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THE PALESTINE DECLARATION TO THE INTERNATIONAL CRIMINAL COURT: THE STATEHOOD ISSUE

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

Declaration recognizing the Jurisdiction of the International Criminal Court

In conformity with Article 12, paragraph 3 of the Statute of the International Criminal Court, the Government of Palestine hereby recognizes the jurisdiction of the Court for the purpose of identifying, prosecuting and judging the authors and accomplices of acts committed on the territory of Palestine since 1 July 2002.

As a consequence, the Government of Palestine will cooperate with the Court without delay or exception, in conformity with Chapter IX of the Statute.

This declaration, made for an indeterminate duration, will enter into force upon its signature.

Material supplementary to and supporting this declaration will be provided shortly in a separate communication.

Signed in The Hague, the Netherlands, 21 January 2009.

For the Government of Palestine
Minister of Justice s/Ali Khashan¹

The declaration references the ICC Statute, which gives the ICC jurisdiction over aggression,

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¹ Declaration recognizing the Jurisdiction of the International Criminal Court, *available at* www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279777/20090122PalestinianDeclaration2.pdf.

genocide, crimes against humanity, and war crimes.² Article 13 specifies the circumstances in which the ICC has jurisdiction over the crimes listed in the Statute.³ Article 12 provides that if a state party refers a case to the prosecutor, or if the prosecutor initiates an investigation on the basis of information received, the ICC has jurisdiction if either (1) the state in whose territory the conduct occurred is a party to the ICC Statute, or (2) the state of nationality of a particular accused person is a party.⁴ Article 12 goes on to say that if the state in whose territory the conduct occurred, or the state of nationality of a named person, is not a party to the ICC Statute, that state may accept ICC jurisdiction “with respect to the crime in question” by filing a declaration with the Registrar of the Court.⁵ It was under that provision that the Minister of Justice filed.

The Palestine declaration was not limited to a particular crime but accepted ICC jurisdiction over any crimes committed in Palestine territory from the date on which the ICC Statute entered into force, July 1, 2002.⁶ The declaration did not further identify the “territory of Palestine” but such territory would presumably include at least Gaza and the West Bank of the Jordan River.

The ICC Prosecutor received the Minister of Justice’s declaration and indicated that the filing would be analyzed before a decision was made on whether to pursue an investigation. In a press statement, his office indicated:

Since 27 December 2008, the OTP [Office of the Prosecutor] has also received 326 communications under Article 15 by individuals and NGOs, related to the situation context of Israel and the Palestinian Territories; some of them were made public by the senders. As per normal practice, the Office is considering all information, including open sources.

The Office will carefully examine all relevant issues related to the jurisdiction of the Court, including whether the declaration by the Palestinian National Authority accepting the exercise of jurisdiction by the ICC meets statutory requirements; whether the alleged crimes fall within the category of crimes defined in the Statute, and whether there are national proceedings in relation to those crimes.⁷

A few days earlier, Bolivia called on the UN Security Council to refer the Gaza situation to the ICC

² Rome Statute of the International Criminal Court, July 17, 1998, art. 5, para. 1 [hereinafter ICC Statute], available at [http://untreaty.un.org/cod/icc/statute/english/rome_statute\(e\).pdf](http://untreaty.un.org/cod/icc/statute/english/rome_statute(e).pdf).

³ *Id.* art. 13.

⁴ *Id.* art. 12.

⁵ *Id.* art. 12, para. 3.

⁶ See ICC Statute, *supra* note 2. The ICC has jurisdiction “only with respect to crimes committed after the entry into force of this Statute.” *Id.* art. 11, para. 1.

