



הארגון הבינלאומי של עורכי-דין ומשפטנים יהודים
THE INTERNATIONAL ASSOCIATION OF JEWISH LAWYERS AND JURISTS

October 18, 2010

His Excellency Luis Moreno-Ocampo, Prosecutor
International Criminal Court
Post Office Box 1951 9 2500CM, The Hague
The Netherlands

via e.mail and Courier

Dear Mr. Moreno-Ocampo,

We are writing to you on behalf of the International Association of Jewish Lawyers and Jurists. You were kind enough to accept our letter dated September 9, 2009 to which a Legal Opinion obtained from Professor Malcolm N. Shaw, QC was attached.

The opinion covered some legal issues raised by the Declaration of the Palestinian Authority of January 22, 2009. Since the date of Professor Shaw's opinion, a number of submissions have been sent to you and have been published on your website, including contributions from Professor Quigley, Professor Pellet and the non-governmental organization Al-Haq.

We would be very grateful if you could accept a Supplementary Opinion from Professor Shaw which addresses arguments raised in the submissions particularly of Professor Quigley, Professor Pellet and the non-governmental organization Al-Haq.

Yours Sincerely,

Alex Hertman, Adv.
President

Irit Kohn, Adv.
Deputy President

**In the Matter of the Jurisdiction of the International Criminal Court with regard to the
Declaration of the Palestinian Authority**

SUPPLEMENTARY OPINION

1. I have been asked to prepare a legal opinion to supplement that dated 30 August 2009 concerning the declaration of acceptance of the jurisdiction of the International Criminal Court (“the ICC”) made by the Minister of Justice of the Palestinian National Authority and delivered to the Prosecutor of the ICC on 22 January 2009. The Office of the Prosecutor is currently continuing to conduct a preliminary analysis of the situation with regard to Palestine.¹
2. In particular, I have been asked to respond to three arguments. First, that “Palestine” is already a State in international law whether as from the declaration of 1988 or as from before 1948 (the Quigley argument); secondly, that the concept of statehood bears a separate and unique meaning within the context of the Rome Statute diverging from that accepted in international law (the Pellet argument); and, thirdly, that it is not statehood that is the key to the situation but rather certain jurisdictional manifestations (the Al-Haq argument).
3. First, however, it is critical to repeat the terms of the relevant provisions of the Rome Statute since this is the key to the status of the Palestinian declaration of 22 January 2009 as the 12 January 2010 letter from the Office of the Prosecutor makes clear.² Under article 13 of the Rome Statute, the Court may exercise its jurisdiction with respect to a crime referred to in article 5 if:

¹ <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/>. See also the letter from the Office of the Prosecutor to the UN Deputy High Commissioner for Human Rights dated 12 January 2010, <http://www.icc-cpi.int/NR/rdonlyres/FF55CC8D-3E63-4D3F-B502-1DB2BC4D45FF/281439/LettertoUNHCR.pdf> and the Summary of submissions published by the Office of the Prosecutor dated 3 May 2010, <http://www.icc-cpi.int/NR/rdonlyres/D3C77FA6-9DEE-45B1-ACC0-B41706BB41E5/282529/PALESTINEFINAL201010112.pdf>

² Paragraph 6 of this letter states that: “the Office must consider first whether the declaration accepting the exercise of jurisdiction by the Court meets statutory requirements”, *op.cit.* See also paragraph 2 of the Summary of submissions stating that: “[t]he first step in the determination of jurisdiction is to ascertain whether the declaration lodged by the PNA meets statutory requirements”, *op. cit.*

“(a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;

(b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or

(c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15”.

4. Since neither a State Party nor the Security Council has referred the situation in the Palestinian Authority territories to the Prosecutor, only subsection (c) is relevant for present purposes.

5. Article 12 is entitled “Preconditions to the Exercise of Jurisdiction” and provides as follows:

“1. A *State* which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.

2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following *States* are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

(a) The *State* on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the *State* of registration of that vessel or aircraft;

(b) The *State* of which the person accused of the crime is a national.

3. If the acceptance of a *State* which is not a Party to this Statute is required under paragraph 2, that *State* may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting *State* shall cooperate with the Court without any delay or exception in accordance with Part 9” (emphases added).

6. Thus, the essential basis for the jurisdiction of the ICC is either that the alleged crime took place within the territory of a State Party to the Statute or that the accused is a

national of a State Party to the Statute. In this, the core provisions of jurisdiction under public international law were reflected.³ Article 12 (3) allows for States that are not Parties to the Statute to accept the jurisdiction of the ICC by way of declaration. Rule 44 of the Rules of Procedure and Evidence requires the Registrar to inform a State making such a declaration that as a consequence of such a declaration, jurisdiction would extend to include crimes referred to in article 5 “of relevance to the situation”. Indeed this essential basis for the exercise of jurisdiction is expressly termed a "pre-condition", that is this question is both logically and constitutionally prior to any other and all else flows from it. Conversely, a finding that the pre-condition is not fulfilled necessarily concludes the matter.

7. At no point, it must be stressed, is there any provision 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 through such act of acceptance. This can be contrasted with situations where the relevant instruments have expressly provided for the status of non-State entities. For example, Additional Protocol I to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict, of 8 June 1977, where express provision was made for the possibility of a non-State entity lodging a declaration with the depositary.⁴ A similar example is provided by the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, of 10 October 1980.⁵ Other examples from outside of the international humanitarian law context include the United Nations Convention on the Law of the Sea, of 10 December 1982, where express provision is made for signature and accession, *inter alia*, "by all territories which enjoy full internal self-government ... but have not attained full independence ... and which have competence over the matters governed by this Convention, including the

³ See eg. M. Akehurst, "Jurisdiction in International Law," 46 BYIL, 1972-3, p. 145; F.A. Mann, "The Doctrine of Jurisdiction in International Law", 111 HR, 1964, p. 1; *Oppenheim's International Law* (eds. R.Y. Jennings and A.D. Watts), London, 9th ed., 1992, p. 456 and I. Brownlie, *Principles of Public International Law*, Oxford, 7th ed., 2008, p. 299.

⁴ Article 96 (3) provides that: "The authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in Article 1, paragraph 4, may undertake to apply the Conventions and this Protocol in relation to that conflict by means of a unilateral declaration addressed to the depositary. ...".

⁵ See Article 7 (4) applying the Convention where "an authority referred to in Article 96, paragraph 3" of Additional Protocol I "undertakes to apply this Convention and the relevant annexed Protocols in relation to that conflict".

competence to enter into treaties in respect of those matters",⁶ and the Agreement on the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, which expressly permits such aforementioned non-State entities, as well as "other fishing entities whose vessels fish on the high seas" to become a party.⁷ Clearly, when negotiators of international agreements intended for such a possibility of acceptance by non-State entities, they provided for it in expressed and unambiguous language.

8. I will now address each of the arguments referred to in paragraph 2 above.

1. The Pre-Existing State Argument

9. The argument that is made, primarily by Professor Quigley,⁸ is that Palestine already exists as a State. On 15 November 1988, a resolution was adopted by the Palestine National Council in which it was stated that:

"The Palestine National Council hereby declares, in the Name of God and on behalf of the Palestinian Arab people, the establishment of the State of Palestine in the land of Palestine with its capital at Jerusalem.... The State of Palestine shall be an Arab State and shall be an integral part of the Arab nation, of its heritage and civilization and of its present endeavour for the achievement of the goals of liberation, development, democracy and unity".⁹

10. The resolution was transmitted in a letter dated 16 November 1988 from the Deputy Permanent Observer of the Palestine Liberation Organization to the United Nations Secretary-General, with the following legend: "I have the honour to transmit herewith the Political Communiqué of the Palestine National Council and Declaration of Independence of 15 November 1988".¹⁰

⁶ Articles 305 (1) (c) and 307.

