



## SITUATION IN PALESTINE

### *Summary of submissions on whether the declaration lodged by the Palestinian National Authority meets statutory requirements*

3 May 2010

#### **Executive Summary**

1. On 21 January 2009, the Minister of Justice of the Palestinian National Authority (PNA) lodged with the Court a declaration pursuant to article 12(3) of the Statute, which enables a State not party to the Statute to accept the exercise of jurisdiction by the Court.

2. The first step in the determination of jurisdiction is to ascertain whether the declaration lodged by the PNA meets statutory requirements. The Office has received a number of submissions on this issue. They are summarised below and made public in order to enhance understanding of the Office's present activities. Further submissions are expected. In particular, the Office expects to receive a comprehensive report from the PNA by end June 2010 as well as submissions from others who have an interest in presenting views. The Office may also request additional information in order to clarify unresolved questions. In order to facilitate the process, the Office anticipates conducting meetings with relevant interlocutors in the coming months. The Office will ensure a due process to all the parties involved.

#### *Interpretation of article 12(3)*

3. Teleological arguments suggest that article 12(3) including the term 'State' should be examined in the context of the Statute and its object and purpose. It is argued that the term 'State' is subject to variable defining characteristics under public international law, and lacks an unambiguous or 'ordinary' meaning. Therefore it should be examined in light of the Statute's object and purpose, and the Court should rule on the applicability of article 12 (3) in a manner that will enable the treaty to fulfil its objectives.

4. Other submissions argue that the express wording of article 12(3) under the rules of treaty interpretation limits the acceptance of the jurisdiction of the Court to a 'State' in accordance with the ordinary meaning of the term. They note that the Statute gives no special meaning to the term 'State' and there is no basis to infer that article 12 (3) includes entities that do not qualify as States under public international law.

### *Exercise of criminal jurisdiction*

5. Following the teleological approach above, a cluster of submissions considers that article 12(3) does not require an assessment of the statehood of the entity making the declaration, but rather an assessment of whether the entity itself exercises sovereign criminal jurisdiction, such that this jurisdiction can be delegated or transferred to the Court. Some argue that the PNA possesses an inherent right to exercise criminal jurisdiction within its territory, which stems both from its right to self-determination as well as from its actual practice. It is held that this is confirmed by the Oslo Accords by virtue of the fact that the Palestinian authorities have agreed to a temporary voluntary waiver of criminal jurisdiction over Israeli nationals.

6. Others recall that the Oslo Accords provide that all powers and responsibilities not unequivocally transferred to the Palestinians were retained by Israel, including jurisdiction over Israeli nationals as well as certain continuing responsibilities for internal security and public order in the West Bank and Gaza. The authors argue that the PNA cannot transfer criminal jurisdiction over Israeli citizens since it does not itself possess such jurisdiction under the Oslo Accords. Some authors who share this view argue this would not preclude the PNA from delegating jurisdiction to the ICC solely in respect of activities undertaken by Palestinians and other non-Israelis.

### *Statehood in international law*

7. A number of submissions examine the declaration in the light of public international law, including the question of recognition and the traditional criteria of statehood enunciated in the Montevideo Convention of 1933, namely, a permanent population, a defined territory, government, and capacity to enter into relations with other states. The authors offer varying opinions on the extent and legal effects of recognition granted Palestine by different States and its membership of international and regional organisations. They differ, moreover, over the interpretation of the Montevideo criteria and whether some or all of the criteria are fulfilled. The question of the continuing relevance of the Montevideo criteria is also raised.

### *Historical considerations*

8. A final cluster of issues refers to the Ottoman era and the League of Nations Mandate period in order to establish whether Palestinian claims to sovereignty is a continuation of a pre-existing title. Some suggest Palestinian statehood was recognized under the League of Nations Mandate system and the UN Partition Plan, referring to recognised competencies of Palestine prior to 1948 such as the conclusion of treaties and the issuance of passports.

