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## Israel, Palestine, and the ICC

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# ISRAEL, PALESTINE, AND THE ICC

Daniel Benoliel\*

Ronen Perry\*\*

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## INTRODUCTION

In the wake of the Israel-Gaza 2008–09 armed conflict and recently commenced process at the International Criminal Court (ICC), the Court will soon face a major challenge with the potential to determine its degree of judicial independence and overall legitimacy. It may need to decide whether a Palestinian state exists, either for the purposes of the Court itself, or perhaps even in general.

The ICC, which currently has 113 member states, has not yet recognized Palestine as a sovereign state or as a member. Moreover, although the ICC potentially has the authority to investigate crimes which fall into its subject-matter jurisdiction, regardless of where they were committed, it will have to assess its jurisdiction over a non-member

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state, in this case Israel. Despite having signed the Rome Statute that founded the Court and having expressed “deep sympathy” for the Court’s goals, the state of Israel withdrew its signature in 2002, in accordance with Article 127 of the Statute.<sup>1</sup> At any rate, a signature is not tantamount to accession, and accordingly Israel was never a party.<sup>2</sup> The latest highly publicized moves in The Hague come amid mounting international pressure on Israel and a growing recognition in Israeli government circles that the country may eventually have to defend itself against war crimes allegations. Unlike the ad hoc international criminal tribunals of the second half of the twentieth century, it already appears that the Prosecutor of the International Criminal Court could act in accordance with the formal requests of the state parties, and with respect to the availability of the accused individual. The ICC already is said to have encountered difficulties in reviewing the Prosecutor’s exercise of discretion in a few highly politicized international conflicts.<sup>3</sup> The recent Israel-Gaza conflict and present judicial process serve as a prime example.

The current debate concerns war crimes allegedly committed during the recent hostilities between Israel and Palestinian combatants in the Gaza Strip. The month-long 2008–2009 Israel-Gaza conflict, part of the ongoing Israeli-Palestinian conflict,<sup>4</sup> began when Israel launched a military campaign in the Gaza Strip on December 27, 2008, code named “Operation Cast Lead.” The Operation’s stated aim was to stop Hamas rocket attacks on southern Israel, and it included the targeting of Hamas’ members, police force, and infrastructure.<sup>5</sup> International reactions during the conflict included calls for an immediate ceasefire, as in the United

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1. Rome Statute of the International Criminal Court art. 127, July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute].

2. See, e.g., Office of the Legal Adviser to the Ministry of Foreign Affairs, Israel and the International Criminal Court, ISR. MINISTRY OF FOREIGN AFFAIRS (June 30, 2002), [http://www.mfa.gov.il/MFA/MFAArchive/2000\\_2009/2002/6/Israel\\_and\\_the\\_International\\_Criminal\\_Court](http://www.mfa.gov.il/MFA/MFAArchive/2000_2009/2002/6/Israel_and_the_International_Criminal_Court). Israel has refrained from signing the Rome Statute because of its concerns about being the subject of prosecutions generating from the illegal status of the settlements in the Palestinian territories, which are considered by many to violate the Fourth Geneva Convention. See U.N. Econ. & Soc. Council [ECOSOC], Comm’n on Human Rights, Question of the Violation of Human Rights in the Occupied Arab Territories, Including Palestine, ¶ 67, U.N. Doc. E/CN.4/2001/121 (Mar. 16, 2001).

3. INT’L CRIMINAL COURT [ICC], OFFICE OF THE PROSECUTOR [OTP], THE INTERESTS OF JUSTICE I (2007), available at <http://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPInterestsOfJustice.pdf>.

4. See, e.g., ANTHONY H. CORDESMAN, THE GAZA WAR: A STRATEGIC ANALYSIS 5 (2009), available at [http://www.csis.org/media/csis/pubs/090202\\_gaza\\_war.pdf](http://www.csis.org/media/csis/pubs/090202_gaza_war.pdf).

5. *Operation Cast Lead: Israel Strikes Back Against Hamas Terror in Gaza*, ISR. MINISTRY OF FOREIGN AFFAIRS (Jan. 21, 2009), [http://www.mfa.gov.il/MFA/Terrorism-%2bObstacle%2bto%2bPeace/Hamas%2bwar%2bagainst%2bIsrael/Israel\\_strikes\\_back\\_against\\_Hamas\\_terror\\_infrastructure\\_Gaza\\_27-Dec-2008.htm](http://www.mfa.gov.il/MFA/Terrorism-%2bObstacle%2bto%2bPeace/Hamas%2bwar%2bagainst%2bIsrael/Israel_strikes_back_against_Hamas_terror_infrastructure_Gaza_27-Dec-2008.htm).

Nations Security Council Resolution 1860,<sup>6</sup> and general concern about the humanitarian situation in the Gaza Strip.<sup>7</sup> Human rights groups and aid organizations have accused Hamas and Israel of war crimes and called for independent investigations and lawsuits.<sup>8</sup> The conflict came to an end on January 18, 2009, after Israel, and subsequently Hamas, announced unilateral ceasefires.<sup>9</sup> On January 21, 2009, Israel completed its withdrawal from the Gaza Strip.<sup>10</sup>

In the period between December 27, 2008 and February 13, 2009, the ICC Office of the Prosecutor (OTP) received 326 communications from individuals and Non-Government Organizations (NGOs), notably from Palestinian groups,<sup>11</sup> repeatedly demanding an investigation of the events.<sup>12</sup> After arguing that the ICC was unable to take the case because it had no jurisdiction over Israel as a non-signatory to the Court's statute, Chief Prosecutor Luis Moreno-Ocampo apparently changed his mind on February 2, 2009.<sup>13</sup> This rethinking likely followed a declaration lodged by the Palestinian National Authority under Article 12(3) of the Rome Statute, which empowers non-member states to accept the Court's jurisdiction. Prosecutor Moreno-Ocampo announced shortly thereafter that the ICC was exploring ways to prosecute Israeli commanders over alleged war crimes in Gaza, this at a time when the Court was presumably examining the case for Palestinian jurisdiction over alleged crimes committed in Gaza.<sup>14</sup>

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6. S.C. Res. 1860, U.N. Doc. S/RES/1860 (Jan. 8, 2009).

7. Nidal al-Mughrabi, *Israel and Hamas Under Pressure for Gaza Aid Truce*, REUTERS (Dec. 30, 2008, 6:33 PM), <http://www.reuters.com/article/idUSLS69391620081230>.

8. Chris McGreal, *Demands Grow for Gaza War Crimes Investigation*, THE GUARDIAN (Jan. 13, 2009), <http://www.guardian.co.uk/world/2009/jan/13/gaza-israel-war-crimes>; Press Release, B'Tselem, Holding Gilad Shalit as a Hostage is a War Crime (June 25, 2007), [http://www.btselem.org/english/Press\\_Releases/20070625.asp](http://www.btselem.org/english/Press_Releases/20070625.asp); *Israel-Gaza Conflict, (Dec. 2008–Jan. 2009)*, HUMAN RIGHTS WATCH, <http://www.hrw.org/en/features/israel-gaza> (last visited Oct. 14, 2010).

9. Arie Bell & Karl Penhaul, *Hamas, Israel Set Independent Cease-fires*, CNN (Jan. 18, 2009, 7:11 PM), <http://edition.cnn.com/2009/WORLD/meast/01/18/israel.gaza/index.html>; *Israel 'Wants Rapid Gaza Pullout'*, BBC (Jan. 19, 2009, 5:38 AM), [http://news.bbc.co.uk/2/hi/middle\\_east/7836660.stm](http://news.bbc.co.uk/2/hi/middle_east/7836660.stm).

10. *Last Israeli Troops 'Leave Gaza'*, BBC (Jan. 21, 2009, 10:35 AM), [http://news.bbc.co.uk/2/hi/middle\\_east/7841902.stm](http://news.bbc.co.uk/2/hi/middle_east/7841902.stm).

11. Catherine Philp & James Hider, *Prosecutor Looks at Ways to Put Israeli Officers on Trial for Gaza 'War Crimes'*, THE TIMES (LONDON), Feb. 2 2009, at 32, available at [http://www.timesonline.co.uk/tol/news/world/middle\\_east/article5636069.ece](http://www.timesonline.co.uk/tol/news/world/middle_east/article5636069.ece).

12. See Press Release, OTP, ICC, Visit of the Palestinian National Authority Minister of Foreign Affairs, Mr. Riad al-Malki, and Minister of Justice, Mr. Ali Khashan, to the Prosecutor of the ICC (Feb. 13, 2009), available at <http://www.icc-cpi.int/NR/rdonlyres/4CC08515-D0BA-454D-A594-446F30289EF2/280869/PNAMFA130209.pdf>.

13. See Philp & Hider, *supra* note 11.

14. *Id.*

A preliminary examination seems to be a standard procedure. The OTP has decided to open investigations only in five situations, including those of the Central African Republic and Darfur; in the cases of Afghanistan, Colombia, Côte d'Ivoire, Georgia, and Guinea, it is still conducting preliminary examinations and has not yet decided whether to open investigations. In other cases, including those of Iraq and Venezuela, it has decided not to open investigations following preliminary examinations.<sup>15</sup> What makes the Israeli-Palestinian case so unique is the fact that because Israel is a non-member of the ICC, the Court may need to expand its reach by advocating statehood on behalf of another non-member party—the Palestinian entity—as a precondition for assessing jurisdiction.

### I. THE NORMATIVE FRAMEWORK

There are certain procedural preconditions for the exercise of ICC jurisdiction. The ICC has been empowered to order investigations on its own initiative regarding matters falling within its jurisdiction. This power is enshrined in Article 15 of the Rome Statute, which describes a four-part procedure.<sup>16</sup> First, the Prosecutor is entitled to proceed *proprio motu* (on his own initiative) with a preliminary examination of alleged crimes on the basis of information received, and he or she may seek additional information from a vast array of entities, including NGOs.<sup>17</sup> Second, if the Prosecutor finds that there is reasonable basis to proceed, he or she submits to the Pre-Trial Chamber a request to authorize an investigation (without prejudice to any subsequent determinations by the ICC pertaining to issues of jurisdiction and the admissibility of a case).<sup>18</sup> Third, if the Pre-Trial Chamber rejects the request, the Prosecutor may present an amended request based on new facts or evidence. Lastly, if the request is granted, the Prosecutor commences the proper investigation, which need not lead to specific accusations.<sup>19</sup>

According to the way in which Article 15 has been drafted, any individual or legal entity may petition the OTP and ask to examine particular incidents. However, the Prosecutor is subject to an important restriction, namely that the alleged crimes have a nexus with a specific state or

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15. *ICC Prosecutor Looking Into Guinea Situation*, 40 THE MONITOR, May–Oct. 2010, at 9–10, available at [http://www.coalitionfortheicc.org/documents/monitor40\\_english\\_web.pdf](http://www.coalitionfortheicc.org/documents/monitor40_english_web.pdf).

16. See Konstantinos D. Magliveras, *The Position of the ICC Prosecutor in the Recent Hostilities in the Gaza Strip*, 25 INT'L ENFORCEMENT L. REP. 209, 211 (2009).

17. Rome Statute, *supra* note 1, art. 15(2).

18. *Id.* arts. 15(3)–(4).

19. *Id.* art. 15(5).

states, be they parties or non-parties to the Rome Statute. Article 12 of the Statute provides that the ICC may exercise its jurisdiction with respect to crimes allegedly committed on the territory or by nationals of states that have either ratified the Statute *or* accepted ICC jurisdiction.<sup>20</sup> The only exception is a Security Council referral, to be discussed below.

With respect to the general Article 12 requirement, even if the Prosecutor were to regard Palestine as a state, he would not have the authority to investigate, because Palestine is not a party to the Rome Statute. Nonetheless, a Prosecutor's decision that Palestine is a "full-status" country would signal international acceptance and recognition of the Palestinian Authority's legal standing. However, Article 12(3) provides that a non-party state may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court on an *ad hoc* basis.<sup>21</sup> Côte d'Ivoire set a precedent as the first non-party state to accept ICC jurisdiction over war crimes allegedly committed on its territory.<sup>22</sup> Côte d'Ivoire signed the Rome Statute but has never ratified it.<sup>23</sup> However, on October 1, 2003, it submitted via a note verbale a declaration dated April 18, 2003, accepting the exercise of the jurisdiction of the Court under Article 12(3) with respect to alleged crimes committed from September 19, 2002.<sup>24</sup>

As explained above, Article 12 provides that when a state party has referred a case to the Prosecutor, or when the Prosecutor has initiated an investigation, "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" by special declaration: "(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; [or] (b) The State of which the person accused of the crime is a national."<sup>25</sup> Given that Israel, the state of the accused, is not a contracting party nor has it consented to the Court's jurisdiction over the

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20. *Id.* arts. 12(1)–(2).

21. *Id.* art. 12(3).

22. Declaration Accepting the Jurisdiction of the International Criminal Court, Côte d'Ivoire, Apr. 18, 2003, available at <http://www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279844/ICDEENG.pdf>; Philp & Hider, *supra* note 11.

23. ICC, *Record of Signatories and Signing Statements* (July 17, 1998), [http://treaties.un.org/doc/Publication/MTDSG/Volume II/Chapter XVIII/XVIII-10.en.pdf](http://treaties.un.org/doc/Publication/MTDSG/Volume%II/Chapter%XVIII/XVIII-10.en.pdf).

24. *Declarations Art. 12(3)*, ICC, <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Registry/Declarations.htm>. Another example of the usage of Article 12(3) took place when the Democratic Republic of Congo (formerly Zaire) entered into such an *ad hoc* agreement in April 2004.

25. Rome Statute, *supra* note 1, art. 12(2). Here, additional citizenships may grant jurisdiction over alleged war crimes committed in Gaza against non-Palestinians or Palestinians holding other citizenships, such as Jordanian citizenship, given that Jordan signed the Rome Statute.

matter, and that the Palestinian Authority, even if it were considered a legitimate representative of the Hamas government in the Gaza Strip, is not a sovereign state, it appears that the conditions of Article 12 are not met.

Part II discusses the requirement that the alleged crimes have a nexus with a specific state or states. Part III deals with two possible ways to circumvent the statehood requirement, namely the Prosecutor's power to commence investigations *proprio motu* with respect to crimes within the jurisdiction of the ICC, and the United Nations Security Council's prerogative to refer matters to the ICC. Lastly, Part IV discusses two legal mechanisms that can be used to block prosecution: the complementarity principle, whereby the ICC Prosecutor defers to national investigations concerning pending allegations, and the Security Council's power to request deferral of investigation or prosecution.

## II. PRELIMINARY JURISDICTIONAL ISSUES

### A. Overview

The Rome Statute established a state-based system. As such, a Palestinian state would need to exist in order for the present proceedings to continue. This Part will analyze several theoretical and practical arguments made in support of recognizing such a state. A distinct question may arise concerning a separate Palestinian state in the Gaza Strip. Several reservations exist herein, relating both to the underlying theoretical aspects of state recognition and, in particular, to the declaratory state recognition criterion involving the ability to govern the Gaza Strip.

Moreover, the question remains whether Palestinian statehood could be upheld by the OTP, given Israel's possible adherence to the Indispensable Third Party Doctrine, which has been systematically practiced by the International Court of Justice.<sup>26</sup> The doctrine specifically entails the inadmissibility of legal processes in the absence of relevant third parties, when their presence is vital to a substantive legal matter at stake. Israel may be regarded as holding competing title to the Palestinian territories in a manner that impacts the latter's claim of sole sovereignty. Under the doctrine, there arises an additional hypothetical question concerning possible future ratification of the Rome Statute by Israel. In particular, there is value, albeit hypothetical, in considering the implications of Israel's reluctance to join the Statute and the parallel scenario in which the Palestinian Authority would unilaterally act to join Israel to any ICC proceeding. All of these considerations will be critically assessed below.

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26. See *infra* Part II.C.

## B. Palestinian (non-)Statehood

### 1. The Statehood Requirement

The state-based system was clearly preserved within the Rome Statute. At the outset, the Statute contains many provisions, some complex, concerning the ICC's jurisdiction. No provision, with a single exception to be discussed below, transcends the state-based system. Arguably, the OTP is not supposed to read a non-state jurisdiction rule into the Rome Statute: *ubi lex voluit, dicit; ubi noluit, tacit*. In contrast, there are a few instances in which the International Court of Justice (ICJ) may deal with non-state entities. In fact, according to the rules of the ICJ, an exception to the state-based rule is expressly recognized: the General Assembly may request an advisory opinion from the Court in accordance with Article 65(2) of the ICJ Statute.<sup>27</sup> Such was the case, *mutatis mutandis*, surrounding the request for an advisory opinion concerning the construction of a "separation wall" on Palestinian Territory.<sup>28</sup>

Moreover, as it is currently configured, the Rome Statute is not open to ratification by entities other than states recognized by the United Nations.<sup>29</sup> Furthermore, rule 44.1 of the ICC Rules of Procedure and Evidence states that the Registrar, upon request of the Prosecutor, may inquire of a state that is not "a Party to the Statute" or that "has become a Party to the Statute" after its entry into force, on a confidential basis, as to whether it intends to make the declaration provided for in Article 12(3).<sup>30</sup> The rule thereby limits the Prosecutor's discretion to states.

On January 22, 2009, the Palestinian National Authority lodged a declaration recognizing the jurisdiction of the Court with respect to acts committed on the territory of the Palestinian Authority since July 1,

27. Statute of the International Court of Justice (annexed to the Charter of the United Nations) (June 26, 1945) Art. 65(2), 59 Stat. 1055, reprinted in Charter of the United Nations, Statutes and Rules of Court and Other Constitutional Documents (Series D, Acts and documents concerning the organization of the court, no. 1, 2d ed. 1947).

28. See INT'L FED'N FOR HUMAN RIGHTS [FIDH] & INT'L COMM'N OF JURISTS, LEGAL CONSEQUENCES OF THE CONSTRUCTION OF A WALL IN THE OCCUPIED PALESTINIAN TERRITORY (REQUEST FOR AN ADVISORY POSITION) (2004), available at <http://www.fidh.org/IMG/pdf/il2302a.pdf>.

29. See ICC, Assembly of State Parties [ASP], *Report of the Bureau on Ratification and Implementation of the Rome Statute and on Participation in the Assembly of States*, ICC Doc. ICC-ASP/5/26 (Nov. 17, 2006), available at [http://www.icc-cpi.int/iccdocs/asp\\_docs/library/asp/ICC-ASP-5-26\\_English.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/library/asp/ICC-ASP-5-26_English.pdf); *Universal Ratification Campaign*, COALITION FOR THE INT'L CRIMINAL COURT, <http://www.iccnw.org/?mod=urc> (a pro-ICC coalition campaigning solely amongst states).

30. ICC, ASP, Rules of Procedure and Evidence, r. 44(1), ICC Doc. ICC-ASP/1/3 (Sept. 2002).



2002, without signaling the Gaza Strip in particular.<sup>31</sup> This date is not arbitrary: the ICC only holds jurisdiction over war crimes and other offenses committed after the Rome Statute came into force on July 1, 2002.<sup>32</sup> Apparently, following this declaration, the ICC may decide that it indeed has jurisdiction to investigate Israel's actions, based on the Palestinian self-referral, and pursuant to Article 12. Yet despite ambiguity within the international community about the existence or non-existence of a state of Palestine, the Registrar accepted the Palestinian request "[w]ithout prejudice to a judicial determination on the applicability of article 12, paragraph 3" to the declaration.<sup>33</sup> Palestinian lawyers argue that the Palestinian Authority should henceforth be allowed to refer the cases in Gaza on an ad hoc basis.<sup>34</sup> But is there a Palestinian state, qualified to accept ICC jurisdiction under Article 12(3)?

