Office of the Prosecutor

ICC NGO Seminar – 19 October 2010

Re: Declaration of the Palestinian Authority

Statement on behalf of the International Association of Jewish Lawyers and Jurists

1. I will make the following points, some of them very briefly due to time constraints, others rather more fully: First, the legal context for this debate over the meaning of the Declaration of the Palestine Authority dated 22 January 2009 remains that of the Rome Statute and its constitutional provisions; second, Palestine currently is not, nor has ever been, a State in international law; third, there is no legal basis for the assertion that Palestine may be deemed to be a State for the purposes only of the ICC; finally, the implications for the Court in accepting that Palestine is a State either generally or for the purposes only of the Rome Statute are serious and might challenge the efficient and successful performance of the functions of the Court, something to which we all aspire.

1. The Legal Context

2. As the 10 January 2010 letter from the Office of the Prosecutor makes clear, the first issue that must be considered is whether the Declaration of 22 January 2009 "meets statutory requirements". This means that the legal context for this debate is constituted by the Rome Statute. Articles 13 and 15 provide for the initiation of an investigation by the Prosecutor, but the necessary prerequisite is the satisfaction of the "Preconditions to the Exercise of Jurisdiction" laid down in Article 12. This provides that the Court (of which the Prosecutor is a constitutional part) can only exercise jurisdiction if either the State on whose territory the alleged crime was committed or the national State of the alleged offender are parties to the Statute. Beyond this, article 12 (3) declares that where neither State is a party, the relevant non-party State may by declaration accept the exercise of jurisdiction by the Court with respect to the crime in question.

3. Thus, the essential basis for the jurisdiction of the ICC is either that the relevant territorial or national States are parties to the Statute or, if not, have entered a declaration of consent. Termed a "pre-condition", it means just that. The first question before the Court must be whether the State in question is a party or if not has expressed consent. This necessary precondition refers to 'States' specifically and only. There is no provision whatsoever in the Statute allowing for a non-State entity, either directly or indirectly, to accept the jurisdiction of the ICC nor for the Court to exercise its jurisdiction with regard to such an entity (other than by way of a binding Security Council referral).

2. There is no State of Palestine

4. The question, therefore, is whether Palestine is a State, for if it is not, then the PA Declaration cannot be valid. Although it has been argued, particularly by Professor Quigley, that a State of Palestine has been in existence either since mandatory times or since 1988, this is clearly not the case. There are essentially two reasons for this. First, the necessary criteria of effective government and capacity to conduct foreign relations are absent. I will not deal in detail with this point here, suffice it to say that the PLO of its own free will accepted in the Oslo Accords with Israel that the consensually created Palestinian Authority, the agreed instrument of Palestinian governance and rights over the relevant territories, would have only limited effective government over the area in question and would have little if any capacity to conduct foreign relations. Israel would be the residuary holder of rights and obligations. This arrangement, I emphasise, was not imposed upon the Palestinians. They accepted it.

5. But the primary reason for the non-existence of a State of Palestine today is that the Palestinian authorities have simply not declared such a State. It is indeed telling that even the letter of 22 January 2009 is headed 'Palestinian National Authority' and refers nowhere to a State of Palestine, while there is no mention whatsoever of any claim to Statehood or assertion of it. Further, the records are replete with comments by authorised Palestinian leaders to the need to establish a State as the necessary result of negotiations. Examples may be found in the written Statements provided to the Prosecutor. Even last week,

there were reports that some leading Palestinians[1] were contemplating as a strategic move the future unilateral declaration of a State in the light of the current difficulties in the peace process. International documents from Oslo to the Roadmap and Statements of the Quartet are all to the same effect. Neither the UN nor the ICC have recognised such a State and treat "Palestine" as a non-State entity and no more. UN International practice is clear that there is no current State of Palestine.