9. Others submit that the last decades of 19<sup>th</sup> Century witnessed competing claims to land in Palestine. Arguments suggesting recognition of sovereignty claims for Arab nationals are countered by reference to the 1917 Balfour Declaration, which expressed support for the establishment in Palestine of a national home for the Jewish people and was incorporated into the Mandate. It is argued that provisional recognition of sovereignty for Class A mandate nations did not represent actual recognition of statehood by the League of Nations.

## Introduction

10. On 21 January 2009, the Minister of Justice of the Palestinian National Authority (PNA) lodged with the International Criminal Court a declaration pursuant to article 12(3) of the Statute, which enables a State not party to the Statute to accept the exercise of jurisdiction by the Court.<sup>1</sup> The relevant part of the declaration reads: "In conformity with Article 12, paragraph 3 of the Statute of the International Criminal Court, the Government of Palestine hereby recognizes the jurisdiction of the Court for the purpose of identifying, prosecuting and judging the authors and accomplices of acts committed on the territory of Palestine since 1 July 2002. As a consequence, the Government of Palestine will cooperate with the Court without delay or exception, in conformity with Chapter IX of the Statute. This declaration, made for an indeterminate duration, will enter into force upon signature."<sup>2</sup>

11. Pursuant to articles 12 and 15 of the Rome Statute and on the basis of the declaration, the Office of the Prosecutor is conducting a preliminary examination in order to determine whether there is a reasonable basis to proceed with an investigation into the situation in Palestine taking into consideration the jurisdiction of the Court, admissibility, and the interests of justice.<sup>3</sup> In particular as part of its assessment of jurisdiction, the Office is considering whether the declaration meets statutory requirements. The Office's preliminary examination is being conducted on the basis of information collected from open sources as well as information received from States, international organizations, non-governmental organisations and other reliable sources.<sup>4</sup>

12. To date the Office has received 388 communications in relation to alleged crimes committed in Gaza between December 2008 and January 2009. The Office has also requested and received information from the Palestinian and Israeli authorities and other relevant institutions and has consulted open sources.

13. On 14 July 2009, the Office wrote to Palestinian Minister of Justice Ali Khashan, requesting the submission of any information of relevance to the preliminary examination. In response, Dr. Khashan, accompanied by a delegation from the PNA, visited the Court on 15-16 October 2009 to present a preliminary report comprising legal arguments in support of the declaration. The Office has been informed that a further comprehensive report will be submitted by end June 2010.

14. On 6 August 2009, the Office wrote to the Embassy of Israel in The Netherlands requesting submission of any information of relevance to the preliminary examination. The Prosecutor also expressed his availability for meetings. The Embassy responded to the Office

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<sup>1</sup> Article 12(3) provides "If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9." Rule 44 explains "the declaration under article 12, paragraph 3, has as a consequence the acceptance of jurisdiction with respect to the crimes referred to in article 5 of relevance to the situation and the provisions of Part 9, and any rules thereunder concerning States Parties, shall apply."

<sup>2</sup> The [declaration](#) and relevant [OTP factsheets and public statements](#) can be accessed on the ICC website.

<sup>3</sup> Articles 15 and 53(1), ICC Statute; Rule 48, ICC Rules of Procedure and Evidence.

<sup>4</sup> Article 15(2), ICC Statute.

on 7 September. The Office has expressed its preparedness to receive any additional information and meet with the Israeli authorities.

15. The Prosecutor has met with various other stakeholders. This has included a high level delegation from the Arab League as well as the members of the Arab League's Independent Fact Finding Committee on Gaza, who visited the Court on 16 October 2009.<sup>5</sup> As part of the meeting, the Fact Finding Committee presented their report "No Safe Place" of 30 April 2009. The Prosecutor has also met with a number of Palestinian and Israeli non-governmental organisations.

16. The Office has received a number of legal submissions on the question whether the declaration lodged by the PNA meets statutory requirements. This includes submissions from the PNA and the Israeli authorities, as well as from a variety of experts, academics, international organizations and non-governmental organisations. A list is annexed providing hyperlinks to those submissions the authors have agreed to make public.