## 2. The Case of Palestine: A Critical Appraisal

In a recent pivotal article by John Quigley, the author presents five seminal arguments affirming the recognition of a Palestinian state. The first of such arguments is that since 1988 there has been a Palestinian state, following the Palestinian Declaration of Independence and its wide recognition by states worldwide.<sup>35</sup> The second argument is that the statehood declared by the Palestine National Council in 1988 was not of a new statehood; rather, it was a declaration of an existing state.<sup>36</sup> The third argument is that Israel never claimed sovereignty over its occupied Palestinian territories, so its sovereignty is not affected by the existence of a Palestinian state.<sup>37</sup> The fourth contention is that Israel itself has recognized the Palestinian state. Recognition is an act undertaken by states, so if Israel had not regarded Palestine as a state, there would have been no point in asking for a Palestinian recognition of Israel as a pretext to the Oslo accords.<sup>38</sup> Lastly, the fifth assertion is that Israel's recognition was

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31. Palestinian Nat'l Auth., Ministry of Justice, Office of the Minister, Declaration Recognizing the Jurisdiction of the International Criminal Court (Jan. 21, 2009), available at <http://www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279777/20090122PalestinianDeclaration2.pdf>.

32. Rome Statute, *supra* note 1, art. 126.

33. See Letter from Silvana Arbia, Registrar, ICC, to Ali Khashan, Minister of Justice, Palestinian Nat'l Auth. (Jan. 23, 2009), available at <http://www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279778/20090123404SALASS2.pdf>.

34. Philp & Hider, *supra* note 11.

35. John Quigley, *The Palestine Declaration to the International Criminal Court: The Statehood Issue*, 35 RUTGERS L. REC. 1, 4 (2009); Francis A. Boyle, *Create the State of Palestine!*, 7 SCANDINAVIAN J. DEV. ALTERNATIVES 25, 38 (1988); Francis A. Boyle, *The Creation of the State of Palestine*, 1 EUR. J. INT'L L. 301, 301 (1990).

36. Quigley, *supra* note 35, at 8.

37. *Id.* at 5–6.

38. *Id.* at 7.

tacit and in compliance with the customary rule whereby state recognition need not be expressed in a formal document.<sup>39</sup>

a. The 1988 Palestinian Declaration

The first argument set forth by Quigley is that soon after the Palestinian Declaration of Independence on November 15, 1988, and upon its wide recognition by the United Nations and states worldwide, a Palestinian state came into existence.<sup>40</sup> The Declaration unequivocally states that the Palestine National Council: “[I]n the name of God, and in the name of the Palestinian Arab people, hereby proclaims the establishment of the State of Palestine on our Palestinian territory with its capital Holy Jerusalem (Al-Quds Ash-Sharif).”<sup>41</sup> Following the declaration, Palestinian Liberation Organization (PLO) Chairman Yasser Arafat was invited to address the U.N. General Assembly, which subsequently adopted Resolution 43/177 “acknowledging the proclamation of the State of Palestine by the Palestine National Council,” and according Palestine an observer-state status within the U.N.<sup>42</sup> The resolution was adopted by a vote of 104 in favor. The United States and Israel opposed, and forty-four other states abstained.<sup>43</sup>

There are, however, several counter arguments to be made to the claim that the Declaration and the General Assembly’s responses to it signaled the recognition of a Palestinian state. First, this claim has a constitutive-state-recognition theoretical structure, and as such it is unconvincing. Second, the United Nations subsequently acted inconsistently with its alleged recognition of Palestinian statehood. Third, the constitutive-state-recognition theory is inconsistent in its application to different Palestinian claims for statehood, and to Palestinian acknowledgment of Palestine’s pre-state status. We shall discuss these counterarguments in turn.

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39. *Id.*

40. Quigley, *supra* note 35, at 4. *But see, e.g.*, GEOFFREY R. WATSON, *THE OSLO ACCORDS: INTERNATIONAL LAW AND THE ISRAELI-PALESTINIAN PEACE AGREEMENTS* 68 (2000) (concluding that no Palestinian statehood was upheld at the time of the signing of the Interim Agreement); James L. Prince, *The International Legal Implications of the November 1988 Palestinian Declaration of Statehood*, 25 *STAN. J. INT’L L.* 681, 688 (1989). For further views that Palestinian statehood was not achieved during the Oslo Accords, *see, e.g.*, Omar M. Dajani, *Stalled Between Seasons: The International Legal Status of Palestine During the Interim Period*, 26 *DENV. J. INT’L L. & POL’Y* 27, 86 (1997) (further arguing that statehood was not achieved even during the Oslo Accords).

41. PALESTINE NATIONAL COUNCIL: *DECLARATION OF INDEPENDENCE* (1988), reprinted in *THE ISRAEL-ARAB READER: A DOCUMENTARY HISTORY OF THE MIDDLE EAST CONFLICT* 356 (Walter Laqueur & Barry Rubin eds., 2001).

42. Quigley, *supra* note 35, at 4 (quoting U.N. GAOR, 43d Sess., 82d plen. mtg., U.N. Doc. A/RES/43/177 (Dec. 15, 1988)).

43. *Id.*

First, the constitutive-state-recognition theory is overly subjective and hence practically insufficient vis-à-vis the Palestinian statehood case. On the one hand, the Palestinian declaration of statehood was immediately recognized by the Soviet Union and a bulk of Arab League, Soviet Bloc, non-identifying, and underdeveloped states. Together, over 114 states have recognized the newly proclaimed state of Palestine.<sup>44</sup> On the other hand, however, the United States and the European Union, and later the Russian Federation itself—all alongside the United Nations—established the “Quartet” bloc in support of two-party negotiations toward Palestinian statehood. By so doing, members of the Quartet have either rejected or overridden Palestinian statehood recognition.<sup>45</sup>

More specifically, the United States, noting that the PLO was not a state, sought to close down the PLO mission at the New York Headquarters of the United Nations upon its unilateral 1988 statehood declaration.<sup>46</sup> The United States further emphasized in its 1991 letter of assurances to the Palestinians, on the eve of the peace talks in the Madrid conference, that it would “accept any outcome agreed by the parties,”<sup>47</sup> signaling its position that Palestinian statehood had yet to be established. In fact, at the time, the United States set a practice of officially avoiding constraints on the outcome of the Palestinian-Israeli peace process and the status of Palestinian statehood, among other things, based on the assumption that the outcome must be negotiated.<sup>48</sup>

Moreover, most European states declined to recognize Palestine after its 1988 Declaration of Independence.<sup>49</sup> Several European states did so on the grounds that they wanted a more definite indication of Palestine’s positive attitude towards Israel, such as an explicit act of recognition of

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45. Performance-based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict, U.N. Doc. S/2003/529/Annex (May 7, 2003) (Endorsed by S.C. Res. 1515, U.N. Doc. S/RES/1515 (Nov. 19, 2003)). See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, 201 (July 9) (supporting the “Roadmap” approved by the U.N. Security Council).

46. *U.S. Informs U.N. It Will Close PLO Mission*, L.A. TIMES (Mar. 11, 1988), available at [http://articles.latimes.com/1988-03-11/news/mn-1412\\_1\\_united-states](http://articles.latimes.com/1988-03-11/news/mn-1412_1_united-states).

47. See CHARLES ENDERLIN, *SHATTERED DREAMS: THE FAILURE OF THE PEACE PROCESS IN THE MIDDLE EAST, 1995–2002*, at 108 (Susan Fairfield trans., Other Press 2003).

48. *Id.* at 108. For example, in a letter from President Clinton to Chairman Arafat in May 1999, Clinton asks Arafat to “continue to rely on the peace process as the way to fulfill the aspirations of your people,” adding that “negotiations are the only realistic way to fulfill those aspirations . . . .” *Id.*

49. John Quigley, *Palestine: The Issue of Statehood*, in *PALESTINE AND INTERNATIONAL LAW: ESSAYS ON POLITICS AND ECONOMICS* 37, 42 (Sanford R. Silverburg ed., 2002).

Israel.<sup>50</sup> Years later, in September 1999, shortly before the commencement of Israeli-Palestinian permanent status negotiations, the European Union's Minister of Foreign Affairs sent a letter to Chairman Arafat reaffirming the European position of not recognizing the 1988 statehood declaration, referring to "the continuing and unqualified Palestinian right to self-determination including the option of a state."<sup>51</sup> Based on the premise that Palestinian statehood should be achieved in the future through mutual agreement between the parties to the conflict, the European letter further appealed to the parties "to strive in good faith for a negotiated solution on the basis of the existing agreements."<sup>52</sup>

Overall, within the Oslo Accords framework, the parties have produced a series of bilateral agreements grounded in United Nations Security Council Resolutions 242 and 338. These agreements endorse the principle of Israel relinquishing land in exchange for peace, intentionally avoiding formal adherence to a notion of pre-existing Palestinian statehood in the main six accords, namely: (1) the Declaration of Principles of 1993 (Oslo I); (2) the Gaza-Jericho Agreement of 1994; (3) Oslo II of 1997; (4) the Hebron Protocol of 1997; (5) the Wye River Memorandum of 1998; and (6) the Sharm el-Sheik Memorandum of 1999.<sup>53</sup>

In 2002, further focusing the negotiation track over Palestinian statehood, the Quartet members adopted the "Road Map" for peace as a plan to resolve the Israeli-Palestinian conflict. The principles of the plan were outlined in U.S. President George W. Bush's speech on June 24, 2002. In his speech, President Bush called for a future independent Palestinian state living side-by-side with Israel in peace.<sup>54</sup> In exchange

50. *Id.*; Quigley, *supra* note 35, at 5 (translating Maurice Flory, *La Naissance d'un État Palestinien*, 93 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 385, 401 (quoting President François Mitterrand of France: "Many European countries are not ready to recognize a Palestine state. Others think that between recognition and non-recognition there are significant degrees; I am among these.")).

51. Berlin European Council, *Presidency Conclusions*, at 24, E.U. Doc. D/99/1 (Mar. 25, 1999), available at [http://ec.europa.eu/regional\\_policy/sources/docoffic/official/regulation/pdf/berlin\\_en.pdf](http://ec.europa.eu/regional_policy/sources/docoffic/official/regulation/pdf/berlin_en.pdf).

52. *Id.*

53. Declaration of Principles on Interim Self-Government Arrangements, Isr.-P.L.O. art. V(4), Sept. 13 1993, 32 I.L.M. 1525 [hereinafter Oslo I]; Agreement on the Gaza Strip and the Jericho Area, Isr.-P.L.O., art. XXIII(5), May 4 1994, 33 I.L.M. 622 [hereinafter Gaza-Jericho Agreement]; Israel-Palestinian Liberation Organization Interim Agreement on the West Bank and the Gaza Strip, Isr.-P.L.O. art. XXXI(6), Sept. 28 1995, 36 I.L.M. 551 [hereinafter Oslo II]; Protocol Concerning the Redeployment in Hebron, Isr.- P.L.O., Jan. 17 1997, 36 I.L.M. 650 [hereinafter Hebron Protocol]; Wye River Memorandum, Isr.-P.L.O., § 5, Oct. 23 1998, 37 I.L.M. 1251; The Sharm el-Sheikh Memorandum on the Implementation Timeline of Outstanding Commitments of Agreements Signed and the Resumption of Permanent Status Negotiations, Isr.- P.L.O., § 10, Sept. 4 1999, 38 I.L.M. 1465 [hereinafter Sharm el-Sheikh Memorandum].

54. President George W. Bush, Second Road Map for Peace Speech (Jun. 24, 2002), available at <http://middleeast.about.com/od/documents/a/me070912b.htm>.

for statehood, the Road Map required the Palestinian Authority to make democratic reforms and abandon the use of violence.<sup>55</sup> The Road Map was subsequently endorsed by the Quartet.<sup>56</sup>

The Quartet members further entrenched the negotiation model of Palestinian statehood through the Annapolis Conference, held at the United States Naval Academy in Annapolis, Maryland, on November 27, 2007.<sup>57</sup> At the conference, a two-state solution was articulated as the mutually agreed outline for addressing the Israeli-Palestinian conflict. It anticipated the recognition of a Palestinian state as the end result of the Israeli-Palestinian conflict.<sup>58</sup> The objective of the conference was to produce a substantive document resolving the Israeli-Palestinian conflict along the lines of President George W. Bush's Road Map for Peace, with the eventual establishment by the Palestinian Authority of a Palestinian state in the Palestinian territories.<sup>59</sup> According to the plan, shortly thereafter the new state was to be collectively recognized by the Russian Federation, European Union, and the United Nations.

The second challenge to the claim that the 1988 Palestinian statehood declaration caused the establishment of a state is that the present United Nations position on the matter is inconsistent with its alleged 1988 recognition of Palestinian statehood, particularly with regard to its Resolution 43/177. Beyond its role as member of the Quartet, the United Nations was clear on its view that Palestinian statehood had not yet become a reality through its official policy to support a negotiated final two state solution as of 2000. In particular, twelve years after the 1988 Declaration, in a U.N. resolution entitled "Peaceful settlement of the question of Palestine," the General Assembly noted "with satisfaction . . . the commencement of the negotiations on the final settlement."<sup>60</sup> The

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55. *Id.* ("[W]hen the Palestinian people have new leaders, new institutions and new security arrangements with their neighbors, the United States of America will support the creation of a Palestinian state . . .").

56. See Allison Beth Hodgkins, *Beyond Two-States: Alternative Visions of Self-Determination for the People of Palestine*, 28 FLETCHER F. WORLD AFF. 109, 109–10 (2004).

57. Press Release, Sean McCormack, U.S. Dep't of State, Announcement of Annapolis Conference (Nov. 20, 2007), available at <http://merln.ndu.edu/archivepdf/NEA/State/95458.pdf>.

58. See President George W. Bush, Address at the Annapolis Conference (Nov. 27, 2007), available at <http://www.nytimes.com/2007/11/27/world/middleeast/27cnd-prexytext.html?pagewanted=all> ("We meet to lay the foundation for the establishment of a new nation, a democratic Palestinian state that will live side by side with Israel in peace and security.").

59. *Id.*

60. G.A. Res. 54/42, ¶ 3, U.N. Doc. A/RES/54/42 (Jan. 21, 2000), available at <http://www.un.org/Depts/dhl/resguide/r54.htm>.

Resolution further called for the “realization of the inalienable rights of the Palestinian people, primarily the right to self-determination.”<sup>61</sup>

Since then, the U.N. has adhered to the Oslo peace accords, and the vision of “a peaceful settlement of the question of Palestine.”<sup>62</sup> The continuing reservations about the status of Palestine are reflected in the practices of United Nations organs and parallel international organizations. Both the 42nd World Health Assembly and the Executive Board of United Nations Educational, Scientific and Cultural Organization (UNESCO) deferred consideration of a Palestinian application for membership in the World Health Organization and UNESCO respectively.<sup>63</sup> Furthermore, Switzerland, being the depository of the 1949 Geneva Convention on the Laws of War and the 1977 Protocols, addressed this matter in 1989. In a Note of Information, “Switzerland reported that it had declined to accept a ‘communication’ from the permanent observer of Palestine to the United Nations office in Geneva, acceding to the Conventions and Protocols.”<sup>64</sup>

A third response to Quigley’s argument regarding the effect of the Declaration is that recognizing Palestinian statehood as expressed in the 1988 Declaration is problematic in light of two competing Palestinian claims for statehood from 1948 and 2009. In September 1948, a Palestinian government was established in the Gaza Strip with the support of the Arab League.<sup>65</sup> That government called itself the “All-Palestine Government” (APG) and on October 1, 1948, it declared an independent Palestinian state on the whole of Mandatory Palestine with Jerusalem as its capital.<sup>66</sup> The head of government was said to be the Jerusalemite Mufti, then Hajj Amin al Husseini.<sup>67</sup> The APG was unsuccessful in its efforts to gain international recognition. Though no Palestinian leadership

61. *Id.* ¶ 5(a). The resolution was adopted by an overwhelming majority (149 votes to 3, with 2 abstentions). Press Release, U.N. General Assembly, Assembly Urges Peaceful Settlement of Palestine Question, Declares Israel’s Jurisdiction over Jerusalem Void, U.N. Doc GA/9674 (Dec. 1, 1999).

62. *Id.* ¶¶ 1–2.

63. James Crawford, *The Creation of the State of Palestine: Too Much Too Soon?*, 1 EUR. J. INT’L L. 307, 311 & n.9 (1990) [hereinafter Crawford, *Too Much Too Soon*] (citing U.N. Educ., Scientific and Cultural Org. [UNESCO], Request for the Admission of Palestine to UNESCO, UNESCO 132 EX/31 (Sept. 29, 1989), and the associated consultation by Professor Alain Pelet (Sept. 7, 1989)).

64. *Id.* at 311 & nn.9–10 (citing Embassy of Switz., Note of Information Sent to States Parties to the Convention and Protocol (Sept. 13, 1989)).

65. Avi Shlaim, *The Rise and Fall of the All-Palestine Government in Gaza*, 20 J. PAL-EST. STUD. 37, 39, 41–42 (2009).

66. *Id.* at 43 (“[A] declaration of independence . . . asserted the right of the Palestinian people to a . . . state with the borders defined as ‘Syria and Lebanon in the north, Syria and Transjordan in the east, and Egypt in the south.’”); AVI PLASCOV, *THE PALESTINIAN REFUGEES IN JORDAN, 1948–1957*, at 8 (1981).

67. Shlaim, *supra* note 65, at 42.

has ever cancelled APG's 1948 declaration of independence, most members of the United Nations followed the British example in ignoring it.<sup>68</sup> For example, Jordan refused to recognize the APG and the Palestinian state.<sup>69</sup> On September 30, 1948, the rival "First Palestinian Congress," also known as the "Amman Congress," pledged allegiance to the Jordanian Hashemite monarch in Amman. It then declared that "Transjordan and Palestine constituted a single territorial unit," and that no Palestinian government should be established "until the entire country had been liberated."<sup>70</sup> Soon after, Jordan invaded the city of Jerusalem, a de facto contradiction of any alleged claim for APG's sovereignty over its capital city.<sup>71</sup> For several years the puppet APG was governed by the Egyptian forces occupying the Gaza Strip.<sup>72</sup> Egypt merely paid lip-service to this government's independence, fully controlling it on the ground.<sup>73</sup> The APG occasionally issued statements from its headquarters in Cairo, but it was disbanded by the Egyptian President Nasir in 1959.<sup>74</sup>

At any rate, any declaration of a Palestinian state as of 1948 was implicitly nullified. In 1964, with the establishment of the PLO in East Jerusalem, the organization officially declared as its political goal the future establishment of a Palestinian state on the entire territory of the British Mandate of Palestine west of the Jordan River.<sup>75</sup> In 1974, the Palestinian leadership admitted for the second time that no Palestinian state existed. In the 12th Palestinian National Congress, the PLO adopted a resolution calling for, *inter alia*, the future establishment of a Palestinian state on "Palestinian Territory" by force, in what is also known as the 1974 Palestinian "Doctrine of Stages."<sup>76</sup>

A second competing declaration of statehood was made in 2009. To suggest that the PLO had the ability to govern the alleged Palestinian state as of 1988 is arguably equivalent to arguing that the Palestinian Al-Qaeda faction in the Gaza Strip has the ability to govern a Palestin-

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68. *Id.* at 44.