3. Palestine may not be deemed to be a State simply for the purposes of the Rome Statute

6. This leads to the argument that Palestine may be deemed to be a State for the purposes of the Statute alone. In other words, Palestine, while not a State in international law, may, by a process of treaty interpretation, be so regarded for the purposes of the ICC. This argument meets a number of principled objections. First, at the policy level, it would indeed be strange for an institution with individual criminal jurisdiction to be accepted as having the competence to determine the existence or not, even for specific purposes, of a State. International law has evolved mechanisms for the recognition of new States in the light of accepted criteria and the views of criminal courts with no jurisdiction over States is not such a method.

7. Secondly, there is a limit to how far treaty interpretation may be stretched in international law. There are many ways to comprehend a quadruped, but an elephant can never be mistaken for a motor car. Let me delve into this a bit more. My friend, Professor Pellet in a contribution apparently requested by the PA, has argued that the Prosecutor and the ICC is not called upon to recognise a claimed State of Palestine, but simply to decide whether, relying upon a teleological and functional interpretation of article 12 (3), one might conclude that Palestine falls within the requirements of that provision. This means that the ICC must interpret the term "State" in a manner which does not confirm

[1] See eg. The Palestine Monitor of 12 Oct 2010, http://www.palestinemonitor.org/spip/spip.php?article1564 and the Christian Science Monitor of 13 Oct 2010, http://www.csmonitor.com/USA/Foreign-Policy/2010/1013/Palestinians-consider-Mideast-talks-trump-card-declaring-Statehood

with the international law requirements of Statehood, but rather fashions out of the object and purposes of the Rome Statute some divergent interpretation. But while a court has inherent power to determine its own jurisdiction and competence, this is constrained by the terms of its constituent instrument. No court can regard such inherent power as unlimited and capable of overturning the clear meaning of constitutional provisions.

8. The general rule of treaty interpretation is laid down in article 31 (1) of the Vienna Convention on the Law of Treaties 1969, which provides that: "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". This is also accepted as a rule of customary international law. This provision lays down the parameters for legitimate interpretation. The tribunal in the *Laguna* case, for example, noted that the process of interpretation "is a judicial function, whose purpose is to determine the precise meaning of a provision, but which cannot change it". Clearly to permit an excessively loose interpretation of an important provision in a treaty would risk undermining the treaty as a whole. Indeed, such an approach would confer upon the Prosecutor an undefined power of discretion in relation to the jurisdictional reach of the Court, unconnected with the express and carefully crafted requirements set out in the Statute.

9. The whole teleological argument revolves around two essential points: first, that the term "State" in article 12 (3) is inherently ambiguous, and, secondly, that the interpretation of that term in the light of the objects and purpose of the Rome State lead inexorably to the conclusion that such term must be understood to include entities that are clearly not States in public international law. Both are incorrect.

10. In support of the teleological argument, reference is made to the definition reached of objective international legal personality by the International Court in the *Reparations* case, which interpreted that notion to include the United Nations. A careful reading of this case, however, does not support this argument. The International Court emphasised that the inclusion of the UN into the category of subjects of international law was achieved in the light of

the inherent flexibility of the concept of international personality and as a consequence of the clear will of the member States as reflected in the provisions of the Charter referring to the competences and powers of the organisation itself.

11. But, the term “State” in international law is very clear. A mix of law and facts ensures that Statehood - which is not a flexible concept with gradations of meaning must involve adherence to the Montevideo criteria coupled with international recognition.

12. It is, of course, necessary that the Statute be interpreted in a way that fulfils its objectives, but such objectives do not include re-interpretation of clear terms. McNair in his classic work, for example, wrote that the task of interpretation could be described as “the duty to giving effect to the expressed intention of the parties, that is, their intention *as expressed in the words used by them in the light of the surrounding* circumstances”, while Sinclair declared that “it is also worth stressing that reference to the object and purpose of the treaty is, as it were, a secondary or ancillary process in the application of the general rule on interpretation”.