17. This paper seeks to provide an overview of the submissions received to date on the issue of whether the declaration meets statutory requirements in the interests of promoting transparency.<sup>6</sup> Further submissions are expected, including a final comprehensive report by the PNA. The Office also anticipates conducting meetings with relevant interlocutors during the coming months. A determination will be made on whether the declaration meets statutory jurisdictional requirements when the Office is satisfied that all relevant arguments have been collected and considered. The Office will also continue to follow developments related to national proceedings in view of the complementarity principle under the Rome Statute.

18. This paper is made public consistent with the Prosecutorial Strategy of the Office which, under Objective 3 (preliminary examinations) sets out to "regularly provide information about the preliminary examination process, taking into consideration the security of persons it interacts with" and to "issue periodic reports on the status of its preliminary examination"<sup>7</sup> and in accordance with Regulation 28 of the Regulations of the Office of the Prosecutor.<sup>8</sup>

19. The arguments submitted to the Office can be grouped into the following general clusters:

1. Interpretation of article 12(3)
2. Exercise of criminal jurisdiction
3. Statehood in international law
4. Historical considerations

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<sup>5</sup> Press Release: ICC Prosecutor receives Palestinian Minister of Justice, Arab League and Independent Fact-Finding Committee, [ICC-OTP-20091016-PR465](#), 16 October 2009.

<sup>6</sup> The Office has previously made public its response to the United Nations for information on the analytical process thus far undertaken; [Letter to Ms. Kyung-Wha Kang, Deputy High Commissioner for Human Rights](#), 12 January 2010.

<sup>7</sup> [Prosecutorial Strategy 2009-2012](#), 1 February 2010.

<sup>8</sup> Regulations of the Office of the Prosecutor, [ICC-BD/05-01-09](#), 23 April 2009

20. As the PNA is the moving party, its submissions and the arguments of those in support of the declaration are listed first, followed by the submissions that question the legal effects of the declaration. The summary below is illustrative, rather than exhaustive. At this stage, no particular weight is attached by the Office to the arguments presented.

### **1. Interpretation of article 12(3)**

21. A number of the submissions received by the Office examine the meaning of the term 'State' for the purpose of article 12(3) of the Rome Statute in the light of principles derived from the rules of treaty interpretation. In particular, resort is made to article 31(1) of the Vienna Convention on the Law of Treaties which provides: "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".<sup>9</sup>

#### *Teleological approach*

22. Arguments based on a teleological or functional interpretation suggest that the term 'State' in article 12(3) should be examined primarily in the context of the Statute and in the light of the Statute's object and purpose. Citing with approval the commentary of the International Law Commission on its final draft articles on the law of treaties, it is observed that "[w]hen a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the object and purposes of the treaty demand that the former interpretation should be adopted."<sup>10</sup> Because the term 'State' is subject to variable defining characteristics, it is argued that it lacks an unambiguous or 'ordinary' meaning and should therefore be examined in the light of the Statute's object and purpose.

23. Accordingly, the authors submit that the meaning of the term 'State' for the purpose of the Rome Statute differs from the interpretation of statehood generally under public international law, and the Court can limit itself to examining the fulfilment by the PNA of the statutory requirements without pronouncing itself on the broader issue of Palestinian statehood. It is argued that the Court, in the light of its inherent power to determine the scope of its own jurisdiction and competence, should interpret the meaning of the term 'State' in a manner that will enable the treaty to fulfil its objectives. This objective is said to be located in the preamble to the Statute, which affirms that "the most serious crimes of concern to the international community as a whole must not go unpunished".<sup>11</sup>

24. Examining the term 'State' within the context of article 12 leads the authors to observe that the preconditions for the exercise of jurisdiction by the Court, which are based on the consent of the State that has territorial and/or active personality jurisdiction, are met in the case of Palestine since it enjoys exclusive territorial title. It is submitted, moreover, that the term 'State' should also be interpreted in the context of the Statute as a whole, including

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<sup>9</sup> *Vienna Convention on the Law of Treaties*, UNTS Vol. 1155, p. 331.