69. *Id.*

70. *Id.*

71. In 1948 there was no separate political Arab "East Jerusalem." See, e.g., Charles Bryan Baron, *The International Legal Status of Jerusalem*, 8 *TOURO INT'L L. REV.* 1, 19 (1998).

72. See, e.g., PLASCOV, *supra* note 66, at 8; *ENCYCLOPEDIA OF THE PALESTINIANS* 20 (Phillip Matter ed., rev. ed. 2005).

73. PLASCOV, *supra* note 66, at 8 ("The whole attempt proved to be a farce as it could only function with the consent of the occupying Egyptian forces.")

74. Shlaim, *supra* note 65, at 50.

75. PALESTINIAN NATIONAL CHARTER art. 2, available at <http://www.science.co.il/Arab-Israeli-conflict/Palestinian-Covenant.asp>.

76. Lt. Col. Jonathan D.H., *Understanding the Breakdown of Israeli-Palestinian Negotiations*, *JERUSALEM VIEWPOINTS* (Oct. 1, 2002), <http://www.jcpa.org/jl/vp486.htm> (last visited Oct. 18, 2010).

ian-Gazan state declared by its leader, Sheikh Abu Nur al Mukaddasi, as of August 13, 2009. That declaration called for the establishment of an Arab Islamic Emirate, in direct confrontation with the present Hamas government in the Gaza Strip and alleged Palestinian state as of 1988.<sup>77</sup> In short, the comparison among these three Palestinian declarations of statehood suggests the failure of all three to adequately comply with the declarative state-recognition condition concerning the ability to effectively govern the disputed territories at all times, as will be discussed later. At least until the establishment of the Palestinian Authority in 1993, no declaration was successful in giving rise to Palestinian statehood.

The Basic Law that served as the temporary Constitution of the Palestinian Authority of 2003 provides that the PLO is the sole and legitimate representative of the Palestinian people and that the future establishment of a Palestinian state would be under its leadership alone.<sup>78</sup> Any previous declaration of independence stands in contradiction to this more recent official Palestinian stance. Thus, the 1988 declaration of statehood failed to comply with declaratory and constitutive state recognition standards alike, either explicitly or implicitly, through international and Palestinian practices.

Since 1993, much has changed in the Palestinian territories. The PLO was replaced by the Palestinian Authority which, since the signing of the Oslo Accords in that same year, has governed parts of the territories. Despite the Palestinian Authority's basic control, there were several periods, most notably following the outbreak of the Second Intifada in 2000, in which Israel maintained military presence in many areas of the territories for security reasons.<sup>79</sup> Furthermore, the Israeli disengagement from the Gaza Strip in August 2005 marks a new limited level of authority for the Palestinian Authority in Gaza, as will be discussed below.

#### b. The Pre-1988 Palestinian State

Quigley's second argument is that the statehood declared by the Palestine National Council in 1988 was not of a new state, but rather was a declaration of already existing statehood. This claim also may be found in

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77. See, e.g., Ali Wakaed, *Hamas Hikhri'a et Ha'emut Berafiyah; 16 Harugim*, YNET (ISR.) (Aug. 15, 2009), <http://www.ynet.co.il/articles/0,7340,L-3762001,00.html>.

78. For the latest annotated version of the Palestinian Constitution, see NATHAN J. BROWN, *THE THIRD DRAFT CONSTITUTION FOR A PALESTINIAN STATE: TRANSLATION AND COMMENTARY* (2003), available at <http://www.pcpsr.org/domestic/2003/nbrowne.pdf>. For a constitutional document published together with the Palestinian Constitution, see *The Declaration of the Establishment of the Palestinian Liberation Organization*, in GUY BECHOR, *THE PLO LEXICON* 37–40 (1991).

79. See, e.g., Eyal Benvenisti, *The Status of the Palestinian Authority*, in *THE ARAB-ISRAELI ACCORDS: LEGAL PERSPECTIVES* 47 (Eugene Cotran & Chibli Mallat eds., 1996).



the ICJ Advisory Opinion of 2004 concerning the “Separation Wall,” stating that Palestinians are entitled to self-determination because self-determination has been a central part of aspirations within international law since the demise of the Ottoman Empire in the wake of World War I. As the Ottoman Empire lost sovereignty, a Palestinian state presumably emerged.<sup>80</sup>

This argument, too, should be rejected. As explained above, the United Nations has since abandoned its earlier constitutive recognition of the state of Palestine. Moreover, there exist serious doubts as to the U.N.’s initial power to endorse Palestinian statehood before 1988. The first of such doubts “involves the ‘provisional recognition’ given to the sovereignty of the nations subject to ‘A’ Class mandates pursuant to Article 22 of the League of Nations Covenant,” as in the case of the Mandate over Palestine.<sup>81</sup> Provisional recognition of peoples was preserved by Article 80 of the United Nations Charter.<sup>82</sup> However, with the exception of Iraq, “provisional recognition” by Article 22 did not amount to recognition of statehood.<sup>83</sup> In practice, the Class “A” mandates were subject to the ordinary mandatory regime, and it was never claimed that the status of the territories concerned was that of independent states. Crawford explains that “certain ‘peoples’ or ‘nations’ were recognized by Article 22 as having rights of a relatively immediate kind, but these rights did not as yet amount to statehood.”<sup>84</sup>

Additionally, these rights originated in the global political and legal settlement conceived during World War I and executed in the post-war years (1919–1923). Insofar as the preceding Ottoman Empire was concerned, the settlement embraced the claims of the Zionist Organization, the Arab National movement, the Kurds, and the Armenians.<sup>85</sup> At this time the term “Palestine” did not have an Arab connotation at all. In fact, the Palestine Foundation Fund (Keren Ha’Yesod),<sup>86</sup> the Palestine Workers’ Fund,<sup>87</sup> the American League for a Free Palestine,<sup>88</sup> the American

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80. See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 165 (July 9).

81. Crawford, *Too Much Too Soon*, *supra* note 63, at 311–12.

82. *Id.* See also JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 436 (2d ed. 2006) [hereinafter CRAWFORD, *CREATION OF STATES*].

83. Crawford, *Too Much Too Soon*, *supra* note 63, at 337–40.

84. *Id.* at 312.

85. Ambassador Henry Morgenthau, the American Ambassador to the Ottoman Sultan from 1913 to 1917, further proposed that the Ottoman Empire be converted into a federation that included Arabia, Armenia, Cyprus, Kurdistan, Mesopotamia, Lebanon, Palestine, Syria, and Turkey. See Paul D. Carrington, *Could and Should America Have Made an Ottoman Republic in 1919?*, 49 WM. & MARY L. REV. 1071, 1082 (2008).

86. PALESTINE FOUNDATION FUND, *THE KEREN HA-YESOD BOOK: COLONISATION PROBLEMS OF THE ERETZ-ISRAEL (PALESTINE) FOUNDATION FUND* 5 (1921).

87. GERHARD MÜNZNER, *LABOR ENTERPRISE IN PALESTINE* 80 (1947).

88. See PALESTINE STATEHOOD COMMITTEE RECORDS, 1939–1949 (2000), *introduction available at* <http://www.gale.cengage.com/pdf/scguides/palestine/palstateintro.pdf>.

Friends of a Jewish Palestine,<sup>89</sup> the Palestine Economic Corporation,<sup>90</sup> the Palestine Electric Wire Company,<sup>91</sup> and the Palestinian Water Company,<sup>92</sup> were all Jewish organizations that existed in Mandatory Palestine.<sup>93</sup> Also, Jews constituted the majority of the population of Jerusalem in the 1860s against the backdrop of a flagging Ottoman Empire.<sup>94</sup>

The League of Nations handed Palestine to Great Britain to govern as a League mandate. Therefore, it was Britain that “picked up” the legal problems that this mandate would generate. Faced with the apparent contradictions between the McMahon Agreement and the Balfour Declaration, the British inherited an area that both Palestinians and Jews believed to be theirs following seemingly bona fide British promises to both parties. The McMahon-Hussein Agreement of October 1915 was understood by Palestinians as a British guarantee that, after the World War, land previously held by the Ottomans would be returned to Arabs who lived in that land.<sup>95</sup> However, Palestine was not mentioned by name in this exchange. The Arabs claimed that it had been included in the promise of an independent Arab state.<sup>96</sup> The British denied this, as evidenced by McMahon’s letter published in the London Times in 1937.<sup>97</sup> Be that as it may, the McMahon-Hussein Agreement would greatly complicate Middle Eastern legal history. It seemed to directly conflict with the Balfour Declaration of 1917, which expressed support for “the establishment in Palestine of a national home for the Jewish people.”<sup>98</sup>

89. *Id.*

90. PALESTINE ECONOMIC CORPORATION RECORDS (PEC), 1921–1944, at 3 (Brenda Hearing ed., 1993), available at <http://legacy.www.nypl.org/research/chss/spe/rbk/faids/pec.pdf>. See also Palestine Economic Corporation, Jewish Virtual Library, [http://www.jewishvirtuallibrary.org/jsource/judaica/jud\\_0002\\_0015\\_0\\_15345.html](http://www.jewishvirtuallibrary.org/jsource/judaica/jud_0002_0015_0_15345.html).

91. PEC RECORDS, *supra* note 90, at 45.

92. *Id.* at 46.

93. See generally PALESTINE STATEHOOD COMMITTEE RECORDS, *supra* note 88; PEC RECORDS, *supra* note 90.

94. See, e.g., Yoram Dinstein, *The Arab-Israeli Conflict from the Perspective of International Law*, 43 U.N.B.L.J. 301, 302 (1994).

95. See Letter from Sir Henry McMahon to Hussein Ibn Ali (Oct. 24, 1915), reprinted in THE ISRAEL-ARAB READER, *supra* note 41, at 11–12 [hereinafter McMahon Letter]; see also Arnold Toynbee & Isaiah Friedman, *The McMahon-Hussein Correspondence: Comments and a Reply*, 5 J. CONTEMP. HISTORY 185, 187 (1970).

96. The disagreement noticeably was found in Article 1 of the letter: “(1) Subject to . . . modifications [as previously set forth], Great Britain is prepared to recognise and support the independence of the Arabs in all the regions within the limits demanded by the Sherif of Mecca.” McMahon Letter, *supra* note 95, at 11. Toynbee and Friedman explain that Britain assured the Arabs only territories “in which she [sic] can act without detriment to the interests of her ally France.” Toynbee & Friedman, *supra* note 95, at 192.

97. See McMahon Letter, *supra* note 95.

98. Letter from Lord Arthur James Balfour to Lord Rothschild (Nov. 2, 1917), reprinted in THE ISRAEL-ARAB READER, *supra* note 41, at 16 [hereinafter The Balfour Declaration]. Friedman adds that similar to the British Balfour Declaration, there was also a

The 1920 San Remo Conference assigned the Mandate to Britain with reference to the Balfour Declaration.<sup>99</sup> The Treaty of Sèvres of 1920 similarly provided that the Mandatory Power would be responsible for implementing the Balfour Declaration.<sup>100</sup> The San Remo Resolution on Palestine and the Treaty of Sèvres, thus, effectively incorporated the Balfour Declaration into Article 22 of the League of Nations Covenant. Additionally, Professor Alan Dershowitz claims that “[a] de facto Jewish homeland already existed in parts of Palestine, and its recognition by the Balfour Declaration became binding international law when the League of Nations adopted it as part of its mandate.”<sup>101</sup> Lastly, the Mandate is relevant to the discussion of the U.N.’s authority pre-1988 to recognize a Palestinian state because Article 80 of the United Nations Charter specifies that it does not alter the pre-existing rights “of any states or any peoples” under mandatory agreements or other existing international agreements.<sup>102</sup>

The second problem with the United Nations’ initial legitimacy to endorse Palestinian statehood prior to 1988 arises from the deliberate lack of a binding rule of succession between the League of Nations and the United Nations.<sup>103</sup> Thus, even if it is argued that the League of Nations was bound by an Arab Palestinian state on the former Mandate of Palestine, the United Nations would not be bounded by it consecutively. To be sure, the ICJ in 1950 in the *Status of South West Opinion*,<sup>104</sup> and again in 1971 in the *Namibia Opinion*,<sup>105</sup> supported the exercise by the United Nations of authority with respect to mandates on the basis of arguments that did not depend on a rule of succession in relation to the League of Nations.

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French guarantee to the Zionists in June 1917 and February 1918, as well as by the Italian Government. Toynbee & Friedman, *supra* note 95, at 200.

99. *The British Mandate*, reprinted in THE ISRAEL-ARAB READER, *supra* note 41, at 30 (“Whereas the Principal Allied Powers have also agreed that the Mandatory should be responsible for putting into effect the declaration originally made on November 2nd, 1917, by the Government of His Britannic Majesty, and adopted by the said Powers, in favour of the establishment in Palestine of a national home for the Jewish people.”).

100. Treaty of Peace Between the Allied and Associated Powers and Turkey art. 95, Aug. 10, 1920, in 2 THE TREATIES OF PEACE: 1919–1923, at 787 (1924). Three years later, Turkey formally ceded control over the area of Palestine to Great Britain in the Treaty of Lausanne. See Treaty of Peace Between the Allied Powers and Turkey, July 24, 1923, 28 L.N.T.S. 11.

101. See ALAN DERSHOWITZ, THE CASE FOR ISRAEL 33 (2003).

102. U.N. Charter art. 80, para. 1.

103. Crawford, *Too Much Too Soon*, *supra* note 63, at 312.

104. International Status of South-West Africa, Advisory Opinion, 1950 I.C.J. 128 (July 11).

105. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, Advisory Opinion, 1971 I.C.J. 16 (June 21).

A third reservation regarding the U.N.'s initial legitimacy in endorsing Palestinian statehood prior to 1988 arises from the mere declaratory power of the United Nations practiced vis-à-vis the establishment of sovereignty of a state over a mandatory territory. For instance, although the General Assembly noticeably acquired power "to revoke the mandate for South West Africa, that power was not of a general discretionary or governing kind, but . . . a declaratory power exercised on behalf of the international community in a situation where no state had sovereignty over the territory concerned" (as in the case of Mandatory Palestine).<sup>106</sup> As Crawford observes, "[t]he binding character of [the GA's] decision [re South West Africa], and in particular the legal consequences for states as set out in the *Namibia Opinion*, were in a substantial part due to the operation of Security Council resolutions pursuant to Article 25 of the Charter."<sup>107</sup>

To conclude, an analysis of the United Nation's authority indeed bears important implications on the status of Palestine prior to the 1988 statehood declaration. As has been argued thus far, the proposition that the General Assembly recognized the statehood of Palestine prior to 1988 appears to fail.

### c. Contradicting Title by a Relevant Party

The third argument set forth by Professor Quigley is that Israel has been in control of Gaza and the West Bank as a belligerent occupier since 1967, but has never claimed sovereignty. A rule of international law is that the occupier does not acquire sovereign rights in the occupied territory, but instead exercises a temporary right of administration on a trustee basis.<sup>108</sup> Furthermore, according to the Restatement of Foreign Relations Law of the United States, "[a]n entity does not necessarily cease to be a state even if all of its territory has been occupied by a foreign power or if it has otherwise lost control of its territory temporarily."<sup>109</sup> Accordingly, when territory is taken via belligerent occupation, sovereignty is not affected.<sup>110</sup>

The seminal work of Professor James Crawford provides an illuminative response. He, like others, suggests focusing on the notion of state

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106. Crawford, *Too Much Too Soon*, *supra* note 63, at 312.

107. *Id.*

108. GERHARD VON GLAHN, *THE OCCUPATION OF ENEMY TERRITORY . . . A COMMENTARY ON THE LAW AND PRACTICE OF BELLIGERENT OCCUPATION* 31 (1957); CRAWFORD, *CREATION OF STATES*, *supra* note 82, at 73.

109. *RESTATEMENT (THIRD) OF FOREIGN RELATIONS* § 201 cmt. b (1987).

110. *See* CRAWFORD, *CREATION OF STATES*, *supra* note 82, at 73.

independence, or sovereignty, as a prerequisite for statehood.<sup>111</sup> Independence, as Crawford explains, should in essence remain the central criterion for statehood.<sup>112</sup> Such a focus, he proffers, should come in place of the four individual criteria for statehood listed in the Montevideo Convention.<sup>113</sup> To qualify as a state, a political entity must have a legal order that is distinct from other states and the capacity to act as it wishes within the limits of international law, without direct or indirect subordination to the will of another state or a group of states.<sup>114</sup> Formal independence or separateness exists “where the powers of government . . . are vested exclusively in one or more separate authorities of the purported State either as a result of its national law . . . or as a result of a grant of sovereignty by a former sovereign.”<sup>115</sup>

Crawford’s theory further requires that state independence embody two indispensable elements. The first element, which is presently resolved through the existence of the Palestinian Authority, is the existence of an organized community on a particular territory, exercising self-governing power, either exclusively or substantially.<sup>116</sup> Indeed, the West Bank and Gaza Strip are territorially distinct from the state of Israel and are governed by a separate legal order.<sup>117</sup>

The second element is the nonexistence of exercise of power by an alternative state—or even the absence of a right, vested in another state, to actualize such governing power.<sup>118</sup> Crawford’s latter condition for state independence leads to much stated controversy concerning Israel’s sovereignty claim over practically most of the land and key areas in the West Bank with reference to its borders, airspace, and underground wa-

111. See, e.g., L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 114–15 (H. Lauterpacht ed., 6th ed. 1947) (explaining that the four preconditions of statehood are: a people, a country in which the people has settled, a government, and sovereignty, which “is [a] supreme authority . . . independent of any other earthly authority”); *RESTATEMENT (THIRD) OF FOREIGN RELATIONS* § 201 n.5 (1987) (“Some writers add independence to the criteria required for statehood. Compare the Austro-German Customs Union case . . . in which the Court advised that a proposed customs union violated Austria’s obligation under the Treaty of St. Germain to retain its independence.”).

112. CRAWFORD, *CREATION OF STATES*, *supra* note 82, at 437. On the criterion of independence, see *Island of Palmas Arbitration* (Neth. v. U.S.), 2 R.I.A.A. 829, 838 (1928) (statement by Judge Huber); see also *Ungar v. Palestine Liberation Organization*, 402 F.3d 274, 288 (1st Cir. 2005).

113. Crawford, *Too Much Too Soon*, *supra* note 63, at 309.

114. DAVID RAIČ, *STATEHOOD AND THE LAW OF SELF-DETERMINATION* 75 (2002).

115. *Id.* at 76.

116. Crawford, *Too Much Too Soon*, *supra* note 63, at 309; see also, Benvenisti, *supra* note 79, at 62–63 (arguing that the Palestinian Authority has international responsibility despite not representing a state).

117. Palestinian residents of these territories are not represented in the Israeli Government, they are subject to separate laws and a separate judicial system, and they may not claim the legal rights guaranteed to residents of Israel.