⁷ Press Release, International Criminal Court Office of the Prosecutor, Visit of the Palestinian National Authority Minister of Foreign Affairs, Mr. Riad al-Malki, and Minister of Justice, Mr. Ali Khashan, to the Prosecutor of the ICC (Feb. 13, 2009), available at <http://www.icc-cpi.int/NR/rdonlyres/A3B77241-DEC1-4E14-9EE5-A850086A7F70/280140/ICCOTP20090213Palestinerev.pdf>. The ICC Statute allows the ICC prosecutor to “initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the Court.” ICC Statute, *supra* note 2, art. 15, para. 1.

so that the responsibility of Israeli officials could be investigated.⁸ Under the ICC Statute, the ICC gains jurisdiction over a situation if the Security Council refers it to the ICC.⁹

As indicated in the press statement of the Office of the Prosecutor, an investigation can be opened only if the ICC has jurisdiction.¹⁰ The Palestine declaration may provide that jurisdiction. A key element in that determination is whether Palestine qualifies as a “state,” since only a state that is sovereign in a particular territory can confer jurisdiction on the ICC in that territory.¹¹ This Article will argue that Palestine is a state, therefore satisfying a required element of the preconditions for ICC jurisdiction in Article 12(3) of the ICC Statute.

Prior episodes that raised the issue of Palestine statehood

Palestinian officials had twice before sought a status that required Palestine to be a state. In 1989, the Palestine Liberation Organization (P.L.O.) applied for membership in the World Health Organization (W.H.O.).¹² This effort floundered, however, after the United States informed the W.H.O. that if Palestine were admitted as a member state, the United States would withhold funding.¹³ At the time, the United States contributed one fourth of the W.H.O. budget.¹⁴ P.L.O. Chairperson Yassir Arafat called the U.S. statement “blackmail.”¹⁵ The W.H.O. director general asked the P.L.O. to withdraw the application.¹⁶ The W.H.O. then voted to postpone action on the application.¹⁷ Thus, the W.H.O. came to no conclusion on the issue of Palestine statehood.

A few weeks later, in June 1989, the P.L.O. submitted to the Government of Switzerland ratification documents for the Geneva Conventions of 1949. The validity of this ratification depended on Palestine being a state, since ratification of these four treaties is open only to “powers”.¹⁸ The Swiss Government replied to the P.L.O. three months later:

Due to the uncertainty [sic] within the international community as to the existence or the non-existence of a State of Palestine and as long as the issue has not been settled

⁸ See Press Release, General Assembly, General Assembly Demands Full Respect For Security Council Resolution 1860, U.N. Doc. GA/10809/Rev. 1 (Jan. 16, 2009) (statement of Hugo Siles Alvarado, Bolivia) available at <http://un.org/News/Press/docs/2009/ga10809.doc.htm> (last visited Apr. 6, 2009).

⁹ ICC Statute, *supra* note 2, art. 13(b).

¹⁰ See ICC Statute, *supra* note 2, art. 15, para. 1.

¹¹ *Id.*, art. 12(3).

¹² Paul Lewis, *Health Organization Asks U.S. Tolerance on P.L.O.*, N.Y. TIMES, Apr. 30, 1989, at A11.

¹³ Paul Lewis, *U.N. Health Agency Seeks Compromise on P.L.O.*, N.Y. TIMES, May 7, 1989, at A5.

¹⁴ Adam Pertman, *US Vows Cutoff in WHO Funds if PLO Joins*, BOSTON GLOBE, May 2, 1989, at A1.

¹⁵ Jonathan C. Randal, *PLO Defeated in Bid to Join World Health Organization*, WASH. POST, May 13, 1989, at A1.

¹⁶ Norman Kempster, *PLO Urged to Drop Bid to U.N. Unit; U.S. Warns It Would Withhold Money for Health Agency*, L.A. TIMES, May 3, 1989, at A9.

¹⁷ Randal, *supra* note 15, at A1; Burton Bollag, *U.N. Health Agency Defers P.L.O. Application to 1990*, N.Y. TIMES, May 13, 1989, at A3.

¹⁸ Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 60, Aug. 12, 1949, 75 U.N.T.S.; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 59, Aug. 12, 1949, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War art. 139, Aug. 12, 1949, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in Time of War art. 155, Aug. 12, 1949, 75 U.N.T.S. 287.

in an appropriate framework, the Swiss Government, in its capacity as depositary of the Geneva Conventions and their additional Protocols, is not in a position to decide whether this communication can be considered as an instrument of accession in the sense of the relevant provisions of the Conventions and their additional Protocols.¹⁹

Thus, like the W.H.O., Switzerland took no position on Palestine statehood. Switzerland did not regard it as proper, as a single state, to make a determination that would have implications for the international community.

