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Confidential Communication

November 19, 2009

His Excellency Luis Moreno-Ocampo  
Prosecutor, International Criminal Court  
Post Office Box 19519  
2500CM The Hague  
The Netherlands

Via FAX: 31-70-515-8555  
And Email

RE: The Palestinian Declaration and ICC Jurisdiction

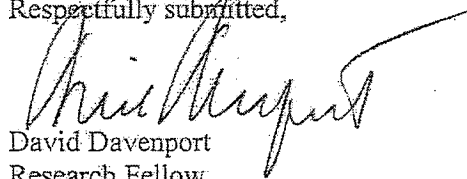
Dear Mr. Moreno-Ocampo:

The undersigned legal scholars and practitioners are concerned about the prospect of the International Criminal Court (ICC) considering the assertion of its jurisdiction, based upon a submission by the Palestinian Authority ("Declaration recognizing the Jurisdiction of the International Criminal Court, January 21, 2009").

It is our studied view that the Palestinian Authority is not a state within the meaning of Article 12(3) of the Rome Statute and therefore its submission does not establish the necessary preconditions for the exercise of legal jurisdiction by the Court. Even an exceptionally broad reading of international law and the Rome Statute would not establish a sufficient basis for jurisdiction.

You have wisely exercised your office in such a way as to avoid some concerns that the new Court might be overly expansive on matters of jurisdiction. We urge you not to allow an investigation to go forward based upon the declaration of a non-state entity such as the Palestinian Authority. A more detailed basis for our position is attached for your information.

Respectfully submitted,



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## Confidential Communication

### INTRODUCTION

The Palestinian Authority (PA) has submitted a “Declaration Recognizing the Jurisdiction of the International Criminal Court” under Article 12 (3) of the Rome Statute.<sup>1</sup> The Declaration recognizes the Court’s jurisdiction “for the purpose of identifying, prosecuting and judging the authors and accomplices of acts committed on the territory of Palestine since 1 July 2002” which is to enter into force upon its signature on 21 January, 2009.<sup>2</sup>

Article 12 (3) of the Rome Statute provides, in pertinent part, as follows:

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. . . .<sup>3</sup>

Under paragraph 2 of Article 12, the Court may then accept jurisdiction for conduct within the jurisdiction of the court (under Article 5) that occurred in “the State on the territory of which the conduct in question occurred.”<sup>4</sup> According to the title of Article 12, this is a “precondition to the exercise of jurisdiction.”<sup>5</sup>

#### I. The Palestinian Authority (PA) Is Not A State

##### A. The PA Is Not A State Under the Treaty of Rome or ICC History and Practice

A threshold question is whether the Palestinian Authority is a “State” within the meaning of Article 12 of the Rome Statute. Under the Rome Statute and ICC practice, it is apparent that no unusual definition of the term “State” was intended. Further, the practice leading up to and after the adoption of the Rome Statute indicates no intention to treat the Palestinian Authority as a “State.” Finally, territorial jurisdiction, as reflected in Article 12(3) was a carefully negotiated compromise that should not be expanded by the Court, especially under these circumstances where the PA would not have domestic judicial jurisdiction over the situation presented.

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<sup>1</sup> See “Declaration Recognizing the Jurisdiction of the International Criminal Court (21 January 2009) from Mr. Ali Khashan, Minister of Justice, Palestinian National Authority, to the ICC Registrar, available at <<http://www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279777/20090122/PalestinianDeclaration2.pdf>> The Registrar of the Court received this declaration on 22 January 2009.

<sup>2</sup> *Id.*

<sup>3</sup> Rome Statute Article 12, UN General Assembly, *Rome Statute of the International Criminal Court (last amended January 2002)*, 17 July 1998, A/CONF. 183/9, available at:

<http://www.unhcr.org/refworld/docid/3ae6b3a84.html> [accessed 29 October 2009]

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

## 1) The Rome Statute Has No Special Definition of State

Although Article 12(3) clearly requires submission by a “State,” there is no unusual definition of the term there or elsewhere in the Rome Statute. Article 125 declares that the Rome Statute shall be open for signature, ratification, acceptance, approval or accession “by all States.”<sup>6</sup> Otto Triffterer’s comprehensive *Commentary on the Rome Statute of the International Criminal Court* (2d edition) points out that this is “a decidedly standard form final clause” and, using a standard formulation of members of the United Nations and the Holy See to determine entities “generally regarded by the international community as States,” concludes: “The total potential parties to the Rome Statute thus stands at 193 . . . .”<sup>7</sup> Such a listing of States does not include Palestine or the Palestinian Authority.

Absent a specific definition of the term “State”, the Court would then turn to applicable treaties, principles and rules of international law under Article 21 of the Rome Statute. Referring to “States”, but supplying no further definition, it would seem clear that the Rome Statute would refer to that term as generally used in international law. As will be noted below (see Section I B(5) ), the international law definition of “States” does not include entities such as the Palestinian Authority.

