

THE EXERCISE OF JURISDICTION BY THE INTERNATIONAL CRIMINAL COURT OVER PALESTINE

WILLIAM THOMAS WORSTER*

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INTRODUCTION

On January 21, 2009, the Minister of Justice of the Palestinian National Authority (“PNA”), Ali Khashan, faxed a declaration to the International Criminal Court (“ICC” or “the Court”) on behalf of the

* Lecturer and Research Director, International Law, Bynkershoek Institute, The Hague University, The Hague, The Netherlands; LL.M. (Adv.) in Public International Law, *cum laude*, Leiden University, Faculty of Law, Leiden, The Netherlands; J.D., Chicago-Kent College of Law, Illinois Institute of Technology, Chicago, Illinois; B.A., Modern European History, University of Kansas, Lawrence, Kansas. The author wishes to express his appreciation to Professor John Dugard and Dr. Michail Vagias for their helpful comments on an earlier draft of this article.

“Government of Palestine” accepting the Court’s jurisdiction for an indefinite period and requesting an investigation into the situation in Gaza,¹ under the cited authority of Article 12(3) of the Rome Statute.²

The PNA’s attempt to accede to the ICC’s jurisdiction followed Israel’s engagement in armed hostilities with Hamas, a militant Islamic group based on the Gaza Strip, in late 2008 and early 2009.³ After airstrikes and an Israeli ground invasion, which lasted a total of three weeks, reports placed Palestinian casualties at approximately 1,300 and Israeli casualties at 10.⁴ Following the end of hostilities, a number of UN officials and NGOs called for an investigation into

1. See Declaration Recognizing the Jurisdiction of the International Criminal Court from Ali Khashan, Minister of Justice, Palestinian Nat’l Auth., to the ICC Registrar (Jan. 21, 2009) [hereinafter Palestinian Declaration], available at <http://www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279777/20090122PalestinianDeclaration2.pdf>. The declaration purported to be retroactively valid from July 1, 2002. *Id.* The next day, the Minister hand delivered the declaration to the Prosecutor. See Int’l Crim. Court, Office of the Prosecutor, *Visit of the Minister of Justice of the Palestinian National Authority, Mr. Ali Khashan, to the ICC (22 January 2009)* (Feb. 6, 2009), <http://www.icc-cpi.int/NR/rdonlyres/4CC08515-D0BA-454D-A594-446F30289EF2/280869/PNAMFA130209.pdf>. Interestingly, the Registrar confirmed receipt of the declaration in a communication addressed to the PNA, not the “Government of Palestine.” Letter from Silvana Arbia, Registrar, Int’l Crim. Court, to Ali Khashan, Minister of Justice, Palestinian Nat’l Auth. (Jan. 23, 2009) [hereinafter Letter from Silvana Arbia], available at <http://www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279778/20090123404SALASS2.pdf>.

2. See Rome Statute of the International Criminal Court art. 12(3), July 17, 1998, 2187 UNT.S. 90 [hereinafter Rome Statute] (outlining a special procedure by which a “state” not party to the Rome Statute may accept the jurisdiction of the ICC by lodging a declaration with the Registrar of the Court). The ICC specified that the Court Registrar accepted Palestine’s declaration “without prejudice to a judicial determination on the applicability of article 12(3)” in light of “the uncertainties of the international community with respect to the existence or non-existence of a State of Palestine.” Int’l Crim. Court, *Report on the Activities of the Court*, para. 61, ICC Doc. ICC-ASP/8/40 (Oct. 21, 2009) [hereinafter *Report on the Activities of the Court*].

3. See Isabel Kershner & Taghreed El-Khodary, *Israeli Troops Launch Attack on Gaza*, N.Y. TIMES, Jan. 3, 2009, <http://www.nytimes.com/2009/01/04/world/middleeast/04mideast.html> (reporting that Israel’s primary goal in attacking Gaza was to destroy the infrastructure of Hamas, including sites used to launch rockets at southern Israel).

4. *Israel Hits Hamas Targets in Gaza*, BBC NEWS (Feb. 1, 2009), <http://news.bbc.co.uk/2/hi/7863500.stm>.

war crimes perpetrated by both sides in the course of the attacks, though the focus was largely on Israel, possibly due to the disproportionate number of casualties suffered by Palestinians.⁵ There are accusations that the Israeli Defense Force (“IDF”) targeted civilians and non-military objects, including a UN school and headquarters, utilized banned weapons, such as white phosphorus, and otherwise used force out of proportion with the military objectives.⁶ In fact, Ehud Olmert pledged a “harsh and disproportionate” response to rocket attacks from Gaza, suggesting that Israel intended to use excessive force.⁷ Reports published by Amnesty International, Human Rights Watch, and the UN Fact Finding Mission, as well as an investigation by the Arab League, have all concluded that Israel likely violated the laws of war and that Israeli officials may have committed war crimes.⁸ Importantly, these

5. See, e.g., Chris McGreal, *Demands Grow for Gaza War Crimes Investigation*, THE GUARDIAN, Jan. 13, 2009, <http://guardian.co.uk/world/2009/jan/13/gaza-israel-war-crimes> (indicating that the International Red Cross, Human Rights Watch, Amnesty International, and local human rights organizations joined the United Nations in calling for an investigation into evidence of war crimes committed by Israel); Fida Qishta & Peter Beaumont, *Israel Accused of War Crimes Over 12-Hour Assault on Gaza Village*, THE OBSERVER, Jan. 18, 2009, <http://www.guardian.co.uk/world/2009/jan/18/israel-war-crimes-gaza-conflict> (noting that B’Tselem, an Israeli human rights organization, raised concerns over Israeli abuses in the village of Khuza’a).

6. See Marlise Simons, *Palestinians Press for War Crimes Inquiry on Gaza*, N.Y. TIMES, Feb. 10, 2009, <http://www.nytimes.com/2009/02/11/world/middleeast/11hague.html>. The Israeli military was also accused of attacking medical facilities and holding Palestinian families as human shields. See McGreal, *supra* note 5.

7. See James Hider, *Israel: Hardline Nationalists Savour Pre-election Boost in Polls*, THE TIMES ONLINE (Feb. 2, 2009), http://www.timesonline.co.uk/tol/news/world/middle_east/article5636047.ece; *Israel Hits Hamas Targets in Gaza*, *supra* note 4 (quoting Ehud Olmert); see also Brian Klug, *A Catastrophic Turn of Phrase: What Did the Israeli Minister Mean When He Talked of a 'Shoah' Befalling the Palestinians in Gaza?*, THE GUARDIAN, (Feb. 29, 2008), <http://www.guardian.co.uk/commentisfree/2008/feb/29/acatastrophicturnofphrase> (publishing a statement by Israeli Deputy Defense Minister, Matan Vilnai, warning that rocket attacks from Gaza will provoke a harsh response by Israel). The Israeli Deputy Defense Minister stated that “[Hamas] will bring upon [itself] a bigger shoah because [Israel] will use all [its] might to defend [itself].” *Id.* Historically, “*shoah*” meant “catastrophe or disaster,” but in recent years, “the term acquired a more specific meaning and an intense emotional charge,” because of its use in reference to the Nazi Holocaust. *Id.*

8. See generally AMNESTY INT’L, ISRAEL/GAZA OPERATION ‘CAST LEAD’: 22 DAYS OF DEATH AND DESTRUCTION (2009), available at <http://www.amnesty.org/en/library/asset/MDE15/015/2009/en/8f299083-9a74-4853-860f->

reports and investigations also concluded that the rocket attacks by Hamas militants probably violated international criminal law.⁹ If these findings are true, Israel and Hamas may be held liable for international crimes as well as for violating provisions of the Fourth Geneva Convention that prohibit disproportionate military attacks, the targeting of civilians, and the enforcement of collective punishment.¹⁰

Calls for investigation and possible prosecution are difficult because it is unclear which actor can and should assert jurisdiction. Israel likely has criminal jurisdiction over IDF members with regard to crimes committed in Gaza.¹¹ The PNA may also have jurisdiction since its territory and “nationals” were both attackers and subjects of attack, though there may be constraints on its capacity or ability to prosecute. Furthermore, if these acts rise to the level of certain international crimes for which universal jurisdiction may be invoked

0563725e633a/mde150152009en.pdf (documenting Israel’s possible violation of international humanitarian law, international human rights law, and international criminal law based on its actions in Gaza); HUMAN RIGHTS WATCH, PRECISELY WRONG: GAZA CIVILIANS KILLED BY ISRAELI DRONE-LAUNCHED MISSILES 4 (June 30, 2009), available at http://www.hrw.org/sites/default/files/reports/ipt0609webwcover_0.pdf (concluding that Israel’s “fail[ure] to take all feasible precautions to verify that the targets were combatants” constitutes a violation of the laws of war); UN Human Rights Council, Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact Finding Mission on the Gaza Conflict, ¶¶ 1715-33, UN Doc. A/HRC/12/48 (2009) (Richard Goldstone et al.) [hereinafter Goldstone Report] (summarizing legal findings regarding Israel’s military operations in Gaza from December 27, 2008 to January 18, 2009); REPORT OF THE INDEPENDENT FACT FINDING COMMITTEE ON GAZA: NO SAFE PLACE para. 572-73 (Apr. 30, 2009) (presented to the League of Arab States), available at http://www.arableagueonline.org/las/picture_gallery/reportfullFINAL.pdf (reiterating that both individual members of IDF and the Israeli state committed war crimes in Gaza).

9. See Goldstone Report, *supra* note 8, ¶¶ 1747-50; REPORT OF THE INDEPENDENT FACT FINDING COMMITTEE ON GAZA: NO SAFE PLACE, *supra* note 8, para. 574-577.

10. See Geneva Convention Relative to the Protection of Civilian Persons in Time of War arts. 3, 4, 33, Aug. 12, 1949, 6 U.S.T. 3516 [hereinafter Geneva Convention IV]; see also REPORT OF THE INDEPENDENT FACT FINDING COMMITTEE ON GAZA: NO SAFE PLACE, *supra* note 8, para. 530-71, 607 (exploring also whether Israel’s actions in Gaza might violate the 1948 Genocide Convention).

11. Israel’s authority to prosecute members of its own armed forces for their actions in Gaza is supported by the customary law principles of active nationality and territorial jurisdiction. See REPORT OF THE INDEPENDENT FACT FINDING COMMITTEE ON GAZA: NO SAFE PLACE, *supra* note 8, para. 578.

then any state may prosecute the alleged criminals.¹² Given the long standing animosity between Israel and Palestine, however, it seems unlikely that either party could accept the other's assertion of jurisdiction, investigation, or criminal prosecution as unbiased and legitimate.¹³ An assertion of universal jurisdiction by a third state would be equally problematic, as many states are perceived as having clear political preferences in the Palestinian situation. These considerations have given rise to calls for a truly neutral international tribunal or commission, such as the ICC, to take jurisdiction over the dispute.¹⁴

From the very beginning, the Palestinian declaration sparked a public debate over whether Palestine constitutes a "state" for the purposes of ICC jurisdiction.¹⁵ Since then, the Prosecutor of the ICC, Luis Moreno-Ocampo, has received hundreds of requests to investigate allegations in Gaza.¹⁶ The Prosecutor is currently

12. See WILLIAM A. SCHABAS, *GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES* 354-55 (2000) (discussing the specific crimes for which universal jurisdiction may be invoked by any state regardless of whether that state has a territorial relationship to the crime or alleged criminal).

13. See *Israel: Military Investigations Fail Gaza War Victims*, HUM. RIGHTS WATCH (Feb. 7, 2010), <http://www.hrw.org/en/news/2010/02/06/israel-military-investigations-fail-gaza-war-victims> (explaining that both Israeli and Hamas authorities failed to conduct impartial investigations); see also *Gaza: Hamas Report Whitewashes Crimes*, HUM. RIGHTS WATCH (Jan. 28, 2010), <http://www.hrw.org/en/news/2010/01/28/gaza-hamas-report-whitewashes-war-crimes> (highlighting Hamas's inability to conduct a legally and factually accurate self-assessment of its attacks against Israel).

14. See Goldstone Report, *supra* note 8, ¶¶ 1760, 1763 (noting that resorting to international justice mechanisms is appropriate "where domestic authorities are unable or unwilling to comply with" their legal obligations "to investigate violations of international human rights and humanitarian law," and considering that the violations committed in Gaza fall within the subject-matter jurisdiction of the ICC).

15. Compare John Dugard, Op-Ed., *Take the Case*, N.Y. TIMES, July 22, 2009, <http://www.nytimes.com/2009/07/23/opinion/23iht-eddugard.html> (contending that the ICC prosecutor should adopt an expansive approach to statehood determination, and that under such an approach, Palestine qualifies as a state for the purpose of the Court), with George P. Fletcher, Op-Ed., *Don't Go There*, N.Y. TIMES, July 22, 2009, <http://www.nytimes.com/2009/07/23/opinion/23iht-edfletcher.html> (arguing that only "full-blooded states" can accept the jurisdiction of the ICC under the Rome Statute, and asserting that Palestine is "[no]where near the status of a state").

16. See Int'l Crim. Court, Office of the Prosecutor, *Situation in Palestine: Summary of Submissions on Whether the Declaration Lodged by the Palestinian*

considering whether Khashan's acceptance of jurisdiction can be honored, and if so, whether the Prosecutor would accordingly have jurisdiction to investigate.¹⁷ To that effect, the Prosecutor is also proceeding with a preliminary investigation to ascertain whether the alleged crimes fall within the Court's subject matter jurisdiction.¹⁸ It appears that Khashan's declaration constitutes acceptance of the Court's jurisdiction for events falling within the designated time period rather than an attempt to permanently join the ICC. This paper argues that Palestine may accept the Court's jurisdiction, in part because Palestine could accede to the Rome Statute as a state party.

I. THE REQUIREMENTS OF THE ROME STATUTE

The ICC is an international organization with legal personality separate from the United Nations.¹⁹ The Court's subject matter jurisdiction is limited to crimes of genocide, crimes against humanity, war crimes, and crimes of aggression,²⁰ which have been committed since the Rome Statute entered into force on July 1, 2002.²¹ The ICC can only exercise its jurisdiction over crimes committed within the territory, or by a national, of States Parties to the Rome Statute,²² unless a non-state party accepts the Court's

National Authority Meets Statutory Requirements, para. 12 (May 3, 2010), http://www.icc-cpi.int/NR/rdonlyres/D3C77FA6-9DEE-45B1-ACC0-B41706BB41E5/281989/PALESTINEFINAL2_2_.pdf [hereinafter *Summary of Submissions on Palestine*] (reporting that, as of May 2010, the ICC Prosecutor received 388 communications relating to "alleged crimes committed in Gaza between December 2008 and January 2009"). The Prosecutor has also received numerous submissions arguing in favor or against the ability of the ICC to exercise jurisdiction based on the declaration by the PNA. *See id.*

17. *See* Sebastian Rotella, *International Criminal Court to Consider Gaza Investigation*, L.A. TIMES, Feb. 5, 2009, <http://articles.latimes.com/2009/feb/05/world/fg-court-palestinians5>. In addition, the Prosecutor may certainly exercise jurisdiction over any Israeli or Palestinian who also has the nationality of a State Party to the Rome Statute. *See* Rome Statute, *supra* note 2, art. 12(2)(b). This alternative basis for jurisdiction appears to be the most likely strategy for the Prosecutor to exercise jurisdiction over Gaza in the near future.

18. *See Report on the Activities of the Court*, *supra* note 2, para. 61.

19. *See* Rome Statute, *supra* note 2, arts. 2, 4(1) (acknowledging that the ICC has a relationship with the UN but also maintains its own legal personality).

20. *Id.* art. 5(1). *But see id.* art. 5(2) (suspending the ICC's jurisdiction over the crime of aggression until the crime is defined).

21. *Id.* art. 11(1).

22. *Id.* art. 12(2).

jurisdiction with respect to a particular crime.²³ Further, the ICC's jurisdiction only extends to designated crimes that are committed after the state has become party to the Rome Statute, unless the state consents to an earlier date, not to precede the entry into force of the Statute generally.²⁴ In addition, the ICC is complementary in the sense that it can only assert its jurisdiction when a situation has been referred to it by a State Party or the UN Security Council, or when the ICC Prosecutor initiates an investigation on his or her own accord.²⁵ Similarly, cases will only be admissible where a state with jurisdiction over a particular crime is itself "unwilling or unable to genuinely to carry out the investigation or prosecution."²⁶

The Rome Statute provides that it is open for ratification by any of the original States Parties to its negotiation and is also "open to accession by all States."²⁷ Throughout the Rome Statute, reference is made to "States" or "States Parties", without providing a specific definition for purposes of the statute.²⁸ Alternatively, the Rome Statute provides that non-members of the ICC may accept the jurisdiction of the Court on a case-by-case basis.²⁹ To date, Côte d'Ivoire is the only state to accept this case-specific jurisdiction.³⁰ In

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

24. *Id.* art. 11(2).

25. *Id.* arts. 13-15. The hundreds of communications received with respect to the situation in Gaza constitute requests for the Prosecutor to exercise powers under Article 15. *See id.* art. 15 (delineating the Prosecutor's power to begin investigations on his own initiative, which includes the power to seek additional information from states, the United Nations, NGOs, and "other reliable sources").

26. *Id.* art. 17(1)(a); *see also id.* art. 17(1)(b)-(d) (requiring the ICC to find a case inadmissible where the case has already been investigated by a state with jurisdiction, and the state made a genuine decision not to prosecute; where the accused has already been subject to prosecution; or where "the case is not of sufficient gravity" to warrant "further action by the Court").

27. *Id.* art. 125(1), (3).

28. *See, e.g., id.* arts. 4(2), 9(1), 9(2), 11(2), 12(1), 12(3), 13(a), 14, 17(1)(a)-(b), 18.