118. CRAWFORD, *CREATION OF STATES*, *supra* note 82, at 66.

ter resources. Israel's contested sovereignty over these areas relates more specifically to: all settlement blocs; extensive Israeli nationalized allotments; private Palestinian land debatably purchased by Jews or Israelis; the entire Jordan valley; Jerusalem and its old City; the border with Jordan; all of the vast underground and mountain aquiferial water resources; military and civil control over the airspace; and, all of the West Bank border controls.<sup>119</sup>

Moreover, characterizations of these and other Palestinian Occupied Territories have changed over time. The term "occupied territories" itself originally derived from Security Council Resolution 242 (1967).<sup>120</sup> Among other things, this Resolution "Affirm[ed] that the fulfillment of Charter principles requires the establishment of a just and lasting peace in the Middle East which should include the . . . [w]ithdrawal of Israeli armed forces from territories occupied in the recent conflict."<sup>121</sup> Upon its adoption, Resolution 242 failed to achieve consensus about whether Israel could maintain title over some of the West Bank. According to one of the American participants in the negotiations over this resolution, United States policy was based on the conviction, articulated explicitly by President Johnson on June 19, 1967, that Israel should not have to return to the exact boundaries of June 5, 1967 because to do so would not be "a prescription for peace . . . but for a renewal of hostilities," and that there had to be real peace among the parties prior to any withdrawal.<sup>122</sup> In contrast, Nabil Elaraby, former member of Egypt's U.N. delegation, Permanent Representative of Egypt to the United Nations, and a Judge in the ICJ, argued that, as a matter of law, Resolution 242 required Israel to withdraw from all territories occupied in 1967.<sup>123</sup>

In short, Resolution 242 did not state whose territory was occupied, even though it is clear that the occupation of territory did occur. Nor did

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119. Agreed Minutes to the Declaration of Principles on Interim Self-Government Arrangements, art. IV, Sept. 13, 1993, 32 I.L.M. 1542. See also Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, Isr.-Palestine, art. XVII, Sept. 28, 1995, 36 I.L.M. 551, 564 (1997) ("In accordance with the [Declaration of Principles], 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 . . ."); Haim Gvirtzman, *Maps of Israeli Interests in Judea and Samaria Determining the Extent of the Additional Withdrawals*, BEGIN-SADAT CENTER FOR STRATEGIC STUDIES (1997), <http://www.biu.ac.il/Besa/books/maps.htm>.

120. S.C. Res. 242, U.N. Doc. S/RES/242 (Nov. 22, 1967).

121. *Id.* § 1.

122. See Eugene Rostow, *The Intent of UNSC Resolution 242—The View of Non-Regional Actors*, in UN SECURITY COUNCIL RESOLUTION 242: THE BUILDING BLOCK OF PEACEMAKING 5, 15 (1993).

123. Nabil Elaraby, *Legal Interpretations of UNSC 242*, in UN SECURITY COUNCIL RESOLUTION 242, *supra* note 122, at 35, 35–44.

the resolution specify the boundaries of Israel or endorse the 1949 Armistice Demarcation Lines as permanent borders. Furthermore, the ICJ's Advisory Opinion of 2004 concerning the Wall in the Occupied Palestinian Territory provided no answer to these two questions.<sup>124</sup> Given the above, there seem to be high expectations within Israeli negotiation teams that portions of the occupied territories in the West Bank will be ceded to Israel.<sup>125</sup>

Furthermore, an argument supporting Israel's claim to parts of the territories occupied in 1967 might call for a proper interpretation of Article 52 of the 1969 Vienna Convention on the Law of Treaties. The Article states that "[a] treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations."<sup>126</sup> The question, then, is whether it should be inferred that a peace treaty ceding territory from the vanquished to the victorious state is invalid. It is possible that, in the words of the Preamble to Resolution 242, "the acquisition of territory by war" is inadmissible.<sup>127</sup> But, as Yoram Dinstein notes, such an inference seems erroneous. Under Article 52:

only a treaty induced by an unlawful use of force is invalidated. There is nothing wrong in a peace treaty providing for the acquisition of territory by the victim of aggression, if the latter [in this case Israel] emerges victorious from the war. Only the aggressor State is barred from reaping the fruits of its aggression.<sup>128</sup>

Article 75 of the Vienna Convention clarifies that the Convention's provisions "are without prejudice to any obligation in relation to a treaty which may arise for an aggressor State" as an end result of its belligerence.<sup>129</sup> This concept also explained the demarcation of the post-Second World War boundaries of Europe, upon substantial loss of territory by former Nazi Germany. Equally relevant is the conclusion that, as Jordan was the aggressor state in June 1967, any border rectifications constructive to Israel based on a peace treaty would be valid under contemporary

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124. See generally *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136 (July 9).

125. *Netanyahu: West Bank Areas to be Kept*, THE WASHINGTON TIMES, Jan. 25, 2010, <http://www.washingtontimes.com/news/2010/jan/25/netanyahu-says-some-west-bank-areas-to-be-kept/>.

126. Vienna Convention on the Law of Treaties, art. 52, May 23, 1969, 1155 U.N.T.S. 331, available at [http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf).

127. S.C. Res. 242, U.N. Doc. S/RES/242 (Nov. 22, 1967); see also Dinstein, *supra* note 94, at 316–17.

128. Dinstein, *supra* note 94, at 317.

129. Vienna Convention on the Law of Treaties, *supra* note 126, 1155 U.N.T.S. at 350.

international law.<sup>130</sup> In short, it is the illegality of the use of force which invalidates treaties whereby territories are ceded from one country to another.

Neither the PLO nor the Palestinian Authority established a defined territory for the future Palestinian state, since its borders were one of the permanent status issues left unresolved by Oslo I.<sup>131</sup> Oslo II also considered the borders of the West Bank and the Gaza Strip as an unresolved permanent status issue, with Israel retaining control of external borders.<sup>132</sup> With respect to the pivotal question of Jerusalem, and who is entitled to territorial sovereignty thereof, Professor Geoffrey Watson notes that the dispute may be difficult to resolve from a practical point of view.<sup>133</sup> Thus, any legal discussion of the competing claims may be futile, and the only way out of this impasse is a negotiated compromise.<sup>134</sup>

#### d. Recognition by the Relevant Party

Quigley's fourth assertion is that recognition is an act executed by states.<sup>135</sup> "If Israel did not regard Palestine as a state, there would have been no point in asking for [Palestinian] recognition [of Israel in the Oslo Accords]. Israel was clearly dealing with Palestine as a state."<sup>136</sup> In reply it should be stated that in the absence of a particular rule, the constitutive state recognition theory embedded into Quigley's reasoning leads inevitably to the proposition that a state is not bound to treat another entity as a state if it has not recognized it. Under the *constitutive* theory of statehood, a political entity becomes a state, endowed with legal personality in international law, only when it is recognized as such by existing states.<sup>137</sup> Put literally, the act of recognition is constitutive of statehood.<sup>138</sup> For example, Oppenheim opined that "[a] State is, and becomes, an International Person through recognition only and exclusively."<sup>139</sup>

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130. Jordan formally admits to have been the aggressor in the 1967 war; "[i]n response to the Israeli attack [on Egypt], Jordanian forces launched an offensive into Israel . . ." <http://www.mefacts.com/cache/html/jordan/10364.htm>.

131. *Id.*; Oslo I, *supra* note 53, 32 I.L.M. at 1529.

132. Oslo II, *supra* note 53, 36 I.L.M. at 562.

133. WATSON, *supra* note 40, at 267–68.

134. *Id.* at 268.

135. *See* Quigley, *supra* note 35, at 7.

136. *Id.*

137. RAIČ, *supra* note 114, at 28–31; MALCOLM N. SHAW, INTERNATIONAL LAW 445–46 (6th ed. 2008); Kathryn M. McKinney, Comment, *The Legal Effects of the Israeli-PLO Declaration of Principles: Steps Toward Statehood for Palestine*, 18 SEATTLE U. L. REV. 93, 95 (1994).

138. Dajani, *supra* note 40, at 80.

139. OPPENHEIM, *supra* note 111, at 121.



The crucial actors in the present case are the United States and Israel, both of which strongly object to recognizing Palestine as a state. Moreover, the argument that Israel implicitly recognized Palestine through the bilateral agreements runs counter to contractual undertakings of both the Palestinians and the Israelis, endorsed by the Quartet members, whereby the establishment of a Palestinian state should be the outcome of mutual agreement.<sup>140</sup> First, the Declaration of Principles on Interim Self-Governing Arrangements (Oslo I) leaves little doubt about the approach of the parties regarding unilateral or external announcement of any legal results. As declared already in its Preamble, the agreement set the parties on a path toward peace and reconciliation “through the agreed political process,” and not in the course of a legal process impressed by third parties.<sup>141</sup> This agreement seems to supersede any theories of prior recognition by Israel or the validity of external recognition by other states.

Second, it was agreed that negotiations for the interim period preceding a permanent settlement would not prejudice final status negotiations.<sup>142</sup> The September 28, 1995 Interim Agreement (Oslo II) states, “[n]either side shall initiate or take any step that will change the status of the West Bank and the Gaza Strip pending the outcome of the permanent status negotiations.”<sup>143</sup> According to the Israel Government Press Office, a hypothetical unilateral declaration of statehood by the Palestinian Authority would contravene the Oslo Accords and the Wye River Memorandum. The Israeli Ministry of Foreign Affairs statement of October 23, 1998, considering the Wye River Memorandum, provides: “The two sides have undertaken to refrain from unilateral steps that would alter the status of the area, until the permanent status negotiations will have been completed.”<sup>144</sup>

Third, it has been agreed between the parties that “disputes arising out of the application or interpretation” of the agreements were to be resolved through negotiations between the parties, and even more specifically, through a “mechanism of conciliation” to be mutually agreed

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140. Crawford, *Too Much Too Soon*, *supra* note 63, at 309 (“[T]here are compelling reasons for rejecting the constitutive theory, and most modern authorities do so.”).

141. See Oslo I, *supra* note 53, 32 I.L.M. at 1527.

142. See Oslo II, *supra* note 53, 36 I.L.M. at 568; Wye River Memorandum, *supra* note 53, 37 I.L.M. at 1255; Sharm el-Sheikh Memorandum, *supra* note 53, 38 I.L.M. at 1468.

143. See Oslo II, *supra* note 53, 32 I.L.M. at 568.

144. Isr. Ministry of Foreign Affairs, The Wye River Memorandum: Background and Main Points (Oct. 23, 1998), <http://www.mfa.gov.il/MFA/Peace%20Process/Guide%20to%20the%20Peace%20Process/The%20Wye%20River%20Memorandum%20Background%20and%20Main%20Poin>.

upon, including binding arbitration.<sup>145</sup> Because the Oslo Accords committed both sides to settling the dispute through negotiations, and forbade them from taking steps that would prejudice these negotiations, it is peculiar that the ICJ Opinion did not mention the agreements in its decision regarding the security barrier.<sup>146</sup>

Finally, Israel has never officially recognized a Palestinian state, and such recognition was not implied in Israel's acceptance of the Partition Resolution, per the General Assembly Resolution 181(II) of November 29, 1947,<sup>147</sup> or in its admittance to the United Nations. Although the pertinent pre-state Jewish organization endorsed the Partition Resolution when it was first adopted, the Resolution was declined by the Arab states involved—or for that matter by any organized Palestinian leadership of Mandatory Palestine.<sup>148</sup> “Instead, war broke out, leading to a ceasefire.”<sup>149</sup> Consequently, Israel was not admitted to the United Nations based on the Partition Resolution.<sup>150</sup> Moreover, the United Nations Charter makes no provision for “conditional admission” for new born states, such as Israel in the 1940s,<sup>151</sup> so one cannot assert that Israel was admitted to the U.N. under the condition of its acceptance of the Partition Resolution.

#### e. Tacit Recognition and Counter-Recognition

Professor Quigley further argues that recognition need not be expressed in a formal document. If states treat an entity as a state, then they are tacitly considered to recognize it.<sup>152</sup> This constitutive state recognition argument, assuming it could be held as binding international law, can also be argued in reverse. In fact, a careful reading of both informal and formal Palestinian leadership statements made over the last sixty years, especially during the Oslo Accords period beginning in the mid 1990s, tells of systematic Palestinian resolve not to declare and establish a Palestinian state so long as the peace talks with Israel had not culminated.

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145. See Oslo I, *supra* note 53, 32 I.L.M. at 1533; Gaza-Jericho Agreement, *supra* note 53, 33 I.L.M. at 634; Oslo II, *supra* note 53, 36 I.L.M. at 566.

146. See generally Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9); HCJ 2056/04 Beit Sourik Village Council v. Gov't of Israel 58(5) PD 807 [2004] (Isr.), available at [http://elyon1.court.gov.il/files\\_eng/04/560/020/a28/04020560.a28.pdf](http://elyon1.court.gov.il/files_eng/04/560/020/a28/04020560.a28.pdf).

147. The Resolution calls for termination of the British Mandate for Palestine, and the partition of the territory into two independent states: Jewish and Arab. See G.A. Res. 181 (Nov. 29, 1947), available at <http://www.yale.edu/lawweb/avalon/un/res181.htm>.

148. Crawford, *Too Much Too Soon*, *supra* note 63, at 313.

149. *Id.*

150. CRAWFORD, CREATION OF STATES, *supra* note 82, at 442.

151. *Id.*

152. John Quigley, *supra* note 35, at 4.

The Palestinian narrative of future statehood seemingly underwent a conceptual overhaul. In the 1940s the Palestinian leadership agreed to a future Palestinian state with permanent borders within Mandatory Palestine (including Israeli territory), but this view has shifted in three directions. All directions disclose that no Palestinian state exists according to Palestinian formal and informal policy, while occasionally criss-crossing three different statehood models. The first of these models calls for the establishment of a future Palestinian state based on the two-state solution, yet with temporary borders and on the entire occupied Palestinian territories, based on U.N. Security Council Resolutions 242 and 338, following the Six-Day War of 1967 and the Yom Kippur War of 1973, respectively.<sup>153</sup> Currently, the international community and the United Nations do not recognize the existence of a Palestinian state according to this statehood-building model.<sup>154</sup> This has been the prevailing model for the longest period of time.

The second statehood model, upheld most noticeably in 2005, bears witness to the formal Palestinian leadership rejecting the notion of a Palestinian state with temporary borders. As stated by Palestinian Authority President, Mr. Mahmoud Abbas (“Abu Mazen”): “If it is up to me, I will reject it . . . it’s better for us and for the Israelis to go directly to final status . . . . I told Mr. Sharon that it’s better for both sides to establish this back channel to deal with final status . . . .”<sup>155</sup> Simply put, according to this reasoning the Palestinians then pursued statehood within the two-state negotiable solution, but with permanent borders.

The third and more recent Palestinian practice admitting the non-existence of a current Palestinian state calls for a single-state solution, based on the “two peoples-one state” conception, effectively pursuing the unification of Palestinian self-determination statehood aspirations with the state of Israel.<sup>156</sup> Be that as it may, all models since the 1940s jointly acknowledge that Palestinian statehood is to be established prospectively.

Examples of these approaches are manifold. To begin with, in the heydays of the Oslo peace process, circa 1995, Palestinian Authority

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153. See discussion *infra*.

154. See, e.g., SHAW, *supra* note 137, at 247.

155. Steven Erlanger, *Abbas Declares War with Israel Effectively Over*, N.Y. TIMES, Feb. 14, 2005, at A1.

156. For a discussion about the single-state solution within Palestinian public opinion, see Tony Judt, *Israel: The Alternative*, N.Y. REV. BOOKS, Oct. 23, 2003, available at <http://www.nybooks.com/articles/archives/2003/oct/23/israel-the-alternative/>; Ahmad Samih Khalidi, *A one-state solution: A unitary Arab-Jewish homeland could bring lasting peace to the Middle East*, THE GUARDIAN, Sept. 29, 2003, at 17; Chris McGreal, *Intifada Leader Uses Courtroom to Point to One-State Solution*, THE GUARDIAN, Sept. 30, 2003, at 17; Michael Tarazi, Op-Ed., *Why Not Two Peoples, One State?*, N.Y. TIMES, Oct 3, 2004, at A25.

Chairman Arafat proclaimed, "We are approaching [the time] to declare an independent Palestinian state and its capital in noble Jerusalem. I mean it. I mean it."<sup>157</sup> In the same year, and arguably in deviation from the second statehood model, Mr. Sakher Habash, a member of the Central Committee of Fatah and one of its founders and recognized chief of ideology, referred to this matter in a speech made in Arafat's name.<sup>158</sup> Referring to the third statehood model, he stated: "Experience teaches us that without establishing a Palestinian state on the entire land, peace cannot be achieved . . . . They [the Zionists] must become citizens of the state of the future, the democratic Palestinian state."<sup>159</sup>

Quigley himself notes elsewhere that:

In 1997, the cabinet of the Palestinian Authority discussed the possibility of declaring the establishment of a Palestinian state with Jerusalem as its capital; Chairman Arafat, asserting that Palestine statehood was "not an Israeli issue" but "an Arab and international issue," indicated that the intent was to do so prior to the final negotiations with Israel on Palestine's status. Israeli Prime Minister Benjamin Netanyahu responded that a "unilateral declaration" of a Palestinian state would violate the then recently signed agreement on Israeli re-deployment from Hebron.<sup>160</sup>

Until 1999, no Palestinian state had been declared or established. On May 4, 1999, Chairman Arafat was expected to unilaterally declare Palestinian statehood,<sup>161</sup> given the approaching deadline for a permanent settlement without momentous diplomatic progress.<sup>162</sup> Addressing a rally in Nablus on November 14, 1998, Arafat said: "[we] will declare our independent state on 4 May 1999, with Jerusalem as its capital."<sup>163</sup> This intention was not fulfilled, as Arafat backed down from his previous statement and instead suggested that he would negotiate for the creation

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157. Justus R. Weiner, *Peace and Its Discounts: Israeli and Palestinian Intellectuals Who Reject the Current Peace Process*, 29 CORNELL INT'L L.J. 501, 528 (1996).

158. Lt. Col. Jonathan D.H., *supra* note 76.

159. *Id.*

160. John Quigley, *The Israel-PLO Interim Agreements: Are They Treaties?*, 30 CORNELL INT'L L.J. 717, 726 (1997) (quoting *Arafat's Cabinet Discusses Establishment of State*, REUTERS, Jan. 24, 1997).

161. See Deborah Sontag, *Arafat's Tightrope: Palestinian Statehood*, N.Y. TIMES, Mar. 23, 1999, at A3.

162. *Id.*; see also Ben Lynfield, *Erekat: May 4 Will be a Normal Day*, JERUSALEM POST, May 4, 1999, at 1.

163. Nat'l Unity Coal. for Isr., *Arafat Again Calls for Palestinian State*, WASHINGTON D.C., Nov. 16, 1998.

of a state.<sup>164</sup> And thus, the official Palestinian position once again impli-  
edly acknowledged that no Palestinian state existed thus far.

