

CAUGHT IN LIMBO

The Palestinian Authority and the Misunderstood State in International Law

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INTRODUCTION

On the 22nd of January 2009, the Palestinian Authority (PA) lodged a declaration recognizing the jurisdiction of the International Criminal Court (ICC) over ‘acts committed on the territory of Palestine since 1 July 2002.’¹ The Registrar of the Court accepted the declaration as extending jurisdiction over the ‘situation’, albeit ‘[w]ithout prejudice to a judicial determination’ on the legality of that declaration.² Under Article 12(3) of the Rome Statute, a *state* not party to the treaty may lodge a declaration with the Registrar to accept the Court’s jurisdiction. Shortly the declaration the Office of the Prosecutor began to consider whether the PA has the legal authority to accept the court’s jurisdiction.³

This situation presents a dilemma: Article 12(3) of the Rome Statute applies only to non-party *states*. With there being no Palestinian state, and Israel being no more than a belligerent occupant of the West Bank and Gaza, what entity may grant the ICC jurisdiction therein? If the laws of occupation deny Israel that power, and the PA is not a state, does that mean no one has the requisite authority? Of relevance to this piece is the obvious concern that the PA may lack this authority, regardless of the construction of Article 12(3) of the Rome Statute, because of the state-centric nature of international law. The PA is left on the fringe of international law because statehood is a necessary precondition to participation in international law for territorially based entities. As a result the Palestinians exist in a legal void.

Chapter One examines the history of the territorial status of Palestine from the end of the First World War right through to the present day. It will be established that sovereignty over the (now) Occupied Palestinian Territories (OPT) rightly resides with the Palestinian

¹ Ministry of Justice, Palestinian National Authority “Declaration Recognizing the Jurisdiction of the International Criminal Court” (Internet) <<http://www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279777/20090122PalestinianDeclaration2.pdf>> accessed 10/10/09.

² The Registrar, International Criminal Court “Letter to Mr Ali Khashan, Minister of Justice, Palestinian National Authority” 23 January 2009 (Internet) <<http://www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279778/20090123404SALASS2.pdf>> accessed 10/10/09.

³ Rotella Sebastian, The Irish Times “International Criminal Court to consider Gaza Investigation” (Internet) <<http://www.irishtimes.com/newspaper/world/2009/0206/1233867922538.html>> accessed 10/10/09.

people, a people having an undisputed right of self-determination.

Chapter Two analyses the PA against the criteria for statehood under international law. The status of the OPT has been a subject of debate ever since the 1988 Declaration of Independence by the Palestinian Liberation Organization (PLO). However, even accounting for the establishment of self-governance in the OPT, there is no reasonable basis to conclude the PA qualifies as an independent state.

Chapter Three introduces the concept of ILP. It presents an intellectual framework for classifying the ability of and extent to which any given actor in international relations can/may participate in international law. This framework will then be applied to the PA and PLO, revealing their limited ability to participate in international law.

Chapter Four addresses the state-centric nature of positive international law. International law is often conceived of as ultimately serving human dignity. The interests and rights of the individual are largely only served through the state entity. Contradictorily, societies not within a state are left disconnected from a law conceived for their very protection.

Chapter Five argues the above dilemma is a product of an incorrect assimilation of the state with ILP. From here the supreme authority of the state is mistakenly seen as a necessary prerequisite to ILP. Similarly, it is assumed the emergence of an international legal person, less than a state, is always an abrogation of another state's ILP. So far as the PA is concerned, being only occupied by Israel, this assumption does not in practice ring true. Therefore, called for in this chapter is the extension of ILP to the PA.

Chapter Six then moves on to consider whether contemporary developments in the contents of international law, such as the principle of self-determination, necessitate the expansion of ILP in furtherance of a more humanistic and democratic international legal system. Being entwined with independence, and therefore the participation for all peoples in international law, self-determination provides an appropriate litmus paper for assessing the advancement towards this end.

CHAPTER I: SOVEREIGNTY OVER PALESTINE SINCE THE END OF THE FIRST WORLD WAR AND THE PALESTINIAN RIGHT OF SELF-DETERMINATION

1. Sovereignty over the Occupied Palestinian Territories

Prior to the end of the First World War Palestine was a significant territory within the Ottoman Empire. All inhabitants of Palestine, whether Muslim, Christian or Jewish, were treated in a constitutionally equal manner as citizens of the Ottoman Empire. The inhabitants of the Arab territories shared sovereignty over all territories within the Empire.⁴ Following the end of the war, the Allied Powers were to receive title to the territories previously forming the Ottoman Empire (other than Turkey itself) in the Treaty of Sèvres⁵. However, Turkey did not ratify this treaty, instead it was superseded by the Treaty of Lausanne. This provided for only the transfer to Italy of several island territories, the other territories' futures were left 'to be settled by the parties concerned.'⁶

(a) Sovereignty under the Mandate System

The fates of the territories were decided through the Mandate system under the League of Nations. Article 22 of the League of Nations Covenant established: Firstly, that the development of such territories towards independence formed a 'sacred trust of civilization' which certain Allied Powers would be entrusted with fulfilling, and secondly, that certain territories within the former Ottoman Empire were at a point of development where their independence could be provisionally recognized 'subject to the rendering of administrative advice and assistance' until able to govern themselves.⁷ Britain successfully managed to incorporate the Balfour Declaration, a pledge by Lord Balfour to

⁴ Cattán, Henry *Palestine and International Law* (Longman Group Ltd, 1973) 64.

⁵ Treaty Relating to Certain Frontiers in Central Europe, Articles 15-16, signed at Sèvres 10 August, 1920, 8 LNTS 39 (Superseded by the Treaty of Peace 24 July, 1923).

⁶ Treaty of Peace with Turkey, Articles 15 and 16, signed at Lausanne 24 July, 1923 (entered into force 6 August, 1924) 28 LNTS 11; Cattán, above note 4 at 66; Stone, Julius *Israel and Palestine* (The John Hopkins University Press, 1981) 115.

⁷ Covenant of the League of Nations, Article 22, signed at Versailles 28 June, 1919 (Entered into force 10 January, 1920) BTS 4 (1919).

the Zionist Federation supporting 'the establishment in Palestine of a national home for the Jewish people' into the Mandate, despite it being widely considered contrary to the aims of Article 22. It would become the source of conflict and unrest in Palestine.⁸ Iraq, Lebanon, Syria and Palestine were classed as 'A' Mandates, and thus supposed to be provisionally independent. However in practice only Iraq was treated in this fashion; France maintained direct rule over Syria and Lebanon; and Britain's control over Palestine included full legislative and administrative powers limited only by the Mandate agreement.⁹

It was therefore debated as to who exactly had sovereignty over 'A' Mandates. There were six theories on where sovereignty lay.¹⁰ The first held that it lay with the Allied Powers *collectively*. This is unlikely given Article 16 of the Treaty of Lausanne did not express any such transfer of sovereignty; the Allied Powers' assured the affected territories they would not, and consequently history confirms that they did not.¹¹

The second view held that sovereignty was vested in the League of Nations. While the League had a supervisory power over the Mandates and controlled their final disposition, the administration of the territories by the Mandatory Powers was not for the League in the nature of a beneficial interest.¹²

The third view held that sovereignty was vested with the Mandatory powers themselves. This can be rejected upon two grounds. First, in *R v Ketter*¹³ it was held that a Turkish subject holding a 'British Passport – Palestine' could not be considered a British subject because neither the Treaty of Lausanne nor the Mandate agreement had transferred or annexed Palestine.¹⁴ Second, it was made clear in the *International Status of South-West*

⁸ Cattani, above note 4 at 11-17.

⁹ Crawford, James *The Creation of States in International Law* (2nd Ed, Oxford University Press, 2006) 569-570.

¹⁰ Blum, YZ "The Missing Reversioner: Reflections of the Status of Judea and Samaria" (1968) 3 *Isr. L. Rev.* 279, 282.

¹¹ McNair, Arnold D "Mandates" (1928) 3.2 *Cambridge L.J.* 149, 155.

¹² Crawford, above note 9, 573.

¹³ *R v Ketter* [1940] 1 K.B. 787; 55; Weis P. *Nationality and Statelessness in International Law* (2nd Ed, Sijthoff & Noordhoff International Publishers, 1979) 21.

¹⁴ Weis P. *ibid.*

*Africa, Advisory Opinion*¹⁵ that the Mandate for South-West Africa and Article 22 of the League of Nations Covenant involved no transfer of sovereignty but rather gave an 'international function of administration'. This would apply even more so in the case of Palestine which was an 'A' Mandate.

The fourth view held that sovereignty was vested with the inhabitants of the Mandates (at least for 'A' Mandates). This view draws on the distinction between sovereignty as *imperium* and sovereignty as *dominium*. On this view the inhabitants of Palestine (an 'A' Mandate) were vested with sovereignty through Article 22 of the Covenant. While not having exercisable control over the territory (*imperium*), which remained with the Mandatory, they retained *dominium* much like a state retains its sovereignty throughout occupation by another state.¹⁶ However, this view only considers where sovereignty should *finally* lie, it ignores, in practice, who exactly held sovereignty in terms of possessing the rights and powers of control over the territories. It also assumes there was a state entity created by the treatment of 'A' Mandates in Article 22 of the Covenant.

The fifth view held that sovereignty was split between the League and the Mandatory. This was based on sovereignty being defined as '...the rights, powers and interests which make up the relationship of the normal state towards its territory and [its] inhabitants...' It held that the Mandatory had most of these rights, the League possessing the rest, including supervisory powers and control over the final disposition of the Mandate.¹⁷ Of course this view focuses very much on sovereignty as *imperium*.

