Palestine and the ICC
- A study in the criteria for statehood and the jurisdiction of the International Criminal Court

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Thesis in Public International Law, 30 HE credits
Examiner:
Stockholm, Spring term 2016
Abstract

From 1948 and forward the Israeli-Palestinian conflict has been an open festering wound on the international community and has been seen as a failure of international diplomacy. In 2009 the Palestinian National Authority made a declaration to the ICC and to the Secretary-General of the UN where it asked the court to start an investigation regarding alleged war crimes perpetrated by Israeli soldiers and lawmakers against Palestinian civilians.

The declaration divided legal scholars into two camps arguing about the legality of the declaration and if Palestine is a state or not. The Palestinian National Authority would in the end gain recognition from the UN and would go on and join the ICC in 2015. The aim of this essay is to discuss if Palestine is a state or not and how Palestine’s membership to the ICC might affect its jurisdiction. This essay will also speculate on future court rulings regarding crimes committed by Israeli citizens against Palestinians within the territory of the Palestinian National Authority.

The conclusion to be drawn from this essay is that Palestine is a state according to both the declarative theory on statehood as well as the constitutive theory. Not only that, Palestine also has the right as a sovereign state to join the ICC and the court will have jurisdiction over crimes committed in Palestine. The reader will also learn from this essay that the ICC will probably be taking a proactive stance on any attacks against its own jurisdiction and will use the “all-state” clause of the Rome Statute as well as UNGA’s resolution 67/191 to dismiss any claim that Palestine is not a state and that the court thus has no jurisdiction over crimes committed in Palestine.
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<tr>
<td>EU</td>
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<td>ICC</td>
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<td>International Court of Justice</td>
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<td>NATO</td>
<td>North Atlantic Treaty Organization</td>
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<td>OTP</td>
<td>Office of the Prosecutor (ICC)</td>
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<td>PLO</td>
<td>Palestine Liberation Organization</td>
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<td>PNA</td>
<td>Palestinian National Authority</td>
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<td>UN</td>
<td>United Nations</td>
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<td>UNGA</td>
<td>United Nations General Assembly</td>
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<td>UNSC</td>
<td>United Nations Security Council</td>
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<td>UNSG</td>
<td>Secretary-General of the United Nations</td>
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<td>USSR</td>
<td>Union of Soviet Socialist Republics</td>
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1. Introduction

1.1 Background

The Rome Statute is a large and complex legislative work that has the purpose of ensuring that criminals who commit the vilest crimes in the history of humanity will not go unpunished. To meet the demand by the people of the world to ensure that the worst criminals in the history of our world are prosecuted over 100 sovereign states has banded together to create an international court, the International Criminal Court (ICC). The ICC has the mission to ensure just and fair trial’s to those accused of crimes that are defined in the Rome Statute. But since there is no universal jurisdiction for the court, only countries that want to ratify the Rome Statute can be subjected to the jurisdiction of the court. This solution to the question of jurisdiction and breach of state’s sovereignty are in most cases not a problem, since the Rome Statute and membership to the ICC is voluntary. But what happens if a state not recognized by all the states in the world joins the ICC? This is the case with Palestine and their successful bid for membership to the ICC. Both Israel and Palestine are recognized by a majority of the world’s sovereign states, with the exception that the majority of states in the western hemisphere does not recognize Palestine. The question of Palestine’s recognition and the fact that the Palestinian government’s control over its own territory is disputed has created a situation where the prosecutor of the ICC might one day have to prosecute suspects with Israeli citizenship.

I will in this essay discuss the criteria for statehood and how it affects the jurisdiction of the ICC in regards to Israel, a state that has stated numerous times that only Israel has criminal jurisdiction of its own citizens and is one of the states that do not recognize Palestine.

1.2 Purpose and research questions

The purpose of this essay is to discuss the rules of accession to the Rome Statute and how the dispute of statehood can affect the rulings of the ICC. With that I will also discuss the actual case of Palestine and its road to accession of the Rome Statute and how the international laws regarding statehood affects Palestine. The research questions of this essay are the following:

- Is Palestine a state?
- Can Palestine join the ICC?
- How may the question of Palestinian statehood affect future court rulings in regard to international crimes on Palestinian territories?
1.3 Method
In this essay I will use the traditional sources of international law, such as the UN charter, the Rome Statute of the International Criminal Court, legal doctrine and scholarly opinion. Throughout the essay the different sources will be listed as footnotes and they will be compiled into a list at the end of this essay. I will in the last part of the essay discuss how the different theories regarding statehood affects the Palestinian claim for statehood as well as the “all-state” formula and how it affects Palestinian membership to the ICC. I will in the last part of the analysis talk about three different scenarios where the ICC has to discuss and their jurisdiction in a fictional case involving an Israeli citizen accused for international crimes committed on Palestinian territory.

1.4 Limitations
There are several examples of states seeking recognition of their sovereignty and their relation to international treaties. In this essay I will only focus on the case of Palestine. Another limitation is that the Rome Statute, the UN charter, the Montevideo convention on statehood and the Oslo accords will be the only treaties discussed in this essay.

1.5 Outline
I will begin the essay with discussing and examining the formal criteria for statehood as well as UN membership and how it relates to the statehood criteria. After that I will talk briefly about the history of the Israeli-Palestinian conflict. Following a brief over the history of the conflict I will talk about the Palestinian road to statehood and the upgrade of their status at the UN. From there I will brief the reader on the history and jurisdiction of the ICC as well as go through the formal criteria to join the Rome Statute. Since the UNSG holds a central role as the depositary of the documents of accession to the Rome Statute I will talk about the so called “all-state” formula and the rules regarding the acceptance of said documents. From there I will talk about different opinions on Palestinian membership to the ICC and compare them to each other. I will end the essay with an analysis where I discuss if Palestine fulfils the criteria for statehood and if they actually can join the ICC. I will end the analysis with three different courtroom scenarios where I will discuss how the court would deal with motions regarding the court’s jurisdiction over crimes committed in Palestinian territories.
2. Statehood

2.1 The Definition of a State

2.1.1 Background

There are two ways a territory can be recognized as a state. The theories can be divided into a declarative theory and a constitutive theory.¹ The constitutive theory has its roots in the 19th century Europe following the congress of Vienna in 1814. The constitutive theory declares that a territory can only become a state if it recognized by other already established states.

The declarative theory has its roots in the 1930s. According to the declarative theory statehood is reached by a territory fulfilling four material criteria set out in the Montevideo Convention on Statehood.² The four criteria to fulfil are: a) a permanent population, b) a defined territory, c) a government and d) capacity to enter into relations with other states, also called the independence criteria. There has been tries from legal scholars to create a more detailed list of criteria under the declarative theory but all such demands have been ignored.³

The ever changing nature of international law has led to a situation where a combination of the two theories is used to discern if a territory is a state. Today membership to the UN or recognition from the UN can be seen as falling under the constitutive theory. At the same time membership to the UN is based on statehood, which means that the Montevideo convention also plays into the question of membership to the UN.

From here I will discuss the declarative theory and its criteria, later on in the analysis I will discuss how the declarative theory and the constitutive theory affects Palestine’s claim to statehood.

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³ Cohen, *supra* at 1129.
2.1.2 Permanent population

Regarding the statehood criteria of permanent population there has been no UN practice\(^4\) and it will probably not be a problem in the future. The permanent population criteria is seen as a criteria that is fulfilled automatically when a territory becomes a state since there needs to be an actual population for there to be a state.

2.1.3 Defined territory

When it comes to the question of defined territory UN practice becomes a bit more controversial.\(^5\) During the creation of Israel and its subsequent membership to the UN, Syria and other Arab states lodged a complaint that since the territory of Israel was contested it could not fulfil the criteria of defined territory.\(^6\) The case of Israel was special as you will see later in this essay, since Israel was given its territory from a binding resolution of the UNGA. During the cold war the question of defined territory was often affected by territorial disputes between states and thus used in arguments between the West and the East regarding the acceptance of states to the UN. The conclusion based on the political climate during the cold war is that the question of defined territory has been applied liberally and earlier legal cases support this. The oldest and most comparative case is the membership of Albania to the League of Nations following World War one. The frontiers of Albania had at the time not been decided on and thus the question of the defined territory of Albania was brought up. The League took a liberal stand and Albania was given membership.\(^7\) Since the UN is considered to be the successor organization of the League of Nations, precedent from the League should be considered valid in cases regarding the UN.

2.1.4 Effective Government

The third criteria is even more controversial in UN practice. Since the divide of the world in two separate ideological camps based in the west and the east and with a third non-aligned camp the question of effective government became a political battle in the UN. On one hand the western democracies regarded an effective government to be democratic while the eastern bloc and the non-aligned states considered effective government to be a question of how effective

\(^4\) Cohen, *supra* at 1134.
\(^5\) Id.
\(^6\) Id.
\(^7\) Cohen, *supra* note 2, at 1135.
the government actually is. In the example of South Korea the USSR and the Eastern Bloc protested the admission of South Korea to the UN since they did not consider South Korea to have a government in actual control over its territory, instead the Soviet Union considered the government of South Korea to be an illegally installed government by the west and the UN. Just like the situation when Israel was recognized as a state there was questions by the Syrian UN delegates if Israel had an effective government that has been chosen to lead the Israeli people. These moral arguments have been blurred and used less following the joining of the Democratic Republic of Congo to the UN. At the time there was no clear group in Congo that could take up the mantle of leadership in the country. Neither the west nor the east could from a political standpoint oppose Congolese ascension to the UN and accepted the country as a member. The only clear aberration is the case of Congo. During the cold war both the west and the east at least pretended to follow the idea of a state with a government elected by its people. But as actual UN practice has shown the focus is more on the idea of an effective government that has actual formal authority and control over its territory.

2.1.5 Independence

The fourth criteria of statehood is independence. Looking at traditional international law a state is not a state until it possesses independence and sovereignty. The discussion relating to the criteria of independence has found two main questions. The first one is “Can a dependent entity be a state in international law?” and the second one is “At which point do restrictions upon sovereignty cause a loss of independence?” In the Customs Unions Judge Anzilotti answers the questions posed above. His definition was the following “Independence...may also be described as sovereignty (suprema potestas), or external sovereignty, by which is meant that the state has over it no other authority than that of international law. The conception of independence, regarded as the normal characteristic of States as subjects of international law, cannot be better defined than by comparing it with the (class of) ‘dependent states’”. This definition thus requires two elements, one “the separateness of state and its direct subordination to international law”. The problems arising is the question if an entity is indeed independent, does one look at the formal arrangements to its independence or does one “look behind” the

8 Cohen, supra note 2, at 1137.
9 Cohen, supra note 2, at 1138.
10 Cohen, supra note 2, at 1138.
11 Id.
12 Cohen, supra note 2, at 1139.
13 Id.
formal arrangements to the effective facts?\textsuperscript{14} The truth is that if there is no possibility to discern a state’s independence from legal facts one must look at the political facts surrounding the events to assess the situation. An important indication relating to the independence criteria is if a state can enter into agreements with other states.

