

**ICC, Office of the Prosecutor-NGO Roundtable  
Session on Palestine, 20 October 2010**

**NOTE ON THE LEGAL EFFECTS OF PALESTINE'S DECLARATION  
UNDER ARTICLE 12(3) OF THE ICC STATUTE**

1. The following remarks were submitted at the OTP-NGO Roundtable discussions of 20 October 2010 on whether the declaration lodged by the Palestinian National Authority on 21 January 2009 under Article 12(3) of the Court's Statute meets statutory requirements. My remarks follow from the Opinion which I signed entitled *Les effets de la reconnaissance par la Palestine de la compétence de la C.P.I.* submitted by Professor Alain Pellet at the request of Maître William Bourdon and which was endorsed by 40 well-known international lawyers.<sup>1</sup> I also draw on a follow-up note which I addressed to the Prosecutor last May.

**A Functional Approach to Statehood for Purposes of Article 12(3)**

2. The gist of Professor Pellet's Opinion is that although there is an on-going debate as to whether Palestine is at present a state or not under international law, it does not fall to the Court to determine this in the abstract since this is a matter for states to decide; ICC acceptance that Palestine may make an effective declaration under Article 12(3) under the Statute does not imply that the ICC takes any position regarding Palestine's statehood under international law. In our view, the validity of the Palestinian declaration should be examined from a functional perspective which focuses on the question of whether Palestine may be considered a state for purposes of the ICC Statute, that is for the purpose of determining the admissibility of Palestine's declaration under Article 12(3) of the Statute and ascertaining whether the necessary conditions for the exercise of the Court's competence have been fulfilled.

3. Recourse to such a functional approach is fairly common in international law; to

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<sup>1</sup> This Opinion was posted on the Court's website.

borrow the term from Judge Rosalyn Higgins, albeit writing with reference to federated entities, the concept of the “state” is one of “variable geometry”; it therefore depends on the particular context or norm which is being applied. Multilateral treaties have encompassed various entities in the term State for purposes of the respective treaty, such as regional integration organizations or state enterprises, and regional courts have on occasion equally done so when it was proved necessary for the promotion of their respective instrument<sup>2</sup>. Entities have been considered as states also for admission to international organizations whenever this has served the purposes of the organization; the best known example is the admission of Ukraine and Byelorussia, as well as India before independence, to membership in the United Nations for purposes of Article 3 of the UN Charter, but it is not the only organisation to have done so.

4. Without prejudice to the question of its statehood under international law, it is notable that Palestine has been assimilated to a state for a variety of purposes. The General Assembly has granted Palestine not only observer status, but additional rights and privileges of participation in its work normally reserved for member states, including the sponsorship of draft resolutions related to the question of Palestine.<sup>3</sup> Since 1975 the PLO has been invited routinely to participate in the discussions on Palestine in the Security Council under rule 37 which applies to “any member of the United Nations” which is not a member of the Security Council,<sup>4</sup> for purposes of the effective exercise of the Security Council’s functions under Chapters VI and VII. The International Court of Justice has also considered that in view of Palestine’s special status in the UN, it could participate in the advisory proceedings relating to the construction of a Wall in the OPT even though the Court’s Statute reserves this privilege only to states and IOs, thereby assimilating

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<sup>2</sup> For illustrations, reference should be made to the Opinion of Professor Pellet.

<sup>3</sup> See, e.g. GA Res. 3210(XXIX), 3236 (XXIX), 3237 (XXIX), and 52/250.

<sup>4</sup> “Any Member of the United Nations which is not a member of the Security Council may be invited, as the result of a decision of the Security Council, to participate, without vote, in the discussion of any question brought before the Security Council when the Security Council considers that the interests of that Member are specially affected, or when a Member brings a matter to the attention of the Security Council in accordance with Article 35 (1) of the Charter.”