<sup>10</sup> *Reports of the Commission to the General Assembly, Yearbook of the International Law Commission*, 1966, Volume II, A/CN.4/SER.A/1966/Add.1, p. 219

<sup>11</sup> Preamble para. 4, ICC Statute.

article 21(3) which provides that the “application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights and be without any adverse distinction” based on the enumerated grounds. It is argued that an interpretation of article 12(3) that denies the right of the Palestinian National Authority to a limited exercise of international personality within the terms of the Statute would adversely affect the Palestinian people and their right to seek accountability for serious international crimes.

25. The authors conclude that to deprive article 12 of its appropriate effects in the situation of Palestine would create an impunity zone in the occupied territories, contrary to the object and purpose of the Statute and the drafters’ intention, since no other State would be able to grant the ICC territorial jurisdiction.

### *Literal interpretation*

26. A number of other submissions argue that an ordinary meaning of the term ‘State’ exists according to the rules of treaty interpretation, thereby limiting the exercise of jurisdiction by the Court pursuant to article 12(3). In particular, it is recalled that article 31(4) of the Vienna Convention on the Law of Treaties provides “[a] special meaning shall be given to a term if it is established that the parties so intended.” Since the Rome Statute gives no special meaning to the term ‘State’, it is observed that there is no express provision to support or infer an interpretation that includes entities that do not qualify as such under the general rules of international law. It is therefore argued that the existence of a generally recognised State of Palestine is a prerequisite for the application of the provision.

27. Submissions favouring a literal interpretation observe that the Rome Statute is founded on a State-based system. It is argued that treaties do not bind or give legal rights to non-parties and that they are not open to ratification by entities other than States recognized by the United Nations. As such, it is stated that the ICC lacks both express and inherent powers to recognise the validity of a declaration lodged by a non-State entity: absent the acceptance of the jurisdiction of the Court by a State on whose territory or by whose nationals the crimes occurred, the only exception recognised under the Statute is where the Security Council refers a situation.

28. It is also suggested that the Court should not decide upon the validity of the declaration if doing so would involve adjudication of the rights and responsibilities of a third party not before the Court and which has not given its consent to the proceedings.<sup>12</sup> It is contended that the Israeli State may have legitimate grievances in respect of Palestinian violations of the Oslo Accords as well as conflicting sovereignty claims with respect to the Palestinian territories that would be infringed.

29. Several authors submit that an interpretation of article 12(3) that is not in conformity with the strict wording of the Statute risks compromising the ICC and creating perceptions of politicisation. It is submitted that it is not for the Court to involve itself in political issues, nor to truncate international and bilateral processes through the unilateral ascription of

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<sup>12</sup> *Monetary Gold Removed from Rome in 1943* (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America), ICJ reports 1954.

statehood. It is suggested that acceptance of the declaration would constitute a *de facto* recognition of Palestinian statehood, whether direct or implied, and that this would counter delicate agreements and on-going international mediation efforts. It is suggested that it could also open a 'Pandora's box' vis-à-vis other potential non-State claimants before the ICC.

## **2. Exercise of criminal jurisdiction**

30. A number of submissions consider article 12(3) of the Statute as requiring an assessment of whether the entity making the declaration itself exercises sovereign criminal jurisdiction, such that this jurisdiction could be delegated or transferred to the Court.

31. Some submissions argue that the declaration was lodged by the competent authorities that exercise criminal jurisdiction within the relevant territory. Although the Oslo Accords exclude Israeli nationals from the remit of Palestinian courts, it is argued that this does not affect the inherent criminal jurisdiction of the Palestinian authorities within the territories. The Accords are described as bilateral agreements providing for a temporary waiver of criminal jurisdiction over Israeli nationals, much like bilateral immunity agreements between States may provide for the exclusive criminal jurisdiction of the State of the accused' nationality. It is suggested that the waiver does not represent a denial of Palestinian sovereignty and could be revoked in the event of a withdrawal from the Accords.