Analogous in some ways is the case of the Faroe Islands and Greenland. When Denmark ratified the Rome Statute, it also issued a declaration that it did not intend the Statute to apply to these territories. As the Triffterer *Commentary* notes: “While this was no doubt motivated by admirable sentiments of respect for local autonomy, it had the effect of excluding the reach of the Court from a territory which, on its own, has no right to correct the situation, *because neither the Faroe Islands nor Greenland are sovereign States and as a result they cannot accede to the Statute.*”<sup>8</sup> Similarly, as will be argued below, the PA is not a sovereign state which can properly refer a case concerning the territory of Gaza to the ICC.

## 2) ICC Practice Indicates No Intention to Include Palestine or the PA as a “State”

The history and practice leading up to the Rome Statute confirm that there was no special intention that the PA be treated as a State. The roster of “Participating States” at the 1998 Rome Conference, for example, does not include Palestine or the Palestinian

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<sup>6</sup> *Id.*, art. 125

<sup>7</sup> OTTO TRIFFTERER, COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, SECOND EDITION, at 1773 (Hart Publishing Company, Oxford, 2008 edition).

<sup>8</sup> *Id.* at 557.

Authority.<sup>9</sup> Instead, “Palestine” was included with “Other Organizations” in the official diplomatic roster and its representatives were so listed.<sup>10</sup>

In the follow-up ICC Preparatory Commission meetings, again PA representatives were included with “Entities, intergovernmental organizations and other bodies having received a standing invitation to participate as *observers* in the sessions and the work of the General Assembly.”<sup>11</sup> Since the Rome Statute entered into force, the meetings of Assembly of States Parties have not included the PA (or “Palestine”) under any category of States, rather designating them again as “Entities, intergovernmental organizations and other entities.”<sup>12</sup>

### 3) Territorial Jurisdiction Under Article 12(3) Was a Careful Compromise that the Court May Not Change

The history of the drafting of Article 12(3) of the Rome Statute, in particular, indicates a careful balancing of interests that should not be altered by an extravagant reading of any term in the text such as the meaning of the term “State.” In his “Introduction” to the Triffterer *Commentary*, ICC President Philippe Kirsch explains competing positions about the preconditions to the exercise of the Court’s jurisdiction, with some wanting a broad universal jurisdiction approach, while others favored various formulations of state limitations. In the end, Kirsch notes:

As a compromise between these widely divergent positions, the Statute allows the Court to exercise jurisdiction with the acceptance of either the territorial State or the State of nationality of the accused. This provision will continue to be regarded by some as too restrictive, and by others as too permissive.<sup>13</sup>

ICC Judge Hans-Peter Kaul confirms this compromise, noting of Article 12 of the Rome Statute in particular:

Given this crucial centerpiece function of Article 12, it is hardly surprising that jurisdiction appears to have been the most important, politically the most difficult and therefore the most controversial question of the negotiations as a whole, in short, the “question of questions of the entire project.”<sup>14</sup>

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<sup>9</sup> See the Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, A/CONF.183/13, volume II at 5, 44.

<sup>10</sup> *Id.*

<sup>11</sup> See, e.g., Preparatory Commission for the International Criminal Court, 9<sup>th</sup> session, New York, 8-19 April 2002, PCNICC/2002/INF/6, 30 April 2002 (emphasis added).

<sup>12</sup> See International Criminal Court, Assembly of States Parties, 7<sup>th</sup> session (second resumption), New York, 9-13 February 2009, ICC-ASP/7/INF.1/Add.2. Compare Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, Article 31(3)(b).

<sup>13</sup> TRIFFTERER, *supra* note 7, at 11.

Kaul goes on to say that, with respect to Article 12, consensus in Rome broke down, leading finally to a vote that did not fully satisfy either the universal jurisdiction or the state sovereignty side<sup>15</sup>.

Indeed, Benjamin Schiff, in his recent book, *Building the International Criminal Court* (2008) says, "The ICC teeters between values of sovereignty and internationalism. Mechanisms devised to maintain the balance shape the Court's operational dynamics."<sup>16</sup> He agrees with Kaul that this balance was particularly sensitive on matters of jurisdiction.<sup>17</sup> For the Prosecutor or even the Court itself to find territorial jurisdiction without a referring "State" would be to alter this carefully negotiated balance, a function of the Assembly of States Parties through an amendment process, not a unilateral role for the Court or Prosecutor.