Palestine's declaration of statehood

In 1988, statehood was declared for Palestine by its representative body, the Palestine National Council. It was that declaration that provided the basis for the approaches both to the W.H.O. and to the Government of Switzerland. The 1988 statehood declaration proclaimed "the establishment of the State of Palestine in the land of Palestine with its capital at Jerusalem."²⁰ As a result of the declaration, PLO Chairman Yasser Arafat was invited to address the UN General Assembly.²¹ The General Assembly then adopted a resolution in which it "acknowledg[ed] the proclamation of the State of Palestine by the Palestine National Council on 15 November 1988," and, further, decided that "the designation 'Palestine' should be used in place of the designation 'Palestine Liberation Organization' in the United Nations system."²² One hundred and four states voted for this resolution, forty-four abstained; only the United States and Israel voted against.²³

That strong vote indicates that Palestine was regarded as a state. Had there been opposition, it would have been expressed. One may contrast in this regard the UN reaction in 1983 to a declaration of statehood for a Turkish Republic of Northern Cyprus. The international community found this declaration invalid on the grounds that Turkey had occupied Cypriot territory militarily and that the putative state was an infringement on Cypriot sovereignty. The UN Security Council pronounced the independence declaration illegal: "Concerned at the declaration by the Turkish Cypriot authorities issued on 15 November 1983 which purports to create an independent State in northern Cyprus, . . . [c]onsidering . . . that the attempt to create a 'Turkish Republic of Northern Cyprus' is invalid," the Security Council said that it "[c]onsiders the declaration referred to above as legally invalid and calls for its withdrawal[]"²⁴

Had the international community viewed the 1988 Palestine declaration as invalid, it would have said so loudly and clearly, given the volatility of the situation in the Middle East. It did not.

The United Nations, as indicated, was already referring to Palestine as a state for purposes of

¹⁹ *Note of Information*, Government of Switzerland, Berne, Sept. 13, 1989.

²⁰ Palestine National Council: Political Communique and Declaration of Independence, Nov. 15, 1988, U.N. Doc. A/43/827, S/20278, Annex III, Nov. 18, 1988, *reprinted in* 27 I.L.M. 1668 (1988).

²¹ Robert Pear, *U.S. Won't Oppose U.N. Geneva Session*, N.Y. TIMES, Nov. 29, 1988, at A3.

²² G.A. Res. 43/177, U.N. GAOR, 43d Sess., U.N. Doc. A/RES/43/177 (Dec. 15, 1988), *available at* http://www.centrodirittumani.unipd.it/a_temi/crisi/israele_palestina/Ris-AG-UN-43-177-1988.pdf; Paul Lewis, *U.N. Ends Its Session in Geneva, Approving 2 Mideast Resolutions*, N.Y. TIMES, Dec. 16, 1988, at A15.

²³ G.A. Res. 43/177, *supra* note 22.

²⁴ S.C. Res. 541, U.N. Doc. S/INF/39 (Nov. 18, 1983).

its participation in the Organization.²⁵ In 1989, a resolution was drafted in the UN General Assembly to construe "Palestine" as a "state" in UN documents.²⁶ The United States threatened to withhold its UN dues, and the draft was not put to a vote.²⁷

All of this UN action came against a background of support for the proposition that the Palestinians enjoyed a right of self-determination. In 1974, the UN General Assembly had resolved in favor of the self-determination rights of the Palestinian people.²⁸ In a companion resolution, it accepted the Palestine Liberation Organization as an observer at the United Nations.²⁹

The UN dealt with Palestine as a state. The UN Security Council let it participate routinely in Security Council sessions when relevant issues were on its agenda.³⁰ Under Security Council rules, only a "state" is entitled to participate.³¹

Following the 1988 Palestine declaration, Palestine was shortly thereafter recognized by eighty-nine states.³² Others hesitated, but their hesitation did not necessarily mean that they did not regard Palestine as a state. French President François Mitterand characterized the European view: "Many European countries are not ready to recognize a Palestine state. Others think that between recognition and non-recognition there are significant degrees; I am among these."³³

