

The Palestinian Declaration and the Jurisdiction of the International Criminal Court

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Abstract

The Declaration made by the Palestinian Authority on 21 January 2009 whereby Palestine agrees to the exercise of jurisdiction by the International Criminal Court for crimes committed in Palestinian territory since 1 July 2002, raises several interesting issues of international law. However, according to the author, the Court must not engage with all such issues, which are indeed extremely broad in scope; in particular, the Court should refrain from pronouncing in abstracto on the issue of whether or not Palestine is a state under international law. On the contrary, the Court should resort to a functional interpretation of the ICC Statute and limit itself to ascertaining whether the conditions required for the Court to exercise jurisdiction are met in the present case. The author argues that these conditions are indeed met.

1. Introduction

This paper seeks to address the issue of whether the Palestinian Authority's recognition of the International Criminal Court's (hereinafter 'the ICC' or 'the Court') jurisdiction can have any effect for the purpose of Article 12 of the ICC Statute.¹ As is well known Article 12 of the Rome

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1 This article is a slightly revised and updated version of the author's contribution to be published in a collection of essays to be published in honour of Madjid Benchikh. The paper heavily draws on a written opinion which was signed by a number of eminent scholars and posted on the International Criminal Court website. It may be read at <http://www.icc-cpi.int/NR/rdonlyres/D3C77FA6-9DEE-45B1-ACC0-B41706BB41E5/281927/PelletENGCLEAN.pdf> (visited 19 August 2010). This work was carried out with the effective assistance of Ms Alina Miron, 'attachée temporaire d'enseignement' at the University of Paris-Ouest Nanterre/La Défense

Statute (entitled ‘Preconditions to the exercise of jurisdiction’) is worded as follows:

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.
2. In the case of article 13, paragraph (a) or (c),² the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
 - (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
 - (b) The State of which the person accused of the crime is a national.
3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9. (Emphasis added.)

The Palestinian National Authority (PNA) in its declaration dated 21 January 2009 states that: ‘The Government of Palestine ... recognizes the jurisdiction of the Court for the purpose of identifying, prosecuting and judging the authors and accomplices of crimes committed on the territory of Palestine since 1 July 2002.’³ The main issue to be tackled by the Court is whether or not such recognition may produce the effect of devolving the situation in Palestine to its jurisdiction. This is particularly important, especially considering the wording of Article 12 of the ICC Statute (which explicitly refers to ‘a State’) and the controversial nature of the Palestinian entity in terms of its subjectivity under international law. It is submitted that the answer to

(CEDIN). The author is also indebted to Professor Salvatore Zappalà, who has kindly edited the English version of this paper.

- 2 It seems apposite to recall a few provisions of the Statute: Art. 13: Exercise of jurisdiction provides that ‘The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if: (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14; (b) ...; or (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.’ And Art. 14 on Referral of a situation by a State Party stipulates: ‘1. A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes. 2....’. Finally, Art. 15 on the *proprio motu* powers of the Prosecutor provides that ‘1. The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court. 2. The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court. [paragraphs 3–6 omitted]’.
- 3 Palestinian National Authority - Minister of Justice, Declaration Recognizing the Jurisdiction of the International Criminal Court, 21 January 2009, available online at <http://www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279777/20090122PalestinianDeclaration2.pdf> (visited 3 August 2010).

such a question must essentially rely on a teleological and functional approach to the ICC Statute.

2. The Relevance of a Functional Approach

Although it could make sense to consider Palestine as a state in the general and usual meaning of the word under international law, the present paper does not wish to take a position on that issue and wants to leave it unprejudiced.⁴ This is largely justified by the idea that it is pointless to take a categorical stand on an issue which is formulated in a general and abstract way, and on the other hand, it seems important to address the issue only in the specific and precise context of Article 12 of the ICC Statute.

In this respect, it is important to stress that although the Court itself has to consider the scope of the above mentioned declaration, the Court will have to refrain from attempting to determine the nature of the Palestine state in the abstract; it should only answer the question of whether or not, under Article 12 of the Statute, the Palestinian declaration can produce certain legal effects (i.e. allow the Court to exercise jurisdiction). Broadly speaking, it is not for the Court to substitute itself for states in recognizing or not Palestine as a state;⁵ the ICC is only called upon to pronounce on whether or not the conditions for exercising its statutory jurisdiction are fulfilled.

With regard thereto, the problem is similar to the question posed in view of an Advisory Opinion by the General Assembly of the United Nations to the International Court of Justice (ICJ) in Resolution 63/3 of 8 October 2008, which gave rise to an Advisory Opinion of 22 July 2010. In that case, the General Assembly was careful not to ask the ICJ about the status of Kosovo as a state in general; rather, it asked whether 'the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo [is] in

4 For my stand on that issue, see 'Le droit international à l'aube du XXIème siècle' (La Société Internationale contemporaine – permanence et tendances nouvelles), in *Cours Euro-méditerranéens Bancaja de Droit International*, Vol. I (Pampelune: Aranzadi, 1998), at 51–52, where I show the statehood of the Palestinian Authority is doubtful to the extent it does not consider itself as a state. I have not changed my mind on this matter, even though it can be argued that the fact that it behaves like a state in some circumstances (for instance when it formulated the declaration reviewed) should lead to put this position in perspective. See also P. Daillier, M. Forteau and A. Pellet, *Droit International Public* (8th edn., Paris: LGDJ, 2009), at 509–512. In this respect, I tend to agree with the thesis sustained by Dr. Yaël Ronen in her article recently published in this *Journal* ('ICC Jurisdiction over Acts Committed in the Gaza Strip: Article 12(3) of the Rome Statute and Non-state Entities', 8 *Journal of International Criminal Justice (JICJ)* (2010) 4, at 13–15 or 26; see also Y. Shany, 'In Defence of Functional Interpretation of Article 12(3) of the Rome Statute', 8 *JICJ* (2010) 329, at 333), although I am certainly less reluctant than that author to accept that, besides its own allegations that it is not a state, Palestine could be considered as such legally speaking.