⁷ Article 1 (2) and (3).

⁸ See eg. "The Palestine Declaration to the International Criminal Court: The Statehood Issue", 35 *Rutgers Law Record*, 2009, p. 1 and sent as a memorandum to the Office of the Prosecutor, 19 May 2009.

⁹ A/43/827-S/20278 and Annexes. The Declaration of Independence may be found in Annex III. See also 27 *International Legal Materials*, 1988, p. 1668.

¹⁰ *Ibid.*

a) *The Claim of a Pre-1988 Statehood*

11. Quigley takes the view that the 1988 declaration constituted merely “a declaration of an existing statehood”.¹¹ Despite the fact that this approach expressly contradicts the statement of the Palestine National Council from 15 November 1988 proclaiming the “establishment of the State of Palestine” and despite the absence in the declaration of any claim that Palestine already exists as a State, it is maintained that Palestine became an “international entity” upon the demise of the Ottoman Empire and as that empire “lost sovereignty, a Palestine emerged”. According to this theory, the introduction of the League of Nations’ mandate system was predicated upon the fact that the people of the territory were the “ultimate holder of sovereignty” and that the mandatory power did not hold sovereignty. In addition, “Palestine” was party to treaties and benefitted from a nationality separate from British nationality. It is concluded thus that “Sovereignty resided with Palestine”.¹²
12. This argument is based on a series of legally disconnected steps and distortion of the historical record. The mandates system under article 22 of the Covenant of the League of Nations made it clear that sovereignty did not lie with the mandatory power and that the well-being of the inhabitants was “a sacred trust of civilisation”. Beyond that, the situation as to sovereignty was subject to debate. Lord McNair, a former President of the International Court, stated that “sovereignty over a mandated territory was in abeyance: if and when the inhabitants of the territory obtain recognition as an independent State ... sovereignty will revive and vest in the new State”.¹³ This came to be accepted as the consensus view.¹⁴
13. However, whatever the role and interests of the inhabitants of the territory, the mandatory power had considerable legal powers and obligations as had the League of Nations itself. Each mandate had its own characteristics and was subject to the terms of the particular mandate agreement. The Palestine mandate dated 24 July 1922 declared that the mandatory power (Great Britain) was to have full powers of legislation and of administration, save as limited by the terms of the mandate (article

¹¹ *Op.cit.*, at p. 8.

¹² *Ibid.*, pp. 8-9.

¹³ *Status of South West Africa*, ICJ Reports, 1950, p. 150. See also Q. Wright, *Mandates under the League of Nations*, 1930, pp. 319-39

¹⁴ J. Crawford, *The Creation of States in International Law*, 2nd ed., 2006, p. 571.

1) and such powers included being entrusted with the control of the foreign relations of Palestine and the right to issue exequaturs to consuls appointed by foreign powers, as well as being entitled to afford diplomatic and consular protection to citizens of Palestine when outside its territorial limits (article 12) and the treaty-making competence, being able to adhere on behalf of the Administration of Palestine to any general international conventions already existing, or which may be concluded hereafter with the approval of the League of Nations (article 19).¹⁵ What, of course, distinguished the Palestine mandate was the specific responsibility imposed upon the mandatory power to place the country under such political, administrative and economic conditions as would secure the establishment of the Jewish national home while safeguarding the civil and religious rights of all the inhabitants of Palestine, irrespective of race and religion (article 2).

14. Further, the mandatory was obliged to provide to the Council of the League of Nations an annual report to the satisfaction of the Council as to the measures taken during the year to carry out the provisions of the mandate (article 24) and, critically, article 27 provided that the consent of the Council of the League of Nations was required for any modification of the terms of the mandate. One modification to the situation was specifically built into the terms of the mandate and that was the power of the mandatory to change the provisions of the mandate with regard to the territories lying between the Jordan and the eastern boundary of Palestine, subject to the consent of the Council of the League of Nations (article 25). This provision led to the removal of the area east of the river Jordan in order to create the new territory of Transjordan.¹⁶ The mandate was terminated by General Assembly resolution 181 (II) of November 1947 after the question of Palestine was referred to the UN by Britain.
15. While it is legally correct to say that Britain was never sovereign over Palestine, it is not legally correct to say that "Palestine" in the sense used by Quigley was a sovereign State as from 1922. In no situation was a mandated territory regarded as a sovereign State prior to the termination of the mandate over the territory in question.

¹⁵ Specifically with regard to slave traffic, the traffic in arms and ammunition, or the traffic in drugs, or relating to commercial equality, freedom of transit and navigation, aerial navigation and postal, telegraphic and wireless communication or literary, artistic or industrial property.

¹⁶ See the Palestine Order in Council of 1 September 1922 and the amendment to the mandate approved in September 1922 and the subsequent treaty between Great Britain and the Emir Abdullah, 1928 and the Treaty of Alliance of 22 March 1946, see generally Crawford, *op.cit.*, pp.422 and following and 576-9.

None of the States that emerged from such territories or the succeeding trust territories traces the commencement of its legal independence as a State from the date of the establishment of the mandate. Indeed, the very fact that some of the territories emerged not as single new States within the territorial framework of the mandated or subsequent trust territory but as multiple States (for example the mandated territory of Syria and the Lebanon emerged as the two States of Syria and Lebanon with the area of Hatay having joined Turkey,¹⁷ while the two States of Rwanda and Burundi succeeded the mandated/trust territory of Ruanda-Urundi¹⁸) or indeed as additions to other States (for example, the mandated/trust territory of British Cameroons was divided into an area which went to Nigeria and an area which went to the independent State of Cameroon,¹⁹ while the mandated/trust territory of British Togoland joined Ghana²⁰) or joined with an existing colony to form a new entity (for example, the mandated/trust territory of New Guinea joined the Australian Territory of Papua to become the independent State of Papua New Guinea²¹) demonstrates the flawed thesis proposed.²²

16. It must also be pointed out that the terms of the Palestine mandate themselves demonstrate the complete absence of any intention that the inhabitants of that territory constituted a State. The extensive competences granted to the mandatory power coupled with the fact that the consent of the Council of the League to any modification of the terms of the mandate lead to the conclusion that the range of powers available to the inhabitants of the territory were far too limited to amount to anything close to the requirements for statehood.
17. It is certainly true that over time the right of self-determination was seen as applicable to non-self-governing territories including mandated and trust territories, and that the International Court of Justice accepted that subsequent developments left little doubt that the ultimate objective of the “sacred trust” of the mandate system was “the self-

¹⁷ See the mandate agreement of 24 July 1922, 17 *American Journal of International Law*, 1923, p. 177 and Crawford, *op.cit.*, p. 575-7.

¹⁸ See General Assembly resolution 1746 (XVI).

¹⁹ See General Assembly resolution 1608 (XV).

²⁰ See General Assembly resolution 1044 (XI).

²¹ See General Assembly resolution 3284 (XXIX).