Possible claimants to Palestine territory

At the time of the 1988 Palestine declaration, Israel controlled Gaza and the West Bank. That fact, however, is not fatal to Palestine statehood. The normal requirement of effective control over territory is applied less strictly if no competing entity claims title.³⁴ With Gaza and the West Bank, there were no competing claimants. Gaza was controlled by Egypt from 1948 to 1967, but Egypt never claimed sovereignty. Egypt regarded Gaza as part of Palestine.³⁵ A Constitution adopted for Gaza by Egypt in 1962 stated, "[t]he Gaza Strip is an indivisible part of the land of Palestine"³⁶ Egypt regarded itself as protecting Gaza from Israel until the Palestine state could assume control. The 1962 Constitution proclaimed in this regard, "[t]his constitution shall continue

²⁵ See G.A. Res. 43/177, *supra* note 22.

²⁶ *PLO Delays Bid for Higher U.N. Status*, L.A. TIMES, Dec. 5, 1989, at A5.

²⁷ Paul Lewis, *Arabs at U.N. Relax Stand on P.L.O.*, N.Y. TIMES, Dec. 6, 1989, at A3.

²⁸ G.A. Res. 3236, U.N. GAOR, 29th Sess., Supp. No. 31 at 4, U.N. Doc. A/9631 (Nov. 22, 1974).

²⁹ G.A. Res. 3237, U.N. GAOR, 29th Sess., Supp. No. 31 at 4, U.N. Doc. A/9631 (Nov. 22, 1974).

³⁰ Letter dated May 21, 2008 from the Permanent Observer of Palestine to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2008/335 (2008) (referring to the Security Council's "past practice" in requesting participation at a Security Council discussion of the protection of civilians in armed conflict).

³¹ Security Council, *Provisional Rules of Procedure*, Rule 14, U.N. Doc. S/96/Rev.4 (1946).

³² Lewis, *supra* note 27, at A3.

³³ Maurice Flory, *La Naissance d'un État Palestinien*, 93 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 385, 401 (1989) (translation by author).

³⁴ See JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 59 (2006).

³⁵ Carol Farhi, *On the Legal Status of the Gaza Strip*, in 1 MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL 1967-1980 61, 75 (1982).

³⁶ *Republican Decree Announcing Constitutional System of Gaza Sector*, Mar. 9, 1962, art. 1, 17 MIDDLE E. J. 156 (1963).

to be observed in the Gaza Strip until a permanent constitution for the state of Palestine is issued."³⁷

Jordan controlled the West Bank from 1948 to 1967. Jordan did assert sovereignty, but did so subject to Palestine's overriding claim to the territory. Jordan's parliament clarified in 1950 that Jordan acted "without prejudicing the final settlement of Palestine's just case within the sphere of national aspirations, inter-Arab co-operation and international justice."³⁸ One analyst characterized Jordan's arrangement: "One might thus conclude, it seems, that the Palestinians are only *provisionally* placed under Jordanian sovereignty."³⁹ In 1988, Jordan renounced its claim.⁴⁰

Israel was in control of Gaza and the West Bank as a belligerent occupant but did not claim sovereignty. When territory is taken via belligerent occupation, sovereignty is not affected.⁴¹ Upon entry of a belligerent occupant, "[t]he legal (*de jure*) sovereignty still remains vested where it was before the territory was occupied, although obviously the legal sovereign is unable to exercise his ruling powers in the occupied territory."⁴² "[T]he occupant does not in any way acquire sovereign rights in the occupied territory but exercises a temporary right of administration on a trustee basis."⁴³ According to the *Restatement of Foreign Relations Law of the United States*, "[a]n entity does not necessarily cease to be a state even if all of its territory has been occupied by a foreign power or if it has otherwise lost control of its territory temporarily."⁴⁴ Kuwait, for example, was a state in 1990-91, even as it was under Iraq's occupation.⁴⁵ Israel's control poses no impediment to a conclusion that Palestine is sovereign in Gaza and the West Bank.⁴⁶

Entitlement to self-determination

Palestine's solid self-determination claim provides a further reason why the international community accepted Palestine as a state even though it did not control territory. As Africa was being decolonized, the issue arose of recognition of colonies as states when the colonial power remained in control. Congo was accepted as a UN member state while Belgium was still in control but had granted independence.⁴⁷ Congolese authorities were in no sense the effective government, yet Congo was regarded as a state.⁴⁸ Guinea-Bissau was accepted as a UN member state at a time

³⁷ *Id.*, art. 73.