2.2 UN membership

2.2.1 Introduction

The rules regarding membership to the United Nations can be derived from article 4 of the UN charter. The article stipulates the following:

(I) Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations

(II) The admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council

From the outset of the creation of the UN the idea was that all countries are part of the supranational organization that is the UN. This unconditional view on membership has moved to a more conditional based membership with a list of five criteria that can be derived from article 4 (I) of the UN charter. The criteria\textsuperscript{15} is the following:

1. Be a state
2. Be peace-loving
3. Accept the obligations contained in the charter
4. Be able to carry out the obligations stipulated in the charter
5. Be willing to carry out the obligations in the charter

By including a list of criteria as a condition to membership the UN hoped that this would help to enlarge the organization in a fast matter\textsuperscript{16} by using a liberal interpretation of article 4. This was also seen in the backdrop of the Cold War where the continuing conflict between East and West was also apparent in the day to day business of the UN and the admission of new members.

\textsuperscript{14} Id.
\textsuperscript{16} Simma, \textit{supra} note 15, at 178.
During the 1950s a deadlock emerged regarding admissions to the UN. There was a view from a group of states that the rules of admissions should be subjected to other conditions that are not expressly mentioned in article 4.\(^\text{17}\)

The International Court of Justice ruled on the issue regarding extra conditions to the admission procedure. A minority of the judges took the view that extra conditions could be subjected on states that wanted to join the UN. The majority of judges took another view on the issue. The court ruled that any other admission criteria but the criteria in article 4 would make the admission inadmissible. Thus the court has confirmed that admission to the UN can only go through article 4 of the UN charter.\(^\text{18}\)

The International Court of Justice did however point out that the conditions in article 4 are elastic and there can be a wide scope for the application of the article.\(^\text{19}\)

The conclusion was the following: “article 4 does not forbid the taking into account of any factor which it is possible reasonably and in good faith to connect with the conditions laid down in that article. (N)o relevant political factor – that is to say, none connected with the conditions of admission – is excluded”.

Moving on I will now discuss the material criteria for joining the United Nations, part of the following text will touch on points talked about in the former chapter.

2.2.2 Statehood criteria

The first material criteria is that the applicant to the UN needs to have reached the formal requirements of statehood under international law.\(^\text{20,21}\) Not only that the applicant also need to prove its factual independence. Examples of non-independence in the admission procedure was the case of the Republic of Korea (Korea was at the time under foreign occupation, Soviet and American), Austria (following the Second World War Austria was considered a neutral country in neither the eastern or western sphere and was put under military occupation directly after the end of the war in Europe).\(^\text{22}\) Other examples can include the relation between Ceylon (Sri Lanka) and its former colonial master the UK. Sri Lanka was not at the time considered to be independent and could thus not join the UN. Angola, another colonial state was also

\(^\text{17}\) Simma, supra note 15, at 179.
\(^\text{18}\) Simma, supra note 15, at 179.
\(^\text{19}\) Id.
\(^\text{20}\) Simma, supra note 15, at 181.
\(^\text{22}\) Simma, supra note 15, at 191.
inadmissible when applying for membership the first time since it was not at the time independent from Portugal. Also the case of Mongolia is interesting. Mongolia was at the time dependent on support from the Soviet Union and this total dependence on another state formally made Mongolia inadmissible to the UN. There is also within the criteria of statehood a criteria of defined territory, this was challenged in the cases of Israel (regarding lack of defined frontiers) and Kuwait and Mauritania (since neighbours to these states made claims to their territory).

2.2.4 Peace-Loving criteria

The Second material criteria is that all states that wants to join the United Nations must be peace-loving. In the beginning of the history of the UN this criteria meant that only states that sided against the Axis powers during the Second World War or where neutral could join the United Nations.

Following the end of the war and the expansion of the UN the notion of old war allegiances as a criteria was put aside to a system based more on how states act in regards of each other’s. The peace-loving criteria has nothing to do with the political system of the applicant, it doesn’t matter if the state is a democracy or a dictatorship. If this was part of the criteria, article 4 would clash with the rules regarding unlawful interference of states internal affairs according the article 2.7 of the UN charter. What matters in regard to the peace-loving criteria is a state’s behaviour in International affairs, examples of actions that would prove a state to not be peace-loving could be:

A state’s non-compliance with UN resolutions, interference with innocent passage in territorial waters, using non-peaceful means for the settlement of disputes regarding territory and frontiers and disrespect for the principle of non-intervention.

However, following the decolonisation of Africa and Asia the criteria of peace-loving had no practical importance at all regarding admission to the UN.

23 Simma, supra note 15, at 182.
24 Simma, supra note 15, at 182.
25 Id.
2.2.5 Accepting the obligations of the UN charter

The third criteria is that a state needs to accept the obligations in the UN charter. Fulfilling this criteria is an administrative procedure. The applicants must attach to their application for membership a formal declaration expressing their acceptance of the obligations enshrined in the charter according to rule 58 of the provisional Rules of Procedure of the UNSC and rule 135 of the Rules of Procedure of the UNGA. The act is a declaration of willingness to be bound under law of the treaties of the UN and following that being bound by UN soft law e.g. traditions of the organization.\textsuperscript{26}

There is a question if the declaration must be done unconditional or can be done with reservation, till this date there has been no declarations to accept the obligations of the charter done with a reservation and it is considered a general rule to accept the conditions unconditional.

2.2.6 The fourth and fifth criteria

The fourth and fifth criteria is that a state is “able and willing to carry out the obligations contained in the charter”. Indications of a state fulfilling the fourth and fifth criteria can for example be: maintenance of friendly relations with other states, fulfilment of international obligations and the reputation of states concerned for being prepared to utilize procedures of peaceful dispute settlement\textsuperscript{27}. The obligations of the fourth and fifth criteria tends to overlaps with the obligations in the second criteria, being “peace-loving”.\textsuperscript{28}

If a state wishes to join the UN the applicant needs to send an application of membership to the UNSG. In the application the state formally proclaims its willingness to follow the obligations contained in the UN charter.

Since member states to the UN are the ones deciding which state can and cannot join the UN, the decision is taken by both the UNSC and the UNGA. The UNSC has the initiative and may exercise control over admission to the UN while the UNGA takes the official step of giving the decision to join actual legal status.

\textsuperscript{26} Simma, \textit{supra} note 15, at 183.
\textsuperscript{27} Simma, \textit{supra} note 15, at 183.
\textsuperscript{28} Simma, \textit{supra} note 15, at 184.
Permanent members of the UNSC has veto power over membership. The International Court of Justice has in its opinion on the Competence of the UNGA for the admission of a State reaffirmed the UNSC’s veto power over which states can join the UN.

Since it is the UNSC and the UNGA’s prerogative to examine if an applicant fulfils all the criteria of the UN charter both organs may create a special committee regarding the admission of a state with the express purpose to check if the applicant fulfils the criteria.

2.2.7 Special problems

One special problem that the UN faced early on was the situation with divided states. During the Cold War several states divided in two on the basis of ideology sought membership to the UN. Two such states where the Federal Republic of Germany in the western part of the country and the German Democratic Republic in the east. Both states where created following the end of the Second World War and the Federal Republic of Germany was aligned to the west during the Cold War and the German Democratic Republic was aligned to the east during the Cold War. The problem was that both states considered themselves to be the only German state and did not recognize the other. The UN could not choose which state was the actual German state and thus the precedent of the UN during the Cold War was not to accept states that were divided into the UN.

The situation with the two Germany’s was resolved in the 1970s when both East and West Germany signed an international agreement that proclaimed that both states where countries under international law. Following the agreement both states where given membership status in the UN following their application.29

The Democratic Republic of Vietnam only received membership to the UN following the end of the Vietnam War and the subsequent re-unification between the South and the North.

North and South Korea both gained membership following the end of the East-West divide and the fact that both countries worked as single entities not bound by each other.

Another situation that can arise is if a state secedes from a current UN member state. This creates a question regarding which state is the successor to the actual UN membership. A distinction must be made regarding situations a member state changes its constitution which

29 Simma, supra note 15, at 185.
changes the political climate in the state or if an actual new state is established from a current member state.

In the case of India the UNGA came to the conclusion that mere amendments or alterations to a constitution or the borders of a state leave the question of a member states membership unaffected. If a state goes extinct the “legal personality” of a member state must be proven before the rights and duties of UN membership will lapse. A newly created state e.g. through secession from a current member state may become a member of the UN only after a formal admission procedure.

In the cases of two states merging or a state being dismembered the UN has shown a great deal of flexibility in the case of membership.

When Egypt and Syria formed the United Arab Republic the new country inherited the Egyptian membership to the UN and there was no admission procedure at all regarding the UARs membership to the UN. Later when the state was dismantled and Egypt and Syria was restored as two independent countries, Egypt inherited the UARs membership and Syria was granted its membership to the UN as if nothing had happened at all.30

As of this date the UN has not refused to accept the UN membership of any state created from a merger between two UN states nor has the UN refused the membership of two former UN states that had earlier merged into one UN state.

In a situation where a UN member withdraws from the UN and then later reactivate its membership the UNGA and the UNSC has ruled that the membership status should be granted directly without any admission procedure. This granted if the withdrawal was a temporally inactive membership and that the UN has given a standing invitation to reactivate the membership proper at any given time. In the case of Indonesia the UNGA accepted without objection that Indonesia had only ended its co-operation but not its membership with the UN and was then entitled to “resume full cooperation in the UN and to take part in the work of the Organization” without re-admission.31

30 Simma, supra note 15, at 186.
31 Simma, supra note 15, at 186.
2.2.8 Observer Status

The observer state functions as a limited participation mode for groups that has some say in regional or international politics, their legal status is one between actual membership to the UN and non-membership. Observer status can be given to non-member states, regional organizations, groups of states and certain national liberation movements.32

Since there has been demands within the UN to ensure that the organization is universal and all states have some actual say in the international arena there exists a way for non-member states to participate in the work of the UNGA and the UN. The functions of a permanent observer mission to the UN is defined in the following way33 according to the Vienna convention on the representation of states in their relations with International Organizations of Universal Character:

a) Ensuring the representation of the sending State and safeguarding its interest in relation to the organization and maintaining liaison with it

b) Ascertaining activities in the Organization and reporting thereon to the government of the sending State

c) Promoting co-operation with the Organization and negotiating with it

National liberation movements has been granted Permanent Observer Status to the UN as a way to prepare the future nation for entrance to the UN. Observer status to the UN is usually very important for liberation movements as a way to get international recognition of their struggle and is a stepping stone to being recognized as an actual state.34 The actual legal basis for national liberation movement’s participation as an observer status can be found in resolutions passed by the UNGA. The most famous invitation is the UNGA’s invitation to PLO to join as a permanent observer.

32 Simma, supra note 15, at 187.
33 Simma, supra note 15, at 188.
34 Simma, supra note 15, 188.
3. Israel-Palestine a brief overview

Following the fall of the Ottoman Empire after the First World War the area of modern day Israel and Palestine was put under British control by mandate of the League of Nations, the forerunner to the United Nations. The birth of nationalism during the second half of the 19th century created several independence and national movements in the area of modern day Palestine. These Palestinian nationalist wished for a sovereign Palestinian state, ruled by Palestinian Arabs who lived in the area under first Turkish and then later British control.