²² See generally on these cases, M.N. Shaw, *Title to Territory in Africa*, 1986, Chapter 3.

determination ... of the peoples concerned”.²³ But leaving aside the question of inter-temporal law as to whether such legal right was recognised at the relevant times of, for example, 1922 and 1947-8, at no stage was the fact that a people was accepted as having the right of self-determination automatically equated as such to sovereignty and independence. The right of self-determination in international law is the right of a particular people to decide for itself its own political future not the right to constitute a State as of that moment. What that future might be was for the people to determine and could consist of independence as a whole territory, independence as more than one territory, association or merger with another State in whole or in part or indeed any other political status.²⁴

18. Of course, there is a further complication to Quigley’s thesis on this point and that is the fact that by virtue of the provisions of the Palestine mandate the stated intention of the League of Nations was to secure in Palestine "the establishment of the Jewish national home", while "safeguarding the civil and religious rights of all the inhabitants of Palestine, irrespective of race and religion". It was only later on in 1947 that the UN General recommended partition of Palestine. To erase the internationally recognised right of the Jewish people in the Palestine mandate and to reinterpret it as simply statehood for the Arab population of the Palestinian mandate as Quigley seeks to do is thus deeply flawed both legally and historically.

b) The Claim of Statehood in 1988

19. Quigley refers to the declaration of statehood made by the Palestine National Council in 1988 and consequential developments which he argues supports that claim of Statehood.²⁵ He refers to the adoption by the General Assembly of resolution 43/177 in which it noted that it was “aware of” and “acknowledges the proclamation of the State of Palestine”. The terminology was important. What the resolution did not do was to support such proclamation or act upon it in any meaningful way. Indeed, the resolution simply decided that the designation “Palestine” should be used in place of

²³ *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, ICJ Reports, 1971, at p. 31. See also the *Western Sahara* case, ICJ Reports, 1975, p. 68; the *East Timor* case, ICJ Reports, 1995, p. 102 and the *Construction of a Wall* case, ICJ Reports, 2004, p. 172.

²⁴ See eg. the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States, General Assembly resolution 2625 (XXV). See also General Assembly resolutions 1514 (XV) and 1541 (XV).

²⁵ *Op.cit.*, p. 4 and following.

the designation “Palestine Liberation Organization” in the United Nations system, but this was specifically stated to be “without prejudice to the observer status and functions of the Palestine Liberation Organization within the United Nations system, in conformity with relevant United Nations resolutions and practice”. In other words, the UN did not act in a manner supportive of the declaration of statehood as such, but simply retitled the Palestinian observer delegation while denying substantive change. The very fact that the declaration was not declared invalid, as the Security Council had done with regards to the “Turkish Republic of Northern Cyprus” in 1983 in very different circumstances, cannot be read *a contrario* to mean that such a declaration was accepted.²⁶ It was merely “acknowledged”, which is a neutral term demonstrating knowledge of the fact of the matter in question without further legal consequence. Quigley’s view that the large vote in favour of the resolution “indicates that Palestine was regarded as a State” is clearly unsupportable in the light of the actual text of the resolution and subsequent UN practice.

20. According to the *Permanent Missions to the United Nations*, published most recently by the Executive Office of the Secretary General, Protocol and Liaison Service in March 2010, Palestine appears in a special category termed “Entities having received a standing invitation to participate as observers in the sessions and the work of the General Assembly and maintaining permanent observer missions at Headquarters”.²⁷ Palestine has a special observer status at the United Nations, but is clearly not accepted as a State by the organisation.
21. Applying the internationally accepted criteria for statehood as expressed in the Montevideo Convention 1933,²⁸ particularly with regard to the need to demonstrate that an effective government must exist with some degree of control over most of the territory claimed²⁹ it is clear, as Crawford writes, that: “Applying the Montevideo Convention in accordance with its terms, Palestine before 1993 could not possibly have constituted a State. Its whole territory was occupied by Israel which functioned as a government there and claimed the right to do so until further agreement. The PLO

²⁶ *Ibid.*

²⁷ The “Blue Book”, No. 300, ST/SG/SER.A/300, March 2010, <http://www.un.int/protocol/bluebook/bb300.pdf>, p. 303.

²⁸ See eg. *Oppenheim's International Law* (eds. R.Y. Jennings and A.D. Watts), 9th ed., 1992, pp. 120-2.

²⁹ As to which see my Opinion dated 30 August 2009, paras. 26-8.

had never functioned as a government there and lacked the means to do so, given strong Israeli opposition”.³⁰

22. The argument, however, has been put that the criteria of statehood need to be understood in the particular context of belligerent occupation, so that the requirement of effective control is not negated where one State occupies part of the territory of another.³¹ The examples given are Iraq’s control and purported annexation of Kuwait in 1990, Iraq under US occupation, Bosnia, Kosovo and East Timor.³² These examples fall into several distinct categories. The first category is the occupation of the territory of one State by the forces of another State (the two Iraq examples³³). In this case, it is clear and accepted that belligerent occupation cannot change the underlying uncontested sovereignty of the latter State with regard to its occupied territory.³⁴ In any event, this category is irrelevant since no doubt existed as to the status of the State, part or all of whose territory was under occupation, as an internationally accepted and recognised State.
23. The second category is the situation where the nascent State is in a situation of civil war so that the government in question is not in effective control of all of its claimed territory (this is the Bosnia example, to which one could add Croatia in the same period of the early 1990s and Angola in 1975). In this category the key issue as to the determination of claimed statehood was membership of the United Nations. Such membership ended doubts as to the asserted statehood.³⁵ This is again remarkably different from the situation under consideration. Thirdly, is the Kosovo situation where an indisputable part of Serbia was, for various reasons, placed under the effective administration and control of the UN pursuant to Security Council resolution 1244. Kosovo’s unilateral declaration of independence in such a situation where the

³⁰ *The Creation of States in International Law*, Oxford, 2nd ed., 2006, p. 437. See also Daillier, Forteau and Pellet, *Droit International Public*, Paris, 8th ed., 2009, p. 510, stating that the 1988 declaration “posait de difficiles problèmes juridiques en sens que ... ses frontières demeurent indéterminées et l’effectivité du contrôle des autorités politiques sur la population palestinienne contestées”. Note also their view that in concluding the Oslo Accords, the PLO “reconnaît implicitement du même coup qu’elle ne constitue pas le gouvernement d’un État au sens du droit international”, *ibid* at p. 511.

³¹ See eg. J. Quigley, “The Palestine Declaration”, *op.cit.* p. 4; *ibid.*, Memorandum to the Office of the Prosecutor, 20 May 2010, p. 6 and E. Mendes, Memorandum, 30 March 2010, p. 17. See also M. Kearney, “Asking the Right Question”, <http://uclalawforum.com/home#Kearney>, p. 7.

³² See particularly, Mendes, *op.cit.*

³³ Quigley also refers to the German occupation of Denmark in this context, *op.cit.* at p. 6.

³⁴ See eg. *The Manual of the Law of Armed Conflict*, UK Ministry of Defence, Oxford, 2004, p. 278.

³⁵ See eg. M.N. Shaw, *International Law*, Cambridge, 6th ed., 2008, p. 201 and following.

provisional institutions of that territory exercised some elements of control together with the UN is at the time of writing still controversial and opposed by some important States. It is not a member of the UN.³⁶ Fourthly, East Timor's independence followed Indonesian occupation, which was ended by an agreement with the UN and subsequent declaration of independence and membership of the UN.³⁷

24. In none of the examples cited by the authors of the asserted doctrine was it demonstrated that the requirement of effective control was dispensed with in a situation of belligerent occupation in any way analogous to the Palestine question. Indeed the argument that has been made is based on the circular argument that belligerent occupation of a territory of a claimed but disputed status demonstrates not that such occupation merely suspends the existing situation (the correct analysis) but proves that the claimed but disputed status is legitimated. It is not even a question of putting the cart before the horse. It is equivalent to putting the cart in an empty space and arguing that a horse therefore exists.
25. Further, an attempt has been made to vary the application of the accepted criteria of statehood concerning independence with the argument that statehood can exist on the basis of seeking independence rather than actually possessing it. In response to arguments made by myself and others,³⁸ Quigley³⁹ and Kearney⁴⁰ apparently seek to explain the many statements made by Palestinian leaders calling for a Palestinian State in the future as meaning a call for independence for the existing State of Palestine. While this is a difficult reading on the terminology actually used, the legal point being made, it seems, is that a state may be created in the absence of independence or without independence have "materialised".⁴¹ This would be contrary to all accepted understanding of statehood in international law. Independence is critical to statehood, the central criterion of statehood in the words of Crawford.⁴² Pellet puts it as following: "l'Etat est le seul sujet de droit qui bénéficie d'un attribut

³⁶ See eg. Advisory Opinion on the Accordance with International Law of the Unilateral Declaration of independence in respect of Kosovo, International Court of Justice, 22 July 2010.