#### 4) Territorial Jurisdiction Under Article 12(3) Is Based on State Sovereignty and Domestic Judicial Authority Which the PA Does Not Have

The history of territorial jurisdiction itself confirms that there would be no I.C.C. jurisdiction in this matter. As the Triffterer *Commentary* points out: "Territorial jurisdiction is a manifestation of State sovereignty."<sup>18</sup> The underlying notion is that the State has jurisdiction over the persons and property of its own territory and its own courts could, therefore, exercise jurisdiction over crimes committed on its territory.<sup>19</sup> Thus, in effect, the territorial State is delegating its sovereign jurisdiction over crimes committed on its territory to the ICC.<sup>20</sup> As one group of commentators point out, Article 12(3) offers "States that are not Parties to the Statute... the opportunity to accept the Court's jurisdiction without putting the States under pressure to accede to the Statute itself."<sup>21</sup> Through such a submission, "the State agrees, in effect, to share with the Court part of the jurisdictional powers that are inherent in State sovereignty."<sup>22</sup>

The failure to meet the definition of a sovereign State suffices, in itself, to preclude the Palestinian Authority from bringing a claim under Article 12(3), but additionally the underlying rationale for Article 12(3) jurisdiction is not present. As is developed more fully below (see Section II C), under the specific and binding terms of the Interim Agreement, the PA does not have criminal jurisdiction over citizens of Israel,

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<sup>14</sup> ANTONIO CASSESE, PAOLA GAETA, JOHN R. W. D. JONES, *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* (Oxford University Press 2002), vol. 1, at 584.

<sup>15</sup> *Id.*

<sup>16</sup> BENJAMIN SCHIFF, *BUILDING THE INTERNATIONAL CRIMINAL COURT* (Cambridge University Press 2008) at 69.

<sup>17</sup> *Id.* at 71-72

<sup>18</sup> TRIFFTERER, *supra* note 7, at 556.

<sup>19</sup> See CASSESE, et al., *supra* note 14 at 607-08. See also TRIFFTERER, *supra* note 7, at 556-57.

<sup>20</sup> See CASSESE, et al., *supra* note 14, at 609.

<sup>21</sup> Carsten Stahn, Mohamed El Zeidy and Hector Olasolo, *The International Criminal Court's Ad Hoc Jurisdiction Revisited*, 99 AJIL (2005) 421 at 422-23.

<sup>22</sup> *Id.*

including those who are in the West Bank and Gaza.<sup>23</sup> That authority belongs to Israel alone. Hence, under Article 12(3), the PA cannot, in effect, transfer authority to the ICC that it does not itself possess through its domestic courts. At most, it could only transfer jurisdiction to investigate activities undertaken by its own citizens. These underlying details of territorial jurisdiction in Gaza not only explicate why the PA may not make a submission to the ICC but also underscore why Article 12(3) jurisdiction is rightly limited to sovereign States.

## B. The PA Is Not Regarded As A State By Other Courts and International Organizations

### 1) The United Nations Does Not Accept the PA As A State

In the United Nations General Assembly, the Palestinian Authority is not allowed to vote and is not even included in the listing of “Non-member States having received a standing invitation to participate as observer in the sessions and the work of the General Assembly and maintaining permanent observer mission at Headquarters.”<sup>24</sup> It is listed among “Entities having received a standing invitation to participate as observers in the sessions and the work of the General Assembly and maintaining permanent observer missions at Headquarters.”<sup>25</sup> This treatment—neither as a member nor as an observer “State” but rather an “Entity”—very much parallels the PA’s exclusion from the ICC.

Palestine’s own proclamation of “the establishment of the State of Palestine” in November 1988 was not accepted by the U.N. General Assembly. The General Assembly merely voted to “acknowledge” the proclamation, but no attempt was made to recommend U.N. membership for Palestine.<sup>26</sup> In 1989, a resolution was drafted in the General Assembly to designate Palestine as a State, but it was not voted upon.<sup>27</sup>

As James Crawford’s treatise on *The Creation of States in International Law (Second Edition)* concludes:

For its part, the General Assembly has stated that it has “a permanent

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<sup>23</sup> See Israeli-Palestinian Interim Agreement On the West Bank and Gaza Strip, Sept. 28, 1995, 36 I.L.M. 557. Annex IV. Article I b reads: “Israel has the power to arrest and to keep in custody individuals suspected of having committed offenses which fall within Israeli criminal jurisdiction as noted in paragraphs 1.c, 2 and 7 of this Article, who are present in the areas under the security responsibility of the Council, where: a. The individual is an Israeli, in accordance with Article II of this Annex; or b. (1) The individual is a non-Israeli suspected of having just committed an offense in a place where Israeli authorities exercise their security functions in accordance with Annex I.”

<sup>24</sup> See, e.g., Executive Office of the Secretary-General, Protocol and Liaison Service, Publication of Permanent Missions to the United Nations, No. 299, March 2009, at p. 297.

<sup>25</sup> *Id.*

<sup>26</sup> JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* (Oxford University Press, second edition, 2006, paperback edition 2007), at 435-36.

