

**STATEHOOD AND PALESTINE FOR THE PURPOSES OF ARTICLE 12(3) OF  
THE ICC STATUTE**

**A contrary Perspective**

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## 1) Introduction

There is no globally accepted treaty framework that lays down the specific and detailed rules concerning the creation of states. However, some leading western jurists<sup>1</sup> claim that there is a body of customary international law, based on firstly a regional treaty called the Montevideo Convention established in 1933<sup>2</sup> and secondly, a list of criteria that has been termed additional criteria for statehood. As will be discussed in the body of this memo, the application of what is termed customary international law could arguably be substantially the results of two decisions of the International Court of Justice in 1975<sup>3</sup> and 1969<sup>4</sup> and the writings of western jurists that promote the Montevideo Convention as evidence of state practice and *opinio juris*. However it will be argued that such doctrinal opinions are without sufficient reference to modern examples of state practice and legal debates about the requisite *opinion juris*.

These modern examples may well require that any application of the Montevideo Convention take a much more nuanced approach that requires looking at the indicia of statehood through a different lens depending on the context in which statehood is in question. That lens focuses on what particular rights and duties a particular putative or *de facto* territorial state is seeking or what duties are to be imposed on that state. This is especially important for states that are under belligerent occupation or protected status or under some form of international administration. In this more nuanced approach to what constitutes a state, it may well be that the actions of the UN General Assembly, the UN Security Council, the constitutive recognition of new states by other states and the establishment of self-determination as a fundamental principle of international human rights law gain much more importance than any mechanical application of the Montevideo Convention.

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<sup>1</sup> See for example, A. Cassese, *International Law*, Second Edition, OUP, (2005); James Crawford, *The Creation of States in International Law*, (1979)

<sup>2</sup> Montevideo Convention on the Rights and Duties of States, 1933, 165 I.N.T.S. 19. The treaty was ratified by 19 Latin American states and the U.S.

<sup>3</sup> Western Sahara, Advisory Opinion, I.C.J. Reports 1975.

<sup>4</sup> North Sea Continental Shelf Case, I.C.J. Reports 1969.

In the context of this more focused approach to statehood, there is a possible new interpretation of the “state” for the purposes of the jurisdiction of the International Criminal Court (ICC) under Article 12 (3) based on a narrower concept of “international legal personality” as it relates to a state under belligerent occupation. This more focused approach to what constitutes a “state” for the purposes of ICC jurisdiction will be discussed after establishing that there are strong legal grounds for the assertion that Palestine is a *de facto* territorial state with a view to granting it international legal personality under emerging customary international law principles for certain contexts as opposed to a more general determination as to whether Palestine constitutes a state under international law.

These contextual issues are critical in the determination of whether the Palestinian State has retained its international legal personality and qualify as such under Article 12(3) of the ICC Rome Statute.

The issue of Palestinian statehood has become the focus of much discussion and potential controversy in the context of the jurisdiction of the International Criminal Court because of the longstanding history of recent violent conflicts between Israel and Palestinian militias. In particular, the possibility of accountability under international criminal law for actions by both sides to the conflict is potentially being triggered by the recent military incursion into Gaza by the Israeli military in December of 2008 to stop the firing of rockets into Israel with the consequent loss of civilian lives and property on both sides together with internal displacement of refugees from the conflict on both sides.

The ICC Statute makes several references to the word “State” in terms of jurisdiction of the ICC, but does not define it. Article 13 of the ICC Statute lists three situations where the Court may exercise jurisdiction. First by a referral by a State Party, second when the situation is referred to by the UN Security Council and thirdly when the Prosecutor has initiated an investigation, *proprio motu*, on the basis of information received and he is satisfied that there are reasonable grounds to proceed with an investigation. This *proprio motu* investigation can only proceed after authorization by the Pre-Trial Chamber.<sup>5</sup>

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<sup>5</sup> Article 13 and Article 15 of the ICC Statute.

However, Article 12 (3) of the ICC Statute states that “If the acceptance by 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...”

Under this provision, the Palestinian National Authority filed in the ICC a declaration accepting the jurisdiction of the ICC in the territory of Palestine. The Declaration filed under the letterhead of the Office of the Minister of Justice stated:<sup>6</sup>

*Declaration recognizing the Jurisdiction of the International Criminal Court*

In conformity with Article 12, paragraph 3 of the Statute of the International Criminal Court, the Government of Palestine hereby recognizes the jurisdiction of the Court for the purpose of identifying, prosecuting and judging the authors and accomplices of acts committed on the territory of Palestine since 1 July 2002.

As a consequence, the Government of Palestine will cooperate with the Court without delay or exception, in conformity with Chapter IX of the Statute.

This declaration, made for an indeterminate duration, will enter into force upon its signature.

Material supplementary to and supporting this declaration will be provided shortly in a separate communication.

Signed in The Hague, the Netherlands, 21 January 2009.

For the Government of Palestine

Minister of Justice s/Ali Khashan

It should be noted that the Declaration was not limited to any allegations of particular crimes in connection with the Gaza military incursion by Israel or indeed any crimes committed by militants firing rockets into Israel before or after the military actions in December of 2008. The jurisdiction of the ICC over all such crimes could date back to July 1, 2002 when the ICC became operative. The Declaration did not specify the territory of Palestine or the nature of the acts mentioned.

Finally, it should be noted that the Prosecutor could potentially initiate a *proprio motu*

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<sup>6</sup> [www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279777/20090122PalestinianDeclaration2.pdf](http://www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279777/20090122PalestinianDeclaration2.pdf)

investigation into the actions by the Palestinian militants and the Israeli militants in the Gaza Strip under Articles 13 and 15 of the ICC Statute. This could occur if there is evidence that Hamas militants that fired rockets into Israel potentially triggering allegations of war crimes and crimes against humanity were also Jordanian nationals or Israeli commanders who are alleged to have committed similar international crimes were also nationals of other state parties to the Rome Statute. However, as discussed above, such exercise of jurisdiction would have to be authorized by the Pre-Trial Chamber of the ICC. There is no guarantee that the Chamber would authorize such an investigation and finding such dual national perpetrators may be either impractical or narrow the scope of the investigation to an unacceptable level.

The fact that this *proprio motu* possibility exists should demonstrate the a finding that the Palestinian Declaration satisfies the jurisdictional threshold of the ICC under Article 12 (3) should not indicate any form of bias towards Israel or support for the appalling and demonstrably criminal actions of the Hamas militants that subjected innocent Israelis to deadly rocket attacks. Indeed a full investigation by the Prosecutor of the actions by both sides in the Gaza conflict could well result in a “road map” that defines what constitutes unacceptable actions of impunity on both sides in future conflicts and could well be a catalyst for peace through negotiations rather than through force of arms.

## **2) Historical Background**

Any historical discussion of the existence or not of the Palestinian State must begin with the creation of the State of Israel and the Arab State called Palestine by following critical historical events:

- A. The Mandate for Palestine
- B. The UN Partition Plan of 1947
- C. The Israeli Unilateral Proclamation of Independence of May 14, 1948
- D. The Palestinian Declaration of Independence of November 15, 1988 supported by UN General Assembly resolution 43/177.

While the later Oslo Accords are of relevance to the question of Palestinian Statehood, the above are important in establishing the genesis of both the Israeli and Palestinian State.

#### A. The Mandate for Palestine

The territory of Palestine from which both Israel and Palestine originated, was one of the territories detached from the Ottoman Empire and placed in 1922 under the League of Nations Mandate system with Great Britain appointed as the Mandatory Power. Article 22 of the Covenant of the League of Nations imposed upon the Mandatory Power the principle “that the well being and development of such peoples form a sacred trust of civilization”. In particular in what were termed Class A Mandates, which included Palestine, the Covenant provided for the provisional recognition of “their existence as independent nations... subject to the rendering of administrative advice and assistance by a Mandatory”.

The intention was always to nurture one or more independent nations from the British Mandate. However, Britain found itself unable to cope with the Arab and Jewish revolts, the illegal Jewish immigration and the rising violence in the Mandate territory. The British then notified the UN of their decision to terminate the Mandate not later than August 1, 1948.<sup>7</sup>

In an event crucial to both the founding of the State of Israel on May, 14, 1948, before the British Mandate ended, the then leader of the Jewish Community and the future Prime Minister David Ben-Gurion, declared unilaterally the independence of the State of Israel. It was very quickly recognized by the United States, the Soviet Union and other states, but not by any Arab states. What followed within a few days was the first Arab-Israeli war. The Israeli Army achieved a quick victory in the first 1948 war which has been termed the war of independence by Israel. After the British withdrawal, the Israeli army invaded the areas designated as part of the Arab State by the UN Partition Plan (discussed below) and subsequently occupied the territory, including the region encompassing Arab Jerusalem.

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<sup>7</sup> For a detailed history of this troubled part of the British Mandate see Bethell Nicholas, *The Palestine Triangle : the Struggle Between the British, the Jews and the Arabs, 1935–48*, London : Deutsch, 1979

## B. The UN Partition Plan

Under General Assembly Resolution 181 (II) Future Government of Palestine on November 29, 1947, the UN adopted a plan that would establish two provisional states, one Jewish and the other Arab. Jerusalem would be established as a separate special international regime, a *corpus separatum*, to be administered by the UN. There would also be a transitional plan that would provide for the gradual withdrawal of British military forces, followed by the termination of the British Mandate by August 1, 1948. The UN would then declare the full independence of the new Jewish and Arab states by October 1, 1948. The importance of the UN Partition Plan as regards the possible statehood of Palestine is that GA Resolution 181 is mentioned in the Israeli Declaration of Independence as recognizing the right of the Jewish People to establish a state. It could therefore be argued that the Palestinian State utilizing its own declaration of independence could also draw its legitimacy from the same General Assembly resolution.

## C. The Israeli Unilateral Proclamation of Independence of May 14, 1948

On May 14<sup>th</sup>, 1948, the same day as the British Mandate expired, the State of Israel unilaterally declared its formal establishment as an independent state. Minutes after the Israeli Declaration of Independence, the US recognized the State of Israel and was followed by several other nations including the Soviet Union on May 17, 1948. The Arab League refused to recognize the new State and instead announced the establishment of a civil administration throughout the Mandate territory. This government was subsequently recognized by Egypt, Iraq, Syria, Lebanon and Saudi Arabia.

The 1948 Arab-Israeli war fought against Israel by Egypt, Iraq, Lebanon and Syria was ended by a quick victory by Israel and a signing of an armistice agreement with Syria on July 24<sup>th</sup>, 1949. The armistice demarcation line between Israeli and Arab forces was fixed by a general armistice agreement of 3 April 1949 between Israel and Jordan. A victorious Israel had not only retained its status as a new state under its Declaration of Independence, but had also increased its territory by almost 50%.