The sixth view considered sovereignty an unhelpful concept when analyzing these newly evolved territorial arrangements. In the *South-West Africa, Advisory Opinion* Lord McNair stated:

'The doctrine of sovereignty has no application to this new system. Sovereignty over a Mandated Territory is in abeyance...the Mandatory acquires only a limited title to the territory entrusted to

¹⁵ *International status of South-West Africa, Advisory Opinion, I.C. J. Reports 1950*, 128, 132.

¹⁶ Cattani, above note 4 at 60-61.

¹⁷ McNair, above note 11 at 160.

it.¹⁸

He expressly compared the Mandatory to a trustee in domestic law, having rights and powers over a territory for the ultimate benefit of its inhabitants.¹⁹ This view has been widely accepted.²⁰ In *South-West Africa* the International Court of Justice (ICJ) concluded that the Mandates continued to exist independently of the (then dissolved) League and that the United Nations General Assembly was to assume the supervisory role over them.²¹ According to Lord McNair, the territorial status created had an *in rem* or *erga omnes* status independent of the League.²²

Accordingly, we can see that sovereignty does not adequately explain claims of title to a territorial entity managed in the nature of the domestic trust and subject to supervision by an international organization. We can only confidently conclude that sovereignty must *finally* lie with the inhabitants of the territory when they are ready to exercise it.

(b) From the Mandate to Occupation

On February 14 1947, Britain announced that it wished to stand down as Mandatory for Palestine and that it would hand the question of the territory's final status over to the United Nations (UN).²³ Then, on the 29th November 1947, the General Assembly passed Resolution 181 providing for the partition of the Mandate for Palestine into two states and the termination of the Mandate as soon as possible but not later than August 1948.²⁴ While this resolution has been considered by some to be *ultra vires* and invalid,²⁵ it is not the object of this piece to consider the many potential issues arising from such a claim. It has also been argued the mandate is still in existence,²⁶ given that Resolution 181 (II) was never implemented and that mandates have a continuing existence. Yet when compared to

¹⁸ Sep. Op. Sir Arnold McNair, *International Status of South-West Africa*, above note 14 at 150.

¹⁹ Ibid, 148-149.

²⁰ Weis P, above note 13 at 22; Crawford 573.

²¹ Sep. Op. Sir Arnold McNair, above note 14 at 136-138.

²² Ibid, 156.

²³ Gerson, Allan *Israel the West Bank and International Law* (Frank Cass 1978) 47.

²⁴ G.A. Res. 181(II) On the Future Government of Palestine (29 November, 1947) Part 1A(1).

²⁵ Cattani, above note 4 at 42-56.

²⁶ Stone, above note 6 at 122.

South West Africa, which history confirms existed until the 1970s, there is no evidential trail of state and UN practice contradicting the clear terms of Resolution 181 (II) providing for the termination of the Mandate for Palestine.²⁷

Following the Six Day War, with no Mandate for Palestine, and the West Bank and Gaza under Israeli occupation, some argued Israel now had the best title to those territories. This view is known as the 'missing reversioner' argument.²⁸ It was based on two principles: firstly, that no right should follow from a wrong, and secondly, that the use of force against the territorial integrity of a state is unlawful.²⁹ It presumed that there was a vacuum in sovereignty left by Britain's withdrawal as the Mandatory in Palestine,³⁰ that Jordan entered and occupied the West Bank (Egypt occupied Gaza) unlawfully as an aggressor,³¹ and that Israel entered and occupied those territories lawfully in self-defence in the Six Day War. Accordingly it then supposes Israel must have a superior claim to the Palestinian Occupied Territories (OPT) because only it entered the territories upon a legal basis.³² This view was founded upon the concept of relative sovereignty in territorial disputes, as opposed to absolute sovereignty, explained in the *Minquiers and Ecrehos*³³ case. However this view would appear to be somewhat out dated and takes no account of the reality that these territories were not *terra nullius*.

Israeli claims to territorial sovereignty over the OPT are unfounded. Firstly, effective possession does not so easily create valid title for Israel. Effectiveness, as discussed later, is only applicable to the extent it maintains stability within the legal order. Hence, international law will not recognize an illegal act of territorial annexation.³⁴ For example, the purported annexation of East Jerusalem in 1980 was widely condemned and even

²⁷ Rostow, Eugene V "To the Editor in Chief" (with reply) (1990) 84 Am. J. Int'l. L. 717, 722; Crawford, above note 9 at 580.

²⁸ See Blum, above note 10 at 283-293.

²⁹ Schwebel, Stephen M "Editorial Comment: What Weight to Conquest?" (1970) 64 Am J. Int'l L. 344 at 345.

³⁰ Stone, above note 6 at 117.

³¹ Schwebel, above note 29 at 346; Ibid, 118-119.

³² Schwebel, Ibid, 346; Stone, Ibid, 119-120.

³³ *The Minquiers and Ecrehos case, Judgment of November 17th, 1953*: I.C. J. Reports 1953, 47.

³⁴ Raič, D. *Statehood and the Law of Self-Determination* (Kluwer International Law, 2002) 52-53

declared 'null and void' by the UN Security Council.³⁵ Further, in *South-West Africa*, the ICJ stressed that the principles of non-annexation of territory and the well-being and development of peoples were at the heart of the 'sacred trust of civilization' under the Mandate System.³⁶ Recently, this was emphasized by several Judges in the *Legal Consequences of the Construction of a Wall in the Palestinian Occupied Territory, Advisory Opinion*.³⁷ Judge Al-Khasawneh referred to the treatment of the territories as *terra nullius* as 'of no contemporary application'.³⁸ Ultimately, today great weight is placed upon the principle of self-determination and the right of the Palestinians to self-determination in those territories.³⁹ Territorial title may lie with states or 'peoples'. In fact it is clear self-determination has had a diminishing effect upon territorial sovereignty in certain circumstances. For example, in the colonial context, self-determination imposed obligations on colonial powers to relinquish sovereignty over their colonial territories.⁴⁰ Similarly, self-determination, as confirmed in the *Western Sahara, Advisory Opinion*⁴¹ is an impediment to territorial acquisition without the freely determined will of the people.⁴² Given the above arguments, it must be concluded any claim by Israel over the occupied territories is untenable.

In summary, it is clear today, and ever since the League of Nations Covenant, that the eventual vesting of sovereignty over the West Bank and Gaza will be with the Palestinian people. The 'sacred trust of civilization' exists now in the principle of self-determination and thus continues the right of the Palestinians to one day both possess and exercise sovereignty in what remains of Palestine.

³⁵ S.C. Res. 478 (XXXV) On the Question of Territories Occupied by Israel (20 August, 1980) para 3.

³⁶ *International Status of South-West Africa*, above note 14 at 131.

³⁷ *Legal Consequences of the Construction of a Wall in the Palestinian Occupied Territory, Advisory Opinion, I.C.J. Reports 2004*, 136; see Judge Koroma, Sep. Op. para 7; Judge Al Khasawneh, Sep. Op. para 8; Judge Elaraby, Sep. Op. para 2.2.

³⁸ Judge Al Khasawneh, Sep. Op. *Legal Consequences of the Construction of a Wall in the Palestinian Occupied Territory, Advisory Opinion*, *ibid*, para 8.

³⁹ *Legal Consequences of the Construction of a Wall in the Palestinian Occupied Territory, Advisory Opinion*, above note 37 paras 149, 155-156.

⁴⁰ Cassese *A Self-Determination of Peoples* (Cambridge University Press, 1995) 186-187.

⁴¹ *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, 12.

⁴² *Ibid*, para 58.

2. The Palestinian Right to Self-Determination in the Occupied Palestinian Territories

While sovereignty and self-determination are separate concepts, they have a natural connection. It is the Palestinians' undisputed right to self-determination, against alien occupation, within the OPT, which gives the Palestinians a right to territorial sovereignty over those territories.

(a) The Development of Self-Determination

Self-determination, as a political concept, found its way into the League of Nations Covenant, albeit in an implicit and vestigial sense, in Article 22 with its focus on bringing a number of nations and peoples into the international community as states through the entrusting of their development to states best able to carry out this goal.⁴³ At Versailles its proponents, including Woodrow Wilson and Jan Christian Smuts, advocated the use of the principle in the League Covenant to classify the surrendered territories according to their political maturity.⁴⁴ Furthermore, it is arguable the Mandate System implicitly recognized 'A' Mandates as independent nations possessed with territorial sovereignty and able to determine their own political future.⁴⁵ Indeed the ICJ has made clear Article 22 of the Covenant is an early source of the right to self-determination for peoples of Mandate territories.⁴⁶

Self-determination is now a key principle in international law and is central to the UN Charter, being among its purposes and principles as well as a basis of certain provisions.⁴⁷

⁴³ Crawford, above note 9 at 116; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, 31.

⁴⁴ Summers, James *Peoples and International Law: How Nationalism and Self-Determination Shape a Contemporary Law of Nations* (Martinus Nijhoff Publishers, 2007) 130-139.

⁴⁵ Cattani, above note 4 at 68-72.

⁴⁶ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, above note 43 para 52-53; *Legal Consequences of the Construction of a Wall in the Palestinian Occupied Territory*, Advisory Opinion, above note 37 para 88.

