

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/18

Date: 16 March 2020

PRE-TRIAL CHAMBER I

Before: Judge Péter Kovács, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Reine Adélaïde Sophie Alapini-Gansou

SITUATION IN THE STATE OF PALESTINE

Public

**Submission of Observations by MyAQSA Foundation (MyAQSA)
(Pursuant to Rule 103 of the Rules)**

Source: MyAQSA Foundation (MyAQSA)

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Fatou Bensouda, Prosecutor

Mr James Stewart

Counsel for the Defence

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

M. Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Mr Phillip Ambach, Chief

Other

Table of Contents

A. Palestine is a ‘State’ for the purpose of Article 12(2)(a) of the Rome Statute	5
I. Palestine is a ‘State’ because of its status as an ICC State Party.....	5
<i>a) The UN General Assembly has resolved the State of Palestine legal status</i>	<i>5</i>
<i>b) The UN Security Council adopted a Resolution condemning the alleged crimes committed on the ‘territory’ of the State of Palestine</i>	<i>7</i>
II. The ICC should adopt Functional Approach in interpreting Article 12 of Rome Statute	8
B. Alternatively, Palestine has fulfilled the criteria as a ‘State’ under International Law	14
C. Conclusion.....	27

ANNOTATION

The arguments presented herein are extracted mainly from these sources which we wish to acknowledge:

1. *A Study on the Statehood of Palestine under International Law*. Asian African Legal Consultative Organization (“AALCO”) Centre for Research and Training, AALCO Secretariat, 2013. Prof. Dr. Rahmat Mohamad who is an eminent person of AALCO was one of the person involved in the study and is now part of MyAQSA Foundation legal team.

2. Pellet, A. "The Palestinian Declaration and the Jurisdiction of the International Criminal Court". *Journal of International Criminal Justice*, vol 8, no. 4, 2010, pp. 981-999. *Oxford University Press (OUP)*, doi:10.1093/jicj/mqq057.

A. Palestine is a ‘State’ for the purpose of Article 12(2)(a) of the Rome Statute

I. Palestine is a ‘State’ because of its status as an ICC State Party

1. Article 12(2) provides two alternative jurisdictional nexuses for this Honourable Court to exercise jurisdiction, either based on the territorial jurisdiction¹ or based on the state of nationality of the accused². Pursuant to Decision on Applications for Leave to File Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence, we are limiting the submission on whether the territorial jurisdiction has been fulfilled under Article 12(2)(a).
2. In addition from the Prosecutor’s submissions, it must be noted that since the Rome Statute does not define the term ‘State’, the ICC Prosecutor had submitted in its *2012 Preliminary Examination Activities Report*³ that the determination of whether the applicant is a State for the purpose of article 12 of the statute is reflected in UNGA resolutions or by the Assembly State Party in accordance with Article 112(2)(g) of the Statute.⁴
3. The ICC Prosecutor further stated that its Office ‘could in the future consider allegations of crimes committed in Palestine, should competent organs of the United Nations...resolve the legal issue relevant to an assessment of [A]rticle 12’.⁵

a) *The UN General Assembly has resolved the State of Palestine legal status*

4. The UN General Assembly (UNGA) adopted Resolution 67/19⁶ on the “[s]tatus of Palestine in the United Nations”, based on Draft Resolution A/67/L.28⁷ (which later became Resolution 67/19) which accorded Palestine with a ‘non-Member State’ status at the UN.⁸

¹ Rome Statute, art 12(2)(a).

² Rome Statute, art 12(2)(b).

³ Office of the Prosecutor, *Report on Preliminary Examination Activities 2012* (n 12).

⁴ *ibid*, 42-43 [200]-[201].

⁵ *ibid*, 43 [203].

⁶ UNGA Res 67/19 (4 December 2012) UN Doc A/RES/67/19.

⁷ Draft Resolution A/67/L.28 (29 November 2012) *On the Question of Palestine*, UN Doc A/67/PV.44.

⁸ UNGA Res 67/19 (n 17) [2].

5. This Resolution indirectly considers Palestine a State, but without being a UN Member State. This is because, to become a UN Member State, it requires a prior approval from the UN Security Council (UNSC) in accordance with Article 4 of the UN Charter.⁹
6. Although the State of Palestine has yet to receive prior approval from the UNSC for its Membership in the UN, this does not negate its statehood under international law since Draft Resolution A/67/L.28 was adopted by the majority of the UNGA Representatives, i.e. 71.5% or 138¹⁰ out of 188¹¹ of the Members present voted in favour of the Draft Resolution.
7. In addition to the Rome Statute, the State of Palestine has also ratified¹² and acceded to a number of treaties as soon as its status has been recognised by the UN pursuant to UNGA Resolution 67/19, among others, the VCLT,¹³ the Vienna Convention on Diplomatic Relations,¹⁴ the Genocide Convention¹⁵ and the International Covenant on Civil and Political Rights.¹⁶
8. If the status of Palestine being a ‘State’ is still questionable, the United Nations Secretary-General (UNSG) would not have accepted Palestine’s accession at the time

⁹ Charter of the United Nations (24 October 1945) 1 UNTS XVI.

¹⁰ For the list of the States which have voted in favour of the Resolution, see Draft Resolution A/67/L.28 (n 18) 12.

¹¹ *ibid.* 9 States have voted against the Draft Resolution and 41 States abstained from voting.

¹² Treaty on the Prohibition of Nuclear Weapons (adopted 7 July 2017, not yet entered into force) UN Doc A/CONF.229/2017/8; United Nations, *Depositary Notification of the Treaty on the Prohibition of Nuclear Weapons, New York, 7 July 2017 – State of Palestine: Ratification* (22 March 2018) UN Doc C.N.161.2018.TREATIES-XXVI.9.

¹³ United Nations, *Depositary Notification of the Vienna Convention on the Law of Treaties, Vienna, 23 May 1969 – State of Palestine: Accession* (9 April 2014) UN Doc C.N.188.2014.TREATIES-XXIII.1.

¹⁴ Vienna Convention on Diplomatic Relations (adopted 18 April 1961, entered into force 24 April 1964) 500 UNTS 95; United Nations, *Depositary Notification of the Vienna Convention on Diplomatic Relations, Vienna, 18 April 1961 – State of Palestine: Accession* (9 April 2014) UN Doc C.N.176.2014.TREATIES-III.3.