It should be noted that the Israeli Declaration of Independence is worded, in the most important parts of the document, in the language of self-determination that could equally apply to the right of the Palestinian people to their own State:<sup>8</sup>

*This right is the natural right of the Jewish people to be masters of their own fate, like all other nations, in their own sovereign State. Thus members and representatives of the Jews of Palestine and of the Zionist movement upon the end of the British Mandate, by virtue of "natural and historic right" and based on the United Nations resolution... Hereby declare the establishment of a Jewish state in the land of Israel to be known as the State of Israel. ...Israel will be open for Jewish immigration and for the "Ingathering of the Exiles"; it will foster the development of the country for the benefit of all its inhabitants; it will be based on freedom, justice and peace as envisaged by the prophets of Israel; it will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex; it will guarantee freedom of religion, conscience, language, education and culture; it will safeguard the Holy Places of all religions; and it will be faithful to the principles of the Charter of the United Nations.*

D. The Palestinian Declaration of Independence of November 15, 1988 supported by UN General Assembly resolution 43/177.

On November 15, 1988, the Palestine National Council meeting in Algiers proclaimed the existence of the new independent state of Palestine. Like the Israeli unilateral declaration, the Arab declaration referred to the GA Resolution 181 as the legitimate authority for the establishment of the State of Palestine.<sup>9</sup> Prior to that date, King Hussein of Jordan announced on July 31, 1988, Jordan was terminating all forms of administrative and legal ties with what was terms the West Bank, thereby demarcating the possible territorial boundaries of the declared Palestinian State. Following the unilateral declaration of a Palestinian State, the UN General Assembly in G.A. Res. 43/177 in 1949, adopted a resolution which “acknowledge the proclamation of the State of Palestine by the Palestinian National Council on 15 November” and pronounced that "the designation 'Palestine' should be used in place of the designation 'Palestine Liberation Organization' in the United Nations

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<sup>8</sup> For the full text see the website of the Israeli Ministry of Foreign Affairs at the following url: <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Declaration+of+Establishment+of+State+of+Israel.htm> ; see also See Harris, J. (1998) [The Israeli Declaration of Independence](#) The Journal of the Society for Textual Reasoning, Vol. 7.

<sup>9</sup> For the text of the Palestinian Declaration see Palestine National Council, Declaration of Independence, Nov. 15, 1988, U.N. Doc. A/43/827, S/20278, Annex III, Nov. 18, 1988, *reprinted in* 27 I.L.M. 1668 (1988) and the Palestinian Yearbook of International Law, 1987/88 at p. 30.



system."<sup>10</sup> Only the U.S. and Israel voted against G.A. Res. 43/177, with the majority of the world's states, numbering 104, voting in favour with 44 abstentions.

It could be argued that the immediate recognition of the unilateral declaration by such large numbers of states must be taken into account in determining the present statehood of Palestine as a matter of customary international law evidencing both state practice and *opinion juris*. American jurist, Professor John Quigley, makes the following case for recognition of the State of Palestine based on the General Assembly resolution:<sup>11</sup>

*That strong vote indicates that Palestine was regarded as a state. Had there been opposition, it would have been expressed. One may contrast in this regard the U.N. reaction in 1983 to a declaration of statehood for a Turkish Republic of Northern Cyprus. The international community found this declaration invalid, on the grounds that Turkey had occupied Cypriot territory militarily and that the putative state was an infringement on Cypriot sovereignty. The U.N. Security Council pronounced the independence declaration illegal: "Concerned at the declaration by the Turkish Cypriot authorities issued on 15 November 1983 which purports to create an independent State in northern Cyprus, . . . [c]onsidering . . . that the attempt to create a 'Turkish Republic of Northern Cyprus' is invalid," the Security Council said that it "[c]onsiders the declaration referred to above as legally invalid and calls for its withdrawal; . . ." (S.C. Resolution 541 (1984).*

*Had the international community viewed the 1988 Palestine declaration as invalid, it would have said so loudly and clearly, given the volatility of the situation in the Middle East. It did not.*

Following the 1988 Declaration and the General Assembly Resolution endorsing the Declaration of Independence, Palestine was in a short period of time recognized by eighty-nine states far more than the handful that recognized the State of Israel in the period after its Declaration of Independence. The fact that many, if not most, that recognized Palestinian Statehood were not from the western world can not invalidate the legal consequences of such recognition. In addition, while many European states

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<sup>10</sup> G.A. Res. 43/177, U.N. GAOR, 43d Sess., Supp. (No. 49), at 62, U.N. Doc. A/43/49 (1989); Paul Lewis, *U.N. ends its session in Geneva, approving 2 Mideast resolutions*, N.Y. Times, Dec. 16, 1988, at A15.

<sup>11</sup> John Quigley, "THE PALESTINE DECLARATION TO THE INTERNATIONAL CRIMINAL COURT: THE STATEHOOD ISSUE" The Internet Journal of Rutgers School of Law, . Volume 35 *Legal Implications of Operation Cast Lead* Spring 2009 at the following url: <http://www.lawrecord.com/files/35-rutgers-l-rec-1.pdf>

were withholding recognition out of caution, they did not necessarily contest the validity of Palestinian Statehood. Not surprisingly Israel claimed that the declaration had no meaning in reality as the declared state had no territory, no borders and with Jerusalem as the capital which was also the capital of the Jewish state.<sup>12</sup> Like Israel, the arguments of the U.S. and other western states that opposed Palestinian Statehood were that the Palestinian State did not satisfy the traditional criteria for statehood under customary international law rules such as those in the Montevideo Convention. As will be discussed below even if the Montevideo Convention criteria are still authoritative criteria in customary international law, there are contrary legal arguments that the Palestinian State does fulfill these traditional criteria under the Montevideo Convention. It should however, be kept in mind that such criteria can not be mechanically applied to states whose full sovereignty is suppressed by belligerent occupation or are under some form of protected status or under international administration.

### **3) Palestinian Statehood and Membership in the United Nations**

If the 1988 Declaration of Independence by the Palestinian National Council had been followed by admission to membership in the United Nations, given the fact that presently the majority of the world's states have recognized the Palestinian State (including an increasing number of major world powers such as China, India, Russia and virtually all the Arab and Islamic states in the world representing the vast majority of the world's population), the question of Palestinian statehood would have been without question even for a general determination of Palestine as a state under international law. So the question that has to be asked is why have there been persistent obstacles to Palestinian membership in the UN and its agencies?

Israel's admittance to the UN and the occurred at a time when the emerging right of self-determination was not as yet a recognized principle of international law and had not further evolved into a fundamental principle of international human rights law. This was even though

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<sup>12</sup> Letter from the Permanent Representative of Israel to the Director-General of the WHO, 21<sup>st</sup> April 1989, reproduced in WHO Doc. A42/INF.Doc./3

the Israeli Declaration of Independence implicitly based its Declaration on the right of the Jewish people to self-determine within a Jewish homeland. At that time there was no pressure at the UN or elsewhere to put the question of Arab or Palestinian self-determination at the UN at the same time as the acceptance of Israel's Declaration of Independence.

The principle of self-determination evolved with the decolonization process in the UN and elsewhere after the Second World War. It was fully developed as a principle of international law and a universal human right by the time of the 1988 Palestinian Declaration of Independence.<sup>13</sup> Indeed by that time, the UN's response to the independence of the **Congo**<sup>14</sup> and the unilateral declaration of **Rhodesia**<sup>15</sup> by the white minority indicated that the criteria of self-determination legitimacy was more important than an effective government, one of the criteria used by Israel and the United States to argue against Palestinian statehood and membership in the UN and its various agencies. More recently the recognition of Bosnia in the middle of an internal civil war with a government that was inherently far from effective is also a testament that the right of self-determination is a crucial factor in the accession to statehood in international law. **However, it could be argued that the emergence of the right of the Palestinian people to self-determination did not by itself give rise to Palestinian Statehood, but enhanced that status as it existed from its beginnings in the Mandate of Palestine, the Partition Plan and subsequently the 1988 Declaration of Independence as affirmed by the General Assembly Resolution 43/177.**

Indeed the U.S. utilized a peculiar interpretation of the General Assembly Resolution 43/177 of 1949 to oppose Palestinian membership in the UN. The Resolution in addition to affirming the need of the Palestinian people to exercise their sovereignty over their territory occupied since 1967 decided that as of 15 December, 1988, the designation "Palestine" should be used in the place of the designation "Palestine Liberation Organization" in the United Nations

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<sup>13</sup> See the opinion of the International Court of Justice in its *Namibia (Continued Presence of South Africa in Namibia)*, ICJ Adv. Op. 1971, 98 and the *Advisory Opinion on Western Sahara (Morocco v. Spain)* ICJ Adv. Op. 1975 12.

<sup>14</sup> See James Crawford, *supra* note 1 at pgs. 42-43

<sup>15</sup> The UN Security Council asserted that the minority white government lacked legitimacy as the self-determination of the majority of the people of Southern Rhodesia was being denied, Security Council Resolution, 217 (1965).

System. The U.S. declared that by this resolution the General Assembly had expressly withheld the attribution of statehood from Palestine since it was specified that the change of the designation of the PLO to “Palestine” was without prejudice to the observer status and functions of the PLO within the UN system. When a draft resolution was proposed in the General Assembly to make it clear that the intent of the Assembly was to have the designation Palestine construed as the State of Palestine, without prejudice to the acquired rights of the PLO, the resolution was not voted on, following a threat by the U.S. to withhold its assessed contribution to the budget of the UN.<sup>16</sup> The U.S. also threatened a similar withholding of dues to the W.H.O. if Palestine was admitted as a member which resulted in the agency postponing action on the application for membership without declaring on Palestinian statehood.<sup>17</sup> The Swiss government may well have faced the same pressure in determining against Palestinian accession to the Geneva Conventions of 1949 due to the uncertainty in the international community as to the existence or not of Palestinian Statehood and did not itself determine whether Palestinian Statehood existed.<sup>18</sup>

There is evidence that the UN and the majority of the members of the UN treated Palestine as a State. In 1974 the U.N. General Assembly confirmed the self-determination rights of the Palestinian people.<sup>19</sup> **One jurist asserts that because the UN Security Council let it participate routinely in Security Council sessions when relevant issues were on its agenda, it was regarded as a State because under Security Council rules, only a "state" is entitled to participate.**<sup>20</sup> These acknowledgments of the legal personality of Palestine suggest that it is critical to have a more focused analysis of what constitutes a “state” in situations of belligerent occupation and for the purposes of such states exercising certain rights and duties.

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<sup>16</sup> V. Gowlland-Debbas, “Collective Responses to the Unilateral Declaration of Independence of Southern Rhodesia and Palestine: An Application of the Legitimizing Function of the United Nations” *The British Yearbook of International Law*, 1990, pp.135-153 at pg. 148.

<sup>17</sup> John Quigley, *supra*, note 11.

<sup>18</sup> John Quigley, *supra* note 11.

<sup>19</sup> G.A. Res. 3236, Nov. 22, 1974, U.N. GAOR, 29th Sess., Supp. (No. 31) at 4, U.N. Doc. A/9631 (1974).

<sup>20</sup> John Quigley, *supra* note 11; see also Security Council, *Provisional Rules of Procedure*, Rule 14, U.N. Doc. S/96/Rev.4 (1946).

It could well be argued that given the overwhelming geopolitical grounds as opposed to grounds based on international law principles, from the U.S. and its allies to Palestinian membership in the UN, the fact that it does not have full membership in the UN or its agencies is not substantially due to any determination of the whether Palestine qualifies as a State.<sup>21</sup>

#### **4) A Contrary View of the Application of the Traditional Criteria for Statehood as established by the Montevideo Convention.**

Many leading international law jurists assert that the Montevideo Convention of 1933 is generally regarded as representative of customary international law and referenced as such in early International Court of Justice Decisions<sup>22</sup>, as regards the modern requirements for statehood.<sup>23</sup>

However, there is insufficient legal analysis of this often stated thesis when one considers that the Convention was only binding on 19 Latin American state parties. To fulfill the requirements of customary international law, the Convention had to be followed, not just by state practice, but also followed out of a sense of legal obligation, the requirement of *opinion juris*.