At the same time in Europe another nationalist movement was growing among the large Jewish community spread out over all of Europe. This new movement was called Zionism and called for Jews to return to the homeland of the Jews prior to their expulsion from Israel by the Romans in 70 A.D.

These two movements first found a common goal against the Turks and the English but as time went by the two groups started to clash against each other. With the conclusion of the Second World War and the world being exposed to the horrors of the National Socialist regime in Germany and their genocide against Jews there was a widespread feeling of shame and failure in the world community for failing to protect minorities such as Jews against the brutality of the Nazi regime.

Zionism as a political movement grew exponentially among Jewish Holocaust survivors and despite the British ban on Jewish immigration to the Palestinian Mandate, Jews from Europe (mainly Western Europe) emigrated in large numbers. The British, ruling the area by mandate of the newly created UN, feared ethnic tensions and clashes between the arriving Jews and Palestinian Arabs living in the area.

Following terror campaigns from both Zionist and Palestinian nationalist groups and ethnic clashes, the state of Israel was declared by the Jews living in the Palestinian mandate. The creation of a Jewish state in the middle-east led to a direct declaration of war from six Arab nations led by Egypt.

The Israel-Arab war became one of the first proxy wars of the emerging Cold War, with the Soviet Union and the Eastern bloc supporting the Arab states against Israel and the US and the Western bloc supporting Israel against its neighbours.

Following Israel’s victory in the war of 1948 and later the Yom Kippur war, Israel’s Arab neighbours one after one signed peace treaties with Israel. At the same time the Palestinian area
shrunk and became smaller and smaller. Ending up divided into two distinct areas, The West Bank and the Gaza strip.

Following the Oslo accords in 1994, the West Bank and the Gaza strip was organized into the “Palestinian National Authority” and is today considered to be the country Palestine. In 2006 elections were held, which led to a civil war between two Palestinian factions. One of the groups is Fatah which is considered to be the direct descendant to the revolutionary Palestinian Liberation Organisation who fought Israel from 1968 and onwards. The other group is Hamas, which is an Islamic Fundamentalist and Palestinian nationalist group. After the election, Hamas received a majority in the Palestinian parliament and thus was given control over the Palestinian Authority. Fatah went into opposition and was later able to secure power in the West Bank.

This has led to a situation where the Palestinian Authority is divided in two distinct groups who rules two distinct areas under the jurisdiction of the Palestinian Authority. The fact that Hamas holds an even more hostile view towards Israel and refuses to recognize Israel or the peace process has led to a situation where Israel does not consider the PNA to have control over the Gaza strip since Israel considers Hamas to be a terrorist organization.
4. The Palestinian road to statehood – a brief overview

To be able to discuss and analyse the question of the ICCs jurisdiction in Palestine we first need to look at Palestine’s claim to statehood.

In the international context, recognition of statehood is often seen as a “political fact with legal consequences”.\(^{35}\) To advance from a non-state to statehood there is a middle step, a “proto-statehood”.

Support for Palestine as a proto-state during the 1920s can be found among legal scholars, but following the British Balfour declaration where the UK declared that they support Jewish immigration to the Palestinian mandate under their control created a political dilemma. The UK had a mandate from the League of Nations following the First World War to ensure the welfare and wellbeing of the peoples under their mandate. Comparing the British Mandate in Iraq and Jordan, where the UK backed a move towards self-determination and statehood of the Arabs in the Iraqi and Jordanian mandate. But in the Palestinian Mandate the UK never pushed for self-determination, instead the Balfour declaration bound the UK to support Jewish immigration to the mandate and thus created a direct contradiction with their mandate from the League of Nations.

In 1947 the UK asked the UN to decide on the fate of the Palestinian mandate. The UN created a special committee that recommended that the mandate should be terminated as soon as possible and Palestine should be granted independence.\(^{36}\) Furthermore, the committee supported a two-state solution and a division of the mandate into two separate states, one Arab and one Jewish but that both states should be linked together economically.\(^{37}\)

Interesting to note is that the committee indicated that the two state “shall come into existence”\(^{38}\) following the end of the mandate. This suggest that both the Jewish and Arab community should establish sovereign states under the authority of the UN charter.\(^{39}\)


\(^{36}\) Nagan & Haddad, supra, at 349.

\(^{37}\) Nagan & Haddad, supra, at 350.

\(^{38}\) Nagan & Haddad, supra, at 351.

\(^{39}\) Id.
In 1948 the UNGA voted in a resolution about the partition of the Palestinian mandate. The resolution declared that the Mandate should be divided into two parts, 57% of the territory would be a Jewish state whilst the rest 43% would be an Arab state.\textsuperscript{40}

The resolution also demanded that both states created should be democracies with working constitutions giving rights to all citizens of respective states. Following the declaration of Israeli independence in 1948 and the failure of Palestine to achieve independence no such constitutions were created in either state.\textsuperscript{41}

After the six day war in 1967 a number of Palestinian organizations formed an umbrella organization for Palestinian resistance against Israel. The organization, named the “Palestine Liberation Organization” (PLO). PLO declared that their mission is to remove Israel from Gaza and the West Bank and there create a Palestinian state. Furthermore PLO stated that Israel as a state shall be dismantled. The last part of the Palestinian convention solidified the conflict between Israel and Palestine. Seeing that PLO had no real chance to defeat Israel through conventional military means the organization decided to seek as much international recognition as possible. Over the course of the latter half of the 20\textsuperscript{th} century over 100 states recognized PLO as the sole representation of the Palestinian people in their quest to self-determination\textsuperscript{42}. In 1967 the UNGA began adopting resolutions which recognized Palestinians rights to self-determination and the PLO was invited to represent Palestine in UN negotiations.\textsuperscript{43}

This was protested by Israel since they considered PLOs strategy to create a Palestinian state as “creeping” by slowly and surely gaining international recognition and to be able to act as a state in the UN. It went so far that PLO received and observer status within the UN.\textsuperscript{44}

There are two key resolutions regarding the relationship between Israel and Palestine. Resolution 242 (22 Nov 1967) which recognize the “inadmissibility of the acquisition of territory by war”\textsuperscript{45} and that the UN charter requires a “just and lasting peace”.\textsuperscript{46} The resolution demands that Israeli armed forces withdraw from occupied Palestinian territories, end the claim of belligerency and respect the “sovereignty, territorial integrity and political independence of

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\textsuperscript{40} Nagan & Haddad, supra note 35, at 352.  
\textsuperscript{41} Nagan & Haddad, supra note 35, at 353.  
\textsuperscript{42} Nagan & Haddad, supra note 35, at 357.  
\textsuperscript{43} Nagan & Haddad, supra note 35, at 355.  
\textsuperscript{44} Nagan & Haddad, supra note 35, at 358.  
\textsuperscript{45} Nagan & Haddad, supra note 35, at 358.  
\textsuperscript{46} Id.
\end{flushright}
all states in the area”. Resolution 338 demands that all states adopts and follows the UNSC’s resolution 242 when a cease-fire has been reached.

A conclusion that can be draw from the resolutions is that “the right of self-determination implicates rights that accrue at a minimum to a de facto state, including claims to sovereignty, territorial integrity and independence”.47

The United States supported Israel from its conception and through an agreement with Israel in Sinai (1975) declared that the US would not negotiate with PLO as long as PLO did not recognize Israel’s right to exist. But following political changes in the US with Jimmy Carter being elected president a new push for peace spearheaded by the US was declared. Through several meetings in Camp David two framework agreements where decided on.

In 1988 the PLO announced the creation of a new Palestinian state in the “State of Palestine with its capital in Jerusalem”. Following the declaration PLO also declared that they will from now on follow resolution 242 and 338 and on top of that renounce terrorism, which was a condition the US congress had codified into law regarding the question of Palestinian statehood. In December 1988 the US entered into negotiations with PLO but these negotiations was suspended 2 years later when PLO refused to condemn a thwarted terror attack in Israel. In 1993 PLO and Israel exchanged letters of mutual recognition and the US again resumed their dialogue with PLO.48

Following the signing of the Oslo accords by Israel, the US and PLO a new entity was created. The PNA. The problem with the Oslo accords was that the accords stipulated that an agreement between the PNA and Israel should be reached within 5 years. This created a situation where Israel could refuse to sign the agreement and thus stop the PNA from declaring statehood. This “veto” would be used by nationalist politicians in Israel who opposed Palestinian statehood and could thus continue with creating settlements and using those settlements to annex territories within the PNA.

Following the Oslo accords the question of Palestinian statehood was more or less put aside, but at the same time violence grew and Israel started to retaliate against rocket attacks from the PNA.

47 Nagan & Haddad, supra note 35, at 359.
48 Nagan & Haddad, supra note 35, at 361.
Through resolution 67/191 adopted by the GA in 2012 the status of Palestine was upgraded at the UN. Palestine had before the resolution been a non-state observer to the UN, but following the resolution Palestine’s status was upgraded into non-member observer state. The upgrade of status has not led to UN membership the resolution is by the wording of the upgrade of status a de facto acceptance from the GA of the PNA’s quest for statehood and international recognition.\(^{49}\)

5. The International Criminal Court – a brief overview

In the so called Nuremberg promise following the trials after World War II the victors of the war promised that tribunals like the ones in Nuremberg and Tokyo would follow. The idea of an international court dealing with crimes committed in war had been proposed much earlier. In 1872, Gustav Moynier, one of the founders of the International Committee of the Red Cross proposed an international court dealing with crimes committed during war. He was worried that national judges would be unable to fairly judge offences done by soldiers of the same nation.

In the Genocide convention of 1948 there was a discussion regarding the creation of a permanent international court dealing with international crimes but the only thing coming out from the creation and discussion of the genocide convention on this matter was the actual agreement of a possible permanent court in the future.\(^{50}\)

The start of the Cold War also helped stall the creation of the court and instead focus was made on creating inter-state cooperation between the prosecuting agencies of national courts.\(^{51}\) These treaties allowed for the extradition, prosecution and legal assistance from one state to another.

In 1989 the state of Trinidad and Tobago proposed\(^{52}\) the creation of an International Criminal Court which would have the main objective to prosecute drug offences. Even though the ICC do not have jurisdiction over drug offences this proposal was the first real push toward the creation of the International Criminal Court. The UNGA acted on the proposal and asked for a draft to be made for the statute of the court and the International Law Commission produced the statute in 1994.\(^{53}\)


\(^{51}\) Cryer, Friman, Robinson & Wilmhurst, supra, at 147.

\(^{52}\) Id.

\(^{53}\) Id.
The first draft was not as far reaching as the current statute of the ICC since it only gave state parties to the convention and the UNSC the power to refer situations to the court. This is so-called opt-in provision only allowed the court jurisdiction if the suspect was in custody in a state that was a member of the statute and if the crime committed happened in the state.