Palestine to a State in order to allow the Court to effectively address the request for an advisory opinion put to it by the General Assembly.<sup>5</sup>

### **Interpretative Approaches to Article 12(3) of the Statute**

5. Whether Palestine can be assimilated to a State *for purposes of Article 12(3)* is a matter of interpretation of the Statute's provisions in regard to the Court's jurisdiction for which the Court has, according to the well-known principle of international law, *kompetenz kompetenz* (see also Article 19 of its Statute). It is accepted that the rules of interpretation laid down in Article 31(1) of the 1969 Vienna Convention on the Law of Treaties apply under which the interpretation of a treaty shall be carried out in good faith in accordance with the ordinary meaning of the term, in their context, and in the light of the treaty's object and purpose.

6. It must be underlined, however, that the ICC Statute is not an ordinary multilateral treaty, but a treaty with a collective interest which establishes obligations of an essentially objective character. The International Court of Justice has given voice to the concept of collective interest embedded in multilateral treaties having a humanitarian purpose for in "a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties..."<sup>6</sup> In approaching such treaties, judicial bodies have resorted to teleological interpretation of the relevant instrument, including the doctrine of implied powers of international organizations, or have invoked their inherent judicial powers. As the Court stated in the well-known *Reparations* case in considering that United Nations international personality could be extrapolated from a teleological reading of the Charter:

"It must be acknowledged that its Members, by entrusting certain functions to [the United Nations]...have clothed it with the competence required to enable those functions to be effectively discharged."<sup>7</sup>

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<sup>5</sup> *Legal Consequences of the Construction of a wall in the Occupied Palestinian Territory*, Advisory Opinion, Order of 19 December 2003, paras. 2 and 4, and para. 4 of the Advisory Opinion of 9 July 2004.

<sup>6</sup> *Reservations to the Convention on Genocide*, Advisory Opinion of 18 May 1951, ICJ Reports 1951, at 23.

<sup>7</sup> *Reparations for Injuries Suffered in the Services of the United Nations*, ICJ Reports 1949, at 179.

7. The meaning of the term “state” in Article 12(3) should be interpreted by looking at the overall context and object and purpose of the Statute. The latter bestows on the Court the means to fulfil its statutory mission to end impunity for the most serious international crimes over which the Court has jurisdiction, i.e. those that are so grave that they “threaten the peace, security and well-being of the world”; such crimes affect the international community as a whole. In the context of Palestine, a number of fact-finding missions have alleged that crimes of the kind that the Court was established to try have been committed. Declarations under paragraph 3 are one of the necessary conditions for the Court to fulfil this mission and the Court would be doing so by treating Palestine as a state solely for the purposes of Articles 12(3) since only Palestine holds sovereignty over the territory in question as well as a duty under international law to investigate and prosecute offences within the jurisdiction of the Court; at the same time, Palestine has given the consent necessary which underlies the Court’s jurisdiction. On the contrary, were it to decline jurisdiction, the Court would be interpreting the Rome Statute in a manner that prevented it from the effective discharge of its mission and establish a zone of impunity in the Occupied Palestinian territory.

8. In addition to a teleological approach, recent judgments by the ICJ, regional courts and quasi-judicial bodies such as the WTO dispute settlement bodies, have drawn on Article 31(3)(c) of the Vienna Convention which states that in interpreting treaty provisions, “there shall be taken into account, together with the context... any relevant rules of international law applicable in the relations between the parties”. As the European Court of Human Rights has held:

“(t)he Convention...cannot be interpreted in a vacuum. The Court must be mindful of the Convention’s special character as a human rights treaty, and it must also take the relevant rules of international law into account. The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms a part...”<sup>8</sup>

This is echoed in Article 21 of the Statute which calls on the Court to apply in

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<sup>8</sup> *McElhinney v. Ireland*, Application no. 31253/96, Judgment of 21 November 2001, European Court of Human Rights, Grand Chamber, para. 36. See also *Al-Adsani v. the United Kingdom*, Application no. 35763/97, Judgment of 21 November 2001, European Court of Human Rights, Grand Chamber, para.55.

addition to its own instruments, applicable treaties and relevant rules of general international law, including general principles of law, providing they are consistent with internationally recognized human rights.