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

30. *See* Press Release, Int'l Crim. Court, Registrar Confirms that Republic of Cote d'Ivoire has Accepted the Jurisdiction of the Court (Feb. 15, 2005), *available at* <http://www.icc-cpi.int/Menu/ICC/Press+and+Media/Press+Releases/2005/> (follow link with article title); *see also* HUMAN RIGHTS WATCH, "BECAUSE THEY HAVE THE GUNS . . . I'M LEFT WITH NOTHING": THE PRICE OF CONTINUING IMPUNITY IN CÔTE D'IVOIRE 31 (May 2006), *available at* <http://www.hrw.org/sites/default/files/reports/cotedivoire0506webwcover.pdf> (lamenting that the ICC Prosecutor had yet to send an investigative delegation to the Côte d'Ivoire more

such alternative jurisdiction situations, the language of the Rome Statute appears to require that the entity accepting jurisdiction be a "State."³¹ Indeed, many have argued that Palestine can neither become a member nor accept the jurisdiction of the Court because it lacks statehood.³² This conclusion is not so easy.

II. PALESTINIAN QUALIFICATIONS

For the purpose of analyzing whether Palestine fulfills the requirements of statehood under international law, an important initial observation is that three entities currently represent Palestine: the people of Palestine,³³ the Palestinian Liberation Organization

than two years after the state accepted the ICC's jurisdiction); *Côte d'Ivoire: Pro-Gbagbo Forces Abducting Opponents*, HUM. RIGHTS WATCH (Dec. 23, 2010), <http://www.hrw.org/node/95212> (reporting the ICC Prosecutor's threat to initiate an investigation should post-election violence turn deadly).

31. See Rome Statute, *supra* note 2, art. 12(3) ("If the acceptance of a *State* which is not a Party to this Statute is required . . . , that *State* may . . . 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") (emphasis added).

32. See, e.g., Fletcher, *supra* note 15 (arguing that statehood must be a precondition to acceptance of the ICC's jurisdiction under article 12(3) of the Rome Statute because otherwise non-state groups can use the procedure to embarrass or threaten states without opening themselves up to reciprocal scrutiny). See generally Mala Tabory, *The Legal Personality of the Palestinian Autonomy*, in NEW POLITICAL ENTITIES IN PUBLIC AND PRIVATE INTERNATIONAL LAW: WITH SPECIAL REFERENCE TO THE PALESTINIAN ENTITY 139-52 (Amos Shapira & Mala Tabory eds., 1999) (concluding that Palestinian Autonomy in Gaza lacks international legal personality, and should be classified as a "non-State entity," in that it does not have "legal capacity to act and to enter into agreements" beyond the specifications of the its constitutive instruments); Daniel Benoliel & Ronen Perry, *Israel, Palestine and the ICC*, 32 MICH. J. INT'L L. 73, 125-26 (2010) (arguing that the Rome Statute guarantees a "state-based system," and dismissing six different "theoretical and practical" arguments for recognizing a Palestinian state); Confidential Communication Regarding the Palestinian Declaration and ICC Jurisdiction from Dave Davenport et al., to Luis Moreno-Ocampo, Prosecutor, Int'l Crim. Court 8-14 (Nov. 19, 2009) [hereinafter Davenport Communication], available at <http://www.icc-cpi.int/NR/rdonlyres/D3C77FA6-9DEE-45B1-ACC0-B41706BB41E5/281873/Paldeclandiccjurisd.pdf> (arguing that Palestine is not a state under "broad principles of international law" or, in the alternative, that the PNA has failed to establish territorial jurisdiction in the criminal law context and, therefore, cannot delegate jurisdiction to the ICC).

33. Cf. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 141, ¶¶ 101-09 (July 22) (distinguishing between the identity of the Government of Kosovo and

(“PLO”), and the PNA. First, both the League of Nations and the United Nations have recognized that the people of Palestine have the right to self-determination under international law.³⁴ The PLO represents the Palestinian people at the international level, including by controlling the observer seat for “Palestine” at the United Nations.³⁵ The PNA was created by the Oslo Accords, an agreement concluded between Israel and the PLO.³⁶ In the Accords and subsequent interim agreements, the parties agreed that the PNA would incrementally obtain jurisdiction over the West Bank and Gaza, and that the Palestinian people could establish a permanent

the competent representatives of the people of Kosovo for purposes of the declaration of independence, and concluding that the declaration was made by the latter even though the representatives were largely the same individuals as those serving in the Government).

34. See League of Nations Covenant art. 22 (declaring that “certain communities formerly belonging to the Turkish Empire” could be provisionally recognized as an independent nations, “subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone”); see also John Quigley, *The Palestine Declaration to the International Criminal Court: The Statehood Issue*, 35 RUTGERS L. REC. 1, 8-9 (2009) (arguing that “Palestine became an international entity upon the demise of the Ottoman Empire in the wake of War World I,” as a result of the mandate system implemented by the League of Nations, under which Palestine was to eventually gain independence). But see Robert Weston Ash, *Is Palestine a “State”? A Response to Professor John Quigley’s Article “The Palestine Declaration to the International Criminal Court: The Statehood Issue”*, 36 RUTGERS L. REC. 186, 197-98 (2009) (countering Quigley’s contention that the mandate system gave Arab Palestinians exclusive claim to the Gaza territory by pointing out that the grant of sovereignty to the “Palestinian people” could include both Jews and Arabs). In 1974, the UN General Assembly again resolved the “Question of Palestine” in favor of the rights of the Palestinian people to “self-determination” and “national independence and sovereignty.” G.A. Res. 3236, UN GAOR, 29th Sess., Supp. No. 31, ¶ 1, UN Doc. A/9361, at 4 (Nov. 22, 1974).

35. G.A. Res. 3237, UN GAOR, 29th Sess., Supp. No. 31, ¶ 1, UN Doc. A/9361, at 4 (Nov. 22, 1974); see also *United States v. Palestinian Liberation Org.*, 695 F. Supp. 1456, 1471 (S.D.N.Y. 1988) (finding that the U.S. Anti-Terrorism Act neither required cancellation of the PLO’s observer status at the UN nor allowed the U.S. government to interfere with that status); *Applicability of the Obligation to Arbitrate Under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, Advisory Opinion, 1988 I.C.J. 12, ¶¶ 57-58 (Apr. 26) (holding that the U.S. was bound by an arbitration clause in an agreement with the UN and was thus required to arbitrate a dispute involving its attempt to close the PLO Mission in New York through anti-terrorism laws).

36. Declaration of Principles on Interim Self Government Arrangements, Isr.-PLO, Sept. 13, 1993, 32 I.L.M. 1525 [hereinafter Oslo Accords].

settlement following a transition period and negotiations.³⁷ While the PNA is responsible for local governmental functions, Israel and the PLO, in connection with the Accords, exchanged letters wherein Israel recognized “the PLO as the representative of the Palestinian people,” at least for the purpose of negotiating peace in the Middle East.³⁸

A. STATEHOOD

The question of whether an entity claiming to be a state is indeed a state is a classic problem of public international law; this analysis resists easy and conclusive determination, especially in questionable cases such as Palestine.³⁹ Most readers will be familiar with the competing constitutive and declaratory theories of statehood.⁴⁰ In

37. See Wye River Memorandum (Interim Agreement), Isr.-PLO, Oct. 23, 1998, 37 I.L.M. 1251 [hereinafter Wye River Memorandum] (outlining actions required to fully implement the Interim Agreement); Interim Agreement on the West Bank and the Gaza Strip, Isr.-PLO, Sept. 28, 1995, art. 17, ¶¶ 1, 8, UN Doc. A/51/889, S/1997/357 [hereinafter Interim Agreement]; Oslo Accords, *supra* note 36, art. 1 (establishing “a Palestinian Interim Self-Government Authority . . . for the Palestinian people in the West Bank and the Gaza Strip, for a transitional period not exceeding five years . . .”). Clearly, a permanent Palestinian settlement has yet to come.

38. See Letter from Yasir Arafat, Chairman, Palestinian Liberation Org., to Yitzhak Rabin, Prime Minister, Israel (Sept. 1993), reprinted in 7 PALESTINIAN Y.B. INT'L L. 230 (1992-94); see also Michael Kearney & Stijn Denayer, *Al-Haq Position Paper on Issues Arising from the Palestinian Authority's Submission of a Declaration to the Prosecutor of the International Criminal Court under Article 12(3) of the Rome Statute* para. 26 (Al Haq, 2009), available at <http://www.icc-cpi.int/NR/rdonlyres/D3C77FA6-9DEE-45B1-ACC0-B41706BB41E5/281874/OTPAIHaqpositionpapericc14December2009.pdf> (comparing the responsibilities of the PNA and PLO and noting, inter alia, that the PLO has the capacity to “conduct negotiations and sign economic agreements ‘for the benefit of’” the PNA).

39. See, e.g., Davenport Communication, *supra* note 32 (acknowledging that the PNA may fulfill some statehood criteria, but ultimately concluding that Palestine is not a state and cannot become one until all criteria are satisfied). This assertion overlooks the considerable state practice cited herein that adopts a middle ground. Furthermore, it also contradicts Davenport's acknowledgment in the same communication that international law has no universally accepted definition of statehood. See *id.* at 8. This appears to contradict his confident conclusion elsewhere

40. Under the constitutive theory, the recognition of a new state by other established states is a requirement for statehood. See JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 19-22 (2d ed. 2006). The declaratory theory of statehood considers recognition of a new state by other states

contemporary scholarship, the prevailing view is that recognition of a new state by other states “does not bring into legal existence a state which did not exist before;” rather, statehood can only be established by the satisfaction of objective criteria.⁴¹ Nevertheless, the constitutive theory is sometimes applied in practice,⁴² or at the very least, the recognition of new states occasionally has constitutive effects.⁴³ This article will not conclude in favor of either theory, as

as a mere “political act” rather than as a pre-condition to achieving statehood. *Id.* at 22-26.

41. J. L. BRIERLY, *THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* 139 (Sir Humphrey Waldock ed., 6th ed. 1963); *see, e.g.*, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J. 1, ¶¶ 91, 94, 95 (Feb. 26) (evaluating the history of UN membership status of the entities that were part of the former Socialist Federal Republic of Yugoslavia (“SFRY”) in light of its dissolution and subsequent loss of UN membership, and concluding that the new Federal Republic of Yugoslavia (“FRY”) was permitted to *participate* at the United Nations until it reapplied for membership); Conference on Yugoslavia, Arbitration Commission, Opinion No. 1, para. 1, 31 I.L.M. 1494, 1495 (1992) (affirming the commission’s position that recognition of new states by other states is declaratory and discussing elements of statehood); Conference on Yugoslavia, Arbitration Commission, Opinion No. 10, para. 4-5, 31 I.L.M. 1526 (1992) (finding that the new FRY obtained statehood status under international law regardless of whether other states recognized it as a state because “recognition [is a] purely declaratory [and] discretionary act”). *See generally* M.J. PETERSON, *RECOGNITION OF GOVERNMENTS: LEGAL DOCTRINE AND STATE PRACTICE, 1815-1995* (1997) (providing a detailed explanation of the practice of recognition of governments, including the impact of recognition on statehood determinations and limits to recognition).

42. Prosecutor v. Delalić, Case No. IT-96-21-T, ¶¶ 105-108 Judgment (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998) (describing the emergence of new states following dissolution of the SFRY, including recognition of certain states by the European Community); *see also* Martti Koskenniemi, *The Place of Law in Collective Security*, 17 MICH. J. INT’L L. 455, 469 n.54 (1996) (commenting that Europe followed a constitutive approach in dealing with the states emerging from the SFRY in that it chose to recognize democratic states that complied with the European ideal of guaranteeing protection to minorities). *See generally* Alexandros Yannis, *The Concept of Suspended Sovereignty in International Law and Its Implications in International Politics*, 13 EUR. J. INT’L L. 1037-52 (2002) (noting the emergence of the concept of “suspended sovereignty” to situations in which states continue to recognize the statehood of another state under occupation that has no factual existence).

43. *See* CRAWFORD, *supra* note 40, at 24 (suggesting that “the actual practice of States respecting the dissolution of Yugoslavia may have been constitutive in effect”); JORRI DUURSMA, *FRAGMENTATION AND THE INTERNATIONAL RELATIONS OF MICRO-STATES: SELF DETERMINATION AND STATEHOOD* 142 (1996) (arguing that recognition and admission by the United Nations may have had constitutive

the following argument in favor of Palestinian statehood does not ultimately hinge on this distinction.⁴⁴

The statehood analysis traditionally begins with the Convention on Rights and Duties of States (“Montevideo Convention”), which established the objective criteria required for statehood including: a permanent population, a defined territory, a government, and the capacity to act in the international realm.⁴⁵ The additional or substitute criteria of “independence” is often asserted as well.⁴⁶ In the case of Palestine, both territory and population appear to be satisfied. Although Palestine’s external borders are not entirely clear, perfectly fixed borders may not be a hard requirement for statehood, as evidenced by Israel’s designation as a state despite its unclear borders. The requirements of government and capacity to enter into international relations will be addressed separately.

Practitioners and scholars have proposed a range of additional criteria for statehood beyond those identified in the Montevideo Convention. For example, one consideration is whether the opinion of the state in question is relevant for the purposes of statehood determination.⁴⁷ In the case of Palestine, some authors have construed

effects for certain European microstates); Matthew C. R. Craven, *The European Community Arbitration Commission on Yugoslavia*, 66 BRIT. Y.B. INT'L L. 1995 373, 375 (1996) (observing that international recognition of Bosnia-Herzegovina and Croatia was “highly ‘constitutive’”); see also A.V. Lowe & Colin Warbrick, *Current Developments: Public International Law: Recognition of States*, 41 INT'L & COMP. L.Q. 473, 480 (1992) (explaining that “reliance on recognition as some kind of constitutive device” gave other states a voice in the Yugoslavia situation by raising the issue of minority rights as related to the constitution of borders, a criteria not traditionally considered in statehood determinations).

44. For an argument that all acts of recognition embrace both theories to varying degrees, see generally William Thomas Worster, *Law, Politics, and the Conception of the State in State Recognition Theory*, 27 B.U. INT'L L.J. 115 (2009).

45. Convention on Rights and Duties of States art. 1, Dec. 26, 1933, 165 L.N.T.S. 19 [hereinafter Montevideo Convention].

46. See *Island of Palmas (Neth. v. U.S.)*, 2 R.I.A.A. 829, 838 (1928) (“Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other state, the functions of a state.”); James Crawford, *The Creation of the State of Palestine: Too Much Too Soon?*, 1 EUR. J. INT'L L. 307, 309 (1990) (contending that “state independence” should be the focus of statehood determinations, and pointing out that the concept embodies the territorial and self-governing elements established in the Montevideo Convention).

47. See, e.g., Yaël Ronen, *Entities that Can Be States But Do Not Claim to Be* (Hebrew Univ. of Jerusalem, Research Paper No. 06-10, 2011), available at

the statements of Palestinian authorities as admissions that Palestine is not a state, in spite of the fact that the state's position on the matter constitutes a subjective belief rather than an objective criterion.⁴⁸ A similar argument has been made in the case of Taiwan.⁴⁹ The Palestinian statements on which these authors rely are, however, less clear than they submit. For example, the authors base their argument on statements by Palestinian authorities referencing "the establishment of an independent Palestinian state" in the future.⁵⁰ These types of statements could equally reflect Palestine's acknowledgement that it needs to secure long-term economic viability, independence from military occupation, and declaratory recognition of its statehood.⁵¹ Further, given the necessity for cautious diplomacy in the Israel-Palestine conflict, the position of the PNA on Palestinian statehood is probably deliberately vague.

It has also been argued, both in the Palestine situation and in the ICJ's advisory opinion on Kosovo,⁵² that recognizing certain entities

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1926421.

48. See, e.g., Legal Memorandum in Opposition to the Palestinian Authority's January 2009 Attempt to Accede to ICC Jurisdiction Over Alleged Acts Committed on Palestinian Territory Since 1 July 2001 from Grégor Puppincq et al. to Luis Moreno-Ocampo, Prosecutor, Int'l Crim. Court, 12-15 (Eur. Ctr. L. & Justice, Sept. 9, 2009) [hereinafter Puppincq Memorandum], available at <http://www.icc-cpi.int/NR/rdonlyres/D3C77FA6-9DEE-45B1-ACC0-B41706BB41E5/281869/OTPllegalmemorandum1.pdf>.

49. See CRAWFORD, *supra* note 40, at 206-21 (discussing the legal status of Taiwan under international law and concluding that Taiwan is "not a State because it has not unequivocally asserted its separation from China and is not recognized as a State distinct from China"). This conclusion is rather absolute, however, and overlooks the likelihood that Taiwan, like Palestine, used purposefully vague language regarding its intent in light of the very real risk that the People's Republic of China would impose sanctions against it. See Bundesgericht [BGer] [Federal Supreme Court] Sept. 9, 2010, Case No. 5A_329/2009 (Switz.) (evidencing that Taiwan regards itself as a state for the purposes of inclusion in the International Organization for Standardization country name list); see also CRAWFORD, *supra* note 40, at 216-18 (discussing Taiwan's ambiguous statements in 1999 regarding a unitary China as signifying Taiwan's hesitance to speak plainly regarding its desire for formal separation in light of threatened sanctions).

50. See Puppincq Memorandum, *supra* note 48, at 12-15.

51. See, e.g., Application of Palestine for Admission to Membership in the United Nations, UN Doc. A/66/371, S/2011/592 (Sept. 23, 2011) (referring repeatedly to the already existing "State of Palestine," and signed by Abbas in his purported capacity as "President of the State of Palestine").

52. See generally Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, *supra* note 33 **Error!**

as states presents a slippery slope problem. The argument's logic is that recognizing an entity or ethnic minority opens the door for other similarly situated groups to seek recognition, thereby undermining the stability of the entire inter-state system.⁵³ It is far from clear that allowing the handful of entities that currently remain outside the state-based system to join the system on equal terms would necessarily result in a catastrophic, domino collapse of the entire state system, especially in light of the principle of territorial integrity. Moreover, even if recognizing those entities as states resulted in such a collapse, it is similarly uncertain whether international law would consider this policy concern to be relevant in the statehood analysis.

B. GOVERNMENT

Two of the objective Montevideo criteria—the existence of a government and the capacity for international relations—demand more detailed consideration in a discussion about the Israeli-Palestinian conflict. This article argues that the PNA has constituted a government for the purposes of establishing Palestinian statehood since the conclusion of the Oslo Accords, and that Palestine's capacity to act internationally, though limited, is also sufficient for the purposes of accepting the ICC's jurisdiction.

