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Editors

Is There a Court for Gaza?

A Test Bench for International Justice

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Chapter 9 The Effects of Palestine's Recognition of the International Criminal Court's Jurisdiction

Allain Pellet

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9.1 Introduction

1. This opinion has been written on the request of Maître William Bourdon, Barrister at law before the Court of Paris. It attempts to determine whether the Palestinian Authority's recognition of the International Criminal Court's (hereinafter "the ICC" or "the Court") jurisdiction in a statement dated January 21, 2009, can have any effect for the purpose of Article 12 of the ICC Statute. It therefore limits itself to a purely legal point of view, in spite of the obvious political aspect permeating the background it applies to.

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2. Article 12 of the Rome Statute is worded as follows:

Preconditions to the exercise of jurisdiction

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, para (a) or (c),¹ 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 para 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 para 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.

3. The Palestinian declaration dated January 21, 2009 is worded as follows:

The Government of Palestine hereby 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 July 1, 2002.

4. It is clear from the start that the issue is whether such recognition may produce effects considering the terms of Article 12 of the ICC Statute and the controversial nature of the Palestinian entity. The answer to such a question must rely on a teleological and functional approach.

¹ Article 13: *Exercise of jurisdiction*: “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) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with Article 15.”

Article 14: *Referral of a situation by a State Party*: “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. As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation.”

Article 15: *Prosecutor*: “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.” (paras 3–6 not reproduced).

9.2 The Relevance of a Functional Approach

5. Although it could make sense to consider that Palestine is a State in the general and usual meaning of the word and the present Opinion has been drafted notwithstanding the solution to be given to that issue,² it seems pointless to have a categorical stand on that issue to answer the question raised which is not formulated in a general and abstract way, but in the specific and precise context of Article 12 of the ICC Statute.

6. It is important to stress that though the Court itself has to consider the scope of the recognition dated January 21, 2009, it should not attempt to determine the nature of the Palestine State in the abstract; it should only wonder whether, under Article 12 of its Statute, the Palestinian declaration can be effective. It does not belong to the Court to substitute itself to States in recognising Palestine as a State³; it is only called to pronounce on whether the conditions for exercising its statutory jurisdiction are fulfilled.

7. With regard thereto, the problem is rather 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 with its resolution A/RES/63/3 of 8 October 2008, and currently under deliberation. In that case, the General Assembly was careful not to ask the ICJ about the State status of Kosovo in general; it asked whether “the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo [is] in accordance with international law?” Likewise in this instance, the ICC is not called for to “recognise” the State of Palestine, but only to ensure that the conditions necessary for the exercise of its jurisdiction are fulfilled.

8. 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, but for that one only, it has to determine whether Palestine is a State *in the meaning of Article 12, para 3, of the Statute*, which comes to wondering whether Palestine could usefully 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

² For my stand on that issue, see Pellet 1998, pp. 51–52; in essence, I show there that 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: Daillier et al. 2009, pp. 509–512.

³ Currently more than one hundred States have recognised Palestine as a State, though figures vary rather significantly from one source to the other—see http://en.wikipedia.org/wiki/state-of-palestineStates_recongising_the_state_of_palestine.

Palestinian declaration fulfils the conditions set out in Article 12, para 3, enabling the Court to exercise its statutory jurisdiction.

9. A functional approach to concepts 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...”⁴; Such is also the approach followed by the ICJ to grasp the concept of international organisation: in order to answer the question of whether the United Nations Organisation has international personality—which issue, it noted, “is not settled by the actual terms of the Charter”—the World Court considers that “we must consider what characteristics it was intended thereby to give to the Organization”.⁵ When commenting on that “praetorian revolution” [*révolution prétrorianne*]⁶—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 “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”⁶; and the author continues by giving numerous examples of recognition of a functional legal personality to individuals before international criminal courts,⁷ to companies in investment laws,⁸ to non-State armed entities,⁹ to micro States whose dependence on their neighbours leaves one to wonder about their true sovereignty.¹⁰

⁴ See among the numerous examples: the Vienna Conventions on Diplomatic Relations of 1961 and on Consular Relations of 1963 (Article 1), the Vienna Conventions on the Law of Treaties of 1969 and 1986 (Article 2), the Convention against Torture of 1984 (Article 1), the United Nations Convention on the Law of the Sea of 1982 (Article 1), the 1992 United Nations Framework Convention on Climate Changes (Article 1), the 1997 Convention on the Law of Non-Navigational Uses of International Watercourses (Article 2) or the 1998 Aarhus Convention Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Article 2).

⁵ ICJ, Advisory Opinion, 11 April 1949, *Reparation for Injuries Suffered in the Service of the United Nations*, Rep. 178. See also below, para 19.