### **The International Status of Palestine Under the Relevant Rules of International Law**

9. The relevant rules of international law applicable to the case are: the Court's obligations towards the United Nations which has responsibility for Palestine, the international status of Palestine and the legitimacy of statehood, and the obligations of state parties towards Palestine.

#### ***Obligations towards the United Nations***

10. The ICC while an independent organization based on its own treaty, has entered into a "mutually beneficial relationship" with the United Nations as expressed in its relationship agreement, in which the ICC has pledged to coordinate and cooperate with the United Nations in the fulfillment of their mutual responsibilities; this includes for the United Nations, a responsibility towards Palestine. For the reasons I will set out shortly, acceptance of Palestine as a "state" under Article 12(3) for the strictly functional purposes of the Statute would not be counteracting but on the contrary supporting the United Nations responsibilities towards Palestine. It will be recalled that, as the ICJ has pointed out, Palestine remains the special and permanent responsibility of the United Nations "...until the question is resolved in all its aspects in a satisfactory manner in accordance with international legitimacy" As a question of international community concern, the question of Palestine cannot therefore be regarded as only a bilateral matter between Israel and Palestine.<sup>9</sup> In its *dispositif* the Court has called on all UN organs, and this would include organisations within the UN system, to take what further action would be required to bring to an end the illegal situation (while the Court was addressing here the illegal construction of a wall in the Occupied Palestinian Territory, this applies to

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<sup>9</sup>Wall Opinion, paras.49-50.

the general situation in Palestine which the ICJ addressed in the rest of its Opinion).<sup>10</sup> The General Assembly has also urged “the specialized agencies and organizations of the United Nations system to continue to support and assist the Palestinian people in the early realization of their right to self-determination.”<sup>11</sup> The exercise of this responsibility may also be linked to the emerging “responsibility to protect” under international law.

***Palestine’s international status and the legitimacy of statehood***

11. Acceptance of Palestine as a state for purposes of the Statute would be in conformity with the international legitimacy bestowed on Palestinian statehood by the international community as a whole acting through the United Nations. Palestine is not a *térritoire sans maitre* but a territory with an international status confirmed as such by the International Court of Justice. This special status flows from the fact that it was a former Class A Mandate, a self-determination unit and occupied territory.

***Palestine as a former Mandate***

12. Palestine was a former “Class A” Mandate, in accordance with Article 22 of the League of Nations Covenant, whose “existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone.” Mandates were guided by two fundamental principles: the principle of non-annexation and the principle of “sacred trust of civilization”.<sup>12</sup> The Mandate could not therefore impair or destroy the rights of the original inhabitants and its essence was based on international supervision and accountability. The “ultimate objective”

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<sup>10</sup> It should be stated from the outset, as this has been contested, that the Court’s Advisory Opinion cannot simply be dismissed as non-binding. States cannot ignore the existence of the fundamental rules that the Court has underlined which bind them in international law nor the automatic legal consequence of their violation. Moreover, the Opinion provides an authorization for them to act in consequence. Most important, the Advisory Opinion which the Court addressed to the General Assembly, has been formally accepted and endorsed by the organ which requested it in its resolution ES-10/15 in July 2004. It therefore binds UN organs, including the Secretary-General of the United Nations.

<sup>11</sup> GA Res 64/150, 26 March 2010.

<sup>12</sup> *International Status of South West Africa*, Advisory Opinion, ICJ Reports 1950, at 131

of the sacred trust was the “self-determination and independence of the peoples concerned.”<sup>13</sup>

13. The separate status of Palestine and a limited international personality was recognised in the inter-war period. It had certain treaty-making capacity, the treaties it concluded with other states being registered with the League of Nations; a separate Palestinian nationality was also recognized by the League of Nations and in the courts of other states.<sup>14</sup> Referring to South-West Africa, which was even further removed from independence as a “Class C” territory, the ICJ underlined that the mandate system “did not involve any cession of territory or transfer of sovereignty”;<sup>15</sup> it was also widely recognized that these mandates enjoyed international personality distinct from the Mandatory Power.<sup>16</sup>