May 4, 1999 was the official deadline for a permanent settlement. It  
passed silently without the parties derogating from their Oslo obliga-  
tions. Successively, four months after the expiration of the deadline, the  
parties “commit[ted] themselves to the full and mutual implementation  
of the Interim Agreement [Oslo II] and all other agreements concluded  
between them since September 1993” in the Sharm El-Sheikh Memo-  
randum.<sup>165</sup> So although no settlement was achieved within the timeframe  
set by Oslo I, the passage of time did not vitiate the agreements concern-  
ing the interim period preceding a permanent settlement.<sup>166</sup> Certainly,  
according to the Vienna Convention, parties cannot denunciate or with-  
draw from a treaty that does not include a termination provision<sup>167</sup>—that  
is, unless it can be established that the parties intended to admit the pos-  
sibility of denunciation or withdrawal,<sup>168</sup> or if such likelihood was  
implied by the nature of the treaty.<sup>169</sup> Both the text of the Oslo Accords  
and the practice of the parties indicate that they intended for the Accords  
to remain in effect in the event that a settlement on permanent status is-  
sues was not achieved within the required timeframe.<sup>170</sup>

Furthering the second two-state statehood model, Arafat declared  
that the conflict with Israel could not end without the transfer of East  
Jerusalem to Palestinian sovereignty and vowed to declare a Palestinian  
state on September 13, 2000 with Jerusalem as its capital.<sup>171</sup> Against the  
backdrop of Israeli and American-levied pressure, no declaration of such  
kind was then made, again tacitly upholding the claim that even accord-

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164. See, e.g., Samar Assad, *Arafat Moderates Position on Palestinian Statehood*, ASSO-  
CIATED PRESS, May 20, 1998.

165. Sharm el-Sheikh Memorandum, *supra* note 53, 38 I.L.M. 1465.

166. Geoffrey R. Watson, *The “Wall” Decisions in Legal and Political Context*, 99 AM.  
J. INT’L L. 6, 23 (2005).

167. Vienna Convention on the Law of Treaties, *supra* note 126, 1155 U.N.T.S. at 345.  
As established in Part III(A)(i), the Vienna Convention is the leading authoritative source of  
international treaty law, even for parties who are not signatories to it, such as the Palestinian  
Authority.

168. *Id.* art. 56(b).

169. *Id.*

170. See Oslo I, *supra* note 53, 32 I.L.M. at 1527; Oslo II, *supra* note 53, 36 I.L.M. at  
558; Watson, *supra* note 166, at 23; Seth Benjamin Orkand, Comment, *Coming Apart at the  
Seamline—the Oslo Accords and Israel’s Security Barrier: A Missed Opportunity at the Inter-  
national Court of Justice and the Israeli Supreme Court*, 10 GONZ. J. INT’L L. 390, 426  
(2007).

171. See, e.g., Hatem Lutfi, *Arafat: No Peace Without Jerusalem*, JERUSALEM TIMES,  
July 28, 2000, at 1 (“Jerusalem is the capital of the state of Palestine and whoever does not  
like this may drink from the Gaza Sea.”).

ing to the Palestinian leadership no Palestinian state has ever been officially declared.<sup>172</sup>

Finally, a recent Palestinian implicit acknowledgment that no Palestinian state has yet been declared took place on August 1, 2009. During the sixth Fatah Congress held in the city of Bethlehem in the West Bank, the Congressional committee officially declared that the formal policy of the PLO was that future declaration of a Palestinian state would take place in the event that peace negotiations with Israel should fail.<sup>173</sup>

In conclusion, international legal practice of the last sixty years, particularly during the Oslo Accords period beginning in the mid-1990s, demonstrates systematic Palestinian determination not to establish a Palestinian state so long as the peace talks with Israel had not yet concluded. By the same token, it is arguably the policy of the Palestinian Authority, in compliance with the constitutive state recognition theory, that from 1948 to the present day, no Palestinian state has existed.

### 3. A Gaza-Based Hamas-Governed State

For the purpose of assessing jurisdiction over the Israel-Gaza conflict, the ICC could argue that a separate Palestinian state exists in the Gaza Strip, where the alleged crimes were committed. This claim has not been made either by the Palestinian Authority or by the Hamas government, and raises various difficulties. For starters, it is inconsistent with the Oslo Accords stance that the Gaza Strip and the West Bank are a single territorial unit.<sup>174</sup>

Moreover, under the *constitutive* theory of statehood, a political entity becomes a state, endowed with legal personality in international law, only when it is recognized as such by existing states. No state or important international organization has recognized a Hamas-based Palestinian state in the Gaza Strip. Such status most probably was never acquired by Hamas following its forcible assumption of power in the Strip in defiance of Palestinian Authority hegemony and of the Oslo peace process at large. Neither does the international community recognize the Hamas government, although it was democratically elected. Hence, the Gaza Strip cannot be deemed an independent state under this theory.

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172. See Danna Harman, *Clinton Warns Arafat Against Unilateral Statehood*, JERUSALEM POST, July 30, 2000, at 1; *Arafat Ready to Discuss Statehood*, ASSOCIATED PRESS, Feb. 22 1999, available in 1999 WL 12932378.

173. See Memorandum from the Fateh 6th Convention (Aug. 10, 2009), available at [http://www.passia.org/about\\_us/MahdiPapers/FatehConvention.pdf](http://www.passia.org/about_us/MahdiPapers/FatehConvention.pdf).

174. See Oslo I, Agreed Minutes, *supra* note 119, 32 I.L.M. at 1542. This was repeated with further elaboration in Art XVII of Oslo II, which states that “[i]n accordance with [Oslo I], the jurisdiction of the Council will cover West Bank and Gaza Strip territory as a single territorial unit.” Oslo II, *supra* note 53, 36 I.L.M. at 564.

According to the *declaratory* theory of statehood, however, a certain entity may be defined as a “state” for the purposes of international law if it meets certain structural criteria, even if it is not recognized as such by other states.<sup>175</sup> Recognition, therefore, is only declaratory of an existing fact. The traditional conditions of independent statehood are stated in the 1933 Montevideo Convention on the Rights and Duties of States.<sup>176</sup> Article 1 provides that a state as a person of international law must possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) a government; and (d) the capacity to enter into relations with other states. Article 3 emphasizes that the political existence of the state is independent of recognition by other states. This definition was endorsed, *inter alia*, by the American Law Institute in the Third Restatement of Foreign Relations.<sup>177</sup>

Most notably, while the Hamas government exercises some control over the Gaza Strip, it seems to fall short of the degree of control exercised by an independent government in that some of those powers were retained by Israel.<sup>178</sup> With regard to the capacity to engage in foreign relations, the Hamas government is theoretically subject to the Oslo Accords, whereby its power to engage in foreign relations is limited. More importantly, the Hamas regime in Gaza is not recognized by most states, the United States and the European Union in particular, rendering formal relations with foreign states practically impossible.<sup>179</sup>

The Hamas government in Gaza lacks at least formal independence. If an entity, albeit independent, does not consider itself a state, “there can be no statehood.”<sup>180</sup> Neither the Palestinian Authority nor the Hamas government has declared independence so far over Gaza alone. The official Palestinian position is that the Gaza Strip is still an occupied territory.<sup>181</sup> This view has been consistently articulated by Hamas leaders. For instance, in a 2007 interview, shortly after the Hamas-Fatah clashes, Hamas leader Mahmoud Zahar stated: “We’re fighting for the liberation

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175. RAIČ, *supra* note 114, at 32–33; SHAW, *supra* note 137, at 446; Dajani, *supra* note 40, at 80–81; McKinney, *supra* note 137, at 95.

176. Convention on Rights and Duties of States, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19, 25. It is generally agreed that Article 1 lays down the traditional criteria for statehood. RAIČ, *supra* note 114, at 24, 49; Dajani, *supra* note 40, at 81.

177. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 201 (1987).

178. Yuval Shany, *Binary Law Meets Complex Reality: The Occupation of Gaza Debate*, 41 ISR. L. REV. 68, 77 (2008) [hereinafter Shany, *Binary Law*].

179. See, e.g., *U.N. Chief Expresses Outrage over Israeli Bombing*, USA TODAY, Jan. 15, 2009, available at [http://www.usatoday.com/news/world/2009-01-15-israel-un\\_N.htm](http://www.usatoday.com/news/world/2009-01-15-israel-un_N.htm) (“The international community does not recognize Hamas’ government.”).

180. RAIČ, *supra* note 114, at 76; See also RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 201 cmt. f (1987) (“While the traditional definition does not formally require it, an entity is not a state if it does not claim to be a state.”).

181. Shany, *Binary Law*, *supra* note 178, at 70–71.

of our land from an occupation.”<sup>182</sup> Zahar restated this position in a 2008 interview. When asked about the analogy between Hamas and Hezbollah he replied: “Don’t make comparisons. Because Hezbollah lives in open borders, Hezbollah is in an independent state. We are under occupation. We should have weapons and arms more than Hezbollah, because Hezbollah is a liberated land, but we are here in an occupied land.”<sup>183</sup> Moreover, under the Oslo Accords, neither side was permitted to attempt to unilaterally alter the status of the West Bank or the Gaza Strip.<sup>184</sup> In short, per the Oslo Accords neither the Palestinian Authority nor the Hamas government could have proclaimed independence without having acted in violation of the agreement.<sup>185</sup>

But is the Gaza Strip at least free of occupation with respect to the “ability to govern” statehood criterion? Israel occupied the Gaza Strip during the Six-Day War of June 1967.<sup>186</sup> The 1979 peace treaty between Egypt and Israel returned the Sinai Peninsula to Egyptian control and established the boundary between the two countries as the recognized international boundary between Egypt and the former mandated territory of Palestine, notably “without prejudice to the issue of the status of the Gaza Strip.”<sup>187</sup> In May 1994, following the Oslo Accords,<sup>188</sup> the Palestinian Authority was given nearly full power of government over most of the Strip, while Israel retained governmental power over Israeli settlements, main roads, borders, airspace, and territorial waters, and security authority over the entire area. A decade later, in February 2005, the Israeli government decided to implement its earlier mentioned unilateral “disengagement plan.”<sup>189</sup> By September 12, 2005, all Israeli settlements and military bases in the Strip had been dismantled, and all Israeli troops and settlers had withdrawn. Israel also withdrew from the Philadelphi Route, a narrow buffer zone along the Gaza-Egyptian border, apparently to dispel any allegation that the territory was still occupied. The Israeli

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182. Interview with Hamas Co-Founder Mahmoud Zahar, SPIEGEL (June 22, 2007), <http://www.spiegel.de/international/world/0,1518,490160,00.html>.

183. Amira Hass, *Top Hamas Leader to Haaretz: U.S. Sanctions to Blame for Gaza Crisis*, HAARETZ, Dec. 14, 2008, available at <http://www.haaretz.com/print-edition/news/top-hamas-leader-to-haaretz-u-s-sanctions-to-blame-for-gaza-crisis-1.259454>.

184. Oslo I, *supra* note 53, 32 I.L.M. at 1537; Oslo II, *supra* note 53, 36 I.L.M. at 568.

185. Nicholas Stephanopoulos, *Israel's Legal Obligations to Gaza After the Pullout*, 31 YALE J. INT'L L. 524, 526 (2006) (referring to a Palestinian declaration of independence as a clear violation of the Oslo Accords).

186. Convention (IV) Respecting the Laws and Customs of War on Land, Annex, Oct. 18, 1907, 187 Consol. T.S. 227 (defining occupation).

187. Treaty of Peace, Egypt-Isr., art. 2, Mar. 26, 1979, 1136 U.N.T.S. 115.

188. Oslo I, *supra* note 53.

189. Israel's Disengagement Plan: 2005, MINISTER OF FOREIGN AFFAIRS, <http://www.mfa.gov.il/MFA/Facts+About+Israel/Israel+in+Maps/Israels+Disengagement+Plan+2005.htm> (last visited Oct. 14, 2010).



Defense Forces (IDF) Chief of Southern Command issued a decree proclaiming the end of military rule in the Strip.<sup>190</sup>

In the January 2006 elections, Hamas won 74 out of 132 seats in the Palestinian Legislative Council. Despite its victory, and following international pressure, Hamas established a unity government with Fatah. Nevertheless, tensions between the two parties escalated,<sup>191</sup> and clashes between Hamas and Fatah erupted in January 2007, and again in May 2007. On June 13–14, 2007, Hamas routed Fatah forces in Gaza. Consequently, Palestinian President Abbas dissolved the Hamas government, declaring his intent to install a new Fatah government.<sup>192</sup> The result was two governments: a Hamas alleged government in Gaza, and a Fatah government under Abbas' presidency in the West Bank.<sup>193</sup>

Despite the disengagement, Israel still possesses certain control over the Gaza Strip. The IDF controls the movement of people and goods from Israel into Gaza, and has limited control over the Gaza-Egyptian border.<sup>194</sup> Secondly, the IDF controls the airspace and territorial waters of the Gaza Strip.<sup>195</sup> In fact, Israel has yet to agree to the opening of Gaza's airport and seaport.<sup>196</sup> Thirdly, Israel still controls the Strip's population registry.<sup>197</sup> Fourthly, Israel has a certain amount of control over the taxation system in the Gaza Strip and the West Bank.<sup>198</sup> Lastly, even before the Cast Lead Operation in 2009, the IDF maintained some control over movement in the Strip through short-term incursions and a "No-Go Zone."<sup>199</sup>

190. Shany, *Binary Law*, *supra* note 178, at 70; Yuval Shany, *Faraway, So Close: The Legal Status of Gaza After Israel's Disengagement*, 8 Y.B. INT'L HUMANITARIAN L. 369, 369 (2005) [hereinafter Shany, *Faraway, So Close*].

191. S.C. Res. 1860, ¶ 7, U.N. Doc. S/RES/1860 (Jan. 8, 2009) ("[E]ncourage tangible steps towards intra-Palestinian reconciliation including in support of mediation efforts of Egypt and the League of Arab States as expressed in the 26 November 2008 resolution, and consistent with Security Council resolution 1850 (2008) and other relevant resolutions."); S.C. Res. 1850, ¶ 4, U.N. Doc. S/RES/1850 (Dec. 16, 2008) (acknowledging the commitment of the Palestinian Liberation Organization to the two-state solution).

192. Eli Lake, *Hamas Takes Over Gaza Security Services*, N.Y. SUN, June 15, 2007, at 1, available at [www.nysun.com/article/56622](http://www.nysun.com/article/56622).

193. SHERIFA ZUHUR, *HAMAS AND ISRAEL: CONFLICTING STRATEGIES OF GROUP-BASED POLITICS* 38 (2008).

194. See GISHA: LEGAL CTR. FOR FREEDOM OF MOVEMENT, *DISENGAGED OCCUPIERS: THE LEGAL STATUS OF GAZA* 32 (2007), available at [http://www.gisha.org/UserFiles/File/Report for the website.pdf](http://www.gisha.org/UserFiles/File/Report%20for%20the%20website.pdf) (last visited Oct. 28, 2010); Stephanopoulos, *supra* note 185, at 524.

195. GISHA, *supra* note 194, at 47; Shany, *Faraway, So Close*, *supra* note 190, at 373; Stephanopoulos, *supra* note 185, at 524.

196. GISHA, *supra* note 194, at 50, 52; Shany, *Faraway, So Close*, *supra* note 190, at 373; Stephanopoulos, *supra* note 185, at 524.

197. See sources cited *supra* note 196.

198. GISHA, *supra* note 194, at 54–55; Stephanopoulos, *supra* note 185, at 524.

199. GISHA, *supra* note 194, at 49; Stephanopoulos, *supra* note 185, at 524.

Before Israel's withdrawal in September 2005, there was little doubt that the Gaza Strip was an occupied non-state territory.<sup>200</sup> For instance, the ICJ held in 2004 that the West Bank was "occupied by Israel in 1967," and that "[s]ubsequent events in these territories [including the implementation of the Oslo Accords] . . . have done nothing to alter the situation. All these . . . territories remain occupied territories and Israel has continued to have the status of occupying Power."<sup>201</sup> This statement applies *mutatis mutandis* to the Gaza Strip. Arguably, the unilateral disengagement did not lead to the complete end of Gaza's occupation; nor did it lead to the establishment or recognition of a sovereign Palestinian state therein, although it should be noted again that a state can be wholly occupied and yet remain an international actor.<sup>202</sup>

Article 42 of the 1907 Hague Regulations, which embody rules of customary international law, provides that a "[t]erritory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised."<sup>203</sup> The traditional view is that "[t]he law of occupation is applicable to regions in which foreign forces are present, and in which they can maintain effective control over the life of the local population and exercise the authority of the legitimate power."<sup>204</sup> Put differently, occupation presumably entails: (a) *actual* presence of hostile troops in the area; (b) the hostile troops' ability to exercise effective governmental powers in the area,<sup>205</sup> and (c) the legitimate government's inability to exercise effective governmental powers.<sup>206</sup> Under the traditional view, occupation ends when the foreign troops leave the occupied territory.<sup>207</sup> Thus at first glance the disengagement

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200. See GISHA, *supra* note 194, at 82. But see Shany, *Binary Law*, *supra* note 178, at 78 ("Already in 1994, following the establishment of Palestinian self-rule in Gaza and Jericho, certain doubts arose pertaining to the continued applicability of the laws of occupation to areas transferred to Palestinian control.").

201. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 167 (July 9).

202. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 201 cmt. b (1987); CRAWFORD, CREATION OF STATES, *supra* note 82, at 59; VON GLAHN, *supra* note 108, at 31.

203. Convention (IV) Respecting the Laws and Customs of War on Land, Annex, Oct. 18, 1907, 187 Consol. T.S. 227.

204. Eyal Benvenisti, *Responsibility for the Protection of Human Rights Under the Interim Israeli-Palestinian Agreements*, 28 ISR. L. REV. 297, 308 (1994). See also EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION 4 (1993) ("[The phenomenon of occupation] can be defined as effective control of a power . . . over a territory to which that power has no sovereign title, without the volition of the sovereign of that territory.").

205. There is no need, however, for the establishment of an actual military government. See H CJ 102/82 Tsemel v. Defense Minister PD 37(3) 365, 373 [1983] (Isr.).

206. Shany, *Faraway, So Close*, *supra* note 190, at 376.

207. Adam Roberts, *The End of Occupation: Iraq 2004*, 54 INT'L & COMP. L.Q. 27, 28 (2005).

plan has brought the occupation of the Gaza Strip to an end. This indeed is the official position of Israel. In an address to the U.N. General Assembly, former Israeli Prime Minister, Ariel Sharon, proclaimed “[t]he end of Israeli control over and responsibility for the Gaza Strip.”<sup>208</sup> However, this position is open to debate for a variety of reasons.

First, as mentioned above, Israel has retained control over the Strip’s airspace and territorial waters, most border crossings, population registry, and tax system. Arguably, effective control does not require actual military presence on the ground.<sup>209</sup> As articulated by the Israeli Human Rights organization *Gisha*: “the proper interpretation of Article 42 of the Hague Conventions is an evolutive interpretation that takes into account changes in the way control is exercised.”<sup>210</sup> While “the source of the occupying power’s authority is military superiority,” the ability to exercise authority, rather than actual physical presence, determines whether a territory is occupied.<sup>211</sup> Under this view, Israel’s control—even after the disengagement—is sufficient to establish occupation.<sup>212</sup> To date, this interpretation remains the official position of the Palestinian Authority itself.<sup>213</sup> It was also endorsed by John Dugard, the U.N. Special Rapporteur for the Occupied Palestinian Territories.<sup>214</sup> However, this view is questionable as it is inconsistent with the customary interpretation of Article 42, requiring physical presence of hostile forces on the ground. As Shany correctly observes, “[t]his is not mere formalism, as it is hard to conceive of the manner in which an occupier with no ground presence could realistically be expected to execute its obligations under *jus in bello* (e.g., maintenance of law and order, provision of basic services, etc.).”<sup>215</sup>

Second, “it is well established in legal doctrine that an occupier can exercise effective control over an entire area without maintaining troop

208. U.N. GAOR, 60th Sess., 5th plen. mtg. at 46, U.N. Doc. A/60/PV.5 (Sept. 15, 2005).

209. Stephanopoulos, *supra* note 185, at 525 (“Boots on the ground are often a reasonable proxy for authority over a territory, but nothing in the Hague Convention makes them a prerequisite for a finding of occupation.”).