¹⁵ Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277; United Nations, *Depositary Notification of the Convention on the Prevention and Punishment of the Crime of Genocide, Paris, 9 December 1948 – State of Palestine: Accession* (9 April 2014) UN Doc C.N.178.2014.TREATIES-IV.1.

¹⁶ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171; United Nations, *Depositary Notification of the International Covenant on Civil and Political Rights, New York, 16 December 1966 – State of Palestine: Accession* (9 April 2014) UN Doc C.N.181.2014.TREATIES-IV.4.

when it has deposited its instrument of accession to the Rome Statute on 31 December 2014 and other treaties aforementioned.

9. The deposit of instruments of accession to the Rome Statute and other treaties reflects the State of Palestine's capacity to enter into a legal relation, in this situation, the treaties, as stipulated under Article 6 of the VCLT. The accession reflects its consent to be bound by those treaties in accordance with Article 15 of the VCLT.
10. As such, the actions taken by the State of Palestine when it declared to accept the jurisdiction of this Honourable Court and later became a State Party to the Rome Statute were similar to the actions done by Cote d'Ivoire.¹⁷
 - b) *The UN Security Council adopted a Resolution condemning the alleged crimes committed on the 'territory' of the State of Palestine*
11. The UN Security Council adopted Resolution 2334¹⁸ on 23 December 2016 which, among others, reaffirms that 'the establishment by Israel of settlements in the Palestinian territory occupied since 1967, including East Jerusalem, has no legal validity and constitutes a flagrant violation under international law'¹⁹ and reiterates its 'demand that Israel immediately and completely cease all settlement activities in the occupied Palestinian territory, including East Jerusalem'.²⁰
12. Based on the language, the term used and the intention of the UNSC in adopting this Resolution, the UNSC has 'demanded' Israel, being a UN Member, to immediately and completely cease all settlement activities in the occupied Palestinian territory, including East Jerusalem since these actions have no legal validity and constitute flagrant violations of international law.

¹⁷ United Nations, *Depositary Notification of the Rome Statute of the International Criminal Court of 17 July 1998 - Cote d'Ivoire: Ratification* (15 February 2013) UN Doc C.N.150.2013.TREATIES-XVIII.10; Letter of Confirmation of the Declaration of Acceptance from the President of Cote d'Ivoire to the President of the ICC (14 December 2010) ICC Doc NR 0039-PR-du 14/12/2010; Declaration of Acceptance of the Jurisdiction of the International Criminal Court by the Ministry of Foreign Affairs of the Republic of the Cote d'Ivoire (18 April 2003).

¹⁸ UNSC Res 2334 (23 December 2016) UN Doc S/RES/2334.

¹⁹ UNSC Res 2334 (n 39) [1].

²⁰ *ibid*, [2].

13. Although the word ‘demand’, instead of ‘decide’, has been used by the UNSC²¹ in this Resolution to imply the ‘decision’ as stipulated under Article 25 of the UN Charter, still, it can be argued that such a Resolution was intended to be binding upon Israel.
14. A similar term has been used, including other terms such as ‘declares’ by the UNSC in a number of its Resolutions, which are intended to be binding. These can be seen, among others, Resolution 276²² when it ‘declares’ that the continued presence of the South African authorities in Namibia is illegal,²³ Resolution 687²⁴ when it ‘demands’ that Iraq and Kuwait respect the inviolability of the international boundary²⁵ and in Resolution 1696²⁶ when it ‘demands’ Iran shall suspend all enrichment-related and reprocessing activities, including research and development, to be verified by the IAEA.²⁷
15. As such, regardless of which Chapter a resolution is adopted under by the UNSC, when the UNSC adopts a ‘decision’ under Article 25 in accordance with the Charter, ‘it is for member States to comply with that decision, including those members of the Security Council which voted against it and those Members of the United Nations who are not members of the Council. To hold otherwise would be to deprive this principal organ of its essential functions and powers under the Charter’.²⁸

II. The ICC should adopt Functional Approach in interpreting Article 12 of Rome Statute²⁹

²¹ The term ‘decides’ has also been used by the UNSC in its Resolutions, among others, UNSC Res 955 (8 November 1994) UN Doc S/RES/955, [1], [2], [6], and [7]; UNSC Res 827 (25 May 1993) UN Doc S/RES/827, [2], [4], [6] and [7].

²² UNSC Res 276 (30 January 1970) UN Doc S/RES/276.

²³ *ibid*, [2].

²⁴ UNSC Res 687 (3 April 1991) UN Doc S/RES/687.

²⁵ *ibid*, [2].

²⁶ UNSC Res 1696 (31 July 2006) UN Doc S/RES/1696.

²⁷ *ibid*, [2].

²⁸ South West Africa Case (n) 54 [116].

²⁹ Paragraphs 18-27 are extracted from Pellet, A. "The Palestinian Declaration and the Jurisdiction of the International Criminal Court". *Journal of International Criminal Justice*, vol 8, no. 4, 2010, pp. 981-999. Oxford University Press (OUP), doi:10.1093/jicj/mqq057.

16. Pursuant to Article 31 of VCLT “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. The object of the Rome Statute is “to put an end to impunity for the perpetrators”³⁰ of the four crimes falling under ICC jurisdiction. The purpose or the methodology is to provide ICC jurisdiction over these crimes. Thus, it is submitted that this Honourable Court should take into account the general scheme of the provisions of the Rome Statute as well as its object and purpose in interpreting Article 12.
17. For the purpose of interpreting Article 12(2), it is humbly submitted that this Honourable Court should resort to a functional interpretation of the Rome Statute as expounded by Alain Pellet and limit itself to ascertaining whether the conditions required for the Court to exercise jurisdiction are met in the present case.³¹
18. In deciding the jurisdiction of the Court over Palestinian’s case, the Court should refrain from pronouncing in *abstracto* on the issue of whether or not Palestine is a state under international law. On the contrary, the Court should resort to a functional interpretation of the Rome Statute and limit itself to ascertaining whether the conditions required for the Court to exercise jurisdiction over State of Palestine.
19. In other words, the idea is not for the Court to rely on a general and ‘ready-made’ definition of the concept of state in international law, but to adopt a functional approach.
20. For instance, referring to case of the request of an Advisory Opinion by the General Assembly of the United Nations to the International Court of Justice (ICJ) in Resolution 63/3 of 8 October 2008 which gave rise to an Advisory Opinion of 22 July 2010 in regards to the similar problem to Palestine’s case. In that case, the General Assembly was careful not to ask the ICJ about the status of Kosovo as a state in

³⁰ Preamble Rome Statute

³¹ Pellet, A. "The Palestinian Declaration and the Jurisdiction of the International Criminal Court". *Journal of International Criminal Justice*, vol 8, no. 4, 2010, pp. 981-999. *Oxford University Press (OUP)*, doi:10.1093/jicj/mqq057. Available at: <http://pellet.actu.com/wp-content/uploads/2016/02/PELLET-2010-Palestinian-Declaration.pdf>

general; rather, it asked whether ‘the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo [is] in accordance with international law?’ The Court took care to answer within the strict limits of that question: ‘The question is narrow and specific; it asks for the Court’s opinion on whether or not the declaration of independence is in accordance with international law. It does not ask about the legal consequences of that declaration.’³² Similarly to this case, it is not the duty of ICC to ‘recognize’ the state of Palestine, but it is only to ensure that the conditions necessary for the exercise of its jurisdiction are fulfilled.