5 Currently more than one hundred states have recognized Palestine as a state, though figures vary rather significantly from one source to the other. See <http://en.wikipedia.org/wiki/state-of-palestineStates.recognising.the.state.of.palestine> (visited 19 July 2010).

accordance with international law?’ The Court took care to answer within the strict limits of that question: ‘The question is narrow and specific; it asks for the Court’s opinion on whether or not the declaration of independence is in accordance with international law. It does not ask about the legal consequences of that declaration.’⁶ Likewise in this instance, the ICC is not called upon to ‘recognize’ the state of Palestine, but only to ensure that the conditions necessary for the exercise of its jurisdiction are fulfilled.

To this end, it is necessary and sufficient for the Court to interpret the provisions of its Statute relating to jurisdiction. It is in light of these provisions that the Court must judge the admissibility of the declaration of the Palestinian government: for that purpose, and for that purpose only, it has to determine whether Palestine is a state *within the meaning of Article 12(3) of the Statute*, and hence whether Palestine could make the declaration specified in that provision. In other words, the idea is not for the Court to rely on a general and ‘ready-made’ definition of the concept of state in international law, but to adopt a functional approach allowing it to finally determine whether the Palestinian declaration fulfils the conditions set out in Article 12(3), hence enabling the Court to exercise its statutory jurisdiction.⁷

Such a functional approach is extremely frequent in international law. Just refer, in this regard, to the very many conventions that define the concepts they refer to ‘for the purpose of this convention ...’ or ‘of the present treaty ...’.⁸ This has been also the approach followed by the ICJ to grasp the concept of international organization: in order to answer the question of whether the United Nations Organization has international personality — an issue, it noted, ‘is not settled by the actual terms of the Charter’ — the ICJ clarified that ‘we must consider what characteristics it was intended thereby to give to the Organization.’⁹ When commenting on that ‘praetorian revolution’

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

7 A functional reading of the Statute has also been recently supported by Y. Shany, *supra* note 4. Professor Shany was writing in response to Y. Ronen, *supra* note 4, *ibid.*, both accepting the possibility of a functional approach, whilst arriving at a different conclusion than that of the present writer. Contrary to what is implied in Ronen’s article (see e.g., at 21; see also 25) ‘a determination by a legal body such as the ICC ... that a state of Palestine exists’ for the purpose of Art. 12(3) is quite different than making this determination generally; the latter is a political act for which states have a full power of appreciation; a Court’s determination of the effects of the Palestinian declaration is an exercise of the *Kompetenz-Kompetenz* principle (for a similar point of view, see Shany, *ibid.*, at 338).

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

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

(*révolution prétorienne*) — which is nowadays generally accepted, Professor Pierre-Marie Dupuy stressed in his General Course to the Hague Academy of International Law that ‘[t]hough the legal personality can vary, in scope and content, depending on the “needs of the community”, there is no reason for the number of subjects not to increase following the development of the international legal order, which itself reflects the extension of the social needs that the “hunger for law” is intended to meet. Thanks to that opinion of the Court, various entities can be granted a personality without this constituting a crime of against sovereignty’;¹⁰ and the author continues by giving numerous examples of recognition of a functional legal personality to individuals before international criminal courts,¹¹ to companies in investment laws,¹² to non-state armed entities,¹³ to micro states whose dependence on their neighbours leaves one to wonder about their true sovereignty.¹⁴

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

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

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

1. In this Convention, with the exception of Articles XXIV to XXVII, references to States shall be deemed to apply to any international intergovernmental organization which conducts space activities if the organization declares its acceptance of the rights and obligations provided for in this Convention and if a majority of the States members of the organization are State Parties to this Convention and to the Treaty on Principles

10 Translation of P.M. Dupuy, ‘L’unité de l’ordre juridique international: cours général de droit international public (2000)’ in *Collected Courses of the Hague Academy of International Law*, Vol. 297 (Martinus Nijhoff Publishers, 2002), at 108–109, footnote omitted. Original text: ‘[s]i la personnalité peut varier, en extension comme en contenu, eu égard aux “besoins de la communauté”, il n’y a pas de raison pour que le nombre des sujets ne s’accroisse pas en fonction du développement normatif de l’ordre juridique international, reflétant lui-même l’extension des nécessités sociales auxquelles cette ‘faim de droit’ est destinée à répondre. Grâce à cet avis de la Cour, des entités diverses peuvent se voir conférer une personnalité sans pour autant qu’il s’agisse d’un crime de lèse-souveraineté.’

11 *Ibid.*, at 111.

12 *Ibid.*, at 112.

13 *Ibid.*

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

Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies.¹⁵

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

The concept of the State has to be understood in the sense most appropriate to the provisions in question and to their objectives; the Court rightly follows a functional approach, basing its interpretation on the scheme and objective of the provisions within which the concept features.¹⁶

This functional view of the state and its subdivisions is omnipresent, for instance, in the ECJ case law relating to the direct effect of the directives:

... it should be noted that a directive cannot be relied on against individuals, whereas it may be relied on as against a State, regardless of the capacity in which the latter is acting, that is to say, whether as employer or as public authority. The entities against which the provisions of a directive that are capable of having direct effect may be relied upon include a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals.¹⁷

The same idea is also behind support for the principle applied by the European Court of Human Rights (hereinafter, 'the Strasbourg Court' or 'ECtHR') in the *Drozd and Janousek* case. Although in that instance it admitted the preliminary objection relating to its lack of jurisdiction *ratione loci*, it specified that it was only because it had not received from Andorra a declaration establishing its consent to the application of the Convention on its territory; but it acknowledged that the Principality could have formulated such a declaration based on Article 5 of the Statute of the Council of Europe,¹⁸ despite its *sui generis* nature that the Court stresses robustly.¹⁹ It is noteworthy that the

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

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

17 ECJ, judgment of 19 April 2009, C-356/05-*Farell*, ECR I-03067, § 40. See also C-188/89 *Foster and Others* [1990] ECR I-3313, at § 20; C-343/98 *Collino and Chiappero* [2000] ECR I-6659, § 23; and Case C-157/02 *Rieser Internationale Transporte* [2004] ECR I-1477, § 24.