<sup>27</sup> *PLO Delays Bid for Higher U.N. Status*, L.A. TIMES, Dec. 5, 1989, at A5. Paul Lewis, *Arabs at U.N. Relax Stand on P.L.O.*, N.Y. TIMES, Dec. 6, 1989, at A3.

responsibility towards the question of Palestine until the question is resolved in all its aspects in a satisfactory manner in accordance with international legitimacy.” Both parties have agreed that unilateral action must not be taken in the meantime to change the status quo . . . .<sup>28</sup>

Indeed the Roadmap to a Permanent Two-State Solution is intended to resolve precisely this question, among others, and, as Crawford suggests, it cannot be said that there is a Palestinian State until these matters are resolved.<sup>29</sup>

Nor does the U.N. Security Council, despite issuing over 200 resolutions concerning the Palestinian Territories and Israel, regard Palestine or the PA as a state. Of the more recent declarations, UNSC Resolution 1860, (adopted on January 8, 2009) states that “the Gaza strip constitutes an integral part of the territory occupied in 1967 and *will be part of the Palestinian state.*”<sup>30</sup> This is to say that the territory *will be* part of the Palestinian state *when and if* the Roadmap to peace and the negotiated agreements are followed to fruition.

## 2) The International Court of Justice Has Not Treated The PA As A State

Only one case before the International Court of Justice (ICJ) deals with Palestine. In 2004, the ICJ issued an Advisory Opinion regarding Israel’s construction of a security wall in the occupied Palestinian territory.<sup>31</sup> Referring to Palestine as one of the actors presenting a request for an advisory opinion, the Court allowed a representative of the Palestinian Authority to submit arguments to the Court.<sup>32</sup> Under the rules of the ICJ, only States may be parties to contentious proceedings conducted before it, although the Court may receive relevant information from international organizations.<sup>33</sup> But in the case of advisory proceedings, where there are no formal parties, both States and international organizations that are relevant to the proceeding are allowed to present their positions.<sup>34</sup>

Although Palestine was allowed to participate in arguments before the ICJ, it was not as a State. Indeed the Court referred to its observer status at the United Nations. In any event, given the advisory opinion context, where the Court may rely upon international organizations (here the League of Arab States and the Organization of the Islamic Conference) as well as States, this would set no precedent regarding Palestinian statehood. Indeed, had this been a contentious proceeding, where only States may participate, the Palestinian Authority would have been excluded.

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<sup>28</sup> CRAWFORD, *supra* note 26, at 448.

<sup>29</sup> *Id.* at 446-48.

<sup>30</sup> U.N. SCOR, 63<sup>rd</sup> Sess., 6063<sup>rd</sup> mtg. at 1 U.N. Doc. S/Res/1860 (2009).

<sup>31</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2003 I.C.J. 131 (July 9, 2003).

<sup>32</sup> *Id.* at 12.

<sup>33</sup> United Nations, *Statute of the International Court of Justice*, Article 34. 18 April 1946, available at: <http://www.unhcr.org/refworld/docid/3deb4b9c0.html> [accessed 26 September 2009].

<sup>34</sup> *Id.* at Article 66.



### 3) U.S. Courts Have Held That The PA Is Not A State

In several American cases based upon the U.S. Antiterrorism Act of 1991, Palestine, the PA and the PLO have all sought immunity from suit based on the protection of “a foreign state, an agency of a foreign state, or an officer or employee of a foreign state . . .”<sup>35</sup> One question before the U.S. courts, then, was whether the PA, or the other Palestinian entities, were, in fact, a state.

Relying upon the Restatement (3<sup>rd</sup>) of Foreign Relations Law of the United States, the courts sought to determine whether Palestine (or the PA) was “an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities.”<sup>36</sup> In every case, the courts concluded that it did not. For example, in *Sokolow v. PLO*, the court held that Palestine was not a state under either U.S. or international law.<sup>37</sup> Applying the same test, the court in another case found that, “[a]t the very least, Defendants fail to establish that Palestine has the capacity to engage in formal relations with other sovereign states.”<sup>38</sup> Another court reached the same result on the grounds that the PA “lacks a defined territory with a permanent population controlled by a government that has the capacity to enter into foreign relations.”<sup>39</sup> The logic of these opinions should prompt the ICC to reach the same conclusion, that the PA is not a state.

### 4) Other International Organizations Have Declined To Find The PA A State

The only other cases where the question of Palestinian statehood arises in the context of international organizations show that the claim was turned back. For example, the Palestinian Liberation Organization (P.L.O.) applied for membership in the World Health Organization (W.H.O.) in 1989.<sup>40</sup> Ultimately the W.H.O. voted to postpone the action.<sup>41</sup> Similarly the Executive Board of UNESCO deferred a Palestinian application for membership.<sup>42</sup>

Also in 1989, the P.L.O. submitted documents to Switzerland in an effort to ratify the Geneva Conventions of 1949. Such ratifications, however, are limited to “powers” or states and the Swiss Government responded that, since a Palestinian State had not been “settled in an appropriate framework,” it would not be able to decide the matter itself.<sup>43</sup>

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<sup>35</sup> 18 USC S 237 (2) (1991).