21. On the strength of the Kosovo’s case, this Honourable Court should not set sights on the status of Palestine as a ‘state’ since Palestine had proclaimed their Declaration of Independence since 1988;³³ rather to focus on the pressing need as Palestine had duly signed and acceded to the Rome Statute in seeking for Court’s protection.

22. Further, such a functional approach is extremely frequent in international law. We would like to refer, in this regard, to the terms ‘for the purpose of this convention...’ or ‘of the present treaty...’ in various conventions.³⁴ We also would like to refer to the “approach followed by the ICJ to grasp the concept of international organization: in order to answer the question of whether the United Nations Organization has international personality - an issue, it noted, ‘is not settled by the actual terms of the Charter’ - the ICJ clarified that ‘we must consider what characteristics it was intended thereby to give to the Organization’.³⁵ When commenting on that ‘praetorian revolution’ (*revolution pretorienne*) - which is nowadays generally accepted, Professor Pierre-Marie Dupuy stressed in his General Course to the Hague Academy of International Law that ‘[t]hough the legal personality can vary, in scope and content, depending on the “needs of the community”, there is no reason for the

³² ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 22 July 2010, x 51; see also x 57.

³³ “Diplomatic Relations.” State of Palestine Mission to the United Nations. Accessed March 9, 2020. <https://palestineun.org/about-palestine/diplomatic-relations/>.

³⁴ See among numerous examples: the Vienna Conventions on Diplomatic Relations and on Consular Relations of 1963 (Art. 1), the Vienna Conventions on the Law of Treaties of 1969 and 1986 (Art. 2), the Convention against Torture of 1984 (Art. 1), the United Nations Convention on the Law of the Sea of 1982 (Art. 1), the 1992 United Nations Framework Convention on Climate Changes (Art. 1), the 1997 Convention on the Law of Non-Navigational Uses of International Watercourses (Art. 2) or the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Art. 2).

³⁵ ICJ, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports (1949) 178, at 8.

number of subjects not to increase following the development of the international legal order, which itself reflects the extension of the social needs that the “hunger for law” is intended to meet. Thanks to that opinion of the Court, various entities can be granted a personality...’,³⁶ and the author continues by giving numerous examples of recognition of a functional legal personality to individuals before international criminal courts,³⁷ to companies in investment laws,³⁸ to non-state armed entities,³⁹ to micro states whose dependence on their neighbours leaves one to wonder about their true sovereignty.^{40,41}

23. As stated by Advocate General Sir Francis Geoffrey Jacobs in the Stardust Marine case before the European Court of Justice (ECJ):

*“The concept of the State has to be understood in the sense most appropriate to the provisions in question and to their objectives; the Court rightly follows a functional approach, basing its interpretation on the scheme and objective of the provisions within which the concept features.”*⁴²

24. In addition, some conventional definitions of the state itself pertain to this functional approach. Such is the case, for instance, of Article 44 of the Convention on the Rights of Persons with Disabilities (on ‘Regional Integration Organisations’) under which:

³⁶ Translation of P.M. Dupuy, ‘L’unité de l’ordre juridique international: cours general de droit international public (2000)’ in Collected Courses of the Hague Academy of International Law, Vol. 297 (Martinus Nijhoff Publishers, 2002), at 108-109, footnote omitted. Original text: ‘[s]I la personnalite peut varier, en extension comme en contenu, eu egard aux “besoins de la communaute”, il n’y a pas de raison pour que le nombre des sujets ne s’accroisse pas en fonction du developpement normatif de l’ordre juridique international, refletant lui-me“me l’extension des necessite s sociales auxquelles cette ‘faim de droit’ est destinee a’ repondre. Grace a’ cet avis de la Cour, des entites diverses peuvent se voir conferer une personnalite sans pour autant qu’il s’agisse d’un crime de le’ se-souverainete.’

³⁷ Ibid., at 111.

³⁸ Ibid., at 112.

³⁹ Ibid.

⁴⁰ The example of Monaco is given at 111 (ibid.); one can also think of the example of Andorra, before its 1993 constitution.

⁴¹ Pellet, A. “The Palestinian Declaration and the Jurisdiction of the International Criminal Court”. *Journal of International Criminal Justice*, vol 8, no. 4, 2010, pp. 981-999. *Oxford University Press (OUP)*, doi:10.1093/jicj/mqq057, page 984-985.

⁴² ECJ, opinion of the Advocate General, 13 December 2001, in C-482/99 French Republic v. Commission of the European Communities, [2002] European Court Reports (ECR) I-04397, 56. See the Court’s ruling in this case (dated 16 May 2002, x 55).

“1. ‘Regional integration organization’ shall mean an organization constituted by sovereign States of a given region, to which its member States have transferred competence in respect of matters governed by this Convention....References to ‘States Parties’ in the present Convention shall apply to such organizations within the limits of their competence.”

25. In the same way, according to Article XXII of the 1972 Convention on International Liability for Damage Caused by Space Objects:

“1. In this Convention, with the exception of Articles XXIV to XXVII, references to States shall be deemed to apply to any international intergovernmental organization which conducts space activities if the organization declares its acceptance of the rights and obligations provided for in this Convention and if a majority of the States members of the organization are State Parties to this Convention and to the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies.⁴³”

26. Similarly, an International Centre for the Settlement of Investment Disputes (ICSID) tribunal noted that:

Under the ICSID Convention, the Centre’s jurisdiction extends only to legal disputes arising directly out of an investment between a Contracting state and a national of another Contracting State. Just as the Centre has no jurisdiction to arbitrate disputes between two states, it also lacks jurisdiction to arbitrate disputes between two private entities. Their main jurisdictional feature is to decide disputes between a private investor and a State. However neither the term ‘national of another Contracting State’ nor the term

⁴³ See also the definition of a ‘country’ in the Explanatory Notes of the Agreement Establishing the WTO dated 15 April 1994: ‘The terms “country” or “countries” as used in this Agreement and the Multilateral Trade Agreements are to be understood to include any separate customs territory Member of the WTO.’