18 Which provides for the possibility that a European 'country' become an associate member.

19 ECtHR, Plenary, *Drozd and Janousek v. France and Spain* (Application no. 12747/87), ruling dated 26 June 1992, at §§ 67 and 86. See also the case of the admission of Kosovo in the IMF (and, consequently, in the World Bank) on the 29th of June 2009 (see Press Release No. 09/240 on the IMF website at <http://www.imf.org/external/np/sec/pr/2009/pr09240.htm> and Press Release No. 2009/448/ECA on the World Bank website at <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/ECAEXT/KOSOVOEXTN/0,,contentMDK:22230081~menuPK:297775~pagePK:2865066~piPK:2865079~theSitePK:297770,00.html>), while the statehood of Kosovo is still fiercely debated among states as well as among lawyers.

Strasbourg Court, guided by the concern of ensuring a broad implementation of the Convention and thereby of an improved human rights protection, as wanted by its authors, does not doubt that its jurisdiction can extend to *sui generis* entities such as the Principality.

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

Under the ICSID Convention, the Centre's jurisdiction extends only to legal disputes arising directly out of an investment between a Contracting state and a national of another Contracting State. Just as the Centre has no jurisdiction to arbitrate disputes between two states, it also lacks jurisdiction to arbitrate disputes between two private entities. Their main jurisdictional feature is to decide disputes between a private investor and a State. However neither the term 'national of another Contracting State' nor the term 'Contracting State' are defined in the Convention.... Accordingly the Tribunal has to answer the following two questions: first, whether or not SODIGA is a State entity for the purpose of determining the jurisdiction of the Centre and the competence of the Tribunal, and second, whether the actions and missions complained of by the Claimant are imputable to the State. While the first issue is one that can be decided at the jurisdictional state of these proceedings, the second issue bears on the merits of the dispute and can be finally resolved only at that state.²⁰

It is interesting to note that, in this case, the Tribunal sought to determine the nature of the state entity at the phase of the appreciation of its jurisdiction (and not of the merits), considering that the difficulty concerned its jurisdiction *ratione personae*. Therefore it handled it 'from a point of view different of that of attribution in the meaning of responsibility law, since "State" can have a specific meaning in the context of the dispute'.²¹ As has been stressed by some legal scholars,

following a 'functional approach' ultimately called for by the ICJ in its 1949 Opinion in the *Reparation for Injuries* case, modern international law conceives the State under the form of a variable geometry shape, whose outline depends on the subject at issue, and it relegates it to the rank of general 'notion' whose interpretation depends 'on the economy and the aims of the provisions' within which it finds itself.... The boundaries of the concept of the State are nonetheless in movement, its 'perimeter' is not an intangible and physically marked limit. International law apprehends the State as an entity that it can itself reshape (as witnesses by the use of conventional definitions of the State²² or the jurisprudential formula whereby international or foreign courts decide that such an entity 'must be

20 ICSID, *Maffezini v. Spain*, Case N° ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000, *ICSID Rev. — For. Investment L. Jl.*, at 27–28, §§ 74–75.

21 M. Forteau, 'L'État selon le droit International: une figure à géométrie variable?' *Revue générale de droit international public (RGDIP)* (2007) 737, at 762–763. Author's translation. Original text: 'sous un angle distinct de celui de l'attribution au sens du droit de la responsabilité, car 'l'Etat' peut avoir un sens particulier dans le contexte du litige.'

22 Footnote 118: 'Of which for the rest, one of the most obvious expressions is article 3 of the United Nations Charter on the basis of which original UN member states have been considered to include the federated entities of Ukraine and Belarus...' (Author's translation; original text: 'Dont, d'ailleurs, une des plus évidentes manifestations est l'article 3 de la Charte des Nations Unies sur la base duquel ont été considérées comme des États membres originaires de l'ONU les entités fédérées de l'Ukraine et de la Biélorussie...').

considered as an emanation of the State, and the latter is, in contemporary international law, increasingly understood differently depending on the norm being applied.²³

Therefore it is by taking into account the general scheme of the provisions of the Rome Statute and the object and purpose of Article 12 that the Court is called upon to give a meaning to the term ‘State’ within the framework of this provision.

3. The Validity of the Palestinian Declaration and its Effects on ICC Jurisdiction

It is for the ICC to define its jurisdiction and the limits imposed on its exercise of jurisdiction, based on its interpretation of the provisions of the Statute, in accordance with the *Kompetenz-Kompetenz* principle. This is a general principle of international dispute settlement²⁴ whose specific conditions of implementation by the ICC are specified in Articles 18 and 19 of the Statute. Such terms must be applied in accordance with the ‘general rule of interpretation’ as codified in Article 31(1) of the Vienna Convention on the Law of Treaties of 23 May 1969:

1. 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.

In this instance, the context and the object and purpose of the Statute and of its Article 12 are of particular importance due to the ‘variable geometry’²⁵ of the very concept of the state, which makes it difficult to keep to a single unambiguous meaning, and, therefore to an ‘ordinary meaning’. In addition, the determination of the jurisdiction of international bodies (organizations and courts — the ICC being both) is a privileged area of teleological treaty

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

24 See ICJ, *Nottebohm (Liechtenstein v. Guatemala)*, Preliminary Objection, 19 November 1953, ICJ Reports (1953) 7, § 119, and the Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Tadić* (IT-94-1-T), Appeal Chamber, 2 October 1995, § 17.