As discussed extensively elsewhere, in brief, the Convention requires the following minimum standards. First, it must have a permanent population, which a settled one rather than a transitory population. Second, it must have a defined territory whose size is not specified in the Convention, but probably some kind of *de minimis* territorial size is required, keeping in mind some of the tiniest territories, like Luxemburg, qualifies. Third, it must have an established government that has effective control, which need not be democratic. Finally, it must have capacity to enter into diplomatic relations.

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<sup>21</sup> John Quigley, *supra*, note 11.

<sup>22</sup> See *Western Sahara Advisory Opinion*, I.C. J. Reports 1975; *North Sea Continental Shelf Case* I.C.J. Reports, 1969.

<sup>23</sup> See James Crawford, *supra*, note 1; C. Warbrick, "State and Recognition in International Law", in *International Law*, M.D. Evans (ed.) Oxford, OUP (2003) at p. 221.

The problem with regarding the Montevideo Convention as applicable to any new claims of statehood is that it arose out of a meeting of independent Latin American States in 1933 that had emerged out of colonial status and eager to demonstrate their full personality to the world and counter any last vestige of claims by their former colonial masters.

As such, in practice the so called customary rules of the Montevideo Convention may not have as authoritative an application to states emerging out of the break up of existing non-colonial multi-ethnic states, such as the former Yugoslavia or to States that were still struggling to break free from long standing colonial ties, such as the Congo, or from military occupation, such as East Timor and the Palestinian State. That authoritative application becomes crucial for the *opinion juris* requirement of customary international law. It is suggested for that reason, the primarily western doctrinal view of the applicability of the Montevideo Convention as customary international law has not been evidenced in the recognition by the international community of the Congo, Bosnia, Kosovo and East Timor where the vital minimum conditions of an effective government in control of its territory was far from clear. The cases of Bosnia and Kosovo are examined below.

These more modern examples of state practice demonstrate perhaps the fact that the Montevideo Convention needs to be updated in the form of a more multilateral convention or treaty that takes into account the criteria for recognition of the growing number of secessionist movements around the world and of particular importance to the question of Palestinian Statehood, the effect of military occupation on the international legal personality of a pre-existing State. The Montevideo Convention application to these types of potentially new States is fraught with difficulty and perhaps no longer representative of customary international law.

Nevertheless, there are some who argue that even if the Montevideo Convention's traditional criteria for statehood are still valid customary international law, Palestine does fulfill the conditions, despite the views of some western jurists.<sup>24</sup>

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<sup>24</sup> See for example, Francis A. Boyle, *The Creation of the State of Palestine* 1 European Journal of International Law, (1990) 301 at pgs. 302-303.

First, there can be little argument that the Palestinian population exists. They were the original Arab inhabitants of the land designated as the West Bank and Gaza. They are a fixed and distinguishable population with identified ethnicity, culture and traditions.<sup>25</sup> The satisfaction of these criteria can not be summarily dismissed by the assertion that the government of this identified people can not exercise effective and independent control referring to the limited powers of the Palestinian National Authority in the Palestinian territory under military occupation by Israel. This would be tantamount to saying that any existing State that is militarily occupied ceases to be a State. Under that logic, Iraq was not a State when under American lead coalition occupation, neither was Kuwait under military occupation by Saddam Hussein.

Second, as regards the requirement for a defined territory, it is universally accepted that it does not have to be fixed and determinate or of a particular size.<sup>26</sup> The Palestinian Declaration of Independence outlined the territory as essentially the West Bank of the Jordan River and the Gaza Strip with East Jerusalem being the capital. Jordan had relinquished any title to the former in 1988 and Egypt the same as regards the Gaza strip in 1962. Despite the recognition of this territory by the majority of the world's states as the territory of Palestine, it is asserted by one writer that the Palestinian claim to statehood is quite difficult to sustain in light of the fact that the actual territory is so indeterminate and so fragmented, in that the mentioned portions of the territory are not contiguous, that it cannot satisfy the requirement of "defined territory".<sup>27</sup>

First this is hardly a tenable position, given that fragmentation has arisen substantially due to the expansion of illegal Jewish settlements and the security wall that became the subject of an International Court of Justice (ICJ) advisory opinion.<sup>28</sup> It should be noted that in the advisory

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<sup>25</sup> Baruch Kimmerling, & Joel S. Migdal *The Palestinian People: A History*, Harvard University Press (2003).

<sup>26</sup> James Crawford, *The criteria for statehood in international law* Brit Yrbk. Int. Law, 48 (1976-7).

<sup>27</sup> James Crawford, *supra* note 1.

<sup>28</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Summary of the Advisory Opinion of the ICJ, 9 July 2004 located at the following url: <http://www.icj-cij.org/docket/files/131/1677.pdf>

opinion of the ICJ, the Court confirmed that all the territory within the 1967 borders of the Arab State under the Mandate of Palestine remained belligerent occupation by Israel and could not be claimed by it in the following words:<sup>29</sup>

*In order to indicate the legal consequences of the construction of the wall in the Occupied Palestinian Territory, the Court has first to determine whether or not the construction of that wall breaches international law. To this end, it first makes a brief historical analysis of the status of the territory concerned since the time that Palestine, having been part of the Ottoman Empire, was, at the end of the First World War, the subject of a class "A" mandate entrusted by the League of Nations to Great Britain. In the course of this analysis, the Court mentions the hostilities of 1948-1949, and the armistice demarcation line between Israeli and Arab forces fixed by a general armistice agreement of 3 April 1949 between Israel and Jordan, referred to as the "Green Line". At the close of its analysis, the Court notes that the territories situated between the Green Line and the former eastern boundary of Palestine under the Mandate were occupied by Israel in 1967 during the armed conflict between Israel and Jordan. Under customary international law, the Court observes, these were therefore occupied territories in which Israel had the status of occupying Power. Subsequent events in these territories have done nothing to alter this situation. The Court concludes that all these territories (including East Jerusalem) remain occupied territories and that Israel has continued to have the status of occupying Power.*

The fact that Gaza is separated from the West Bank is as relevant as the fact that Alaska is separated from the continental United States. Second, it is only when (or if) there is a settlement of any "Two-State" negotiations between Israel and Palestine that Israel's own borders will be fixed or determinate. No state or western jurists would deny that Israel is a State. As has been convincingly stated elsewhere, Israel is in control of Palestinian territory as a belligerent occupant, but does not claim sovereignty.<sup>30</sup> If there is no Palestinian sovereignty over the West Bank and Gaza then we face the absurd conclusion that nobody exercises permanent sovereignty over the territory and people in them. The fact that Palestine retains sovereignty and Israel is the occupying power is confirmed by the ICJ in the advisory opinion on the security wall quoted above.

The most contentious condition that western jurists claim that Palestine fails to satisfy the Montevideo Convention conditions is that of an effective government authority or control. It has been argued elsewhere because the Oslo Accords and the Interim Agreement flowing from it gave only temporal and limited powers, much of which had to be exercised along

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<sup>29</sup> Ibid.

<sup>30</sup> John Quigley, *supra*, note 11.



with Israeli approval such as jurisdiction over internal security.. Further arguments along the same line assert that critical elements of sovereign governmental authority such as external security and border security were never transferred to the Palestinian Authority and remained under the authority of Israel. As regards the withdrawal of Israeli troops in 2005 from the Gaza Strip, the de facto larger authority of the Hamas government and the remaining Palestinian National Authority functions, Israel still claims to exercise effective control over the borders of the Strip. For these reasons, Israel would claim that the Palestinian National Authority does not constitute an independent government in a wide variety of jurisdictions and so calls into question whether Palestine can be regarded as a state even with limited international legal personality.

What this analysis ignores is that this Montevideo Convention criterion of an effective and independent government can not be mechanically applied to a situation of belligerent occupation. It is almost certain that the pre-existing government would, under such an occupation, “lack the capacity to function independently in a wide variety of governmental spheres”. To conclude otherwise would mean that Iraq would not qualify as a State while under American occupation and neither would Bosnia, Kosovo or East Timor which also had governments that lacked the capacity to function independently in a wide variety of governmental spheres and did not control its borders or much of its territory because of ongoing civil conflict.

Indeed, it is significant that the transitional Iraqi government of Eyad Allawi had decided to join the Rome Statute of the ICC before pressure by the Bush Administration in the U.S. forced it to change its mind. There was much criticism of this change of mind by European states and international and Iraqi civil society groups.<sup>31</sup> There was no opposition, even from the U.S., to the Iraqi accession to the ICC Statute on the basis that Iraq was not a state and that the Allawi interim government under American occupation of Iraq was not an effective or independent government of the Iraqi people and territory. Indeed it seems from press

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<sup>31</sup> See the report by Haider Rizvi titled “Groups Urge Iraq to Join ICC” Inter Press Service at <http://ipsnews.net/news.asp?idnews=29801>

reports that European nations were happy to see the possible accession to the ICC Statute by the Allawi government.<sup>32</sup>

Instead what has to be examined is whether, despite any of the agreements with the occupying power or UN/International supervision during civil conflicts that limits general governmental powers in a wide variety of spheres, there are legitimate representatives of the people under occupation who are asserting the sovereignty of their people under the international law of the right to self-determination. Then the focus should be on whether these representatives are rightly exercising their claim to represent the sovereign rights of the people under an asserted international legal personality and that such legitimate representation will seek an independent and full capacity to govern once the occupation ends.

This is precisely why the European Community and the United States, on April 2, 1992, recognized Bosnia as a State and the government of Alija Izetbegovic as the legitimate representative of the Bosnian population even though a bloody civil war was raging which meant that it had little control over the full range of governmental capacity and its borders. At the time of the recognition of Bosnia by the majority of western states, the new State's capital was in effect under siege by the Bosnian Serb militias and the Yugoslav Army with massive casualties, injuries and damage inflicted on the government and the civilian population. It should also be noted that even after the war ended with the Dayton Peace Accords in November of 1995, the government of Izetbegović who had become a Member of the tripartite Presidency of Bosnia Herzegovina had substantially less power than the High Representative appointed by the international community. Yet few contested that Bosnia was a state with an effective government.<sup>33</sup> Few states, with the exception of Serbia and Russia perhaps, would have contested the right of the new Bosnian state to become a member of the ICC or issue a declaration under Article 12(3) of the ICC Statute if the Court had existed at that time.

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<sup>32</sup> Ibid.

<sup>33</sup> See Steven L. Burg, Paul S. Shoup, *The war in Bosnia-Herzegovina Ethnic Conflict and International Intervention*, Armonk : Sharpe, 1997.