³⁷ See eg. Shaw, *op.cit.*, pp. 233-4 and S/1999/1024.

³⁸ See my original memorandum submitted on 30 August 2009, para. 30 and following.

³⁹ In his memorandum of 20 May 2010, p. 1.

⁴⁰ "Palestine and the International Criminal Court: Asking the Right Question", <http://uclalawforum.com/home>.

⁴¹ See Quigley, memorandum of 20 May 2010, p. 1.

⁴² *Creation of States in International Law*, Oxford, 2nd ed., 2006, p. 62.

fondamental, la *souveraineté* ou l'*indépendance*".⁴³ In other words, statehood without independence is not possible.

2. The Argument Claiming a Divergent Rome Statute Meaning for "State"

26. The argument has been put, most notably by Professor Pellet,⁴⁴ 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 the PA territories fall within the requirements of that provision. This means that the ICC must interpret the term "State" in a manner which does not conform with the international law requirements of statehood, but rather fashion out of the object and purposes of the Rome Statute some divergent interpretation.
27. 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 use such inherent power as unlimited and capable of overturning the clear meaning of constitutional provisions.
28. As detailed above, the Rome Statute clearly sets out the basis for the jurisdiction of the ICC, requiring either that the alleged crime took place within the territory - or by a national - of a "State" which is Party to the Statute, or in the case of "a State which is not a Party", by means of a declaration lodged by that State pursuant to Article 12 (3). 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; nor is there any indication that the requirement for a "State" in Article 12 (3) is merely guidance or a non-exclusive example of the sort of entity that could provide the Court with jurisdiction.
29. 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

⁴³ *Op.cit.*, p. 449.

⁴⁴ In a paper entitled "Les Effets de la Reconnaissance [sic] par la Palestine de la Compétence de la C.P.I." available at <http://humanrightsdoctorate.blogspot.com/2010/02/legal-advice-on-palestines-icc.html>. This paper, which was signed by a number of authors and formally submitted by Professor Pellet, was requested by the PA, see M.C. Bassiouni, <http://uclalawforum.com/forum/permalink/859>.

also accepted as a rule of customary international law.⁴⁵ This provision lays down the parameters for legitimate interpretation. It has, for example, been 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”.⁴⁶ Clearly to permit an excessively loose interpretation of an important provision in a treaty would risk undermining the treaty as a whole. Indeed, in this context, such an approach would confer upon the Court (and 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.⁴⁷

30. 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 object and purpose of the Rome Statute lead inexorably to the conclusion that such term must be understood to include entities that are clearly not States in public international law.
31. In support of the teleological argument, Pellet's submission refers to the definition reached of objective international legal personality by the International Court in the *Reparations* case,⁴⁸ which interpreted that notion to include the United Nations. However, the *Reparations* case in no way stands as precedent for the notion that a purposive interpretation can or should be used to reinterpret the clear and unambiguous provisions of a treaty; furthermore it is important to recognize why and how this position was taken by the ICJ.
32. The International Court first made the point that the concept of international legal personality itself was inherently flexible. Secondly, it noted that while the UN Charter

⁴⁵ See e.g. the *Genocide Convention (Bosnia v Serbia)* case, ICJ Reports, 2007, para. 160ff; *Indonesia/Malaysia* case, ICJ Reports, 2002, p. 625, 645-6; the *Botswana/Namibia* case, ICJ Reports, 1999, p. 1045; the *Libya/Chad* case, ICJ Reports, 1994, pp. 6, 21-2; 100 ILR, pp. 1, 20-1, and the *Qatar v. Bahrain* case, ICJ Reports, 1995, pp. 6, 18; 102 ILR, pp. 47, 59.

⁴⁶ See e.g. the *Laguna del Desierto* case, 113 ILR, pp. 1, 44.

⁴⁷ A similar point was made by the ICJ in dealing with the legality of conditioning consent to admission of States to the UN on conditions not expressly provided for by the Charter: "It would lead to conferring upon Members an indefinite and practically unlimited power of discretion in the imposition of new conditions. ... To warrant an interpretation other than that which ensues from the natural meaning of the words, a decisive reason would be required which has not been established. ... If the authors of the Charter had meant to leave Members free to import into the application of this provision considerations extraneous to the conditions laid down therein, they would undoubtedly have adopted a different wording." See Advisory Opinion on *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, ICJ Rep 1948, p. 57 at 63.

⁴⁸ ICJ Reports, 1949, p. 174.

did not as such provide an answer in express terms as to the international personality of the UN itself, the specified purposes and principles of the organisation were such that “to achieve these ends the attribution of international personality is indispensable”.⁴⁹ The Court concluded that:

“fifty states, representing the vast majority of the members of the international community, have the power, in conformity with international law, to bring into being an entity possessing objective international personality and not merely personality recognised by them alone, together with the capacity to bring international claims”.⁵⁰

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33. In other words, 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. Unlike the notion of objective international legal personality which is inherently flexible and dependent upon State practice for its precise definition in any given case, however, the term “State” in international law is very clear. As has been correctly emphasised, the definition of a State, “à pour ambition première d’isoler ce phénomène et cette institution juridique, d’autres entités jouant un rôle dans les relations internationales: l’État doit rester un sujet de droit suffisamment puissant et ‘rare’ pour prétendre conserver une place privilégiée dans la conduite des relations internationales”.⁵¹ A mix of law and facts ensures that statehood - which is not a flexible concept with gradations of meaning⁵² - must involve adherence to the Montevideo criteria coupled with international recognition.⁵³
34. 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 or deletion of clear terms.

⁴⁹ *Ibid.*, p. 178.

⁵⁰ *Ibid.*, p. 185.

⁵¹ Daillier, Forteau and Pellet, *op.cit.*, p. 449.

⁵² Pellet argues that “le droit international contemporain dessine l’État sous la forme d’une figure à géométrie variable” citing *inter alia* Higgins, “The Concept of the ‘State’: Variable Geometry and Dualist Perceptions”, in Laurence Boisson de Chazournes and Vera Gowlland-Debas (eds), *L’ordre juridique international*, Nijhoff, 2001, pp. 547-562. However, it is very clear that Higgins is talking of various organs of the State and not of different types of State as such, *ibid.*

⁵³ See my opinion of 30 August 2009, para. 25 and following.

35. 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*”.⁵⁴ 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”.⁵⁵ Aust has concluded that: “In practice, having regard to the object and purpose is more for the purpose of confirming an interpretation ... Thus although paragraph 1 contains both the textual (or literal) and the effectiveness (or teleological) approaches, it gives precedence to the textual”.⁵⁶
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36. Moreover, the object and purpose of the Rome Statute cannot be simplistically asserted as implying a lack of jurisdictional limitation for the International Criminal 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, and article 12 in particular, were among the most contentious,⁵⁷ 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”.
37. No reasonable interpretation of “State” in article 12 (3) in the light of the object and purpose of the Rome Statute, 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).

⁵⁴ *Law of Treaties*, Oxford, 1961, p. 365 (emphasis in original).

⁵⁵ *The Vienna Convention on the Law of Treaties*, Manchester, 2nd ed., 1984, p. 130. Further, Gardiner has written that “the object and purpose of a treaty cannot be used to alter the clear meaning of a term of a treaty”, *Treaty Interpretation*, Oxford, 2008, p. 198.

⁵⁶ *Modern Treaty Law and Practice*, Cambridge, 2nd ed., 2007.

⁵⁷ Sharon A Williams/William A Schabas, Article 12, in Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court* (2nd edn 2008) (“Triffterer, Article 12”), para. 1.