⁶ Dupuy 2002, pp. 108–109. My translation [« *[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* »].

⁷ *Ibid.*, 111.

⁸ *Ibid.*, 112.

⁹ *Ibid.*, 112.

¹⁰ The example of Monaco is given on p. 111; one can also think of the example of Andorra, before its 1993 constitution.

10. Besides, some conventional definitions of the State itself pertain to this functional approach. Such is the case, for instance, in 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–XXVII, references to States shall be deemed to apply to any international intergovernmental organisation which conducts space activities if the organisation declares its acceptance of the rights and obligations provided for in this Convention and if a majority of the States members of the organisation are State Parties to this Convention and to the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies.¹¹

11. As stated by Advocate General Sir Francis Geoffrey Jacobs in the ECJ *Stardust* case:

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.¹²

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.¹³

¹¹ See also the definition of a “country” in the Explanatory Notes of the Agreement Establishing the WTO dated April 15, 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.”

¹² ECJ, *French Republic v Commission*, Case C-482/99, Rep. p. I-04397, Opinion of the Advocate General, December 13, 2001, *ibid.*, para 56. See the Court’s ruling in this case (dated May 16, 2002, para 55).

¹³ ECJ, *Farell*, case C-356/05, ruling dated April 19, 2007, Rep. p. I-03067, para 40. See also Case C-188/89 *Foster and Others* [1990] ECR I-3313, para 20; Case C-343/98 *Collino and Chiappero* [2000] ECR I-6659, para 23; and Case C-157/02 *Rieser Internationale Transporte* [2004] ECR I-1477, para 24.

12. It is also this idea that supports the principle applied by the European Court of Human Rights in the *Drozdz 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,¹⁴ despite its *sui generis* nature that the Court stresses robustly.¹⁵ It is noteworthy that the 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 was supposed to be.

13. Similarly, an ICSID tribunal noted that:

74 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. (...).

75 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.¹⁶

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".¹⁷

14. As has been stressed in doctrine, "following actually a 'functional approach' ultimately called for by the World Court 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

¹⁴ Which provides for the possibility that a European 'country' become an associate member.

¹⁵ ECHR, Plenary, req n° 12747/87, *Drozdz and Janousek v France and Spain*, ruling dated June 26, 1992, paras 67 and 86.

¹⁶ *Maffezini v. Spain*, Case N° ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000, ICSID Rev.—For. Investment L. JI., pp. 27–28, paras 74–75.

¹⁷ Forteau 2007, pp. 762–763. My translation [*« sous un angle distinct de celui de l'attribution au sens du droit de la responsabilité, car 'l'État' peut avoir un sens particulier dans le contexte du litige »*].

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 State¹⁸ or the jurisprudential formula whereby international or foreign courts decide that such an entity 'must be considered as an emanation of the State'), and the latter is, in contemporary international law, increasingly understood differently depending on the norm being applied".¹⁹

15. 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.

9.3 The Validity of the Palestinian Declaration of 21 January 2009

16. 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 principle of the *kompetent kompetenz*, according to which it is judge of its own jurisdiction. This is a general principle of international dispute settlement²⁰ whose specific conditions of implementation by the ICC are specified in Articles 18 and 19 of the Statute.

¹⁸ [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 (...)." My translation [*« 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 (...) »*].

¹⁹ Forteau 2007, p. 768—my translation [*« [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 'périmètre' 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 [fn.18] 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 Higgins 2001, pp. 547–562.

²⁰ See ICJ, Judgment, 21 March 1953, *Nottebohm (Liechtenstein v Guatemala)*, Preliminary Objection, Rep. 1953, p. 7, para 119 or ICTY, Appeal Chamber, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, 2 October 1995, IT-94-1-T, *Prosecutor v. Dusko Tadić*, para 17.

17. That appreciation must be made in accordance with the “general rule of interpretation” codified in Article 31, para 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.

18. 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”²¹ 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 (organisations and courts—the ICC being both) is a privileged area of teleological treaty interpretation.

19. The *Comte Bernadotte* case is a remarkable illustration of the use of such reasoning. The ICJ justifies therein the use of the UN’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.²²

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.²³

20. 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 ICTY in its founding ruling:

10. [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. [...]

11. 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

²¹ Above, n. 17.

²² Advisory Opinion, above, n. 5, p. 179.