Prior to the Oslo Accords, Israel occupied the Palestinian territory and exercised government functions. Then, as stated previously, the PNA was established pursuant to the Oslo Accords, as an autonomous sub-organ of the PLO.⁵⁴ In the Accords and subsequent interim agreements, Israel consented to implementation of Security Council Resolutions 242 and 338, which included the transfer of

Bookmark not defined. ¶ 122 (entertaining arguments against Kosovo's unilateral declaration of independence, but ultimately concluding that "the adoption of [the February 2008] declaration did not violate any applicable rule of international law").

53. See e.g. Letter from Grégor Puppink, Ctr. Euro. L. & Justice, to Luis Moreno-Ocampo, Prosecutor, Int'l Crim. Ct (Sept. 9, 2009) available at <http://www.icc-cpi.int/NR/rdonlyres/D3C77FA6-9DEE-45B1-ACC0-B41706BB41E5/281869/OTPllegalmemorandum1.pdf> (warning—in colorful terms—that the ICC's extension of jurisdiction to Palestine "could open a Pandora's Box," and consequently "lead[] to a flood of similar declarations by non-state entities, thereby diluting the effectiveness of the Court and disrupting its activities").

54. See, e.g., Oslo Accords, *supra* note 36, art. I.

jurisdiction over the West Bank and Gaza to the newly created PNA for a transitional period of five years followed by a permanent settlement.⁵⁵ Both Israel and the PLO agreed that the West Bank and the Gaza Strip would be considered “a single territorial unit,”⁵⁶ over which the PNA would have sole jurisdiction.⁵⁷

The Accords and subsequent interim agreements provided that the PNA would have broad legislative, executive, and judicial authority,⁵⁸ which would extend to “education and culture, health, social welfare, direct taxation, and tourism.”⁵⁹ In addition, the agreements specified that the PNA would operate its own police force.⁶⁰ These agreements also stipulated that Israel could continue to exercise “powers and responsibilities not transferred to the [PNA],” notwithstanding their military’s withdrawal from the West Bank and Gaza.⁶¹ Israel specifically reserved that it “will continue to be responsible for external security, and for internal security and public order of settlements and Israelis.”⁶²

With regards to foreign relations, Israel and the PLO agreed that the PNA “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 . . . , the appointment of or admission of diplomatic and consular staff, and the exercise of diplomatic functions.”⁶³ Under the agreements, however, the PLO was permitted to conclude international agreements with states or international organizations “for the benefit of the [PNA],”⁶⁴ in narrow circumstances related to economic and

55. *Id.* arts. I, VI.

56. *See id.* art. IV; Interim Agreement, *supra* note 377, art. XVII(1).

57. Interim Agreement, *supra* note 37, art. XVII(2)(a).

58. *Id.* arts. IX (1), (6); *id.* art. XVII(3).

59. *See* Oslo Accords, *supra* note 36, art. VI(2).

60. *Id.* art. VI(2); *see also* Wye River Memorandum, *supra* note 377, § II(C)(1) (setting forth rules to ensure that the Palestinian police force complies with the agreements between Palestine and Israel).

61. Interim Agreement, *supra* note 37, art. I(5); *see also id.* art. XVII(1)(a)-(b) (excluding from the PNA’s jurisdiction “issues that will be negotiated in the permanent status negotiations: Jerusalem, settlements, specified military locations, Palestinian refugees, borders, foreign relations and Israelis” as well as any other powers not expressly transferred to the PNA).

62. *See* Interim Agreement, *supra* note 37, arts. IX(2), XII(1).

63. *Id.* art. IX(5)(a).

64. *Id.* art. IX (5)(b); *see also id.* art. IX (5)(c) (clarifying that the PNA’s

cultural development goals.⁶⁵

While dissenters make much of these limitations,⁶⁶ overall, the competencies transferred to the PNA permit the conclusion that Palestine has a government. Under the Accords and related agreements, the PNA is responsible for two of the most fundamental government services: a judiciary and a police force.⁶⁷ As for external security and diplomatic relations, international law does not necessarily require that an entity exercise these powers in order to satisfy the governmental criterion. Several small states, such as Liechtenstein, Monaco, and San Marino, which are widely regarded as states, do not substantively exercise powers of external security and diplomatic relations, yet their institutions satisfy the governmental criterion. Even without the microstate example, the PLO is capable of undertaking *some* international relations, a point discussed in greater depth below.⁶⁸ The fact that Palestine's governing bodies have limited powers and a potentially fractured existence does not mean that it is not a government and cannot satisfy this criterion for the purpose of establishing its statehood.

C. CAPACITY TO ACT INTERNATIONALLY

The criterion of capacity to act internationally demands further discussion. To begin, scholars debate whether such capacity is, in

dealings with foreign states and international organizations "shall not be considered foreign relations" if conducted for the purpose of implementing the Oslo Accords and subsequent agreements).

65. *Id.* art. IX (5)(b).

66. *See e.g.* Legal Opinion of Malcolm Shaw, In the Matter of the Jurisdiction of the International Criminal Court with Regard to the Declaration of Palestinian Authority from Alex Herman to Luis Moreno-Ocampo, Prosecutor, Int'l Crim. Court (Int'l Assoc. Jewish Lawyers & Jurists, Sept. 9, 2009) [hereinafter Shaw Opinion], available at <http://www.icc-cpi.int/NR/rdonlyres/D3C77FA6-9DEE-45B1-ACC0-B41706BB41E5/281883/OTP2009000036046InformationreceivedfromInternation.pdf> (contending that the transfer of limited powers to the PNA is not sufficient to establish the independence of the PNA for purposes of statehood, but failing to identify which powers are essential for a government to have and failing to consider that the transfer of powers from an occupying force to a people with the right to self-determination does limit the people from exercising other powers).

67. *See* Oslo Accords, *supra* note 36, art. VIII; Interim Agreement, *supra* note 37, art. IX(6). *But see* Davenport Communication, *supra* note 32, at 11 (pointing out that Hamas has attempted to "hijack" the Palestinian court system).

68. *See infra* Part III(C).

fact, a consequence of statehood, rather than a criterion.⁶⁹ If that is the case, then capacity to act internationally is evidence of statehood, rather than a criterion. This argument will not be addressed directly here since in either case, capacity to act internationally is significant for statehood. This section explores the ways in which Palestine has acted internationally. While these manifestations constitute evidence of statehood, this author ultimately concludes that Palestine's inconsistent capacity to act internationally does not rise to the level enjoyed by other states.

The entity that purports to be the "Arab State of Palestine" in fact declared itself to be a state in 1988, though that declaration may be somewhat lacking in content.⁷⁰ This declaration of statehood has been recognized by approximately ninety-seven states, including many Arab, African, and Eastern European states, but also by such significant world powers as Russia, China, India, and Indonesia,⁷¹ two of which sit as permanent members on the UN Security Council. All of Palestine's neighbors, except Israel, have recognized its statehood.⁷² These recognizing entities comprise approximately half of the world's states and a significant percentage of the world's population.⁷³ Many of these states are also States Parties to the Rome Statute, although admittedly Russia, China, India, and Indonesia are not.⁷⁴ While the United States does not currently recognize Palestine

69. CRAWFORD, *supra* note 40, at 61 (explaining that capacity to act internationally conflates the requirements of government and independence).

70. See G.A. Res. 43/827, Annex II, UN Doc. A/43/827 (Nov. 18, 1988). Certain authors argue that Palestine cannot be a state because it has not made subsequent declarations of statehood, and it did not satisfy the criteria of statehood at the time of its declaration in 1988. See *e.g.*, Shaw Opinion, *supra* 66, para. 48, n. 61. This conclusion, however, is inconsistent with international law, which only requires that statehood be established at some point.

71. *International Recognition of the State of Palestine*, PALESTINIAN NAT. AUTH.,

http://web.archive.org/web/20051226213246/www.pna.gov.ps/Government/gov/recognition_of_the_State_of_Palestine.asp (last visited Sept. 1, 2011). *But see* 3.10 – *How Many Countries Recognize Palestine as a State?*, INST. MIDDLE EAST UNDERSTANDING, <http://imeu.net/news/article0065.shtml> (last visited Sept. 1, 2011) (noting that the Palestinian passport is only accepted by twenty-nine states).

72. See *International Recognition of the State of Palestine*, *supra*, note 71.

73. For an argument that the international community has accepted the 1988 declaration as valid, see Quigley, *supra* note 34, at 4.

74. *The States Parties to the Rome Statute*, INT'L CRIM. CT., <http://www.icc-cpi.int/Menus/ASP/states+parties/> (last visited Sept. 1, 2011).

as a state, it has expressed its intention to do so in the near future.⁷⁵ It is unclear, however, what actual changes in the situation on the ground (aside from a negotiated peace with Israel) will prompt this recognition. Palestine has been admitted as a member to the League of Arab States,⁷⁶ the Organization of the Islamic Conference,⁷⁷ and the Arab League Educational Cultural and Scientific Organization, among others.⁷⁸ Admittedly, these are all Arab organizations and most fall under the umbrella of the League of Arab States. Palestine has also signed several international conventions, including investment and trade treaties with Egypt,⁷⁹ the United States,⁸⁰ and the European Union,⁸¹ and a variety of other minor agreements such

75. See Jeffrey Heller & Adam Entous, *Obama Envoy Tells Israel U.S. Wants Palestinian State*, REUTERS (Apr. 16, 2009), <http://www.reuters.com/article/idUKTRE53F20V20090416> (reporting that Obama's envoy to the Middle East stressed the President's commitment to "a two-state solution" in talks with Israeli leaders); *Clinton: Palestinian State 'Inescapable'*, USA TODAY, Mar. 3, 2009, http://www.usatoday.com/news/world/2009-03-03-clinton-israel_N.htm (highlighting statements by U.S. Secretary of State, Hillary Clinton, emphasizing the inevitability of a Palestinian state, while stressing the U.S.'s commitment to Israel's security). It has not been argued in international law that statehood is the gift of any particular state under either the declaratory or constitutive theories. Thus, the U.S. position cannot be contemplating the creation of a state, but rather the recognition of one.

76. See Pact of the League of Arab States Annex on Palestine, Mar. 22, 1945, 70 UNT.S. 237. Although the Pact specified that the League "shall be composed of . . . independent Arab States," the Pact provided for a Palestinian delegate in light of "Palestine's special circumstances," and specified that this arrangement would last until Palestine achieved independence, at which point, it would presumably be admitted as a state. *Id.* art. 1, Annex on Palestine.

77. See *Member States*, ORG. OF THE ISLAMIC CONF., http://www.oic-oci.org/member_states.asp (last visited Sept. 1, 2011).

78. See *The Member States*, ARAB LEAGUE EDUC. CULTURE & SCI. ORG., http://www.alecso.org.tn/lng/index.php?option=com_content&task=view&id=12&Itemid=13&lang=en (last visited Sept. 1, 2011).

79. See UN Comm'n on Trade and Dev. [UNCTAD], *Bilateral Investment Treaties: 1959-1999*, at 50, UN Doc. UNCTAD/ITE/IIA/2 (2000), available at <http://www.unctad.org/en/docs/poiteiid2.en.pdf>.

80. See Agreement on Encouragement of Investment, Aug. 11 & Sept. 12, 1994, U.S. - P.L.O., T.I.A.S. 12564 (entered into force Sept. 12, 1994). Note that this agreement is with the PLO, not the "State of Palestine."

81. See Euro-Mediterranean Interim Association Agreement on Trade and Cooperation, Feb. 24, 1997, Eur. Comm. - P.L.O. (stating that the agreement was executed by the PLO "for the benefit of the Palestinian Authority of the West Bank and the Gaza Strip"); see also Kearney & Denayer, *supra* note 38, at para. 28 (arguing that the fact that the PLO can enter into agreements on behalf of the PNA renders meaningless the limitations placed on the PNA by the Oslo Accords).

as those on international roads,⁸² railways,⁸³ and maritime transport cooperation.⁸⁴ Regarding the latter agreements, each was accepted for deposit by the Secretary-General of the United Nations, a privilege generally reserved for UN members.⁸⁵ Moreover, Palestinian athletes have participated under the Palestine flag in the Olympics since 1996 and with the International Federation of Football Association since 1998.⁸⁶ Interestingly, as of 2003, the American Academy of Motion Picture Arts & Sciences in Hollywood recognizes Palestine as a state for purposes of the Oscar category for foreign films.⁸⁷ Taken collectively, this practice appears to weigh strongly in favor of statehood.

On the other hand, a number of organizations have refused or otherwise postponed indefinitely Palestine's applications for

82. See, e.g., UN Secretary-General, Agreement on International Roads in the Arab Mashreq, Palestine: Ratification (Depositary Notification), UN Doc. C.N.1275.2006.TREATIES-3 (Jan. 5, 2007); UN Secretary-General, Agreement on International Roads in the Arab Mashreq, Palestinian Authority: Signature (Depositary Notification) UN Doc. C.N.572.2001.TREATIES-3 (June 7, 2001).

83. See, e.g., UN Secretary General, Agreement on International Railways in the Arab Mashreq, Palestine: Ratification (Depositary Notification) UN Doc. C.N.1274.2006.TREATIES-2 (Jan. 5, 2007); UN Secretary-General, Agreement on International Railways in the Arab Mashreq, Palestine: Signature (Depositary Notification) UN Doc. C.N.285.2003.TREATIES-5 (Apr. 25, 2003).

84. See, e.g., UN Secretary General, Agreement on Maritime Transport Cooperation in the Arab Mashreq, Palestine: Definitive Signature (Depositary Notification), UN Doc. XI.D.7, Ref. C.N.624.2005.TREATIES-10 (Aug. 9, 2005).

85. See UN Charter art. 102(1) ("Every treaty and every international agreement entered into by *any Member of the United Nations* after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.") (emphasis added).

86. See *Palestinian Olympic Committee*, INT'L OLYMPIC COMM., <http://www.olympic.org/en/content/National-Olympic-Committees/palestine/> (last visited Sept. 1, 2011); *Historic Day for Palestine*, INT'L FEDERATION OF ASSOC. FOOTBALL, (Oct. 24, 2008), <http://www.fifa.com/aboutfifa/federation/president/news/newsid=924099.html>; INT'L FEDERATION OF ASSOC. FOOTBALL, FIFA STATUTES: REGULATIONS GOVERNING THE APPLICATION OF THE STATUTES art. 10 (2008), available at http://www.fifa.com/mm/document/affederation/administration/01/09/75/14/fifa_statutes_072008_en.pdf (providing that "[a]ny Association which is responsible for organising and supervising football in its country may become a Member of FIFA" and clarifying that a country is defined as "an independent state recognised by the international community") (emphasis added).

87. See *Oscars Will Recognize 'Palestine': Academy Includes Entry Among 'Record 55 Countries in Competition'*, WORLDNETDAILY.COM (Oct. 22, 2003), http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=35201.

membership, among them the United Nations Educational, Scientific and Cultural Organization (“UNESCO”), the World Health Organization (“WHO”), the Food and Agriculture Organization (“FAO”), the International Labor Organization (“ILO”), the International Telecommunication Union (“ITU”), and the Commonwealth.⁸⁸ In terms of treaties, Switzerland refused Palestine’s attempt to accede to the Geneva Conventions, as it was entitled to do as the depositary state, but recognized as valid the PLO’s decision to abide by the conventions.⁸⁹ For an entity to be a

88. See WHO, Study by the Director-General on the Admission of Palestine, WHO Doc. A43/3 (1990); UN Educ. Scientific, & Cultural Org. [UNESCO], Decisions Adopted by the Executive Board at Its 132nd Session 44-46 (Dec. 13, 1989), available at <http://unesdoc.unesco.org/images/0008/000845/084504e.pdf> (deferring consideration of the Palestinian application for membership “in a spirit of constructive co-operation”); see also Frederic L. Kirgis Jr., *Admission of “Palestine” as a Member of a Specialized Agency and Withholding the Payment of Assessments in Response*, 84 AM. J. INT’L L. 218 (1990) (noting that the United States threatened to withhold its dues to the WHO, FAO, and other UN agencies in order to prevent the admission of Palestine as a member); Commonwealth heads of Government Meeting, Kampala, Uganda, Nov. 25-27, 2007, *Membership of the Commonwealth: Report of the Committee on Commonwealth Membership*, HGM(07)(FM)3 (Oct. 24, 2007), available at http://www.thecommonwealth.org/shared_asp_files/GFSR.asp?NodeID=174532 (noting that certain Commissioners in The Commonwealth believe that Palestine’s membership should be deferred until it attains statehood). It is notable that most of these organizations are UN agencies or closely related to the United Nations and may have been guided by UN practice on the matter.

Shortly before this article went to publication, UNESCO voted to admit Palestine as a member. See Steven Erlanger & Scott Sayare, *UNESCO Accepts Palestinians as Full Members*, N.Y. TIMES (Oct. 31, 2011), available at http://www.nytimes.com/2011/11/01/world/middleeast/unesco-approves-full-membership-for-palestinians.html?_r=1&scp=2&sq=UNESCO&st=cse. The decision to admit Palestine appears to have been based on functional criteria, i.e. whether the entity purporting to be a state of Palestine can engage in and benefit from the particular educational, scientific, and cultural projects done by UNESCO. See, e.g., *Address by Ms. Irina Bokova, Director-General of UNESCO on the occasion of the agenda item concerning the admission of Palestine as UNESCO State Member*, Gen. Conf. 36th plen. sess., UNESCO Doc. DG/2011/147 (Oct. 31, 2011), available at <http://unesdoc.unesco.org/images/0021/002136/213660e.pdf>.

89. INT’L COMM. RED CROSS, STATE PARTIES TO THE FOLLOWING INTERNATIONAL HUMANITARIAN LAW AND OTHER RELATED TREATIES AS OF 8-SEP-2010 6 (2010), available at [http://www.icrc.org/IHL.nsf/\(SPF\)/party_main_treaties/\\$File/IHL_and_other_related_Treaties.pdf](http://www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf) (recognizing that the PLO is “entrusted with the functions of the Government of the State of Palestine” and that it decided via letter to “adhere to the Four Geneva Conventions,” and explaining that the Swiss Federal Council notified the Red Cross that it could not determine

state, we might expect it to receive more confidence from the international community.