14. With the end of the League, the rights conferred on the people under mandate were safeguarded under Article 80 (1) of the UN Charter and the responsibilities and supervisory functions over the administration of the Mandate devolved upon the United Nations.<sup>17</sup> Resolution 181 (II), the Partition Plan, adopted by the General Assembly on 29 November 1947 in exercise of its responsibilities and which terminated the Mandate, laid down the concept of a two-State solution and has since become the express foundation of the legitimacy of the establishment both of the State of Israel in 1948 and of the Palestinian State declared by the Palestine National Council at its 19<sup>th</sup> Extraordinary Session in Algiers on 15 November 1988.<sup>18</sup>

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<sup>13</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, at 31.

<sup>14</sup> For a comprehensive overview of the status of Palestine under mandate, see Mutaz Qafisheh, *The International Law Foundations of Palestinian Nationality*, Martinus Nijhoff, 2008.

<sup>15</sup> *International Status of South West Africa*, at 132.

<sup>16</sup> See the 1931 resolution of the Institute of International Law.

<sup>17</sup> *International Status of South West Africa*, at 128, 133. The Court derived the competence of the General Assembly to exercise such supervisory functions in part from its broad powers under Article 10 of the Charter as well as Article 80(1) of the Charter.

<sup>18</sup> The Israeli Declaration of Independence states that the establishment of a Jewish State was made “by virtue of our natural and historic right and on the strength of the Resolution (181) of the United Nations General Assembly” (see website of the Israeli Foreign Ministry). The Palestinian declaration states: “By virtue of the natural, historical and legal right of the Palestinian Arab people to its homeland, Palestine . . .

*Palestine as a self-determination unit*

15. The General Assembly's responsibility for the Territory beyond the termination of the Mandate did not end, but now flowed from the collective recognition by the international community expressed through the General Assembly of the right to self-determination of the Palestinian people which comprised a right to statehood.<sup>19</sup> This has been endorsed in numerous UN resolutions and confirmed in the Advisory Opinion in the *Wall* case. The right to self-determination is a sovereign right of peoples. The Court considered that the existence of a "Palestinian people" is no longer in issue and that the reference to the "legitimate rights" of the Palestinian people in the Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip of 28 September 1995 also included the right to self-determination.<sup>20</sup>

16. Since this right can only be exercised over a territory, the affirmation of the right to self-determination of the Palestinian people has meant recognition of a self-determination unit; this corresponds to the Territory occupied by Israel since 1967. Thus the borders of the state of Palestine are not in question and have been recognized by the international community.

17. The right to self-determination has been recognised as a norm of *jus cogens*, a peremptory norm of international law, which cannot be derogated from even by the parties concerned. The Court has likewise confirmed its *erga omnes* character, a right in which every State has a legal interest and a duty in its protection.<sup>21</sup> The right to self-determination therefore entails a right to respect for the territorial

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on the basis of the international legitimacy embodied in the resolutions of the United Nations since 1947" (27 *ILM*, 1998, 1637-1654). See V. Gowlland-Debbas, "Collective Responses to the Unilateral Declarations of Independence of Southern Rhodesia and Palestine: An Application of the Legitimizing Function of the United Nations", 61 *BYIL*, 1990, 135-153. In its Resolution 273(III) admitting Israel into the United Nations on 11 May 1949, the General Assembly took note of the declarations made by the representative of Israel before the *ad hoc* Committee respecting Israel's implementation of Resolutions 181(II) and 194(II).

<sup>19</sup> GA Res. 2535/B(XXIV), 2628 (XXV), 2672/C (XXV) and since reaffirmed in countless resolutions.

<sup>20</sup> *Wall Opinion*, para.118.

<sup>21</sup> *Barcelona Traction, Light and Power Company, Limited*, Second Phase, Judgment, ICJ Reports 1970, at 32; *East Timor (Portugal v. Australia)*, Judgment, ICJ Reports 1995, at 102.



integrity and unity of the whole Territory under occupation<sup>22</sup>, and the obligation to promote the realization of that right.