In 1998 the ICC statute was drafted and negotiated over in Rome. The Rome conference was close to failing but in the end an actual statue was drafted that created an International Criminal Court. The biggest obstacle for the conference to climb was the actual question of the Courts jurisdiction and the role of the UNSC.54

The judges of the ICC is divided into three different categories. Pre-trial, Trial and Appeals Chambers. The president of the court together with two vice-presidents are elected by the judges of the ICC and are responsible for the administration of the court.55

The ICC deals with “the most serious crimes of international concern” which are: genocide, crimes against humanity, war crimes and aggression.56 The codification of these crimes where meant to be uncontroversial and thus tends to be as conservative as possible but has led to the advancement of criminal law regarding these crimes.57

The Rome Statute to the International Criminal Court created three possibilities to initiate proceedings at the ICC, the so-called “trigger” mechanism.58 These triggers are a referral by a State Party to the ICC59, referral by the UNSC and also the prosecutor’s power to initiate an investigation independently according to article 13.6061 The result of article 13 is that the prosecutor is given an independent and strong role in the prosecution of international crimes but the power to initiate proceedings are hampered by the need of an authorization by the Pre-Trial Chamber.62 This was put in to appease those state-parties that where worried that giving the prosecutor too much power of the proceedings could lead to politically motivated prosecutions that would not be under the supervision and oversight of national authorities.

54 Cryer, Friman, Robinson & Wilmhurst, supra note 50, at 148.
55 Cryer, Friman, Robinson & Wilmhurst, supra note 50, at 150.
56 Cryer, Friman, Robinson & Wilmhurst, supra note 50, at 151.
57 Id.
58 Cryer, Friman, Robinson & Wilmhurst, supra note 50, at 163.
59 Cryer, Friman, Robinson & Wilmhurst, supra note 50, at 163.
60 Cryer, Friman, Robinson & Wilmhurst, supra note 50, at 164.
61 Cryer, Friman, Robinson & Wilmhurst, supra note 50, at 164.
62 Cryer, Friman, Robinson & Wilmhurst, supra note 50, at 165.
There is also a “fourth” trigger,\textsuperscript{63} which is called self-referrals. In this situation a state-party to the ICC may ask the prosecutor to initiate an investigation regarding a situation within the jurisdiction of the state. This was wanted by the drafters of the Rome Statute since it would strengthen the spirit of cooperation but there has been attempts by states to abuse this right\textsuperscript{64}. State-parties embroiled in civil war or other internal conflict might use the self-referral right to use the ICC to prosecute its political enemies. This happened in 2003 in Uganda, where the government tried to use the ICC to prosecute crimes done by the Lord’s Resistance Army. The prosecutor made it clear that he won’t be used in such ways and that if a state request an investigation by the prosecutor the prosecutor will investigate all crimes related to the situation, including crimes committed by the state who referred the case to the prosecutor.

6. The Jurisdiction of the ICC

The Jurisdiction of the court is threefold: personal, territorial and temporal.\textsuperscript{65}

The ICC has potential worldwide jurisdiction based on the wording of the Rome Statute and the fact that it is open for all states in the world to join. There are two principles of jurisdiction for the court, the first one is territorial jurisdiction and the second one is personal jurisdiction. Article 11 of the Rome Statute stipulates that the ICC has jurisdiction over all international crimes committed following the statute’s implementation in 2002. Article 11(2) of the statute stipulates on the other hand that the court only has jurisdiction in a member state over crimes committed after the statute’s entry into force, but article 11(2) also offers the possibility for a state party to give the court jurisdiction over crimes committed prior to the state party’s accession to the Rome Statute. This type of “temporal jurisdiction” is based on article 12(3) of the Rome Statute.

Territorial jurisdiction\textsuperscript{66} is based on article 12(2)(a) of the Rome Statute which gives the court jurisdiction of crimes that has been conducted in the territory of a state party to the Rome Statute.

\textsuperscript{63} Cryer, Friman, Robinson & Wilmhurst, \textit{supra} note 50, at 166.
\textsuperscript{64} \textit{Id.}
\textsuperscript{65} Cryer, Friman, Robinson & Wilmhurst, \textit{supra} note 50, at 166.
\textsuperscript{66} Cryer, Friman, Robinson & Wilmhurst, \textit{supra} note 50, at 167.
The second principle of jurisdiction is based on article 12(2)(b) of the Rome Statute, which stipulated that the court has jurisdiction in situations where the person accused of the crime is a national of a state party to the Rome Statute, so called “personal jurisdiction”. 67

Temporal jurisdiction 68 is based on article 12(3) of the Rome Statute. Article 12(3) gives a state which has not ratified the statute the right to give the court jurisdiction with the respect of a special situation in the country. A 12(3) declaration also gives a new state party to the ICC the right to give the court jurisdiction over crimes committed prior to the state’s accession according to article 11 of the Rome Statute.

Furthermore the ICC also has jurisdiction when the UNSC refers 69 a situation to the ICC according to chapter VII of the UN Charter. The court will gain jurisdiction even if the state where the situation is referring to is a member of the Rome Statute or not.

The court has jurisdiction over all the core crimes mentioned in the Rome Statute (Genocide, Crimes against Humanity and War Crimes) and by joining the Rome Statute the court gains automatic jurisdiction. There is however one exception to the rule. A state that joins the Rome Statute can according to article 124 declare that crimes committed by the states nationals or on the territory of the state will not fall under the jurisdiction of the court for a period of seven years. This provision has no real justification except that the Statute would not have been accepted at the Rome conference if it was not written in. As of the moment only two states has used article 124 when ratifying the Rome Statute and by now the time limit has gone out and the court has total jurisdiction for all international crimes in the territory of its member states.

67 Cryer, Friman, Robinson & Wilmhurst, supra note 50, at 167.
68 Cryer, Friman, Robinson & Wilmhurst, supra note 50, at 169.
69 Cryer, Friman, Robinson & Wilmhurst, supra note 50, at 164.
7. Joining the ICC

According to article 125(1) of the Rome Statute the actual statute is open for signing at the UN headquarters till the 31st December 2000.

After the date any countries wishing to access the Rome Statute may do so by deposit the instruments of accession to the Secretary General of the UN. This allows for the adding potentially all states in the world to the Rome Statute which would give the ICC universal jurisdiction.

By joining the Rome Statute, state-parties accept that the court has jurisdiction over international crimes committed on the territory of the state.

8. All state formula

8.1 Introduction

When a state joins a convention there are usually rules in the convention that sets out which states may join or not. In some cases the conventions are for members of the United Nations and thus only member states may sign the convention. In other situations the conventions are open for all states, thus states that may not be members of the UN are eligible for membership.

This has created a problem for the UNSG in cases where the signing/accession of a convention is supposed to be lodged to the UNSG. That’s why there exist two formulas that the UNSG uses in such situations, these two are called the “Vienna formula” and the “All state formula”.

8.2 Vienna Formula

The Vienna formula was created to respond to situations where a participant of the international community cannot gain membership to the UN or the ICJ, which would automatically award them recognition as a state, but at the same time is considered a state by large parts of the international community. The Vienna Convention on the Law of Treaties is open for signature of all members of the UN or states invited by the UNGA to sign the convention.70

70 Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, United Nations, New York, 1999, at 22, §79.
Thus in a situation where a convention follows the Vienna Formula the UNSG has no problem to deposit the signatories of non-members of the UN based on the precedent found from the formula.

8.3 All states formula

But there are conventions that are open for “all states” whether or not they have been invited by the UNGA to sign the convention. In this case the UNSG himself stated that this is a problem for him because there could be situations where states that are not recognized by the international community signs a treaty and then lodge it to the UNSG. In a situation like this the UNSG would be forced to take a stand on the actual status of the state lodging the accession to the UN.\textsuperscript{71} Believing that deciding if a state is a state or not would fall outside his competence as UNSG a formula was decided on to solve future problems. The solution is that the UNSG will only accept the accession to a convention according to the all-state formula if the UNGA provides him with the complete list of the states falling within the formula other than those falling within the Vienna Formula.\textsuperscript{72}

To clarify this means that in a situation where the UNSG has to decide whether or not to accept letter of accession from a non-member state of the UN he has to ask the UNGA for guidance on the matter.

This practice was adopted by the UNGA during the 2202\textsuperscript{nd} plenary meeting in December 1973.\textsuperscript{73} The following was decided: “the Secretary-General, in discharging his functions as a depositary of a convention with an ‘all states’ clause, will follow the practice of the Assembly in implementing such a clause and, whenever advisable, will request the opinion of the Assembly before receiving a signature or an instrument of ratification or accession”.\textsuperscript{74}

In this section I will showcase some of the examples when the all state or the Vienna formula has been used in UN practice.

\textsuperscript{71} Summary of Practice, \textit{supra} note 70, at 23, §81.
\textsuperscript{72} Summary of Practice, \textit{supra} note 70, at 23, §81.
\textsuperscript{73} Summary of Practice, \textit{supra} note 70, at 23, §82.
\textsuperscript{74} Summary of Practice, \textit{supra} note 70, at 23, §83.
8.4 Colonial independence

In deliberations regarding the independence of former colonial nations and their statehood the UNGA implemented the Declaration of Independence to Colonial countries and Peoples which in turn helped with the accession of several former colonies to statehood, an example of this was the case of Brunei. The UNSG has taken these decision into consideration and he came to the conclusion that the Declaration paved the way for former colonial nations to be included into the “all states formula”.75

8.4.1 Example of Cook Islands

Another question regarding the independence of a state was the situation of the Cook Islands. For some time the island was considered not to have sovereign independence because of its special relationship with New Zealand. The island had self-governing but its external affairs and defence was conducted on their behalf by New Zealand. Following a resolution in 1965 (resolution 2064) the UNGA reaffirmed the UNs responsibility to help the Cook Islands to achieve full independence and join other sovereign nations on the international stage.76 The phrasing of the UNGA has led to the interpretation of the UNSG that unless specifically invited to participate in a treaty the Cook Islands could not invoke an “all state” clause when lodging an accession of a treaty or convention to the UNSG.

However in 1984 when the Cook Islands applied for membership in the World Health Organization which was approved by the World Health Assembly. According to the convention the Cook Island became a member by depositing the instrument of acceptance with the UNSG. In this situation the UNSG felt that since the World Health Assembly considered the Cook Islands eligible for membership as a state the actual question of the statehood considering the Cook Islands was solved77. Had the UNSG asked the UNGA for guidance in solving the issue of the Cook Islands statehood there would most likely been no problem with the Cook Islands deposit and the UNGA would have reached the same conclusion that the World Health Assembly did78.

75 Summary of Practice, supra note 70, at 24, §84.
76 Summary of Practice, supra note 70, at 24, §85.
77 Summary of Practice, supra note 70, at 24, §86.
78 Summary of Practice, supra note 70, at 24, §86.
In 1994 the exact same situation occurred but this time regarding the nation of Niue. Since Niue joined the World Health Assembly and the UNGA came to the conclusion that Niue is a state the UNSG accepted the signatory of Niue in accordance to the “all-state formula”.

8.4.2 Marshall Islands

When the Marshall Islands where admitted to the International Civil Aviation Organization the government of the islands indicated that they wished to participate in other treaties deposited with the UNSG. There was however a special circumstance in the situation of the Marshall Islands. The islands was still at the time a trustee under the UNSC resolution 21 (of 1947) and furthermore there was questions if the admission to the International Civil Aviation Organization had been conducted following the rules of the organization.

The Marshall Islands and the International Civil Aviation Organization used article 92 of the Chicago convention which allowed state members of the UN, associates of the UN and neutral states during the Second World War to simply deposit their accession with the depositary of the United States. In other cases a new member-state to the International Civil Aviation Organization would have to be voted in by member states with a majority of four fifths according to article 93.