Likewise, in the aftermath of a civil war with Serbia and military intervention by NATO in the 1990s, Kosovo unilaterally declared independence from Serbia on February 17, 2008 by a vote of the Assembly of Kosovo with 109 of its members in favour and the 11 Serb members boycotting the vote. By April 2009, 57 of the 192 members of the UN have recognized the Republic of Kosovo as an independent State, including a majority of EU member states (22 out of 27) and three of the UN Security Council, namely the United States, the United Kingdom and France. Canada has also recognized Kosovo as a state despite its own secessionist movement in Quebec.

Other major countries that have their own secessionist movements, along with their allies, have refused to recognize Kosovo Statehood, in part for that reason. This includes China, Spain, Indonesia and Russia who regards the unilateral declaration as illegal. As regards the countries bordering Kosovo, only Serbia has refused to recognize Kosovo Statehood.

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While the UN has so far remained neutral because of Russian and Chinese positions, it is not without significance that the UN has cooperated with the move from a UN administered regime in Kosovo under UNMIK (created under a Security Council Resolution<sup>35</sup> that placed Kosovo under UN Administration in 1999) to the establishment of the EU administered EULEX mission in Kosovo which will still have significant government capacity over the independent Kosovo State, including in the monitoring and mentoring of policing, justice and customs areas. In a clear sign that the government of the Kosovo State will not have complete and full government capacity, the EU has announced that their mission is composed of three main areas, namely a “rule of law” mission, an EU special representative that will head the International Civilian Office and a European Commission unit leading economic development and reform.<sup>36</sup>

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<sup>34</sup> For the discussion of the divisions in the international community over the recognition of Kosovo see e.g. <http://news.bbc.co.uk/2/hi/europe/7251359.stm>

<sup>35</sup> UN Security Council Resolution 1244 (1999)

<sup>36</sup> See the Reuters Report of February 16, 2008, on the EU announcement at <http://www.reuters.com/article/topNews/idUSL163410020080216>

It should be also noted that the UN General Assembly has requested an advisory opinion from the International Court of Justice on October 8, 2008 on the legality of the Kosovo Declaration of Independence on request by Serbia. As noted elsewhere, the General Assembly seemed divided on the request with over half agreeing (77 states) and half abstaining (74 States) and 6 states opposed. The Court accepted jurisdiction on October 21, 2008 and has been receiving submission from presently 35 member states of the UN. These submissions either in support or in opposition to Kosovo Statehood are remaining confidential at this early stage of the proceedings.

There is little doubt that the United States along with a majority of the members of the UN Security Council and most EU members have rushed to recognize Kosovo because of the fact that after 9 years of UN Administration, almost 90% of the population supported the creation of a Kosovo Statehood as a bulwark against any claims to Kosovo by Serbia and to maintain peace and stability in a hoped for multi-ethnic new state.<sup>37</sup>

However, such recognition does put into stark contrast, the opposition by the United States and the caution by most EU countries to recognize Palestinian Statehood, for general purposes as a state in international law, on the same grounds. It is almost certain that a similar percentage of Palestinians, if not higher, would want to have similar U.S. and European recognition of their State. This recognition of the Palestinian right to self-determination is also the basis of over half the world's states recognizing the Palestinian State and is the reason why such a majority recognition can not be lightly dismissed.

This situation again reinforces the view that U.S. opposition and EU member states caution on Palestinian Statehood is based more on geopolitical grounds than on sound international law principles whether on the basis of the traditional criteria of the Montevideo Convention or on the more modern constitutive theory of the recognition of states which is discussed below.

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<sup>37</sup> See the views of the U.S. Government on reasons why Kosovo was recognized as an independent new state at the following url. It should be noted that the U.S. insisted such recognition should not be regarded as a precedent for other claims of statehood:  
<http://www.america.gov/st/peacesec-english/2008/February/20080218144244dmslahrellek0.9832117.html>

The question that would still remain is whether under belligerent occupation of the Palestinian territory and people, there is an effective and independent government for statehood to be accorded Palestine and who or what would constitute that government and what is its legitimacy?

As stated above, Israel would claim that under the Oslo Accords the Interim Palestinian National Authority was empowered with restricted governmental capacities and in important areas of responsibility, it was subject to the overriding residual authority of Israel. This opinion therefore asserts that it is hard to conclude that the Palestinian National Authority constitutes an independent government, since it lacks the capacity to function independently in a wide variety of government spheres.

As has been discussed, this conclusion fails to take into account whether emerging customary international law requires a different approach to governments under belligerent occupation and civil war, based on the examples of Bosnia, Kosovo, East Timor and Iraq. This approach may not require a substantially independent government that can function independently in a variety of government spheres for statehood or at least international legal personality to exist.

A bigger objection to such a position is the failure to properly examine the nature of the Oslo Accords and whether the framework behind the Accords prevents it from being such a strong indication against Palestinian Statehood.

The first issue to be established is whether the Oslo Accords gives any form of sovereignty to Israel over Palestinian Territory. It does not. Israel is in control of the West Bank and East Jerusalem as a belligerent occupant. It has withdrawn militarily from the territory of Gaza, but the status of that part of the Palestinian territory remains uncertain until there is a negotiated settlement between Israel and the Palestinians. Israel has not claimed sovereignty over the occupied territories of Palestine and can not contemplate such a claim as a belligerent occupier<sup>38</sup> When the occupation of a previously sovereign territory

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<sup>38</sup> James Crawford, *The Creation of International States*, (2006) at pg. 73.

occurs, "[t]he legal (*de jure*) sovereignty still remains vested where it was before the territory was occupied, although obviously the legal sovereign is unable to exercise his ruling powers in the occupied territory."<sup>39</sup>

The occupier exercises a temporary right only of administration on a trustee basis.<sup>40</sup> Of necessity, this will mean that the previous or existing representative body of the occupied people will usually NOT have full independent and effective governmental capacity, but that does NOT undermine its right to represent the sovereignty of the occupied territory and its people and the ability of its legitimate representatives to have an international legal personality that bestows on it certain rights and duties. For this fundamental reason, the government of Iraq while under American occupation would not be contested as legitimately representing the State at the UN or elsewhere even though its governmental powers were severely curtailed.

The Palestinian Liberation Organization (PLO) that established the Palestinian National Authority was neither a state nor an international organization. It derives its legal status from being the legitimate representative of the Palestinian people since 1993 and reflects the right of self-determination of the Palestinian people. Its position as a legitimate representative of a sovereign people was confirmed in the negotiations with Israel under the Oslo Accords regarding the permanent status of the West Bank and Gaza. The legitimacy of the PLO as the representative of the Palestinian people was also endorsed by the Security Council in Resolutions 242<sup>41</sup> and 338<sup>42</sup> which called for the peaceful resolution of the Arab-Israeli conflict through territorial compromise and negotiations for

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<sup>39</sup> Morris Greenspan, *The Modern Law of Land Warfare* (1959) at pg. 217 cited in John Quigley, unpublished article submitted to OTP.

<sup>40</sup> Gerhard von Glahn, *The Occupation of Enemy Territory* (1951) at pg. 31 also cited in the John Quigley article submitted to the OTP.

<sup>41</sup> The full text of Security Council Resolution 242 of November 22, 1967 can be found at the following url: <http://domino.un.org/unispal.nsf/db942872b9eae454852560f6005a76fb/9f5f09a80bb6878b0525672300565063!OpenDocument>

<sup>42</sup> The full text of Security Council Resolution 338 of October 22, 1973 can be found at the following url: <http://domino.un.org/unispal.nsf/dcb71e2bf9f2dca585256cef0073ed5d/7fb7c26fcbe80a31852560c50065f878!OpenDocument>

a just and durable peace. It should be also noted that the Resolution 242 also called for the withdrawal of Israeli armed forces from the territories occupied in the 1967 war, the termination of the state of belligerency, achieving a just settlement of the refugee problem and mutual acknowledgment of the sovereignty, territorial integrity and political independence of every State in the area, and their right to live in peace within secure and recognized boundaries free from threats or acts of force.

The fact that the Oslo Accords drew their legitimacy from Security Council Resolutions 242 and 338 could indicate that the Accords were to be interpreted and possibly governed by international law principles. If this interpretation is accepted, the limited transfer of powers to the Palestinian National Authority could be regarded as an internal distribution of powers between two existing states, one under the belligerent occupation by the other, rather than any permanent transfer of sovereign governmental powers and capacities or the termination of international legal personality under international law.<sup>43</sup>

This interpretation is reinforced by the fact that the PLO and subsequently the Palestinian National Authority under the Basic Law of Palestine are widely recognized as having sufficient international legal personality to have negotiating and treaty-making capacity with states and international organizations, for example with various agencies of the UN and the European Union in different areas of economic and social development.<sup>44</sup> Indeed the negotiations with Israel leading to the Oslo Accords under the auspices of Security Council Resolutions 242 and 338, also imply an international recognition of the PLO's and the later Palestinian National Authority's international legal personality by Israel itself and vice versa the recognition of Israel by the PLO and the Palestinian National Authority<sup>45</sup> (and impliedly the U.S. through its participation in the Camp David Accord).

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<sup>43</sup> See Paul J.I.M. deWaart, *Self-Rule under Oslo II: The State of Palestine within a Stone's Throw*, 8 *Palestinian Yearbook of International Law*, 35, (1994-1995) at pg. 41

<sup>44</sup> See also Kassim, *The Palestine Liberation Organization's claim to Status: A Juridical Analysis Under International Law*, 9 *Denver Journal of International Law and Policy*, 1 at 18-26 (1980).

<sup>45</sup> Paul J.I.M. de Waart, *supra*, note 43 at pg. 41.

The Oslo Accords can not be taken as the basis on which to judge whether there is an effective and independent government for Palestine to qualify for as a state. It should be taken as a method of resolving a belligerent occupation under Resolution 242 and 338 of the Security Council and agreeing on the division of powers and territorial jurisdictions within the occupied territory between two existing states while the belligerent occupation continues.<sup>46</sup>

The Oslo Accords should also 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 under a framework that has expired, but was hoped to decide the division of territory and end the occupation.

The limited powers of the Palestinian National Authority under the Oslo Accords should not be relevant to the determination of whether Palestine qualifies as a state for the purposes of Article 12(3) of the ICC Statute. The Accords should be regarded as primarily dealing with the principles between two international actors regarding belligerent occupation and negotiations to end it as mandated by Security Council Resolutions 242 and 338.

Likewise, any arguments about the limited powers of the PLO or the Palestinian National Authority under the Palestinian Basic Law whose provisions limited full sovereign powers to the PNA due to the Oslo Accords, should also be viewed in its historical, social and legal contexts.

It can be argued that the Basic Law must be placed in the context of the international process of the Oslo Accords mandated by Resolution 242 and 338 of the UN Security Council. Arising out of a situation of belligerent occupation, it is a legal framework created by the Israeli occupation, it was highly contested, even by President Arafat who refused initially to sign it, and its legitimacy was compromised. Some have asserted that

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<sup>46</sup> Ibid.



the Basic Law is similar to legal frameworks arising out of colonial impositions of legal order imposed on subjugated peoples.<sup>47</sup> This is reinforced by the fact that the Oslo Accords limited the Basic Law to personal jurisdiction rather than territorial, as it applies only to Palestinians and not to Israeli citizens, soldiers, settlers or even corporations.