38. 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 as some have claimed. 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 jurisdiction⁵⁸ and the administrative jurisdiction of its Supreme Court sitting as the High Court of Justice⁵⁹ and it is a matter of public record that this jurisdiction has and is continuing to be exercised in relation to the Gaza Operation.⁶⁰ It is internationally accepted that Israel's legal system is independent, credible and effective.⁶¹ It is also the case that the Palestinian authorities may prosecute Palestinians, subject to the jurisdictional powers established by the Oslo Accords (see section 3 of this Supplementary Opinion).

⁵⁸ See Israel's Second Update (19 July 2010), available at http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Hamas+war+against+Israel/Gaza_Operation_Investigations_Second_Update_July_2010.htm

⁵⁹

Indeed, it must be recognized that even after Israel's disengagement from the Gaza Strip, Israel's Supreme Court sitting as the High Court of Justice, has continued to hear petitions brought against the Israeli government and its military regarding the State's actions in relation to Gaza and its residents. This has included hearing cases in the very midst of the Gaza Operation (Dec. '08 – Jan. '09), including two petitions which challenged the IDF's conduct in the Gaza Strip under international humanitarian law filed by human rights organizations: see *Physicians for Human Rights and others v Prime Minister of Israel and others* HCJ 201/09 and *Gisha Legal Centre for Freedom of Movement and others v. Minister of Defence* HCJ 248/09, [2009] IsrLR 1 available at http://elyon1.court.gov.il/files_eng/09/010/002/n07/09002010.n07.pdf. More generally, see *Judgments of the Israel Supreme Court: Fighting Terrorism within the Law* (Volumes 1, 2 and 3) available at http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Terror+Groups/Judgments_Israel_Supreme_Court-Fighting_Terrorism_within_Law-Vol_3.

⁶⁰ A recent example includes the conviction of IDF soldiers by an Israeli military court for having enlisted the use of a Palestinian minor to search through bags believed to be booby-trapped, in the course of military operations during the Operation in Gaza, see <http://www.reuters.com/article/idUSTRE69210020101003>.

⁶¹ This has been recognised by various courts and legal officials from around the world, including, the Supreme Court of Canada (*Application Under S. 83.28 of the Criminal Code*, 2004 SCC 42, para.7), the U.K. House of Lords (*A and others v. Secretary of State for the Home Department*, [2006] 2 A.C. 221, para. 150), the ECJ Advocate General (*Kadi v. Council of the European Union*, 3 C.M.L.R. 41, para. AG 45). See also the decisions of the Canadian Superior Court (District of Montreal) (*Bil'in (Village Council) C. Green Park International Inc.* 2009 QCCS 4151, upheld by the Court of Appeal on 11.8.10) and the Spanish National High Court (*Spain National High Court Order 1/09* (9.7.09); approved by Spain Supreme Court (Criminal Division), Appeal Number 1979/09 (5.4.10).

39. In addition to the textual and teleological interpretation, Article 31 specifies other parameters of legitimate interpretation. 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”.
40. It is to be noted that 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 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”.⁶² Nothing could be plainer.
41. Practice further underlines this. At the Rome Conference leading to the establishment of the ICC, Palestine was placed under the heading of “Other Organisations” in the list of delegations, separate from the list of participating States and UN bodies and after the category of “Intergovernmental Organisations and other entities having a standing invitation to participate in the sessions and work of the General Assembly”.⁶³ Similarly, in the work of the ICC Preparatory Commission, Palestine was placed in the category entitled “Entities, intergovernmental organizations and other bodies having received a standing invitation to participate as observers in the sessions and the work of the General Assembly”,⁶⁴ while at the second resumption of the seventh session of the Assembly of States Parties in New York in February 2009, for example, Palestine was placed in the category entitled “Entities, intergovernmental

⁶² <http://uclalawforum.com/forum/permalink/859>

⁶³ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, June 15 to July 17, 1998, Official Records, vol. II, U.N. Doc. A/CONF.183/13 (vol. II) (2002) at pp. 5 and 44.

⁶⁴ See United Nations, Preparatory Commission for the International Criminal Court, New York, 8–19 April 2002, List of Delegations, U.N. Doc. PCNICC/2002/INF/6, 2002, p. 10.

organisations and other entities”.⁶⁵ The same practice was evident most recently at the Review Conference in Kampala in June 2010.⁶⁶ In no case did Palestine or the Palestinian Authority receive recognition or standing as a State, nor indeed did they apply for such in accordance with the instruments of the Court.

42. In his submission, Pellet referred⁶⁷ specifically to the Convention on the Rights of Persons with Disabilities which in article 44 (2) states that the term “States Parties” should apply to relevant regional organisations and to article XXII of the Convention on International Liability for Damage Caused by Space Objects, article XXII of which provides that the term “States” should be taken to refer also to relevant intergovernmental organisations.⁶⁸ But the critical factor in cases such as these is that the convention itself specifically declares that a particular meaning is to be given to the term “States” or “States Parties”. A special provision is thus seen as being required in order to achieve the purpose. The fact that such exceptional provisions exist can only mean in general principle that absent such provisions, the terms provided could only bear their normal meaning, otherwise there would be no need for articles such as those referred to above.
43. In addition, one has to ask what the consequences of this excessively broad interpretation of the Rome Statute may be. At the least it will constitute an encouragement to a variety of non-state entities to seek to emulate the example of the PA’s declaration. This will challenge the Court both politically and legally and may well lead to a situation providing a serious distraction from the core tasks of the Court under the Rome Statute.
44. One final point made by Pellet deserves brief comment. He notes that, “seule l’Autorité palestinienne possède, en vertu du droit international, un titre territorial

⁶⁵ ICC-ASP/7/INF.1/Add.2 (26 Mar. 2009), http://www2.icc-cpi.int/iccdocs/asp_docs/ICC-ASP-7-INF.1-Add.2.pdf, p. 50.

⁶⁶ See ICC-RC/INF.1 (6 Jun. 2010), p.65.

⁶⁷ *Op.cit.*, at para. 10.

⁶⁸ This provides that: “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 States 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”. Articles XXIV to XXVII refer to the competence to sign, propose amendments, propose a review of the convention or withdraw from the convention.

exclusive sur le territoire palestinien et la population qui y est établie”⁶⁹ and Palestine is the “souverain territorial”.⁷⁰ This is an extraordinary statement from several points of view.

45. First, it is at best highly controversial in international law whether a non-state entity may hold what he terms “exclusive territorial title”. Title to territory is held by States. Even in the process to independence in the case of non-self-governing territories, sovereign title was always recognised as being held by the administering State subject to the exercise of the right of self-determination. Self-determination gives the relevant people in question the right to proceed to independence (or other political status as it may choose, it should not be forgotten) not territorial title. To assert that non-state entities may hold territorial title is an argument replete with hazard for the international community, as well as being legally dubious.⁷¹
46. Secondly, the question of territorial title to the Palestinian territories is a matter that can only be resolved by agreement by the relevant parties, including Israel. Indeed, in accordance with the Oslo Accords, Israel and the PLO specifically reserved their rights, claims and positions regarding the territories pending the outcome of permanent status negotiations.⁷² This is not the place to enter into a discussion as to sovereign title with regard to the territory of mandatory Palestine. Suffice it to say for the purposes of this opinion that it has been accepted by all the relevant parties, as well as the international community,⁷³ that these matters should be resolved in peace process negotiations. It is not a question susceptible to simplistic assertion.

⁶⁹ At para. 25 (“only the Palestinian authority possesses, under international law, an exclusive territorial title over the Palestinian territory and the Palestinian population established therein”).

⁷⁰ *Ibid.*, at para. 26 (“territorial sovereign”).