At the time the UNSG felt that he did not have the competence to accept instruments of accession from the Marshall Islands based on the legal ambiguity of the membership to the International Civil Aviation Organization.

The issue was later resolved with an UNSC resolution which resulted in the disbandment of the Trusteeship of the Marshall Islands. Furthermore the UNSC informed the UNSG that the membership of the Marshall Islands to the International Civil Aviation Organization had not met any objections of the organizations members.

It would have been possible of the UNSG to inform the UNSC or the trusteeship council of the situation and seek guidance from there but the UNSG choose not to do so.

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79 Summary of Practice, supra note 70, at 24, § 86.
80 Summary of Practice, supra note 70, at 25, § 87.
81 Summary of Practice, supra note 70, at 24, § 87.
82 Id.
8.5 States that do not meet the requirements of the Vienna Formula

In 1992 another problem for the UNSG arose regarding the status of the Federal Republic of Yugoslavia (Serbia and Montenegro) following the dissolution of the Socialist Federal Republic of Yugoslavia. The UNGA considered that Serbia & Montenegro could not continue using the membership of the former Yugoslavian state and thus that Serbia & Montenegro needs to re-apply for membership to the UN. The UNSG concluded that Serbia & Montenegro was not capable of to take part in any UN subsidiary organs or meetings. The result was that Serbia & Montenegro was not invited to attend conferences convened by the UNGA. However the UNSG also came to the conclusion that Serbia & Montenegro still could deposit treaty documents to him prior to their future membership of the UN.83

8.5.1 UN council for Namibia

Through the UNGA resolution 2248 in 1967 the UN council for Namibia was established. Later on questions would arise regarding the councils participation in international treaties. The council was through the resolution in the UNGA organized as a subsidiary organ to the UNGA and was responsible to the UNGA and under its direct authority, just like other UN organs subsidiary to the UNGA. But the UN council for Namibia also had another legal capacity as the legal administrative authority of Namibia. The powers invested in the council made it different to other organs of the UN since it had through the UNGA the authority and the competence to act on the behalf of Namibia in ways that reminds of an actual government. Not only that, the council also represented Namibia internationally. Being the actual representative of Namibia in international affairs the council became a party to several treaties including the Vienna Convention on Diplomatic relations and the UN convention on the laws of the seas. Both these conventions documents of accession was deposited to the UNSG.

This shows that even UN organs can in certain situations use the all state formula to deposit documents of accession to the UN.84

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83 Summary of Practice, supra note 70, at 25, §89.
84 Summary of Practice, supra note 70, at 26, §90.
8.6 Regional agreements

In some cases non UN members might join a regional agreement under the framework of a UN commission. If these regional agreements call for regional economic integration and states in the agreement have a consultative role the UNSG may accept instrument of accession.

With the dissolution of Yugoslavia in the early 90s a problem rouse regarding membership to the Economic Commission for Europe. In article 8 of the terms of references of the Economic Commission, European nations that are not members to the UN may join the commission. But at the same time article 8 did not give the Commission authority to decide if a state is a state or not since according to article 1 of the terms of references the commission was still an organ attached to the UN. Furthermore according to rule 72 of the commission, the commission is supposed to follow the practice of the UNGA when implementing an all-state clause and when appropriate seek guidance from the UNGA regarding decisions of membership of states that are not widely recognized. The new entity that sought membership to the commission had at the time not achieved membership and recognition from the UN and was at the time a co-belligerent of the Yugoslavian civil war. The Economic Commission for Europe came to the conclusion that the entity did not at the time fulfil the actual requirements for statehood and could thus not join the commission under the all-state clause.\textsuperscript{85}

8.7 Participation of non-independent entities

Some treaties allow for the participation of non-independent entities. An example of this was the request of Southern Rhodesia to access to the Protocol of 1963 for the Prolongation of the International Sugar agreement. According to the protocol accession to the agreement is open for members of the UN and other governments invited by the United Nations Sugar Conference. Southern Rhodesia was not a member of the UN and it fell on the UNSG to decide if Southern Rhodesia could access to the protocol stemming from the invitation to sign by the United Nations Sugar Conference. The legality of this was decided upon during the 17\textsuperscript{th} session of the International Sugar Council and the conclusion was that Southern Rhodesia was not an independent sovereign state.

In the case of Southern Rhodesia it was obvious that Southern Rhodesia was not an independent state but instead non-self-governing territory confirmed by the UNGA. There had been situation

\textsuperscript{85} Summary of Practice, \textit{supra} note 70, at 27, §93.
where non-sovereign states had entered into commodity agreements and that the UN had accepted nevertheless. The UNSG came to the conclusion that the Sugar Council had necessary authority to decide on South Rhodesia’s participation to the International Sugar agreement.

There are some other notable examples of entities whom are not considered independent states but still has the capability to enter into regional agreements. A good example of this is Hong Kong, which is part of the Peoples Republic of China but because of its colonial past and connection to the United Kingdoms has a special relationship with mainland China. Hong Kong does not have control over its own foreign policy and is not an independent state but is still party to the General Agreement on Tariffs and Trade. This type of membership is authorized by an “associate membership” clause in the relevant treaty texts. These associate members do not fall within the “all-state” clause and cannot participate in treaties only open to “states”.

8.8 International organizations

There is also the question relating to an international organizations participation to an international treaty and how it affects the “all-state” formula.

There is an international treaty called the “Vienna Convention on the Law of Treaties between States and International Organizations”. This treaty is modelled on the “Vienna Convention on the Law of Treaties”.

Participation of an international organization to an international treaty depends on the relevant upon provisions of the treaty. Some conventions do not allow accession from International organizations, the most common is conventions relating to Human Rights. On the other hand there are several multilateral treaties relating to commodities, fishing, trade and etc. that are open to international organizations. The treaty in question usually identifies the organizations that the treaty is open for or specifies the characteristics and competence that the organization must possess.

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86 Summary of Practice, supra note 70, at 27, §95.
87 Summary of Practice, supra note 70, at 28, §97.
88 Summary of Practice, supra note 70, at 28, §98.
89 Summary of Practice, supra note 70, at 28, §98.
8.9 Liberation Movements

Relating to the duties of the UNSG as depositary of international agreements there was two requests from two different liberation movements regarding accession into the International Coffee Agreement. The UNSG was of the notion that accession to the Agreement is under the authority of the International Coffee Organization and that he only has the authority to accept documents of accession as stipulated by the International Coffee Agreement. When a liberation movement succeeds and is accepted by the international community as a sovereign state the UNSG may accept documents of accession under the “all-state” formula.  

9. Opinion and views on the ICC

9.1 Palestine and the ICC

In January 2009 the PNA made an article 12(3) declaration to the ICC regarding alleged crimes committed by Israeli nationals on Palestinian territory. Article 12(3) allows a non-state party to ask the prosecutor to investigate and gives the court jurisdiction where it usually do not have jurisdiction.  

At the time the PNA was an observer entity to the UN and this was determinant to the conclusion the court made about the declaration lodged to the ICC. The prosecutor argued since Palestine was not a state based on their relationship to the UN they could not access the Rome Statute through the UNSG in his role as depositary and therefore was not a state. The non-state status of Palestine lead to the conclusion that only a state can make a 12(3) declaration and even if Palestine was at the time recognized by over 130 states the prosecutor decided to let the UN decide on the actual question of Palestinian statehood.  

Since the Rome Statute is an “all-state” statute, meaning that any state may join, with no regard to a state’s membership to the UN, Palestine if recognized as a state may join the statute. At the

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90 Summary of Practice, supra note 70, at 29, §100.
92 The Office of the Prosecutor, Situation in Palestine: Summary of submissions on whether the declaration lodged by the Palestinian National Authority meets statutory requirements, International Criminal Court, May 2010, at 3, §10.
93 The Office of the Prosecutor, Situation in Palestine, International Criminal Court, April 2012, at 1, §4.
94 The Office of the Prosecutor, Situation in Palestine, supra note 93, at 2, §7.
same time the UNSG has the role of depositary of several international conventions and treaties, with the Rome Statute being one of them. As talked about above it is not in the UNSG’s role to decide which states is states but he may be put in an awkward position to decide on the question if a state is a state or not. The solution to this problem as talked about above was giving the UNGA the role to decide if the UNSG could accept documents of accession to an international convention or not. In the case of Palestine the UNSG did not accept Palestine’s first attempt to access the Rome Statute since Palestine was only an observer entity.

However later in 2012 through resolution 67/19 the UNGA granted the PNA the status of a “non-member observer State” and by extension recognizing Palestine as an actual state. Following the precedent of the UN regarding deposition of documents of accession the UNSG accepted the Palestinian National Authorities documents of accession to the Rome Statute in January 2015. Four days later, on the 6th of January, Palestine joined Rome Statute as its 123rd member.

9.2 Israel and the ICC

Israel was one of the countries that had representatives present during the Rome conference and negotiation of the Rome Statute and was an early signatory to the treaty. Israel did however not accede the treaty and did not become a member state. Israel and Israeli lawyers and politicians has been active participants in the creation of International Criminal Law and the creation of the ICC. But following the Rome Conference in 1998 Israel has held a contentious stance against the court and the statute. According to Israel the wording and formulation of the statute creates a tool to be used by certain states in the furthering of political goals.

In 2002 Israel made a formal declaration to the UNSG of the UN that the state of Israel had no intention to become a state party to the Rome Statute in the future and thus the earlier signatory by Israeli representatives will no longer have any legal bearing and Israel as a state will no longer have any legal obligations towards the International Criminal Court.95

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9.3 The Prosecutors opinion on Palestinian membership to the ICC

When discussing the prosecutor’s view on Palestinian membership to the ICC one needs to differentiate between two timelines. The first timeline is the pre 2009 article 12(3) declaration by the PNA to the ICC and the second timeline follows after the UNGA declared that Palestine may join the UN as a non-member Observer state.

The Rome Statute is an “all-state” statute meaning that all states regardless of geographical location may join the court. The only actual criteria for membership is that the state wanting to join the ICC is a state.

Article 12(3) of the Rome Statute offers non-member state’s the opportunity to ask the prosecutor to investigate alleged crimes within the country’s jurisdiction and thus giving the ICC temporal jurisdiction within its borders.

This is what the PNA did in 2009 and the prosecutor was given the responsibility to decide if Palestine can make a 12(3) declaration or not. The problem with the situation was that the prosecutor suddenly had the responsibility to decide if Palestine was a state or not.

In 2012 the prosecutor decided to not accept the 12(3) declaration from Palestine on the grounds that the PNA had not at the time reached the sufficient criteria for statehood. The prosecutor used UN practice regarding the depositing of documents of accession to reach the conclusion that Palestine had not at the time fulfilled the criteria. In the statement released by the prosecutor the obligation to determine if a state can join the ICC is put on the UNSG whom, the prosecutor notes, will most likely turn to the UNGA for guidance. Thus the prosecutor removed himself from the process and declared that it wasn’t within his responsibility to decide if Palestine was a state that could make a 12(3) declaration or not.96

In 2015 the PNA sent a new application to the ICC, this time regarding membership to the court in accordance to the Rome Statute. The difference now was that the UNGA had through a resolution granted Palestine a seat as a non-member observer state.