Moreover, the Palestinian Basic Law was designed to function as a temporary constitution for the Palestinian National Authority until the ending of the belligerent occupation by Israel and the establishment of an independent state and a permanent constitution for Palestine can be achieved. The Basic Law was passed by the Palestinian Legislative Council in 1997 and ratified by President Yasser Arafat in 2002. Despite the limitations of the powers of the Palestinian authorities under the Basic law, there have been successive efforts to demonstrate that under the Basic Law, the Palestinian authorities are developing a sui generis legal order that are exhibiting state-like features in the limited areas of self-government it delineates. For example, the Basic Law has subsequently been amended twice; in 2003 the political system was changed to introduce the Office of the Prime Minister. In 2005 it was amended to conform to the new Election Law. The 2003 reform was comprehensive and affected the whole nature of the Palestinian political and legal system, including security sector reforms.<sup>48</sup>

It should be noted that the Hamas government in Gaza which had opposed the Basic Law provisions before the 2006 elections, changed its position and now claims legitimacy under the provisions of the Basic Law.<sup>49</sup>

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<sup>47</sup> Strawson, John. "The Basic Law and Palestinian State-Building" *Paper presented at the annual meeting of the The Law and Society Association*, Jul 06, 2006. <[http://www.allacademic.com/meta/p115001\\_index.html](http://www.allacademic.com/meta/p115001_index.html)>

<sup>48</sup> For analysis of the Palestinian Basic Law see Barry Rubin, *the Transformation of Palestinian Politics, From Revolution to State Building*, Harvard University Press, 2001.

<sup>49</sup> Unpublished paper by "Professor Nathan Brown, George Washington University "Can Constitutionalism help Palestine" Legal Encounter Institute of Law, Birzeit University Thursday, 17 July 2008

If the stated opinion that the Palestinian National Authority is not a legitimate effective and independent government for the purposes of the Montevideo Convention is accepted because of the provisions of the Oslo Accords and the Basic Law, and can not exert any other international legal capacities such as the ability to submit a Declaration under Article 12(3) of the ICC Statute, it is tantamount to arriving at the following conclusion; that the belligerent occupation of the Palestinian territory as modified by the Oslo Accords has ended the sovereignty of the Palestinian people and territory. This would be a denial of the sovereignty of the Palestinian people which was confirmed under the Mandate of Palestine, the Partition Plan of 1947, the Palestinian Declaration of Independence, the right of the self-determination of the Palestinian people, the recognition by more than half the world's states of the Palestinian State and finally the declared sovereignty and political independence of every state in the area under Security Council Resolutions 242 and 338.

In effect, such a position must lead to a conclusion that Israel exercises complete sovereignty over Palestinian territory with the Palestinian National Authority being no more than a figure head of Israel as an occupying power.<sup>50</sup> This is clearly not the case under any of the above mentioned sources of international law and state practice and was never the intention of either Israel or the PLO in entering negotiations leading to the Oslo Accords. In addition, the Oslo Accords did not prejudice or pre-empt the outcome of the permanent status negotiations.<sup>51</sup>

**The fact that the interim Iraqi government of Eyad Allawi with limited governmental powers<sup>52</sup>, when Iraq was under American occupation, did not see any**

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<sup>50</sup> de Waart supra, note 43 at pg. 45.

<sup>51</sup> Ibid at pg. 48.

<sup>52</sup> The Interim government was a creature of the U.S. and its coalition partners who were an occupying power. This Interim government would hold de jure governmental power until the Iraqi Transitional Government was elected on January 30, 2005. When the Interim Iraqi government succeeded the Coalition Provisional Authority, the U.S., the UN, the Arab League and other states recognized the Interim Iraqi government as the sovereign government while the U.S. maintained much of the de facto power in Iraq. The powers of the Interim government was limited by the Transitional Administrative Law (TAL) was

**Montevideo Convention criteria obstacles to joining the Rome Statute of the ICC demonstrates that agreements as to what limited powers a government may have under belligerent occupation should not affect other external capacities including acceding to the jurisdiction of the ICC under the Rome Statute.**

### **5) The Contemporary Criteria for Statehood**

Many positions taken by contemporary jurists as well as the recognition policy of some states tend to indicate that the traditional criteria are being extended to include the following elements: The elements cited are i) a lawful claim to statehood ii) being willing and able to abide by international law iii) viable entity iv) compatibility with the right of self-determination, v) respect for human rights and vi) constitutive theory of statehood.

However, what is often cited for this opinion is substantially the work of a small number of western jurists such as James Crawford<sup>53</sup> and the work of the Israeli jurist Tal Becker.<sup>54</sup>

As regard the assertion that the traditional criteria have been extended as customary international law to include the contemporary criteria, there is very little state practice and the requisite *opinion juris* to suggest that this is the case, especially as regards the

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signed on March 8, 2004 by the Interim Governing Council (GC) of Iraq which was dominated by the U.S (see the comments on the composition of the GC by the International Crisis Group at the following url: <http://www.crisisgroup.org/home/index.cfm?id=1672>

The TAL laid out defined areas of exclusive sovereign powers for the Interim Government which included the following:

- National security policy; independent militias shall be prohibited,
- Foreign policy, diplomatic representation, and border control,
- National fiscal, monetary and commercial policy

See <http://www.globalsecurity.org/military/world/iraq/ig.htm>

<sup>53</sup> See James Crawford, *supra*, note 1.

<sup>54</sup> See Tal Becker, *International Recognition of a Unilaterally Declared Palestinian State: Legal and Policy Dilemmas* Jerusalem Center for Public Affairs, 1998 located at the website of the JCPA at <http://www.jcpa.org/art/becker2.htm>

criteria of respect for human rights as a precondition for statehood as will be discussed below. One such example of a formal recognition policy cited by Becker is that the European Community had a formal recognition policy<sup>55</sup> for the new states emerging from the break up of the former Soviet Union. However customary international law can not be based on only the policies of the limited number of European states that is specific to the break up of the Soviet Bloc countries.

Actual state practice in recent history would indicate that customary international law may be moving to make the traditional criteria compete for primacy with two of the contemporary criteria as the main basis of statehood, namely the compatibility with the right to self-determination and the constitutive theory of statehood as will be discussed below. Moreover, it can be strongly disputed that the claim to Palestinian Statehood fails all or most of the contemporary criteria as will be discussed in the following section.

**i) Lawful claim to statehood**

It can hardly be argued that the Palestinian State which is recognized by over half the world's states should be regarded as resulting from conduct which violates international law and whose territorial integrity is confirmed by the majority of the world's states in General Assembly resolutions and by the UN Security Council resolutions and the International Court of Justice. The fact that the Palestinian State also meets the traditional criteria under the Montevideo Convention places no obstacle to having Palestine qualify under this first contemporary criterion for Statehood. Given the history of the lawful existence of the Palestinian territory and population, it would be absurd to equate the Palestinian State with recent claims to Statehood which were clearly unlawful such as the assertion by Russia of the new State of South Ossetia after their own military invasion of the Georgian territory.

**ii) Viable Entity**

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<sup>55</sup> See European Community: Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union, December 16, 1991, 31 I.L.M. 1486.

The arguments against the Palestinian National Authority on this asserted ground is again based on the inability to function as a sovereign state as a matter of fact and law.<sup>56</sup> These arguments again ignore the fact that such criteria can not be mechanically applied to a situation of belligerent occupation where as a matter of fact and law, the powers of the governmental entity can be severely limited, but the pre-existing state does not by that fact and law lose their sovereignty or international legal personality.<sup>57</sup>

### iii) **Being willing and able to abide by international law**

The requirement that the state be willing to abide by international law has been stated as another contemporary feature of international law.<sup>58</sup> There is absolutely no foundation in any source of international law that would justify a position that a unilateral declaration to statehood by Palestine can be viewed as an illegal act due to the fact that both Israel and the PLO agreed to resolve all outstanding matters by negotiations, as arising from the Interim Agreement. The fact that the majority of the world's states have recognized the 1988 Palestinian Declaration of Independence as legal and legitimate should have put to rest any argument on this issue. Moreover, there have been lawful declarations of unilateral declarations of independence based on legitimate self-determination assertions that did not await negotiations with the parent state. East Timor<sup>59</sup> and the breakup of the former Yugoslavia into Bosnia, Croatia and Slovenia after unilateral declarations of independence are also examples.<sup>60</sup>

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<sup>56</sup> See Tal Becker, *supra* note 49.

<sup>57</sup> Gerhard von Glahn, *The Occupation of Enemy Territory* (1951) at pg. 31 also cited in the John Quigley article submitted to the OTP

<sup>58</sup> James Crawford, *The Creation of States in International Law*, second edition (2006).

<sup>59</sup> See for example, J. Fox, Dionisio Babo Soares (eds.) *“Out of the ashes: destruction and reconstruction of East Timor”* ANU E Press, 2003

<sup>60</sup> See R. Rich *“Recognition of States: The Collapse of Yugoslavia and the Soviet Union”* European Journal of International Law 1993 4(1):36-65, (1993).

There is an element of irrationality for anyone to suggest that the Palestinian State can not even declare independence **after** the Oslo Accords expired on September 13, 2000 as it contained an obligation to refrain from doing anything to undermine the object and purpose of the Accords such as a unilateral declaration of independence. There is no international law authority supporting this position and if it was accurate, it would also call into question the legitimacy of Israel's actions since the expiration of the Oslo Accords, given the illegal expansion of settlements in the West Bank. Moreover, the Palestinian Declaration had been pronounced long before the Oslo Accords and its permanence and legality has been recognized by over half the world's states.

**iv) Respect for Human Rights**

There is a very weak argument to be made against Palestinian statehood that because human rights abuses have been allegedly committed in the territory administered by the Palestinian National Authority along with an ineffective judiciary and widespread corruption, it is not able to comply with international law and so should be denied the status of Statehood. Clearly almost any state that has been recognized as an independent state in the past century would also have failed to qualify on this basis, including all the new Balkan states. This is clearly an absurd position.

**v) Compatibility with the right of self-determination**

Counter-argument will have to be made by Israel and others against the use of the Palestinian right of self-determination as the basis for recognizing their statehood as recognized by the UN Charter<sup>61</sup> and the International Court of Justice.<sup>62</sup> Such counter-arguments would include the assertion that self-determination does not give rise as of right to unilaterally declare a sovereign state as there is no general right to statehood given that bestowal of such a status must take into account the legitimate rights of others. While contested by some writers, in the view of this author, this is an accurate position in

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<sup>61</sup> Article 1(2), UN Charter

<sup>62</sup> Advisory Opinion on the Western Sahara (*Morocco v. Spain*), 1975 I.C.J. 12; Advisory Opinion on Namibia, 1971 I.C.J. 16.

the evolving field of international law.<sup>63</sup> Moreover, the Palestinian right of self-determination is not resting on the basis of its territory or as a colony belonging to another sovereign power which has violated the right of the Palestinian people to political, social or cultural self-determination which would require taking the legitimate interests of that sovereign power into account. Since the ending of the Ottoman sovereignty over Palestinian territory, the sovereignty of no other nation, including Israel, over the West Bank and the Gaza Strip has ever been recognized by the League of Nations, the United Nations General Assembly and most importantly the UN Security Council.<sup>64</sup> The ICJ in the Advisory Opinion on the security wall has expressly confirmed this in the following terms:<sup>65</sup>

*The Court recalls that both the General Assembly and the Security Council have referred, with regard to Palestine, to the customary rule of “the inadmissibility of the acquisition of territory by war”. As regards the principle of the right of peoples to self-determination, the Court observes that the existence of a “Palestinian people” is no longer in issue, and has been recognized by Israel, along with that people’s “legitimate rights”. The Court considers that those rights include the right to self-determination, as the General Assembly has moreover recognized on a number of occasions.*

However, opponents of the existence of a Palestinian State would argue that because the terms of the expired Oslo Accords and the Interim Agreement set out a framework that would result in a negotiated settlement, neither Israel or Palestine can pursue rights unilaterally outside the agreed framework. This has not hindered Israel in terms of the expansion of the settlements and the building of the Wall which indicates that there were unclear expectations in practice as to whether any obligations would outlast the expired negotiations.