⁴⁷ Charter of the United Nations, with Annexed Statute of the International Court of Justice, Article 1(2) and

The 1960s saw the meaningful beginning of its growth as a principle of international law. In the Declaration of the Granting of Independence to Colonial Countries and Peoples a direct application of the principle to end colonialism was made. It declared that the ‘subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights [and] is contrary to the provisions of the Charter of the United Nation.’⁴⁸ This language appears to include the Palestinian situation, which is one of foreign occupation, despite the declaration’s targeting of colonialism.⁴⁹ In 1970 the Declaration on the Principles of International Law Concerning Friendly Relations among States in Accordance with the Charter of the United Nations, while calling upon states to bring about a ‘speedy end to colonialism’, made clear that ‘alien subjugation, domination and exploitation’ constituted a breach of the principle of self-determination outside of colonialism.⁵⁰ Indeed Arab states highlighted its relevance to Palestine.⁵¹ While not legally binding, both these declarations have been treated authoritatively and cited extensively by the ICJ.⁵²

The principle of self-determination was included in both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Social Cultural and Economic Rights (ICESCR)⁵³ as well as a number of other significant texts.⁵⁴

Yet the exact status of the principle of self-determination within the hierarchy of legal

55, signed at San Francisco 26 June, 1945 (entered into force 24 October 14, 2009) BTS 67 (1946).

⁴⁸ G.A. Res. 1514 (XV) Declaration of the Granting of Independence to Colonial Countries and Peoples (14 December, 1960) para 1.

⁴⁹ Summers, above note at 194.

⁵⁰ G.A. Res. 2625 (XXV) Declaration on the Principles of International Law Concerning Friendly Relations among States in Accordance with the Charter of the United Nations (24 October, 1970) para 2.

⁵¹ Summers, above note 44 at 224.

⁵² *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *Advisory Opinion*, above note 43 para 52; *Western Sahara, Advisory Opinion*, above note 41 paras 55-58; *Legal Consequences of the Construction of a Wall in the Palestinian Occupied Territory, Advisory Opinion*, above note 37 paras 87-88; Summers, above note 44 at 196 and 214.

⁵³ International Covenant on Civil and Political Rights, adopted by the United Nations General Assembly on 16 December, 1966 (entered into force 23 March 1976) 999 UNTS 171; International Covenant on Economic Social and Cultural Rights, adopted by the United Nations General Assembly on 16 December, 1966 (entered into force 3 January 1976) 993 UNTS 3, 4(E).

⁵⁴ Final Act of Helsinki, signed at Helsinki 1 August, 1975 (1975) 14 I.L.M 1292; The Charter of Paris for a New Europe, signed at Paris 21 November, 1990, (1991) 30 I.L.M. 190;

norms remains uncertain. In any event, as discussed above, the principle has prevailed over the territorial sovereignty of colonial powers and is undoubtedly an influential principle ‘that shapes the drafting of instruments, the decisions of judicial bodies and the nature of obligations’.⁵⁵

(b) The Palestinian Right of Self-Determination

By the late 1960s the General Assembly had clearly recognized the right as applicable to the Palestinian people. In 1969 it reaffirmed the ‘inalienable rights of the people of Palestine’⁵⁶ and in 1970 it recognized ‘that the people of Palestine are entitled to equal rights and self-determination in accordance with the Charter of the United Nations.’⁵⁷ This was repeated in many subsequent resolutions.⁵⁸ Other sources include the ICCPR and ICESCR, frequent acknowledgment by the Human Rights Committee and the Definition of Aggression.⁵⁹

In 1978, Egypt and Israel signed an agreement, as part of the Camp David Accords, to negotiate the establishment of a self-governing authority in the OPT.⁶⁰ It was to exist for five years as an interim step towards the negotiation of a final status agreement. However, given the ambiguous language of the agreement and disagreement over its meaning, it was never implemented.⁶¹

Today the Palestinians’ right is undisputed and was affirmed by the ICJ in the *Wall Advisory Opinion*. The court made clear that there could be no doubting the existence of the ‘Palestinian people’ since the exchange of letters on 9 September 1993 between

⁵⁵ Summers, above note 44 at 400.

⁵⁶ G.A. Res. 2535/B (XXIV) On the Problem of Palestinian Arab Refugees (10 December, 1969) para 1.

⁵⁷ G.A. Res. 2672/C (XXV) On the Problem of Palestinian Arab Refugees (8 December, 1970) para 1.

⁵⁸ G.A. Res. 2792/D (XXVI) On the Effects on Palestinian Arab Refugees of Recent Operations carried out by the Israeli Military (6 December, 1971); G.A. Res. 2963/E (XXVII) On the Problem of the Palestinian Arab Refugees (13 December, 1972); G.A. Res. 3089/D (XXVIII) On the Problem of the Palestinian Arab Refugees (7 December, 1973).

⁵⁹ Summers, above note 44 at 358.

⁶⁰ A Framework for Peace in the Middle East Agreed at Camp David, signed at Camp David 17 September 1978, (1978) 17 I.L.M. 1466.

⁶¹ Cassese, above note 40 at 245-246.

Israeli Prime Minister Yitzhak Rabin and Palestinian Liberation Organization (hereinafter PLO) leader Yasser Arafat.⁶² The court further held the construction of the security wall within the OPT was a breach of the Palestinians' right to self-determination because it adversely disrupted populations and amounted to a de facto annexation of territory.⁶³

It is clear from the above discussion on self-determination and territorial sovereignty that the Palestinian people are entitled to self-determination in at least the OPT. Of course while not all aspects of their right to self-determination are entirely clear, it seems that the right applies without controversy to the Palestinians in the OPT.⁶⁴

⁶² *Legal Consequences of the Construction of a Wall in the Palestinian Occupied Territory, Advisory Opinion*, above note 37 para 118; Schulman, David I. "The Israeli-PLO on the Declaration of Principles on Interim Self-Government Arrangements: The First Step Towards Palestinian Self-Determination" (1993) 7 *Emory Int'l L. Rev.* 793, 795.

⁶³ *Ibid.*, paras 121-122, 149.

⁶⁴ On the uncertainties see: Cassese, above note 40 at 240-241.

CHAPTER II: THE OSLO ACCORDS AND THE PALESTINIAN CLAIM TO STATEHOOD

Account must be taken of the effect of the Oslo Accords on the OPT and the creation of the self-governing entity, the Palestinian Authority (PA), under those agreements. As will be seen, the PA is not a state under international law. Rather the PA is merely a self-governing entity for the Palestinians essentially replacing the Israeli military regime. However despite this, it is important to show that the PA is an entity with all the structures and organs of a state government and, consequently, one could argue it has state-like capacity.

1. The 1988 Declaration of Independence and the status of the Oslo Accords

(a) The 1988 Declaration of Independence

In November 1988, in response to the *intifada* the PLO declared the OPT to be a sovereign and independent state (named 'Palestine').⁶⁵ The General Assembly did not acknowledge the existence of a state. It merely affirmed 'the need for the Palestinian people to exercise sovereignty over their territory...' and renamed the PLO observer delegation to the UN 'Palestine'.⁶⁶ Critical to arguments supporting the validity of the declaration was the loose application of two of the criteria of statehood (defined territory and effective government) found in the Montevideo Convention on Rights and Duties of States.⁶⁷ It was argued the PLO declaration described a determinate enough territory (being the West Bank and Gaza) given that borders need not be absolutely defined, and that the extent of the PLO's control in the West Bank and Gaza through the provision of basic social and administrative services qualified it as an effective government.⁶⁸ Permanent population and the capacity to conduct foreign relations were more certainly

⁶⁵ Crawford, above note 9 at 435.

⁶⁶ G.A. Res. 43/177 Question of Palestine U.N. Doc. A/RES/43/177 (15 December, 1988) paras 1-3.

⁶⁷ Convention on Rights and Duties of States adopted by the Seventh International Conference of American States, signed at Montevideo 26 December, 1933 (entered into force 26 December, 1934) 165 LNTS 19.

⁶⁸ Boyle, Francis A "The Creation of the State of Palestine" (1990) 1 Eur. J. Int'l L. 301, 302.

satisfied.⁶⁹ The opposing views adhered to a strict assessment of effective government and independence.⁷⁰ From this point of view there was no state. The PLO's authority in the OPT, being subordinate to an occupying military regime, was not consistent with the existence of 'an organized community on a particular territory, exclusively or substantially exercising self-governing power' to the exclusion, in fact and as of right, of any other state.⁷¹

However the 1990s brought about the beginnings of self-government in the OPT through the creation of the PA. The PA was one of the products of a number of years of negotiation between Israel and the PLO. The process began with a mutual exchange of recognition, Israel being recognized as a state and the PLO as 'the legitimate representative of the Palestinian people.'⁷² Then on the 13th of September 1993 the Declaration of Principles⁷³ (DOP) was signed by the PLO and Israel. This agreement established several things: that there would be an elected self-governing council for the Palestinians⁷⁴ (now the PA); that Israeli civil administration powers in the West Bank and Gaza would be transferred to this council as it became ready to receive them;⁷⁵ that there would be the negotiation of a more comprehensive interim agreement;⁷⁶ and finally, that there would be a partial withdrawal of Israeli troops from the OPT.⁷⁷ In 1995 the Interim Agreement⁷⁸ was concluded. While several other agreements were concluded both before and after the Interim Agreement, the Interim Agreement is the key document when assessing the structure and capacity of the PA.

⁶⁹ Ibid, 302-303.

⁷⁰ Crawford, James "The Creation of the State of Palestine: Too Much Too Soon?" (1990) 1 Eur. J. Int'l L. 307, 308-309

⁷¹ Crawford, above note 9 at 437; Crawford, above note 68 at 309.

⁷² Schulman, above note 62 at 795; Quigley, John "The Israeli-PLO Interim Agreements: Are They Treaties?" (1997) 30 Cornell Int'l L.J. 717 at 736; Summers, above note 44 at 361.