Using the “all-state” formula created by the UNGA and the UNSG the court felt that it had the sufficient proof that Palestine was a state since now the UNSG could accept Palestinian

96 The Office of the Prosecutor, *Situation in Palestine, supra* note 93, at 2, §7.
documents of accession to the Rome Statute on the basis that the UNGA had accepted Palestine as a state but not a member to the UN.

The ICC is not an organ under the UN even if the UNSG is the depositary of the documents of accession. Yet the prosecutor weighted the UN’s relationship to the PNA before accepting the Palestinian membership. The formula “saved” the prosecutor and the ICC from taking a very controversial decision since already in 2012 it could be argued that the PNA was an actual state and not just a territory that claimed statehood. By deciding to not accept the 12(3) declaration in 2012 the prosecutor and the ICC put the question of statehood in the UN’s hands whom followed with declaring that Palestine is a state.

Suffice to say that the prosecutor’s opinion on Palestinian statehood and subsequent accession to the Rome Statute mirrors the UN’s opinion on the matter.

9.4 Scholarly Opinion on Palestinian membership to the ICC

Some legal scholars have taken an issue with the prosecutor’s decision to not accept the 12(3) declaration lodged by the PNA in 2009.

Criticism of the decision and the handling of the case by the prosecutor has been directed at the office of the prosecutor and I will in this part of the essay list some of these arguments to be weighed against the prosecutor’s decision.

An argument used by detractors of the decision made by the prosecutor in 2012 is that the Rome Statute does not in article 12(3) or any other part of the Statute stipulates that any other organ should decide if the prosecutor or the court can conduct an investigation or if the court has jurisdiction. The argument is based on the fact that in a “normal” declaration or proceeding the prosecutor would himself conduct an investigation and decide if the court has jurisdiction in that particular situation. Within this test regarding jurisdiction also falls the obligation of the prosecutor to test if a state can actually access the Rome Statute and/or make a 12(3) declaration just like the prosecutor would decide if the court had jurisdiction in any other case.99

97 Id.
99 Schabas, supra, §6.
Furthermore the argument goes that if the prosecutor does not have the authority to decide which states can make a 12(3) declaration then the responsibility should fall on the court and not any outside organ or representative of said organ.\textsuperscript{100}

Another part of the argument is that if the court or the prosecutor would ask the UNSG directly for guidance in the situation regarding Palestine and the 12(3) declaration the UNSG would simply say that it does not fall within his responsibility to decide when a state can access to a specific statute. In this case the UNSG’s role is simply to accept the documents of accession when they are lodged by a state wanting to accede.\textsuperscript{101}

Criticism against the prosecutor in this regard can be summed up to the prosecutor simply pushing away the question and putting it into the hands of the UNSG.

Another critical aspect of the prosecutor’s decision is the situation of Switzerland. At the time of the Rome Statute’s creation in 1998 Switzerland was not a UN member but still a signatory of the Rome Statute. The argument that a state in the meaning of the convention has to be a UN member is flawed since the Statute allows all states in the world to join the ICC and thus by putting the responsibility to decide which state can join the ICC in the hand of the UN goes directly against the wording of the Rome Statute.\textsuperscript{102}

Another example that critics like to point out is the example of the Cook Islands. In 2008 the Cook Islands accession to the Rome Statute was accepted by the UNSG. To be noted is that the Cook Islands where not a member of the UN nor was it a non-member observer state. The Cook Islands argument was used by critics of the prosecutor’s decision to show that the UN’s definition of statehood was/is flawed and biased and the UN should not be trusted in regards to decide which state can join the ICC or not.\textsuperscript{103}

In an opinion to the OTP, Professor John Quigley argues that Palestine was a state prior to the Oslo Accords in 1993 by virtue of the PLO declaration in 1988 and thus have the opportunity to make a 12(3) declaration to the ICC.

This argument is based on the fact that when Yasser Arafat, then Chairman of PLO, made the declaration when he was invited to the UNGA, which adopted a resolution that proclaimed that henceforth the PLO would be designated as “Palestine” by the UN. The resolution passed with

\textsuperscript{100} Id.
\textsuperscript{101} Schabas, \textit{supra} note 98, §8.
\textsuperscript{102} Schabas, \textit{supra} note 98, §13.
\textsuperscript{103} Schabas, \textit{supra} note 98, §17.
a majority vote of 104, whereas 44 abstained and only two states voted no, the United States of America and Israel. This according to Quigley highly indicates that Palestine was at the time considered to be a state by the UNGA. Later in 1989 the UNGA drafted a new resolution that would recognize Palestine as a state, the resolution was withdrawn after the United States threatened to withhold its UN dues. This also strongly indicates that Palestine was seen as and recognized as a state by the majority of the members of the UN.

Quigley furthers his argument that Palestine was and is a state recognized by the UN by addressing the fact that PLO/Palestine was allowed to participate in UNSC sessions. According to the rules of the UNSC only states may participate in any UNSC session.

Furthermore Quigley talks about the territory of Palestine and that even before the 1988 declaration Palestine had a defined territory. Even if both the West Bank and the Gaza Strip was occupied Israel the areas was still part of the territory of Palestine since Israel has never claimed sovereignty over the areas. The fact that when the Gaza Strip was occupied by Egypt and that Egypt also never claimed sovereignty over area but instead considered itself “protecting” the area from Israel should also indicate that Palestine had a defined territory prior to the Oslo Accords. Quigley ends his opinion where he concludes that Palestine is a state and thus has the right to make a 12(3) declaration to the ICC.

Professor Malcom Shaw argued against Quigley in his opinion to the OTP. In his opinion he accuses Quigley from ignoring the fine print of the 1988 resolution in regard to Palestine’s declaration of statehood. He starts with pointing out that Quigley’s argument that Palestine was a state prior to the 1988 declaration is not true by nature of the wording of the declaration. He goes on with attacking the notion that Palestine has been a state since 1922 from the outset of the creation of the Palestinian mandate by pointing out that the UK had all legislative power in the Palestinian mandate by order of the League of Nations and therefore Palestine was not a state during its control by the Palestinian mandate.

105 Id.
107 Quigley, *supra*, at 4
110 Shaw, *supra*, at 6, §15
Furthermore he presses the argument that Quigley has misunderstood the actual meaning of the 1988 resolution by the UNGA. According to Shaw the wording of the resolution merely acknowledge the proclamation of Palestinian statehood and does in no way accept it as fact\textsuperscript{111} and that the declaration led to the UNGA simply refer the PLO as “Palestine”.\textsuperscript{112} According to Shaw, Palestine had not at the time fulfilled the material criteria for statehood and could thus not make a 12(3) declaration.

9.5 Israel’s view on Palestinian membership to the ICC

In 2009 when the PNA made an article 12(3) declaration to the ICC, Israel protested and was of the meaning since Palestine is not a recognized state, the ICC can’t have any legal jurisdiction in Palestine.

The same type of protest and arguments was heard from the Israeli government in 2015 following PNA’s accession to the Rome Statute.\textsuperscript{113}\textsuperscript{114}

An Israeli NGO, the International Association of Jewish Lawyers and Jurists which is a Human rights NGO, was critical to the declaration and any future jurisdiction of the court in Palestinian territories. The organization stressed, in their opinion to the prosecutor, the fact that only states can be members of the Rome Statute and thus only states can issue a 12(3) declaration. They asked for a legal opinion from Professor Malcom Shaw on the issue of the Palestinian declaration.\textsuperscript{115}

The main argument made by Professor Shaw was the argument relating to the “effective” government of the PNA. According to the Professor the government of a state must have control over the area it claims as part of its state, the PNA does not fulfil this criteria of the Montevideo Convention since it has not since its creation had any actual effective control over its territories.\textsuperscript{116} Shaw also points towards the Oslo Accords and the fact that the territories claimed

\textsuperscript{111}Shaw, supra note 109, at 8, §19
\textsuperscript{112}Id.
\textsuperscript{113}See the statement done by the Israeli Ministry of Foreign Affairs in April 2015 found at http://mfa.gov.il/MFA/PressRoom/2015/Pages/Palestinian-Authority-joins-the-ICC-Israel-response-1-Apr-2015.aspx (last accessed 2016-05-13)
\textsuperscript{114}See the statement done by the Prime Minister of Israel, Benjamin Netanyahu in January 2015 found at http://mfa.gov.il/MFA/PressRoom/2015/Pages/PM-Netanyahu-on-decision-of-the-ICC-prosecutor-17-Jan-2015.aspx (last accessed 2016-05-13)
\textsuperscript{115}Hertman, Alex, Letter to the Prosecutor of the ICC, The International Association of Jewish Lawyers and Jurists, September 2009, at 2, §9.
\textsuperscript{116}Shaw, Malcom, In the Matter of the Jurisdiction of the International Criminal Court with regard to the Declaration of the Palestinian Authority, London, August 2009, at 11, §27. (Not to be confused with the opinion of Shaw with the same title written in October 2010).
by the PNA where supposed to be handed to them by the Israelis through several phases stretching over several years. At the time Israel has not given the PNA control over its territories and thus the PNA does not fulfil the criteria for statehood set out in the Montevideo Convention.\textsuperscript{117}

Another argument made by Professor Shaw was that the PNA also did not have effective control over the Gaza Strip and that Hamas had taken it over. Thus the organization mean the criteria is simply not fulfilled as the PNA does not have total control over its territories.\textsuperscript{118}

The professor also pointed out the fact that Palestine was only part of international organizations as either an “observer” or as another “organization”.

During an NGO roundtable hosted by the prosecutor of the ICC regarding the question of the Palestinian declaration in 2009 former Israeli representative to the UN, Dore Gold, was asked about his opinion on the declaration. In his opinion he also stressed the fact that Palestine is not a state\textsuperscript{119} and it thus invalidates the PNA from making a 12(3) declaration. Using an advisory opinion from the International Court of Justice regarding the legality of the Israeli border fence to Palestinian territory, Dore Gold makes a case that Palestine has yet to achieve the actual requirements for statehood.\textsuperscript{120}

Another point Mr Gold makes is that according to article VII, 5.a of the Oslo Accords the PNA has no legal power in the sphere of foreign relations.\textsuperscript{121} Furthermore according to article XXXI of the Oslo Accords, neither Israel nor the PNA is allowed to initiate or take any step that will change the status of the West Bank and the Gaza Strip pending the outcome of the negotiations of the status of the areas.\textsuperscript{122} Another argument made by Mr Gold is that through the Oslo Accords the PNA accepted that Israel would have exclusive criminal jurisdiction over Israeli citizens who live or commit’s crimes in the territories of the PNA.\textsuperscript{123}

\textsuperscript{117} Shaw, \textit{In the Matter of the Jurisdiction of the International Criminal Court with regard to the Declaration of the Palestinian Authority}, supra note 116, at 16, §36.

\textsuperscript{118} Shaw, \textit{In the Matter of the Jurisdiction of the International Criminal Court with regard to the Declaration of the Palestinian Authority}, supra note 116, at 11, §28.

\textsuperscript{119} Gold, Dore, \textit{Discussion on Whether the Declaration Lodged by the Palestinian Authority Meets Statutory Requirements: Historical and Diplomatic Considerations}, October 2010, at 3.