³⁸ Albion Ross, *Amman Parliament Vote Unites Arab Palestine and Transjordan*, N.Y. TIMES, April 25, 1950, at A1.

³⁹ G. Feuer, *Les Accords Passés par les Gouvernements Jordanien et Libanais Avec les Organisations Palestiniennes (1968-1970)*, 16 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 177, 189 (1970) (trans. G. Feuer).

⁴⁰ John Kifner, *Hussein Surrenders Claims on West Bank to the P.L.O.*, N.Y. TIMES, Aug. 1, 1988, at A1; *Excerpts from Hussein's address on abandoning claims to the West Bank*, N.Y. TIMES, Aug. 1, 1988, at A4.

⁴¹ CRAWFORD, *supra* note 34, at 73.

⁴² MORRIS GREENSPAN, *THE MODERN LAW OF LAND WARFARE* 217 (1959).

⁴³ GERHARD VON GLAHN, *THE OCCUPATION OF ENEMY TERRITORY* 31 (1957).

⁴⁴ 1 RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987), §201 cmt b.

⁴⁵ See LOUIS HENKIN ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* 247 (1993); EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 151 (1993).

⁴⁶ Eugene Cotran, *Some Legal Aspects of the Declaration of Principles: A Palestinian View*, in *THE ARAB-ISRAELI ACCORDS: LEGAL PERSPECTIVES* 67, 73 (E. Cotran & C. Mallat eds. 1996).

⁴⁷ CRAWFORD, *supra* note 34, at 57.

⁴⁸ *Id.*

when Portugal, similarly, remained in control⁴⁹ but had agreed to withdraw.⁵⁰

Reaction of states

The attitude of other states is a key ingredient in regard to statehood. If an entity is accepted as a state, then it is a state. Palestine was regarded as a state even by states that did not formally recognize it. In 1991, the United States and the USSR initiated a process of dialogue between Palestine and Israel, starting with a conference in Madrid.⁵¹ That dialogue was aimed at settling the conflict between the two parties, particularly in regard to territory.⁵² This process was forwarded by a bilateral Declaration of Principles in 1993 that envisaged negotiations over territory.⁵³ Israeli Prime Minister Yitzhak Rabin recognized the P.L.O. "as the representative of the Palestinian people."⁵⁴ He demanded that the P.L.O. recognize Israel, and in response Chairman Arafat wrote him a letter, stating, "[t]he PLO recognizes the right of the State of Israel to exist in peace and security."⁵⁵ Recognition is an act done by states.⁵⁶ If Israel did not regard Palestine as a state, there would have been no point in asking for recognition. Israel was clearly dealing with Palestine as a state.

Recognition need not be expressed in a formal document. If states treat an entity as a state, then they are considered to recognize it. "[R]ecognition," writes one analyst, "need not necessarily be express; it may be implied from the circumstances."⁵⁷ "[I]nformal relations, without intent to recognize in the political sense, especially if these persist," writes another, "have probative value on the issue of statehood."⁵⁸ That has been the case with Palestine. The international community deals with it on the assumption that it is sovereign in at least some of the territory that was Palestine in the mandate period. Recognition does not require that there be certainty about the precise borders of a state. Israel, for example, is recognized by many states even though Israel's borders are not defined.⁵⁹

This manner in which the international community has dealt with Palestine in recent decades is central to resolving the issue of Palestine statehood. The international community regards Palestine as a state. Otherwise, the international community would not encourage Palestine to recognize Israel and negotiate with respect to territory.

⁴⁹ G.A. Res. 3205, U.N. GAOR, 29th Sess., Supp. No. 31, at 2, U.N. Doc. A/9631 (Sept. 17, 1974).

⁵⁰ Joint Declaration (Guinea-Bissau, Portugal) signed at Algiers, Aug. 26, 1974, *reprinted in* 78 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 1252-53 (1974).