25 *Tadić*, *ibid.*

interpretation. The *Comte Bernadotte* case is a remarkable illustration of the use of such reasoning whereby the ICJ justifies therein the use of the United Nation's implied powers doctrine:

It must be acknowledged that its Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged.²⁶

And, regarding more precisely the capacity to submit an international claim with a view to seeking compensation for damages caused to its agents, the Court noted:

Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.²⁷

Regarding more specifically the assessment of their own jurisdiction, international courts and tribunals usually opt for a teleological interpretation of the statutory provisions that support it. As noted by the International Criminal Tribunal for the former Yugoslavia (ICTY) in its founding ruling:

[J]urisdiction is not merely an ambit or sphere (better described in this case as 'competence'); it is basically — as is visible from the Latin origin of the word itself, *jurisdictio* — a legal power, hence necessarily a legitimate power, 'to state the law' (*dire le droit*) within this ambit, in an authoritative and final manner....

A narrow concept of jurisdiction may, perhaps, be warranted in a national context but not in international law. International law, because it lacks a centralized structure, does not provide for an integrated judicial system operating an orderly division of labour among a number of tribunals, where certain aspects or components of jurisdiction as a power could be centralized or vested in one of them but not the others. In international law, every tribunal is a self-contained system (unless otherwise provided). This is incompatible with a narrow concept of jurisdiction, which presupposes a certain division of labour. Of course, the constitutive instrument of an international tribunal can limit some of its jurisdictional powers, but only to the extent to which such limitation does not jeopardize its 'judicial character', as shall be discussed later on. Such limitations cannot, however, be presumed and, in any case, they cannot be deduced from the concept of jurisdiction itself.²⁸

The ICJ has faced similar issues in the *Genocide* and the *Legality of the Use of Force* cases brought before it in the framework of the Yugoslav crisis.²⁹

26 *Reparation* Advisory Opinion, *supra* note 9.

27 *Ibid.* See also PCIJ, *Competence of the ILO to Regulate Incidentally the Personal Work of the Employer*, Advisory Opinion n° 13, 23 July 1926, Series B, N° 13, at 18.

28 *Tadić*, *supra* note 24, §§ 10–11. For another illustration of that approach, see for instance *Western Sahara*, Advisory Opinion, ICJ Reports (1975) 20, § 18; 'the references to "any legal question" in the abovementioned provisions of the Charter and Statute are not to be interpreted restrictively.'

29 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Provisional Measures, Order of 8 April 1993, Preliminary Objections, judgment of 11 July 1996, *Merits*, Judgment of 26 February 2007; *Application for Revision of the Judgment of 11 July 1996 in the Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections (*Yugoslavia v. Bosnia and Herzegovina*), judgment of

Without entering into the meandering (and contradictions) of the Court's successive arguments in those emotionally-charged and extraordinarily politically delicate cases, one can note that, except in those cases where the Claimant itself had in fact disputed the jurisdiction of the ICJ,³⁰ in the end, the ICJ always retained its competence. It is quite apparent that in doing so, despite the legal 'difficulties' of which it was aware and that it constantly tried to minimize,³¹ the ICJ recognized full effect to the provisions regarding its jurisdiction — in cases involving unquestionably the most serious of international crimes: the crime of genocide.

Likewise, there cannot be any question for the ICC to go beyond the mission that the State Parties to the Rome Statute have given it, or to substitute its will to theirs, thus making itself a law maker, which it certainly is not. Nor can the problem be posed either in terms of 'extensive' or 'restrictive' interpretation of the Statute.³² The idea is only to interpret a provision thereof in its context and in the framework of the specific issue on which the ICC might be called to pronounce itself for the purpose of determining the scope (and the limits) of its jurisdiction in the circumstances in question.³³ For that purpose, the sensible guideline appearing in the International Law Commission's Report on its final Draft Articles on the Law of Treaties should be kept in mind:

When 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 objects and purposes of the treaty demand that the former interpretation should be adopted.³⁴

Article 12 of the Statute,³⁵ according to its very title, establishes the 'Preconditions to the exercise of jurisdiction' by the ICC. Participation in the

3 February 2003. *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, Provisional Measures, Order of 2 June 1999, Preliminary Objections, judgment of 15 December 2004 (and seven other similar cases); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Preliminary Objections, judgment of 18 November 2008.

30 Although it had not formally given notice of the discontinuance of the proceedings (ICJ Reports (2004), at 293–295, §§ 31–36) — see also the Judgment dated 28 November 2008, § 89; for the Preliminary Objections, see ICJ Reports (2004), at 327–328, §§ 172–129; in its ruling on the merits of 2007, in the *Genocide* case (Bosnia Herzegovina), the Court also comments that, 'No finding was made in those [eight similar] judgments on the question whether or not the Respondent was a party to the Genocide Convention at the relevant time' (ICJ Reports (2007), § 83).

31 *Supra* note 28, see in particular ICJ Reports (1993), at 14, § 18; see also the 2007 judgment, § 130, or the 2008 judgment, § 75.

32 On all these matters, see C. de Visscher, *Problèmes d'interprétation judiciaire en droit international public* (Paris: Pedone, 1963), 263; or D. Simon, *L'interprétation judiciaire des traités d'organisations internationales – Morphologie des conventions et fonction juridictionnelle* (Paris: Pedone, 1981), XV-936 (in particular 319–466).

33 As aptly noted by Professor Shany, 'The decision whether or not to embrace a functional approach should ... be made on a case-by-case basis, in light of the nature and function of the legal arrangement in question' (*supra* note 4, at 336).

34 International Law Commission (ILC), *Yearbook* 1966, vol. II, at 218, § 6 on the Commentaries under Draft Article 28.

35 Quoted *supra*, at 1.

Statute (Paragraph 1) or the declaration provided for in Paragraph 3 are therefore conditional acts whose non-existence would prevent the Court from exercising its jurisdiction. It is indeed only if this declaration is made³⁶ that the Court can carry out its mission (to which Paragraph 1 of Article 12 formally refers, mentioning 'the crimes specified in article 5')³⁷: the judgment of persons accused of the crime of genocide, of a crime against humanity or of a war crime. This involves, to paraphrase the terms of the Preamble, crimes of such gravity that threaten the peace, security and well-being of the world, which, being of concern to the international community as a whole, must not go unpunished and whose effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.