‘Contracting State’ are defined in the Convention.... Accordingly the Tribunal has to answer the following two questions: first, whether or not SODIGA is a State entity for the purpose of determining the jurisdiction of the Centre and the competence of the Tribunal, and second, whether the actions and missions complained of by the Claimant are imputable to the State. While the first issue is one that can be decided at the jurisdictional state of these proceedings, the second issue bears on the merits of the dispute and can be finally resolved only at that state.⁴⁴

27. It is interesting to note that, in this case, the Tribunal sought to determine the nature of the state entity at the phase of the appreciation of its jurisdiction (and not of the merits), considering that the difficulty concerned its jurisdiction *ratione personae*. Therefore, it handled it ‘from a point of view different of that of attribution in the meaning of responsibility law, since “State” can have a specific meaning in the context of the dispute’.⁴⁵ As has been stressed by some legal scholars,

following a ‘functional approach’ ultimately called for by the ICJ in its 1949 Opinion in the Reparation for Injuries case, modern international law conceives the State under the form of a variable geometry shape, whose outline depends on the subject at issue, and it relegates it to the rank of general ‘notion’ whose interpretation depends ‘on the economy and the aims of the provisions’ within which it finds itself The boundaries of the concept of the State are nonetheless in movement, its ‘perimeter’ is not an intangible and physically marked limit. International law apprehends the State as an entity that it can itself reshape (as witnesses by the use of conventional definitions of the State⁴⁶ or the jurisprudential

⁴⁴ ICSID, *Maffezini v. Spain*, Case N8 ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000, ICSID Rev. ç For. Investment L. Jl., at 27-28, xx 74-75.

⁴⁵ M. Forteau, ‘L’E tat selon le droit International: une figure a' geometrie variable?’ *Revue generale de droit international public (RGDIP)* (2007) 737, at 762-763. Author’s translation. Original text: ‘sous un angle distinct de celui de l’attribution au sens du droit de la responsabilite, car ‘l’Etat’ peut avoir un sens particulier dans le contexte du litige’.

⁴⁶ Footnote 118: ‘Of which for the rest, one of the most obvious expressions is article 3 of the United Nations Charter on the basis of which original UN member states have been considered to include the federated entities of Ukraine and Belarus:...’ (Author’s translation; original text: ‘Dont, d’ailleurs, une des plus evidentes

*formula whereby international or foreign courts decide that such an entity ‘must be considered as an emanation of the State, and the latter is, in contemporary international law, increasingly understood differently depending on the norm being applied’.*⁴⁷

28. Therefore, applying the functional approach, the Court need not pronounce in theory on the issue of whether or not Palestine is a state for all purposes. For the purpose of making the Rome Statute functional, Palestine meets all the necessary requirements to be considered as a state even if its territory is entirely or nearly entirely occupied.

B. Alternatively, Palestine has fulfilled the criteria as a ‘State’ under International Law⁴⁸

29. The elements of Statehood are “principally matters of fact from which a legal conclusion is drawn”.⁴⁹ The traditional criteria for Statehood are set out in the 1933 Montevideo Convention on the Rights and Duties of States, which enumerates the formal factual criteria for the existence of a State, namely:
- a. defined territory;
 - b. permanent population;
 - c. government; and
 - d. capacity to enter into relations with other States.

manifestations est l’article 3 de la Charte des Nations Unies sur la base duquel ont été considérées comme des États membres originaires de l’ONU les entités fédérées de l’Ukraine et de la Biélorussie...’).

⁴⁷ Forteau, supra note 21, at 768. Author’s translation. Original text: ‘[s]uivant effectivement une “approche fonctionnelle”, au demeurant déjà sollicitée par la Cour de La Haye dans son avis de 1949 rendu dans l’affaire de la Réparation des dommages, le droit international contemporain dessine l’État sous la forme d’une figure à géométrie variable, dont le tracé des contours dépend de la matière impliquée, et il le relève au simple rang d’une “notion” dont l’interprétation dépend de “l’économie et de l’objectif des dispositions au sein desquelles” elle figure... Les confins de l’État n’en sont pas moins mouvants, son “périmètre” n’a rien d’une frontière intangible et physiquement bornée. Le droit international appréhende l’État comme une entité qu’il peut lui-même modeler (en témoigne le recours à des définitions conventionnelles de l’État ou la formule jurisprudentielle par laquelle les juridictions internationales ou étrangères décident que telle entité “doit être considérée comme” une émanation de l’État), et ce dernier est, dans le droit international contemporain, de plus en plus souvent appréhendé différemment selon la norme appliquée.’ See also R. Higgins, ‘The Concept of the “State”: Variable Geometry and Dualist Perceptions’, in L. Boisson de Chazournes and V. Gowlland-Debbas (eds), *The International Legal System in Quest of Equity and Universality*, Liber Amicorum Georges Abi-Saab (The Hague: Kluwer, 2001) 547-562.

⁴⁸ Paragraphs 29-61 are extracted from *A Study on the Statehood of Palestine under International Law*. Asian African Legal Consultative Organization (“AALCO”) Centre for Research and Training, AALCO Secretariat, 2013.

⁴⁹ C Warbrick, *States and recognition in international law*, 231.