210. *GISHA*, *supra* note 194, at 69.

211. *Id.* at 76.

212. Mustafa Mari, *The Israeli Disengagement from the Gaza Strip: An End of the Occupation?*, 8 Y.B. INT’L HUM. L. 356, 367–68 (2005).

213. Shany, *Binary Law*, *supra* note 178, at 70–71; Robert A. Caplen, *Rules of “Disengagement”: Relating the Establishment of Palestinian Gaza to Israel’s Right to Exercise Self-Defense as Interpreted by the International Court of Justice at The Hague*, 18 FLA. J. INT’L L. 679, 710 (2006); Mari, *supra* note 212, at 367–68.

214. John Dugard, *Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967*, ¶ 6, U.N. Doc. A/HRC/4/17 (Jan. 29, 2007).

215. Shany, *Faraway, So Close*, *supra* note 190, at 380.

presence in parts thereof.”<sup>216</sup> According to the Oslo Accords “[t]he two sides view the West Bank and the Gaza Strip as a single territorial unit, whose integrity will be preserved during the interim period.”<sup>217</sup> One may thereby contend that Israel has only withdrawn its troops from part of the territory.<sup>218</sup> Partial withdrawal of forces does not end occupation. This view appears to be the official stance of neighboring Egypt.<sup>219</sup> However, the Strip constitutes a separate geographical district “effectively cut off” from the West Bank. In fact, since the Hamas takeover of the Strip in 2007, it also constitutes a separate political entity.<sup>220</sup> At the very least, one may aver that the disengagement plan involved complete withdrawal of Israeli forces from the territory relevant to the matter before the ICC, namely the Gaza Strip.<sup>221</sup>

Third, under the Oslo Accords and subsequent agreements, “neither side could initiate or take any step changing the status of the West Bank or the Gaza Strip [pending the outcome of the permanent status negotiations].”<sup>222</sup> As explained above, the Strip was occupied before the disengagement. Arguably, it must still be deemed occupied or else “Israel will have [affected] the unilateral change in status prohibited by the Israel-PA interim agreements.”<sup>223</sup> The Palestinians “have not consented to any alteration of Gaza’s legal status.”<sup>224</sup> A possible reply is that the validity of the Oslo Accords is in doubt given the multiple violations of central provisions by both parties and the expiration of the time allocated for the conclusion of a permanent status agreement.<sup>225</sup> An alternative

216. Yuval Shany, *The Law Applicable to Non-Occupied Gaza: A Comment on Bassiouni v. Prime Minister of Israel* 42 ISR. L. REV. 101, 101 (2009) [hereinafter Shany, *The Law Applicable*].

217. Oslo I, *supra* note 53, 32 I.L.M. at 1528.

218. Ardi Imseis, *Critical Reflections on the International Humanitarian Law Aspects of the ICJ Wall Advisory Opinion*, 99 AM. J. INT’L L. 102, 107 n.21 (2005).

219. *Egypt’s Perspective on the Legal Status of Gaza*, EGYPT STATE INFO. SERV., <http://www.sis.gov.eg/en/Story.aspx?sid=3072> (last visited Oct. 18, 2010).

220. See, e.g., Nidal al-Mughrabi, *Hundreds Flee Hamas-Run Gaza amid Spillover Fears*, REUTERS (June 16, 2007), available at <http://www.reuters.com/article/newsOne/idUSFLE45503220070616> (“Gaza and the . . . West Bank . . . now appear poised to function as two separate territories.”).

221. Shany, *Faraway, So Close*, *supra* note 190, at 372.

222. Oslo I, *supra* note 53, 32 I.L.M. at 1537; Oslo II, *supra* note 53, 36 I.L.M. at 568; Wye River Memorandum, *supra* note 53, 37 I.L.M. at 1255 (“[N]either side shall initiate or take any step that will change the status of the West Bank and the Gaza Strip in accordance with the Interim Agreement.”); Sharm El-Sheikh Memorandum, *supra* note 53, 38 I.L.M. at 1468 (using identical language as in the Wye River Memorandum, quoted above).

223. Stephanopoulos, *supra* note 185, at 526; Justus R. Weiner, *Hard Facts Meet Soft Law—The Israel-PLO Declaration of Principles and the Prospects for Peace: A Response to Katherine W. Meighan*, 35 VA. J. INT’L L. 931, 941 (1995).

224. Stephanopoulos, *supra* note 185, at 526.

225. Shany, *Faraway, So Close*, *supra* note 190, at 381; Shany, *Binary Law*, *supra* note 178, at 79.

reply is that while the Oslo Accords are still in force,<sup>226</sup> termination of occupation—as opposed to annexation by Israel or a Palestinian declaration of independence—is not prohibited. Former legal adviser to the Israeli Foreign Ministry, Alan Baker, opined that the disengagement plan complied with the Oslo Accords, holding that the agreements included Israeli obligations to redeploy that did not depend on Palestinian agreement. Baker concluded: “I see this as a kind of redeployment, as far as it can be implemented.”<sup>227</sup>

Moreover, Israel has only limited potential to exercise effective control over the Gaza Strip. Arguably, retaking actual control over the Strip would require a lengthy and costly military operation due to the expected resistance by local organized forces.<sup>228</sup> This level of potential control is presumably insufficient to establish occupation under the classic paradigm. It appears to “fall short of the test for potential control laid down by the U.S. Field Manual and the *List* and *Naletilić* cases, which requires the occupier to have the capacity for exercising its authority over the territory in question within a reasonable time.”<sup>229</sup>

Finally, the existence of an organized Palestinian government that exercises effective governmental powers in the Strip without significant external intervention implies that the third condition for occupation is also absent.<sup>230</sup> In addition to governmental bodies, Hamas boasts tens of thousands of security personnel in the Strip. Still, this level of control is insufficient to establish independent statehood over the Gaza Strip.

### C. Israeli (non-)Membership

Under the *pacta tertiis nec nocent nec prosunt* rule of customary international law, also enshrined in the Vienna Convention on the Law of Treaties, treaties such as the Rome Statute generally do not bind or give legal rights to non-parties.<sup>231</sup> This is the case except as explicitly altered

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226. See, e.g., Ruth Lapidoth, *With the Israelis Gone, What is Gaza's New Legal Status?*, DAILY STAR, Aug. 24, 2005, available at [http://www.dailystar.com.lb/article.asp?edition\\_id=10&categ\\_id=5&article\\_id=17896](http://www.dailystar.com.lb/article.asp?edition_id=10&categ_id=5&article_id=17896).

227. Aluf Benn, *Oslo Lives*, HAARETZ, June 26 2005, available at <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=472471> (last visited Oct. 18, 2010).

228. Shany, *Faraway, So Close*, *supra* note 190, at 382; Shany, *Binary Law*, *supra* note 178, at 77.

229. Shany, *The Law Applicable*, *supra* note 216, at 5. See also Shany, *Binary Law*, *supra* note 178, at 77.

230. This condition is the legitimate government's inability to exercise effective governmental powers. Shany, *The Law Applicable*, *supra* note 216, at 5; Shany, *Binary Law*, *supra* note 178, at 77.

231. Vienna Convention on the Law of Treaties, *supra* note 126, 1155 U.N.T.S. at 341 (concerning third parties of a treaty). For further discussion see CHRISTINE CHINKIN, *THIRD PARTIES IN INTERNATIONAL LAW* (1993) [hereinafter CHINKIN, *THIRD PARTIES*]; C.M. Chin-

by the parties with the consent of non-parties.<sup>232</sup> Moreover, the Rome Statute was amended to curtail its originally considered Universal Jurisdiction over non-party states.<sup>233</sup> Instead, the statute “leaves out the express language of ‘universal’ or ‘inherent’ jurisdiction, but ‘preserves some of the essence of universal jurisdiction,’ namely that the ICC could bind non-party states if ‘one or more of’ the states affected by the conduct in question was a party” within the state-based jurisdictional scope of Article 12.<sup>234</sup>

Even prior to the adoption of the Vienna Convention, a judiciary principle, known as the Monetary Gold doctrine had evolved in the ICJ.<sup>235</sup> The *Monetary Gold* case was part of a post World War II dispute over 2,338 kilograms of gold seized by the Nazis from Rome in 1943. After the war, in 1950, both Italy and Albania claimed ownership of the gold before the joint French-UK-US Commission for the Restitution of Monetary Gold. The failure of the Commission to resolve the matter was then followed by an ICJ decision. The first issue to be addressed was the legal dispute between Italy and Albania over the nationalization of the National Bank of Albania. Consequently, as Albania had not deferred to the ICJ in this case, the ICJ had no jurisdiction over the said matter.<sup>236</sup>

The Monetary Gold doctrine suggests that a court should not decide a case if doing so would involve adjudication of the rights and responsibilities of a third party not before the court, and which had not given its consent to the proceedings.<sup>237</sup> The Monetary Gold doctrine

kin, *Third-Party Intervention Before the International Court of Justice*, 80 AM. J. INT’L L. 495 (1986) [hereinafter Chinkin, *Intervention*].

232. CHINKIN, THIRD PARTIES, *supra* note 231; Chinkin, *Intervention*, *supra* note 231.

233. See U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an Int’l Criminal Court, *Proposal Submitted by the United States of America*, U.N. Doc. A/CONF.183/C.1/L.70 (July 14, 1998) (limiting the jurisdiction of the court to those situations in which both the state in which the act or omission occurred and the accused state have accepted the court’s jurisdiction); U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an Int’l Criminal Court, *Proposal Submitted by the United States of America*, U.N. Doc. A/CONF.183/C.1/L.90 (July 16, 1998) (limiting a court’s jurisdiction to situations in which the states in question have accepted jurisdiction, as well as any state whose acceptance is required under Article 7).

234. See Marcus R. Mumford, *Building Upon a Foundation of Sand: A Commentary on the International Criminal Court Treaty Conference*, 8 J. INT’L L. & PRAC. 151, 185 (1999) (quoting the U.S. Delegation’s Final Intervention at the International Criminal Court Conference, July 17, 1998). To be sure, this noticeably has been the American delegation’s view.

235. *Monetary Gold Removed from Rome in 1943 (Italy v. Fr.)*, 1954 I.C.J. 19 (June 15). *But see* SHABTAI ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT* 431 (2d ed., Martinus Nijhoff Publishers 1985) (offering of a narrow application of the doctrine to where a third party’s rights form the very subject matter of the dispute).

236. *Monetary Gold*, 1954 I.C.J. at 33, 41.

237. *Id.* at 33. The doctrine in fact is rooted in the Permanent Court of International Justice (PCIJ). In the *Eastern Carelia* case the PCIJ declined to issue an advisory opinion on the interpretation of a bilateral treaty in dispute between Finland and Russia over the status of

presently applies to all international law tribunals.<sup>238</sup> Likewise, in 2001, based on its analysis of the line of Monetary Gold cases, the Permanent Court of Arbitration (PCA) at The Hague in the *Larsen* case interpreted those cases as setting forth a general international principle that “an international tribunal cannot decide a dispute between the parties before it if the very subject matter of the decision would be the rights or obligations of a State which is not a party to the proceedings.”<sup>239</sup>

In the *Monetary Gold* case the ICJ concluded that it could not adjudicate the merits because the legal interests of Albania, the absent party, “would form the very subject-matter of the decision.”<sup>240</sup> The Court assumed that Albania had title to an adjudicated ownership of gold.<sup>241</sup> A similar assumption may be derived from the current context, namely that the absent Israel may have legitimate claims about Palestinian violations of the Oslo Accords, conflicting sovereignty over Palestinian territories, and proportional use of the right to self-defense during the Israeli-Gaza conflict, in light of the definition of segments of the Palestinian fighting force as non-combatants.

In the *Monetary Gold* case, it did not seem pertinent to the Court that it could have avoided prejudicing Albania’s interests by simply limiting itself to determining which of the two parties to the dispute before the Court retained the superior claim. The ICJ rejected the United Kingdom’s argument that Albania’s absence should not be a barrier to adjudication. It stated that Albania was free to request intervention, but that if Albania refrained from joining the process, it would make the ICJ’s determination of its own jurisdiction dependent upon uncertain

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East Karelia. The PCIJ ruled according to the doctrine, as Russia had refused to participate in the proceedings and did not recognize the jurisdiction of the League or the Court. See Status of Eastern Carelia, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 5 at 6 (July 23). The contemporary spelling of the name of the territory is Karelia.

238. The Kingdom of Hawaii recently appeared as a party at a proceeding before the Permanent Court of Arbitration at The Hague. *Larsen v. Kingdom of Hawaii*, 119 I.L.R. 566, 590–91 (Perm. Ct. Arb. 2001). The Monetary Gold doctrine also was recently upheld in the East Timor Case. See Case Concerning East Timor (Port. v. Austl.), 1995 I.C.J. 90, 102–05 (June 30). The applicability of the other tribunals to the Rome Statute derives, *mutatis mutandis*, from the Vienna Convention on the Law of Treaties, which stipulates “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.” Vienna Convention on the Law of Treaties, *supra* note 126, 1155 U.N.T.S. at 340.

239. *Larsen*, 119 I.L.R. at 588. See also, David J. Bederman, *International Decision: Lance Paul Larsen v. The Hawaiian Kingdom*, 95 AM. J. INT’L L. 927, 930–32 (2001).

240. Monetary Gold Removed from Rome in 1943 (Italy v. Fr.), 1954 I.C.J. 19 (June 15). See also SHABTAI ROSENNE, INTERVENTION IN THE INTERNATIONAL COURT OF JUSTICE 171–74, 190 (1993).

241. See *Monetary Gold*, 1954 I.C.J. 19. But see CHINKIN, THIRD PARTIES, *supra* note 231, at 200 n.57 (questioning whether Italy may have had independent rights to the gold, notwithstanding an arbitrator’s prior finding in favor of the Albanian claim).

events.<sup>242</sup> In sum, the doctrine is applicable in cases where pronouncement by the courts on the rights and responsibilities of a third state is a necessary prerequisite for the determination of the case before the court on either substantive or procedural law.

The nondiscretionary character of the Monetary Gold doctrine became noticeably manifest in the *Case Concerning East Timor*.<sup>243</sup> In that case, for the first time since *Monetary Gold*, the ICJ declined to exercise jurisdiction in the absence of a third party state because the absent state had an interest in the determination of East Timor's statehood.<sup>244</sup> The ICJ refused to rule on the validity of the Timor Gap Treaty between Australia and Indonesia due to Indonesia's position as a third party that had not consented to the jurisdiction of the Court.<sup>245</sup> The Court held that it could not exercise jurisdiction because in ruling on Portugal's claims, it would have had to rule on the lawfulness of Indonesia's conduct in Indonesia's absence. In fact, the Court paid no attention to concerns over the legal nature of Indonesia's competing self-governing claim, based on theories of occupation, annexation, or other means of competing self-governance. The Court reached its decision despite the fact that Portugal maintained that the right that Australia had breached, the right of self-determination, was a right *erga omnes*.

The case of *East Timor* is of particular relevance to Israel's status within the Palestinian statehood inquiry, in light of the principle of non-intervention, embodied in Article 2(7) of United Nations Charter, and the principle of self-determination. If East Timor is an Indonesian province, as claimed by Indonesia, then the situation there is arguably not a matter of international legal controversy and largely remains outside of United Nations jurisdiction, given the non-intervention principle of Article 2(7) of the U.N. Charter.<sup>246</sup> On the other hand, if the people of East Timor have exercised their right to self-determination, then the principle of non-intervention is inapplicable to the consideration of United Nations action therein. If Indonesia's annexation of East Timor was illegal, as was claimed by Portugal, then the territory remains a non-self-governing territory of proper international concern under Chapter XI of the U.N. Charter. Be that as it may, East Timor's status under international law was ambiguous at the time of the relevant matter before the ICJ. Although the Court had the opportunity to answer the question in East

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242. See *Monetary Gold*, 1954 I.C.J. at 31–32.

243. See *Case Concerning East Timor* (Port. v. Austl.), 1995 I.C.J. 90 (June 30).

244. *Id.* at 100–05.

245. *Id.*

246. See Gerry J. Simpson, *Judging the East Timor Dispute: Self-Determination at the International Court of Justice*, 17 HASTINGS INT'L & COMP. L. REV. 323, 337–38 (1994) (referring to the intricacies and possibilities facing East Timor).



Timor, it justifiably refused to do so without Indonesia's joinder.<sup>247</sup> In this sense, the *East Timor* judgment, as it adheres to the Monetary Gold doctrine, may challenge the OTP's position in assessing jurisdiction over the Israel-Gaza war crime allegations, amidst a particularly complex Palestinian statehood controversy.<sup>248</sup> The Palestinian matter remains at least as controversial as the East Timor statehood consideration before the ICJ.

Moreover, in a separate opinion in the *East Timor* case, Judge Shahabuddeen added that based on the implications of binding a non-party to a controversial and complex case, Article 59 of the ICJ statute's plain text should be read to stipulate that a non-party could never in subsequent litigation before the Court be bound by the results of a former adjudication to which it was not a party.<sup>249</sup> Israel, in that sense, in its continued capacity as a non-party to the Statute of Rome, might make a similar analogy to former adjudication at the ICC over the Palestinian status.

The Monetary Gold doctrine is not binary, but one of degree;<sup>250</sup> however its degree seems to be subject to two competing interpretative approaches. On the one hand, the narrow approach, analogous to that of the preparatory work of the Statute of the Permanent Court of International Justice, rejects the view that intervention should be allowed as a general right, not only in disputes concerning the interpretation of a multilateral treaty to which the intervening state is a party.<sup>251</sup> On the other hand, a broader approach upheld by Judge Shahabuddeen in *East Timor*, suggests that the concern underlying the Monetary Gold rule should not and need not serve as a formal getaway that overly limits the Revised

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247. *Id.*

248. See Dapo Akande, *The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits*, 1 J. INT'L CRIM. JUST. 618, 635-36 (2003) (discussing ICC jurisdiction over non-parties); James A.R. Nafziger, *Thomas J. Bodie's Politics and the Emergence of an Activist International Court of Justice*, 20 LEGAL STUD. F. 129, 131 (1997) (book review) (discussing ICJ jurisdiction over non-parties).

249. See Case Concerning East Timor (Port. v. Austl.), 1995 I.C.J. 90, 119 (June 30) (separate opinion of Judge Shahabuddeen) ("When [a] judgment would, in fact, even though not in law, amount to a determination of the rights and obligations of a non-party, the Court is being asked to exercise jurisdiction over a State without its consent. *Monetary Gold Removed from Rome in 1943* says it cannot do that.").

250. See Antonio F. Perez, *The Passive Virtues and the World Court: Pro-Dialogic Abstinence by the International Court of Justice*, 18 MICH. J. INT'L L. 399, 419 (1997).