It is also telling that according to the terms of Article 12(3), the jurisdiction of the Court is established whenever a state that can claim a territorial title, or a personal title, has agreed to its jurisdiction.³⁸ As a result, the Court may exercise its jurisdiction for events that took place under the jurisdiction of states that have not ratified the Statute nor made the declaration specified in Paragraph 3 of Article 12, or with regard to nationals of states that are not parties nor have formulated a declaration.³⁹ Consequently, mutual consent, which is a crucial condition for the jurisdiction of most international courts (including the ICJ), is not a condition for the exercise by the ICC of its jurisdiction. The possibility open to the Security Council acting under Chapter VII of the UN Charter by Article 13(b) of the Statute, to refer to the Prosecutor 'a situation in which one or more of such crimes appears to have been committed' confirms this conclusion. In this regard, the ICC can be compared to regional courts dedicated to human rights protection. The finding made, for example,

36 The question of Palestine ratifying the Statute does not arise for now, but it is not forbidden to think that it might appear in the future, would Palestine decide to become a Party in accordance with Art. 125 ICCSt.

37 Art. 5(1): 'The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

- (a) The crime of genocide;
- (b) Crimes against humanity;
- (c) War crimes;
- (d) The crime of aggression.'

See also the introduction to Art. 13, referring to Paragraph 2 of Art. 12: 'The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute'.

38 For a clear description of the drafting history that led to the adoption of that principle in spite of the determined opposition of some states, including the United States, see H.P. Kaul 'Preconditions to the Exercise of Jurisdiction', in A. Cassese, P. Gaeta and J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: OUP, 2002) 593–605; see also W.A. Schabas, *The International Criminal Court – A Commentary on the Rome Statute* (Oxford: OUP, 2010), 278–283.

39 See in particular L. Condorelli, 'La Cour internationale en débat', *Revue Générale de Droit International Public* (1999), at 18.

by the ECtHR in the *Loizidou v. Turkey* case, in which the Court strongly stressed that the non-recognition, by one of the parties to the dispute, of the Government of the other, does not prevent the exercise of its jurisdiction:

In any event recognition of an applicant Government by a respondent Government is not a precondition for either the institution of proceedings under Article 24 (art. 24[sic]) of the Convention or the referral of cases to the Court under Article 48 (art. 48[sic]) (see application no. 8007/77, *loc. cit.*, pp. 147–48). If it were otherwise, the system of collective enforcement which is a central element in the Convention system could be effectively neutralised by the interplay of recognition between individual Governments and States.⁴⁰

Far from governing only relations between states '[t]he Statute deals with the collective reaction of its State Parties to the breach by an individual of its obligation *erga omnes*.'⁴¹ This puts into perspective the importance not that a consent be given by the holder of a territorial or personal title, but that of the legal qualification of the entity providing this consent: whether it is a state, as believed by a majority of the existing states in the world,⁴² — or not — as considered by a minority of other countries, the fact is that only the Palestinian authority possesses, under international law, an exclusive territorial title over the Palestinian territory and the population established therein.

Besides, it is indeed in its capacity as territorial sovereign that Palestine made the declaration under Article 12(3) on 21 January 2009: 'The Government of Palestine hereby recognizes the jurisdiction of the Court for the ... crimes committed *on the territory* of Palestine since 1 July 2002.'⁴³

There is no doubt that the West Bank and Gaza are occupied territories and are internationally recognised as such. As the ICJ observed in its Advisory Opinion of 9 July 2004:

The territories situated between the Green Line ... and the former eastern boundary of Palestine under the Mandate were occupied by Israel in 1967 during the armed conflict between Israel and Jordan. Under customary international law, these were therefore occupied territories in which Israel had the status of occupying Power. Subsequent events in these territories ... have done nothing to alter this situation. All these territories (including East Jerusalem) remain occupied territories and Israel has continued to have the status of occupying Power.⁴⁴

This paper is not an appropriate framework for assessing all the consequences of this hard to challenge position. It suffices to note that:

- (i) In no way does the occupation of a territory grant the occupying power sovereignty thereupon: 'Whatever the effects of the occupation of a

40 ECtHR, *Loizidou v. Turkey* (Application no. 15318/89), *Preliminary Objections*, 23 March 1995, § 41 (emphasis added).

41 Kaul, *supra* note 38, at 609.

42 *Supra* note 5.

43 For the full text of the declaration, see *supra* note 4. On the 'territoriality' of the Rome Statute, see Schabas, *supra* note 38, at 285–287.

44 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports (2004) 167, § 78 (hereinafter 'Wall Advisory Opinion').

territory by the opponent before peace is re-established, it is certain that such occupation alone does not cause the sovereignty to be transferred.⁴⁵

- (ii) Conversely, the de facto annexation of Palestinian territories infringes territorial sovereignty and the rights of the Palestinians to self-determination.⁴⁶ And it is untenable to consider the Oslo-Washington Interim Agreement as a renunciation from their part to the right to self-determination: not only is this right imprescriptible, but also Article 1 of the Declaration of Principles on Interim Self-Government Arrangements (Washington, 13 September 1993 – ‘Aim of the Negotiations’) emphasizes that the suspension of the effects of the 1988 Algiers Declaration, in view of ‘a permanent settlement based on Security Council Resolutions 242 and 338’, was only intended for a maximal period of five years.
- (iii) Besides, Israel does not claim the exercise of territorial sovereignty over the occupied territories:⁴⁷ thus for instance, in its report to the Committee on Economic and Social Rights, dated 19 October 2001, it argued that: ‘Israel has consistently maintained that the Covenant does not apply to areas that are not subject to its sovereign territory and jurisdiction’⁴⁸ (i.e. the West Bank and Gaza).⁴⁹ On many occasions

45 Eugène Borel’s Arbitral Award in the case of the *Dette publique ottomane*, RIAA vol. I, 535. Author’s translation; original text: ‘Quels que soient les effets de l’occupation d’un territoire par l’adversaire avant le rétablissement de la paix, il est certain qu’à elle seule cette occupation ne pouvait opérer le transfert de souveraineté’. See also A. Pellet ‘The Destruction of Troy will not Take Place - There is but one Criterion Applicable in the Law of Belligerent Occupation: Respect for the Sovereign Rights of the Occupied People’, in E. Playfair (ed.), *The Administration of Occupied Territories: The West Bank* (Oxford: Clarendon Press, 1992) 169–204, at 174–180; in French: ‘La destruction de Troie n’aura pas lieu – Il n’y a qu’un critère de mise en oeuvre du droit de l’occupation de guerre: le respect des droits souverains du peuple soumis à occupation’, *Palestine Yearbook of International Law* (1987–1988), at 51–58.