A. *Defined Territory*

30. States are territorial units. It has been said that “Territorial Sovereignty... involves the exclusive right to display the activities of the States.”⁵⁰ The requirement is only for the necessity of territory and, there is no stipulation as to the minimum area of territory which needs to be present. States with an extremely small area can exist, as long as they are independent. There is also no requirement that the territory must be contiguous.⁵¹ As an example, in the case of East Prussia was separated from Germany, Alaska from the United States or East Pakistan from West Pakistan up to 1971 were separate from the mainland but still considered to be part of the same State.
31. It has been preserved that the category of Statehood has priority over the category of acquisition of territory. Hence, the “definitive establishment of a new state on certain territory defeats claims by other states that relate to the whole of that territory; where the claims relate only to the part of the territory, they may survive but they become dependent for settlement on the consent of the new state.”⁵²
32. The case of Israel can be taken as one in point. There was an argument in 1948 that the partition resolution had conferred territory on the new state so that the case was only that of undefined frontiers.⁵³ Subsequently, Israel was admitted to the United Nations on 11 May 1949. The argument for Israel’s membership Ambassador Jessup of United States stated that:

“One does not find in the general classic treatment of this subject any instance that the territory of a State must be exactly fixed by definite frontiers...the concept of territory does not necessarily include precise delimitation of the boundaries of that territory. The reason for the rule (requiring territory) is that one cannot contemplate a state as a kind of disembodied spirit...There must be

⁵⁰ Island of Palmas Case (1928) 4 ILR 3,103.

⁵¹ Crawford, *The Creation of States in International Law*, p.47

⁵² *Monastery at St. Naoum (Albanian Frontier)*, (1924) 2 ILR 385; *Polish- Czechoslovakian Frontier (Question of Jaworzina)*

⁵³ General Assembly Resolution 181 (II) of 29 November 1947.

some portion of the earth's surface which its people inhabit and over which its Government exercises authority."⁵⁴

33. There issues on the matter of entire territory of a state being raised in the context of admission to the United Nations. The proposition that a state exists despite claims to the whole of its territory was not been challenged in the cases of Israel, Kuwait, Mauritania and Belize. A German-Polish Mixed Tribunal stated that:

"Whatever may be the importance of the delimitation of boundaries, one cannot go for so as to maintain that as long as this delimitation has not been legally affected the state in question cannot be considered as having any territory whatever...In order to say that a state exists...it is enough that this territory has sufficient consistency even though its boundaries may not have been actually delimited, and that the state actually exercises independent public authority over that territory."

34. The International Court of Justice in the North Sea Continental Shelf Case confirmed this rule, stating that:

*"The apurtance of a given area, considered as an entity, in no governs the precise delimitation of its boundaries, any more than uncertainty as to boundaries can affect territorial rights. There is for instance no rule that the land frontiers of a State must be delimited and defined, and often in various places and for long periods they are not, as shown by the case of the entry of Albania into the League of Nations."*⁵⁵

35. This position has further been tacitly reaffirmed in subsequent cases involving territorial disputes.⁵⁶ In the case of Croatia, the borders of the new State in 1991 were

⁵⁴ SCOR 383rd meeting, 2 December 1948, p.11

⁵⁵ ICJ Rep.1969 p.3,32

⁵⁶ Crawford, 50

fairly certain however, effective control fluctuated with the ongoing armed conflict with the new State and the Serbian force.

36. The application of the rule can be seen in the Croatia case as in 1992, regardless of the occupation of Eastern Slavonia by the Yugoslav National Army, Croatia was recognised by a number of States. Thus, although a substantial boundary or territorial dispute with a new state is not enough to bring statehood into question. The only requirement is that the state must consist of a certain coherent territory effectively governed.
37. This element requires the exercise of governmental power over some territory, without specifying a minimum area for the purpose of fulfilling this condition. For example, Tuvalu, a state of only 26sq km, obtained independence in 1978 and became a full member of the UN in 2000. Furthermore, the territory of the state in international law does not require continuity of the territory.⁵⁷
38. At the end of the 1967 war, Israel had occupied the West Bank, including East Jerusalem and the Gaza strip. It needs to be noted that the international community has continuously refused to recognize these territories to be part of Israeli territory. This is in furtherance of and an acknowledgement of the application of the rule of international law that prohibits the acquisition of the territory of another by resort to force. Security Council Resolution 242 (1967) adopted as a response to the 1967 war also emphasized this and called for “[w]ithdrawal of Israel armed forces from territories occupied in recent conflict”. This was followed by Resolution 338 (1973) and both of these call on Israel to withdraw to 1949 armistice lines, indicating that the West Bank and Gaza Strip occupied by Israel (including within it East Jerusalem) would constitute the territory of the Palestine State. This formulation has received the assent of the international community including the Security Council of the United Nations⁵⁸, the International Court of Justice in the Advisory opinion⁵⁹ and the

⁵⁷ Rewand Hajjaj, “International Recognition Evolving Statehood Criterion: Comparative Analysis of Palestine and Kosovo” (Central European University, Department of Legal Studies, 2012), 6.

⁵⁸ Security Council resolution 1515 (2003), and Security Council Resolution 1860 (2009)

⁵⁹ Legal consequences of the construction of a wall in the occupied Palestinian territory Advisory Opinion, ICJ Rep 2004, 136, paras.78, 162.

Quartet⁶⁰. Notably, Palestine has also accepted this formulation within its 1988 Declaration of Independence⁶¹ and in the mutual recognition by Israeli and Palestinian Liberation Organisation (PLO) in the year 1993.⁶²

39. Hence, the territorial extent of Palestinian State should be established constitute the West Bank (including East Jerusalem) and the Gaza strip. The 1948-49 armistice lines that delineate West and Gaza (i.e. Israel's pre-1969 borders) would be the international boundaries between Israel and the Palestinian State.

B. *Permanent Population*

40. On the second element, a permanent population, it is probably the least contentious of the four traditional statehood benchmarks. It is necessary for statehood, and it is connected with the territorial dimension, because "*if states are territorial entities, they are also aggregates of individuals*". Moreover, like in the case of territory, no minimum population is required.
41. According to the Palestinian Central Bureau of Statistics, the estimated population on Palestinian territory in 2020 was a little over 5.1 million of which over 3 million lived in West Bank and over 2 in the Gaza Strip.⁶³ The United Nations Estimates that the number of people living in the Occupied Palestinian Territory (OPT) would come to about 4.03 million.⁶⁴

⁶⁰ Quartet Statement of September 2009---"The Quartet reiterates that the only viable solution to the Israeli-Palestinian conflict is an agreement that ends the occupation that began in 1967... The Quartet re-affirms that Arab-Israeli peace and the establishment of a peaceful state of Palestine in the West Bank and Gaza, on this basis, is in the fundamental interests of the parties, of all states in the region, and of the international community".

⁶¹ FA. Boyle, The Algiers Declaration on Palestine, 1 European Journal of International Law 301 (1990).