Turning to United Nations practice specifically, the UN has expressed an intention for Palestine to be independent and self-governing since 1947.⁹⁰ To date, Palestine has been admitted as an observer to the United Nations and its documents are circulated freely by the Secretariat.⁹¹ Admission as an observer has long been regarded as a preliminary gesture prior to attaining actual statehood.⁹² Although formally an observer, Palestine's substantive status is, in fact, something more. Palestine is accorded more privileges than a mere observer, such as "the right to co-sponsor resolutions."⁹³ Yet, both the UN General Assembly and Secretary-General have declined to definitively say whether the entity is a state.⁹⁴

Based on the foregoing, Palestine undeniably has capacity to act internationally, though this capacity is limited. If capacity is a consequence of statehood, then Palestine must necessarily have some aspects of statehood to exercise this capacity. If capacity to act internationally is a criterion of statehood, then the question of

whether the PLO's letter "constituted an instrument of accession").

90. See generally G.A. Res. 181 (II), UN Doc. A/RES/181(II) (Nov. 29, 1947) (describing the process for the withdrawal of the Palestinian Mandate and outlining the creation of independent Jewish and Arab states).

91. See G.A. Res. 43/177, ¶ 3, UN Doc. A/RES/43/177 (Dec. 15, 1988) (changing designation as observer from "P.L.O." to "Palestine"); G.A. Res. 43/160, ¶ 1, UN Doc. A/RES/43/160 (Dec. 9, 1988); G.A. Res. 3236/29, UN Doc. A/Res/3236/29 (Nov. 22, 1979). The change in designation of Palestine from PLO at the United Nations, however, was made "without prejudice to the observer status and functions of the Palestine Liberation Organization within the United Nations system. . . ." See G.A. Res. 43/177, *supra*, ¶ 3.

92. See NGUYEN QUOC DINH ET AL., *DROIT INTERNATIONAL PUBLIC [PUBLIC INTERNATIONAL LAW]* (2d ed. 1980). Of course, observer status does not mean that an entity necessarily will attain statehood.

93. See, e.g., G.A. Res. 52/250, ¶1, Annex, UN Doc. A/RES/52/250 (July 13, 1998) (granting Palestine the "right to participate in general debate of the General Assembly," the "right of reply," the "right to co-sponsor resolutions," the right to raise points of order on issues affecting Palestine or the Middle East generally, and the privilege of seating in order "immediately after non-member states, but before the other observers").

94. See e.g., G.A. Res. 43/177, *supra* note 91, ¶¶ 1-3 (acknowledging the Palestine National Council's 1988 declaration of statehood and noting "the need to enable" Palestinian sovereignty over occupied territory while reaffirming Palestine's observer status within the UN system).

whether Palestine satisfies this criterion is one of degree. Palestine satisfies the criterion only partly, and not to the same degree as other states.

D. CONCLUSION ON PALESTINIAN STATEHOOD

This article argues that Palestine has attained some recognition as a state, exhibits the essential features of a government, and manifests some capacity to act internationally. Nevertheless, the effective triumvirate of the PNA, PLO, and people of Palestine does not fully and conclusively satisfy the objective Montevideo requirements for statehood, and has not garnered subjective recognition from an overwhelming number of the states in the world. Although Palestine acts internationally in many ways and in many situations, it does not enjoy the same degree of freedom in international relations as other states. In other words, Palestine is not a state for all purposes, though it appears to be incrementally exerting increasing independence.⁹⁵ Rather, Palestine has been regarded as a state at *certain* times by *certain* actors in *certain* contexts. Palestine is most appropriately categorized as a quasi-state.

E. QUASI-STATEHOOD

Entities can be recognized as states for certain purposes or in certain contexts without being considered states for all purposes. There have been many examples of such “relative” statehood.⁹⁶ These include the “A” Mandated Territories,⁹⁷ the Free City of Danzig,⁹⁸ the Holy See,⁹⁹ the Sovereign Military Order of Malta,¹⁰⁰

95. See Tabory, *supra* note 322, at 142 (defining the PNA as a “non-State entity”). See generally Benoliel & Perry, *supra* note 32 (presenting and refuting arguments for recognizing Palestine as a state). But see generally JOHN QUIGLEY, THE CASE FOR PALESTINE: AN INTERNATIONAL LAW PERSPECTIVE (2005) (evaluating the history of the Israeli-Palestinian conflict and submitting that a Palestinian state is possible); Memorandum from John Quigley to the Ofc. of the Prosec., ICC (Mar. 23, 2009) reprinted in *Summary of Submissions on Palestine*, *supra* note 16, Annex (responding to Crawford and contending that a Palestinian state is consistent with international law).

96. Hans Kelsen, *Recognition in International Law: Theoretical Observations*, 35 AM. J. INT'L L. 605, 609 (1941) (“[T]he legal existence of a state . . . has a relative character. A state exists legally only in its relations to other states. There is no such thing as absolute existence.”).

97. CRAWFORD, *supra* note 40, at 31.

98. *Id.* (noting that Danzig is treated as a state for purposes of article 71(2) of

British India,¹⁰¹ Ukraine and Belarus (formerly the Byelorussian Soviet Socialist Republic),¹⁰² protectorates and protected states such as Bhutan and San Marino,¹⁰³ and associated states like Puerto Rico.¹⁰⁴

the rules of the Permanent Court of International Justice, but that its status as a state in other contexts is unclear).

99. *Id.* at 37, n. 37.

100. Noel Cox, *The Acquisition of Sovereignty by Quasi-states: The Case of the Order of Malta*, 6 MOUNTBATTEN J. LEG. STUDIES 26, 47 (2002) (concluding that the Order of Malta is not technically a state even though it has international legal personality, and pointing out that the emergence of “newer types of international entities” signifies the eroding relevance of traditional notions of state sovereignty).

101. See Crawford, *supra* note 46, at 320-23 (describing Great Britain’s relationship with the Indian Native States prior to 1947 and explaining that, while Britain considered those areas “as extraterritorial . . . [and afforded them] the general right to internal self-government,” it also claimed the rights to “conduct international relations, exercise . . . jurisdiction over Europeans and Americans, . . . and [regulate their militaries].” Compare *Maharaja of Tripura v. Prov. of Assam*, 22 I.L.R. 64, 66 (High Ct. Calcutta, Ind. 1948) (holding that the Maharaja of Tripura is an “independent sovereign” under international law), with *Singh v. Comm’r of Income Tax, Cent. & United*, 10 I.L.R. 43, 46-47 (High Ct. Allahbad, Ind. 1942) (holding that “Indian states,” as suzerainties were “not independent” for the purposes of British tax immunity), and *R.S.B. Singh v. Vindhya Pradesh*, 20 I.L.R. 3, 4 (India 1953) (holding that the entity was only “internally sovereign”).

102. See UN Legal Counsel, *Questions regarding the scale of assessment for Belarus and Ukraine in the light of the change in the relationship between them and the former Union of Soviet Socialist Republics – Report of the Committee on contributions on “Assessment of New member States” – General Assembly Resolution 46/221 A and Rule 160 of the Rules of Procedure of the General Assembly*, 1992 UN Jurid. Y.B. 435, UN Sales No. 97.V.8 (confirming that Ukraine and Belarus are “original Members” of the United Nations following their dissolution from the Soviet Union).

103. See Crawford, *supra* note 46, at 288-89 (prescribing a general rule “that the exercise of delegated powers pursuant to protectorate arrangements is not inconsistent with statehood if the derogations from independence are based on local consent, do not involve extensive powers of internal control and do not leave the local entity without some degree of influence over the exercise of its foreign affairs,” and noting that Bhutan and San Marino both satisfy these basic criteria); *Nationality Decrees Issued in Tunis and Morocco, Advisory Opinion*, 1923 P.C.I.J. (ser. B) No. 4, at 27 (Feb. 7) (“The extent of the powers of a protecting State in the territory of a protected States depends, first, upon the Treaties between the protecting State and the protected State establishing the Protectorate, and, secondly, upon the conditions under which the Protectorate has been recognized by third Powers as against whom there is an intention to rely on the provisions of these Treaties.”).

104. See generally CRAWFORD, *supra* note 40 (outlining the key characteristics of associated states, which in some cases closely approximate statehood, and noting the increased willingness of international organizations to admit associated

In addition, many entities are now accepted as states despite a long period of uncertainty regarding their status.¹⁰⁵ Canada and other former Dominions of the British Empire are ready examples. Canada's independence is best characterized as an evolving one. The Constitutional Act of 1791,¹⁰⁶ the British North America Acts of 1867 through 1975,¹⁰⁷ the Statute of Westminster of 1931,¹⁰⁸ and the Constitution Act (Canada Act) of 1982¹⁰⁹ all represent the incremental steps taken towards Canadian statehood. Moreover, although the Parliament of the United Kingdom claimed the right to legislate for Canada until 1982,¹¹⁰ Canada was recognized as a sovereign state and acted as such prior to that date.¹¹¹ Therefore,

states as full members or observers). For a detailed analysis of the debate surrounding Puerto Rico's status as a commonwealth, see generally Lani E. Medina, Note, *An Unsatisfactory Case of Self-Determination: Resolving Puerto Rico's Political Status*, 33 *FORDHAM INT'L L. J.* 1048 (2010) (examining the meaning of "self-determination" in international law, and arguing that "the people of Puerto Rico have yet to fully exercise their right to self-determination").

105. Dissenters of Palestinian statehood often take an all or nothing approach, ignoring the concrete steps Palestine has taken towards becoming a state. *See, e.g.* Davenport Communication, *supra* note 32, at 8 (arguing that Palestine is "in the midst of a process that may lead to statehood, but is not a state at this time").

106. Constitution Act, 1791, 31 Geo. 3, c. 31 (U.K.) (establishing the Canadian government).

107. Constitution Act, 1867, 30 & 31 Vict. c. 3 (U.K.); British North America Act, 1871, 34 & 35 Vict. c. 28 (U.K.); British North America Act, 1886, 49 & 50 Vict. c. 35 (U.K.); British North America Act, 1907, 7 Edw. VII, c. 11 (U.K.); British North America Act, 1915, 5 & 6 Geo. V, c. 45 (U.K.); Constitution Act, 1930, 20 & 21 Geo. V, c. 26 (U.K.); British North America Act, 1940, 3 & 4 Geo. VI, c. 36 (U.K.); British North America Act, 1943, 6 & 7 Geo. VI, c. 30 (U.K.) (repealed); British North America Act, 1946, 9 & 10 Geo. VI, c. 63 (U.K.) (repealed); British North America Act, 1949, 12, 13 & 14 Geo. 6, c. 22 (U.K.); British North America (No. 2) Act, 1949, 12, 13 & 14 Geo. 6, c. 81 (U.K.) (repealed); British North America Act, R.S.C. 1952, c. 304 (Can.); British North America Act, 1965, 14 Eliz. 11, c. 4 (U.K.); British North America Act, 1974, 23 Eliz. II, c. 13 (U.K.); British North America Act (No. 1), 1975, 23 & 24 Eliz. II, c. 28 (U.K.); British North America Act (No. 2), 1975, 23 & 24 Eliz. II, c. 53 (U.K.).

108. *See* Statute of Westminster, 1931, 22 & 23 Geo. 5, c. 4, arts. 2(2)-(4) (U.K.) (providing Canada (and other "Dominions") the power to legislate independently from England and extraterritorially).

109. *See* Canada Act, 1982, c. 11 pmb. ¶ 2 (U.K.) (renouncing any residual legislative authority of the United Kingdom's parliament to enact amendments to the Canadian Constitution and, thus, patriating the Canadian Constitution).

110. *See id.*

111. *See, e.g.*, Convention Between the Government of Canada and the Government of the United Kingdom of Great Britain and Northern Ireland for the

throughout much of its history, Canada's status was that of a quasi-state.

Even further, this situation is not dissimilar to that of the status of international organizations. Some organizations have absolute legal personality, such as the United Nations.¹¹² Other organizations have relative legal personality, meaning they have legal personality only in relation to those members that accept the international organization as such.¹¹³ Consequently, international law tolerates the

Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains, 1980 Can. T.S. No. 25. The fact that the United Kingdom entered into a treaty with Canada in 1980, at which point it retained the right to legislate for Canada, suggests that even the United Kingdom regarded its intra-Commonwealth relations as foreign relations. *See also* Agreement on the Establishment of Direct Diplomatic Relations Between Canada and the Union of Soviet Socialist Republics, 1942 Can. T.S. No. 12; Agreement Between the Government of Canada and the Government of the Union of Soviet Socialist Republics Providing for the Exchange of Consuls, 1942 Can. T.S. No. 9; *R. v. Sec'y of State for Foreign & Commonwealth Affairs, ex parte Indian Ass'n of Alta. et al.*, [1982] Q.B. 892 (C.A.) (Eng.) (Denning, M.R., Kerr & May, J.J.) (discussing the divisibility of the Crown as evolutionary through "constitutional usage and practice"), *aff'd* (H. Lords, Mar. 11, 1982) (Diplock, Fraser of Tullybelton, Russel of Killowen, Scarman & Bridge of Harwich, LL.), *reprinted at* 78 INT'L L. REPS. 421.

112. *See* *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. 174, 187-88 (Apr. 11) (concluding that the United Nations has the capacity to sue a Member State on behalf of an injured agent). *See generally* James E. Hickey, Jr., *The Source of International Legal Personality in the 21st Century*, 2 HOFSTRA L. & POL'Y SYMP. 1, 18 (1997) (documenting the rise of international and regional organizations as legal personalities in the twentieth century, and examining potential bases for the international legal personality of new entities such as "nongovernmental organizations, multinational corporations and to some extent, subnational governments" in the twenty-first century).

113. *See* CRAWFORD, *supra* note 40, at 30 (distinguishing between entities with objective legal personality, which exists "wherever the rights and obligations of an entity are conferred by general international law," and those cases where an entity is created "by particular States for special purposes," and only those states are bound). *Compare* David Ettinger, Comment, *The Legal Status of the International Olympic Committee*, 4 PACE Y.B. INT'L L. 97, 104 (1992) (mentioning that the Olympic Charter has international personality by virtue of its near universal activities, and that the norms embodied in the Olympic Charter rise to the level of customary international law) *with* Romana Sadurska & C.M. Chinkin, *The Collapse of the International Tin Council: A Case of State Responsibility?*, 30 VA. J. INT'L L. 845, (1990) (describing the creation of the International Tin Council ("ITC") by over twenty tin producing and consuming states, and arguing that the ITC and its Member States could be held liable by third party creditors in certain circumstances).

recognition of certain entities as states for certain purposes and not for others.

Many factors suggest that Palestine has some form of relative statehood status that could be sufficient to satisfy the requirements of the Rome Statute.¹¹⁴ First, in certain contexts, Palestine is regarded as a state.¹¹⁵ In addition, even those states that have not recognized Palestine as a state have accorded its envoys a form of diplomatic relations and privileges and immunities.¹¹⁶ Others have expressed their hope or expectation that Palestine will be recognized as a state in the future.¹¹⁷ Finally, scholars of international law have likened Palestine to other entities that have some degree of capacity to act internationally, including the Cook Islands, Greenland, Puerto Rico, and Taiwan.¹¹⁸ Perhaps one day, the international community will universally and conclusively recognize Palestine as a state, most likely following a negotiated peace settlement. If that happens, the present period is analogous to the transitory phase that marked Canada's long process of achieving independence.

Accession to the Rome Statute will not be enough to constitute Palestine as a state. A single act of accession to a treaty cannot

114. The PNA's attempt to accede to the ICC need not be considered a request for recognition of an absolute Palestinian statehood. It makes no request of that gravity in its application, though it does presuppose statehood. Thus, arguments that PNA officials themselves doubt whether Palestine is a state are not relevant here. *See supra* notes 54-56 and accompanying text.

115. *See, e.g.*, Case C-386/08, *Brita GmbH v Hauptzollamt Hamburg-Hafen*, Judgment, ¶¶ 44-53 (Eur. Ct. Just., 4th Ch., Feb. 25, 2010) (recognizing that the European Communities entered into trade agreements with Israel and the PLO separately, and noting that each agreement "has its own territorial scope" with the EC-PLO agreement applying to the West Bank and Gaza Strip). Moreover, even Israel occasionally treats the PNA as a quasi-foreign entity for certain purposes. *See also, Israel: Prohibition Against Bribery of Foreign Public Officials*, LIBRARY OF CONG. (Mar. 8, 2010), http://www.loc.gov/lawweb/servlet/lloc_news?disp3_1205401855_text (publicizing an amendment to an Israeli statute that "prohibits bribery of public officials of foreign countries, and of international and political entities, including the Palestinian Authority").

116. *International Recognition of the State of Palestine*, *supra* note 71 (listing France, Belgium, Germany, Greece, Italy, Netherlands, Portugal, Spain, United Kingdom, Brazil, and Switzerland as among those non-recognizing countries that have granted some form of diplomatic status to Palestinian representation).

117. *See supra* notes 70-87 and accompanying text.

118. CRAWFORD, *supra* note 40, at 739-40 (including Palestine on the list of "Territorial Entities Proximate to State").

establish that an entity is a state for all purposes, just as one act of recognition by one state would not render an entity a state.¹¹⁹ In his work on recognition, Hersch Lauterpacht opined that a supra-national organ might one day be empowered to make conclusive statehood determinations.¹²⁰ John Dugard took this thesis one step further and concluded that the United Nations had effectively become that organ.¹²¹ This author is reluctant to go so far. It is far from clear that the negotiating parties intended for the United Nations to serve such a function.¹²² Further, subsequent practice rebuts the argument that membership in the United Nations is synonymous with statehood. At its inception, the United Nations excluded some entities from membership, even though it acknowledged them as states.¹²³ Also, in practice, a UN member is not obliged to recognize another member as a state, even though it acknowledges the entity's membership in the United Nations.¹²⁴

119. See *supra* note 40-43 and accompanying text (accepting the constitutive theory of statehood as the minority view).

120. See HERSCH LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW* 55 (1947).

121. See JOHN DUGARD, *RECOGNITION AND THE UNITED NATIONS* 3 (1987); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 201 comm. h. (“[A]dmission to membership in an international organization such as the United Nations is an acknowledgement by the organization, and by those members who vote for admission, that the entity has satisfied the requirements of statehood.”); THEODOR MERON, *THE HUMANIZATION OF INTERNATIONAL LAW* 310 (2006) (“While distinct from the recognition of statehood, admission to international organizations necessarily assumes recognition as a State.”); Thomas D. Grant, *Defining Statehood: The Montevideo Convention and its Discontents*, 37 COLUM. J. TRANSNAT’L L. 403, 412 (reviewing various scholarly opinions on criteria for statehood that look to the UN membership practices as evidence of statehood).