<sup>36</sup> RESTATEMENT (3<sup>RD</sup>) OF FOREIGN RELATIONS LAW OF THE U.S. S201.

<sup>37</sup> 583 F. Supp. 2d 451, 457 (S.D.N.Y. April 9, 2009).

<sup>38</sup> *Gilmore v. Palestinian Interim Self-Government Authority*, 422 F. Supp. 2d 96, 101 (D.D.C. 2006).

<sup>39</sup> *Estates v. Palestinian Authority*, 315 F. Supp. 2d 164, 167 (D.R.I. 2004).

<sup>40</sup> Paul Lewis, *Health Organization Asks U.S. Tolerance on P.L.O.*, N.Y. TIMES, Apr. 30, 1989, at A11.

<sup>41</sup> Burton Bollag, *U.N. Health Agency Defers P.L.O. Application to 1990*, N.Y. TIMES, May 13, 1989, at A3.

<sup>42</sup> See UNESCO 132EX/31, 29 September 1989.

<sup>43</sup> *Note of Information*, Government of Switzerland, Berne, Sept. 13, 1989.

## 5) The Palestinian Authority Is Not a State under Broad Principles of International Law

It is, perhaps, surprising that a concept as basic as statehood has no universally accepted definition in international law.<sup>44</sup> The classic test of statehood under international law is the four-part test of the Montevideo Convention: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states.<sup>45</sup> Scholars such as James Crawford have argued that these four criteria all really point to one question: whether there exists an independent state, that is, an organized community exercising self-governing power of a territory, with no exercise by another state or group of states to exercise self-governing powers over that same territory.<sup>46</sup>

It is clear that under either the traditional Montevideo test, or the streamlined approach proposed by Crawford and others, the PA is not a state. As is noted at length in Section IIA below, the PA has neither internal nor external control over the Gaza territory. In particular, other entities assert control in contravention of the kind of independence the PA would need in order to establish statehood in Gaza. Within Gaza itself, Hamas is in control, and Hamas openly opposes the authority of the PA. Further, under the Interim Agreement, Israel has retained authority over its own citizens in Gaza, which is surely the aim of the PA submission to the ICC.<sup>47</sup> From almost any point of view then, the PA cannot be said to possess independent authority, which is the touchstone of statehood over Gaza.

Indeed, both the PA's own leadership and experts in the field generally see Palestine largely in the same way: in the midst of a process that may lead to statehood, but is not a State at this time. Several times, the President of the Palestinian Authority, Mahmoud Abbas, has referred to the Palestinian state as an aim or aspiration, not as a present reality.<sup>48</sup> Earlier this year, he referred to the Palestinian state as a future entity.<sup>49</sup>

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<sup>44</sup> JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* (Clarendon Press, 1979) at 37.

<sup>45</sup> See Convention on the Rights and Duties of States (Montevideo Convention), December 26, 1933, 165 League of Nations Treaty Series (LNTS) 19; 28 American Journal of International Law (Supplement) 53 (1934).

<sup>46</sup> James Crawford, 'The Creation of the State of Palestine: Too Much Too Soon?', *EJIL* (1990) 309.

<sup>47</sup> See note 23, *supra*.

<sup>48</sup> See Inaugural Speech – Palestinian Prime Minister Mahmoud Abbas, April 29, 2003, available at <http://www.mideastweb.org.abumazen.htm> (last visited September 21, 2009). See also Inauguration of Palestinian President Mahmoud Abbas, January 15, 2005, available at <http://electronicintifada.net/bytopic/historicalspeeches/338.shtml> (last visited September 21, 2009). See also Speech of Palestinian President Mahmoud Abbas, February 18, 2006, available at <http://www.pij.org/documents/a%20speech%20bv%20president%20mahmoud%20abbas.pdf> (last visited on March 9, 2009).

Implicitly acknowledging that Palestine is not a state, he has recently considered a unilateral appeal for the U.N. Security Council to recognize Palestine as a state in the West Bank and Gaza<sup>50</sup>. The entire roadmap process, which is still obviously a work in progress, may result in a Palestinian state, but it cannot be declared short of completion of the process and its several goals. As Crawford concludes in his book on statehood:

The essential point is that a process of negotiation toward identified and acceptable ends is still, however precariously in place. That being so, it misrepresents the reality of the situation to claim that one party already has that for which it is striving.<sup>51</sup>

In the end, the PA either is or is not a state. Neither the Rome Statute nor international law recognizes any middle ground. It would be well beyond the authority of a criminal court or its prosecutor to break new ground by establishing a status not recognized by other international courts or organizations.