\textsuperscript{120} Gold, supra, at 4.

\textsuperscript{121} Gold, supra, at 5.

\textsuperscript{122} Gold, supra, at 6.

\textsuperscript{123} Gold, supra, at 6.
Mr Gold also argues that if the ICC accepts the Palestinian declaration or membership to the ICC then every political independence movement in the world will try to use the ICC to achieve international recognition for their cause.124

The points Mr Gold made about the statehood argument was proven right by the court since Palestine’s declaration was not accepted by the court based on the fact that Palestine was not considered to be a state in 2012.

The Israeli government echoed Mr Gold’s thoughts on the subject. In official statements from the Israeli foreign office the decision to allow Palestine to join the ICC is seen as a mistake. The official stance of the Israeli government is that Palestine is not a state and thus cannot become a signatory to the Rome Statute under the “all-state” clause. Furthermore, the fact that the PNA has a political partnership with Hamas, which is classed as a terrorist organization in Israel and much of the world delegitimizes any Palestinian claims of statehood. Lastly the foreign office also means that allowing Palestine to join the ICC is a political statement which is something the court should avoid since the ICC was created to prosecute crimes and not be used as a political and diplomatic tool between countries in regards to International Diplomacy. According to the foreign office, Palestinian membership delegitimizes the ICC and makes the court take a stance on international issues.

Israeli reaction to the UNGA resolution 67/191 has been negative. In December 2012, PM Benjamin Netanyahu addressed the question of the UNGA resolution in a cabinet communiqué. In the communiqué he states that he and the Israeli state rejects the resolution and that the PNA has violated the Oslo accords by seeking recognition in the UNGA.125

Ambassador Ron Prosor, then Permanent Representative to the UN, addressed the UNGA prior to the vote on resolution 69/191. In his address he stresses the fact that the Israeli government is of the view that the only viable road to peace in the region is through regional agreements and not UNGA resolutions and he and Israel would reject the resolution.126

124 Gold, supra note 119, at 7.
125 Netanyahu, Benjamin, Israeli cabinet communiqué, December 2012, found at http://mfa.gov.il/MFA/PressRoom/2012/Pages/Cabinet-communiqu%C3%A9-2-December%202012.aspx (last accessed 2016-05-17)
126 Prosor, Ron, Address to the UNGA, November 2012, found at http://mfa.gov.il/MFA/PressRoom/2012/Pages/UNGA-debate-on-Palestinian-status-29-Nov-2012.aspx (last accessed 2016-05-17)
10. Analysis

10.1 Introduction

This analysis will be divided into three distinct parts. The reason for this is to make it easier for the reader to understand the conclusions of the writer and how they apply on the subject in this essay.

The first part will be about the statehood criteria and its relationship to Palestine and if Palestine is a state or not. The second part will be about the “all-state” formula and how it affects the Palestinian bid for accession to the ICC. The third part will be about the jurisdiction of the court and how the court would in an hypothetical setting dismiss or evaluate Israeli claims that the court does not have jurisdiction based on the Israeli claim that Palestine is not a state.

10.2 Palestinian statehood

10.2.1 Introduction

In this part I will list the criteria’s for statehood and compare them to Palestine’s situation. I will weigh the arguments for and against and I will conclude that Palestine is a state according to the Montevideo Convention.

As talked about earlier in the essay there are four general criteria’s to statehood: a) a permanent population, b) a defined territory, c) a government and d) a capacity to enter into relations with other states.

10.2.2 Permanent population in the Palestinian National Authority

In 2015 the total population in the Palestinian territories was 4,682,467 people. Of those people, 2,862,485 lived in the West Bank and 1,819,982 lived in the Gaza Strip.127 The permanent population criteria has never been a problematic criteria in UN practice and I shall thus treat it simple. Looking at statistics the population in the Palestinian territories has increased continually from 1997 and forward. The claim that the Palestinian territories has a permanent population is as of the moment unchallenged.

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Thus the conclusion is that there is permanent Palestinian population in the areas claimed by the PNA and the criteria for a permanent population is thus fulfilled.

10.2.3 The defined territory criteria and Palestine

The defined territory criterion is a bit harder to fit on the PNA. As I have talked about earlier in this essay the defined territory criterion has been tried in a liberal sense. The problem with Palestinian territories are that they are divided into separate exclaves with no common connection to each other.

This argument has been used in favour to block any attempt at Palestinian statehood since the idea of a defined territory is just that, “defined”. Palestine’s fragmentation makes it hard to justify it as an actual defined territory.

On the other hand the territorial integrity of Palestine has been reaffirmed by the UNSC, the UNGA and the International Court of Justice. This seems to point towards the territory to be actually defined.

Also the fact that some parts of the Palestinian territory is considered to be “occupied” territory lends to the argument that Palestine as a whole would be connected and thus have a defined territory.

Furthermore there exist several exclaves in the world such as Alaska, Gibraltar and Kaliningrad and these exclaves do not affect the territorial integrity of the countries in control over the exclaves.

And lastly, the argument that Palestine has undefined borders is undermined by the fact that Israel, which statehood is not in question, has undefined borders as well. Since this is not a problem when defending Israeli claim of statehood it should not be an argument when discussing Palestinian statehood and the definition of Palestinian territory.
10.2.4 The Effective Government criteria and Palestine

The third criterion is the “effective government” criterion. As I have talked about earlier this criterion has been very controversial based on the East-West divide following the Second World War.

The divide ended up in two separate definition. The western one is that an effective government is a democratic government. While the eastern definition, and the definition that the UN uses, is that an effective government is based on its effective control over its territories and how much authority the government actually has.

Israel has been critical to Palestinian statehood and one of the main arguments have been Hamas and their control over the Gaza strip. The government of the PNA, led by the Fatah party, fought a civil war with Hamas but has now settled into an agreement with the group where Hamas administer the Gaza strip but is under the authority of the PNA. According to Israel this make Palestine an undemocratic nation especially since Israel considers Hamas to be a terrorist organization and one of the biggest obstacles to an actual solution to the conflict.

But based on actual UN practice the effective part of the criterions means actual effective control over the territories claimed by the state. Now this has also been contested by detractors to Palestinian statehood since they mean that the PNA does not have actual effective control over its territories. This argument is backed by the fact that the PNA does not have control over its external security and parts of the West Bank is under Israeli control. Also the fact that Israel didn’t withdraw until 2005 from the Gaza strip furthers the argument that the PNA has no real control over the territories it has the mandate to rule over.

From supporters of Palestinian statehood the argument has been that the effective Government criteria set out in the Montevideo convention has nothing to do with actual “effective” control. Instead the supporters mean that there is a new state practice where states can be recognized even if they do not exercise full authority at the time of their recognition. This was the case of Kosovo and its declaration of statehood and recognition by most western states.128

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Furthermore other territorial units have been refused recognition despite having actual effective control over their territories. Instead they lacked the right to self-determination as was the case of Rhodesia (modern day Zimbabwe).¹²⁹

Since Palestine has been granted the right to self-determination through UN resolutions, supporters of Palestinian statehood mean that this right should be used to balance out the effective part of the government criteria.

One could also look at how the Palestinian government is organized. As of the moment there is an actual cabinet with ministers who have portfolios and political mandate. Also as seen in this flowchart¹³⁰ there is an actual legislative and political structure with an executive branch ruling the PNA. One could argue about how effective can such an organization actually be since parts of the territories the government claims to control are occupied by a foreign power or in control by a rival political organization but needless to say there is an actual political and executive structure that could pass as an effective government.

I would say that in this case it lends to the fact that Palestine is recognized by the UN through UN resolution that there has been from the UNGA an express view that Palestine should exist as a state. Thus I conclude that the PNA has an effective government. But I also recognize that it is a controversial conclusion.

10.2.5 Palestinian independence and state recognition

When analysing the fourth criteria the reader should keep in mind two very distinct theories in international law in regards to statehood and state recognition. The Montevideo Convention’s four criteria fall in under the so called “declarative theory”. In the declarative theory the question of statehood are based on the four criteria in the Montevideo Convention but a large part of the analysis of a state’s right to statehood is based on its actual independence and ability to enter into relations with other states.

¹³⁰ See the detailed flowchart on the workings of the Palestinian legislature and judiciary made by the Konrad Adenauer Stiftung, found at http://www.kas.de/wf/doc/kas_2042-1442-2-30.pdf?101018163527 (last accessed 2016-05-13)
The other theory on statehood is the constitutive theory. This theory is based on the idea that a state can only gain the right to act on the international arena if it is recognized as a sovereign state by other already established states.\textsuperscript{131,132}

I will in this part of the analysis discuss both the fourth criteria of the Montevideo Convention and if the PNA is able to fulfil it. I will also touch on the constitutive theory in my following analysis how recognition by the UN could be seen as a part of the theory.

Looking at Palestine and the criteria of independence one should look on which states recognize Palestine, how many they are and what relationship they have with the PNA.

Palestinian participation as a non-member state to the UN should be an indication that most countries in the world consider Palestine a state because the right to participate in the UNGA is based on the will of the UNGA and brought by vote. The UNGA decided to recognize the declaration of Independence by the Palestinian National Council in 1988 via resolution 43/177. Only the US and Israel voted against the resolution.

I think it is quite clear from the facts about Palestine’s participation in the UN and the large amount of states in the world that recognize Palestine as a state that Palestine is an actual state. One could also argue that since Palestine has signed several international agreements would also tip the conclusion in favour of Palestine being independent and being recognized by other states in the international forum.

On the other hand the Oslo accords especially neuters the PNA’s ability to set up and maintain diplomatic missions abroad.

Another argument against Palestinian independence is the fact that not all states recognize Palestine as a state. This has however not stopped countries to act like a state or be recognized by the majority of states in the world. At the moment the majority of the states in the world consider Palestine to be a state and recognize them as such. The biggest constellation of states not recognizing Palestine is in the western world, namely Europe and the US. From a legal standpoint it should not matter which states recognizes Palestine since according to international law all states are equal. But from a realistic standpoint with international politics

\textsuperscript{131} Bring, Mahmoudi & Wrange, \textit{supra} note 1, at 65.
in regard a recognition from the majority of the western nations would probably be needed for the debate regarding Palestinian statehood to end once and for all.

Furthermore, there has been arguments that the PNA does not consider itself to be a state but is actively striving towards statehood. This argument might have been a bit more pervasive some years ago but looking at the current political situation with the UN recognizing Palestine as a state through not only UNGA resolutions but also by the fact that the PNA is a non-member observer state to the UN should put an end to this argument.

It should serve the reader to keep in mind that even though the Montevideo convention exists and that there is a long list of actual legal jurisprudence, international law is ever shifting and the meaning of the criteria might have shifted or changed completely.

Some legal scholars has put forward the argument that the question of statehood has moved more towards the ability of the states to garner international recognition and the ability to actually carry out the functions of a state in areas controlled by it. This new line of reasoning would not hamper a Palestinian bid for statehood since according to both the UN and the World Bank the PNA is in a situation where it can govern a Palestinian state. The authority has the ability to provide healthcare, education, energy and justice to its citizens and has a somewhat stable financial administration.\textsuperscript{133} What one should keep in mind with this argument is that it is not customary international law and would probably not stand on its own as an argument. But combined with the criteria of the Montevideo Convention it strengthens the PNA’s claim to statehood.