32. It is also recalled that the conduct proscribed under the ICC Statute is of international concern and gives rise to pre-existing treaty obligations, including under the grave breaches of the Geneva Conventions, under which all States carry a duty to try or extradite offenders. It is observed that all States are under an obligation to repress such crimes, regardless of the nationality of the accused. As such, it is suggested that the exclusion of Israelis from Palestinian criminal jurisdiction should be interpreted to apply only to ordinary crimes and not to international crimes subject to universal jurisdiction.

33. Other submissions recall that the Oslo Accords provide that all powers and responsibilities that were not unequivocally transferred to the Palestinians were explicitly retained by Israel. Palestinian internal security and public order, moreover, is limited to specific areas, while Israel retains responsibilities in other areas. Under the Accords, the PNA cannot exercise criminal jurisdiction over Israeli nationals, including those in the West Bank and Gaza. Hence, it is argued that the PNA cannot, by virtue of a declaration under article 12(3) of the Statute, in effect delegate authority to the ICC that it does not itself possess: at most, it could only transfer criminal jurisdiction with respect to the conduct of its own nationals or other non-Israelis.

## **3. Statehood in international law**

34. A third cluster of arguments examine the declaration in the light of general rules for attributing statehood under international law, including the question of recognition as well as the traditional criteria for statehood enunciated in the Montevideo Convention of 1933.<sup>13</sup>

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<sup>13</sup> *Montevideo Convention on the Rights and Duties of States* (26 December 1933), 165 U.N.T.S. 19

## *Recognition*

35. A number of submissions observe that Palestine is recognised as a State by 97 States; is tacitly treated as such by a number of additional States; has passports issued by its authorities recognised by 29 States; and is accorded diplomatic status in numerous countries. It is also observed that the 1988 declaration of independence by the Palestine National Council was not in relation to a new state, but was merely declarative of a pre-existing state that was founded prior to 1948. It is argued, moreover, that the fact that Israel has demanded Palestinian recognition of Israel in the context of bilateral negotiations implies tacit recognition of its statehood, since mutual recognition can only be provided between States.

36. Arguing on the basis of the constitutive theory of recognition, other submissions observe that a political entity can only become a State when it is recognised as such by existing States. The non-recognition of Palestinian statehood by a significant portion of the international community is recalled. It is also argued that national case law of a number of countries has held that the PNA lacks one or more of the Montevideo Convention's indicia of sovereignty. It is moreover observed that in order for a State to be recognised the entity in question must assert a claim to statehood, whereas it is noted in this regard that the PNA itself appears to consider statehood in aspirational terms as a result which is to emerge only as part of a future comprehensive settlement.

37. In relation to Palestine's membership of international organisations, some submissions observe that the issue reflects geo-political considerations rather than a principled application of international law. While some international organisations have not admitted Palestine as a member state, others have, including the League of Arab States, the Organization of the Islamic Conference, and the Non-Aligned Movement. It is argued that the acknowledgement by the General Assembly of "the proclamation of the State of Palestine by the Palestine National Council" in resolution 43/177, with only Israel and United States casting voting against, demonstrates that Palestine was recognised as a State by the international community.<sup>14</sup> This contrasts with the reaction to the declaration of statehood by the Turkish Republic of Northern Cyprus, which resulted in the Security Council issuing a resolution stating that the declaration was legally invalid and calling on States not to recognise it.<sup>15</sup> The UN Security Council has routinely allowed Palestine to participate in Security Council sessions where relevant issues were on its agenda, arguably enabling it to participate in the capacity that is limited to States under the rules of the Security Council. It is suggested that the opposition by Israel and the US to the full accession of Palestine to the UN and others organisations has so far prevented it from enjoying the rights that accompany statehood within such organisations. Accordingly, it is submitted that the absence of consistent practice by international organisations should not preclude the ICC from exercising jurisdiction.