*Palestine as Occupied Territory*

18. The international status of Palestine also flows from the fact that it is an occupied territory and that that regime is regulated by international law from which flows rights and obligations, in particular the application of the Fourth Geneva Convention; the latter is evidence that there are two parties to an international conflict who potentially may be in violation of its grave breaches provisions.

19. In its Advisory Opinion, the ICJ confirmed the series of pronouncements embedded in countless Security Council resolutions since 1948 which underline the legal consequences ensuing from this status. The Security Council has reaffirmed the well-established principle of the inadmissibility of the acquisition of territory by force in its resolutions on Palestine and has called for the withdrawal of Israeli armed forces from the Occupied Palestinian Territory, including Jerusalem<sup>23</sup>. Security Council resolutions have also declared that all legislative and administrative measures taken by Israel which purported to alter the character and status of the Occupied Palestinian Territory, including E. Jerusalem, such as its 1980 Basic Law establishing Jerusalem as the “complete and united” capital of Israel, are null and void.<sup>24</sup> The Court has also upheld Security Council resolutions declaring the illegality of the Israeli settlements in the OPT established in breach of article 49 (6) of the Geneva Conventions, a view which was endorsed also by its sole dissenting Judge.<sup>25</sup>

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<sup>22</sup> GA Res 63/165.

<sup>23</sup> E.g. Resolutions 242(1967) and 338(1973). For the drafting history of SC Res.242 which indicates that the Security Council had no intention of endorsing Israeli annexation of any part of the West Bank or Gaza Strip, see John McHugo, “Resolution 242: A Legal Reappraisal of the Right-Wing Israeli Interpretation of the Withdrawal Phrase with Reference to the Conflict between Israel and the Palestinians”, 51 *ICLQ* (2002) 851-882.

<sup>24</sup> See e.g. SC Res. 298 (1971), 446 (1979), 476 and 478 (1980) and 1322 (2000).

<sup>25</sup> *Wall Opinion*, para.120. The Court cites Resolution 237 (1967), 271 (1969), 681 (1990), 799 (1992) and 904 (1994) regarding the applicability to the OPT of the Geneva Conventions in which the Security Council considered that those settlements had “no legal validity”. See Declaration by Judge Buergenthal.

20. Unilateral acts by Israel to change the character of the OPT are therefore proscribed and this is confirmed by Article XXXI.7 of the Interim Accord on the West Bank and Gaza Strip which states that neither party will take the initiative nor adopt any measures which would modify the status of the West Bank and the Gaza Strip until a permanent agreement is reached. A declaration of Palestinian statehood would be in line with, rather than affect, the status of the West Bank and Gaza which as stated above, includes the right to self-determination and statehood. The arguments which have so far been presented to the Court urging it not to give effect to the Palestinian declaration under Article 12(3), remain strangely silent on the fact that restrictions on Palestinian independence are solely due to belligerent occupation. It should be stressed that the status of Gaza as occupied territory continues to be recognised by the United Nations. The Security Council in its Resolution 1860 (2009) adopted on 8 January 2009 stresses “that the Gaza Strip constitutes an integral part of the territory occupied in 1967 and will be a part of the Palestinian state”.<sup>26</sup>

#### *The legitimacy of Palestinian Statehood*

21. The legitimacy of Palestinian statehood has been confirmed on numerous occasions by the United Nations. In its Resolution 43/1977, adopted by an overwhelming majority with only two votes against, the General Assembly in 1988, “acknowledged” the proclamation of the State of Palestine by the Palestine National Council and declared it to be “in line with General Assembly resolution 181 (II) and in exercise of the inalienable rights of the Palestinian people” and affirmed “the need to enable the Palestinian people to exercise their sovereignty over their territory occupied since 1967”. The resolution thus recognized and affirmed the intrinsic legality of a situation considered to be in conformity with the right to self-determination, and the consequent intrinsic illegality, despite its effectiveness, of the Israeli occupation which was preventing the State of Palestine from exercising authority over this territory. By implicitly acknowledging that the conditions for the