122. E.g., United Nation Conference on International Organizations, Norwegian Delegation, Amendments and Observations on the Dumbarton Oaks Proposals, UN Doc. 2, G/7(n)(1) ¶4 (May 4, 1945) (documenting a proposal by Norway that UN members be permitted to advocate for the recognition of new States by other member states); Hans Aufricht, *Principles and Practices of Recognition by International Organizations*, 43 AM. J. INT’L L. 679, 680 (1949) (asserting that “simultaneous membership in an international organization is not a substitute for *de jure* or *de facto* recognition by states”).

123. See Leo Gross, *Progress Towards Universality of Membership in the United Nations*, 50 AM. J. INT’L L. 791, 826 n.168 (1956) (acknowledging that, even by the Tenth Session of the UN General Assembly, “essential states like Germany and Japan” were still not accepted as members).

124. Cf. Aufricht, *supra* note 122, at 680-81 (“[A]dmission to [the League of Nations] did not necessarily imply that each individual Member of the League was therefore bound to recognize every other Member.”). Recent examples include:

Further, states are not obliged to join the UN merely because they are states.¹²⁵ In any event, even if some supra-national organization was competent to determine conclusively which entities are states, it would most likely be the United Nations, not the ICC. Therefore, Palestine's accession to the Rome Statute could be evidence of statehood, but it would not impose a collective recognition obligation on the other States Parties.

In conclusion, Palestine's statehood status is uncertain. It is, quite frankly, a difficult case. Until its status becomes more defined, Palestine is best classified as a quasi-state in acknowledgement of the facts that it has been recognized by some states and that it has some capacity to act internationally. If Palestine is a quasi-state, it may be considered a state for specific purposes even though it has not attained absolute statehood. For example, China and Russia, among others, have recognized Palestine as a state, and presumably Palestine must be treated as a state in its relations with those countries. Indeed, extending the logic of this observation to its conclusion suggests that China and Russia may be estopped from denying Palestinian statehood. On the other hand, the United Nations has so far reached the opposite conclusion, so Palestine need not be treated as a state in UN matters for the time being. Quasi-state status, however, means that Palestine's relations with the ICC are an open question. The ICC should not conclude that international law demands that it refuse to recognize Palestine as a state. Rather, international law may permit the ICC to recognize it as a state for the limited purposes of jurisdiction or accession.

F. THE ROME STATUTE AND NON-STATE ENTITIES

As a quasi-state, this article contends that Palestine may accede to the Rome Statute or otherwise accept the jurisdiction of the Court. As observed above, the Rome Statute appears to limit membership to

Israel's lack of recognition by many Middle Eastern states, Liechtenstein's lack of recognition by Czechoslovakia, and Belize's lack of recognition by Guatemala.

125. See James Crawford, *State Practice and International Law in Relation to Unilateral Secession*, in ANNE F. BAYESKY, SELF-DETERMINATION IN INTERNATIONAL LAW: QUEBEC AND LESSONS LEARNED 31, 35 n. 7 (2000) (noting that Switzerland, the Vatican City, Kiribati, Nauru, Tonga, and Tuvalu, are among those states which had not sought membership in the United Nations at the time).

states by its express terms.¹²⁶ Some authorities have stated that the ICC must determine whether Palestine is a state before it may be permitted to join the Court.¹²⁷ This article suggests a different possibility; namely, that the Rome Statute's definition of "state" can be interpreted to include quasi-states such as Palestine.

International organizations may limit membership to states but international law does not require them to do so.¹²⁸ Indeed, some organizations expressly provide that members need not be states, including, *inter alia*, the African, Caribbean, and Pacific Group of States ("ACP"),¹²⁹ Asian Development Bank ("ADB"),¹³⁰ Caribbean Community and Common Market ("CARICOM"),¹³¹ Economic and Social Commission for Asia and the Pacific ("ESCAP"),¹³² European and Mediterranean Plant Protection Organization,¹³³ International Civil Aviation Organization ("ICAO"),¹³⁴ International Fund for

126. See Rome Statute, *supra* note 2, arts. 4(1), 9(1)–(2), 11(2), 12(1), 12(3), 13(a), 14, 17(1)(a)–(b), 18, 125(1), 125(3), 127(1).

127. See Rotella, *supra* note 17 (quoting the Israeli Foreign Minister's belief that "[t]he ICC charter is adhered to by sovereign states, and the Palestinian Authority has not yet been recognized as one, so it cannot be a member . . . [the Palestinian declaration] doesn't mean anything except that it's a good propaganda stunt"); Puppink Memorandum, *supra* note 48, at 11 (stating categorically that "non-state entities" are not permitted to accede to the Rome Statute).

128. See FELICE MORGENSTERN, LEGAL PROBLEMS OF INTERNATIONAL ORGANIZATIONS 50-51 (1986).

129. See Partnership Agreement Between the Members of the African, Caribbean and Pacific Group of States and Its Member States, of the One Part, and the European Community and Its Member States, of the Other Part art. 4, June 23, 2000, 2000 O.J. (L 317) 3 [hereinafter *The Cotonou Agreement*] (explaining the role of non-State actors); *ACP Member States*, AFRICAN, CARIBBEAN, AND PACIFIC GRP. OF STATES, http://www.acpsec.org/en/acp_states.htm (last visited Sept. 1, 2011) (listing Cook Islands and Niue as members).

130. See Agreement Establishing the Asian Development Bank art. 3(3), Dec. 4, 1965, 17 U.S.T. 1418; CRAWFORD, *supra* note 40, at 633 n.146 (reporting admission of Cook Islands as a member).

131. See Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy arts. 3(2), 231, July 5, 2001, available at http://www.caricom.org/jsp/community/revised_treaty-text.pdf (admitting territories in the Caribbean region).

132. See *Members*, ESCAP, <http://www.unescap.org/about/member.asp> (last visited Sept. 1, 2011) (listing Cook Islands, Niue, and Northern Mariana Islands as associate members).

133. See Convention for the Establishment of the European and Mediterranean Plant Protection Organization arts. III, XXI, Apr. 18, 1951, U.K.T.S. 44 (1956).

134. See *Contracting States*, INTERNATIONAL CIVIL AVIATION ORGANIZATION

Agricultural Development,¹³⁵ International Federation of Red Cross and Red Crescent Societies (“IFRC”),¹³⁶ International Confederation of Free Trade Unions (“ICFTU”),¹³⁷ International Olympic Committee (“IOC”),¹³⁸ Pacific Community (“PC”),¹³⁹ Pacific Island Forum (“PIF”),¹⁴⁰ South Pacific Regional Trade and Economic Cooperation Agreement,¹⁴¹ Universal Postal Union,¹⁴²

(ICAO), <http://www.icao.int/cgi/statesDB4.pl?en> (last visited Sept. 1, 2011) (listing Cook Islands as a contracting state).

135. See Agreement Establishing the International Fund for Agricultural Development art. 3(1)(b), June 13, 1976, 28 U.S.T. 8435 (allowing groups of States to join); *IFAD Member States*, INTERNATIONAL FUND FOR AGRICULTURAL DEVELOPMENT FUND, <http://www.ifad.org/governance/ifad/ms.htm> (last visited Sept. 1, 2011) (listing Cook Islands as a Member State).

136. See Constitution of the International Federation of Red Cross and Red Crescent Societies arts. 1, 6-7, available at http://www.ifrc.org/Docs/pubs/who/constitution/Constitution_revised-en.pdf (membership is comprised of National Societies); *Directory*, INTERNATIONAL FEDERATION OF RED CROSS AND RED CRESCENT SOCIETIES, <http://www.ifrc.org/ADDRESS/directory.asp> (last visited Sept. 1, 2011) (listing Cook Islands).

137. See Constitution of the International Federation of Free Trade Unions art. I(a)-(b), available at <http://www.icftu.org/www/pdf/Constitution-18.pdf> (admitting trade union organizations); *ICFTU Address Book*, INT'L FEDERATION OF FREE TRADE UNIONS, <http://www.icftu.org/addresslist.asp?Language=EN> (last visited Sept. 1, 2011) (listing the trade unions of Cook Islands and Puerto Rico as members).

138. See INT'L OLYMPIC COMM., OLYMPIC CHARTER R. 28(3), 31(1) (July 7, 2007), available at http://multimedia.olympic.org/pdf/en_report_122.pdf (creating National Olympic Committees, which exclusively represent their respective countries, and defining “country” as “an independent state recognized by the international community”); see also CRAWFORD, *supra* note 40, at 633 nn.146-47 (reporting admission of Cook Islands and Puerto Rico as members).

139. See Consolidation of Agreed Provisions and Practices Relating to the Establishment and Operations of the South Pacific Commission, Including the Canberra Agreement of 1947 as Amended arts. II(2)(a), available at <http://wwwx.spc.int/coastfish/canberra.htm> (admitting territories in the Pacific Ocean administered by a participating Government, amongst other requirements); *SPC Member Countries*, SOUTH PACIFIC COMMISSION, http://www.spc.int/pps/spc_member_countries.htm (last visited Sept. 1, 2011) (listing Cook Islands, Niue, and Northern Mariana Islands as members).

140. See Agreement Establishing the Pacific Islands Forum Secretariat art. IV, Oct. 30, 2000, available at <http://www.forumsec.org/resources/uploads/attachments/documents/Agreement%20Establishing%20the%20PIFS,%202000.pdf> (listing governments of Australia, the Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Nauru, New Zealand, Niue, Palau, Papua New Guinea, the Republic of the Marshall Islands, Samoa, Solomon Islands, Tonga, Tuvalu, and Vanuatu as entitled to membership).

141. See South Pacific Regional Trade and Economic Cooperation Agreement

World Federation of Trade Unions,¹⁴³ and the World Meteorological Organization.¹⁴⁴ Most of these are small organizations of relatively minor, topical, or historical importance. However, other more widely-known organizations also include non-state entities among their members—including the FAO,¹⁴⁵ ILO,¹⁴⁶ Interpol,¹⁴⁷ League of

art. I, July 14, 1980, *available at* <http://www.forumsec.org.fj/pages.cfm/about-us/member-countries/> (listing Cook Islands and Niue as “Forum Island countries” and Cook Islands additionally as a “Smaller Forum Island” country).

142. *See* Constitution of the Universal Postal Union arts. 2, 11, July 10, 1964, 16 U.S.T. 129; *Member Countries*, UNIVERSAL POSTAL UNION, <http://www.upu.int/en/the-upu/member-countries.html> (last visited Sept. 1, 2011) (listing Netherlands Antilles and Aruba as single member, and also the U.K. overseas territories). The UPU permits the admission of a member that represents a group of states or non-autonomous territories: the Netherlands Antilles and Suriname joined as a single member under this provision.

143. *See* Constitution of the World Federation of Trade Unions art. 1(1), *available at* http://www.wftucentral.org/?page_id=246&language=en (admitting trade union organizations as members); CRAWFORD, *supra* note 40, at 633 n.147 (reporting admission of Puerto Rico as a member).

144. *See* Convention of the World Meteorological Organization art. 3(d), Oct. 11, 1947, 77 UNT.S. 143 (allowing any territory, group of territories, trust territory, or group of trust territories maintaining its own meteorological service to join under specified conditions); *see also id.* at Annex II (including Palestine).

145. *See* Constitution of the UN Food and Agric. Org. art. II, *available at* <http://www.fao.org/docrep/009/j8038e/j8038e00.htm> (amending the constitution to permit any regional economic integration organization to join); Rachel Frid, *The European Economic Community: A Member of a Specialized Agency of the United Nations*, 4 EUR. J. INT’L L. 239, 253-54 (1993) (discussing the unique “mixed membership” status of regional economic integration organizations, such as the European Economic Community, in the FAO and other international organizations); *see also* *FAO Members*, UN FOOD & AGRIC. ORG., <http://termportal.fao.org/faonocs/nocs/pages/homeNocs.jsp> (last visited Sept. 1, 2011) (listing the Cook Islands and Niue as members).

146. *See* Constitution of the International Labour Organization art. 1(2), 1(3), *available at* <http://www.ilo.org/ilolex/english/constq.htm> (providing that states seeking admission to the ILO must be original members of the United Nations, or any state admitted to the United Nations). *But see* *Alphabetical List of ILO Member Countries*, INT’L LABOUR ORG., <http://www.ilo.org/public/english/standards/reln/country.htm> (last visited Sept. 1, 2011) (listing Namibia as a member country); EBERE OSIEKE, *CONSTITUTIONAL LAW AND PRACTICE IN THE INTERNATIONAL LABOUR ORGANISATION* 24-28 (1985) (noting that Namibia was first admitted to the ILO prior to attaining statehood, and explaining that, even though Namibia was not yet a state and its admission did not require other states to recognize it as such, upon its admission to the ILO, Namibia was on “equal footing” with other ILO members for the purposes of the ILO).

147. *See* INTERPOL Constitution arts. 4, 45, *available at* <http://www.interpol.int/Public/ICPO/LegalMaterials/constitution/constitutionGenR>

Nations,¹⁴⁸ WHO,¹⁴⁹ World Trade Organization (“WTO”),¹⁵⁰ and UNESCO,¹⁵¹ as well as possibly the World Bank and International Monetary Fund.¹⁵² However, some of these organizations do not

eg/constitution.asp?HM=1 (stating that countries delegate police bodies as members of the organization); *INTERPOL Member Countries*, INTERPOL, <http://www.interpol.int/public/Region/Americas/Members.asp> (last visited Sept. 1, 2011) (listing Puerto Rico as a sub-bureau of the United States).

148. See League of Nations Covenant art. I, para. 2 (“Any fully self-governing State, Dominion or Colony not named in the Annex may become a Member of the League”); see also MALBONE W. GRAHAM, *THE LEAGUE OF NATIONS AND THE RECOGNITION OF STATES* 26-32 (1933) (explaining the debate over admitting states that had not been recognized de jure and emphasizing that a state not so recognized could still be admitted to the League of Nations). *But see* DAVID HUNTER MILLER, *THE DRAFTING OF THE COVENANT* 164, 284 (1969) (noting that the League of Nations did not admit India and the Philippines because they were not fully self-governing); Michael M. Gunter, Comment, *Liechtenstein and the League of Nations: A Precedent for the United Nation’s Ministate Problem?*, 68 AM. J. INT’L L. 496, 497-99 (1974) (describing how the League of Nations rejected Liechtenstein while acknowledging it was a state).

149. See Constitution of the World Health Organization art. 8, available at <http://www.who.int/countries/en/> (allowing territories or groups of territories not conducting their own international relations to be admitted as Associate Members upon meeting specified conditions); *Countries*, WORLD HEALTH ORG., <http://www.who.int/countries/en/> (last visited Sept. 1, 2011) (listing Cook Islands and Niue as members).

150. See Marrakesh Agreement Establishing the World Trade Organization arts. XI(1), XXII(1), XIV(1), Apr. 15, 1994, 1867 UNT.S. 154[hereinafter Marrakesh Agreement] (permitting the European Communities to accept the agreement as a separate member).

151. See Constitution of the UN Educ., Scientific & Cultural Org. art. II(1)-(3), available at http://portal.unesco.org/en/ev.php-URL_ID=15244&URL_DO=DO_TOPIC&URL_SECTION=201.html (allowing those who are members of the United Nations to be members of UNESCO as well as territories or groups of territories not responsible for the conduct of their international relations); *Member States*, UNESCO, <http://erc.unesco.org/portal/UNESCOMemberStates.asp?language=en> (last visited Sept. 1, 2011) (listing Cook Islands and Niue as members).

152. See International Bank for Reconstruction and Development, Articles of Agreement art. II(1)(b), Feb. 16, 1989, available at <http://siteresources.worldbank.org/EXTABOUTUS/Resources/ibrd-articlesofagreement.pdf> (“Membership shall be open to other members of the [International Monetary] Fund, at such times and in accordance with such terms as may be prescribed by the Bank.”); Articles of Agreement of the International Monetary Fund art. II(2), Dec. 27, 1945, 60 Stat. 1401, 2 UNT.S. 40 (amended in 1969) (“Membership shall be open to other countries at such times and in accordance with such terms as may be prescribed by the Board of Governors. These terms, including the terms for subscriptions, shall be based on principles consistent with those applied to other countries that are already members.”); see also Erik Denters, *Representation of the EC in the IMF*, in

afford full voting rights to non-independent states because of their special status,¹⁵³ and the constitutive instruments of many of these organizations appear to limit membership to states. For example, many organizations mention “states” only in their founding instruments, but have nonetheless accepted non-states as members. The admission of non-state entities may be accomplished by amending the founding instrument, but in many cases, non-states are simply accepted based on a functional understanding of the term “state” in the constitutive instrument.¹⁵⁴

In fact, the United Nations itself has applied a liberal, functional approach to the statehood requirement. The UN Charter contemplates that only states can be members,¹⁵⁵ that only states may bring matters involving peace and security to the attention of the United Nations,¹⁵⁶ and that states are the only non-member entities which may “participate, without a vote” in discussions before the Security Council.¹⁵⁷

These statehood requirements stand in stark contrast to the original inclusion of the Byelorussian and Ukrainian Soviet Socialist Republics (“the S.S.R.s”), as they were not independent states.¹⁵⁸ The

INTERNATIONAL MONETARY LAW: ISSUES FOR THE NEW MILLENNIUM 211, 219-21 (Mario Giovanoli ed., 2000) (arguing that although the IMF Articles use the word “country” and do not provide specifically for non-state members, its provision for “countries” could be read to permit an entity such as the EC/EU); Press Release, World Bank, Kosovo Joins World Bank Group Institutions (June 29, 2009), *available at* <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/ECAEXT/0,,contentMDK:22230081~menuPK:258604~pagePK:2865106~piPK:2865128~theSitePK:258599,00.html> (noting that Kosovo, whose statehood is controversial, was admitted as a member of the World Bank).

153. See, e.g., Convention of the World Meteorological Organization, *supra* note 144, art. 11(a) (restricting voting on specific subjects to only “Members which are States”).

154. See, e.g., *supra* note 42-43.

155. See UN Charter arts. 3, 4.

156. See *id.* arts. 11(2), 35(2).

157. See *id.* art. 32; Provisional Rules of Procedure of the UN Security Council, r. 14, 2410th mtg., UN Doc. S/96/Rev. 7 (Dec. 21, 1983) (requiring members and non-member states participating in Security Council meetings to submit credentials prior to the meeting).