²³ *Ibid.*, p. 182. See also PCIJ, Advisory Opinion n° 13, 23 July 1926, *Competence of the ILO to Regulate Incidentally the Personal Work of the Employer*, Series B, N° 13, p. 18.

on. Such limitations cannot, however, be presumed and, in any case, they cannot be deduced from the concept of jurisdiction itself.²⁴

21. The ICJ has faced similar issues in the *Genocide and Legality of the Use of Force* cases brought before it in the framework of the Yugoslav crisis.²⁵ Without entering into the meandering (and contradictions) of the Court’s successive argument 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 World Court,²⁶ 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 minimise,²⁷ 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.

22. 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.²⁸ 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. For that purpose, the sensible guideline appearing in

²⁴ Decision, above, n. 20, paras 10–11. For another illustration of that approach, see for instance: ICJ, Advisory Opinion, 16 October 1975, *Western Sahara*: “the references to ‘any legal question’ in the abovementioned provisions of the Charter and Statute are not to be interpreted restrictively” (Rep 1975, p. 20, para 18).

²⁵ 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 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.

²⁶ Although it had not formally given notice of the discontinuance of the proceedings (Rep 2004, pp. 293–295, paras 31–36)—see also the ruling dated November 28, 2008, para 89; for the Preliminary Objections, see pp. 327–328, paras 129–172: 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” (Rep 2007, para 83).

²⁷ See in particular Rep 1993, p. 14, para 18; see also the 2007 Judgment, para 130 or the 2008 Judgment, para 75.

²⁸ On all these matters, see Charles de Visscher 1963, p. 263 or Denys Simon 1981, *passim*—in particular pp. 319–466.

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.²⁹

23. Article 12 of the Statute,³⁰ according to its very title, establishes the "Preconditions to the Exercise of Jurisdiction" by the ICC. Participation in the Statute (para 1) or the declaration provided for in para 3 are therefore conditional acts whose non-existence would prevent the Court from exercising its jurisdiction. It is indeed only if this declaration is made³¹ that the Court can carry out its mission (to which para 1 of Article 12 formally refers, mentioning "the crimes specified in Article 5"³²): the judgment of persons accused of the crime of genocide, of a crime against humanity or of a war crime. This involves, to quote the terms of the Preamble, crimes of such gravity that they "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."

24. It is also telling that according to the terms of Article 12, para 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.³³ 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 para 3 of Article 12, or with regard to nationals of States that are not parties nor have formulated a declaration.³⁴ 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

²⁹ ILC, Yearbook 1966, vol. II, p. 218, para (6) of the Commentaries under Draft Article 28.

³⁰ Above, para 1.

³¹ The question of Palestine ratifying the Statute does not arise for now, but it is not forbidden that it might appear in the future.

³² Article 5, para 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 Article 13, referring to para 2 of Article 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".

³³ 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 Kaul 2002, pp. 593–605.

³⁴ See in particular Condorelli 1999, p. 18.

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, by the European Court of Human Rights 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, can, in its principle, be transposed to the problem under review:

41. 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 (Article 24[sic] [sic]) of the Convention or the referral of cases to the Court under Article 48 (Article 48) (see application no. 8007/77, *loc. cit.*, pp. 147–148). 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.³⁵

25. 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*".³⁶ 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, that have recognised Palestine as such³⁷—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.

26. Besides, it is indeed in its capacity as territorial sovereign that Palestine made the declaration under Article 12, para 3, on January 21, 2009:

The Government of Palestine hereby recognizes the jurisdiction of the Court for the (...) crimes committed *on the territory* of Palestine since 1 July 2002.³⁸

27. There is no doubt that the West Bank and Gaza are occupied territories and are internationally recognised as such. Like 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

³⁵ ECHR, *Loizidou v. Turkey, Preliminary Objections*, 23 March 1995, n°. 15318/89, para 41. My emphasis.

³⁶ Kaul 2002, p. 609.

³⁷ See above, n. 3.

³⁸ For the full text of the declaration, see above para 3.

(including East Jerusalem) remain occupied territories and Israel has continued to have the status of occupying Power.³⁹

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

- In no way does the occupation of a territory grant the occupying power sovereignty thereupon: “Whatever the effects of the occupation of a territory by the opponent before peace is re-established, it is certain that such occupation alone does not cause the sovereignty to be transferred”.⁴⁰
- Conversely, the *de facto* annexation of Palestinian territories infringes territorial sovereignty and the rights of the Palestinians to self-determination.⁴¹ 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 inalienable, but also Article 1 of the Declaration of Principles on Interim Self-Government Arrangements (Washington, 13 September 1993—“Aim of the Negotiations”) emphasises 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;
- Besides, Israel does not claim the exercise of territorial sovereignty over the occupied territories⁴²; thus for instance, in its report to the Committee on Economic and Social Rights, dated October 19, 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”⁴³ (i.e. the West Bank and Gaza).⁴⁴