⁷³ Israel-Palestine Liberation Organisation, Declaration of Principles on Interim Self-Government Arrangements, signed at Washington D.C. 13 September, 1993, (1993) 32 ILM 1527

⁷⁴ Ibid, Article 3.

⁷⁵ Ibid, Article 6.

⁷⁶ Ibid, Article 7.

⁷⁷ Ibid, Articles 13 and 14.

⁷⁸ Israel-Palestine Liberation Organisation, Interim Agreement on the West Bank and the Gaza Strip, 28 September 1995, (1997) 36 ILM 557.

(b) The Oslo Accords as Binding Agreements between Subjects of International Law

Before even considering any claim to statehood brought about by these agreements, one might question whether these agreements, not being between two states, even qualify as binding agreements at international law. The Vienna Convention on the Law of Treaties (VCLT) is a ‘codification of customary international law’ and defines treaties as between states but does not prejudice the legal force of agreements between states and other subjects.⁷⁹ Thus their status under the VCLT is still relevant despite neither party being a signatory to the VCLT.⁸⁰ As to their status as binding agreements between subjects of international law, views are some what varied. Some question the ability of the PLO to conclude such agreements as a subject of international law.⁸¹ However, peoples and states have frequently negotiated binding agreements, including the Maori people of New Zealand, Native American Indian tribes, the African Party for the Independence of Guinea-Bassau and the Cape Verde Islands (PAIGC), and the POLISARIO in Western Sahara.⁸² Self-determination has given rise to the subjectivity of peoples under international law and can be contrasted with the status of armed insurrection groups.⁸³ The PLO has observer status in the UN, full diplomatic status with sixty states, and has concluded other bilateral agreements with Lebanon and Jordan regarding Palestinian refugees.⁸⁴ It is undoubtedly a subject of international law.

The agreements themselves have been described as too general and imprecise to create obligations.⁸⁵ While the DOP’s language is somewhat passive, there are clear signs that it

⁷⁹ Vienna Convention on the Law of Treaties, Articles 2(1)(a) and 3(a), opened for signature 23 May, 1969 (entered into force 27 January 1980) 1155 UNTS 331, 332 (E).

⁸⁰ Watson, Geoffrey R. *The Oslo Accords International Law and the Israeli-Palestinian Peace Agreements* (Oxford University Press, 2000) 57

⁸¹ Weiss Jeffery “Terminating the Israel-PLO Declaration of Principles: Is it Legal Under International Law?” (1995) 18 Loy. L.A. Int’l & Comp. L.J. 109, 128.

⁸² Watson, above note 80 at 93; *Hoani Te Heuheu Tukino v Aotea District Maori Land Board* [1941] AC 308.

⁸³ Cassese, above note 40 at 165-167; Noortman Math “Non-State Actors in International Law” in Arts Bas, Noortman Math, Reinalda Bob (eds) *Non-State Actors in International Relations* (2nd Ed, Ashgate Publishing Company, 2003) 67-68.

⁸⁴ Noortman, *ibid*, 68; Watson, above note 80 at 98.

⁸⁵ Weiss, above note 81 at 129.

was intended to be binding. For example, it was drafted to enter into force.⁸⁶ More importantly, there can be no doubting the Interim Agreement's intended binding status. It provides numerous specific obligations thorough detailed Annexes, it is drafted largely in the active voice, and like the DOP, was drafted to come into force.⁸⁷ These binding agreements have accordingly created an entity whose legal existence would logically continue should they be terminated.⁸⁸ In this sense, we could say the PA has an existence independent of its constitutive texts.

2. Statehood under International Law

Before assessing the capacities of the PA and the arguments suggesting there now exists a state of Palestine, an overview of the law of statehood is necessary.

(a) Recognition

To begin with the legal significance of recognition warrants discussion. Two theories exist, the constitutive and declaratory theories. The constitutive theory is rooted in Nineteenth Century positivism where consent was the basis of international law.⁸⁹ The act of recognition was a necessary pre-condition of statehood.⁹⁰ Recognition was constitutive, in holding that statehood is brought about *by* recognition. However the constitutive theory is flawed in several respects. Firstly, it results in all states existence being relative and only so far as its bilateral instances of recognition.⁹¹ This peculiarly can leave an entity a state and not a state concurrently. Additionally universally unrecognized entities would not exist within international law, denied the protection of international rights and corresponding accountability of international duties.⁹² The theory

⁸⁶ Israel-Palestine Liberation Organisation, Declaration of Principles on Interim Self-Government Arrangements, Art 17(1), above note 73; Watson, above note 80 at 66.

⁸⁷ Ibid, 71-72.

⁸⁸ Benvenisti Eyal "The Israeli-Palestinian Declaration of Principles: A Framework for Future Settlement" (1993) 4 Eur. J. Int'l L. 542, 54; see also Vienna Convention on the Law of Treaties, Article 70, above note 79.

⁸⁹ Crawford, above note 9 at 13.

⁹⁰ Ibid, 14-17; Raič, above note 34 at 29-31.

⁹¹ Crawford, ibid, 21-22; Raič, ibid, 33.

⁹² Grant, Thomas D. *The Recognition of States: Law and Practice in Debate and Evolution* (Praeger, 1999) 20; Raič, above note 34 at 33-34.

is also circular as recognition confers upon a state the very legal personality required to contract with other states in the first place.⁹³ It also marginalizes the ability for states to emerge in defiance of political opponents, such as where a colony seeks independence from its colonial ruler which will deny it recognition.⁹⁴

More realistically, the declaratory theory holds that the existence of a state is a situation with an *erga omnes* effect on states. Recognition is merely an affirmation that the state exists in fact.⁹⁵ This theory compliments the shift of international law towards respect for human rights because it does not treat unrecognized states as not subject to its norms.⁹⁶ A state does not have to be admitted into the legal realm of international law to be accountable. In practice the declaratory theory appears well accepted. It was adopted by the Arbitration Commission when advising the European Peace Conference in respect of Yugoslavia.⁹⁷ It was also impliedly approved by the ICJ in rejecting any arguments claiming that the mutual lack of recognition between the two parties prevented the application of the Genocide Convention's rights and duties to each party.⁹⁸ States do not, however, become legal persons purely as a matter of fact; rather *the law attributes* personality to entities meeting such factual criteria.⁹⁹

(b)The Montevideo Criteria

The starting point to assessing whether an entity has been attributed statehood by international law is in the Montevideo Convention criteria. Yet giving too much weight to these criteria would seem inappropriate. This is because the criteria, with the exception of effective government, appear highly flexible and unimportant relative to the criterion of independence. Firstly, there appears to be no limit upon the size or contiguity of a territory: the Vatican is a mere 0.4 Square kilometers and Pakistan was geographically

⁹³ Grant, *ibid*, 19.

⁹⁴ Raič, above note 34 at 36.

⁹⁵ *Ibid*, 32.

⁹⁶ Grant, above note 92 at 35-36.

⁹⁷ Crawford, above note 9 at 24-25.

⁹⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, I.C. J. Reports 1996*, 595, 613

⁹⁹ Raič, above note 34 at 38.

divided until 1971.¹⁰⁰ Secondly, population would appear to have no minimum number as a requirement: the Vatican having a population of 768.¹⁰¹ Thirdly the capacity to conduct foreign relations, while being something all states must have, is possessed by entities other than states such as the PLO.¹⁰² Finally, the criterion of effective government is essentially linked to the key criterion of independence.

Effective government acts as an umbrella to the other three Montevideo criteria because governmental authority is measured in terms of territorial and personal authority.¹⁰³

Effective government can thus be defined as:

‘an institutionalized political, administrative and executive organization machinery for the purpose of regulating the relations in the community and charged with the task of upholding rules...[and] must actually exercise authority over the claimed territory and the people residing in that territory.’¹⁰⁴

Effective government is a prerequisite to an ‘independent’ entity, with independence taken to mean the exercise of exclusive or substantial authority in a given area to the exclusion of any other state.¹⁰⁵ Judge Huber in the *Islands of Palmas Case* explained that ‘sovereignty in the relations between states signifies independence’ (emphasis added) and *the right of exclusive function* as a state in a territory.¹⁰⁶ Independence thus has two aspects: ‘internal supremacy and external independence’.¹⁰⁷ Consequently, a state must be the supreme governmental authority within a territory and be able to assert itself as sovereign against all other states.

¹⁰⁰ Crawford, above note 9 at 47.

¹⁰¹ Ibid, 52.

¹⁰² Ibid, 61.

¹⁰³ Ibid, 55-56.

¹⁰⁴ Raič, above note 34 at 62.

¹⁰⁵ Above note 71; Judge Huber, Sep. Op. *Islands of Palmas Case* (1928) 2 RIAA 829, 838

¹⁰⁶ Ibid.

¹⁰⁷ Fowler, Michael Ross and Marie, Bunck Julie *Law, Power, and the Sovereign State: The Evolution and Application of the Concept of Sovereignty* (Pennsylvania State University Press, 1995) 42-47.

(c) Independence

Independence is assessed in terms of formal and actual independence. Formal independence equates to an entity being legally and constitutionally separate from any other state.¹⁰⁸ Where an entity is subject to a power of discretionary internal intervention held by a state, there is no independence.¹⁰⁹ Similarly Britain's ability to bind the Dominions to the Treaty of Lausanne is an example of a 'special claim of right' by one state over the affairs of another negating independence.¹¹⁰ However the following situations do not derogate from independence: constitutional and treaty-based restraints on governmental authority; arrangements of territorial concession; (willful) delegation of certain state powers to other states; joint organs between states; and membership of international organizations.¹¹¹ What is thus determinative is not how burdensome a state's obligations and legal restraints are but whether these establish a relationship of subordination to another state.¹¹² Yet this distinction is not always very clear. For example, Canada was an independent state long before Britain gave it the power to amend its own constitution.¹¹³ Accordingly, some formal ties will carry constitutional significance while others will not.