158. See UN Legal Counsel, *supra* note 102, at 435 (concluding that Belarus and Ukraine, despite constitutional changes since their entry into the United Nations, retain their status as original Members).

case of the S.S.R.s is not easily distinguished on the basis of the fact that they were “original” rather than “subsequent” members. First, there is no clear legal basis for an exception for original members in the UN Charter because the Charter assumes that original members are also “states.” Even accepting the argument that an exception for original membership exists as valid, it still does not explain why the S.S.R.s would be considered qualified to join as original members when they were unquestionably constituent republics of the U.S.S.R., which was also itself a member of the United Nations. This is comparable to permitting California and New York to join the United Nations as members in their own right, even though the United States is already a member.

An alternative explanation for the S.S.R.s’ membership is that the drafters of the UN Charter contemplated that Ukraine and Belarus would be members from the outset. This explanation suggests a liberal intent behind the original meaning of the term “state.” This interpretation is supported by the later admission of India and the Philippines, as well as the admission of other entities that were not widely considered states at the time of accession.¹⁵⁹

As it pertains to the rule that only states may bring matters to the attention of the Security Council or participate in Security Council discussions, this interpretation of “state” has also been liberally applied. Both Indonesia and Hyderabad, as well as Tunisia and Kuwait, have either brought matters to the attention of the Security

159. See DUGARD, *supra* note 121, at 52-55 (discussing Byelorussia, India, Lebanon, Namibia, the Philippines, Syria, and the Ukraine); see also Roger O’Keefe, *The Admission to the United Nations of the Ex-Soviet and Ex-Yugoslav States*, 1 BALTIC Y.B. INT’L L. 167, 171-76 (2001) (observing that the admission of Moldova, Georgia, and Bosnia-Herzegovina to the United Nations when each had only tenuous governmental authority demonstrates the United Nations’ “flexible approach to the formal criteria for membership”); cf. MORGENSTERN, *supra* note 128, at 50 (noting the ILO’s admission of Vietnam in 1950, at a time when France still exerted influence over Vietnam’s foreign affairs). *But see* UN SCOR, 16th Sess., 985th mtg. at 8-10, UN Doc S/PV.985 (Nov. 30, 1961) (presenting arguments made regarding whether Kuwait was sufficiently independent from the United Kingdom to be admitted to the United Nations); ROSALYN HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* 16-17 (1969) (suggesting that although certain countries that fell short of meeting the criteria for statehood, like India, were admitted as original members to the United Nations, these cases are “not truly indicative of United Nations practice”).

Council or been invited to participate in discussions,¹⁶⁰ despite widespread dispute over the status of their statehood at the time of the invitation.¹⁶¹ Not all of these entities received widespread recognition as states following their participation in Security Council discussions, particularly Hyderabad.

Admittedly, this interpretation of “state” might be an aberration; otherwise, the procedural consequences of statehood could supersede an effort to answer the substantive question of whether statehood exists. For instance, in debates before the Security Council regarding whether an entity could be a “state” for council purposes even if it lacks total sovereignty, some UN members have contended that both sides to a dispute ought to be heard because the whole purpose of the Security Council is to resolve disputes.¹⁶² Crawford argues that, while this is not a definitive argument, “[t]his is a reasonable position provided the entity [presenting its side of the dispute] has *some* status as a putative State.” Crawford adopts a cautious stance as to the meaning of “state” in Article 32 of the UN Charter in light of the “variable practice” of the Security Council.¹⁶³ While some delegations were refused on the basis that they did not represent “states,”¹⁶⁴ practice illustrates that the United Nations considers the term “state” liberally in certain circumstances, provided the entity has some degree of statehood.¹⁶⁵ Palestine confirms this

160. See UN SCOR, 2d Sess., 180th mtg. at 1940, UN Doc. S/447 (Aug. 12, 1947) (voting to invite representatives of Indonesia to discuss its admission to the United Nations with the Security Council, and emphasizing that this invitation “would not bind any State to recognize the independence or sovereignty of the Indonesian Republic”); UN SCOR, 3d Sess., 357th mtg. at 11, UN Doc. S/988, S/998, S/1000 (Sept. 16, 1948) (inviting the representative from Hyderabad to make a statement regarding prior communications sent to the UN Security Council).

161. See, e.g., UN SCOR, 2d Sess., 184th mtg., at 1984-5 (Aug. 14, 1947) (noting the U.K. delegate’s “grave doubts” over the Security Council’s invitation to Indonesia, and his belief that “[the Security Council had] taken a wrong step” in the matter). In addition, although Tunisia - and possibly Kuwait - arguably had international legal personality prior to invasion that was simply dormant until independence, neither were *de facto* independent operating entities at the time when they addressed the Security Council.

162. CRAWFORD, *supra* note 40, at 190-91.

163. *Id.* at 191.

164. See, e.g., UN SCOR, 2d Sess., 193d mtg., at 2172 (Aug. 22, 1947) (voting not to admit representatives of East Indonesia and Borneo to the Security Council).

165. See HIGGINS, *supra* note 159, at 42-43 (“If the term ‘state’ has no absolute

interpretation of statehood. The Security Council has already permitted Palestine to participate in sessions, implicitly acknowledging that it has a sufficient degree of statehood for this purpose.¹⁶⁶ The relationship between the ICC and Palestine is analogous. If the question of accession or acceptance of the Court's jurisdiction hinges on statehood, which in turn hinges on the question of capacity, then it would be circular for capacity to hinge, in turn, on statehood.

The Vienna Convention on the Law of Treaties ("Vienna Convention") also supports this reading of the Rome Statute. Under the Vienna Convention, a term's "ordinary meaning" controls, which is deduced by looking at the term's meaning in context and in consideration of the treaty's overall "object and purpose."¹⁶⁷ However, when interpreting their constitutive instruments, recourse is usually had to teleological interpretation.¹⁶⁸ The language of the Rome Statute clearly limits membership to "states;" however, this article points to past and current international practice as evidence of a flexible approach to the "ordinary meaning" of "state." For this reason, the object and purpose of the Rome Statute becomes even more important. Simply stated, the object and purpose of the Rome Statute is to end impunity for international crimes that are "of concern to the international community as a whole."¹⁶⁹ The ICC does not merely aim to end impunity for international crimes that are of concern to states. In light of that purpose, permitting territorial entities that have some, but not all, of the attributes of states to accede to the Rome Statute would further the purpose. In fact,

fixed meaning, but rather varies slightly in meaning according to the claim for which it is being used, then it is likely that entities which would not be considered states for the purposes of a claim for comprehensive participation in the United Nations might nevertheless satisfy the requirements of statehood where the claim is for limited participation.").

166. *Accord Quigley*, *supra*, note 34, at 5.

167. Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 UNT.S. 331 [hereinafter Vienna Convention].

168. *See, e.g.*, Prosecutor v. Tadic, Case No. IT-94-1-I, para. 11, 18 Decision on Defense Motion for Interlocutory Appeal of Jurisdiction (Int'l Crim. Trib. For the Former Yugoslavia Oct. 2, 1995) (observing that international tribunals retain inherent authority to determine their own jurisdiction); Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. Reps. 174, 178-9 (Apr. 11).

169. *See* Rome Statute, *supra* note 2, pmb1.

prohibiting such an entity would frustrate the ICC's purpose: the perpetrators of many alleged international crimes could escape responsibility based on the simple fact that they are stateless (Palestinian "nationals") or because the statehood status of the area of the world in which they committed their acts is less than absolutely clear. As a basis for comparison it is interesting to recall that Interpol permits the participation of non-state members based on the pragmatic pursuit of the organization's objective to combat transnational crime.¹⁷⁰ Although not all international crimes have a transnational component, the analogy is apt insofar as the ICC's ability to successfully combat impunity for serious crimes worldwide depends on its ability to extend its jurisdiction widely. Given the vague nature of the term state and the need for an object and purpose interpretive approach, the term "state" may be interpreted broadly and functionally within the rules of the Vienna Convention.

This interpretation is also necessitated by the law binding all of the organs of the Court. The applicable law of the ICC consists of the Rome Statute, Court regulations, and other sources of international law.¹⁷¹ Further, the ICC must apply and interpret the law, regardless of its source, in a fashion that is "consistent with internationally recognized human rights."¹⁷² In the case of Palestine, it is worth mentioning that this last requirement arguably applies to all of the organs of the Court, including the Registry. The language of the Rome Statute refers to the law applicable to "the Court,"¹⁷³ which is in turn defined as a "permanent institution" comprised of four separate organs, of which the judiciary is just one.¹⁷⁴ The Registrar is

170. See INTERPOL Constitution, *supra* note 147, arts. 1, 4.

171. See Rome Statute, *supra* note 2, art. 21(1)(a)-(b) (recognizing "applicable treaties," "the principles and rules of international law," and "the international law of armed conflict" as binding on the ICC). Secondarily, the ICC may extract and apply "general principles of law" based on national laws from around the world. *Id.* art. 21(1)(c).

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

173. *Id.* art. 21(1).

174. See *id.* arts. 1, 34 (listing the four organs of the ICC as: the Presidency, the Judicial Division, the Office of the Prosecutor, and the Registry); see also Steven Freeland, *How Open Should the Door Be? – Declarations by Non-States Parties Under Article 12(3) of the Rome Statute of the International Criminal Court*, 75 NORDIC J. INT'L L. 211, 218-19 (2006) (describing the procedural rules that apply to declarations lodged with the ICC registrar and stating that the ICC rules are unclear as to the exact course of action the Registrar must take regarding such

a creation of the Rome Statute and is empowered under the Rome Statute to accept registrations of accession and declarations of acceptance of jurisdiction.¹⁷⁵ It therefore makes sense that the Registrar would also be bound by the Rome Statute. If that is the case and the Registrar is bound by the requirement that the Rome Statute be interpreted and applied consistently with human rights obligations, this perhaps also obliges the Registrar to apply a liberal reading of the term “state” when evaluating Palestine’s declaration—if doing so will achieve its humanitarian goals of ending impunity.¹⁷⁶

It appears that the ICC has already taken the liberal approach. The list of States Parties to the Rome Statute includes entities widely acknowledged to be states.¹⁷⁷ Still, many prominent states, such as the United States, China, Russia, India, and Indonesia, and a number of countries from the Middle East, Central Asia, and South Asia, are not members of the ICC.¹⁷⁸ This author is aware of only one possible case in which a State Party to the ICC has not recognized another State Party as a “state”; until 2009, Lichtenstein did not recognize the Czech and Slovak Republics.¹⁷⁹ Currently, however, one State Party to the ICC is not widely regarded as an independent state—the Cook Islands.¹⁸⁰

The Cook Islands is a self-governing entity in free association with New Zealand.¹⁸¹ Residents of the islands are considered New

declarations).

175. See Rome Statute, *supra* note 2, arts. 12(3), 43.

176. It appears that the Registrar has taken this position because the Registrar’s office acknowledged receipt of Mr. Khashan’s letter, but stated that the ICC judges must make the final determination of Article 12(3) in this situation. See REPORT OF THE INDEPENDENT FACT FINDING COMMITTEE ON GAZA: NO SAFE PLACE, *supra* note 8, paras. 589-90.

177. *The State Parties to the Rome Statute*, INT’L CRIM. CT., <http://www.icc-cpi.int/Menus/ASP/states+parties/> (last visited Sept. 1, 2011).

178. See *id.*

179. See *supra* note 124 and accompanying text (discussing the dispute between Liechtenstein and the Czech and Slovak Republics); see also Rob Cameron, *Liechtenstein, Czech Republic Establish Relations After Long Property Dispute*, ČESKÝ ROZHLAS [CZECH RADIO] (Sept. 9, 2009, 4:29 PM), <http://www.radio.cz/en/section/curraffrs/liechtenstein-czech-republic-establish-relations-after-long-property-dispute>.

180. See *Cook Islands: Ratification and Implementation Status*, INT’L CRIM. CT., <http://www.icc-cpi.int/Menus/ASP/states+parties/Asian+States/Cook+Islands.htm> (last visited Sept. 1, 2011).

181. See Cook Islands Constitution Amendment Act 1965 (*amending* Cook

Zealand nationals.¹⁸² Although it has never done so, the Cook Islands can unilaterally declare full independence.¹⁸³ The Cook Islands is not a member of the United Nations,¹⁸⁴ though it is a member of the FAO, PIF, ADB, ICAO, WHO, and UNESCO,¹⁸⁵ as well as an associate member of the Commonwealth, and the United Nations Economic and Social Commission for Asia.¹⁸⁶ The Cook Islands has signed international treaties such as the Convention on the Rights of the Child,¹⁸⁷ and established diplomatic relationships with nineteen countries.¹⁸⁸ As noted above, Crawford designates both the Cook Islands and Palestine as “Territorial Entities Proximate to State.”¹⁸⁹ Thus, like Palestine, the Cook Islands is most appropriately termed a quasi-state. The Cook Islands acceded to the Rome Statute on July

Islands Constitution Act 1964).

182. See *Voyage to Statehood*, COOK ISLANDS GOV'T, <http://www.cookislands.gov.ck/history/php> (last visited Sept. 1, 2011).

183. See *World Factbook: Cook Islands*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/cw.html> (last updated Dec. 8, 2010).

184. See *Member States*, UNITED NATIONS, <http://www.un.org/en/members/> (last visited Sept. 1, 2011).

185. See *FAO Governing Bodies: FAO Membership as at 17 November 2007*, UN FOOD & AGRIC. ORG., http://www.fao.org/unfao/govbodies/memberships3_en.asp (last visited Sept. 1, 2011); *Member Countries*, PAC. ISLANDS FORUM SECRETARIAT, <http://www.forumsec.org.fj/pages.cfm/about-us/member-countries/> (last visited Sept. 1, 2011); *Regions and Countries*, ASIAN DEV. BANK, <http://www.adb.org/countries> (last visited Dec. 27, 2010); *Contracting States*, INT'L CIVIL AVIATION ORG., <http://www.icao.int/cgi/statesdb4.pl?en> (last visited Dec. 27, 2010); *Countries*, WORLD HEALTH ORG., <http://www.who.int/countries/en/> (last visited Sept. 1, 2011); *Member States*, UNESCO, <http://erc.unesco.org/portal/UNESCOMemberStates.asp?language=en> (last visited Sept. 1, 2011).

186. See *Country Profiles: New Zealand – Cook Islands*, COMMONWEALTH SECRETARIAT, http://www.thecommonwealth.org/YearbookInternal/140411/140412/cook_islands/ (last visited Sept. 1, 2011); *Members*, UNESCAP, <http://www.unescap.org/about/member.asp> (last visited Sept. 1, 2011).

187. See, e.g., *Status of Treaties, Convention of the Rights of the Child*, UN TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en (last visited Sept. 1, 2011).

188. See *Voyage to Statehood*, *supra* note 182 (noting that “the Cook Islands has diplomats in New Zealand and the European Communities,” as well as honorary consuls in Germany, France, and United Kingdom).

189. See *supra* note 137 and accompanying text; see also CRAWFORD, *supra* note 40, at 739.

18, 2008.¹⁹⁰ The ICC's decision to accept the accession of the Cook Islands generated no controversy. In practice, therefore, the ICC already exercises a degree of flexibility in how it interprets the term "state" for the purposes of the Rome Statute, and states and other interested parties seem to have accepted such interpretation in those instances.

The same argument holds for acceptance of the Court's jurisdiction on a case-by-case basis. Article 12(3) of the Rome Statute employs the term "state" like the articles discussing membership.¹⁹¹ As the above discussion demonstrates, international law does not require an international organization to interpret the word "state" in its constitutive document in a restrictive fashion for membership purposes. It therefore follows that international law also permits a liberal interpretation of the same term in other sections of the instrument. As discussed previously, in the case of Hyderabad, the entity was permitted to bring a matter to the attention of the Security Council even though it was not a member of the United Nations or widely regarded as a state (or even later regarded as such).¹⁹² The Security Council read the UN Charter to allow the broadest interpretation of the term "state" based on its purpose of providing a forum for each party in a dispute to have its views heard.¹⁹³

In the Gaza situation, there is an imbalance in the ability of the two parties to submit the situation to ICC jurisdiction because of Palestine's uncertain status. The Vienna Convention instructs that treaty terms should be interpreted with consideration for the object and purpose of the treaty, and the object and purpose of the Rome Statute is to end impunity for war crimes. In addition, international law does not require a narrow interpretation of the word "state" for purposes of an Article 12(3) acceptance of jurisdiction. Thus, in order to fulfill the Rome Statute's purpose of promoting justice for victims and perpetrators of war crimes, the ICC should recognize that Palestine is at least a quasi-state, and interpret the Rome Statute

190. *Cook Islands: Ratification and Implementation Status*, *supra* note 180.

191. *See* Rome Statute, *supra* note 2, art. 125(1), (3) (declaring that the Rome Statute is open for signature or accession by "all States").

192. *See* UN SCOR, 3d Sess., 357th mtg., *supra* note 157, at 11. It is unclear whether Hyderabad was ever truly recognized as an independent state.

193. *See* CRAWFORD, *supra* note 40, at 190-91.

liberally to allow for its accession or acceptance of the Court's jurisdiction.

III. CAPACITY OF THE PNA TO ACT INTERNATIONALLY

Palestine is arguably a state for the purposes of the Rome Statute, but in order to ascertain whether the ICC can exercise its jurisdiction over Gaza, it is necessary to examine whether the PNA, specifically, has the capacity to accept the Court's jurisdiction on behalf the "state." As discussed earlier, the people of Palestine, the PLO, and the PNA all currently represent the Palestinian entity.¹⁹⁴ Admittedly, it is unclear in which of these capacities the PNA Justice Minister accepted the Court's jurisdiction—Minister Khashan made his declaration in the name of the "Government of Palestine,"¹⁹⁵ and based on the ICC's response, the Registrar apparently interpreted this to mean the PNA.¹⁹⁶ Some have observed that Palestine cannot join the ICC if it does not have the capacity to do so,¹⁹⁷ and that the refusal of Hamas in Gaza to recognize the PNA restricts the PNA's capacity over Gaza.¹⁹⁸ This section first explores whether the PNA has the capacity to accede to the Rome Statute or otherwise accept the Court's jurisdiction under the Oslo Accords, and concludes that it may, based on its power to establish a judiciary. Even if the PNA does not have this capacity under the Oslo Accords, as a quasi-state, Palestine might have the inherent capacity to do so notwithstanding the Oslo Accords.