## II. Assuming Arguendo It Were A State, The Palestinian Authority Has Failed to Establish Territorial Jurisdiction Over Gaza As Required by Article 12 (2) (a)

### A. The PA Lacks Internal And External Control Of Gaza

In order for a State to have legitimate claims over a territory it must possess "effective control" under international law.<sup>52</sup> Effective control, as referenced in the *Island of Palmas* case is "the continual and peaceful display of territorial sovereignty."<sup>53</sup> It has also been noted that "Effective control by a government over territory and population is the...core element which combines the other two into a state for the purposes of international law...one internal, one external."<sup>54</sup> Internal control includes the right of a people "to choose their own political system and to pursue their own economic, social, and cultural development."<sup>55</sup>

The Palestinian Authority does not have this control of the Gaza Strip. In 2006, Hamas took power in Gaza, despite its history as a terrorist organization. Hamas rejects the Palestinian Authority and the ideology of the PLO. Hamas has overtaken all internal

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<sup>49</sup> Speech of Mahmoud Abbas, President of the Palestinian Authority, 4 February, 2009, available at <http://www.cstihlermep.com/?PageId=b47alef2-7341-8e04-1135-786638b8d1d3> (last visited March 9, 2009).

<sup>50</sup> Wall Street Journal, November 16, 2009, "Palestinians Weigh U.N. Statehood Declaration."

<sup>51</sup> CRAWFORD, *supra* note 26 at 446.

<sup>52</sup> Regulations Concerning the Laws and Customs of War on Land, Oct. 18, 1907, art. 42, 205 Consol. T. S. 277 (1907).

<sup>53</sup> Judge Huber, *Island of Palmas Case*, 2 RIAA, pp. 839-845.

<sup>54</sup> PETER MALANCZUK, AND MICHAEL BARTON AKEHURST, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 77 (Routledge, ed. 1997).

<sup>55</sup> DANIEL THURER, *Self-Determination*, in ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 364, 367 (R. Bernhardt, ed. 2000). *See also* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 553 (6th ed. 2003) (stating that the right to self-determination is "the right of cohesive national groups ('peoples') to choose for themselves a form of political organization and their relation to other groups.").

civil administrative agencies.<sup>56</sup> Hamas controls the religious institutions, the education system, the judicial organs, religious and militant police forces and charities other than those operated by international non-government organizations. The PLO and the PA do not exercise any control over public services or daily functioning of institutions within the Gaza strip.<sup>57</sup> On the contrary—any PA or PLO sympathizers who remain in Gaza have been subject to persecution and death at the hands of Hamas.<sup>58</sup>

The Palestinian Authority also lacks full capacity to conduct foreign relations. Such capacity requires “the ability to act autonomously on the international level without being legally dependent on other states within the international legal order.”<sup>59</sup> Under the Interim Agreements the Palestinian Authority lacks these full powers. In the Oslo Accords, the power to act internationally was deliberately restricted to the liberation movement of the PLO. Bilateral arrangements for economic assistance or cultural missions or a diplomatic presence for a liberation organization do not amount to the full recognition required for statehood. Because it lacks legal external relations powers and abilities, the Palestinian Authority lingers as a sub-state entity.<sup>60</sup> In addition, it should be noted that even the granted powers of the Palestinian Authority have been disputed by the de fact power in Gaza, namely, Hamas.

#### B) Hamas Rejects The Authority Of The PA

Furthermore, Hamas, widely considered a terrorist organization by Western powers, does not accept the authority of the the PA or the PLO. It claims itself to be the uncorrupted Islamic alternative for the Palestinian people.<sup>61</sup> Due to the Israeli withdrawal from Gaza in 2005, Hamas decided to participate in the Palestinian National Council (PNC) elections it previously boycotted in 1996. Hamas overwhelmed the Fatah majority and claimed a preponderance of the seats in the Council. Rather than simply shifting the balance of power of an otherwise unified Palestinian governing body, the change resulted in greater clashes with Fatah until the majority of the Fatah party’s fighters were dead or expelled from the Gaza Strip. In the West Bank, Hamas officials were expelled from the Palestinian Authority apparatus and replaced by Fatah members, further dividing the Occupied Territories and the PNC.

Islamist Hamas rejects not only the leadership of the PA and PLO, but any ideological compromises the two other Palestinian representative entities attempt to reach

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<sup>56</sup> Jerusalem Post. February 6, 2008. ‘*The Strategic Implications for Israel of the Gaza-Egypt Border Breach.*’

<sup>57</sup> BARBARA, IBRAHIM. FROM CHARITY TO SOCIAL CHANGE: TRENDS IN ARAB PHILANTHROPY (American University in Cairo Press 2009).

<sup>58</sup> Human Rights Watch, Esveld, Bill Van; Abrahams, Fred, Li, Darryl. UNDER COVER OF WAR: HAMAS POLITICAL VIOLENCE IN GAZA 5 (Human Rights Watch, 2009).

<sup>59</sup> See MALANSZUK, & AKEHURST *supra* note 54, at 77.