10.2.6 Conclusion

Thus one can draw the conclusion that the PNA is a state based on the Montevideo convention as well as the constitutive theory. This gives Palestine eligibility to join International Organizations such as the UN and the ICC.

10.3 Palestine and the all-state formula

In this part of the essay I will talk about the all-state formula and how it fits in with Palestine’s bid for statehood and membership to the ICC.

As I talked about earlier the “all-state” formula is a legal formula used by the UNSG to decide if a state which is not member to the UN may deposit any documents of accession to international conventions to the UNSG.

The importance of the formula in the case of Palestine and their bid for membership to the ICC cannot be stressed enough since it is the use of the “all-state” formula following Palestine’s upgrade to non-member observer state to the UN that is the reason for the ICC to accept the Palestinian accession of the Rome Statute.

The formula exist to make sure that the UNSG can fulfil his duties as depositary of documents of accession to international conventions. If an international convention has an “all-state” clause and if a state that is not a UN member seeks to access the convention the UNSG has to ensure that the state in question is an actual state. The majority of situations will probably be resolved easily since the state in question is most likely internationally recognized as a state. But it is in situations where the state in question is recognized as a state it becomes problematic for the UNSG.

In such cases the UNSG is supposed to ask the UNGA for guidance in the matter, this is to ensure that a political responsibility is not put on the UNSG’s shoulders which could damage the neutrality of the office. Instead it becomes the UNGA responsibility to decide if a state can access to a convention with an “all-state” clause.

This becomes even more important in the situation of Palestine and its bid for statehood. It would be impossible for the UNSG to decide on his own if Palestine can access a convention with an “all-state” clause or not. If he accepts the documents of accession he is through his office recognizing Palestine as a state and if he does not accept the documents he is denying Palestinian statehood.

The status of Palestinian statehood is not for the UNSG to decide but for the UNGA together with the UNSC to decide.

The Palestinian 12(3) declaration was never lodged with the UNSG and he did not have to seek guidance from the UNGA what to do with the declaration. At the same time the prosecutor refer
to the formula in his decision not to accept the 12(3) declaration by Palestine claiming that it is
not until the UNSG can accept Palestinian documents of accession that he as a prosecutor can
accept the declaration.

Following the PNA’s upgrade from non-state permanent observer to a non-member state
observer to the UN the “all-state” formula can be used to strengthen the claim for Palestinian
statehood.

When Palestine asked to deposit the letter of accession to the UN in the beginning of 2015 there
was no need of the UNSG to seek guidance from the UNGA since the matter had been settled
earlier by the UNGA in its upgrade of Palestine’s status, e.g. the UNGA had by regarding
Palestine as a non-state member to the UN recognized Palestine as a state.

Since the Rome Statute has an “all-state” clause which means that only states can join the ICC.
The upgrade of Palestine’s status to a state means that Palestine can join the ICC and that the
ICC has jurisdiction in all territories controlled by Palestine and for all cases where Palestinian
citizens has been victim to or the perpetrator of International crimes.

10.4 Hypothetical court ruling

10.4.1 Introduction

Coming to the last part of the analysis I will talk about what might happen in the future if the
prosecutor decides to investigate any future crimes committed by Israeli nationals on
Palestinian territory. The reason for this part of the essay is to examine how the court will deal
with the fact that Israel does not consider Palestine to be a state and thus consider Palestinian
membership to the ICC to not be valid.

I will in this part talk about three hypothetical scenarios and how the court will deal with them
individually, through this part of the essay I will make references to the Tadic case in the
Yugoslav Tribunal and especially the questions of the court’s jurisdiction for crimes committed
during the wars and how the decision of the court to move on with the proceedings can give us
an indication how the ICC would deal with similar questions.

The reader should note that Israel would probably not cooperate in ensuring that any of its
citizens are put under the authority of the court in the Hague but in a situation where an Israeli
citizen was accused of war crimes he or she could through his or her attorney still claim that the court has no jurisdiction and that the case should be dismissed.

In all three examples the accused will claim that the ICC has no jurisdiction regarding international crimes committed in the territories of the PNA or against citizens of the PNA since Palestine is not a state and can thus not be a state-party to the Rome Statute.

10.4.2 The Tadic case

Dusko Tadic was a Serbian politician and member of a Serbian paramilitary unit during the Yugoslav wars in the 90’s. He was accused for war crimes against civilian Croats and Bosnians in Bosnia-Herzegovina during the war. Tadic was accused for taking part in forcefully confining 3000 Croats and Bosnians in a former mining complex that had been remade into a prison camp called the “Omarska” camp in 1992.

At the camp Tadic and other members of the militia mistreated the prisoners and Tadic himself is accused of taking parts of the killing and the rape of several civilian prisoners at the camp. Tadic’s actions at the camp ranged from rape, to torture to actual wilful killings of civilians. He also forced civilian prisoners to hurt each other’s both sexually and physically. The offenses was titled as Crimes against Humanity and War crimes by the prosecutor of the tribunal for former Yugoslavia.

Following the arrest of Tadic and his indictment his lawyers filed a motion to dismiss the case on the basis that the Tribunal had no jurisdiction over the alleged crimes in the former state of Yugoslavia during the time period of 1991- and forward. The defence was of the notion that the Tribunal had been illegally created by the UNSC and that neither Bosnia & Herzegovina nor Yugoslavia/Serbia had entered a treaty on the creation of the tribunal and thus giving it jurisdiction over International crimes committed in the territory of the former Federal Republic of Yugoslavia and that Tadic should be released from custody and all charges dropped.

The tribunal decided to answer the allegations of its illegal creation in a decision on the matter.134

The tribunal starts with making it clear that its competence is in the field of criminal law and not the legality of the actions of UN organs such as the UNSC but also conceded that the tribunal

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should answer the allegations of the defendant and explain why it has jurisdiction over the crimes he allegedly committed.\textsuperscript{135}

Drawing precedent from the UN charter article 27 the Tribunal explains that the UNSC has been tasked with ensuring international peace and security and that by joining the UN and accepting the charter all states accept this.

Since the tribunal had been created by the UNSC under its obligation to ensure international peace and security and since the UNSC has a broad discretion relating to its own authority the decisions of the UNSC is not subject to review of any UN organ or tribunal.

The tribunal also finds arguments for the fact that it does not have the power to decide upon the actions of the UNSC in the Lockerbie decision and the Namibia Advisory Opinion. The conclusion is that since the UNSC created the tribunal and gave it jurisdiction over all international crimes in the former territory of the now defunct state of Yugoslavia the court has legal jurisdiction that cannot be questioned nor appealed.\textsuperscript{136}

10.4.3 The first scenario

The first example is a situation where the court decides to make a decision where it dismisses the defendants claim that Palestine is not a state and the court has no jurisdiction. In this scenario the Court just refers to the fact that Palestine is a member of the Rome Statute and that by virtue gives the Court jurisdiction for international crimes committed in the territory of the PNA or by crimes committed by citizens of the PNA.

10.4.4 The second scenario

In the second scenario the court dismisses the claim that the court has no jurisdiction but explains that the court is following the “all-state” formula regarding the status of Palestinian statehood.

The court would most likely begin with explaining that the Rome Statute has an “all-state” clause which makes all states of the world eligible for accession and which gives the court potential worldwide jurisdiction.

\textsuperscript{135} Tadic, supra, §6.

\textsuperscript{136} Tadic, supra note 133, §10 and §11.
From there the court explains how the “all-state” clause plays in with the responsibility of the UNSG as the depositary of the documents of accession to the Rome Statute. Here it makes it clear that the UNSG only accepts documents of accession to a convention with an “all-state” clause if he has been given clearance from the UNGA to do so. By accepting the PNA’s documents of accession the UNSG and the UNGA recognizes Palestinian statehood and confers on Palestine the right to call itself a state and thus makes it eligible for membership to the ICC.

Not only that since the UNGA has already through a resolution declared that the PNA’s status as a non-state observer to the UN has been upgraded to a non-member state observer the question of Palestine’s statehood is not under review.

This gives the court Jurisdiction over the territory of the PNA in accordance to article 12 of the Rome Statute since Palestine is a member of the ICC since 2015.

Following its explanation on its jurisdiction and the question of Palestinian statehood the court dismisses the defendants claim that Palestine is not a state and continues with the criminal procedure.

10.4.5 The third scenario

The last scenario is the scenario where the court decides to answer the motion on dismissal by reviewing Palestine’s claim for statehood and their membership to the ICC.

This scenario has the same results as scenario one and two and also utilizes the precedent from the Tadic case to explain to the defendant why the court has jurisdiction. This scenario isn’t hinged on the “all-state” formula like scenario two but more on the fact that Palestine is a state based on the Montevideo convention.

The court begins by listing the criteria for statehood according to the Montevideo convention and how they fit relating to Palestinian statehood (see section 10.2). From there the court continues by reaching the conclusion that Palestine is a state and thus can access the Rome Statute.

Since Palestine is a state and they are a state-party to the Rome Statute the court has jurisdiction in cases relating to International crimes committed in the territory of Palestine or by Palestinian citizens as well as crimes committed against Palestinian citizens in accordance with article 12 of the Rome Statute.
The court dismisses the defendants claim that Palestine is not a state and continues with the criminal procedure.

10.4.6 Conclusion

The reader should have in mind that the three scenarios described in part 14.4 of this essay are pure speculation from my part, we do not know how the ICC would deal with a motion regarding its own jurisdiction since there hasn’t been such a motion in the history of the ICC.

We can however draw some conclusions from the Tadic case relating to how the tribunal chose to handle the question regarding its jurisdiction. Reading the Tadic case I believe that scenario three would be the least likely of actions taken by the ICC in a situation like this since the question of Palestinian statehood has already been resolved through the UNGA’s decision to upgrade Palestine’s status to statehood.

Instead I believe one should expect a ruling more like the second scenario since in that scenario the court would explain why Palestine is a member of the ICC through its accession of the Rome statute and thus giving the court jurisdiction in Palestinian territory without the need to justify the decision of the UNGA or the UN as a whole.

I also believe that the chances of the court going with scenario one is slim since the precedent of the Tadic case is to explain to the defendant to a degree why the court has jurisdiction and by ignoring the complaints of the defendant in this regard could be to disregard the defendants right to a fair trial.

To answer the questions posed in the beginning of this essay, I think it is suffice to say that Palestine is a state and has the right to be a state-party to the ICC and looking at how the ICTY handled the Tadic case there should probably be no problems in regard to the question of Palestinian statehood and the jurisdiction of the ICC in a criminal procedure against an Israeli citizen.

I do believe that the decision to accept the PNA as a state-party is the correct decision from a legal standpoint I can still acknowledge Israeli criticism and from a political standpoint the move might hurt the credibility of the ICC in Israel. It will most likely take a long time until Israel considers to join the ICC, which I personally see as a political failure which will result in weakening international cooperation regarding the prosecution of criminals committing some of the worse crimes imaginable.
11. Index of Authorities

11.1 Literature


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11.2 Articles


11.3 Case law


11.4 Reports

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11.5 Resolutions


11.6 Declarations


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