⁵¹ Mary Curtius, *US, Soviets Invite Sides to Mideast Peace Talks*, BOSTON GLOBE, Oct. 19, 1991, at 1

⁵² *In the Dispute Over Land: 3 Leaders Trade Accusations and Offer Answers*, N.Y. TIMES, Nov. 2, 1991, at A5

⁵³ Declaration of Principles on Interim Self-Government Arrangements (Israel-P.L.O.), Sept. 13, 1993, *reprinted in* 32 I.L.M. 1525 (1993).

⁵⁴ Letter, Prime Minister Yitzhak Rabin to P.L.O. Chairman Arafat, Sept. 9, 1993, *reprinted in* 7 PALESTINE Y. B. INT'L L. at 231 (1992/94).

⁵⁵ Letter, P.L.O. Chairman Arafat to Prime Minister Rabin, Sept. 9, 1993, *id.* at 230.

⁵⁶ H. LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 6 (1947).

⁵⁷ NII LANTE WALLACE-BRUCE, CLAIMS TO STATEHOOD IN INTERNATIONAL LAW 74 (1994).

⁵⁸ IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 94 (5th ed., Oxford Univ. Press 1999) (1966).

⁵⁹ See P.R. Kumaraswamy, *The Legacy of Undefined Borders*, TEL AVIV NOTES, No. 40 (June 5, 2002).

A continuing statehood

The statehood declared by the Palestine National Council in 1988 was not of a new statehood. Rather, it was a declaration of an existing statehood. That fact strengthens the Palestine claim to statehood, as requirements for an existing state are less rigorous than those for an entity purporting to be a new state. Palestine became an international entity upon the demise of the Ottoman Empire in the wake of World War I. As the Ottoman Empire lost sovereignty, a Palestine emerged. Great Britain administered Palestine under an arrangement devised by the League of Nations called “mandates.”⁶⁰ This arrangement, as provided in Article 22 of the League Covenant, was based on the concept that certain peoples were “not yet able to stand by themselves under the strenuous conditions of the modern world”⁶¹ France and Britain were to administer various sectors of the former Ottoman Empire, and to do so for the benefit of the people.⁶² The people, in their collectivity, were recognized as the ultimate holder of sovereignty.⁶³ As the International Court of Justice explained, the “ultimate objective” of the mandate system was the “self-determination and independence of the peoples concerned.”⁶⁴ It would be only a matter of time until those peoples would control their territories.

The 1988 declaration in fact referred expressly to the League Covenant, stating that “the international community, in Article 22 of the Covenant of the League of Nations of 1919 . . . recognized that the Palestinian Arab people was no different from the other Arab peoples detached from the Ottoman State and was a free and independent people.”⁶⁵ Thus, the 1988 declaration read as a reaffirmation of an existing status of Palestine statehood.

Under the mandate system, a mandatory power, as Britain was in Palestine, was forbidden to claim title to the territory, the operative principle being “no annexation.”⁶⁶ It was that principle that distinguished the mandate system from the colonial system.⁶⁷ Thus, Britain did not hold sovereignty. The role of the mandatory power was to promote self-governing institutions, after which it would cease its administration. The Attorney-General of the Government of Palestine, Norman Bentwich, explained the relationship as follows: “[A]mong the leading doctrines of international law in its extended sphere, is the right of nationalities, great and small, in the East as in the West, to live their national life, and the duty of the greater States to train them to that end.”⁶⁸

The governments of mandate territories concluded treaties with the governments of other states. The “Class A” mandates, which included Palestine, were the most active in concluding

⁶⁰ League of Nations Covenant art. 22.

⁶¹ *Id.* at para.1.

⁶² *See id.*; J. STOYANOVSKY, THE MANDATE FOR PALESTINE 30-36 (1928).

⁶³ *See* STOYANOVSKY, *supra* note 62, at 262.

⁶⁴ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, 31 (June 21).

⁶⁵ Palestine National Council, *supra* note 20, (preamble paragraph of declaration).

⁶⁶ Legal Consequences, *supra* note 64, at 30. *See also* CRAWFORD, *supra* note 34, at 566.

⁶⁷ AARON N. MARGALITH, THE INTERNATIONAL MANDATES 46 (1930).