⁶² In the 9 September 1993 letter from PLO Chairman Arafat to Israeli Prime Minister Rabin, the PLO accepted Security Council resolution 242 and 338, and Article I of the Israeli-Palestinian Declaration of Principles on Interim Self-Government Arrangement (13 September, 1993) declared that the aim of negotiations between the parties was to lead to "a permanent settlement based on Security Council resolutions 242(1967) and 338(1973)".

⁶³ Palestinian Central Bureau of Statistics, Estimated Population in the Palestinian Territory Mid-Year by Governorate, 1997-2021. Available at:

<http://www.pcbs.gov.ps/Portals/Rainbow/Documents/%D8%A7%D9%84%D9%85%D8%AD%D8%A7%D9%81%D8%B8%D8%A7%D8%AA%20%D8%A7%D9%86%D8%AC%D9%84%D9%8A%D8%B2%D9%8A%2097-2017.html>

⁶⁴ United Nations Secretariat, World Population Prospects: The 2010 Revision, Department of Economic and Social Affairs, Population Division, available at: http://esa.un.org/unpd/wpp/unpp/panel_population.htm

C. *Effective Government*

42. The third requirement is the presence of a government capable of exercising independent and effective authority over the population and the territory. Fundamentally, it must be shown that the territory has a government who is independent, controls the affairs of the state and ensures social and legal order. Nonetheless, if a state ceases temporarily to have an effective government (think about scenarios of civil war) this does not mean that the state disappeared.⁶⁵
43. International law defines and understands territory not in the manner the private law does. It refers to the extent of governmental power being exercised or is capable of being exercised with respect to some territory or some population. Territorial sovereignty is not a concept of ownership but one of exercise of power and control. It could be then be said that government is indeed the most important criteria for statehood – on which all the other factors would impinge on. “However, as practice as states show, the extend of government and how effective it actually is have remained grey areas while several states have been granted independence and recognition.”
44. Congo is an excellent case in point: Belgian Congo was granted independence in 1960 as the Republic of Congo (later Zaire and since 1997, the Democratic Republic of Congo). However, while this was done, the situation in Congo was actually a difficult one: there was hardly and preparations for the effective granting of the working of the state machinery when independence was granted. There were several secessionary movements all through the country. The existing central government had split into two and each fraction claimed to be the lawful authority. Further, there was also a reintroduction of the Belgian troops for reasons of humanitarian intervention. Shortly after independence was granted, the UN army had to be called in to maintain order and peace. In addition to this, in complete violation of the Resolution of the General Assembly, there were also several Belgian troops, mercenaries and political advisors present in the Congolese territory. In these conditions it could hardly be said that there was any effective government at all. Yet, in 1960 itself, Congo was recognized as a

⁶⁵ Martin Dixon, *Textbook on International Law* (Oxford: Oxford University Press, 2010), 121.

state in the full sense of the term and its application for membership in the United Nations was approved without any dissent.

45. Before evaluating the grade of accomplishment of this condition in the case of Palestine, it seems useful to sum up the governmental structure and the different actors involved in the governance of the OPT. Established in 1964, the PLO emerged with the aim to represent the Palestinian people. In its early years, it was seen as an extension of Arab regimes, especially the Egypt of Nasser, without possessing complete autonomy over its decision- making.⁶⁶ However, after the defeat in the 1967 Six-Day War the PLO gained more international reputation. A decade after its creation, it was recognized as the Palestinians' sole legitimate representative by the Arab League and the UNGA through Resolution 67/19, which upgraded Palestine to non-member observer status.
46. "In 1988 the Palestinian National Council (hereinafter, PNC), the legislative body of the PLO, adopted the Palestinian Declaration of Independence. It was proclaimed by Yasser Arafat, Chairman of the PLO, which assumed also the title of first President of Palestine. Arafat and the PLO acted as the diplomatic face of the Palestinians, such as in the negotiations of the Oslo Accords with Israel in 1993. They brought to the establishment of the PA, which was created as a five-year interim body with the aim to oversee Palestinian affairs in the OPT. It exceeded its initial five-year mandate and a complex web of political representation emerged. However, it is the PLO, and not the PA, who handles negotiations with Israel and operates embassies and diplomatic missions around the world.⁶⁷ The PLO includes several political parties, though it has been dominated by Fatah, which gradually abandoned its previous stance against the existence of Israel and in favour of a military solution to the conflict. Since the 90's, Hamas challenged the primacy of Fatah and carried out a series of suicide attacks against Israel in order to undermine the peace process. It was not until March 2005, after the election of Mahmoud Abbas as President of the PA, following Arafat's death, that Hamas and Fatah reached an agreement in Cairo in which the former

⁶⁶ Salem Barahmeh, "The Palestinians, the PLO, and Political Representation: the Search for Palestinian Self-Determination", *International Centre for the Study of Radicalisation and Political Violence* (June 2014): 7.

⁶⁷ Yaghi Mohammad, "Hamas Challenge to the PLO: Opportunities and Prospects", *The Washington Institute*, 9 February 2009. Available at: <http://www.washingtoninstitute.org/policy-analysis/view/hamas-challenge-to-the-plo-opportunities-and-prospects> (Last accessed 23 February 2018).

committed to end [attack] against Israel.⁶⁸ In the legislative elections held in 2006 Hamas surprisingly won, achieving the majority of the seats in the Palestinian Legislative Council. Fatah and other factions refused to participate in the new government because of differences in the political program. After the intensification of the clashes between the two factions at the beginning of 2007, an agreement was signed in Mecca which brought to the formation of a government of national unity. Unfortunately, it was dismantled by another explosion of violence through which Hamas seized control of the Gaza Strip, while Fatah consolidated its control over the West Bank, paving the way for two separate Palestinian governments. Even if some attempts of reconciliation have been made, they were not implemented, and now there exists a complex internal situation which in a certain sense could undermine the future of Palestine. Anyway, despite the political conflicts emerged inside the PA, we can say that under Abbas it has established governmental functions close to those of a state government and that great progresses have been made in terms of democratic processes.⁶⁹ However, it is still debatable whether the Palestinian government exercises sufficient authority over its territories. It has full control only over parts of them, while in others, specifically the West Bank, it is only partial as Israel possesses almost the 60%. Further critical arguments claim that important areas of governmental authority such as external and border security were never transferred to the PA, while remained in Israeli hands. However, the limitation on its responsibilities does not necessarily defeat the requirement of effective government, because international law does not oblige an entity to have all these competences and powers in order to satisfy the government criterion.⁷⁰ We can sustain that the competencies transferred to the PA with the Interim Agreement are the evidence that Palestine has a government because the PA is responsible for almost all the most important governmental services, such as a judiciary and a police force, legislative and executive authority including education, tourism, culture, social welfare, taxation and so on.^{71,72}

⁶⁸ Yaghi Mohammad, " Hamas Challenge to the PLO: Opportunities and Prospects", *The Washington Institute*, 9 February 2009. Available at: <http://www.washingtoninstitute.org/policy-analysis/view/hamas-challenge-to-the-plo-opportunities-and-prospects> (Last accessed 23 February 2018).