194. See *supra* notes 36-42 and accompanying text.

195. See Palestinian Declaration, *supra* note 1.

196. See Letter from Silvana Arbia, *supra* note 1.

197. See Rotella, *supra* note 17 (reporting that the ICC prosecutor must determine whether the Palestinian Authority can legally recognize the ICC's authority). See generally Benoliel & Perry, *supra* note 32, at 79-127 (considering the many reservations to allowing Palestine to join the ICC, and arguing that it must be recognized as a State in order for the ICC to have jurisdiction).

198. See Rotella, *supra* note 17 (noting Israeli officials' concern that the residents of Gaza do not recognize the jurisdiction of the PNA); Davenport Communication, *supra* note 32, at 9-10 (asserting that Hamas controls civil administrative agencies to the exclusion of the PA, and that Hamas in fact persecutes supporters of the PNA and the PLO in Gaza).

A. CAPACITY TO ACT UNDER THE OSLO ACCORDS

A preliminary consideration is whether the Oslo Accords have, in fact, lapsed. If they have, then the terms governing jurisdictional competence are no longer in effect. The Accords were specifically provided to put a system of governance in place for a term of five years, beginning upon the withdrawal of IDF forces in June 1994.¹⁹⁹ Some argue that Israel's failure to engage in Gaza since the end of the five-year period constitutes a relinquishment of any criminal jurisdiction over the territory.²⁰⁰ This argument is rather weak because the actions of the parties since the end of the five-year period suggest their understanding that the Accords have not lapsed, and that the agreement is being continued on an *ad hoc* basis. It does not appear that the Accords have lapsed, so we turn next to the question of capacity.

Whether or not the PNA has the capacity to accede to the ICC depends on whether a state's accession to the Rome Statute is better characterized as an act of foreign relations or as a judicial capacity building measure. Under the Accords, only the PLO, not the PNA, has competence over foreign relations.²⁰¹ The PNA is specifically competent, however, to establish and operate a judiciary and police force.²⁰² Accession to the Rome Statute or acceptance of jurisdiction is arguably more comparable to a judicial function than a foreign relations function, such as the establishment of a diplomatic mission, and thus better classified as an exercise of the PNA's judicial power. In fact, the PNA has already exchanged letters with the European Union to form an EU Police Mission in the Palestinian Territories

199. Oslo Accords, *supra* note 36, arts. I, V(1).

200. See REPORT OF THE INDEPENDENT FACT FINDING COMMITTEE ON GAZA: NO SAFE PLACE, *supra* note 8, para. 601 (pointing out that Israel has also designated the Gaza Strip as a "hostile entity"); see also GEOFFREY R. WATSON, THE OSLO ACCORDS: INTERNATIONAL LAW AND THE ISRAELI-PALESTINIAN PEACE AGREEMENTS 246-50 (2000) (describing Israeli and Palestinian compliance with the Oslo Accords and Interim Agreements and noting that Israel has permitted the Palestinian Police force to grow beyond the limits set forth in the Interim Agreement).

201. See Interim Agreement, *supra* note 37, art. IX(5)(b); see also Case C-386/08, Brita GmbH v. Hauptzollamt Mahburg-Hafen 2010 E.C.R., ¶¶ 44-53 (recognizing the PLO's capacity to enter into the EC-PLO Agreement regarding trade and customs between Europe and Palestine).

202. See Oslo Accords, *supra* note 36, arts. VII(2), VIII, IX.

and open the European Union Coordinating Office for Palestinian Police Support.²⁰³ This act was not viewed as a violation of the Accords. Although a PNA accession or acceptance of jurisdiction involves an international organization, this act is substantively a means of adjudicating certain international crimes that the PNA is unable or unwilling to prosecute itself. A state's self-referral to the ICC, based on its own assessment that it is unable to prosecute those responsible, seems to exemplify a judicial capacity building measure. But even if accession to the Rome Statute does not fall within the PNA's power to establish a judiciary, under the Accords, the PLO still retains a wide-ranging competence to engage in foreign relations and could apply for the accession of Palestine if the PNA communication fails.²⁰⁴ Still, in any event, there is a good argument that accession to the ICC falls within the powers of the PNA as agreed under the Oslo Accords.

The conclusion is also the same if the PNA merely accepts the jurisdiction of the ICC, rather than accedes to the Rome Statute. The PNA has competence to establish and operate a judiciary—that is, it has adjudicative jurisdiction over the territory. Under the Accords, Israel has only exempted from the PNA's competence responsibility “for external security, and for internal security and public order of settlements and Israelis.”²⁰⁵ While some argue that this means that Israel retains sole judicial authority of its own citizens in Gaza,²⁰⁶ this “responsibility” exemption could also be read narrowly to mean that

203. See Council Joint Action 2005/797/CFSP, 2005 O.J. (L 300) 65, pmb. ¶¶ 3-6.

204. Interim Agreement, *supra* note 37, art. IX(5)(b).

205. See Oslo Accords, *supra* note 36, at Agreed Minutes, Annex II; see also *id.* art. IV (“Jurisdiction of the [PNA] will cover West Bank and Gaza Strip territory, except for issues that will be negotiated in the permanent status negotiations. The two sides view the West Bank and the Gaza Strip as a single territorial unit, whose integrity will be preserved during the interim period.”). Although the Accords, in principle, established a territorial jurisdictional regime, they did not specify exactly which parts of the West Bank and Gaza Strip territories are covered or how they are exempted from jurisdiction.

206. See Davenport Communication, *supra* note 32, at 4-5 (contending that the Interim Agreement prohibits the Palestinian Authority's exercise of criminal jurisdiction over citizens of Israel “including those who are in the West Bank and Gaza,” and further arguing that the Palestinian authority cannot transfer jurisdiction to the ICC which when it does not itself possess this jurisdiction in its domestic courts).

Israel will provide security and policing for settlements and Israelis.²⁰⁷ In the latter case, the PNA would not be prohibited from exercising adjudicative authority over Israelis.²⁰⁸ Even if the PNA does not have adjudicative authority over Israelis under the Oslo Accords, we could interpret that provision as a “constitutional” limitation on the PNA as a government that might not necessarily apply to the ICC.

The capacity of an international legal person to accede to the Rome Statute has been addressed by the French Constitutional Council in a slightly different context. In *Re Treaty Establishing the International Criminal Court*,²⁰⁹ the Council determined that Article 27 of the Rome Statute, which provided that official immunity was not a bar to prosecution, conflicted with Article 68 of the French Constitution, which granted the President of the French Republic immunity from prosecution “for acts performed in the exercise of his functions.”²¹⁰ The same objection was claimed for the immunity provided to members of the French Parliament, who are immune for “opinions or votes expressed in the exercise of their functions” under Article 26 of the French Constitution.²¹¹ The Constitutional Council concluded that this conflict would bar France from acceding to the Rome Statute. Subsequently, the French Parliament amended the

207. The argument that Israel retains sole jurisdiction over its citizens in Gaza presumes a conclusive legal interpretation of the term “responsible” and introduces terms such as “retained” which are not present in the Oslo Accords. It also overlooks the fact that Israel has previously argued that it does not have jurisdiction in the West Bank and Gaza. *See, e.g.*, UN Econ. & Social Council, Implementation of the International Covenant on Economic, Social, and Cultural Rights: Second Periodic Reports Submitted by States under Articles 16 and 17 of the Covenant, ¶¶ 5,6, UN Doc. E/1990/6/Add.32 intro (Oct. 16 2001); UN International Covenant on Civil and Political Rights, Concluding Observations of the Human Rights Committee: Israel, ¶ 11, UN Doc. CO/78/ISR (Aug. 21, 2003);

208. There are anecdotal reports of PNA police arresting and otherwise exercising jurisdiction over Israelis, though these cases appear to feature Israelis of Arab ethnicity primarily. Israeli does not appear to have contested these exercises. Substantiating information on this matter is, however, unavailable as criminal matters under the PNA are protected by confidentiality requirements.

209. *See Re Treaty Establishing the International Criminal Court*, Dec. No. 98-408 DC, para. 16 (Const. Council, Fr., Jan. 22, 1999), reprinted in 1999 REVUE GENERAL DE DROIT INTERNATIONAL PUBLIC [GEN. REV. PUB. INT'L L.] 464 [Fr.], translated in 125 I.L.R. 475 (1999) (“pour les actes accomplis dans l'exercice de ses fonctions”).

210. *Id.* para. 16 (“pour les actes accomplis dans l'exercice de ses fonctions”).

211. *See id.* (“opinions ou votes émis dans l'exercice de leurs fonctions”).

French Constitution to permit it to join the ICC.²¹²

The fact that the Constitutional Council found a conflict between these provisions suggests that the Council believes that violations of international criminal law could constitute official acts of the President. This conclusion contradicts well-established case law in the United Kingdom. In *Pinochet*,²¹³ the House of Lords held that the crime of torture, as provided in the Torture Convention, was not part of the Chilean dictator Pinochet's executive duties.²¹⁴ As far as this author is aware, France signed and ratified the Torture Convention in 1986 without constitutional objection.²¹⁵ If we agree that the *Pinochet* holding is a correct statement of law, then the French Constitutional Council was simply incorrect.

This constitutional issue in France might suggest that Palestine does not have the capacity to accede to the Rome Statute or at least accept its jurisdiction if it does not have "constitutional" capacity to do so—that is, capacity under the Oslo Accords. But, this is simply not the case. The impediment in the French case was the constitutional allocation of jurisdictional competence over the President and members of Parliament and was a limitation on the powers of the judiciary, not the inherent inability of the French State to prosecute violations of the law.²¹⁶ The fact that the French Parliament easily amended the French Constitution to provide for accession shows that it clearly has that power. At the end of the day, the conflict, if there was one, was entirely municipal. Accession to the Rome Statute would have placed France in the untenable position of overriding and granting immunities at the same time. As far as international law was concerned, though, once France adhered to the Rome Statute, it was bound regardless of its internal legal

212. See Loi constitutionnelle de modernisation des institutions de la Vè République [Constitutional Law on the Modernization of the Institutions of the Fifth Republic], Law No. 78 –2009/2, J. Off. No. 171 (July 24, 2008).

213. Regina v. Bow Street Metro. Stipendiary Magistrate *ex parte* Pinochet Ugarte, [1999] 1 A.C. 147 (H.L.) (U.K.).

214. See *id.* at 205.

215. See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 UNT.S. 85 (reserving that it shall not be bound by paragraph 1 of Article 30).

216. See Re Treaty Establishing the International Criminal Court, *supra* note 209, para. 16.

provisions.²¹⁷ If France had interpreted its constitution in a manner similar to U.K. courts in *Pinochet*, so that an amendment would not have been required, then the ICC would not enquire into the correct interpretation of French competence to join the ICC. If Palestine is a quasi-state with the right to self-determination, and is thus accepted as a “state” at least for the purposes of acceding to the Rome Statute or otherwise accepting the jurisdiction of the ICC, then there is no impediment under international law, and municipal law is beside the point.

It does not necessarily follow that the PNA’s jurisdictional limitations would similarly constrain the ICC. The States Parties to the Rome Statute and other states that accept the ICC’s jurisdiction are *accepting* the jurisdiction of the Court. Although the “transfer” or “delegation” of jurisdiction by the state to the ICC is the paradigm most often used to describe the complementary relationship between the ICC and its States Parties,²¹⁸ that particular language is not present in the Rome Statute. Contrary to the theory that powers are attributed to an international organization through delegation or transfer, international organizations also can be said to have certain inherent powers and competencies, usually based on the organization’s functions.²¹⁹ Often, these inherent competencies are limited to treaty making, legation, and maintaining international disputes, but international law does not restrict them to these areas.²²⁰

217. Vienna Convention, *supra* note 167, art. 27 (“A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”).

218. *See, e.g.*, THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 609 (Antonio Cassese ed., 2002) (“[T]here is no rule of international law prohibiting the territorial State from voluntarily delegating to a new collective judicial mechanism as the ICC its sovereign authority to persecute perpetrators of [international crimes].”).

219. *See* Rome Statute, *supra* note 2, art. 12(3) (permitting non-State Parties to allow the Court to exercise its jurisdiction over them). *See generally* DAN SAROOSHI, INTERNATIONAL ORGANIZATIONS AND THEIR EXERCISE OF SOVEREIGN POWERS 54-107 (2005) (discussing paradigms for characterizing the power sharing relationship between international organizations and states other than delegation and attribution); FINN SEYERSTED, OBJECTIVE INTERNATIONAL PERSONALITY OF INTERGOVERNMENTAL ORGANIZATIONS 28-30 (1964) (arguing that organizations have inherent powers to accomplish their objectives, aside from those powers expressly prohibited by their constitutive instruments).

220. *See* SEYERSTED, *supra* note 219, at 28 (noting that international organizations do not lack legal capacity to perform the full range of international acts performed by states; rather, organizations do not have the “practical need” to

One question relevant to this situation is whether a purely judicial international legal person has an inherent jurisdictional capacity that states merely accept.²²¹ One possible example of the ICC's inherent jurisdiction is in regards to head of state immunities. If states merely transfer their jurisdiction to the ICC, then the Court could never hear the case of any serving head of state because states cannot have jurisdiction over a person enjoying state immunity.²²² Clearly the states of the world were able to bring into existence an entity that would have jurisdiction over serving heads of state, despite the fact that they themselves did not have that capacity.²²³ Indeed, arguing

perform many international acts because they lack territory and nationals).

221. *But cf.* René Uruena, *The World Trade Organization and Its Powers to Adopt a Competition Policy*, 3 INT'L ORGS. L. REV. 55, 81-83 (2006) (pointing out the logical contradictions inherent in the inherent powers doctrine and arguing the doctrine does not justify the WTO's position that it has the power to "address anticompetitive practices that do not hinder market access").

222. *See* Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.) 2002 I.C.J. 3, ¶¶ 58-61 (Feb. 14) (reviewing the rules of international criminal tribunals on immunity and criminal responsibility of persons acting within an official capacity and concluding that "an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction," including the future International Criminal Court). Any incapacity on the part of the ICC is likely limited to heads of state from states not parties to the Rome Statute since the states parties to the Rome Statute have arguably modified customary international law regarding head of state immunity in their relations among themselves. *See* Rome Statute, *supra* note 2, art. 27. However, the modification of customary international law regarding head of state immunity in the Rome Statute was only for the purposes of the Rome Statute and not for the purpose of surrender to another State Party or any other action when not under a binding obligation from the ICC to do so.

223. *See, e.g.*, Paola Gaeta, *Does President Al Bashir Enjoy Immunity from Arrest?*, 7 J. INT'L CRIM. JUST. 315, 332 (2009) (arguing that if a state party to the ICC arrested Sudanese leader Al Bashir, the arrest would be unlawful because it would violate his head of state immunity, but also asserting that such an unlawful arrest would not affect the ICC's jurisdiction because the ICC need not respect head of state immunities). Although arguments have been made that the Rome Statute could be characterized as a collective waiver of immunity amongst the various States Parties, these arguments are ultimately unconvincing. For one, the language used by the International Court of Justice in the *Arrest Warrant* case did not reflect the collective waiver argument; rather, it suggested that there is something unique to international tribunals that allows them to disregard the head of state immunity doctrine. This approach was applied in practice in the *Charles Taylor* case. *See* Prosecutor v. Taylor, Case No. SCSL-03-01-PT, Prosecution's Second Amended Indictment (May 29, 2007) (holding Taylor individually criminally responsible for the crimes charged). Further, if the collective waiver argument bears weight, it will be difficult for the ICC or any international tribunal

that the ICC must examine each state's municipal jurisdiction provisions and condition the application of the Rome Statute to the state's municipal situation is an untenable position. The jurisdictional transfer paradigm does not fully capture the relationship between the ICC and the States Parties, and that convenient expression should not prejudice the relationship by suggesting that the ICC is strictly limited to exercising the particular jurisdictional competence of the state's judiciary.

Provided that the PNA has sufficient capacity to accede to the Rome Statute as a treaty, or otherwise accept the Court's jurisdiction, the PNA is recognized as an international legal person for that purpose and the ICC may then apply its own jurisdictional, competence, and admissibility requirements as provided in the Rome Statute. To date, neither the Defense, Prosecution, nor the ICC bench have ever raised questions about the jurisdictional provisions of the states in which allegedly criminal acts took place—at least as a limit on the provisions of the Rome Statute. In fact, the PNA's jurisdictional limitations might be the very reason that it is “unable” to prosecute certain crimes over which the ICC could have jurisdiction, thus rendering the case admissible before the Court.

B. CAPACITY TO ACT REGARDLESS OF THE OSLO ACCORDS

A second consideration is whether Palestine, as a nation with the right to self-determination, needs authorization under the Accords to accede to the Rome Statute or accept the jurisdiction of the Court. If Palestine is acknowledged as a state, it would not need any other state's permission to accede to a treaty regardless of whether Israel considers Palestine a state. However, if Palestine falls into a quasi-state status, then its situation is less clear. Given that Palestine is widely regarded as a people with a right to self-determination, then the people may have an inherent competence to accede to any treaty.²²⁴ As discussed above, the PLO, as the generally

to prosecute heads of state when the state has not expressly waived its immunity by acceding to the Rome Statute. This was the case in *Al Bashir* which was referred to the ICC by the UN Security Council. *See* Prosec. v. Al Bashir, ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (Mar. 4, 2009). If the collective waiver argument holds, then the case against Al Bashir cannot go forward.

224. As a people with the right to self-determination and the international duty

acknowledged international representative of the people, has been accorded the privilege of concluding international agreements. The difficulty here, however, is that the PNA Minister, not a PLO representative, communicated the acceptance of the Rome Statute to the ICC. Additionally, the communication to the ICC was purportedly from the “Government of Palestine,” not the PNA.²²⁵ Although the Registrar understood the communication to be submitted by the PNA, and the PNA Justice Minister did not appear to protest that understanding, the Registrar’s preliminary understanding or misunderstanding would not necessarily control. If it was the PLO and not the PNA that submitted the communication, this action would not be limited by the PNA’s competence under the Oslo Accords.