38. Other submissions note that Palestine has been routinely treated as a non-State entity by international organisations. For example, in relation to the UN, where acceptance of candidature for membership is considered by the authors as a critical benchmark for

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<sup>14</sup> A/RES/43/177 (1988)

<sup>15</sup> S/RES/541 (1983)



statehood, Palestine participates as an observer, without the right to vote, under the category “Entities Having Received a Standing Invitation to Participate as Observers in the Sessions and the Work of the General Assembly and Maintaining Permanent Observer Missions at Headquarters”. During negotiations for the establishment of the ICC, similarly, Palestine did not participate as a State, but was placed under the category of “Other organizations”. Palestine continues to attend meetings of the ICC Assembly of States Parties under the category “Entities, intergovernmental organisations and other entities”. Accordingly, it is argued that the very institution before which Palestine is claiming, if indirectly, to be a State has not accepted this proposition. Other international organisations have also deferred consideration of the application of Palestine for admission as a member, including the WHO and the UNESCO. Moreover, when the PLO submitted in June 1989 to the Government of Switzerland ratification documents for the Geneva Conventions of 1949, the answer of Switzerland was that it could not decide on the issue because of the “uncertainty within the international community as to the existence or the non-existence of a State of Palestine”.<sup>16</sup>

### *Attributes of statehood*

39. In terms of the attributes of statehood, the main criteria examined in the submissions are those set out in article 1 of the Montevideo Convention, namely: (a) permanent population; (b) defined territory; (c) government; and (d) capacity to enter into relations with the other states.<sup>17</sup>

#### *(a) Permanent population*

40. The various submissions received agree that the criterion of a permanent population is satisfied.

#### *(b) Defined territory*

41. A number of submissions assert that the territorial integrity of Palestine has been recognised and reaffirmed in resolutions of the UN Security Council and General Assembly and by the International Court of Justice.<sup>18</sup> Palestine’s limited control of the full extent of its territory does not affect such integrity, since it results from a state of belligerent occupation. It is argued that its fragmentation is not a relevant criterion in this regard, nor the indeterminacy of its extent, which is held to apply also to Israel.

42. Others submit that the fragmentation and indeterminacy of the Palestinian territories undermines the requirement of a defined territory, noting that borders were one of the

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<sup>16</sup> Government of Switzerland, Note of Information, Berne, 13 September 1989, reprinted in. *Palestine Yearbook of International Law*, vol. 5, 322 (1989).

<sup>17</sup> A number of submissions examine the situation against other contemporary criteria for statehood and question the ongoing relevance and appropriateness of the Montevideo criteria.

<sup>18</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion), 9 July 2004, ICJ Rep. 136, paras 87-88.

permanent status issues left unresolved by the Oslo Accords.<sup>19</sup> The criterion is held to necessitate a minimum consistent area of territory that is undeniably controlled by the entity claiming sovereignty. It is noted, moreover, that competing claims exist on certain portions of the territory in question.

(c) *Government*

43. A number of submissions suggest the criterion of government should be assessed from the normative perspective: statehood being a claim of right, not only a matter of fact. It is noted that the Montevideo Convention does not qualify the term “government” with effectiveness. In this regard, state practice is said to reflect examples of entities that did not exercise effective governmental authority at the time of their recognition by the international community (such as the Democratic Republic of Congo, Guinea-Bissau, Bosnia and Herzegovina, Kosovo and East Timor). By contrast, other entities have been denied international recognition despite the exercise of governmental authority where the criterion of self-determination was found lacking (for example, Rhodesia). As such, it is suggested that an internationally recognised right to self-determination acts as a countervailing consideration to the absence of effective governmental authority.<sup>20</sup>