Actual or de facto independence 'is a matter of political fact.' Independence therefore requires a 'minimum degree of real governmental power at the disposal of the authorities of the putative State.'¹¹⁴ A state with actual independence will have control of its own organs and will bear responsibility for its actions under international law. Established states will maintain actual independence despite close political alliances or even belligerent occupation. However where an entity emerges illegally and is under extensive 'overbearing' foreign control or influence it will not have actual independence.¹¹⁵ For

¹⁰⁸ Fowler and Bunck, above note 107 at 51.

¹⁰⁹ Raič, above note 34 at 76-77.

¹¹⁰ Crawford, above note 9 at 71.

¹¹¹ Ibid, 67-71.

¹¹² Judge Anzilotti, Sep. Op. *Customs Regime Between Germany and Austria (Protocol of March 19th, 1931) Advisory Opinion*, PCIJ, Ser A/B No 41. 45, 57-58.

¹¹³ Fowler and Bunck, above note 107 at 52-53.

¹¹⁴ Crawford, above note 9 at 72.

¹¹⁵ Ibid, 72-74, 85-86.

example Manchukuo, established by Japan after invading the Manchuria Province in 1931, was ostensibly independent but was considered by a League of Nations fact-finding commission to be entirely under Japanese control.¹¹⁶

How formal and actual independence interrelate and apply in a given situation varies. For example, formal independence bears little significance where an entity lacks any actual independence.¹¹⁷ Yet it would be incorrect to conclude that a constitutional crisis negates actual independence. This is because there is discrimination in the application of the criteria of statehood between existing and emerging states.¹¹⁸ For instance, during the Lebanese civil war there was never any question of the existence of the state of Lebanon yet the incumbent government lacked control over significant parts of the country.¹¹⁹ The same can be said of the constitutional crisis in Albania in the late 1990s.¹²⁰ In contrast, the PLO Declaration of Independence in 1988 was assessed upon a very strict basis. Underpinning this discrimination is the principle of effectiveness. The role of this principle is to attribute legal consequences to factual circumstances but only to the extent that attribution is conducive of stability in the legal order. Statehood as effectiveness applies discriminately. Therefore an established state's legal existence will survive a period of inoperative government¹²¹ while an emerging entity will be advanced statehood where there exists a right or title to statehood, as was the case with the Congo.¹²²

(d) Legality

Practice has also shown that a number of effective entities have been denied statehood.¹²³ The emergence without contravention of a peremptory norm is a sixth key criterion. Where an entity emerges in breach of a peremptory norm the effect is *erga omnes* and

¹¹⁶ Raič, above note 34 at 78.

¹¹⁷ Crawford, above note 9 at 88; Raič, above note 34 at 77.

¹¹⁸ Crawford, *ibid.*, 66-67; Raič, *ibid.*, 72

¹¹⁹ Fowler and Bunch, above note 107 at 42-43.

¹²⁰ Raič, above note 34 at 70.

¹²¹ *Ibid.*, 72.

¹²² Crawford, above note 9 at 56-58.

¹²³ *Ibid.*, 97.

entails obligatory non-recognition of the situation by all states.¹²⁴ Through the doctrine of collective non-recognition, the international community has applied this criterion to entities emerging in breach of the principle of self-determination. The call for non-recognition of Rhodesia by the Security Council in 1965¹²⁵ was based, not on its ineffectiveness, but on its creation as a minority regime of white settlers who had monopolized power to the exclusion of the people of Rhodesia.¹²⁶ Similarly the ‘Bantustans’ of South Africa were condemned and not recognized upon the basis they were an extension of Apartheid and in breach of the right of self-determination held by the people of South Africa.¹²⁷ Fundamentally, this criterion, like the doctrine collective non-recognition, aims to promote international peace and stability.¹²⁸

In summary, States exist objectively; their recognition by other states is merely declaratory. The key criteria of statehood can be summarized as the four criteria of effectiveness – all essentially within that of effective government – independence, and the emergence without a breach of a peremptory norm. Importantly, the attainment of statehood will vary upon the principle of effectiveness and the maintenance of a stable the legal order. With these conclusions in mind, I turn to consider the status of the PA.

3. The Status of the Palestinian Authority

(a) Organs and Structure

The PA was established by the Gaza-Jericho Agreement¹²⁹ which was later incorporated into the Interim Agreement.¹³⁰ It has a legislature, executive, judiciary and a president.¹³¹

¹²⁴ Ibid, 158; Raič, above note 34 at 107-110.

¹²⁵ S.C. Res 216 (XX) Concerning the Situation in Southern Rhodesia, (12 November, 1965) para 2.

¹²⁶ Crawford, above note 9 at 129-131; Raič, above note 34 at 130-131.

¹²⁷ Ibid, 137-141.

¹²⁸ Raič, above note 34 at 111.

¹²⁹ Israel-Palestine Liberation Organisation, Agreement on the Gaza Strip and the Jericho Area, signed at Cairo 4 May, 1994, (1994) 33 ILM 622.

¹³⁰ Hussein, Hiba I. “Challenges and Reforms in the Palestinian Authority” (2002-3) 26 Fordham Int’l L.J. 500, 504.

¹³¹ Ibid, 505.

The Interim Agreement provides that the legislature shall have 82 members¹³² and from this body the executive authority shall be derived.¹³³ While the PA is designed as a self-governing authority, it is unlikely that it is the government of a state.

The relationship between the PLO and the PA has been very carefully structured. While the PLO was the signatory and negotiator in each and every agreement, it plays no part in the PA other than having a limited power to conclude agreements with states on the PA's behalf.¹³⁴ Essentially the PLO, although a subject of international law, has no role in the governance of the OPT. On the other hand the PA, being a governmental authority, has no competence in foreign relations¹³⁵ or external security.¹³⁶ The clear design behind the agreements is to fracture the establishment of a Palestinian state by maintaining a clear separation between the international standing of the PLO and the governmental authority of the PA.¹³⁷ Interestingly, Mahmoud Abbas, acting in his capacity as President of the PA, negotiated the Road Map for Peace in 2003, a declaration outlining a return to a path towards the negotiation of a final agreement. Apparently, then, future status negotiations may well be concluded by the PA rather than the PLO.¹³⁸

(b) Jurisdiction

However, turning to the jurisdictional power of the PA, we find scope of its authority to act on internal matters is severely limited. Firstly, its territorial jurisdiction is particularly limited. The PA has no jurisdiction over Israeli settlements and military facilities.¹³⁹ The full extent of its functional jurisdiction may only be exercised in a very small part of the

¹³² Israel-Palestine Liberation Organisation, Interim Agreement on the West Bank and the Gaza Strip, Article 4, above note 78.

¹³³ Ibid, Article 5.

¹³⁴ Ibid, Article 9(5)(b): The four areas permitted are economic relations, financial assistance agreements, regional development agreements and cultural, scientific and educational agreements.

¹³⁵ Ibid, Article 9(5)(a)

¹³⁶ Ibid, Article 10(4)

¹³⁷ Crawford, above note 9 at 444-446; Watson, above note 80 at 61; Chiang, Amy "An International Perspective of Hamas" (2008) 83 Chi. -Kent. L. Rev. 1021, 1027-1028; Dajani, Omar M. "Stalled Between Seasons: The International Legal Status of Palestine During the Interim Period" 26 Denv. J. Int'l. L. & Pol'y 27, 71.

¹³⁸ Chiang, *ibid*, 1028-1029.

¹³⁹ Husseini, above note 130 at 507-508.

territories.

Secondly, territorially speaking, the functional jurisdiction of the PA is very limited. Article 11 of the Interim Agreement sets out Areas 'A', 'B' and 'C'¹⁴⁰ and determines the extent of functional jurisdiction within those areas. In Area 'A' the PA possesses the full extent of its functional jurisdiction, that area comprising a mere three percent of the West Bank.¹⁴¹ In Area 'B' the PA has substantially the same extent of functional jurisdiction with the exception of the Israeli military retaining control over all security and anti-terrorism matters, that area comprising only twenty-seven percent of the West Bank.¹⁴² In Area 'C', comprising the remaining seventy percent of the West Bank, the PA has a very limited jurisdiction which is supposed to be slowly and eventually transferred to it from Israel.¹⁴³

Thirdly, its functional jurisdiction is as a whole very limited. The PA is excluded from foreign relations and external security.¹⁴⁴ It has only shared authority, through a fifty percent representation on the Civil Affairs Coordination and Cooperation Committee, over matters regarding infrastructure.¹⁴⁵ Residually, then, the PA is left with exclusive jurisdiction only in matters purely affecting Palestinians. Such matters include agriculture, health, archeology, environment, labor and tourism.¹⁴⁶ Yet even many of these matters remain subject to Israeli oversight.¹⁴⁷

Fourth, the personal jurisdiction of the PA extends only to Palestinians.¹⁴⁸ This means, for

¹⁴⁰ Israel-Palestine Liberation Organisation, Interim Agreement on the West Bank and the Gaza Strip, Article 11(3)(a)-(c), above note 78.

¹⁴¹ Dajani, above note 137 at 63.

¹⁴² Ibid.

¹⁴³ Ibid.

¹⁴⁴ Israel-Palestine Liberation Organisation, Interim Agreement on the West Bank and the Gaza Strip, Articles 9(5) and 10(4), above note 78.

¹⁴⁵ Israel-Palestine Liberation Organisation, Interim Agreement on the West Bank and the Gaza Strip, Article 1(6), above note 78; Dajani, above note 137 at 67.