46 Wall Advisory Opinion, *supra* note 44, at 181–182, § 115 and at 184, § 122.

47 Even though it denies, — wrongly in my opinion — the occupied territory status of some portions of the territory annexed following the 1967 armed conflict (Golan Heights, East Jerusalem). Among the numerous resolutions of the General Assembly condemning the occupation, one can mention: A/RES/63/29, 26 November 2008, A/RES/61/25, 1 December 2006, A/RES/58/21, 3 December 2003 (*Peaceful settlement of the question of Palestine*), A/RES/43/58, 6 December 1988 (*Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories*). A great number of resolutions of the Security Council also remind Israel of the duties of an occupying country; see in particular SC Res: 446, 22 March 1979; 452, 20 July 1979; 465, 1 March 1980; or, 904, 18 March 1994.

48 UN Doc. E/1990/6/Add.32, § 5; see also the Wall Advisory Opinion, *supra* note 44, 173–174, § 93 and the ruling of the Supreme Court of Israel, 30 May 2004, mentioned, at 175–176, § 100.

49 Such is the stand constantly maintained by Israel before human rights treaty monitoring bodies. See *Concluding observations of the Committee on the Elimination of Racial Discrimination: Israel*, UN Doc. CERD/C/ISR/CO/13, 14 June 2007, § 3; *Report by the Committee for the elimination of discrimination against women*, UN Doc. A/60/38, 31 August 2005, § 243; *Final Observations of the Human Rights Committee: Israel*, UN Doc. CCPR/CO/78/ISR, 21 August 2003, § 1.

the United Nations General Assembly⁵⁰ and the Security Council⁵¹ have recalled the enforceability, in all occupied territories, of the law of war occupation, and in particular of the Fourth Geneva Convention, as the ICJ recalled in its *Wall* Advisory Opinion of 2004.⁵²

In the Cairo Agreement of 4 May 1994, on Gaza and Jericho, and in the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip signed in Washington DC on 25 September 1995, Israel recognizes⁵³ the Palestinian jurisdiction in judicial (including criminal)⁵⁴ and human rights⁵⁵ matters. By accepting the ICC's jurisdiction with regard to the crimes specified in Article 5 of the Rome Statute, Palestine partly discharges this responsibility.⁵⁶

It is additionally noteworthy that, in its 2004 Advisory Opinion, the ICJ stressed that section III of the Regulation appended to the 1907 Hague Regulations that 'concerns "Military authority over the territory of the hostile State"', is particularly pertinent in the present case.⁵⁷ In doing so, the ICJ clearly considers that the Fourth 1949 Geneva Convention 'is applicable in the Palestinian territories which before the conflict lay to the east of the Green Line and which, during that conflict, were occupied by Israel, *there being no need for any enquiry into the precise prior status of those territories*'.⁵⁸ The same reasoning can be transposed, *mutatis mutandis*, to this instance:

- (i) The general interpretation rule reflected in Article 31 of the 1969 Vienna Convention should be applied to Article 12 of the Rome Statute;⁵⁹

50 See GA Res.10/2, 23 April 1997: 'Also convinced, in this context, that the repeated violation by Israel, the occupying Power, of international law and its failure to comply with relevant Security Council and General Assembly resolutions and the agreements reached between the parties undermine the Middle East peace process and constitute a threat to international peace and security'. See also GA Res. 63/29, 26 November 2008, *supra* note 47.

51 See SC Res. 242, 22 November 1967, which stresses the inadmissibility of the acquisition of territories by means of war and calls for the 'withdrawal of Israel armed forces from territories occupied in the recent conflict' and 'termination of all claims or states of belligerency'; see also SC Res. 446, 22 March 1979 and more recent resolutions cited above, note 47.

52 *Wall* Advisory Opinion, *supra* note 44, at 176, §§ 98–99.

53 It cannot be a transfer of jurisdiction: the occupying party is certainly not the original holder; see, for instance, on that matter: G. Bastid-Burdeau, 'Les références au droit international dans la question des titres de compétence dans les territoires de l'ancienne Palestine sous mandat: incertitudes et confusion' in SFDI, *Colloque de Rennes, Les compétences de l'Etat en droit international* (Paris: Pedone, 2006), at 169.

54 See Arts IV and XVII of the Interim Agreement and Annex IV, Art. I (see also Art. VII, § 2, Oslo Agreement of 13 September 1993).

55 See Art. XIX, *ibid.*

56 It is a fact that the Israel Palestinian agreements exclude Israeli citizens from the jurisdiction of Palestinian courts (see Art. XVII 4 ii) of the 1995 interim agreement and Art.13 ii) of Appendix IV. But it is more than doubtful that bilateral agreements prevail over the ICC's jurisdiction such as specified in its Statute. This is the short answer (on this difficult issue a detailed discussion of which would exceed the scope of this paper) to the interesting discussion in Ronen, *supra* note 4, 18–20 and Shany, *supra* note 4, 339–342).

57 *Wall* Advisory Opinion, *supra* note 44, at 171, § 89 (emphasis added).

58 *Ibid.*, at 177, § 101.