44. Accordingly, it is argued that any limitations of powers under the Oslo Accords cannot form the basis of an assessment of governmental capacity. The Accords are said to represent a method of resolving a situation of belligerent occupation in accordance with Security Council resolutions 242 (1967) and 338 (1973) and for distributing powers and competencies between the parties while the occupation continues. In relation to the prevailing factual situation, it is submitted that since the initial transfer of autonomous government control in 1994 the Palestinian authorities have in any event acquired sufficient actual control to substantiate a claim of effective government. In this regard, although Palestinian control over the occupied territories is constrained by the Israeli occupation, it is claimed that the scope of the powers and competencies of Palestinian authority has gradually evolved and expanded. It is also recalled that under international law occupation neither affects the *de jure* sovereignty of the State concerned, nor the displaced authority of its government.

45. Other submissions argue that the Montevideo Convention requires not only a government, but one which exercises effective control; and question whether such effective control, both *de facto* and *de jure*, exists in the Palestinian territories. In terms of international practice, it is argued that there is no support for the proposition that statehood can be based exclusively on the right to self-determination without factual realisation. Although there are precedents demonstrating the recognition of States based on the right to self-determination before effective control was established, such early recognition was predicated on: (i) the attainment of effective control within a foreseeable timeframe,<sup>21</sup> or (ii) the fact that effective

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<sup>19</sup> *Declaration of Principles on Interim Self-Government (“Oslo Agreement”)*, 13 September 1993; A/48/486, S/26560 (11 October 1993). See also *The Interim Agreement on the West Bank and the Gaza Strip (“Oslo II”)*, 28 September 1995; A/51/889, S/1997/357 (5 May 1997).

<sup>20</sup> The Palestinian right to self-determination has been recognized in a number of UN resolutions, see e.g. A/RES/58/163 (22 December 2003).

<sup>21</sup> Democratic Republic of Congo

control was already being exercised over part of the territory.<sup>22</sup> Namibia is cited as the only exception where a State was recognised despite its territory being wholly under foreign control (South Africa) and with no expectation of effective control in the foreseeable future. This is held out as an isolated example that cannot alone demonstrate a general practice to allow the entitlement to self-determination to override the criterion of effective government.

46. In terms of the law of occupation, it is argued that the West Bank and Gaza Strip were not independently sovereign prior to their occupation by Israel: therefore the claim that sovereignty is not affected by occupation is not directly applicable.

47. As to exercise of PNA authority, it is noted that any competencies enjoyed by the PNA were created by the Oslo Accords, through which Israel transferred a limited number of powers and responsibilities. It is also argued that the PNA possesses relative control over portions of the territory according to whether they are classed as category A, B or C areas; with category C, constituting 60% of the West Bank, remaining under Israeli control. It is recalled that the powers and responsibilities not transferred to the PNA are retained by Israel. Even with regard to internal security and public order within the West Bank and the Gaza Strip, the submissions recall that Israel continues to carry responsibilities for defense against external threats from the sea and from the air, protection of the borders, as well as overall security of Israelis and Settlements.<sup>23</sup> Accordingly it is argued that the restrictions on the PNA exercise of effective control over significant portions of its territory and the lack of independent competence negate Palestinian claims of statehood.

*(d) Capacity to enter into relations with the other states*

48. A number of submissions note that Palestine has entered into agreements and has ratified regional conventions in the framework of the international organisations to which it participates as a member state.<sup>24</sup> Moreover, the capacity and ability of the PLO/PNA to conduct negotiations and sign agreements as provided for in the Oslo Accords<sup>25</sup> has been interpreted broadly in practice, including the establishment of embassies and foreign posts.

49. Others submit that the PNA lacks the general capacity to conduct foreign relations under the Accords since critical functions held to be indispensable to statehood are expressly excluded from the powers and responsibilities of the Palestinian Council, including the establishment abroad of embassies, consulates or other types of foreign missions and posts or permitting their establishment in the West Bank or the Gaza Strip, the appointment of or admission of diplomatic and consular staff, and the exercise of diplomatic functions.<sup>26</sup>

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<sup>22</sup> Guinea-Bissau; Bosnia and Herzegovina.

