTP can all be convincingly answered in the positive and that the ICC may validly consider Palestine to be a state for the purposes of Article 12(3) of the Rome Statute and may accept the transfer of jurisdiction from the PA to the Court in line with the Statute and the principles of international law. At any rate, the decision of the OTP is not final as it will be subject to review by a Pre Trial Chamber, at which point the Court itself can rule on the validity of the acceptance of the declaration, a factor which should encourage the Prosecutor to take this essential step.
45. Al-Haq submits this position paper for consideration of what are pressing and critical issues. We trust that an expeditious decision re the Palestinian declaration will be made taking these conclusions into account and indicate our willingness to assist and support the Court in its work in any way that we can.