⁷¹ See generally, R.Y. Jennings, *The Acquisition of Territory in International Law*, Manchester, 1963.

⁷² See Interim Agreement, Article XXXI.6: “Nothing in this Agreement shall prejudice or preempt the outcome of the negotiations on the permanent status to be conducted pursuant to the DOP. Neither Party shall be deemed, by virtue of having entered into this Agreement, to have renounced or waived any of its existing rights, claims or positions.” Even after the Israel’s disengagement from Gaza, the relevant existing agreements between Israel and the Palestinians were expressly stated to “continue to be in effect” (see paragraph 7 of Israel’s Revised Disengagement Plan of 6 June 2004), available at <http://www.mfa.gov.il/MFA/Peace+Process/Reference+Documents/Revised+Disengagement+Plan+6-June-2004.htm>

⁷³ See, for instance, the Quartet sponsored “Roadmap” from April 2003, “A Performance Based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict” (the main objective of which was to return to negotiations aimed at reaching a permanent status agreement including issues of borders, Jerusalem, refugees and settlements), www.un.org/News/dh/mideast/roadmap122002.pdf.

3. The Jurisdictional Competence Argument

47. It has been maintained by the Palestinian non-governmental organisation Al-Haq in a position paper⁷⁴ that “Palestine can be considered a state for the purposes of the Rome Statute only”⁷⁵ taken in the light of an “expansive approach” to article 12 (3).⁷⁶ However, it has noted that at a meeting held in The Hague on 2-3 November 2009 between representatives of the Court including the Office of the Prosecutor and Palestinian and international NGOs, “it was confirmed that a determination as to whether ‘the declaration by the Palestinian Authority accepting the exercise of jurisdiction by the Court meets statutory requirements’ would not be decided on the question of whether Palestine was generally recognised as a State, but rather on the basis of whether the Palestinian Authority could satisfy the requirements of the Statute by demonstrating that they possess adequate ‘government “capacity”’ to transfer jurisdiction to the Court”.⁷⁷
48. This approach is essentially an attempt to by-pass difficulties in assessing the status of Palestine by focusing upon certain functional attributes claimed to be possessed by the Palestinian Authority. It constitutes a different approach to that of seeking to interpret the Statute so as to confer on the PA the status of “State” for the purposes of article 12 (3) by simply appearing to assert that the mere possession of what is termed “adequate government capacity to transfer jurisdiction to the Court” would suffice for the purposes of article 12 (3).⁷⁸ The Al-Haq paper further maintains that the Office of the Prosecutor put three questions to the Palestinian side “with the requirement that they be convincingly answered in the positive in order that the declaration can be considered as satisfying the statutory requirements”. Such questions asked whether the PA had the capacity to enter into international agreements, to try Palestinians on criminal charges or to try Israeli citizens on criminal charges.⁷⁹ In other words, it is

⁷⁴ Entitled “Issues Arising from the Palestinian Authority’s Submission of a Declaration to the Prosecutor of the International Criminal Court under Article 12 (3) of the Rome Statute”, see <http://www.alhaq.org/etemplate.php?id=494>

⁷⁵ *Ibid.*, para. 12. Al-Haq accepts that “the existence or otherwise of a state of Palestine remains moot at best”, *ibid.*, para. 16.

⁷⁶ *Ibid.*, para. 20.

⁷⁷ *Ibid.*, para. 21 (footnote omitted). See also para. 10.

⁷⁸ It is unclear whether the formulation used was that by Al-Haq or another NGO or that used by a representative of the Court. This question will not be pursued in this opinion.

⁷⁹ *Ibid.*, para. 22. I am unaware whether the Office of the Prosecutor asked such questions with the formulation used or indeed the conclusion proffered. Similarly, I am unaware of the accuracy of the view maintained in the paper that “What is clear from the substance of these questions is that if the answer to each is in the affirmative,

suggested that should the PA be able to answer these questions positively, then it would be regarded as a State for the purposes of article 12 (3).

49. This is problematic in a number of ways. First, it suggests that the term “State” for the purposes of article 12 (3) can be interpreted to mean no more than conformity with some elements of only one of the criteria of statehood (such criteria in international law being, of course, cumulative and not alternatives). The actual terminology used falls far below the requirement of ‘government’ as a criterion of statehood.⁸⁰ In other words, what is sought is the acceptance of an entity as a State on the basis of being able to perform certain functions that form part, but only part, of one of the required criteria of statehood.

50. As a matter of law, these suggestions fall very far short indeed of statehood in international law. It is also extremely doubtful that such suggestions could be interpreted to amount to a *sui generis* concept of statehood for the ICC since the link between the capacities mentioned and statehood in any form is minimal and fragile at best. The same objection made with regard to the teleological approach to interpretation⁸¹ in terms of being constrained by the ordinary meaning of the words used would apply here too. In addition, there is clearly nothing in the *travaux préparatoires*, recourse to which constitutes a supplementary means of interpretation under article 32 of the Vienna Convention, that supports the view that the term “State” as used in article 12 (3) was meant to cover non-state entities or indeed that Palestine was to be regarded as a State. On the contrary, as noted above, Palestine was treated as belonging to a non-state category.⁸² Accordingly, the view that the capacity to transfer jurisdiction to the ICC can be seen as equivalent to being a “State” cannot be legally correct either generally or specifically with regard to the Rome Statute unless one interpreted the Statute in a manner totally inconsistent with the ordinary meaning of the words used and the relevant context and the *travaux préparatoires*.

51. Even if one were to accept the basic premise that the mere existence of several competences suffices for statehood for article 12 (3) purposes, which is incorrect, it is

the Prosecutor will act under the assumption that the PA therefore has the capacity to transfer such cases to the Court”, *ibid.*, para. 23.

⁸⁰ See further as to this, my Opinion of 30 August 2009, para. 26 and following.

⁸¹ See above, para. 30 and following.

⁸² See above, para. 40.

clear that the answers to the questions apparently posed are not as suggested by the Al-Haq paper.

i) *Capacity of the PA to Enter into International Agreements*

52. It is clear from the Oslo Accords, which are legal agreements binding upon Israel and the Palestinian side,⁸³ that the phased transfer of defined powers from the Israeli military government to the newly created Palestinian Authority in the West Bank and the Gaza Strip, expressly excluded the transfer of powers in the sphere of foreign relations, including the general power to conclude international agreements. Indeed, other than in four specifically enumerated cases in which the PLO was expressly empowered to enter into agreements "for the benefit" of the PA, Israel refrained from transferring the foreign relations powers in relation to the West Bank and the Gaza Strip.
53. This conclusion is evident from the express and clearly stated terms of the Interim Agreement of 1995. Thus, Article I (1) of the Interim Agreement provides that "Israel shall transfer powers and responsibilities as specified in this Agreement from the Israeli military government and its Civil Administration to the Council [the body intended to replace the PA] in accordance with this Agreement", and adds that "Israel shall continue to exercise powers and responsibilities not so transferred." Article IX (5) a provides that "the Council will not have powers and responsibilities in the sphere of foreign relations", although limited exception was granted to the Palestine Liberation Organisation (and not the PA) under Article IX (5) b of the Interim Agreement to negotiate and enter into agreements "for the benefit" of the Palestinian Authority in certain limited circumstances.⁸⁴ Article 17(1) of the Interim Agreement, also clarifies that: "In accordance with the DOP [Declaration of Principles 1993], the jurisdiction of the Council will cover West Bank and Gaza Strip territory as a single territorial unit, except for: (a) issues that will be negotiated in the permanent status negotiations: Jerusalem, settlements, specified military locations, Palestinian refugees, borders, *foreign relations* and Israelis" (emphasis added).

⁸³ This is accepted by Kearney, *op.cit.*, p. 12.