The strongest argument against this asserted legal argumentation, is that nowhere in the Oslo Accords or the Interim Agreement did the Palestinian National Authority give up

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<sup>63</sup> See e.g. Allen Buchanan, *Justice, legitimacy, and self-determination* Oxford University Press, 2007 where the author argues for a justice, human rights and moral basis for the recognition of states claiming the right to do so on the basis of self-determination under international law.

<sup>64</sup> See Paul J.I.M. deWaart, *Self-Rule under Oslo II: The State of Palestine within a Stone’s Throw*, 8 *Palestinian Yearbook of International Law*, 35, (1994-1995) at pg.45.

<sup>65</sup> *Supra*, note 26, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Summary of the Advisory Opinion of the ICJ, 9 July 2004.

the Palestinian right of self-determination going back to the Mandate of Palestine, the Partition Plan, the 1988 Declaration of Independence and the various General Assembly resolutions together with the recognition of Palestine as a State recognized by the majority of the world's states that affirmed the Palestinian right of self-determination. The Palestinian negotiators in the Oslo process never renounced their claim to Statehood on the basis of the Mandate for Palestine and the Partition Plan.<sup>66</sup>

It should not be forgotten that Israel too bases its right to statehood on a unilateral declaration of independence and the fact that the Palestinian unilateral declaration has been recognized as legitimate and lawful by a majority of the nations of the world.

#### vi) **The Constitutive Theory of Statehood**

Two of the leading western international law jurists, Lassa Oppenheim and Ronald Roxburgh have stated the “..International Law does not say that a State is not in existence as long as it is not recognized, but it takes no notice of it before its recognition. Through recognition only and exclusively a State becomes a person and a subject of International Law”.<sup>67</sup> Therefore even in the doctrine written by western jurists there is evidence that this constitutive theory of statehood through recognition may be as significant as the criteria of the Montevideo Convention. Modern state practice seems to be moving in this direction also, with the more recent precedents of the new Balkan states, including Kosovo<sup>68</sup> and the older precedents of East Timor and the Congo and the refusal to recognize Northern Cyprus and Rhodesia.

The opponents of those who oppose the Palestinian Article 12 (3) would have to concede that the constitutive theory of statehood contradicts *in toto*, the principle of effectiveness

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<sup>66</sup> See Paul J.I.M. deWaart, *Self-Rule under Oslo II: The State of Palestine within a Stone's Throw*, 8 Palestinian Yearbook of International Law, 35, (1994-1995) at pg 49.

<sup>67</sup> L.Oppenheim, R. Roxburgh *International Law: A Treatise*. (2005) The Law Book Exchange at pg. 135.

<sup>68</sup> Despite not fully satisfying the traditional criteria of governmental effectiveness, 54 states have recognized the Republic of Kosovo as an independent state including the majority of the states of the European Union.



that is central to the Montevideo Convention criteria. The constitutive theory implies that a state can qualify as such based on its recognition by other states. However, the opponents of the Article 12 (3) Palestinian declaration would argue that there is no rule, under international law, according to which recognition by a majority of states in the world is binding in international law. The argument would then posit that given that Palestine has not been recognized by crucial actors, such as the United States and Israel, such majority recognition can not bestow any form of statehood on Palestine.

It would be an undermining of any traditional conception of customary international law to make any established majority state practice and emerging *opinion juris* to be dependent on the consent of any particular two states, apart from the U.S. and Israel. The fact that a majority of states have recognized Palestine as a State should easily fulfill the requisite state practice. What is left to be proved is whether that state practice is accompanied by the requisite *opinion juris*.

Recent state practice supports the constitutive theory of statehood, yet several modern writers, who are primarily western jurists, reject it claiming that it would lead, *inter alia*, to too much subjectivity in the notion of the state.<sup>69</sup> If the emerging customary international law is making the constitutive theory the foundation of statehood, the subjective assertions of a limited number of western jurists can not alter that development. To allow doctrine to alter customary international law principles would be a complete misapplication of the hierarchy of sources of international law as mandated under Article 38 of the International Court of Justice Statute.<sup>70</sup>

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<sup>69</sup> See James Crawford, *The Creation of States in International Law*, second edition (2006); C. Warbrick, "State and Recognition in International Law", in M.D. Evans (ed.) *International Law*, Oxford University Press, (2003 at pg. 237.

<sup>70</sup> Article 38 of the ICJ Statute gives the hierarchy of the sources of law as follows:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

Finally, what is often missing from the legal analysis of the impact of such a large degree of recognition of Palestine by other states is that such recognition contributes to the process of state formation. One writer suggests it does this in two ways:<sup>71</sup>

*First, in viewing and treating the entity as a state, other states offer a perception of the entity that can be internalized by the entity itself and the population. ..  
Secondly by treating the entity as a state, other states give it a variety of powers that increase its ability to obtain generalized acceptance as a rule-giver. For instance, foreign states can decide to accept the travel documents (passports) of the State of Palestine (none have been issued) thereby giving to the entity a power it did not previously have and that is generally reserved for states...  
These factors, which could be brought into play only after the Palestinian Declaration of Independence, demonstrate some of the significance of the Declaration in the state building process.*

Since this article was written in 1989, by 1995 approximately 33,000 Palestinian passports had been issued by the Palestinian National Authority<sup>72</sup> and more significantly approximately 43 countries recognize these passports.<sup>73</sup> Israel itself has accepted the use and legitimacy of these passports thereby implicitly recognizing the international legal personality of the Palestinian State.

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b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

<http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>

<sup>71</sup> Jerome Segal, 19 Journal of Palestinian Studies (1989) 14 at pg.20.

<sup>72</sup> See the New York Times report on the period when the Palestinians could use their own passports instead of traveling on Israeli documents or other nations' passports at the following url:  
<http://www.nytimes.com/1995/12/07/world/world-news-briefs-palestinians-now-able-to-use-own-passports.html>

<sup>73</sup> See the list of countries at the Jewish Virtual Library at the following url:  
<http://www.jewishvirtuallibrary.org/jsourc/Peace/palrec.html>

## 6) The Recent Historical Development of Hamas and Gaza

The election of Hamas in June of 2007 and its control over the Gaza Strip has complicated the claims of Palestinian Statehood. This is especially so, after Hamas has refused to recognize Israel and its militants have sent rockets into Israel leading to a military incursion into Gaza by the Israeli defense forces which resulted in significant civilian casualties. Hamas has also been designated as a sponsor of terrorism and listed as a terrorist organization by several countries including the U.S, the European Union and Canada. There has been very little recognition of the Hamas **government** by other states. The U.S. and the European Union has refused to recognize the Hamas **government**.<sup>74</sup>

Only Norway has so far given full recognition to the Hamas government while Egypt has given conditional recognition. To the best of the knowledge of this author, the Hamas government has not sought the recognition of the Gaza Strip as a separate state. Therefore whether Gaza qualifies under the Montevideo Convention criteria or the contemporary criteria is, in the view of this author, not necessary. The fact that Hamas could demonstrate much more effective and independent control over the Gaza Strip than the Palestinian National Authority over the West Bank potentially does not diminish the pre-existing claims to statehood by Palestine. Indeed it potentially enhances those claims as it demonstrates the possible return to an effective and independent government of the Palestinian people and territory once the belligerent occupation by Israel ends.

This conclusion is reinforced by the fact that the Hamas government through its former Prime Minister, Ismail Hayena, has not advocated the break up of a pre-existing Palestinian State into Gaza and the West Bank controlled by the Palestinian National Authority and has as its objective the reestablishment of the Palestinian State based on

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<sup>74</sup> See the report on the state of recognition of the Hamas government by Israel News at [http://zionism-israel.com/israel\\_news/2007/04/hamas-government-gaining-legitimacy.html](http://zionism-israel.com/israel_news/2007/04/hamas-government-gaining-legitimacy.html) . The report alleges that Switzerland and China are also contemplating recognition although China denies it.

the 1967 borders which Hayena calls a joint national goal with the Palestinian National Authority.<sup>75</sup>

The Palestinian National Authority is also arguing that since the withdrawal of the Israeli military forces and settlements from Gaza in 2006, Palestine has become the *de facto* territorial state in the Gaza Strip that should have sufficient legal personality to be able to submit a declaration accepting the jurisdiction of the ICC over crimes committed there since 2006.<sup>76</sup> This assertion, acquiesced in by the Hamas government in Gaza, reinforces the Palestinian National Authority's claim that it represents the legal personality of the entire *de facto* territorial state of Palestine in order to exercise certain rights and duties, including those under the ICC Statute.

**7) Application of ICC Statute Article 12(3) to the Palestinian Declaration and the relevance of international legal personality as opposed to the general application of the criteria of statehood under international law**

The Declaration by the Palestinian National Authority was received and acknowledged by the Court and the Prosecutor has indicated the filing would be analyzed before a decision would be made on whether to initiate an investigation. The Office of the Prosecutor has clarified in a press statement the following:<sup>77</sup>

Since 27 December 2008, the OTP [Office of the Prosecutor] has also received 213 communications under Article 15 by individuals and NGOs, related to the situation context of Israel and the Palestinian Territories; some of them were made public by the senders. As per normal practice, the Office is considering all information, including open sources.

The Office will carefully examine all relevant issues related to the jurisdiction of the Court, including whether the declaration by the Palestinian National Authority accepting the exercise of jurisdiction by the ICC meets statutory requirements; whether the alleged crimes fall within the category of

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<sup>75</sup> Report by a China news service at [http://news.xinhuanet.com/english/2009-04/02/content\\_11121185.htm](http://news.xinhuanet.com/english/2009-04/02/content_11121185.htm)

<sup>76</sup> See the report by the Times of London, Timesonline at the following url [http://www.timesonline.co.uk/tol/news/world/middle\\_east/article5636069.ece](http://www.timesonline.co.uk/tol/news/world/middle_east/article5636069.ece)

<sup>77</sup> John Quigley, *supra*, note 11.