59 See *supra*, at 988.

- (ii) That provision applies whenever a state (holding a territorial or personal title) makes the declaration planned in Paragraph 3,⁶⁰
- (iii) It reflects the intention of the authors of the Statute not to permit a state to unilaterally block the exercise of its jurisdiction by the ICC and to give as broad an extent as possible to the fight against impunity of the crimes listed in Article 5, which is the basic object of the treaty;⁶¹
- (iv) While encompassing both the territorial sovereignty and the jurisdiction of the flag or registration state within the spaces submitted to an international legal regime, Article 12(2)(a) of the ICC Statute is worded in such a way as to cover all the world spaces; in the contemporary world, there exists no more '*terra nullius*' (namely spaces free of any state or inter-state hold): they are either submitted to a state sovereignty or to an international legal regime according to which states may exercise police powers, by virtue of their 'personal' jurisdiction, over ships, aircrafts and space objects; the consequence thus entailed by Article 12(2)(a) is consistent with the overall philosophy of the Statute: universal jurisdiction calls for an universal field of application.

It can be inferred from the above that one or more contracting Parties could not prevent the Palestinian declaration of 21 January 2009 from producing its effects on the Palestinian territory; by making it ineffective, the Court would give its blessing to the constitution of a zone of impunity in the territories occupied by Israel, which is contrary to the intentions of the authors of the Rome Statute, and to its very purpose and object, since, in this case, *no* state could grant the Court jurisdiction within these territories.⁶²

The situation which would ensue from the ICC's refusal to give effect to the 2009 Palestinian declaration accepting its jurisdiction would be far more shocking and would have far more serious consequences than the one resulting from the position — moreover quite open to criticism⁶³ — of Switzerland

60 See *supra*, at 991.

61 *Ibid.*

62 It has been argued that 'there is no such situation, in the Palestinian territories or elsewhere, since the Security Council's power to grant jurisdiction is territorially and personally unlimited' (Ronen, *supra* note 4, at 17). It remains that if this were to be accepted as a bar to the possibility for Palestine to accept the jurisdiction of the Court under Art. 12(3) ICCSt., the Palestinian territory would be the *only one* on earth (i) for which the territorial sovereign (and there is no doubt that it is Palestine, not Israel) could not accept the Court's jurisdiction on the basis of Art. 12, (ii) while the Security Council could only act within the framework of Chapter VII and (iii) even in that case, impunity would be entirely left to the good will of the Council and the absence of veto within that organ. As noted by Prof. Shany, '[a]s a result, the actual reach of the ICC depends on the combined effect of its delegation-based and universalistic jurisdictional powers. Cutting one "branch" of jurisdiction would leave the ICC with truncated capabilities for fulfilling its mandate.' (Shany, *supra* note 4, at 337).

63 For a few examples of those justified criticisms, see for instance, V. Gowlland-Debbas 'Collective Response to the Unilateral Declarations of Independence of Southern Rhodesia and Palestine: An Application of the Legitimizing Function of the United Nations', LXI *British Year Book of International Law* (1990), in particular at 141, or F. Ouguergouz, 'Palestine and the August 12,

following Palestine's 1989 ratification of the Fourth 1949 Red Cross Conventions. Indeed, as explained by the ICJ:

Palestine gave a unilateral undertaking, by declaration of 7 June 1982, to apply the Fourth Geneva Convention. Switzerland, as depositary State, considered that unilateral undertaking valid. It concluded, however, that it '[was] not — as a depositary — in a position to decide whether' ... 'the request [dated 14 June 1989] from the Palestine Liberation Movement in the name of the "State of Palestine" to accede' *inter alia* to the Fourth Geneva Convention 'can be considered as an instrument of accession'.⁶⁴

In other words, the unilateral undertaking by Palestine (which certainly binds it)⁶⁵ overcame most⁶⁶ of the disadvantages resulting from Switzerland's undeniable failure to perform its duties as depositary.⁶⁷ Under its 1982 Declaration Palestine was (and is) bound to comply with the rules of the Fourth 1949 Convention. However, the implementation of the Rome Statute is not Palestine's responsibility, it is the Court's. If the latter declares the Palestinian declaration to be invalid, it will remain irreversibly (except if the Security Council takes action) ineffective in the Palestinian occupied territories.⁶⁸

This situation would be all the more intolerable since by its very nature, the purpose of the Statute is to protect the basic interests of the international community as a whole and is reminiscent of the 1948 Genocide Convention of which the ICJ observed that:

In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high

1949 Geneva Conventions or the History of an Aborted Membership', in Boisson de Chazournes and Gowlland-Debbas (eds), *supra* note 23, 507–543.

64 *Wall Advisory Opinion*, *supra* note 44, at 173, § 91.

65 See *Nuclear Tests Case*, ICJ Reports (1974), 267, at § 43 and 472 at § 46; see also Guiding Principles applicable to unilateral declarations of states capable of creating legal obligations, in particular principles no. 1 and 3 (see ILC's Report on its fifty-eighth session (1 May–9 June and 3 July–11 August 2006) General Assembly, Official Documents, 61st session, Supplement No. 10, (A/61/10), at 370.

66 This situation could however be unfair to Palestine if it were found that its undertaking was made without any condition of reciprocity — for reasons that do not need to be developed here, it is not my opinion.

67 See Art. 77 VCLT, which indisputably shows that Switzerland — which was indeed not responsible for pronouncing on the nature of the PLO's application — should have informed the parties to the 1949 Conventions as well as the states eligible to become such parties.