⁸⁴ *Ibid.*, para. 34. These are expressly confined to certain economic agreements; certain agreements with donor countries; agreements to implement regional development plans; and cultural, scientific and educational agreements.

54. The Al-Haq paper seeks to by-pass such clear legally binding provisions by conflating the powers of the PLO and PA and by arguing that in practice the capacity and ability of the PLO and the PA to engage in foreign relations has been broadly interpreted.⁸⁵ However, this is not so. It has, for example, been the Palestine Liberation Organisation (the "PLO"), an internationally recognised "national liberation movement" accepted as representing externally the Palestinian people,⁸⁶ which has signed all of the agreements with Israel, commencing with the Declaration of Principles, 1993⁸⁷. The PLO and the PA are clearly separate and distinct entities, and even if we assumed that foreign relations powers are relevant for the purpose of assessing the validity of the PA declaration, it must be the powers of the PA which are assessed, since although the PLO may have been accepted as representing the Palestinian people internationally, the PA is the agreed body to which certain governmental powers have been delegated in relation to the territory of the West Bank and the Gaza Strip.

55. This relationship has been explained by Professor James Crawford, who quotes at length from an article authored by former PLO lawyer Omar Dajani, as follows:

"The PLO, which has been recognized to possess an independent international personality as representative of the Palestinian people, has been delegated the power to act on behalf of the PA in the international arena with regard to specific substantive areas. Nevertheless, the PA's constituent organs ... form a local government with largely municipal functions and, with regard to those functions, they are independent of the PLO Moreover, the powers withheld from the PLO by the DOP – i.e. the authority to conclude international agreements (with parties other than Israel) that affect the status or security of the OPT – are held by Israel, not by the PA. The PA is consequently in a position of subordination to both the PLO and Israel."⁸⁸

⁸⁵ At paras. 26-7.

⁸⁶ See eg. General Assembly resolution 3210 (XXIX).

⁸⁷ See my opinion of 30 August 2009, para. 31 and following.

⁸⁸ See eg. Crawford, *Creation of States*, pp. 444-5 and O. Dajani, "Stalled Between Seasons: The International Legal Status of Palestine During the Interim Period", 26 Denv. J. Int'l L. & Pol'y, 1997-8, pp. 27, 90-1, who also notes at p.87 that "Although the PLO has demonstrated its capacity to enter into foreign relations on behalf of the Palestinian people, the legal and functional separation of the PLO and the PA prevent the PLO from independently implementing international obligations in the territory and with regard to the population of

56. Moreover, examples provided in the Al-Haq paper seeking to prove otherwise are neither persuasive nor correct. For instance, it is stated that the PLO representative in Egypt has been designated as a PA official and that a PLO representative signed a protocol on security cooperation with Russia in the name of the PA which merely illustrates that in both cases it was apparently a PLO rather than a PA representative that so acted. It is stated in addition that the "PA joined the International Airport Council *as the PA*",⁸⁹ but in fact the PA joined an organisation called the Airports Council (International), which is not an intergovernmental organisation but rather an association created by airport operators around the world in order to represent their common interests and foster cooperation with partners throughout the air transport industry.⁹⁰ Beyond these instances, the fact that an EU Police Mission (EUPOL COPPS) in the territories was established "on the explicit written invitation of the PA" is cited as evidence of PA foreign policy powers, whereas no mention is made of the fact that the process was closely coordinated and specifically agreed with Israel.
57. Finally, Al Haq state that the PA is "seeking observer status at the World Trade Organization, 'as preparation for statehood'", omitting that statehood is neither required for observer status, nor membership of the WTO.
58. Thus, the relatively few examples claimed by Al Haq fail to show that the Interim Agreement provisions respecting foreign relations are no longer applicable or disregarded by the international community. Indeed, given that more than 15 years have passed since the Oslo Accords were signed, the sparse examples provided as opposed to the hundreds of international agreements entered into by States over this period, not to mention their activities in international organizations, tend to prove rather the opposite. As concluded by Watson in his leading work on the Oslo Accords, "Once there is a Palestinian State, it will of course enjoy the full right to conduct its own foreign policy. In the meantime, the Accords implicitly recognise that the Palestinians have a right to do so – but only through the PLO, and only on certain

Palestine. Under the terms of the DOP and the subsequent agreements concluded pursuant to it, Israel maintains authority over most aspects of the PA's external relations; the PLO is empowered to represent it only in international negotiations regarding economic, social, and technical development."

⁸⁹ Para. 26 (emphasis in original).

⁹⁰ See http://www.airports.org/cda/aci_common/display/main/aci_content07_banners.jsp?zn=aci&cp=1-2-4622_725_2

matters".⁹¹ Accordingly, the PA does not have authority to make international agreements or otherwise conduct foreign relations. It therefore constitutionally clearly lacks the "capacity" to lodge declarations with the ICC.

ii) *Capacity of the PA to Try Palestinians on Criminal Charges*

59. The PA exercises within the West Bank and Gaza a number of powers and responsibilities expressly transferred from Israel under the Oslo Accords. Annex IV to the Interim Agreement, relating to Legal Matters between Israel and the PA contains detailed provisions on the subject of criminal jurisdiction. In brief, in Area A of the West Bank and in the Gaza Strip, the PA exercises criminal jurisdiction over all offences committed by Palestinians and/or non-Israelis,⁹² subject to Israel's retained right to exercise concurrent criminal jurisdiction in respect of offences committed against Israel or an Israeli.⁹³ In Area B of the West Bank, the criminal jurisdiction of the PA covers those offences committed by Palestinians and/or non-Israelis, including those which relate to the PA's responsibility for public order for Palestinians, but not in relation to offences within the remit of Israel's overriding responsibility for security for the purposes of protecting Israelis and confronting the threat of terrorism.⁹⁴ Palestinian criminal jurisdiction is subject to Israel's concurrent criminal jurisdiction in respect of offences committed against Israel or an Israeli.⁹⁵ In Area C of the West Bank, jurisdiction with respect to criminal offences is exercised by the PA with regard to Palestinians and their visitors who have committed offenses against Palestinians or their visitors in the West Bank and Gaza Strip, provided that the offense is not related to Israel's security interests.⁹⁶
60. Nowhere, however, is there any provision for the PA to transfer suspects or to delegate criminal jurisdiction in respect of Palestinians to any international organization or to any country other than Israel. Indeed, bearing in mind the principle that the PA does not have powers which have not been explicitly transferred to it, and the express limitation in respect of foreign relations to which the PA is subject, any

⁹¹ *The Oslo Accords*, Oxford, 2000, p. 246.

⁹² Article 1.1.a

⁹³ Article 1.7.a.

⁹⁴ Article 1.1.a, c and d.

⁹⁵ Article 1.7.a.

⁹⁶ Article 1.1.b.

attempt to transfer criminal jurisdiction to an external entity is both *ultra vires* and an apparent breach of the Oslo Accords.

iii) *Capacity of the PA to Try Israeli Citizens on Criminal Charges*

61. As the Al-Haq paper concedes “under Oslo Israel retained exclusive personal jurisdiction in criminal matters over Israelis, including offences committed in Areas A and B, as well as C”.⁹⁷ This is correct and there has been no agreement between Israel and the Palestinians to the contrary. However, Al-Haq seeks to get around this by two arguments. First, it claims that the Interim Agreement with its clear jurisdictional provisions marked a temporary agreement by which “the PA temporarily waived an inherent right which as the bearers of the right to self-determination and to an independent state in the West Bank and Gaza they continue to hold”, thus leaving the PA with a “latent capacity to exercise criminal jurisdiction over any individual within its control”.⁹⁸
62. To this, one may make three replies. First, the Interim Agreement remains as a binding agreement and the PA remains bound so that it continues without the competence to exercise criminal jurisdiction over Israelis. Second, should the Palestinians withdraw from the Interim Agreement, this would throw open the legal (and political) situation and it would be impossible to determine the consequences at this stage. Thirdly, however, the argument is based on the incorrect view that the possession of the right to self-determination as such grants inherent rights to exercise comprehensive criminal jurisdiction. There is no practice to this effect. On the contrary, the practice that does exist with regard, for example, to non-self-governing territories demonstrates clearly that until independence, the administering power continued to exercise criminal jurisdiction and no inherent or latent jurisdiction as such was recognised as belonging to the people concerned. In conclusion, as aptly noted by Crawford, in his treatise on statehood; “... it misrepresents the reality of the situation to claim that one party already has that for which it is striving.”⁹⁹
63. Additionally, it is stressed that the PA declaration is not simply an apparent breach of the Oslo Accords, but also *ultra vires* or constitutionally beyond its capacity in the

⁹⁷ At para. 31. See article XVII of the Interim Agreement.