<sup>60</sup> LUZIUS WILDHABER ET AL., NATIONAL TREATY LAW AND PRACTICE: SWITZERLAND, IN NATIONAL TREATY LAW AND PRACTICE: FRANCE, GERMANY, INDIA, SWITZERLAND, THAILAND, UNITED KINGDOM 117, 128 (Monroe Leigh & Merritt R. Blakeslee eds., 1995).

<sup>61</sup> See HAMAS COVENANT 1998: THE COVENANT OF THE ISLAMIC RESISTANCE MOVEMENT, THE AVALON PROJECT AT YALE LAW SCHOOL (1998) Article 27.

on behalf of the Palestinian people.<sup>62</sup> The Palestinian Authority does not accept the legitimacy of Hamas and, alongside the international community, considers the terrorist regime illegal. In 2007, the President of the Palestinian Authority, Mahmoud Abbas, declared the three-month-old unity government (which included Hamas) officially dissolved.<sup>63</sup>

C) The PA Lacks Courts With Sufficient Domestic Jurisdiction Over The Conduct In Question.

A key part of domestic control, especially in a criminal law context, is judicial jurisdiction. Within Gaza, however, the Palestinian court system was hijacked by Hamas in November of 2007 and the Attorney General was attacked and arrested. In response, “the Palestinian bar instructed its 1,000 attorneys in Gaza not to cooperate with the new, Hamas-appointed judges.”<sup>64</sup> The “court system” in Gaza is notorious for sentencing defendants in absentia and for disproportionately harsh sentencing.<sup>65</sup> The Palestinian High Judicial Council has expressly stated that the Hamas-run courts are illegitimate. Hamas claims that the Palestinian Authority-run courts are corrupt and incompetent.<sup>66</sup> And, as previously noted, Israel maintains sole judicial authority over its own citizens in Gaza.<sup>67</sup>

III. The Palestinian Authority Lacks the Internal Authority to File an Article 12 (3) Declaration

A. Under the Interim Agreements the PLO Has External Relations Powers

Under the internationally recognized Interim Agreements, the PA and the PLO have distinct and separate powers. Under the Oslo accords -- as the Norwegian diplomatic facilitator Terje Roed Larsen has noted on many occasions -- it is the Palestinian Liberation Organization that claims and maintains the right to represent the Palestinian people internationally -- not the Palestinian National Authority.

The Gaza-Jericho Agreement states in Article VI.2.b<sup>68</sup>:

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<sup>62</sup> DAVID PHILLIPS, FROM BULLETS TO BALLOTS: VIOLENT MUSLIM MOVEMENTS IN TRANSITION 70 (Transaction Publishers, 2008).

<sup>63</sup> The New York Times, June 15, 2007. ‘*Palestinian Split Deepens, With Government In Chaos*’.

<sup>64</sup> Haaretz, December 12, 2007, ‘*Hamas Builds New Courts in Gaza*’.

<sup>65</sup> BBC Monitoring, Middle East, May 24, 2009. ‘*Palestinian Gaza Court Sentences Three Fatah Activists to Death*’.

<sup>66</sup> BBC Monitoring, Middle East, December 10, 2007. ‘*Palestinian Judicial Council Halts Work in Gaza Over Hamas Control of Courts*’.

<sup>67</sup> See note 23 *supra*.

<sup>68</sup> Gaza Strip and Jericho Agreement, May 4, 1994, Israel-PLO, reprinted in 33 I.L.M. 622 (1994).

Notwithstanding the provisions of this paragraph, the PLO may conduct negotiations and sign agreements with states or international organizations for the benefit of the Palestinian Authority in the following cases only:

1. economic agreements, as specifically provided in Annex IV of this Agreement;
2. agreements with donor countries for the purpose of implementing arrangements for the provision of assistance to the Palestinian Authority;
3. agreements for the purpose of implementing the regional development plans detailed in Annex IV of the Declaration of Principles or in agreements entered into in the framework of the multilateral negotiations; and
4. cultural, scientific and educational agreements.

These powers to act internationally are limited, and were not granted to the Palestinian Authority, but rather to the PLO as a freestanding movement of national liberation. To further clarify that the Palestinian Authority did not have the full powers of a state, the Agreement explicitly stated in section VI.2.c<sup>69</sup>:

Dealings between the Palestinian Authority and representatives of foreign states and international organizations, as well as the establishment in the Gaza Strip and the Jericho Area of representative offices other than those described in subparagraph 2.a. above, for the purpose of implementing the agreements referred to in subparagraph 2.b. above, *shall not be considered foreign relations*. (Emphasis added).

Therefore the PLO was granted the power to function as the liaison on behalf of the Palestinian people on a limited number of issues. This limited the PLO and the Palestinian Authority to a status below statehood as it is conceived under customary international law<sup>70</sup>. This was reiterated in the Interim Agreement following the first and second phases of the transfer of powers outlined in the Declaration of Principles (DOP)<sup>71</sup>. It was further affirmed in the 2002 Roadmap endorsed by the United States, Russia, the European Union and the United Nations which established the criteria for the Palestinians to achieve statehood after the completion of benchmarks of performance<sup>72</sup>. It did not, in any way, suggest that the Palestinians possessed a state already.