¹⁴⁶ Hussein, above note 130, 512.

¹⁴⁷ Dajani, above note 137 at 66.

¹⁴⁸ Israel-Palestine Liberation Organisation, Interim Agreement on the West Bank and the Gaza Strip, Article 17(2)(c), above note 78.

example, that Israelis are not subject to the criminal jurisdiction of PA courts¹⁴⁹ and are only subject to civil jurisdiction when they voluntarily consent, when they maintain an ongoing business presence in the territories, or when they are in dispute over real property within the territories.¹⁵⁰

(c) Subordination

The subordinate position of the PA in relation to Israel is compounded in two respects. First, the PA's powers are merely transferred from Israel¹⁵¹ and all powers not transferred remain held by Israel.¹⁵² Second, the PA's legislative actions will be voidable if they exceed its powers or are inconsistent with the DOP or Interim Agreement.¹⁵³ Thus Israel has a discretionary ability to intervene in the internal affairs of the PA amounting to a 'foreign control overbearing the decision-making of the entity concerned on a wide range of matters and doing so systematically on a permanent basis.'¹⁵⁴

Furthermore, despite the disengagement from Gaza in 2005, it undoubtedly remains occupied by Israel. In 2004 the Israeli Cabinet approved a plan to remove all military presence from the Gaza Strip and to demolish the civilian settlements within the territory.¹⁵⁵ Prior to the disengagement Israel was indisputably occupying the West Bank and Gaza.¹⁵⁶ The disengagement has not altered this. Israel continues to have exclusive control over Gaza's airspace, coastal waters, telecommunications, electricity, water,

¹⁴⁹ Ibid, Annex 4, Article 1(2).

¹⁵⁰ Ibid, Annex 4, Article 3(2).

¹⁵¹ Ibid, Article 1(1)

¹⁵² Ibid, Art 1(1) and 1(5)

¹⁵³ Dajani, above note 137 at 65.

¹⁵⁴ Crawford, above note 9 at 86.

¹⁵⁵ The Cabinet Resolution Regarding the Disengagement Plan (June 6, 2004) <http://www.strategicassessments.org/library/disengagement/revised_disengagement_plan_-_cabinet_approval_june_2004.pdf> accessed 28/08/09

¹⁵⁶ Carey, James "Mere Words: The 'Enemy Entity' Designation of the Gaza Strip" 32 *Hastings Int'l & Comp. L. Rev.* 643, 650; *Legal Consequences of the Construction of a Wall in the Palestinian Occupied Territory, Advisory Opinion*, above note 37 para 166; S.C. Res. 1544 *The Situation in the Middle East, Including the Palestine Question* U.N. Doc. S/RES/1544 (May 19, 2004); G.A. Res. 58/292 *Status of the Occupied Palestinian Territory* U.N. Doc. A/Res/58/292 (May 17, 2004); *Adjuri v IDF Commander*, 17019 II. H.C. 02, 2056 II (2002); *Beit Sourik Village Council v. Commander of the IDF Forces in the West Bank* H.C. 04 at 1 (2004)

sewage and the movement of persons and goods across its borders.¹⁵⁷ Even without a permanent military presence, the frequent and unfettered military operations in the Gaza Strip illustrate that the territories remain under Israel's effective control.¹⁵⁸

Ultimately, the PA has an incomplete territorial jurisdiction, an incomplete personal jurisdiction over only Palestinians, and a substantially limited functional jurisdiction. The PA consequently lacks the extent of internal authority a state government must possess. There is simply no 'organized community...exclusively or substantially exercising self-governing power [to the exclusion] of...another state...over that territory'.¹⁵⁹

¹⁵⁷ Carey, above note 156 at 644.

¹⁵⁸ Ibid, 652-653.

¹⁵⁹ Crawford, above note 9 at 437.

CHAPTER III: THE CONCEPT OF INTERNATIONAL LEGAL PERSONALITY

With the Palestinian right to self-determination and territorial sovereignty in the OPT confirmed, and the lack of a Palestinian state entity clarified, the nature and extent of legal personality possessed by PA must now be considered. This will involve an introduction to the concept of international legal personality, the identification of an intellectual framework for analyzing actors in the international community, and its application to the PA. This will make clear the unique and marginalized position of the PA in international law.

1. Introducing International Legal Personality

(a) The Core Concepts

ILP has been succinctly defined as ‘the concept lawyers use to identify a certain actor as a separate and independent entity’.¹⁶⁰ It is a general concept of law that identifies who is able and entitled to participate in a given legal system.¹⁶¹ A useful analogy to the international legal person under international law is that of a corporate entity under domestic law. When a company is incorporated it gains an independent legal personality which enables it to have rights, owe obligations and protect interests in domestic jurisdictions. ILP can be thought of as ‘a bridge between social reality and legal reality’.¹⁶² It allows an actor in international relations to cross into the realm of international law.¹⁶³

An international legal person is an entity with rights and obligations under international

¹⁶⁰ Nijman, Janne Elizabeth *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law* (TMC Asser Press, 2004) 3.

¹⁶¹ Meijknecht, Anna *Towards International Personality: the Position of Minorities and Indigenous Peoples in International Law* (Intersentia, 2001) 28-29.

¹⁶² *Ibid*, 25.

¹⁶³ Green, Fergus “Fragmentation in Two Dimensions: The ICJ’s Flawed Approach to Non-State Actors and International Legal Personality” (2008) 9 *Melb. J. Int’l L.* 47, 50.

law, the capacity to bring claims against other legal persons, and the capacity to be held accountable for its own acts.¹⁶⁴ In the *Reparations for Injuries Suffered in the Service of the United Nations Advisory Opinion*¹⁶⁵ the ICJ concluded that the UN was an international person. It explained that this did not mean it was a state, but rather a subject possessing international rights, duties and capacities. These will be by no means identical, their nature and extent will vary according to the needs of the international community.¹⁶⁶

(b) An Intellectual Framework for Understanding ILP

ILP is an ‘umbrella concept’¹⁶⁷ with three elements: legal capacity, subjectivity and *jus standi*. Despite there being a degree of overlap between and debate as to the severability of these elements, they take on distinctive roles when thought of as constituent elements of an international legal person.¹⁶⁸ A brief explanation of these concepts is warranted. Factual capacity is the reality of an entity’s structured existence which gives it the ability to bear international rights and duties.¹⁶⁹ Subjectivity describes the circumstances where an entity actually bears international rights and duties and its conduct is regulated by international law.¹⁷⁰ *Jus standi* is the competence to bring an international claim and protect one’s interests under international law. It involves the possession of procedural capacities under international law.

(i) Legal Capacity

Legal capacity (sometimes referred to as factual capacity) can be broken down into several components: autonomy, a will, and a face and voice. Autonomy requires that an

¹⁶⁴ Raič, above note 34 at 10; Fichtelberg, Aaron *Law at the Vanishing Point: A Philosophical Analysis of International Law* (Ashgate, 2008) 73.

¹⁶⁵ *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C. J. Reports 1949*, 174.

¹⁶⁶ *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion*, above note 165 at 178; Shaw, Malcom N *International Law* (6th ed, Cambridge University Press, 2008) 138.

¹⁶⁷ Fichtelberg, above note 164 at 73.

¹⁶⁸ Meijknecht, above note 161 at 61.

¹⁶⁹ *Ibid*, 35.

¹⁷⁰ Fichtelberg, above note 164 at 73; *ibid*, 45; Raič, above note 34 at 10.

entity exist in a sphere of exclusive jurisdiction, bearing in mind that this is a relative concept and so exclusive jurisdiction need not be absolute.¹⁷¹ Generally speaking, an entity of a self-governing nature, able to act according to its own ‘needs and will...without interference...’ will have the requisite autonomy for factual capacity.¹⁷² While autonomy is an external expression of legal capacity, the will constitutes an internal legal capacity.¹⁷³ This will is, like corporate personality, a fiction and in reality is only the composite will of a group of individuals.¹⁷⁴ A legal person must be able to act in accordance with its will.¹⁷⁵ Lastly an entity must have a face and voice. This occurs through organs and structures which allow the entity to conduct itself.¹⁷⁶

(ii) *Subjectivity*

Some authors stress the need to separate legal capacity from subjectivity.¹⁷⁷ This distinction is a useful one and should be maintained for two reasons. Firstly, to consider legal capacity as the sole pre-condition to legal personality would leave subjectivity a redundant concept.¹⁷⁸ Subjectivity distinguishes between the many organized entities *capable* of bearing international rights and duties, and the few other than states that *do*.¹⁷⁹ Secondly, legal capacity dictates what type of rights and duties an entity is reasonably capable of possessing. Therefore, to consider subjectivity as the only prerequisite to legal personality ignores the need for an entity’s rights and obligations to be limited by and closely correlated to its nature and legal capacity.¹⁸⁰ For example, if an international organization is capable of breaching human rights norms it should be able to be held

¹⁷¹ Meijknecht, above note 161 at 36.

¹⁷² Ibid, 37.

¹⁷³ Ibid, 38.

¹⁷⁴ Manner, G. “The Object Theory of the Individual in International Law” (1952) 46 Am. J.Int’l. L. 428, 430-432.

¹⁷⁵ Meijknecht, above note 161 at 38.

¹⁷⁶ Meijknecht, above note 161 at 41.

¹⁷⁷ Clapham, Andrew *Human Rights Obligations of Non-State Actors* (Oxford University Press, 2006) 69-73; Ibid, 45-50.

¹⁷⁸ Ibid, 49.

¹⁷⁹ Raič, above note 34 at 11.