- On many occasions the United Nations General Assembly⁴⁵ and the Security Council⁴⁶ 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* Opinion of 2004.⁴⁷
- 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 recognises⁴⁸ the Palestinian jurisdiction in judicial (including criminal)⁴⁹ and human rights⁵⁰ 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.⁵¹

29. It is additionally noteworthy that, in its 2004 Opinion, the World Court 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”.⁵² In doing so, the ICJ clearly considers that the Fourth 1949 Geneva Convention “is applicable in the Palestinian territories

³⁹ E/1990/6/Add.32, para 5; see also the Advisory Opinion, above, n. 39, Rep 2004, pp. 173–174, para 93 and the ruling of the Supreme Court of Israel dated May 30, 2004, mentioned, same pp. 175–176, para 100.

⁴⁰ Such is the stand constantly maintained by Israel before the universal human rights conventions monitoring bodies. See CERD/C/ISR/CO/13, para 3. CEDAW, Report by the Committee for the elimination of discrimination against women, August 31, 2005, doc A/60/38, p. 143, para 243, Human Rights Committee, Final Observations of the Human Rights Committee, Israel, August 21, 2003, doc CCPR/CO/78/ISR, para 1.

⁴¹ See the General Assembly resolution A/ES–10/2 dated April 23, 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 A/RES/63/29 dated November 26, 2008, above n. 42.

⁴² See resolution 242 (1967) dated November 22, 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 resolution 446 (1979) dated March 22, 1979 and more recent resolutions cited above, n. 42.

⁴³ Above, n. 39, Rep 2004, p. 176, paras 98–99.

⁴⁴ It cannot be a transfer of jurisdiction: the occupying party is certainly not the original holder; see, for instance, on that matter: Bastid-Burdeau 2006, p. 169.

⁴⁵ See Articles IV and XVII of the Interim Agreement and annex IV, Article I (see also Article VII, para 2, de Oslo Agreement of 13 September 1993).

⁴⁶ See Article XIX *ibid*.

⁴⁷ It is a fact that the Israel–Palestinian agreements exclude Israeli citizens from the jurisdiction of Palestinian courts. See Article XVII 4(ii) of the 1995 interim agreement and Article 13(ii) of Appendix IV. But it is doubtful that bilateral agreements prevail over the ICC’s jurisdiction such as specified in its Statute.

⁴⁸ Above-mentioned Advisory Opinion, note 39, Rep 2004, p. 171, para 89, emphasis added.

³⁹ ICJ, Advisory Opinion, 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Rep 167, para 78.

⁴⁰ Eugène Borel’s Arbitral Award in the case of the *Dette publique ottomane*, RIAA, vol. I, p. 535, my translation [« *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 Pellet 1992, pp. 174–180; in French: “*La destruction de Troie n’aura pas lieu—Il n’y a qu’un critère de mise en œuvre du droit de l’occupation de guerre: le respect des droits souverains du peuple soumis à occupation*” (Pal YBIL, 1987–1988, pp. 51–58) and the case-law and doctrine cited.

⁴¹ See above n. 39, the ICJ’s Advisory Opinion, pp. 181–182, para 115 and p. 184, para 122.

⁴² 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, 1st 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 446 (1979), 22 March 1979, 452 (1979), 20 July 1979, 465 (1980), 1st March 1980 or 904 (1994), 18 March 1994.

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*".⁵³

30. The same reasoning can be transposed, *mutatis mutandis*, to this instance:

- The general interpretation rule reflected in Article 31 of the 1969 Vienna Convention should be applied to Article 12 of the Rome Statute⁵⁴;
- That provisions applies whenever a State (holding a territorial or personal title) makes the declaration planned in para 3⁵⁵;
- 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 treaty⁵⁶;
- 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, para 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, para 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 January 21, 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.

31. 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 criticism⁵⁷—of Switzerland following

⁵³ *Ibid.*, p. 177, para 101.

⁵⁴ See above, para 17.

⁵⁵ See above, para 23.

⁵⁶ *Ibid.*

⁵⁷ For a few examples of those justified criticisms, see for instance: Vera 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", *BYBIL*, Vol. LXI (1990), in particular p. 141 or Fatsah Ouguergouz 2001.

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'.⁵⁸

In other words, the unilateral undertaking by Palestine (which certainly binds it)⁵⁹ overcame most⁶⁰ of the disadvantages resulting from Switzerland's undeniable failure to perform its duties as depositary⁶¹: 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's⁶²: 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.

31. This situation would be all the more intolerable that 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 purposes which are the *raison d'être* of the convention. Consequently, in a convention of

⁵⁸ Advisory Opinion, above, n. 39, Rep 2004, p. 173, para 91.