The limited powers of the Palestinian Authority (and to the same extent, the Palestinian Council that operates under its aegis) are also made plain in Article 9.5.a of the Interim Agreement, which states:

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<sup>69</sup> *Id.*

<sup>70</sup> See Convention on the Rights and Duties of States, art. 1, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 25. See also RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES §201 (1987).

<sup>71</sup> See Declaration of Principles on Interim Self-Government Arrangements, Sept. 13, 1993, Isr.-PLO (1993).

<sup>72</sup> The Secretary-General, Letter from the Secretary General to the President of the Security Council, U.N. Doc. S/2003/529 (May 7, 2003).

In accordance with the DOP, the Council *will not have powers and responsibilities in the sphere of foreign relations*, which sphere includes the establishment abroad of embassies, consulates or other types of foreign missions and posts or permitting their establishment in the West Bank or the Gaza Strip, the appointment of or admission of diplomatic and consular staff, and the exercise of diplomatic functions. [emphasis added]

Despite the autonomous powers granted to Palestine under the DOP and subsequent Transfer of Power agreements, the Palestinian Authority maintains its position as a non-state entity “having the legal capacity to act and to enter into agreements only to the extent necessary to fulfill its functions as derived from its constitutive instrument”<sup>73</sup>. Again, these functions are limited to a capacity that falls far short of sovereignty or statehood.

#### B) The Declaration Was Submitted By The PA, Not The PLO

The Palestinian Authority’s Declaration submitted to the International Criminal Court ignores the fact that the Palestinian Authority (PA) is a provisional body under the overarching authority of the Palestinian Liberation Organization (PLO)<sup>74</sup>. The PLO is the external representative of the Palestinian people and the only internationally recognized entity capable of making or participating in international agreements<sup>75</sup>. The PA Declaration to the Court also ignores the fact that though *some* powers of *local* governance have been vested in the Palestinian Authority following the Oslo Accords, the PA lacks effective control of the Gaza strip. Both these deficiencies disqualify the Palestinian Authority from any possible claim of statehood and vitiate any effect of the Declaration submitted to the International Criminal Court.<sup>76</sup>

#### Conclusion

It seems evident that the Palestinian Authority is not a “State”—either under customary international law or as that term is contemplated in the Rome Statute. The balance that was struck at Rome in 1998 in the consideration of the scope of the Court’s jurisdiction cannot be ignored by allowing a non-state entity to bring a matter to the ICC under the authority limited to States by Article 12(3). In any event, the PA lacks any effective control in Gaza and lacks the scope of domestic judicial jurisdiction to satisfy even the broadest imaginable reading of Article 12(3) jurisdiction. If new law is to be

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<sup>73</sup> Tabory, Mala. *The Legal Personality of the Palestinian Autonomy* at 152. 1999.

<sup>74</sup> Declaration of Principles on Interim Self-Government Agreements, September 13, 1993.

<sup>75</sup> See Palestine National Charter, available at <http://www.state.gov/p/nea/rls/22573.htm>

<sup>76</sup> See MALANCZUK, *supra* note 54 at 77. Akehurst states that “effective control” entails internal and external control of a territory—neither of which were fulfilled by the Palestinian Liberation Organization’s assertion of statehood in 1988.

made in this arena, it should be by the Assembly of States parties, through the amendment process contemplated by the Rome treaty itself -- not the prosecutor or even the Court acting ipse dixit. The Security Council retains the authority to refer any matter to the International Criminal Court as well. The rules of legality that govern any court -- including an international court -- do not permit ignoring established norms of customary law or setting sail into the uncertain seas of politics.

The acts complained of here are under the jurisdiction of national courts, not the ICC. If the U.N. Security Council wishes to do so, it may refer the matter to the ICC or use its powers under chapter VII of the U.N. charter to create a special ad hoc tribunal<sup>77</sup>. For the ICC to undertake such a case without a U.N. Security Council referral would rightly subject the Court to criticism that it had exceeded its jurisdiction and had improperly succumbed to political pressures.

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<sup>77</sup> The recent study of the Task Force of the American Society of International Law complimented the Prosecutor's jurisdictional decisions to date but warned: "Yet another test for the ICC will be how it handles the declaration lodged on January 22, 2009, by the Palestinian National Authority (PNA) pursuant to Article 12 (3) of the Rome Statute . . . . The matter raises issues about the authority of the Prosecutor, and of the ICC, to treat as a State an entity which is not generally recognized as a state and which is not a U.N. member." WILLIAM H. TAFT ET AL., U.S. POLICY TOWARD THE INTERNATIONAL CRIMINAL COURT: FURTHERING POSITIVE ENGAGEMENT, at vii-viii (AM. SOC'Y INT'L LAW ed., 2009).