<sup>23</sup> Article XII, Oslo II.

<sup>24</sup> See e.g. *The Riyadh Arab Agreement for Judicial Cooperation* (1983); *The Arab Convention on the suppression of terrorism* (1998), and *The Arab Charter of Human Rights* (2004). According to the Arab League, Palestine represented by the PLO has become party to 33 multilateral agreements and has signed 3 others, while it is party to seven other agreements and conventions of the Organization of the Islamic Conference.

<sup>25</sup> See Article IX (5)(b) *Oslo II*.

<sup>26</sup> Annex II, Para 3,(b) *Oslo Agreement*; Article IX (5)(a), *Oslo II*.

#### 4. Historical arguments

50. A final set of issues examined in the various submissions relates to the situation before 1948, during the Ottoman era and the later League of Nations Mandate period, in order to determine whether Palestinian claims to sovereignty are a continuation of a pre-existing title.

51. A number of submissions argue that the 1988 Palestinian declaration of independence was in relation to an extant statehood: it was not by an entity purporting to be a new state. The declaration of independence refers to the League Covenant in this regard, supporting the notion of a pre-existing claim. It is suggested that Palestine first became an international entity after the demise of the Ottoman Empire in the wake of World War I, when the British administered Palestine under the League of Nations mandate system. Palestine was assigned a Class A mandate in the category belonging to independent nations.<sup>27</sup> During the mandate era international treaties were concluded by the administering power to which Palestine was registered a party under the League of Nations Treaty Series. Palestinians, moreover, lost Ottoman citizenship and gained a new Palestinian nationality and carried Palestinian passports. Pre-existing title to sovereignty is said to be reflected, moreover, in the 1947 General Assembly resolution setting out the Partition Plan, which envisaged the establishment of two provisional States.<sup>28</sup> Since the resolution is recalled in the unilateral Israeli declaration of independence in recognition of the right of the Jewish people to establish a State, it is suggested that it can equally be regarded as the basis for recognising Palestinian sovereignty.

52. Other submissions suggest that the last decades of the 19<sup>th</sup> Century evidence competing claims to land by both Jews and Palestinians. It is observed that the McMahon-Hussein Agreement of 1915 was accepted by Palestinians as a British promise that after World War I land previously held by the Ottomans would be returned to Arab nationals.<sup>29</sup> The Balfour Declaration of 1917 under which the British Government expressed support for the establishment in Palestine of a national home for the Jewish people superseded this agreement, however.<sup>30</sup> The 1920 San Remo Conference assigned the Mandate for Palestine to Britain with reference to the Balfour Declaration. Article 95 of the 1920 Treaty of Sèvres also stated “[t]he Mandatory will be responsible for putting into effect the declaration originally made on November 2, 1917”,<sup>31</sup> thereby incorporating the Balfour Declaration into the mandate for Palestine. It is observed, lastly, that the provisional recognition of the sovereignty of nations subject to Class A mandates pursuant to article 22 of the League of Nations Covenant did not amount to actual recognition or existence of statehood.

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<sup>27</sup> See article 22, Covenant of the League of Nations (28 June 1919): “Certain communities formerly belonging to the Turkish empire have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory.”

<sup>28</sup> A/RES/181 (II) (1948)

<sup>29</sup> Also known as the McMahon-Sharif Husayn Correspondence, representing the protracted exchange of letters between the British High Commissioner in Egypt and the Sharif of Mecca, from 14 July 1915 to 30 January 1916

<sup>30</sup> The Balfour Declaration (2 November 1917)

<sup>31</sup> The Treaty of Peace Between the Allied and Associated Powers and Turkey signed at Sèvres August 10, 1920

## Annex: List of Submissions

John Quigley, [Memo to the Prosecutor](#), 23 March 2009; [The Palestine Declaration to the International Criminal Court: The Statehood Issue](#), and [The Statehood of Palestine: law and sovereignty in the Middle East Conflict](#), 19 May 2009

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