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<sup>26</sup> See also the reports of the Fact-finding missions established by the Human Rights Council.

establishment of a Palestinian State had now been met<sup>27</sup>, the Assembly was asserting its competence to determine the forms and procedures by which the right to self-determination of territories over which it exercised responsibility was to be realized.<sup>28</sup> The right to statehood has been constantly reiterated, including by the Security Council which called for the achievement of the two-state solution.<sup>29</sup> The ICJ has also considered in the *Wall* case that it had a duty to draw the attention of the General Assembly, *inter alia*, to the need to encourage efforts to establish a Palestinian State.<sup>30</sup>

22. In short, far from emerging in violation of international law, Palestine's statehood is a necessary consequence of a fundamental principle of international law, the right to self-determination. The collective recognition of this international status within the United Nations is therefore what distinguishes Palestine from entities such as the former South African Bantustans or the self-proclaimed "Turkish Republic of Northern Cyprus" and other such entities, in regard to which the United Nations has refused to bestow legitimacy.

23. Under international law, illegal effectiveness does not affect the sovereignty of States victims of an illegal occupation. While the Security Council declared null and void the unilateral declaration of independence of Southern Rhodesia in 1965, despite its fulfilment of the criteria of statehood, including that of effectiveness, because contrary to the right to self-determination, conversely in several instances recognition of statehood was bestowed on peoples still under foreign occupation because this was in line with their legitimate rights. Namibia was admitted to membership of the ILO and other specialized agencies (where membership is

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<sup>27</sup> The debate surrounding the adoption of this resolution supports this view. Even those States which had not recognized the state of Palestine stated that they nevertheless welcomed the proclamation as the exercise of the right of self-determination, differing only on the timing of recognition (see e.g. A/43/PV.79, Sweden, p.74; A/43/PV.80, Chile, pp.18-20, Austria, pp.21-2, New Zealand, p.132, Canada, pp.172-6; A/43/PV.82, Japan, p.82, and France, pp.87-8).

<sup>28</sup> See *Western Sahara, Advisory Opinion*, ICJ Reports 1975, at 36.

<sup>29</sup> SC Res.1397 (2002) and 1515 (2003).

<sup>30</sup> Para.162.

contingent on statehood) on the basis that its legitimate rights should not be frustrated by the illegal occupation of South Africa.<sup>31</sup> The ILO Resolution reads:

“Noting that Namibia is the only remaining case of a former mandate of the League of Nations where the former mandatory Power is still in occupation,  
 Considering that an application for membership in terms of article 1 is prevented only by the illegal occupation of Namibia by South Africa, the illegal nature of this occupation having been confirmed by the ICJ in its Advisory Opinion of 21 June 1971,  
 Affirming that the ILO is not prepared to allow the legitimate rights of the Namibian people to be frustrated by the illegal action of South Africa,  
 Making it clear that in now granting the application for membership it does not overlook the wording of article 1 and believes that in the near future the illegal occupation of Namibia by South Africa will be terminated,  
 1) Decides to admit Namibia to membership in the Organisation it being agreed that, until the present illegal occupation of Namibia is terminated, the United Nations Council for Namibia....will be regarded as the Government of Namibia for the purpose of the application of the Constitution of the Organisation”.

24. There are other examples of recognition of states emerging from the exercise of the right to self-determination, even under occupation, include the accession to independence of the people of Guinea-Bissau, thereby creating a sovereign State recognized by the General Assembly even while still occupied by Portugal.<sup>32</sup>

### ***Obligations under international law of the states parties to the ICC Statute***

25. The fact that Palestine is a territory with an international status and is therefore of international concern has several implications, including the imposition of obligations on third parties. Therefore to give effect to Palestine’s declaration under Article 12(3) would not be contrary to the ICC state parties’ obligations under international law.