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

The recent Independent Fact Finding Commission on Gaza, chaired by Professor John Dugard, in its report to the League of Arab States, has drawn attention to the fact that the Registrar of the ICC in acknowledging receipt of the declaration referred to the Palestinian National Authority rather than the Government of Palestine, thereby implying that the acceptance of the declaration was without prejudice to the application of Article 12(3).<sup>78</sup> The report went on to argue that the ICC Registrar exceeded her authority by the acknowledgment of the receipt of the declaration from the Palestinian National Authority rather than the Government of Palestine in the following manner:<sup>79</sup>

*593. It is significant the answer from the ICC mentioned the PNA, and not, as the declaration itself did, the Government of Palestine. The term Palestinian (National) Authority results from the Oslo Agreements that had a limited duration of five years, ending in June 1999 when the withdrawal of Israeli forces from the Gaza Strip and the Jericho area began.<sup>413</sup> The expiration of this term without the recognition by Israel of the Palestinian State and without the effective termination of the occupation was followed by the second intifada in 2000.*

*594. The above change by the ICC in its public information did not take into account that the Palestinian people have the authority to consider and designate the Palestine Liberation Organization (PLO) as its government. It should be noted in this connection that the PLO as party to the Oslo Agreements did not object to the lodging of the declaration by the Palestine government. In the opinion of the Committee the ICC exceeded its authority by changing the Government of Palestine into the PNA.*

It is suggested that there is little substance to this argument that the Registrar of the ICC exceeded her authority in acknowledging receipt from the Palestinian National Authority rather than the Government of Palestine. The PNA, for the reasons discussed above can be regarded as the legitimate representatives of the Palestinian people and hence a “Government of Palestine” with limited capacity due to the belligerent occupation of its territory by Israel. In a similar fashion, the Dugard Committee report rather inadequately examines whether the Palestinian National Authority can issue a declaration on behalf of

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<sup>78</sup> The report has not yet been publicly disclosed but an unofficial copy can be located at the following url: <http://www.filedropper.com/reportoftheindependentfactfindingcommitteeongaza30april2009final>

<sup>79</sup> Ibid.

a Palestinian “State” under Article 12(3) and whether in fact and law Palestine can be a state **for the purposes focused on the jurisdictional issue in Article 12(3), and not for any larger purpose in international law.**

For the same reason, the ultimate recommendations of the Dugard Committee are somewhat premature that if the Palestinian declaration fails to qualify for acceptance of jurisdiction under Article 12(3) and the Security Council fails to refer the Gaza situation to the ICC, the Arab League should ask the UN General Assembly to endorse the Palestinian declaration under Article 12 (3) using the Uniting for Peace Resolution process under the Tenth Emergency Special Session.<sup>80</sup>

The Registrar of the Court acknowledged the Declaration does not rule out the likelihood for Palestine to be a State under Article 12 (3). Those familiar with the operation of the ICC under the Rome Statute will acknowledge that Article 12(3) has to be read in conjunction with Article 19(1) which explicitly states that ultimately it is the Court that must satisfy itself that it has jurisdiction in any case brought before it. Therefore ultimately it will be the Court itself to decide whether article 12(3) is applicable in this case.

While these conclusions are accurate, they do not deal with the issue regarding whether for the narrow purpose of Article 12(3), the full gamut of analysis of the traditional criteria for statehood under the Montevideo Convention cumulatively with or alternatively the contemporary criteria for statehood is actually appropriate for deciding whether Palestine qualifies for the purposes of Article 12(3).

Article 12(3) should be interpreted in the context of the very purpose and mandate of the ICC. This purpose and mandate is found in the words of the Rome Statute preamble “Affirming that the most serious crimes of concern to the international community as a

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<sup>80</sup> Ibid.

whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing cooperation”.

The preamble also adds the foundation of the ICC is “to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes”.

Generally preambles in international treaties do not carry the same weight as the actual provisions of the treaty and are often regarded as “soft law”. However preambles are of some significance in determining the rationale and objectives of the member states and the history of the negotiations leading to the establishment of the treaty. Therefore, where there is ambiguity about the provisions of a treaty or its objectives and history, the preamble can take on interpretive significance to fill any gaps. The 1969 Vienna Convention on the Law of Treaties confirms that a preamble forms part of the context in which a treaty has been adopted and is therefore an important tool for its interpretation.<sup>81</sup> This approach has been taken as regards the interpretation of the European Community and European Union treaties.<sup>82</sup>

Given these critical objectives and historical foundations of the ICC Statute itself, if Palestine could never qualify under Article 12 (3) and the Prosecutor is unable to use his *proprio motu* powers to start an investigation for the reasons discussed above that would be tantamount to creating an “impunity zone” in the territory of the West Bank and the Gaza Strip. The occurrence of serious crimes of concern to the international community as whole on all sides of the conflict could go unpunished and that their effective prosecution not take place.

This is not to claim that the ICC is the only possible forum for the investigation and prosecution given the complementarity jurisdiction of the Court. However, in the case of

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<sup>81</sup> Article 31(2) of the Vienna Convention on the Law of Treaties state the following:

The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

<sup>82</sup> See Manfred Zuleeg in Hans von der Groeben & Jurgen Schwarze, eds (2003) Vol. 1. 6<sup>th</sup> ed. (Baden-Baden, Germany, Nomos Verlagsgesellschaft) Preamble EU Treaty at para 3.

the West Bank and Gaza, the situation of impunity would be possible if neither Israel nor possibly Jordan ( in the case of Palestinians with dual Jordanian citizenship) decided not to seek the prosecution of such serious crimes in their national courts or at the ICC. Given that there are already numerous allegations of possible serious crimes being committed, many alleged actions involving the Israeli military, it is unlikely that Israel would be a referring state under Article 12(3). There is also no indication so far that Jordan has asked the ICC to investigate any allegations regarding the military actions by Israel in the Gaza Strip. Finally, while the UN Security Council could refer the situation in the West Bank or Gaza to the ICC, there is no evidence that it is likely to make such a referral. The possibility of impunity for grave crimes must be looked at in the context of the real world of factual probabilities, not in the abstract world of theoretical possibilities.

Given the above logical extrapolations from the foundational objectives in the preamble to the ICC Statute, the scope of what is meant by “State” in Article 12(3) could be considerably narrower than what is envisaged by the general meaning of Statehood in the wider range of international law issues.

That narrower scope of what could constitute a “State” for the purposes of Article 12(3) and indeed for the general jurisdiction of the ICC could be extracted from the most basic principles of humanitarian law in a situation of belligerent occupation as is the case of Palestine and Israel. There is no doubt that humanitarian law applies to the Palestinian territories occupied by Israel and that Israel is bound by the Geneva Conventions. One expert on the law of occupation puts this conclusion in the following terms: <sup>83</sup>

*The occupation of part of the Kingdom of Jordan to the west of the River Jordan (the West Bank) and of the Gaza Strip by Israel in 1967, raises an interesting question concerning the law of belligerent occupation. Having initially left unanswered applicability of GC IV [the 4<sup>th</sup> Geneva Convention] to these territories, the Israeli government later took the view that this treaty was not applicable, since, inter alia, the*

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<sup>83</sup> D. Fleck & M.Bothe, *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford University Press, 2000 at pg. 244.



*international status of Western Jordan and Gaza was not clear. In any case, neither Jordan or Egypt could claim territorial sovereignty , and thus Israel could not be seen as an occupant. This reasoning is not acceptable since denying the existence of conditions for application of GC IV, it relies upon a possible controversy upon the legal status of that territory.*

*The purpose of the law of belligerent occupation is to ensure protection for persons and objects no longer under the control of their own authorities, but of a foreign power, as a result of war. There is no doubt that from the viewpoint of the inhabitants of Western Jordan and the Gaza Strip, Israel is a foreign power. Furthermore, GC IV regulates only humanitarian issues resulting from the fact of occupation for the inhabitants of occupied territories. The legal fate of the territories is a question that must be kept distinct from the purposes of Geneva Law. However, the Israeli authorities stated their determination to apply the humanitarian provisions on a de facto basis.*

The ICJ in the advisory opinion on the security wall has also disagreed with Israel's position that the 4<sup>th</sup> Geneva Convention did not apply *de jure* to the occupied territories in the following terms:<sup>84</sup>

*In view of the foregoing, the Court considers that the Fourth Geneva Convention is applicable in the Palestinian territories which before the 1967 conflict lay to the east of the Green Line and which, during that conflict, were occupied by Israel, there being no need for any enquiry into the precise prior status of those territories.*

The International Commission of the Red Cross (ICRC) has also authoritatively stated that humanitarian law, in particular, the 1949, 4<sup>th</sup> Geneva Convention, does apply to the situation of belligerent occupation, but also notes that since the belligerent occupation is temporary, it can not make far-reaching changes in the existing order.<sup>85</sup>

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<sup>84</sup> Advisory Opinion of the ICJ, *supra*, note 28.

<sup>85</sup> See the ICRC website on the law of belligerent occupation at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5P8EX4/\\$File/LAW9\\_final.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5P8EX4/$File/LAW9_final.pdf)

*The annexation of conquered territory is prohibited by international law. This necessarily means that if one State achieves power over parts of another State's territory by force or threat of force, the situation must be considered temporary by international law. The international law of belligerent occupation must therefore be understood as meaning that the occupying power exercises provisional and temporary control over foreign territory. **It follows from this that measures taken by the occupying authorities should avoid far-reaching changes in the existing order. (emphasis added)***

Given this reality of the application of humanitarian law in the occupied territories of Palestine by the Israeli military, the most far-reaching change that belligerent occupation could accomplish is to not only to terminate any claim to a pre-existing Palestinian sovereignty, (which as argued that it can not under international law) but also terminate any form of international legal personality that the pre-existing Palestinian state possessed in order to be able to accept the jurisdiction of the ICC and qualify as a “state” for that limited purpose. This is reinforced by the fact that the ICC has become the permanent global criminal tribunal with the mandate to apply its codified form of humanitarian law in its Statute to combat impunity and ensure that serious crimes do not go unpunished as stated in its preamble.

The ICC Statute is unclear about whether a pre-existing state under belligerent occupation does qualify as a state **only** for the purposes of the jurisdiction of the Court and in particular the application of Article 12(3). The scope of this ambiguity does not trigger the gamut of issues relating what qualifies as a state in international law, but is more focused on whether Palestine and the PNA, which exercises the sovereignty of the people in the occupied territories, despite the belligerent occupation by Israel, has legal personality to trigger the jurisdiction of the ICC under Article 12(3) with the Declaration submitted to the Court. There is clear historical precedent that demonstrates that belligerent occupation can not and has not terminated the international legal personality of the occupied territories. One leading authority describes the legal position in the following manner:<sup>86</sup>

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<sup>86</sup> David Raic, *Statehood and the Law of Self-Determination*, Kluwer Law International, 2002 at pg. 67.