⁵⁹ See ICJ, Judgment, 20 December 1974, *Nuclear Tests*, Rep 1974, p. 267, para 43 and p. 472, para 46; see also Principles relating to Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, in particular principles n° 1 and 3 (see ILC's Report on its fifty-eighth session (May 1–June 9–July 3–August 11, 2006) General Assembly, Official Documents, 61st session, Supplement n° 10, (A/61/10) p. 370.

⁶⁰ 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.

⁶¹ See Article 77 of the 1969 Vienna Convention on Law of Treaties, 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.

⁶² 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, para 2). The Court, which has the *kompetenz kompetenz*, (see above para 16), could not rely on such reasoning.

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.⁶³

As the World Court 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.⁶⁴

33. 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 1st 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—allows to reasonably believe that crimes that could fall under the Court's jurisdiction may have been committed by both sides⁶⁵ during the "Operation Cast Lead"⁶⁶;

⁶³ ICJ, Advisory Opinion, 28 May 1951, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Rep. 1951, p. 24. See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections*, Rep. 1996, p. 611, para 22 and, in the same case, Judgment of 26 February 2007, para 161 and the Advisory Opinion, 8 July 1996, *Legality of the Threat or Use of Nuclear Weapons*, Rep. 1996, p. 257.

⁶⁴ Rep. 1951, p. 24; see also Rep. 1996, p. 612, para 22.

⁶⁵ 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, document A/64/651, Report of the Secretary-General, Follow-up to the report of the United Nations Fact-Finding Mission on the Gaza Conflict. The undertaking, which can only be based on the territorial sovereignty of the Palestinian Authority in the occupied territories, is part of the same process than the one that led to the January 21, 2009 declaration.

⁶⁶ Other international reports lead to believe that war crimes and/or crimes against humanity may have been committed in the territory of Palestine since July 1, 2002; see in particular Amnesty International 2009 dated July 2, 2009, and Human Rights Watch 2009 dated March 25, 2009.

- *Ratione temporis*, by retrospectively recognising the jurisdiction of the ICC for actions posterior to 1st July 2002 (the date on which the Rome Statute came into force), the Declaration complies with the terms of Article 11⁶⁷;
- *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 sovereignty⁶⁸ (and to the persons having committed them) in accordance with the provisions of Article 12, para 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 authority⁶⁹ on 21 January 2009.

34. On this last point, which is central to the issues discussed in this Opinion, it appears to me that the Court does not, for the reasons developed above, need to pronounce, in theory, on the issue of whether, "in absolute", Palestine is or not a State. This would necessitate for it to decide between the sovereign assessments of the States that constitute the international society (and that have a power of appreciation for that purpose) whereas they are deeply divided. Rather, it 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.

9.4 Postscript

This legal opinion has been co-signed by the following authorities:

Georges ABI-SAAB, Honorary Professor of International Law at the Graduate Institute of International and Development Studies, Geneva, Honorary

⁶⁷ "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, para 3."

⁶⁸ See above paras 25–28.

⁶⁹ 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" (ICJ, Judgment, 3 February 2006, *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, para 47.

Professor at the Law Faculty of the University of Cairo, Member of the Institut de Droit international

M. Cherif BASSIOUNI, Distinguished Research Professor of Law Emeritus at DePaul University College of Law, President Emeritus of the Law School's International Human Rights Law Institute, President of the International Institute of Higher Studies in Criminal Sciences (Syracusa) and Honorary President of the International Association of Penal Law (Paris)

Rafaâ BEN ACHOUR, Professor of Law, Director of the International Law and International Tribunals Research Unit, Faculty of Social, Political and Juridical Studies, Tunis

Phon van den BIESEN, Attorney at Law, Amsterdam

Michael BOHLANDER, Professor of International Law, Durham Law School, Director of the Centre for Criminal Law and Criminal Justice

Laurence BOISSON DE CHAZOURNES, Professor of International Law, Director of the Department of Public International Law and International Organization, Faculty of Law, University of Geneva

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Chapter 10 The Palestine Declaration to the International Criminal Court: The Statehood Issue

John Quigley

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In the wake of Israel's military incursion into Gaza from December 2008 to January 2009, the Palestinian National Authority filed in the International Criminal Court (ICC) a declaration accepting the jurisdiction of the ICC in the territory of Palestine. The Declaration, submitted on the letterhead of the Palestinian National Authority, Ministry of Justice, Office of Minister, reads:

Declaration recognizing the Jurisdiction of the International Criminal Court
In conformity with Article 12, para 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

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