251. See generally *East Timor*, 1995 I.C.J. at 119-228 (separate opinion of Judge Shahabuddeen); cf. Statute of the International Court of Justice (annexed to the Charter of the United Nations, June 26, 1945) arts. 62, 63, 59 Stat. 1055, reprinted in CHARTER OF THE UNITED NATIONS, STATUTES AND RULES OF COURT AND OTHER CONSTITUTIONAL DOCUMENTS (Series D, Acts and documents concerning the organization of the court, no. 1, 2d ed. 1947).

Rules of the Court, 1977, with regard to procedure and standing.<sup>252</sup> Accordingly, every state has, to some extent, “an interest in the development of international law by the Court, since the law the Court develops may well affect particular legal interests of States in present or future disputes.”<sup>253</sup>

Where the ICC exercises jurisdiction over individuals acting pursuant to the official policy of states, a prerequisite ruling must be made on these states’ contractual obligations, and their compliance with International Humanitarian law, whenever fundamental legal concerns are at issue. For instance, the ICC would need to address the fundamental concern of whether the Gaza Strip is still under Israeli military occupation given Israel’s unilateral disengagement from the Strip in relation to the Palestinian statehood inquiry. In the wake of the recent Gaza conflict, Israel’s state responsibility might not necessarily flow from a tentative accusation of crimes committed by its representatives, and thus a determination will have to be made regarding Israel’s legal responsibility as a prerequisite. As was decided in the *Larsen/Hawaiian* case, the findings here will not merely be findings of fact. They may necessitate a legal assessment of Israel’s conduct or legal position.<sup>254</sup>

Lastly, in the future, “[d]epending on the definition of the crime of aggression that is ultimately adopted,<sup>255</sup> the ICC may, when it begins to exercise jurisdiction over that crime, be required to find that a state has committed aggression as a prerequisite to convicting an individual [representative thereof] for [the same] crime.”<sup>256</sup> Indeed, Article 16 of the International Law Commission’s 1996 Draft Code of Crimes against Peace and Security of Mankind defines “crime of aggression” thus: “An individual who, as leader or organizer, actively participates in or orders the planning, preparation, initiation or waging of aggression committed by a State shall be responsible for a crime of aggression.”<sup>257</sup> Put differently, a violation by a state is a precondition for attributing the crime to an individual. If the ICC makes the decision about state aggression,

252. See *East Timor*, 1995 I.C.J. at 119–22. See also Revised Rules of the Court, 1977 I.C.J. Acts & Docs. art. 69 (“[I]f a public international organization sees fit to furnish, on its own initiative, information relevant to a case before the Court, [it may do so.]”).

253. Perez, *supra* note 250, at 419.

254. See *Larsen v. Kingdom of Hawaii*, 119 I.L.R. 566, 592 (Perm. Ct. Arb. 2001).

255. Akande, *supra* note 248, at 637 (citing Rome Statute, *supra* note 1, art. 5(2)) (“[T]he ICC will only be able to exercise jurisdiction with respect to aggression when a review conference has defined the crime and adopts considerations relating to prosecution for that crime.”).

256. *Id.*

257. Rep. of the Int’l Law Comm’n, 48th sess, May 6–July 26, 1996, U.N. Doc. A/51/10; GAOR Supp. No. 10 (1996).

“such a finding would constitute a violation of the Monetary Gold doctrine, where the state concerned is a non-party to the Rome Statute.”<sup>258</sup>

In the eleventh-hour, there remains the hypothetical future joinder by Israel to the ICC within the time frame of the mentioned proceedings. Joinder of third parties to disputes has been practiced occasionally. The ICJ, for its part, has a record of maintaining a very cautious policy in defining the legal interest required for interventions by third parties to disputes before it.<sup>259</sup> While its establishing statute allows third-party states to intervene, the Court has allowed third-party intervention only twice. In the first case, the 1990 *Land, Island and Maritime Frontier Dispute*,<sup>260</sup> the Court granted Nicaragua the right to intervene in a decision on the legal regime for the waters of the Gulf of Fonseca. In the second case, the *Land and Maritime Boundary* case decided in 1999, the Court permitted Equatorial Guinea to intervene in a boundary dispute between Cameroon and Nigeria to protect its legal interest in the maritime boundary between the two.<sup>261</sup> Even when the Court accepted the joinder of parties, it applied a wide discretionary approach inquiring into the “legal matter” at stake.<sup>262</sup> In doing so, the Court quoted its opinion in the *Nicaragua Intervention* case, upholding that whenever a third-party state requests intervention “to inform the Court of the nature of the legal rights [of that state] which are in issue in the dispute,” it cannot be said that this object is not a proper one.<sup>263</sup> In such cases, ICJ experience indeed is “to accord with the function of intervention.”<sup>264</sup> However, even in the event that Israel will tentatively be allowed to join the proceedings of the ICC, it probably will not do so, primarily so that it may continue to insist on its present-day policy of not ratifying the

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258. Akande, *supra* note 248, at 637

259. For an analysis of third-state remedies, see Jonathan I. Charney, *Third State Remedies in International Law*, 10 MICH J. INT'L L. 57 (1989).

260. *Land, Island and Maritime Frontier Dispute* (El Sal. v. Hond.), 1990 I.C.J. 92, 121–22 (Sept. 13).

261. *Land and Maritime Boundary* (Cameroon v. Nig.), 1999 I.C.J. 1029 (Oct. 21).

262. See *Land and Maritime Boundary*, 1999 I.C.J. at 1034 (quoting *Land, Island and Maritime Frontier Dispute*, 1990 I.C.J. at 130). *But see*, *Sovereignty over Pulau Ligitan and Pulau Sipadan* (Indon. v. Malay.), 2001 I.C.J. 575 (Oct. 23) (rejecting joinder request where the Philippines claim of sovereignty over North Borneo conflicted with that of Malaysia and the Philippines attempted to intervene in order to preserve their sovereign rights to the extent that the question of sovereignty over Pulau Ligitan and Pulau Sipadan might affect them). North Borneo is the area formerly known as the British North Borneo Co., and is presently acknowledged as Sabah—an independent state of Malaysia. The Philippines uses the term North Borneo, instead of Sabah, as its claim of sovereignty conflicts with that of Malaysia.

263. *Land and Maritime Boundary*, 1999 I.C.J. at 1034 (quoting *Land, Island and Maritime Frontier Dispute*, 1990 I.C.J. at 130). For a general discussion about the intervention by Equatorial Guinea, see Malcolm D. Evans, *Decisions of International Tribunals: The International Court of Justice*, 49 INT'L & COMP. L.Q. 720, 720–23 (2000).

264. *Land and Maritime Boundary*, 1999 I.C.J. at 1034.

Statute of Rome, fearing the prospect of prosecution of Jewish settlers as alleged war criminals.<sup>265</sup>

A key determining factor for Israel's refusal to join is soundly based on the international law principle governing "consent," as applied in the *Monetary Gold* case. Under international law, an international tribunal may not exercise jurisdiction over a state unless that state has given its consent to the exercise of jurisdiction.<sup>266</sup> This principle also applies to cases before the ICC, according to Article 12.<sup>267</sup> Reinforcing this position was the Permanent Court of Arbitration's view that it operates within the "general confines of public international law"<sup>268</sup> and, therefore, within parameters similar to those of the ICJ. The latter also cannot exercise jurisdiction over a state "which is not a party to the proceedings."<sup>269</sup> In short, the tribunal unequivocally upheld that the principle of consent in international law would itself be violated if the tribunal were to determine the legality of the conduct of a non-party, in that case the United States.<sup>270</sup>

Similarly important, practice shows that even in the hypothetical case in which the Palestinian Authority would request a joinder of Israel, such joinder would possibly confront existing international law practice upheld in the *Anglo-Iranian Oil Company* case. There, the Court was asked by the United Kingdom to adjudicate a dispute with Iran. The Iranians had seized the assets of a British oil company as they nationalized the oil industry.<sup>271</sup> The ICJ ruled again that it could not exercise jurisdiction without the consent of Iran.<sup>272</sup>

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265. See, e.g., Daniel A. Blumenthal, *The Politics of Justice: Why Israel Signed the International Criminal Court Statute and What the Signature Means*, 30 GA. J. INT'L & COMP. L. 593 (2002).

266. See *Monetary Gold Removed from Rome in 1943 (Italy v. Fr.)*, 1954 I.C.J. 19 (June 15). This doctrine is in keeping with international principles of comity and dispute settlement.

267. Rome Statute, *supra* note 1, art. 12.

268. *Larsen v. Kingdom of Hawaii*, 119 I.L.R. 566, 590 (Perm. Ct. Arb. 2001).

269. *Id.*

270. *Id.* at 591.

271. *Anglo-Iranian Oil Co. (U.K. v. Iran)*, 1952 I.C.J. 93, 102 (July 22).

272. *Id.* at 103.

### III. CIRCUMVENTING THE EX-ANTE STATEHOOD REQUIREMENT

#### A. The “*Proprio Motu*” Rule

##### 1. The Normative Framework

With state parties, the prosecutor bears the authority to initiate prosecutions *proprio motu*, without referral by a state party.<sup>273</sup> If the prosecutor argues that the Palestinian Authority, or even the Gaza Strip alone, may qualify as a state, the OTP may be faced with a novel situation. Article 15(4) sets a lenient standard of examination for the Pre-Trial Chamber, whereby the Chamber may permit the commencement of investigations “without prejudice to subsequent determinations by the Court with regard to . . . jurisdiction,” if “the case appears to fall within the jurisdiction of the Court.”<sup>274</sup>

The Prosecutor has said that in determining whether to exercise his *proprio motu* powers, he is required to consider three factors, all of them rooted in the ICC Statute. First, he must determine whether the available information provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed.<sup>275</sup> Second, he must assess whether the case would be admissible in terms of Article 17 of the ICC Statute.<sup>276</sup> This second factor involves examination of the familiar standard of whether the national courts are unwilling or genuinely unable to proceed; but it also involves an evaluation of the enigmatic notion of “gravity,” to be expanded upon below.<sup>277</sup> Third, if these conditions are met, the prosecutor must then give consideration to the “interests of justice.”<sup>278</sup> As recent ICC practice shows, these criteria, especially those of “gravity” and “interests of justice,” provide much room, albeit contentious, for discretionary determinations.<sup>279</sup>

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273. Rome Statute, *supra* note 1, arts. 13(c) & 15(3); Corrina Heyder, *The U.N. Security Council's Referral of the Crimes in Darfur to the International Criminal Court in Light of U.S. Opposition to the Court: Implications for the International Criminal Court's Functions and Status*, 24 BERKELEY J. INT'L L. 650, 667 (2006).

274. Cf. Carsten Stahn, Mohamed M. El Zeidy & Héctor Olásolo, *The International Criminal Court's Ad Hoc Jurisdiction Revisited*, 99 AM. J. INT'L L. 421, 425 (2005) (citing John T. Holmes, *Jurisdiction and Admissibility*, in *THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE* 325 (Roy S. Lee ed., 2001)).

275. Rome Statute, *supra* note 1, art. 53(1)(a).

276. Id. art. 53(1)(b).

277. See *infra* Part III.A.3.

278. Rome Statute, *supra* note 1, art. 53(1)(c).

279. But see Matthew R. Brubacher, *Prosecutorial Discretion Within the International Criminal Court*, 2 J. INT'L CRIM. JUST. 71, 71 (2004); Luc Côté, *International Justice: Tightening up the Rules of the Game*, 88 INT'L REV. RED CROSS 133 (2006).

## 2. The Reasonableness of Criminal Proceedings

Theoretically, the prosecutor may commence an investigation even before the putative Palestinian state lodges a declaration in accordance with Article 12(3).<sup>280</sup> In fact, the OTP may commence an investigation into the crimes related to a putative Palestinian state, even if the ICC might ultimately conclude that Palestine remains a non-state.<sup>281</sup>

The Prosecutor's findings, assuming that he considers the allegations merit continuing the process, might have far-reaching ramifications. Although Israel is not a state party to the ICC, the Prosecutor would have the power to demand that Israel try those responsible for any of the enumerated offenses. Additionally, if Israel were to ignore the OTP's request, or decline to follow it, the ICC, the Palestinian Authority, and numerous other states would have sufficient moral authority to propose that member-states of the ICC, such as the United Kingdom or Canada, arrest and charge Israeli "war criminals" under their domestic legislation if they step onto the soil of those countries.

The ICC Prosecutor must conclude that there is a reasonable basis to proceed with an investigation before submitting an investigation authorization request to the Pre-Trial Chamber.<sup>282</sup> However, the prosecutorial structure established by the Rome Statute raises serious concerns in this area. Under this particularly broad discretion, the prosecutor has the power to initiate an investigation and prosecution completely on his own authority and without oversight or control by any national or international power, with the exception of limited review by the Pre-Trial Chamber.<sup>283</sup> This exception was designed to prevent the prosecutor from being swayed by political concerns, but "experience in the United States suggests that there is more to fear from a politically unaccountable prosecutor than from a politically accountable one."<sup>284</sup>

## 3. The Dialectics of Gravity

The second criterion which the Prosecutor must assess under Article 17 of the Rome Statute involves the evaluation of the rather enigmatic notion of the "gravity" of the alleged crime. Article 5 of the Rome Statute discusses the ICC's subject-matter jurisdiction. It provides that "[t]he jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole."<sup>285</sup> Article 17(1)(d) of

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280. See Stahn et. al, *supra* note 274, at 425 n.33.

281. *Id.*

282. Rome Statute, *supra* note 1, arts. 15(3) & 53(1).

283. Rome Statute, *supra* note 1, art. 15.

284. Richard G. Wilkins, *Ramifications of the International Criminal Court for War, Peace, and Social Change*, CURRENT CONCERNS, no. 3, 2002 at 6.

285. Rome Statute, *supra* note 1, art. 5(1).

the Statute clarifies that the ICC shall rule a case inadmissible if it is not "of sufficient gravity to justify further action by the Court."<sup>286</sup>

Although formal OTP policy considers a relativistic approach, experience points to only partial consistency in scaling gravity of crimes thus far. The OTP "Prosecutorial Strategy," published in September 2006, provides that in selecting cases, "the Office adopted a policy of focusing . . . on the most serious crimes and on those who bear the greatest responsibility for these crimes."<sup>287</sup> According to Schabas, "[t]his is apparently combined with a so-called sequenced approach to selection, whereby 'cases inside the [specific] situation are selected in accordance with their gravity.'"<sup>288</sup> Any crime within ICC jurisdiction is serious, but the Statute requires an additional consideration of gravity: the OTP "must determine that a case is of sufficient gravity to justify further action by the Court."<sup>289</sup> According to the OTP, factors relevant in assessing gravity include, *inter alia*, the scale, the nature, the manner of commission, and the impact of the crimes.<sup>290</sup>

Comparing the case of the Israel-Gaza conflict of 2008 with the case of Iraq, it may appear that the Chief Prosecutor was overly careful in exercising his responsibilities to ensure that an investigation was warranted with regard to the latter. In his reply to over 240 communications regarding suspected war crimes in the Iraq war, Chief Prosecutor Moreno-Ocampo wrote a ten-page carefully considered letter explaining the limits of his and the ICC's mandate. He then concluded that "the available information did not provide a reasonable basis to believe that a crime within the jurisdiction of the Court had been committed" with regard to the targeting of civilians or clearly excessive attacks.<sup>291</sup> His analysis was based on the relative finding that the number of victims was of a much smaller magnitude than the three situations his office was investigating in the Darfur region of Sudan, Uganda, and the Democratic Republic of Congo. As a result, it "did not appear to meet the required threshold of the Statute."<sup>292</sup> A second relative finding was that alleged

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286. Rome Statute, *supra* note 1, art. 17(1)(d).

287. William A. Schabas, *Prosecutorial Discretion v. Judicial Activism at the International Criminal Court*, 6 J. INT'L CRIM. JUST. 731, 735 (2008) (quoting ICC, OTP, *Report of Prosecutorial Strategy* (Sept. 14, 2006)).

288. *Id.* at 735–36.

289. *Id.* at 736.

290. See ICC, OTP, REPORT ON PROSECUTORIAL STRATEGY 5–6 (Sept. 14, 2006).

291. Letter from Luis Moreno-Ocampo, Prosecutor, ICC, at 4–7 (Feb. 9, 2006), available at [http://www2.icc-cpi.int/NR/rdonlyres/F596D08D-D810-43A2-99BB-B899B9C5BCD2/277422/OTP\\_letter\\_to\\_senders\\_re\\_Iraq\\_9\\_February\\_2006.pdf](http://www2.icc-cpi.int/NR/rdonlyres/F596D08D-D810-43A2-99BB-B899B9C5BCD2/277422/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf).

292. *Id.* at 8–9. Compare Rome Statute, *supra* note 1, art. 9(3) ("The Elements of Crimes . . . shall be consistent with this Statute.") with arts. 7(1)(g) (providing a catchall for "any other form of sexual violence of comparable gravity") and 17(1)(d) (limiting the Court's jurisdiction

willful killing and inhuman treatment in Iraq were not “committed as part of a plan or policy or as part of a large-scale commission of such crimes” as required by Article 8(1) of the Rome Statute to meet the definition of war crimes.<sup>293</sup>

A second warning about the use of the gravity test concerns the cyclical nature of the Israel-Gaza exchange of violence and relates to the interests of peace and stability involved in ending cycles of violence.<sup>294</sup> Israel, as has been said, is not a state party to the Rome Statute establishing the ICC. It cannot refer a situation to the Court arising from events that occurred on its territory as part of the cycle of violence that revolved around the Israel-Gaza conflict.<sup>295</sup> That is the case even if such events may have explanatory power for Israel’s continuous claims of self-defense toward the Hamas organization in Gaza.

Within that rather limited geographical scope, were the Prosecutor to commence a preliminary examination, and if thereafter an investigation were to be initiated, he formally would not be obliged to look into any crimes committed by the Palestinian side from a legal viewpoint. Of little console within the perspective of Israeli public opinion is the fact that although there were 326 plights for investigation, most, if not all, came from the Palestinian side and carried a one-sided nature.<sup>296</sup> In arguing for a cyclical, or at least comparative, evaluation of the events, Professor Irwin Cotler—a former Canadian Minister of Justice, along with the Human Rights Watch,<sup>297</sup> and Amnesty International<sup>298</sup>—practically remained a cry in the wilderness. Despite modest media coverage of that account and noticeably few public supporters of Israel during the mentioned Operation, Professor Irwin Cotler concluded that there was “almost no comparable example” anywhere in today’s world of a group such as Hamas that so systematically violates international law related to

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to cases of sufficient gravity). Such a determination is within the jurisdictional discretion of the Prosecutor. *Id.* art. 53(1)(c).

293. Letter from Luis Moreno-Ocampo, *supra* note 291, at 8 (citing the Rome Statute for the International Criminal Court, *supra* note 1, art. 8).

294. Cf. Alexander K.A. Greenawalt, *Justice Without Politics? Prosecutorial Discretion and the International Criminal Court*, 39 N.Y.U. J. INT’L L. & POL. 583, 601–02 (2007) (explaining that international criminal tribunals increase the likelihood of punishment of political actors, thereby deterring them from committing criminal acts).

295. See Rome Statute, *supra* note 1, art. 13. Israel could hypothetically accept jurisdiction over a specific alleged crime by lodging a declaration, *id.* art. 12(3), or by seeking referral from the Security Council, *id.* art. 13(b).

296. See *supra* note 11.

297. Letter from Sarah Leah Whitson, Executive Dir., Middle E. and N. Afr. Div., Human Rights Watch, to Leaders of Islamic Resistance Movement (Jan. 28, 2006), available at <http://www.hrw.org/en/news/2006/01/28/letter-leaders-hamas>.