*Practice indicates that even a prolonged period of absence of effective government does not ex definitione lead to the extinction of a state that is there is a strong presumption in favour of the continuity of statehood. This applies in different cases, such as, for instance, belligerent occupation of a state. **Under contemporary international law, belligerent occupation, per se, (accompanied or not by a government-in-exile) does not lead to the extinction of the international personality of the state, as was shown by the occupation of several states by Nazi Germany during World War II. (emphasis added)***

The definition of legal personality is not the same as that of sovereignty or statehood. Two of the leading western jurists in international law, namely Sir Robert Jennings and Sir Arthur Watts, describe international personality as follows:<sup>87</sup>

*A state upon becoming a member of the international community, acquires international personality. This signifies the state's capacity to possess rights and duties in international law, its capacity to operate upon the international plane, its acquisition of a persona in the contemplation of international law, and its status as a subject of international law. Although the typical and principal subject of international law is sovereign state 'the subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and the international legal system is no exception. The possession of international rights and duties involves, pro tanto, the possession of international personality; but the possession of international personality does not involve the possession of the full range of international rights and duties. **The degree of international personality (and the extent of the particular international rights and duties) possessed is in each case a matter of inquiry. In the normal case of a sovereign state, the degree of international personality and the extent of rights and duties possessed will be the same as for all other sovereign states. But there are many variations in the extent of international personality, as I the case, for example of states under protection and international organization [emphasis added]***

There can be little doubt that the Palestinian National Authority can exercise a range of rights and bear a range of duties on behalf of the Palestinian international legal personality. It is in that capacity that it has entered into international relations with many states and international organizations and has its passports recognized throughout the world as discussed above. Given the mandate and objectives of the ICC and the ambiguity regarding the definition of the word "state" therein, it is a matter of both

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<sup>87</sup> Sir Robert Jennings & Sir Arthur Watts, *Oppenheim's International Law*, Vol. 1 9<sup>th</sup> Ed. Peace, Introduction & Part 1. at pg. 330.

logical extrapolation and indeed sound legal analysis to suggest that as regards states like Palestine under belligerent occupation or protectorates as suggested by Jennings and Watts, they retain the international right to submit to the jurisdiction of the ICC as a non-state party under Article 12(3) of the ICC Statute and have the duty to cooperate with the Court under the same provision.

This conclusion is reinforced by the universally accepted accession by the Cook Islands to the Rome Statute of the ICC. The Cook Islands constitute a self-governing entity in free association with the state of New Zealand. While the Cook Islands “state” is fully responsible for internal affairs, New Zealand retains responsibility for external affairs, in consultation with the Cook Islands. This limitation on the capacity to conduct external affairs was not seen as an obstacle within the narrower context of accession to the jurisdiction of the ICC.

It should also not be forgotten that the ICC itself, like most international organizations also have international legal personality under Article 4 and under that provision has such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes. In the discussions for the draft Statute for an International Criminal Tribunal, the International Law Commission had even considered the ability of international organizations to have the legal personality to accede to the jurisdiction of the ICC. Given this contemplation, it is conceivable that it was taken as understood that de facto territorial states under belligerent occupation would be able to accept the jurisdiction of the Court under Article 12(3).

## **8) Conclusion**

The International Court of Justice (ICJ) in the Advisory Opinion on the Israeli Security Wall has implicitly signaled the need for a more sophisticated interpretation of what are the rights and duties of both Israel and Palestine in their different international legal capacities in the following words:<sup>88</sup>

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<sup>88</sup> Supra, note 26.

*The Court considers that its conclusion that the construction of the wall by Israel in the Occupied Palestinian Territory is contrary to international law must be placed in a more general context. Since 1947, the year when General Assembly resolution 181 (II) was adopted and the Mandate for Palestine was terminated, there has been a succession of armed conflicts, acts of indiscriminate violence and repressive measures on the former mandated territory. The Court would emphasize that both Israel and Palestine are under an obligation scrupulously to observe the rules of international humanitarian law, one of the paramount purposes of which is to protect civilian life. Illegal actions and unilateral decisions have been taken on all sides, whereas, in the Court's view, this tragic situation can be brought to an end only through implementation in good faith of all relevant Security Council resolutions, in particular resolutions 242 (1967) and 338 (1973).*

The ICJ in this decision (a majority of 14 judges agreeing on all the principal points with only Judge Thomas Buergenthal issuing a dissenting declaration) seems to be according a status to Palestine that goes beyond one that has no claim to international legal personality and seems to according both Israel and Palestine equal status as international actors (with obvious different capacities) in terms of their obligations under international law based on the history going back to Mandate of Palestine as this memorandum has also done. Throughout the judgment of the International Court of Justice in the Israeli Security Wall decision, reference is made (including by Israel with its position that the Wall was an act of self-defense against another international entity, a position that was rejected by the ICJ) to Palestine as an international actor with legal personality and its people having the undisputed the right to self-determination.<sup>89</sup>

*The first argument presented to the Court in this regard is to the effect that it should not exercise its jurisdiction in the present case because the request concerns a contentious matter between Israel and Palestine, in respect of which Israel has not consented to the exercise of that*

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<sup>89</sup> Ibid.. The separate decision of Judge Higgins expressly stated that Palestine had been invited to participate in the hearings before the Court and she described the Israel and Palestine dispute over the security wall in the following fashion. “*There is thus a dispute between two international actors, and the advisor opinion request bears upon one element of it.*” The separate opinion can be found at the ICJ site at the following url: <http://www.icj-cij.org/docket/files/131/1681.pdf> The dissenting declaration of Judge Buergenthal did not contest this view of Palestine as an international actor.

*jurisdiction.....*

*Lastly, another argument advanced by Israel with regard to the propriety of its giving an advisory opinion in the present proceedings is that Palestine, given its responsibility for acts of violence against Israel and its population which the wall is aimed at addressing, cannot seek from the Court a remedy for a situation resulting from its own wrongdoing...*

*The Court recalls that both the General Assembly and the Security Council have referred, with regard to Palestine, to the customary rule of “the inadmissibility of the acquisition of territory by war”. As regards the principle of the right of peoples to self-determination, the Court observes that the existence of a “Palestinian people” is no longer in issue, and has been recognized by Israel, along with that people’s “legitimate rights”. The Court considers that those rights include the right to self-determination, as the General Assembly has moreover recognized on a number of occasions.....*

*The Court notes that Israel is first obliged to comply with the international obligations it has breached by the construction of the wall in the Occupied Palestinian Territory. Consequently, Israel is bound to comply with its obligation to respect the right of the Palestinian people to self-determination and its obligations under international humanitarian law and international human rights law.*

One leading American jurist has made the following evaluation of how the ICJ treated Palestine in the course of the hearing and in the final Advisory Opinion:<sup>90</sup>

*The Court was unwilling to regard Palestine as a “state” for the purposes of Article 51, which is consistent with the fact that Palestine is not a member of the United Nations. However, in its treatment of Palestine throughout the proceedings (allowing it to make written and oral submissions) and in much of the ius in bello analysis, the court appears to regard Palestine as the functional equivalent as a state. Thus, the Court considered the West Bank and Gaza Strip as sufficiently close to being a territory of a foreign state for the purposes of applying the Fourth Geneva Convention”....*

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<sup>90</sup> Sean D. Murphy, “Self-Defense and the Israeli Wall, Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory” 99 American Journal of International Law, 92005), at pg. 63, footnote. 10.

These conclusions of the ICJ, while non-binding as it is in the form of an Advisory Opinion are nevertheless one of the highest forms of authority in terms of declaring the state of international law. The ICJ decision in the Security Wall Advisory Opinion provides a foundation for also asserting that both Israel and Palestine are equally able, as international actors in the words of Judge Rosalyn Higgins, to submit to the jurisdiction of the most important global institution whose mandate is to investigate and prosecute gross violations of humanitarian law as codified in the ICC Statute.

It is suggested that not to follow this view of Palestinian international legal personality in the context of the meaning of “state” in Article 12 (3) of the ICC Statute would be tantamount to permitting the West Bank and the Gaza Strip to be virtually an impunity zone for the reasons described above. This could hardly have been the objectives of the signatory states and the thousands of civil society groups and individuals which laboured so hard for so many decades to have the first permanent international criminal tribunal to combat impunity and ensure that the most serious crimes do not go unpunished.

Finally, the provisions of applicable law by which to interpret the concept of “state” in Article 12(3) must be determined by reference to Article 21 of the same ICC Statute. An application of the provisions of Article 21 could itself lead to the same conclusion that Palestine has sufficient legal personality as an international actor and state under belligerent occupation, to submit a declaration under Article 12(3).

In Article 21(1) a-d, the Statute offers a hierarchy of sources in terms of applicable law that starts with the Statute itself (which one assumes includes the preamble), the Elements of Crime and the Rules of Procedure and Evidence. Next, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict. Thirdly failing that, general principles of law derived by the Court from national laws or legal systems of the world, including, as appropriate the national laws of States that would normally exercise jurisdiction provided that those principles are not inconsistent with the ICC Statute and with international law and internationally recognized norms and standards. In Article

21(2) the Statute also permits the Court to apply principles and rules of law as interpreted in its previous decisions. However, the provisions of Article 21(3) apply to all the sources of applicable law wherever in the hierarchy of applicability. This provision states that the application and interpretation of the applicable sources of law *must be consistent with internationally recognized human rights, and be without any adverse distinction founded on the enumerated grounds.*

It is the totality of Article 21 that all parts of the ICC must take into account in deciding whether Palestine exercising its international legal personality through the Palestinian National Authority can legitimately submit a declaration as a non-member State, including whether the chosen interpretation is consistent with the following key areas of applicable law:

- 1) The linking of the objectives of the ICC Statute in the preamble with any possible interpretation given to the concept of “state” in Article 12(3) as discussed above, to prevent a zone of **probable** impunity for serious international crimes in the territories of Palestine if there is no ability on the part of the Palestinian National Authority to submit a declaration as a non-State member under Article 12(3). Such a finding by the Office of the Prosecutor of the ICC or a Pre-Trial Chamber would seriously derogate from the objectives of the Court as stated in the Rome Statute Preamble.
- 2) While the traditional and contemporary criteria of statehood does form the principles and rules of customary international law as regards the general meaning of statehood in international law, these principles and rules must be linked with the law of belligerent occupation under the body of international law of armed conflict that asserts that pre-existing states do not lose their sovereignty or international legal personality while under belligerent occupation. This combined principle of customary international law and the law of armed conflict has been confirmed by the International Court of Justice, the Security Council, General Assembly Resolutions and by the doctrine of jurists from different regions of the



world. The fact that Palestine has not lost its sovereignty or international legal personality is especially crucial for the determination of the meaning of state in Article 12(3) of the ICC Statute.

- 3) Under Article 21(3), any interpretation of “state” in Article 13(3) that denies the right of the Palestinian National Authority to exercise a limited international personality on behalf of the Palestinian State would be adversely discriminatory on the Palestinian people as they would be potentially the only national group in the world that is recognized as a state by the majority of the world’s other states that could NOT accept the jurisdiction of the ICC to ensure that serious crimes against its peoples do not go unpunished and no effective prosecution for such crimes occurs, the objectives of the Court as stated in the ICC Preamble.
  
- 4) Moreover, to deny the right of Palestine to accept the Court’s jurisdiction would be a denial of the internationally recognized right of the Palestinian people to self-determination together with the accompanying right and indeed duty to seek accountability for alleged serious international crimes committed by all sides in the recent armed conflict that occurred in the Gaza Strip. In this regard, it should be noted that the ICJ in the Advisory Opinion on the Security Wall ruled that Israel’s international human rights obligations extended to its actions in the occupied territories of Palestine and included not violating the fundamental rights of the Palestinian people. **This interpretative principle that requires the internationally recognized rights of the Palestinian people in interpreting the meaning of statehood in Article 12(3) must take priority over any other conflicting meanings in international law and practice under the provisions of Article 21(3).**

These foundational principles and the legal text of the ICC Statute and the Court require reaching beyond doctrinal (primarily from the West), political or literal perspectives of ambiguous, but critically important text, such as the concept of “state” in Article 13(3) to

avoid in the words of Martin Luther King, "A denial of justice anywhere is a threat to justice everywhere"