⁶⁸ Norman Bentwich, *Mandated Territories: Palestine and Mesopotamia (Iraq)*, 2 BRIT. Y.B. INT’L L. 48, 56 (1921-22).

treaties.⁶⁹ Palestine was party to treaties that were published in the *League of Nations Treaty Series* like the treaties of other states. Palestine was party to a multilateral treaty, for example, that established an international agency to deal with locust plagues.⁷⁰ The International Agreement for the Establishment of an International Bureau of Intelligence on Locusts, concluded at Damascus in 1926, referred in its text to the contracting parties as the “contracting states.”⁷¹

Palestine was party to an Agreement with Egypt Regarding the Reciprocal Enforcement of Judgments.⁷² It was party to bilateral treaties on the exchange of postal parcels with Switzerland,⁷³ Italy,⁷⁴ Greece,⁷⁵ and France.⁷⁶ Most indicative is a treaty with the mandatory power, Great Britain. The Agreement between the Post Office of the United Kingdom of Great Britain and Ireland and the Post Office of Palestine for the Exchange of Money Orders, signed at London, January 10, 1922, and at Jerusalem, January 23, 1922, provided for a regular exchange of money orders.⁷⁷ This treaty was registered with the League of Nations and was published in the *League of Nations Treaty Series*.⁷⁸ Had Britain and Palestine constituted a single sovereignty, there would have been no point to a treaty between them. Sovereignty resided with Palestine.

The sovereignty of Palestine was reflected as well in the arrangement for citizenship. The inhabitants of Palestine lost their Ottoman nationality when the Ottoman Empire fell but gained a new nationality, namely, that of Palestine. They were not British nationals, even though it was Britain who represented individual Palestinians abroad. An Order in Council adopted by Britain in its capacity as administering power dealt with Palestine nationality and referred to “Palestinian citizenship.”⁷⁹

Conclusion

For the ICC Prosecutor, the question of Palestine statehood has a particular twist. Only states can give consent to ICC jurisdiction over acts committed in their territory. The consent of the territorial state is the primary means by which the ICC gains jurisdiction. If Palestine is not a state, then there is no state that has the capacity to grant the ICC jurisdiction in Gaza. Gaza would be a virtual dead zone from the perspective of the ICC. The only remaining potential bases of jurisdiction would be the nationality of a particular offender, or a referral by the UN Security Council.

⁶⁹ Oliver Lissitzyn, *Territorial Entities Other Than Independent States in the Law of Treaties*, in 125 RECUEIL DES COURS 5, 55-56 (1968).

⁷⁰ International Agreement for the Establishment of an International Bureau of Intelligence on Locusts, May 20, 1926, 109 L.N.T.S. 121.

⁷¹ *Id.*

⁷² Agreement with Egypt, Jan. 12, 1929, 9 L.N.T.S. 96.

⁷³ Agreement concerning the Exchange of Postal Parcels, May 5 & 16, 1929, 95 L.N.T.S. 395.

⁷⁴ Agreement concerning the Exchange of Postal Parcels, Dec. 6 & 16, 1931, 139 L.N.T.S. 59.

⁷⁵ Agreement on the Exchange of Parcels by Parcel Post, Mar. 13 & 28, 1936, 170 L.N.T.S. 145.

⁷⁶ Agreement on the Exchange of Parcels by Parcel Post, Mar. 31 & June 19, 1936, 172 L.N.T.S. 17.

⁷⁷ 13 L.N.T.S. 9.

⁷⁸ *Id.*

⁷⁹ Palestinian Citizenship Order in Council, 1925, Stat. R. & O., no. 777, at 474, (UK); see also Norman Bentwich, *Nationality in Mandated Territories Detached from Turkey*, 7 BRIT. Y.B. INT'L L. 97, 102 (1926).

The Palestine declaration under ICC Statute Article 12(3) provides the ICC with jurisdiction over the 2008-09 hostilities in Gaza. On the issue of Palestine statehood, one finds a solid base in international law for a conclusion that such statehood exists. While that conclusion may be counterintuitive to many, it follows logically from the rules in customary international law on sovereignty and on recognition.