26. As stated above, the right to self-determination has been recognised as a norm of *jus cogens*, having also an *erga omnes* character. In view of this, the states parties to the Statute have a duty under general international law to promote the realization of the right to statehood of the Palestinian people and not to recognize the illegality of the situation.<sup>33</sup>

<sup>31</sup> ILO 64<sup>th</sup> session (Geneva, June 1978), Provisional Record, No.24, pp.19-20.

<sup>32</sup> GA Res.3061 (XXVIII).

<sup>33</sup> *Wall Opinion*, para.159. As stated in the *Namibia Opinion* “It would be an untenable interpretation to maintain that, once such a declaration (of illegality) had been made by the Security Council under Article 24 of the Charter, on behalf of all member States, those Members would be free to act in disregard of such illegality or even to recognize violations of law resulting from it”. ICJ Reports 1971, at 52.

27. As parties to the Geneva Conventions, the states parties to the ICC Statute also have a duty to ensure that the grave breaches provisions do not remain a dead letter; common Article 1 of the Geneva Conventions calls on them not only to respect but also to ensure respect for the terms of the conventions; they therefore have a duty to enforce the system of repression of grave breaches under the Fourth Geneva Convention through all the means at their disposal, as the Court has confirmed in its *dispositif* in the *Wall* case.

28. Palestine also has duties under international humanitarian law as the entity which holds exclusive title to the territory of Palestine within its 1967 borders. Much has been made of the limiting effects of the Oslo Accords on Palestinian jurisdiction over its territory. The Oslo Accords however should not be taken to be more than the transfer of belligerent administrative powers and responsibilities from the occupying Israeli military administration to the Palestinian National Authority in preparation for full Israeli withdrawal from the OPT. As stated above, these agreements do not affect the status of Palestine nor the external capacities it has under international law in accordance to which, *inter alia*, it has been admitted to international organizations, concluded a number of treaties in its own right and established official relations with a large number of states. Moreover, not only is the legal status of the Oslo Accords far from clear in that, not having been registered with the UN, they cannot be invoked before any organ of the United Nations (Article 102(2) of the UN Charter), but also Article 103 of the UN Charter ensures that in case of conflict, the obligations of Israel under the Charter would prevail over any other agreement. The General Assembly has also considered that any “partial agreement or separate treaty which purports to determine the future of the Palestinian territories occupied by Israel since 1967 in violation of their right to self-determination”, would lack validity.<sup>34</sup>

29. The Oslo accords cannot, moreover, purport to have the effect of depriving

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<sup>34</sup> See Resolutions 34/70 and 35/169B

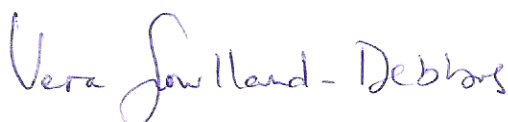
protected persons in the occupied Palestinian territory of their intransgressible rights under international humanitarian law, nor restrict the right and duty of the Palestinian authorities to exercise their jurisdiction fully in respect of the grave breaches of Geneva Convention IV, whatever legal effects the Oslo Accords may have in respect of everyday crimes. Article 47 of the Fourth Geneva Convention (which is effective over the whole duration of the occupation) clearly 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...**by any agreement concluded between the authorities of the occupied territories and the Occupying Power...**”  
(emphasis added).

On the other hand, if for the sake of argument it can be construed that the Palestinian authorities are *unable* because of the Oslo Accords to proceed in respect of crimes within the ICC’s jurisdiction, for which the UN has called specifically on them to investigate, then the admissibility requirements under Article 17(1)(b) of the Statute would be fulfilled. In view of all the above arguments, the Oslo Accords may not be construed in any way as constituting an obstacle to the effectiveness of a Palestine declaration under Article 12(3).

30. In short, were the ICC to give effect to Palestine’s declaration under Article 12(3) of the Statute, it would be acting not only in line with the object and purpose of its Statute, but also with the legitimacy bestowed by the international community on Palestinian statehood under international law.

31. In conclusion, as stated in the Opinion by Professor Alain Pellet, all the conditions (*ratione materiae, temporis, loci and personae*) exist for the Palestinian declaration to deploy its effects.



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