298. AMNESTY INT’L, OCCUPIED PALESTINIAN TERRITORIES: TORN APART BY FACTIONAL STRIFE (2008), available at <http://www.amnesty.org/en/library/asset/MDE21/020/2007/en/6609e419-d363-11dd-a329-2f46302a8cc6/mde210202007en.html> (last visited Oct. 18, 2010).



armed conflict.<sup>299</sup> In his view, there were at least six violations of international law, namely the deliberate targeting of civilians by launching rockets at towns in southern Israel for eight years; Hamas attacks from within civilian areas and civilian structures; “the misuse and abuse of humanitarian symbols for purposes of launching attacks,” such as using ambulances to transport fighters or weapons; direct and public incitement to commit genocide within the Hamas covenant; the “crime against humanity” manifested in the widespread and systematic attack against civilian population; and the recruitment of children into armed conflict.<sup>300</sup>

Gravity assessment, as it seems, begs a proper comparative assessment of events during any conflict, and the Israel-Gaza conflict in particular, both internationally and among the parties involved in the particular cycle of violence.

#### 4. Interests of Justice and Peace

A third criterion for the Prosecutor lies within the “interests of justice” in the case. Article 53 of the ICC Statute authorizes the Prosecutor to decline to proceed with an investigation or a prosecution when it would not be in “the interests of justice.”<sup>301</sup> The expression was not invented by the drafters of the ICC Statute; many legal systems use the term or a similar formulation thereof. For instance, Article 14 of the International Covenant on Civil and Political Rights, and Article 6 of the European Convention on Human Rights, use that exact term in assessing whether to allow exceptions to the principle of a public trial, and when to require funded counsel for a criminal defendant.<sup>302</sup> Experience in the ICC again shows wide discretionary usage of the term, specifically vis-à-vis the United Nations’ role and interest in peace and security, and peace negotiations in particular.

The ICC drafters’ contemplation of the peace-justice tension refers to a “delicate balance between the search for international justice . . . and the need for the maintenance of international peace and security,” within the United Nations Charter context.<sup>303</sup> In response to the latter concern,

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299. Haviv Rettig Gur, *Law professor: Hamas is a War Crimes ‘Case Study’*, JERUSALEM POST, Jan. 13, 2009, <http://fr.jpost.com/servlet/Satellite?cid=1231866576202&pagename=JPArticle/ShowFull>.

300. *Id.*

301. Rome Statute, *supra* note 1, art. 53.

302. International Covenant on Civil and Political Rights art. 14, *adopted* Dec. 19, 1966, 999 U.N.T.S. 171; Convention for the Protection of Human Rights and Fundamental Freedoms art. 6, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter *European Convention on Human Rights*].

303. Roy S. Lee, *The Rome Conference and Its Contributions to International Law*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE* 1, 35 (Roy S. Lee ed., 1999).

ICC drafters balanced the discretionary power of the OTP by including a provision allowing the Security Council to refer situations to the Court and allowing the Security Council to defer an ICC investigation or prosecution for a renewable 12-month period.<sup>304</sup> But when it comes to peace and security concerns not taken up by the Security Council, the ICC Statute says very little. Michael Scharf, who discussed the matter with Philippe Kirsch, the Chairman of the Rome Diplomatic Conference, reported that according to Kirsch “the issue was not definitively resolved during the Diplomatic Conference. Rather, the provisions that were adopted reflect ‘creative ambiguity’ which could potentially allow the prosecutor and the judges of the [ICC] to interpret the Rome Statute as permitting recognition of an amnesty exception to the jurisdiction of the court.”<sup>305</sup>

Perhaps taking on a more literal approach, Chief Prosecutor Moreno-Ocampo is said to argue that the OTP’s role is not to functionalize peace *per se*. As he has stated, “there is a difference between the concepts of the interests of justice and the interests of peace and . . . the latter falls within the mandate of institutions other than the Office of the Prosecutor.”<sup>306</sup> In other words, he is said to take on the view that peace in fact requires ICC adherence to the rule of law and justice, and also that this was precisely the consensus of the Rome Conference when the international community established the ICC.<sup>307</sup> In tandem, Human Rights Watch and Amnesty International have in general held that the ICC must push forward on the path to formal prosecution in the absence of adequate national trials.<sup>308</sup>

The United Nations seems to have thus far taken a more dichotomous approach to peace-justice interests. First, the then-United Nations Secretary-General Kofi Annan, in his opening remarks to the Rome Conference, referred to the apprehension on the part of some “that the pursuit of justice may sometimes interfere with the vital work of making

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304. *Id.* at 35–36 (citing Rome Statute, *supra* note 1, arts. 13, 16).

305. Michael P. Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 CORNELL INT’L L.J. 507, 521–22 (1999) (citations omitted).

306. ICC, OTP, THE INTERESTS OF JUSTICE I (Sept. 2007), available at <http://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPInterestsOfJustice.pdf>.

307. For Moreno-Ocampo’s position, see Luis Moreno-Ocampo, Prosecutor, ICC, Building a Future on Peace and Justice, Address in Nuremberg (June 24–25, 2007).

308. *Uganda: No Amnesty for Atrocities*, HUMAN RIGHTS WATCH (July 27, 2006), <http://www.hrw.org/ja/news/2006/07/28/uganda-no-amnesty-atrocities>; *Uganda Strikes Deal with LRA on Trials*, AMNESTY INT’L (Feb. 20, 2008), <http://www.amnesty.org/en/news-and-updates/news/uganda-strikes-deal-lra-trials-20080220>.

peace.”<sup>309</sup> Notwithstanding, the ICC Policy Paper on the Interests of Justice of 2007 further makes room for the view that the OTP must “respect the mandates of those engaged in other areas.”<sup>310</sup> In distinguishing the “interests of peace” from the “interests of justice,” vis-à-vis the mandate of the OTP, the Prosecutor already has been criticized for reading much into the latter term.<sup>311</sup> In the event that the Oslo peace process is hampered due to single-sidedness vis-à-vis Israel, and there is not an ICC member capable of suing Palestinian leaders at the ICC, one could argue that this is not only contrary to peace but also contrary to justice.

Secondly, the dichotomous institutional approach was backed by the United Nations, as well as Israel’s peace promoting policies during the ongoing Oslo peace process. The U.N. advanced or endorsed the granting of amnesty “as a means of restoring peace and democratic government” with respect to four countries—Cambodia, El Salvador, Haiti, and South Africa.<sup>312</sup> Similarly, Israel on its end also has often provided amnesty during the Oslo peace process to hundreds of convicted terrorists and criminal Palestinian prisoners, including life-sentenced inmates said to have “blood on their hands.”<sup>313</sup>

Moreover, as Michael Scharf observed in his article on the paradox of the ICC in balancing peace and justice, the U.S. delegation put forth a suggestion at the 1997 preparatory conference for the establishment of a permanent International Criminal Court that, “the proposed permanent court should take into account such amnesties in the interest of international peace and national reconciliation when deciding whether to exercise jurisdiction over a situation or to prosecute a particular offender.”<sup>314</sup> In advancing this proposal, the U.S. argued that “the policies favoring prosecution of international offenders must be balanced against the need to close ‘a door on the conflict of a past era’ and ‘to encourage the surrender or reincorporation of armed dissident groups,’ and thereby facilitate the transition to democracy.”<sup>315</sup> Concretely, during the Rome

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309. Press Release, U.N., UN Secretary-General Declares Overriding Interest of International Criminal Court Conference Must Be That of Victims and World Community as a Whole, U.N. Doc. SG/SM/6597, L/2871 (June 15, 1998).

310. ICC, OTP, THE INTERESTS OF JUSTICE, *supra* note 306, at 8.

311. Schabas, *supra* note 287, at 749.

312. See Michael P. Scharf, *The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes*, 59 L. & CONTEMP. PROBS. 41, 41 (1996).

313. Nadav Shragai, *Releasing Terrorists: New Victims Pay the Price*, 8 JERUSALEM ISSUE BRIEFS, no. 8, 2008, available at <http://www.jcpa.org/JCPA/Templates/ShowPage.asp?DBID=1&LNGID=1&TMID=111&FID=442&PID=0&IID=2498> (discussing Israeli Cabinet approval on August 17, 2008 of the release of almost 200 Palestinian security prisoners as a “goodwill gesture” to Palestinian Authority leader Mahmoud Abbas).

314. Michael P. Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 CORNELL INT’L L.J. 507, 508 (1999).

315. *Id.*

Statute negotiations, the United States and others “expressed concern that the ICC could hamper efforts to halt human rights violations and to restore peace and democracy in places like Haiti and South Africa.”<sup>316</sup>

### B. Security Council Referral

The United Nations Security Council, acting under Chapter VII of the United Nations Charter, may refer matters to the ICC, whether or not the state involved is a party to the treaty ex-ante, or at all.<sup>317</sup> This was done, for example, in the case of Darfur. Sudan is not a signatory state to the ICC Charter and therefore the country would not normally be subject to its jurisdiction. However, the situation in Darfur was referred to the ICC Prosecutor by the United Nations Security Council in 2005. The United States agreed that genocide was being committed in Darfur, and like three other non-parties to the Rome Statute, abstained from voting on the matter in the U.N. Security Council.<sup>318</sup> Arguably, a Security Council referral does not constitute violation of the Monetary Gold doctrine, because the doctrine does not apply “if the legal finding against an absent third party could be taken as given (for example, by reason of an authoritative decision of the Security Council on the point).”<sup>319</sup> Put differently, in the case of referral, the ICC will take the non-member state’s responsibility as given, without having to discuss it. Still, a Security Council referral with respect to the Israeli-Palestinian conflict seems unlikely, as any such resolution would almost certainly be vetoed by the United States.

## IV. BLOCKING PROSECUTION

### A. The Complementarity Principle

The Preamble to the Rome Statute explicitly provides that the ICC is “complementary to national criminal jurisdictions,” and “is not intended to supersede their jurisdiction.”<sup>320</sup> “As such, the Court’s jurisdiction will

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316. See Michael Scharf, *Justice Versus Peace*, reprinted in *THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT: NATIONAL SECURITY* 179 (Sarah B. Sewall & Carl Kaysen eds., 2000).

317. Rome Statute, *supra* note 1, art. 13(b).

318. See, e.g., Stephanie Hanson, *Africa and the International Criminal Court*, July 24, 2008, [http://www.cfr.org/publication/12048/africa\\_and\\_the\\_international\\_criminal\\_court.html](http://www.cfr.org/publication/12048/africa_and_the_international_criminal_court.html).

319. *Larsen v. Kingdom of Hawaii*, 119 I.L.R. 566, 592 (Perm. Ct. Arb. 2001).

320. See ROD RASTAN, *THE POWER OF THE PROSECUTOR IN INITIATING INVESTIGATIONS* (2007), available at <http://www.icclr.law.ubc.ca/Site Map/ICC/PoweroftheProsecutor.pdf>.

only be called into effect exceptionally, where national authorities are unwilling or unable to hold genuine proceedings.<sup>321</sup>

Under Article 15(4), a majority of a panel of the Pre-Trial Chamber must determine whether there is a reasonable basis to proceed with an investigation, and whether the case appears to fall within the jurisdiction of the Court before authorizing the ICC Prosecutor to commence the investigation.<sup>322</sup> The ICC Prosecutor must then “notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned.”<sup>323</sup> A state has one month to inform the ICC “that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes [within the ICC’s jurisdiction] and which relate to the information provided in the notification to States,” and to request that the ICC Prosecutor defer his investigation.<sup>324</sup> “[T]he Prosecutor shall defer to the State’s investigation of those persons unless a majority of the seven judges on the Pre-Trial Chamber, on the application of the Prosecutor, [nevertheless] decides to authorize the investigation,” in which case the state concerned may appeal to the Appeals Chamber on an expedited basis.<sup>325</sup> The state concerned may again subsequently challenge the admissibility of the case before the ICC will hear it.<sup>326</sup> Finally, the U.N. Security Council, acting under Chapter VII of the U.N. Charter, may defer the investigation or prosecution of any case for renewable twelve-month periods.<sup>327</sup> Unlike the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, which have primacy over domestic courts, the ICC turns primacy on its head by giving precedence to domestic courts operating in good faith and genuine effort.<sup>328</sup>

Interestingly, in the aftermath of the Cast Lead Operation, the Israeli military has ordered five cumulative inquiries into allegations concerning Israeli warfare in Gaza during Operation Cast Lead.<sup>329</sup> It remains to be

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321. *Id.*

322. Rome Statute, *supra* note 1, art. 15(4).

323. *Id.* art. 18(1).

324. *Id.* art. 18(2).

325. *Id.* arts. 18(2), 18(4), 82.

326. *Id.* arts. 19(2)(b) & 19(4). “The challenge shall take place prior to or at the commencement of the trial. In exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial.” *Id.* art. 19(4).

327. *Id.* art. 16.

328. *Id.* art. 17

329. Philip Williams, *Israeli Military Orders Inquiry Into the Recent Gaza Conflict*, *The World Today*, AUSTL. BROAD. CORP. (Mar. 12, 2009), <http://www.abc.net.au/worldtoday/content/2008/s2521408.htm>; Shimon Cohen, *Shai: Five ongoing Investigations are Conducted Following “Operation Cast Lead”*, ARUTZ SHEVA (Apr. 1, 2009), <http://>

seen how the OTP will deal with pro-Palestinian sentiment given possible Israeli legal findings of rather modest gravity, if at all.

### B. Security Council Request for Deferral

Under Article 16 of the Rome Statute, the ICC Prosecutor may not commence or proceed with an investigation or prosecution, if the Security Council, acting under Chapter VII of the U.N. Charter, has requested a deferral.<sup>330</sup> Such a deferral of an investigation or prosecution lasts for 12 months, but it may be renewed by the Security Council.<sup>331</sup> The likelihood of using this mechanism in a highly politicized Security Council is doubtful. While it was not accepted that the Security Council should have general political control, it was conceded that there may be circumstances in which the exercise of jurisdiction by the Court would interfere with the resolution of an ongoing conflict by the Council itself.<sup>332</sup> In those limited circumstances, the ICC parties have accepted that the Security Council, acting under Chapter VII, may demand that the requirements of peace and security are to take precedence over the immediate demands of justice.<sup>333</sup>

Given that ICC parties have accepted obligations under the Statute and non-parties, such as Israel, have not, it is more likely that the Security Council will exercise its powers under Article 16 in relation to non-parties.<sup>334</sup>

## CONCLUSION

A state-based system arguably was guaranteed within the Rome Statute. This construction means that a Palestinian state must be in existence in order for the post-Israel-Gaza conflict proceedings to continue.

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[www.inn.co.il/News/News.aspx/187562](http://www.inn.co.il/News/News.aspx/187562) (noting that the five inquires include the attacks against the International Red Cross compound, non-combatant civilians, house demolitions, land stripping, and usage of white phosphorus ammunition).

330. Rome Statute, *supra* note 1, art. 16.

331. *Id.*

332. See Mahnouch H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AM. J. INT'L L. 22, 26–27 (1999).

333. See Dan Sarooshi, *Aspects of the Relationship between the International Criminal Court and the United Nations*, 32 NETH. Y.B. INT'L L. 27, 38–39 (2001); Akande, *supra* note 248, at 646.

334. S.C. Res., 1422 U.N. Doc. S/RES/1442 (Nov. 25, 2002), renewed in S.C. Res., 1487 U.N. Doc. S/RES/1487 (June 12, 2003) (“[The Security Council] Requests . . . that the ICC, if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute . . . [shall] not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise.”). See also Carsten Stahn, *The Ambiguities of Security Council Resolution 1422 (2002)*, 14 EUR. J. INT'L L. 85, 85 (2003).

This Article critically discussed several theoretical and practical arguments for recognizing such a state, and concluded that these arguments were not adequately persuasive.

One argument upholding Palestinian statehood under public international law was that a Palestinian state has existed since 1988, given the Palestinian Declaration of Independence and its worldwide recognition. A second argument was that the statehood declared by the Palestine National Council in 1988 was not of a new state, but of an existing one. As explained above, these arguments fail to comply with international law and historical events relating to Palestine, the United Nations, and the international community at large. First, they are overly subjective and therefore practically sub-standard vis-à-vis the constitutive theory of state recognition. Second, the United Nations acted inconsistently with its early recognition of Palestinian statehood. Third, the constitutive-recognition theory is inconsistent in its application to different Palestinian claims for statehood, as well as to Palestinian acknowledgment of Palestine's pre-state status. Lastly, the U.N. authority to endorse Palestinian statehood prior to 1988 was questionable.

The third argument analyzed was that Israel never claimed sovereignty over the occupied Palestinian territories, and as such its sovereignty was not affected by the existence of a Palestinian state. Based on the seminal work of Crawford, this Article suggested that state independence embodies two indispensable elements, one of which, namely lack of competing title for sovereignty, is absent in our case, given Israel's ongoing title dispute over most Palestinian territories.

The fourth argument was that Israel itself recognized the Palestinian state. As recognition is an act undertaken by states, if Israel did not regard Palestine as a state, there would be no point in asking for a Palestinian recognition of Israel as a pretext to the Oslo Accords. As was explained, since the crucial state actors here are the United States and Israel, which vehemently do not recognize Palestine as a state, the constitutive theory runs contradictory to contractual undertakings by both Palestinians and Israelis, backed by Quartet members, namely the United States, the European Union, the Russian Federation, and the United Nations.

The fifth argument was that Israel's recognition was tacitly in compliance with the customary rule whereby state recognition need not be expressed in a formal document. A cautious reading of both informal and formal Palestinian leadership statements of the last sixty years, however, indicate a systematic Palestinian insistence on not declaring and estab-

lishing a Palestinian state as long as peace talks with Israel have not terminated.

A distinct question may arise with regard to a separate Palestinian state in the Gaza Strip. Several problems exist here in light of state-recognition theoretical aspects, in particular the declaratory state-recognition criterion of the ability to govern the Strip.

Finally, there remains a question of whether Palestinian statehood could be upheld by the OTP, given Israel's possible adherence to the Indispensable Third Party Doctrine, as has been systematically practiced by the ICJ. The doctrine specifically entails the inadmissibility of legal processes in the absence of relevant third parties when their absence is vital to a substantive legal matter at hand. Israel may be regarded as holding competing title for Palestinian territories in a sense that conflicts with the latter's claim for sole sovereignty. Within the doctrine, there remains the hypothetical question concerning the possible future joinder of Israel to the Rome Statute. In particular, there is value, albeit speculative, in considering the implications of Israel's reluctance to join the ICC and the parallel scenario in which the Palestinian Authority would unilaterally act to join Israel. On both accounts it was argued in this Article that the power to act against Israel was legally questionable.

In exercising his *proprio motu* powers under the Rome Statute, the Prosecutor is required to consider whether the national courts are unwilling or unable genuinely to proceed. In doing so, ICC practice entails further evaluation of the somewhat enigmatic notion of crime "gravity" and the "interests of justice." These criteria provide, as recent ICC practice shows, a great deal of room, albeit contentious, for discretionary determinations.

In the wake of the tragic Israel-Gaza 2008–09 armed conflict and recently commenced process at the ICC, the Court will need to carefully consider all of the reservations presented here, in the process of maintaining both justice and peace for Israel and the future state of Palestine.