⁹⁸ At para. 32.

⁹⁹ *The Creation of States, op.cit.*, p.446.

light of those agreements. Given that the PA is a non-State entity, this is a matter of considerable consequence on the international level, since the Court cannot simply ignore the relevant international agreements and accept an expression of competence on the part of the PA which is contrary to the agreements in question.

64. The second argument put forward by Al-Haq is by reference to the grave breaches regime of international humanitarian law, which is part of customary law.¹⁰⁰ It is maintained that the “exclusion of Israelis from PA jurisdiction as provided for in the Interim Agreement cannot legitimately be considered as extending to the international crimes of war crimes and crimes against humanity as to do so would be incompatible with international law”¹⁰¹ This is apparently based upon the extradite or prosecute provisions of the Geneva Conventions of 1949 which, however, do not apply to the PA as it is not a High Contracting Party. The fact that grave breaches constitute (for the sake of argument) violations of customary international law means that once incorporated into the relevant domestic legal system of a State, they would then constitute domestic criminal offences, provided that the necessary jurisdictional provisions were in place.¹⁰²
65. Al-Haq notes that the PLO (not, it should be emphasised in passing, the PA) has expressed the intention to be bound by the Geneva Conventions,¹⁰³ but there is no evidence that the PA has either incorporated the Conventions into its domestic law or, more significantly, provided its local courts with jurisdiction to hear relevant cases. In any event, however, the suggestion that the customary nature of the Geneva Conventions of 1949 can somehow imply or create non-established jurisdictional capacities for the PA is a *non sequitur*. It is also incorrect that the PA is “an entity acknowledged by the international community as having both the capacity and responsibility for investigating and prosecuting serious violations of international human rights and humanitarian law” so that it must be seen as having the capacity and responsibility to investigate Israelis suspected of having committed such violations.¹⁰⁴ There is no such recognition and the call by the Human Rights Council, for example, for the PA to investigate alleged Palestinian war crimes during the 2009-9 Gaza

¹⁰⁰ *Op.cit.*, para. 33.

¹⁰¹ *Ibid.*, para. 36.

¹⁰² Without express incorporation, such customary law crimes cannot be seen as domestic crimes, see eg. *R v Jones* [2006] UKHL 16.

¹⁰³ *Ibid.*, para. 33.

¹⁰⁴ *Ibid.*, para. 36.

Operation cannot be so understood. Indeed, the expectation of the international community has been for each side to investigate allegations that crimes have been committed by their own side. Attempts to get around this problem by arguing for non-discriminatory treatment are deeply flawed.

66. The Al-Haq also makes reference to provisions under the Fourth Geneva Convention whereby protected persons may under no circumstances renounce rights secured to them by the Convention¹⁰⁵ in order to justify the argument that the PA is obliged to search for and prosecute or extradite persons in line with article 146 (2). However, it is at best unclear whether the obligations under article 146 applicable to States are relevant to reference made as to the “rights secured” to protected persons under the Convention. Again, this appears to amount to a *non sequitur*. Furthermore, it would be bizarre to regard the Oslo Accords, which in fact created the PA, as amounting to the “renunciation” of rights under the Geneva Conventions. It should also be noted that article 98 (2) of the Rome Statute provides that States should not be placed in situations where they are required to act inconsistently with obligations under international agreements and in particular:

“2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender”.

67. Thus, for the sake of argument, even if we were to ignore the fact that the PA is not a State, and that the Oslo Accords cannot in any way be likened to Status of Forces Agreements, it would be strange to infer that non-State entities, such as the PA, might be expected to act in a manner that even States would not under the Rome Statute.
68. It is, therefore, simply not sustainable to maintain that the Oslo Accords providing for the exclusion of Israelis from the defined criminal jurisdiction which was expressly accorded to the PA under the agreements has been rendered ineffective or invalid.

¹⁰⁵ Articles 8 and 47.

Accordingly, the PA does not have the capacity to exercise criminal jurisdiction over Israelis.

69. It is important not to lose sight of two critical facts. First, that the Palestinian authorities still see themselves as bound by the Oslo Accords, as does the international community, and, secondly, that no declaration of independence of a Palestinian State has been made since 1993. From this one may draw the inevitable conclusion that the Palestinian authorities see a negotiated agreement leading to the establishment of a Palestinian State in cooperation with Israel as their aim. It would have been quite open to the Palestinian leaders to declare independence unilaterally and no doubt some international support would have accrued. But they have not done so and that cannot be ignored. To draw a legal conclusion that such a State now exists in form or in substance, and not least for the purposes of such a critical institution as the International Criminal Court, by way of implication and contrary to express declaration is simply perverse.
70. The international community, including Israel, has accepted that the Palestinian people have the right to self-determination. The Palestinian authorities have chosen to exercise that right through the mechanism and prism of the Oslo Accords as exemplified in the Road Map and other relevant international documents and work towards a State in cooperation with Israel and in agreement with it. This process has been endorsed by the international community, including the UN, the EU, Russia, the US, and numerous Arab and Muslim countries. The PA cannot at the same time maintain this consistent position, while claiming that they already constitute a State, whether in general or with regard only to the International Criminal Court, a claim manifestly in contradiction with their international position.

4. Conclusions

71. I have reached the following conclusions:
- i) Palestine currently has not fulfilled the required conditions for statehood. It is thus not a State under public international law;
 - ii) Palestine did not constitute a State during the mandatory period. It constituted a mandated territory subject to the exercise of extensive administrative powers

- by the mandatory power, overseen by the Council of the League of Nations, whose consent was required for any change to the terms of the mandate agreement;
- iii) The declaration of a State of Palestine in 1988 was ineffective in law, the necessary conditions for statehood under international law not having been satisfied;
 - iv) As a matter of necessary interpretation under the principles of the Vienna Convention on the Law of Treaties and customary international law, there is no basis for understanding the term “State” appearing in article 12 (3) of the Rome Statute as including such non-state entities as the PA. Any teleological interpretation has to be seen in the light of the ordinary meaning of the words used and in any event an examination of the object and purpose of the Rome Statute does not lead to the conclusion that “State” must include non-state entities such as the PA;
 - v) The fact that Palestine cannot validly make a declaration under article 12 (3) does not mean that a legal situation of impunity exists with regard to the Palestinian territories. Israelis are subject at all times to Israeli law, which is fully enforced in an independent and effective fashion, while non-Israelis and Palestinians are subject to the jurisdiction of the PA and/or Israel depending on the particular circumstances. Further, it is always open to the Security Council to refer the situation in Gaza and/or the PA territories generally to the ICC;
 - vi) As a matter of law, a people entitled to self-determination are not capable of holding title to territory as such or being as such territorial sovereigns. The question of title to the PA territories is an issue to be decided by all the relevant parties;
 - vii) Palestine is, accordingly, not a State for the purposes only of the Rome Statute. This is so even if this argued *sui generis* concept of statehood is defined to mean only partial compliance with one of the required criteria of