¹⁸⁰ Green, above note 163 at 72-75; Meijknecht, above note 161 at 50; *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion*, above note 165 at 178.

accountable.¹⁸¹

With legal capacity and subjectivity distinguished, the extent of legal capacity required for subjectivity by various entities needs consideration. Entities with subjectivity and thus adequate legal capacity include national liberation movements, constituent states within federations¹⁸² and inter-governmental organizations like the UN.¹⁸³ Examples of more unusual subjects, both past and present, suggest there is a lowest common denominator to subjectivity, viz, being able to demonstrate a freedom from subordination to a superior authority (other than authorities like UN Security Council).¹⁸⁴ The Holy See is a legal person and party to a number of multilateral conventions¹⁸⁵ and bilateral agreements¹⁸⁶ in its capacity as the Holy See, not the territorial entity of the Vatican.¹⁸⁷ It conducts its relations with states as an equal, not as a state or territorial entity, but an entity subordinate to no higher authority.¹⁸⁸ Another example is the treatment of Czechoslovakia in peace treaties with Hungary and Austria as among the ‘allied and associated powers’ when, at the time, it comprised no more than the Czechoslovak National Council and a 30,000 man army. It was treated equally as a subject prior to having a territorial basis.¹⁸⁹ While these examples demonstrate the degree of autonomy states have considered adequate for subjectivity, they confirm that the attribution of subjectivity remains at the discretion of states.¹⁹⁰

It must be clarified that this constitutive approach to subjectivity through attribution,

¹⁸¹ Clapham, above note 177 at 71.

¹⁸² Hollis, Duncan B “Why State Consent Still Matters – Non-State Actors, Treaties, and the Changing Sources of International Law” (2005) 23 Berkeley J. Int’l L. 137, 147-151.

¹⁸³ Which is in addition a legal person with an objective personality opposable against even non-member states: *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion*, above note 165 at 185.

¹⁸⁴ Acquaviva, Guido “Subjects of International Law: A Power-Based Analysis” (2005) 38 Vand. J. Transnat’l L. 345, 380.

¹⁸⁵ For example, the Geneva Conventions.

¹⁸⁶ For example the Fundamental Agreement between the Holy See and Israel, signed 30 December 1993, (1994) 33 I.L.M. 154.

¹⁸⁷ Acquaviva, above note 184, 353-355.

¹⁸⁸ *Ibid*, 355.

¹⁸⁹ *Ibid*, 359-361.

¹⁹⁰ Hollis, above note 182 at 146-147, 154-155; Meijknecht, above note 161 at 49.

bears no relation to the declaratory nature of the recognition of states discussed above.¹⁹¹

(ii) *Jus standi*

While there are many subjects in international law, there are few with the procedural capacity to enforce their rights. This suggests that there is an additional element to being an international person. In the *Reparations Opinion*, *jus standi* was defined as ‘the capacity to resort to the customary methods recognized by international law for the establishment, presentation and the settlement of claims.’¹⁹² In finding that the UN had an independent legal personality and in distinguishing subjectivity from *jus standi* the ICJ noted:

‘What it does mean is that it is a subject of international law and capable of possessing international rights and duties, *and* that it has capacity to maintain its rights by bringing international claims.’¹⁹³

The ICJ clearly saw *jus standi* as separate to subjectivity and a necessary third element to international legal personality. This distinction has been accepted elsewhere.¹⁹⁴

Introducing this element helps resolve the long-standing debate over the significance of the possession of rights without the capacity to enforce them. Hersch Lauterpacht argued that procedural capacity is a separate matter to subjectivity and that mere beneficiaries of rights still possess those rights, not the entity or person charged with their enforcement.¹⁹⁵ In contrast one can argue that where rights are attributed to individuals without regard for procedural capacities, those individuals are only the objects of a right protecting a state’s interests.¹⁹⁶

¹⁹¹ The distinction comes from the fact that recognizing a *new class* of legal subject constitutes its *legal* existence. In contrast, because states as an entity have an accepted existence in the legal order, their recognition by other states does not constitute their existence as international legal persons. That occurs objectively when an entity meets the criteria of statehood.

¹⁹² *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion*, above note 165 at 177.

¹⁹³ *Ibid.*, 179.

¹⁹⁴ Meijknecht, above note 161 at 60; Raič, above note 34 at 12-13.

¹⁹⁵ Lauterpacht, Hersch *International Law and Human Rights* (Steven & Sons, 1968) 27; Meijknecht, above note 161 at 59; Nijman, above note 160 at 316.

¹⁹⁶ Okeke C.N. *The Expansion of New Subjects of Contemporary International Law Through their Treaty-Making Capacity* (Universitaire Pers Rotterdam, 1973) 18-19.

The international legal person, as distinct from the subject, rationalizes the significance of procedural capacities to the possession of rights. *Jus standi*, as a third constitutive element of an international legal person, recognizes that rights-holders without procedural capacities are subjects of international law and those with procedural capacities are international legal persons who actually participate in international law.¹⁹⁷

In summary, we can see that ILP is best understood as an umbrella concept built upon the inter-related but distinct concepts of legal capacity, subjectivity and *jus standi*. Each element is crucial in explaining the complex issue of ‘who’ is within the realm of international law and what rights, duties and procedural capacities they have. Without this framework, ILP remains an inflexible concept unable to accommodate developments in international society.

2. Applying the Framework: The PA and PLO

As discussed above, the PLO and PA are separate entities, each tending to have the powers and capacities the other lacks. This inquiry will demonstrate that the Palestinian people are left in a void. They are without any meaningful representation in the international community. While this is in part a result of the carefully constructed Interim Agreement, it is also a product of the state-centric nature of international law which unnecessarily views the state as the sole and desired entity for the presentation and protection of individuals’ interests under international law.

(a) The Palestinian Liberation Organization

The PLO is recognized by more than one hundred states as the legitimate representative of the Palestinian people and has been given full diplomatic status by around sixty.¹⁹⁸ It

¹⁹⁷ Meijknecht, above note 161 at 60.

¹⁹⁸ Noortman, above note 83 at 68; Benvenisti, above note 88 at 544; Chiang, above note 137 at 1026; Boyle, above note 68 at 302.

has permanent observer status in the UN,¹⁹⁹ meaning it may observe and speak at General Assembly sessions (but may not vote)²⁰⁰ and it also has a special power to co-sponsor draft resolutions concerning matters in the Middle East.²⁰¹ The PLO has also been a party to many binding agreements, including the Interim Agreement and refugee agreements with Jordan and Lebanon, and continues to negotiate agreements for the benefit of the Palestinian Authority, including a free association agreement with the EU.²⁰²

(b) The Palestinian Authority

The PA on the other hand has been excluded from participation in foreign relations,²⁰³ with the exception of four areas: economic relations, financial assistance agreements, regional development agreements and cultural, scientific and educational agreements.²⁰⁴ However, this must be done by the PLO on the PA's behalf.²⁰⁵ Nonetheless, the PA has sent and received diplomats and concluded a number of bilateral investment treaties.²⁰⁶ Some even argue that Article 45 of the VCLT could sanction the modification of the Interim Agreement given Israel's apparent acquiescence in the conclusion of these agreements.²⁰⁷

(c) The Collective Result

Consequently, while the PA and PLO have legal capacity and a degree of subjectivity, neither are yet international legal persons, on a plane comparable to states, able to protect and represent Palestinian interests internationally. Without a state entity, or rather as will

¹⁹⁹ G.A. Res 3237(XXIX) Observer Status for the Palestinian Liberation Organisation (22 November 1974); In 1988 the PLO delegation was renamed 'Palestine': G.A. Res. 43/177 Question of Palestine U.N. Doc. A/RES/43/177 (15 December 1988)

²⁰⁰ Breger, Marshall J and Quast, Shelby R. "International Commercial Arbitration: A Case Study of the Areas under Control the Palestinian Authority" (2000) 32 Case W. Res. J. Int'l. L. 185, 226.

²⁰¹ Ibid, 226-227.

²⁰² Ibid, 239-240.

²⁰³ Israel-Palestine Liberation Organisation, Interim Agreement on the West Bank and the Gaza Strip, Article 9(5)(a), above note 78.

²⁰⁴ Ibid, Article 9(5)(b)(i)-(iv).

²⁰⁵ Ibid, Article 9(5)(b).

²⁰⁶ Breger and Quast, above note 200 at 234, 236-237.

²⁰⁷ Ibid, 233, 235.

be argued later, without an entity providing a *bureaucratic link* between international law and the territories' inhabitants, the Palestinians remain in a legal void. Does it not seem peculiar and unsatisfactory that a people with a self-governing authority, but no higher state entity committed to their protection,²⁰⁸ should be excluded from meaningful participation in international law? The next chapter will consider whether the present structure of international law contradicts commonly accepted fundamental understandings of international law.

²⁰⁸ See Chapter V, Part 3.

CHAPTER IV: STATE-CENTRISM AND THE DIVERGENCE FROM THE PURPOSES OF INTERNATIONAL LAW

This chapter will highlight the disparity between the present structure of international law and the nature of attribution of subjectivity on the one hand, and the fundamental purposes of international law on the other. International law at present mistakenly treats statehood as a necessary prerequisite to being a fully endowed legal person under international law, tasked with the representation and protection of its nationals. The fixation on states, as territorial entities with exclusive jurisdiction therein, when considered against the situation of the PA in the OPT, frustrates and goes against the most fundamental purposes and aims of international law.

1. The Present State of ILP and Subjectivity

(a) The Approach to Attribution

The *Reparations Advisory Opinion*, although admittedly limited somewhat by its context, is a common starting place for examining the approach to the attribution of subjectivity and personality for new entities under international law. The opinion lays out a very progressive policy for the attribution of legal personality and subjectivity, though it remains under-utilized and silent on several matters.