68 In addition, the Swiss government relied on the fact that 'in its capacity as depositary of the Geneva Conventions and their additional protocols, it was not in a position to settle the point of knowing whether that communication has to be considered as a membership instrument in the meaning of the relevant contractual provisions of the Conventions and their additional protocols' (Note d'information du Gouvernement suisse, Berne, 13 September 1989, § 2—original text: en sa qualité de dépositaire des Conventions de Genève et de leurs Protocoles additionnels, [il n'était] pas en mesure de trancher le point de savoir si cette communication doit être considérée comme un instrument d'adhésion au sens des dispositions conventionnelles pertinentes des Conventions et de leurs Protocoles additionnels). The Court, which has the *Kompetenz Kompetenz* (see *supra*, at 988), could not take shelter behind such reasoning.

purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties.⁶⁹

As the ICJ found in the same Advisory Opinion (and as is true in the present case):

The object and purpose of the Genocide Convention [here the Rome Statute] imply that it was the intention of the General Assembly [here the State Parties Conference] and of the States which adopted it that as many States as possible should participate. The complete exclusion from the Convention of one or more States would not only restrict the scope of its application, but would detract from the authority of the moral and humanitarian principles which are its basis. It is inconceivable that the contracting parties readily contemplated that an objection to a minor reservation should produce such a result.⁷⁰

4. Conclusion

As a result, and based on this review, I am led to conclude that the Palestinian Declaration of 21 January 2009, accepting the ICC's jurisdiction for the purpose of identifying, prosecuting and judging the authors of crimes listed in Article 5 of the Rome Statute committed in the territory of Palestine since 1 July 2002 and their accomplices, can be effective in accordance with the provisions of Article 12 of the Statute, and specifically that all conditions for the Court to exercise its jurisdiction in pursuance of Article 13 are met:

– *Ratione materiae*, the Goldstone Report — to mention only it — provides for reasonable belief that crimes that could fall under the Court's jurisdiction may have been committed by both sides⁷¹ during 'Operation Cast Lead';⁷²

69 ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, ICJ Reports (1951), at 24. See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections*, Merits, ICJ Reports (1996), 611 at § 22, and in the same case, Judgment of 26 February 2007, § 161 and the *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports (1996) at 257.

70 ICJ Report (1951), at 24; see also ICJ Report (1996), 612 at § 22.

71 It is not uninteresting to note that Palestine intends to follow up on the recommendations of the Goldstone Report, by setting up an independent investigating committee in its territory (see Letter dated 29 January 2010 from the Permanent Observer of Palestine to the United Nations addressed to the Secretary-General, Appendix II, UN Doc. A/64/651, Report of the Secretary-General, Follow-up to the report of the United Nations Fact-Finding Mission on the Gaza Conflict). This undertaking, which can only be based on the territorial sovereignty of the Palestinian Authority in the occupied territories, is part of the same process that led to the 21 January 2009 declaration.

72 Other international reports lead to believe that war crimes and/or crimes against humanity may have been committed in the territory of Palestine since 1 July 2002; see in particular Amnesty International, *Israel/Gaza: Operation "Cast Lead": 22 days of death and destruction* (2009), available online at <http://www.amnesty.org/en/library/info/MDE15/015/2009/en>, and Human Rights Watch, *Rain of Fire, Israel, Unlawful Use of White Phosphorus in Gaza*, report

- *Ratione temporis*, by retrospectively recognizing the jurisdiction of the ICC for actions posterior to 1 July 2002 (the date on which the Rome Statute came into force), the Declaration complies with the terms of Article 11;⁷³
- *Ratione loci* (and as a result *ratione personae*), it extends the jurisdiction of the Court to crimes committed on the territory of Palestine, upon which only the Palestinian Authority has territorial sovereignty⁷⁴ (and to the persons having committed them) in accordance with the provisions of Article 12(2)(b), which provides for the Court's jurisdiction over a state 'on the territory of which the conduct in question occurred'; and
- '*Ratione conventionis*' so to speak, these mechanisms can be set into motion, in pursuance of the statement made by a relevant Palestinian authority⁷⁵ on 21 January 2009.

On this last point, which is central to the issues discussed in this paper, it appears to me that the Court does not, for the reasons developed above, need to pronounce, in theory, on the issue of whether or not Palestine is a state for all purposes. This would require the Court to take a decision replacing its own judgment to the sovereign assessment of states that constitute the international society (and that have a power of appreciation for that purpose) whereas they are deeply divided and do not share the same views on the issue. Rather, the Court just has to acknowledge that, whatever the situation in other cases, for the purpose of the Rome Statute, this Declaration could be made in accordance with the provisions of Article 12 and that it can have the effects specified by Article 13.

This said, I remain convinced that Palestine meets all the necessary requirements to be considered a state (even if its territory is entirely or nearly entirely occupied),⁷⁶ and it would suffice for Palestine to proclaim this status to avoid any doubts. I must also say that by making the Declaration for the purposes

dated 25 March 2009, at <http://www.hrw.org/fr/reports/2009/03/25/rain-fire> (both websites visited 23 August 2010).

73 Article 11, Jurisdiction *ratione temporis*: 1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute. 2. If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, Paragraph 3.'

74 See the remarks made above, *supra* at 992–993.

75 The Declaration is signed by the Minister for Justice, but as noted by the ICJ, 'with increasing frequency in modern international relations other persons [other than the Head of State, the Head of Government and the Minister for Foreign Affairs] representing a State in specific fields may be authorized by that State to bind it by their statements in respect of matters falling within their purview. This may be true, for example, of holders of technical ministerial portfolios exercising powers in their field of competence in the area of foreign relations, and even of certain officials.' See *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, judgment of 3 February 2006, § 47.

76 With some doubts, which are however not relevant in the present case, one may have due to a limited territorial control of the Gaza strip by the Palestinian Authority.

of Article 12 ICC Statute, Palestine rightly behaved as a state. This could attenuate my reluctance not to characterize Palestine as a state under general international law⁷⁷ due to the lack of a proper *animus* (or intention) to consider it a state in the mind of the Palestinian Authority, since the 1993 Oslo and 1994 Cairo agreements.⁷⁸

⁷⁷ Cf. *supra* note 4.

⁷⁸ These are agreements concluded between the 'Government of the State of Israel' and the PLO representing the Palestinian People, which attests that the Palestinian Authority itself does not consider Palestine a state.