13. Moreover, the object and purpose of the Rome Statute cannot be simplistically interpreted as implying the absence of jurisdictional limitation for the Court. In fact, the object and purpose of the ICC Statute is to promote the fight against impunity *within* the jurisdictional framework of the Statute. As is well known, the jurisdictional provisions of the Statute were among the most contentious, and form a carefully negotiated balance which would be undermined by any attempt to ignore them in favour of the argument that the sole and overriding object and purpose of the Statute was to "end impunity" to the detriment of any agreed jurisdictional provision.

14. No reasonable interpretation of “State” in article 12 (3) in the light of the object and purpose of the Rome Statute, ie. no impunity coupled with prosecution by national jurisdictions or failing that by the ICC, can extend that term to include non-State entities of whatever hue. After all article 31 (1) of the Vienna Convention on the Law of Treaties commences by stating, and thus prioritising, the principle that a treaty has to be interpreted “in good faith in

accordance with the ordinary meaning to be given to its terms …". The teleological approach to treaty interpretation does not give free reign to the interpreter to alter the clear meaning of terms, this approach is rather carefully circumscribed by the other required elements of article 31 (1).

15. Article 31 (3) states that the subsequent practice of the parties in the application of the treaty which establishes the agreement of the parties regarding its interpretation may be taken into account, as may any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions, while article 31 (4) specifically provides that a "special meaning shall be given to a term if it is established that the parties so intended". Examples here would include the Disabilities Convention and Space Liability Convention, where the convention itself specifically allows for the term 'State' to include certain non-State entities. This is not the case here.

16. There is nothing within the text of Article 12 or any other provision of the Rome Statute to suggest that the term "State" was intended to include non-State entities or be attributed with a special meaning. There has been no relevant subsequent practice or subsequent agreement with regard to accepting a divergent definition of "State" for the purposes of article 12 (3) of the Rome Statute, nor has it been established that the parties intended such special meaning to be given to this term. Indeed, there is no evidence at all that any flexible interpretation of "State" was intended by any of the States negotiating what became the Rome Statute. As Professor Bassiouni himself has authoritatively concluded: "As Chairman of the Diplomatic Conference's Drafting Committee, I can attest to the fact that referrals under Article 12 (3) were intended to be by States only". Nothing could be plainer.

17. Article 31 (3) states that the subsequent practice of the parties in the application of the treaty which establishes the agreement of the parties regarding its interpretation may be taken into account, as may any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions, while article 31 (4) specifically provides that a "special meaning shall be given to a term if it is established that the parties so intended".

18. In this context, it is also important to note that the alternative to recognising Palestine as a State for the purposes of article 12 (3) is not a legal vacuum or alleged impunity. Firstly, it is still open to Israel to accept the jurisdiction of the Court either by way of accession to the treaty or by lodging a declaration with regard to the situation. Secondly, it is open to the Security Council to refer the relevant situation to the ICC, as some have argued indeed. Thirdly, the doctrine of universal jurisdiction enables foreign national jurisdictions to deal with alleged international crimes, regardless of the jurisdictional reach of the ICC. Fourthly, in actual fact any alleged war crimes committed by Israelis are undeniably susceptible to the exercise of Israeli jurisdiction, including both its criminal jurisdiction and the administrative jurisdiction of its Supreme Court sitting as the High Court of Justice and it is well known that this jurisdiction has and is continuing to be exercised in relation to the Gaza Operation. It is internationally accepted that Israel's legal system is independent, credible and effective. It is also the case that concurrently with Israeli jurisdiction, the Palestinian Authority may prosecute Palestinians, subject to the jurisdictional powers established by the Oslo Accords.

4. Implications of Accepting the Claims of the PA Declaration

19. Very briefly, for the ICC to accept the assertions made in the PA's Declaration would raise problems in three particular ways. First, it would seriously complicate the delicate and difficult attempts to move forward with the Middle East peace process. Secondly, it might well embroil the Court in further highly political disputes, as other non-State entities sought to issue and maintain similar declarations. Thirdly, the necessarily expansive and controversial interpretation of Article 12 (3) that would be required would concern a variety of States around the world (current parties and non-parties) and might well impact adversely upon the real and necessary work of the ICC.

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