⁶⁹ Michael Emerson, "The Political and Legal Logic for Palestinian Statehood", *Centre for European Policy Studies* (October 2011): 2.

⁷⁰ There are several small states, such as Liechtenstein, Monaco and San Marino, which are regarded as States but do not exercise effective competences and powers in the external security area.

⁷¹ William T. Worster, "The exercise of jurisdiction by the ICC over Palestine", *American University International Law Review* 26, no. 5 (February 2012): 1167.

47. Even though more than a 100 State did recognize Palestine following the declaration of Independence in 1988, the Palestine Liberation Organization did not in fact exercise effective governmental control over the Occupied Territories. These acts of recognition had thus effectively ignored the requirements of effective government and hence would have to be regarded as premature. With the creation of the Palestinian Interim Self-Government Authority in the West Bank and in Gaza, Israel has transferred to the Palestinian National Authority certain governmental powers and responsibilities.⁷³
48. According to the Israel-PLO Interim agreement on the West Bank and the Gaza strip, in the 'A' region of Gaza Strip, the PA exercises full civil and security powers. Area A includes major towns located in West Bank and covers about 18 percent of the same. In area B, which makes about 60 percent of West Bank, the PA has only civil powers and Israel continues to exercise the security powers. Area C, which makes about 60 percent of West Bank consists of Jewish settlements, Israeli military bases and their surroundings, which is fully controlled by Israel.⁷⁴ Since 2007 June, the Gaza Strip has been controlled by the Hamas, however, the PA continues to provide some of the services and electricity, health, reconstruction and rehabilitation etc.
49. However, despite Israel continuance in exercising their control over some of the governmental functions and powers even in relation to Areas A and B and in Gaza such as maritime areas and the border access points, the PA still continues to provide services and perform governmental functions within a defined territory to a population, especially in West Bank. It displays all signs of an effective government with a legislature, an executive and a judiciary.

⁷² "Statehood and Recognition: The Case Of Palestine". *Diposit.Ub.Edu*, 2020, page 18-19. Available at: http://diposit.ub.edu/dspace/bitstream/2445/123175/1/TFM_Michele_Pitta.pdf.

⁷³ Agreement on the Gaza Strip and Jericho Area (4 May 1994); Agreement on Preparatory Transfer of Powers and Responsibilities (29 Aug 1994); Interim Agreement between Israel and the Palestinians (September 28, 1995).

⁷⁴ See the 1995 Interim Agreement, especially arts XI, XIII, XVII; Btselem, Land Grab: Israel's Settlement Policy in the West Bank (May 2002) 93, available at: https://www.btselem.org/download/200205_land_grab_eng.pdf

50. In April 2011, the International Monetary Fund had observed that the “that the PA is now able to conduct the sound economic policies expected of a future well-functioning Palestine State, given its solid track record in reforms and institution-building in the public finance and financial areas.”⁷⁵ The World Bank had also made an observation that “despite continued stringent Israeli restrictions on access to resources and markets, the PA has continued to strengthen its institutions, delivering public services and promoting reforms that many existing States struggle to achieve.” The report did note that there was still significant changes and reforms required, but that these were no more that those faced by other middle-income countries. It was further observed that “if the PA maintains its performance in institution-building and delivery of public services, it is well-positioned for the establishment of a State at any point in the near future.”⁷⁶
51. In 2011, the United Nations, in a report titled “Palestinian State-building: a decisive period, it was observed that “in the limited territory under its control and within the constraints on the ground imposed by unresolved political issues, the PA has accelerated progress in improving its governmental functions”. In six areas where the UN is most engaged (governance, rule of law and human rights, employment, education and culture, health, social protection and infrastructure and water) governmental functions are now sufficient for a functioning government of a State.”⁷⁷ The report however pointed out that there were still significant number of difficulties that the Palestine Authorities face.
52. The UN report nevertheless pointed out that significant difficulties face the PA. It was observe that ‘the progress achieved, the persistence of occupation and the continuing Palestinian divide between the West Bank and Gaza deprives the PA of the ability to extend its institutional authority to areas outside its reach and thus of the ability to provide governmental services to people in those areas.’ It was also observed that

⁷⁵ IMF, Macroeconomic and fiscal framework for the West Bank and Gaza: seventh review of progress (April 2011), para 22, available at: <file:///C:/Users/User/Downloads/041311.pdf>

⁷⁶ World Bank, Building the Palestinian State: sustaining growth, institutions and service delivery, Economic monitoring Report to the Ad Hoc Liaison Committee (April 2011), 5, 24, 30, available at: <http://siteresources.worldbank.org/INTWESTBANKGAZA/Resources/AHLCReportApril2011.pdf>

⁷⁷ Office of The United Nations Special Coordinator For The Middle East Peace Process, Palestinian Statebuilding: a decisive period (April 2011) iii-iv, available at: <https://www.un.org/unispal/document/auto-insert-206028/>

“the institutional achievements of the Palestinian State building agenda are approaching their limits within the political and physical space currently available”. The space for any further progress in governance is thus limited and impinge on the withdrawal of the occupying forces, especially in the Gaza area where there exists “a disconnect between Gazans and PA institutions.”⁷⁸

53. A 2011 report by the Quartet Representative also acknowledged that “since 2007 the PA has greatly enhanced its capability to govern and to deliver services. The PA’s achievements have been substantial, as has been recognized by the international community.” However, the report was also careful to note that this does not cover Area C which was a vital area for the economic development and livelihood of Palestine people.⁷⁹ The same report observed that the East Jerusalem neighbourhoods were in a state of urban and economic decay and is “disconnected from their natural economic surroundings in the West Bank”.⁸⁰
54. Even as one concedes that the strict application of the criterion of effective government in the context of Palestine raises difficult questions, particularly in view of the ongoing and continuing occupation of its territories by Israel and the division of governmental powers and functions, especially in the Gaza strip, it needs to be noted that there is indeed effective Palestinian government in the Areas A and B of the West Bank. It needs to be then concluded that the effective government criterion has been largely met in part of the defined territory of Palestine. However, as noted earlier, International Law at present makes a less stringent requirement of government, especially where an issue of self-determination arises.⁸¹ For this reason, the recognition of Palestine would be a lawful one, particularly when the principle of self-determination is one of the essential principles of International Law, which all states have a duty to promote.