Yet, if the communication was conclusively determined to have been submitted by the PNA, there does not appear to be a requirement that the ICC regard the PLO as the sole international representative of the Palestinian people. The relationship between the PLO and PNA, both exercising certain authority of the Palestinian people, might justify overlooking the structural formalities to consider the substantive matter at issue: the people of Palestine have accepted the ICC’s jurisdiction through their representatives.²²⁶ The PNA’s application to accede to the Rome Statute might be *ultra vires* vis-à-vis the Oslo Accords, and any PLO intent to accede that uses the PNA as a communication vehicle might similarly violate its undertaking in the Accords not to exercise such competence.²²⁷

to extradite or prosecute violations of international criminal law, the people of Palestine arguably cannot release themselves from this duty. Thus, Palestine retains authority to prosecute any person in its territory for violations of international criminal law, even if it has delegated away authority to prosecute for other minor crimes. *See, e.g.,* Kearney & Denayer, *supra* note 38, ¶¶ 33-34..

225. *See* Palestinian Declaration, *supra* note 1.

226. In fact, it appears that the formal distinctions between PLO and PNA competencies are already being “blurred in practice.” *See, e.g.,* Kearney & Denayer, *supra* note 38, ¶ 26 (noting that the PNA has entered into agreements with international organizations and the PLO concluded a security agreement, but signed as the PNA). None of these blurred practices appear to have been protested.

227. *See* Wye River Memorandum, *supra* note 37, § V (“Recognizing the necessity to create a positive environment for the negotiations, neither side shall initiate or take any step that will change the status of the West Bank and the Gaza Strip in accordance with the Interim Agreement.”). The determination that either PNA accession to the Rome Statute or the PLO’s encouragement of the PNA’s

However, Israel's unwillingness to authorize the accession does not necessarily deprive the people of Palestine of their inherent capacity to accede.

Even if the PNA was exceeding its authority in acceding to the Rome Statute or accepting the Court's jurisdiction, that fact would not, by itself, necessarily be grounds for the ICC to refuse to act. The Vienna Convention provides:

A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.²²⁸

It then clarifies that “[a] violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.”²²⁹ First, the Vienna Convention only provides the acceding state with a ground to object to its accession, not a right of third-party states to intervene and object. Similarly, the Convention does not confer upon a treaty organization—like the ICC—the option to object. In the case of Palestine, therefore, Israel does not have grounds to assert that the PNA is not competent, nor does any other state. Similarly, the ICC would not have a basis in the Vienna Convention to refuse on that ground.

Even if the ICC or a third-party state could object on this ground, the objecting party would have the onus of showing that the PNA manifestly lacks competence and that its actions have violated a rule of fundamental importance *to Palestine*. This would be an impossible argument to make if Palestine merely asserts that the Oslo Accords

accession violated the Accords would necessitate a preliminary finding that the accession or acceptance of ICC jurisdiction changed “the status of the West Bank and the Gaza Strip.” Further, Israel would also need to determine whether such an act changed the status of the territory in a manner significant enough to constitute a material breach of the Accords. This would permit Israel to denounce the Accords, and would likely result in Israel's revocation of the PNA's right to exist. However, the power of states to terminate a treaty for material breach is, in turn, constrained when the termination would affect the human rights of the individuals benefiting from the treaty.

228. Vienna Convention, *supra* note 167, art. 46(1).

229. *Id.* art. 46(2).

are not of fundamental importance. Given the arguments above regarding inherent self-determination and the relationships between the PNA, PLO, and Palestinian people, the PNA's competence may be unclear, but such issues are not necessarily manifest and fundamental to Palestine.

Some have argued that the Palestinian declaration is invalid because of Hamas' refusal to accept the authority of the PNA in Gaza.²³⁰ The fact that a portion of a state or a rebel group, or similar rebellious region, does not accept the authority of the central government of a state (or quasi-state) does not mean that the government lacks the legal authority to act for the entirety of the state (or quasi-state) internationally. Not only has Israel recognized the PNA as the authority acting internally and the PLO as the authority acting internationally, for the entirety of the territory of the West Bank and Gaza, but so have all of the organizations that Palestine has joined or at which it has been seated as an observer.²³¹ Since Gaza appears to be recognized as a part of the entity of Palestine, the Fatah-led government in the West Bank would be the only authority competent to act for the Gaza territory internally, and the PLO remains competent to act for the entire Palestinian people internationally. This argument loses even more support following the creation of the unity government between Hamas and Fatah.

Based on the above, the PNA is arguably authorized under the Oslo Accords and has the capacity to accede to a judicial treaty such as the Rome Statute or otherwise accept the adjudicative jurisdiction of the ICC. Moreover, under its right to self-determination, Palestine (possibly through the PNA and certainly through the PLO) is inherently competent to accede to any treaty or treaty organization that will recognize it as having that capacity. If it is true that the

230. See, e.g., Davenport Communication, *supra* note 32, at 9-10.

231. See Vienna Convention, *supra* note 167, art. 29 ("Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory."). In addition, the Hamas-led government in Gaza has accepted the Basic Law promulgated by the Fatah-led PNA for the entirety of the Palestinian territory, and has even asserted its own legitimacy as a government under the PNA Basic Law. See Errol Mendes, *Statehood and Palestine for the Purposes of Article 12(3) of the ICC Statute: A Contrary Perspective* 25 (March 30, 2010), available at <http://www.icc-cpi.int/NR/rdonlyres/D3C77FA6-9DEE-45B1-ACC0-B41706BB41E5/281876/OTPErrolMendesNewSTATEHOODANDPALESTINEFORTHEPURPOS.pdf>.

PNA's accession to the Rome Statute is a *judicial* act, then the PNA's acts would not be *ultra vires* under the Oslo Accords. If, on the other hand, accession is not a judicial act, then it might be beyond the scope of the Accords. However, even if the act could be considered *ultra vires* under the Oslo Accords, the violation would not necessarily deprive the PNA's acts of all legal force.²³² Therefore, Palestine has the capacity to accede to the Rome Statute or otherwise accept the jurisdiction of the ICC, arguably through any of its various personalities of the people of Palestine, the PLO, or the PNA.

IV. FORM OF ACCESSION

While this article ultimately concludes that Palestine may join the ICC or accept its jurisdiction, there is no reason to assume that Palestine must be afforded the same rights as other State Parties. On the contrary, there are a variety of limited forms of membership that might be suitable. For example, some organizations that accept non-state entities as members do not permit full voting rights to non-independent states because of their status.²³³ In the period in which the "micro-state" problem was being debated at the United Nations, there were proposals that miniscule states might be admitted with special conditions, such as reduced voting rights or other limitations on their participation rights.²³⁴ These proposals were ultimately rejected, but the rejection appears to have been for political reasons (a failure to amend the Charter to provide for differing forms of membership), not because there was any international legal obstacle to conditional membership.²³⁵ Palestine could be admitted to the ICC, though its participation rights in the Assembly of States Parties

232. Cf. Competence of the International Labour Organization in Regard to Examination of Proposals for the Organization and Development of the Methods of Agricultural Production, Advisory Opinion, 1922 P.C.I.J (ser. B) No. 3, § 18 (Aug. 12) (finding that the International Labour Organization "cannot be excluded from dealing with the matters specifically committed to it by treaty on the ground that this may involve . . . consideration of [matters the Organization should have considered prior to concluding the treaty]").

233. See, e.g., Convention of the World Meteorological Organization, *supra* note 144, art. 11(a).

234. See generally DUURSMA, *supra* note 43, at 135-37 (discussing observer status and associate membership as possible solutions to the question of micro-state participation at the United Nations).

235. See, e.g., *id.* at 138.

(“ASP”) might be limited in some way. It might also be possible to limit Palestine’s ability to refer situations occurring in other states to the ICC.

Unfortunately, at this point in time, the Rome Statute does not provide for these possibilities. To accommodate a limited form of membership, the Statute would most likely need to be amended, unless it was informally amended by practice accepted by the membership.²³⁶ A final possibility is that Palestine could be admitted as an observer over which the ICC might even exercise complementary adjudicative jurisdiction, but which could not participate in the organization’s political processes. The creation of an observer category could be an inherent power of an international organization, possibly even without enabling language in the organization’s constitutive instrument. This is exemplified by the consistent practice of international organizations admitting observers, and the fact that the Rome Statute might be implicitly amended through the practice of admitting observers. In any event, Palestinian accession to the Rome Statute might not require that it join in the same membership category as other States Parties.

V. EXERCISE OF JURISDICTION

As noted above, the ICC may only assert its jurisdiction in one of three situations: referral by a State Party, referral by the UN Security Council, or when the ICC Prosecutor investigates on his own initiative.²³⁷ Both Saudi Arabia and Yemen, though neither State Parties to the Rome Statute or permanent members of the UN Security Council, have nonetheless expressed a desire to refer the situation in Gaza to the Court.²³⁸ Alternatively, the “self-referral” of a State Party to the Rome Statute has been accepted in practice where the referring state would be the locus for the investigation.²³⁹

236. See *Certain Expenses of the United Nations*, Advisory Opinion, 1962 I.C.J. 151, 168 (July 20); *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion, 1950 I.C.J. 4 (Mar. 3).

237. See Rome Statute, *supra* note 2, arts. 13-15.

238. See *Saudi Likens Gaza Assault to Nazi War Crimes*, AM. FREE PRESS, Mar. 2, 2008, available at <http://afp.google.com/article/ALeqM5ixB0uFAPL FVTGSnGR0Kp4jeIEljQ>.

239. See M. Cherif Bassiouni, *The ICC – Quo Vadis?*, 4 J. INT’L CRIM. JUST. 421, 424-25 (2006) (highlighting the first two self-referrals to the ICC, northern Uganda and the Democratic Republic of Congo) See generally Mohamed M. El

However, this alternative would require that Palestine be a party to the Rome Statute, not merely that it have accepted the Court's jurisdiction. Self-referral would also require that Palestine not have been admitted as a special case member under an amended Rome Statute membership category that raises institutional limitations on lodging referrals, should such a category be created. If so, it would seem odd that a special case member could not refer itself, at a minimum. Finally, the Prosecutor could also start an investigation in Palestine "*proprio motu*"—on his own initiative. As of yet, the Prosecutor has never exercised his power in this fashion, but he is certainly not precluded from doing so. In sum, one of these actions must be taken in order to "trigger" the ICC's jurisdiction.

The necessary protocol for triggering the Court's jurisdiction is somewhat less clear where an entity has merely accepted the Court's jurisdiction rather than acceded to the Statute wholesale.²⁴⁰ This paper will not take a position in this debate, but will proceed with the assumption that the Court's jurisdiction must be additionally triggered in the same fashion as it must for a State Party, simply to ensure a complete discussion. In this analysis, the self-referral option would be unavailable because Palestine would not be a State Party to the Rome Statute. Therefore, either another state that is party to the Rome Statute or the Security Council would need to refer the Gaza situation to the ICC, or the Prosecutor would need to take the initiative on his own accord.

As mentioned above, in order for a case to be admissible to the ICC, a state with jurisdiction must either be unwilling or unable to genuinely investigate or prosecute the alleged crime.²⁴¹ If the Court had jurisdiction through the initiative of Palestine, either because it accepted the ICC's jurisdiction and another State Party referred the situation in Gaza, or because Palestine referred itself though not a State Party, we can presume that this condition would be satisfied.

Zeidy, *The Ugandan Government Triggers the First Test of the Complementarity Principle: An Assessment of the First State's Party Referral to the ICC*, 5 INT'L CRIM. L. REV. 83, 99-105 (2005) (describing how the principle of complementarity applies in the situation of Uganda's self-referral to the ICC).

240. See Freeland, *supra* note 174, at 217.

241. See Rome Statute, *supra* note 2, art. 17(1)(a)-(b) (determining that cases are inadmissible if a state with jurisdiction over a case is investigating or prosecuting it or has decided not to investigate or prosecute the case).

Similar analyses for pending situations of self-referral currently before the Court have reached the same conclusion.²⁴² Palestine could block the admissibility of a case at any point by genuinely investigating and prosecuting the situation itself. Given its relations with Israel and the PNA's historic relations with Hamas, however, Palestine likely accepted the Court's jurisdiction because it could not exercise such jurisdiction in Gaza. Israel, on the other hand, could also block a case by genuinely investigating and prosecuting the situation. Because the alleged violations occurred within the hierarchical and accountable IDF, Israel's option to block the admissibility of a case is a real possibility and a welcome one—if it is genuine. The sad reality is that, politically speaking, even a thorough investigation and prosecution by Israel might not be perceived as legitimate.²⁴³ The Court would need to wade into the treacherous waters of determining the genuine quality of such an investigation and prosecution, but, that is one subject for another discussion.

CONCLUSION

This article argues that there is no barrier under international law for Palestine to accede to the Rome Statute or accept the jurisdiction of the ICC, and that the ICC may exercise jurisdiction over the situation in Gaza, or any other situation in the Palestinian territories or involving “nationals” of Palestine.

The Rome Statute limits membership and acceptances of jurisdiction to “states.” Although there is an argument that Palestine satisfies the conditions for statehood under the declaratory and constitutive theories, the criteria are not fully or clearly met. Nevertheless, because Palestine satisfies the conditions, at least in

242. See, e.g., El Zeidy, *supra* note 239, at 111-19 (discussing whether Uganda, which self-referred to the ICC's jurisdiction, has competence to investigate and prosecute alleged crimes by the Lord Resistance Army).

243. See, e.g., Isabel Kershner, *Israel Rebukes 2 for UN Gaza Compound Shelling*, N.Y. TIMES, Feb. 2 2010, <http://www.nytimes.com/2010/02/02/world/middleeast/02mideast.html> (reporting that Israel reprimanded military officers for their use of white phosphorous, but also that Israel has been accused of “covering up details of the shelling of the [UN] compound”); *Israel: Military Investigations Fail Gaza War Victims*, *supra* note 13 (“Israel has failed to demonstrate that it will conduct thorough and impartial investigations into alleged laws-of-war violations by its forces during last year's Gaza conflict.”).

part, Palestine may qualify as a quasi-state, with some aspects of statehood for some purposes. This article argues that those purposes include both accession to the Rome Statute and acceptance of the ICC's jurisdiction.

Palestine, through its personalities of the PNA, the PLO, and the Palestinian people, has the capacity to accede to the Rome Statute and/or accept the ICC's jurisdiction. The Oslo Accords limited the PNA's authority to engage in foreign relations, but the PLO remains free to act internationally. Also, the authority granted to the PNA includes the competence to establish a judiciary and police force, which arguably includes the right to accede to an international judiciary or otherwise delegate its adjudicative jurisdiction. Furthermore, the Palestinian people still hold the right to self-determination. On that basis, the Palestinian people may derive the right to accede to any treaty, regardless of the demands of its neighboring people. Thus, even if the Oslo Accords limit the authorization of the PNA to accede to an international treaty, the Accords would not restrict Palestine's inherent capacity to enter treaties, though doing so might violate its agreement with Israel that it would not act internationally.

Although the text of the Rome Statute appears to limit membership to "states," the practice of international organizations is that that term "state" may be used liberally to include quasi-states with some degree of statehood, notwithstanding the clear language of the text. There is no requirement of international law that the term be interpreted restrictively. In fact, the ICC has already admitted one quasi-state—the Cook Islands—to membership. There is also no obligation under international law that only states be admitted as members of international organizations, generally, or that only states participate in the work of international organizations. Thus, there is no barrier under international law to Palestinian accession to the Rome Statute or acceptance of the ICC's jurisdiction. That does not mean, however, that Palestine must necessarily join with the same status as other States Parties. International law would permit the ICC to limit Palestine's voting rights or even to invent a form of observer status that reflects Palestine's status as a quasi-state.

Finally, if the ICC acquired complementary jurisdiction over Palestinian territory and "nationals," and accepted referral of the

situation in Gaza, that referral would not mean that the ICC would be limited to investigating only the attacks on Palestinians by the IDF. Instead, the referral and jurisdiction over the situation should be interpreted to include the actions of Palestinians in Gaza—specifically, the acts of the Hamas-led government in Gaza. Hamas has been accused of committing serious war crimes, such as launching more than six thousand mortar attacks targeting civilians and otherwise failing to make any distinction between civilians and legitimate combatants.²⁴⁴ It may also be responsible for acts of genocide.²⁴⁵ The accession of Palestine to the ICC should not add to the problems in the region by resulting in a one-sided prosecution policy by the ICC, as that would contravene its mandate.

Based on the above, Palestine may join the ICC or, in the alternative, accept the Court's jurisdiction. The ICC will need to examine whether it will recognize Palestine as a state or whether the object and purpose of the Rome Statute permits a liberal interpretation of the term "state," as it appeared to do with the Cook Islands. Therefore, if the ICC ultimately concludes that Palestine may not accede to the Rome Statute or that the ICC cannot otherwise exercise its jurisdiction over the territory and "nationals," it will be because political concerns are perceived by the ICC as significant enough to justify a conservative approach, not because international law demands it.

244. See Goldstone Report, *supra* note 8, at ¶¶ 41–42; see also Dina Hadid, *Rights Group: Hamas May Have Committed War Crimes*, SEATTLE TIMES, Aug. 6, 2009, http://seattletimes.nsource.com/html/nationworld/2009607824_apmlpalestinianswarcrimes.html; Simons, *supra* note 6 (noting allegations that Hamas targeted civilian areas without any distinction between civilian and military objects and used civilians as human shields).

245. See Convention on the Prevention and Punishment of the Crime of Genocide art. 2, Dec. 9 1948, S. Exec. Doc. O, 81-1 (1949), 78 U.N.T.S. 277 (entered into force Jan. 12, 1951); The Covenant of the Islamic Resistance Movement (Hamas Covenant) pmb., art. 7, Aug. 18, 1988, available at http://avalon.law.yale.edu/20th_century/hamas.asp ("Our struggle against the Jews is very great and very serious. It needs all sincere efforts. It is a step that inevitably should be followed by other steps. The Movement is but one squadron that should be supported by more and more squadrons from this vast Arab and Islamic world, until the enemy is vanquished and Allah's victory is realized."). It would appear that Hamas operatives are engaging in acts prohibited under Article 2 of the Genocide Convention against Jews with the intent to destroy, in whole or in part, their protected group.