⁷⁸ Office of The United Nations Special Coordinator For The Middle East Peace Process, Palestinian Statebuilding: a decisive period (April 2011) iii-iv, available at: <https://www.un.org/unispal/document/auto-insert-206028/>

⁷⁹ Office Of The Quartet Representative, Report for the meeting of the ad hoc Liaison Committee on OQR, Action in support of Palestinian Authority State-building (April 2011) 4, 10, available at: http://www.lacs.ps/documents>Show.aspx?ATT_ID=3880

⁸⁰ Ibid

⁸¹ Crawford, The Creation of States in International Law, p.57.

D. Capacity to Enter into Diplomatic Relations with other States

55. The capacity in this criterion would depend in part on the power of a government over a territory without which international obligations undertaken cannot be given effect to and in part on the entity concerned being a separate one for the purposes of international relations so that no other entity accepts or carries out such obligation. Thus, in a sense this criterion can be said to be an extension of the requirement of effective government and of independence.⁸²
56. It has been maintained that the legal independence of a State can be assured as long as the independence of its legal order is assured; that is as long as it is not subject to the legal order of another state, especially in day-to-day decision making and implementation of those decisions.⁸³
57. After a survey of the State Practice in this area, it has been concluded that in applying the criterion of independence as the criterion of statehood, the following presumptions are of value:⁸⁴
- 57.1. As a matter of general principle, any territorial entity formally state and possessing a certain degree of actual power is capable of being and other things being equal should be regarded as state for general international purposes. The denomination 'sui generis' often applied to entities that for some reason it is desired not to characterize as states is of little value. The regime of rules concerning States provides a flexible and readily acceptable standard; by contrast inducing a multitude of necessary and usually unexpressed rules regarding a sui generis entity is laborious and for most purposes unnecessary. To suggest that entities such as 'protected states' or internationalized territories are a priori excluded from statehood is unjustified and exaggerates the exclusivity of the international legal regime of statehood. The international Court has never made that assumption.

⁸² Crawford, *The Creation of States in International Law*, p.62.

⁸³ Stefan Talmon, *The Constitutive Versus The Declaratory Theory of Recognition: TERTIUM NON DATUR*, (2004) *British Year Book of International Law* 101,111.

⁸⁴ Crawford, *The Creation of States in International Law*, p.88-89.

- 57.2. Specifically, independence for the purpose of statehood must be presumed where an entity is formally independent and its creation was not attended by serious illegality.
- 57.3. There is strong presumption in favour of the continued statehood of existing states, despite very extensive loss of actual authority.
- 57.4. There is presumption in favour of the independence of a territorial unit as a whole, when it has been granted full formal independent by the former metropolitan state.
58. The Palestinian Authority exercises its capacity to enter into relations with other states through the Palestine Liberation Organization. An overwhelming majority of States has formally recognized the PLO as the representative of the people of Palestine and maintains bilateral relations with it, often to the level of full range of diplomatic relations.⁸⁵ The PLO maintains permanent representative offices in more than 70 States⁸⁶ and more than 130 countries have accorded it recognition, following its declaration of Independence in the year 1988. Palestine has observer status in a number of International Organizations such as the World Health Organization and full membership in UNESCO and the Movement of Non-Aligned Countries, the Islamic Conference, the Group of 77 and China, and the League of Arab States.
59. In the year 1974, the PLO was granted observer status at the United Nations and was also invited by the assembly to participate in all the sessions and in all international conferences convened by or under the auspicious of the United Nations.⁸⁷ The PLO has a unique place in the United Nations with the most extensive participatory rights that any other entity that participates in the capacity of an observer.⁸⁸

⁸⁵ Status of the Palestine Liberation Organisation in the UN, UN Juridical Yearbook 156 (1982) 159.

⁸⁶ Palestinian National Authority, Ministry of Foreign Affairs website, available at: http://www.mofa.pna.ps/ar/index.php?p=foreign_relations

⁸⁷ General Assembly resolution 3237 (XXIX) [1974].

⁸⁸ Status of the Palestine Liberation Organisation in the UN, UN Judicial Yearbook 156 (1982) 157.

60. Since 1988 the Palestinian representation in the UN has been referred to as “Palestine.”⁸⁹ In 1998, the General Assembly granted it additional rights of participation which includes the right to raise points of order and the right to co-sponsor draft resolutions on Palestinian and Middle East issues.⁹⁰ Palestine also has an invitation to participate in the Security Council debates on the situation in the Middle East, which is similar to those accorded to those member states which are not part of the Security Council, when issues that pertains to them are discussed by the Council.
61. Some quarters maintain that this criterion for statehood is not fulfilled, impinging on the formal distinction between the PLO and the PA. According to the Interim Agreement, the PA does not have the powers with respect to foreign relations and exercise of diplomatic functions.⁹¹ The PLO may take part in negotiations and sign agreements with international organizations for and on behalf of the PA.⁹² However, in actual practice, this distinction is little with the PA taking the role of a full-fledged government and Palestine, PA and PLO often being used interchangeably. It is thus clear that the Palestine has the capacity to enter into relations with other states.

C. Conclusion

62. From the above, it is clear that Palestine meets all the necessary requirements to be considered as a state (even if its territory is entirely or nearly entirely occupied). Palestine is a state for purpose of Article 12(2) of the Rome Statute.



Dr. Hj. Noorazman Mohd Samsuddin
On behalf of
CEO MyAQSA Foundation [MyAQSA]

Dated this 16 March 2020
At Kuala Lumpur, Malaysia

⁸⁹ General Assembly resolution 43/177 [1988]58

⁹⁰ General Assembly resolution 52/177 [1988]

⁹¹ M, Shaw, Supplementary opinion in the matter of the jurisdiction of the International Criminal Court with regard to the Declaration of the Palestinian Authority (October 2010), available at <https://www.icc-cpi.int/NR/rdonlyres/D3C77FA6-9DEE-45B1-ACC0-B41706BB41E5/282851/OTP2010000035449SupplementaryOpinionMalcolmShaw.pdf>

⁹² Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (1995) Article IX, sec 5.