The ICJ made very clear its view on the adaptability of international law to international life and the potential for a diversity of subjects when it stated:

‘The subjects of law in any legal system...and their nature depend upon the needs of the community. Throughout its history...international law has been influenced by the requirements of international life, and...the collective activities of States [have] already given rise to instances of action upon the international plane by certain entities which are not States.’²⁰⁹

The Court then explained that the UN had to have been created with an independent and

²⁰⁹ *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion*, above note 165 at 178.

objective legal personality, given the nature of its responsibilities and purposes in the Charter.²¹⁰ The Court stressed repeatedly that international rights and duties can be implied on the basis of functional necessity.²¹¹ For the UN, impartiality and independence from its member states necessitated an objective legal personality.²¹²

This functional approach is significant and potentially revolutionary. However, as has been pointed out, the ‘needs of the community’ are typically understood to be the needs of states and not international human society itself.²¹³ The Court did not go beyond the issue before it and addressed ILP upon a universal basis. In addition, it did not clarify whether the capacity to have ILP was a precondition to or a consequence of attaining ILP.²¹⁴

(b) The Consequent Confusion

Without a universal approach to attribution of subjectivity or personality, entry to the international legal realm remains fractured. This inadequate situation became obvious in the *Wall Advisory Opinion*. Israel argued that under Article 51 of the UN Charter and a string of Security Resolutions that followed September 11 2001,²¹⁵ it had a right to respond (preemptively) in self-defense to armed attacks by terrorist groups emanating from another state. While this expansion of the right to self-defence is widely accepted,²¹⁶ the Court still considered the application of Article 51 irrelevant because the attacks to which Israel was responding were from within the OPT, which are under Israeli control

²¹⁰ *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion*, above note 165 at 179; see the Charter of the United Nations, Article 1, above note 47.

²¹¹ *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion*, above note 165 at 179-180, 182-184.

²¹² *Ibid*, 183.

²¹³ Green, above note 163 at 54.

²¹⁴ *Ibid* 55; see the discussion in Chapter 3, Part 1(b)(ii) which suggests it is a pre-condition because legal capacity must determine the type of rights and duties an entity is capable of possessing.

²¹⁵ Charter of the United Nations, Article 51, above note 47.; S.C. Res. 1368 Threats Caused to International Peace and Security Caused by Terrorist Acts U.N. Doc. S/RES/1368 (12 September 2001); S.C. Res. 1373 Threats Caused to International Peace and Security Caused by Terrorist Acts U.N. Doc. S/RES/1373 (28 September 2001); *Legal Consequences of the Construction of a Wall in the Palestinian Occupied Territory, Advisory Opinion*, above note 37 para 138.

²¹⁶ Dinstein Yoram *War Aggression and Self-Defence* (4th ed, Cambridge University Press, 2005) 206-207.

and thus not ‘imputable to a foreign state.’²¹⁷ According to the prevailing interpretation, Article 51 does not apply when an attack has not emanated from another state.²¹⁸ In evaluating Israel’s argument, the Court relied heavily on its conclusion there was no state entity to impute as the emanating state. While we might insist that the attack be imputed to a subject of international law, with rights and duties allowing legal consequences to follow from its actions, in theory this need not be a state.²¹⁹ Judge Higgins recognized this flaw in the majority’s reasoning. She explained:

‘Palestine cannot be sufficiently an international entity to be invited to these proceedings, and to benefit from humanitarian law, but not sufficiently an international entity for the prohibition of armed attack on others to be applicable.’²²⁰

The gist of her argument was that it is unfair for Israel to lose its right of self-defence where an attack emanates from an area within its control and yet, facts permitting, an entity exists in some respects under international law able to be attributed with responsibility. The fragmented state of non-state actor subjectivity and personality is largely because attribution occurs without a close correlation to legal capacity.²²¹ The imputable state approach to dealing with non-state actors appeared implicitly in the reasoning of the *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda)*²²² in 2005. Uganda sought to invoke responsibility against the Democratic Republic of Congo (DRC) for attacks against Uganda, claiming it supported anti-Ugandan rebel groups operating from within its.²²³ Despite the factual responsibility of rebel groups for the attacks, and thus their potential capacity to incur legal responsibility for them, the present understanding of international law can only analyze such a situation in terms of state responsibility.²²⁴ While peoples are

²¹⁷ *Legal Consequences of the Construction of a Wall in the Palestinian Occupied Territory, Advisory Opinion*, above note 37 para 139.

²¹⁸ Dinstein, above note 216 at 204-205.

²¹⁹ Green, above note 162 at 64.

²²⁰ Sep. Op. Judge Higgins, *Legal Consequences of the Construction of a Wall in the Palestinian Occupied Territory, Advisory Opinion*, above note 37, para 34.

²²¹ Green, above note 163 at 70-74.

²²² *Case Concerning Armed Activities on the Territory of the Congo (New Application 2002) (Democratic Republic of the Congo v Rwanda), Judgment of 19 December 2005* (Internet) <<http://www.icj-cij.org/docket/files/116/10455.pdf>> accessed 14/10/09.

²²³ *Ibid*, paras 131-135.

²²⁴ *Ibid*, paras 142-147.

subjects under international law,²²⁵ the *structure* of international law does not yet approach legal personality universally. This inhibits the proper legal analysis of non-state actors' interactions with states and other legal persons.²²⁶

2. The Present Structure of International Law

(a) *Positivism and Realism*

While in theory and practice international law accommodates a wide range of actors, international law remains state-centric. Positivism views international law in terms of how it works, not how it ought to work. On this view international law applies to states and comprises only objective rules.²²⁷ While this view of international law may be somewhat contested today, it is widely supported and treats the non-state subjects on the international plane as mere exceptions.²²⁸ Similarly, states are treated with primacy in the realist tradition in international relations. Realism's most famous proponent, Hans Morgenthau, saw international law as subordinate to power politics because international law was too weak to curb state power.²²⁹ Because the international legal system remains in a state of anarchy, there can be no supreme norm or reason to the law, and the sovereign state is supreme.²³⁰

(b) *The Legal Order as it Stands*

Although this picture may seem inadequate, it remains largely true when one looks at fundamental areas of international law. The primary organization for the conduct of world affairs and the development of international law, the UN, is only open for membership to

²²⁵ Cassese above note 40 at 165.

²²⁶ Of course while one finds the suggestion Israel may invoke self-defense against a people repugnant, it must be bore in mind that a universal and correlative approach to ILP suggests it is conceptually coherent. While no just legal order *should* condone such a rule, it does not follow it *cannot*.

²²⁷ Noortman, above note 83 at 60-61.

²²⁸ Green, above note 163 at 51.

²²⁹ Morgenthau, Hans *Politics Among Nations* (3rd ed, Knopf, 1962) 80

²³⁰ Nijman, above note 160 at 294.

states.²³¹ The representation of individuals, peoples and societies is then dependent upon representation through independent states.²³² Similarly, the Statute of the ICJ states that ‘only states may be parties in cases before the court.’²³³ Therefore two fundamental institutions to the present structure of international law remain open to only states and provide no equivalent membership for an entity like the PA.

Similarly, the most recent Draft Articles on Diplomatic Protection remain entirely predicated upon states invoking protection. By definition it involves ‘invocation by a state’²³⁴, it is a right of states²³⁵ and can only be exercised over stateless persons where they are within the territorial jurisdiction of the state invoking the right.²³⁶ The fundamental process for the protection of nationals abroad is entirely state-centric and unable to accommodate the protection of the Palestinians.

A similar presumption appears in Article 2(1)(a) of the VCLT which provides that treaties are agreements concluded between states.²³⁷ Of course Article 3 does admit agreements other than treaties can be binding (such as the Interim Agreement discussed above) and that customary international law can still apply to them.²³⁸ Nonetheless, it is an example of the state-centric nature of international law. Agreements between states and non-state subjects, although still accepted, deviate from the norm. This is not to say that there are no treaties which do not allow a wider range of parties. For example, the United Nations Convention on the Laws of the Sea accommodates certain types of non-state entities.²³⁹ However, as explained later, such accommodation is still inadequate for the uniquely placed PA.²⁴⁰

²³¹ Charter of the United Nations, Article 4, above note 47.

²³² There are some exceptions, such as Belarus and Ukraine who were UN members despite being within the Soviet Union until its collapse.

²³³ Statute of the International Court of Justice, Article 34, above note 47.

²³⁴ Draft Articles on Diplomatic Protection 2006, Article 1 (2006) Y.B. Int'l. L. Comm's vol. II, 24.

²³⁵ Ibid, Article 2 at 28.

²³⁶ Ibid, Article 8 at 47.

²³⁷ Vienna Convention on the Law of Treaties, Article 2(1)(a), above note 79.

²³⁸ Ibid, Article 3(a) and (b).

²³⁹ United Nations Convention on the Law of the Sea with Annexes I-IX, Article 305, opened for signature at Montego Bay 10 December, 1982 (entered into force 16 November 1994) 1833 UNTS 3.

²⁴⁰ See Chapter V, Parts 3 and 4.

The UN Specialized Agencies also appear to have a focus on state membership. The PA is not a member of the Food and Agricultural Organization (FAO) of the United Nations.²⁴¹ The agency does, however, produce advice aimed to benefit the territories.²⁴² The position would appear the same for the International Fund for Agricultural Development (IFAD) which provides assistance through projects²⁴³ and loans,²⁴⁴ the International Monetary Fund (IMF) which provides advice to the PA on implementing financial policies,²⁴⁵ the United Nations Industrial Development Organization (UNIDO) which supports various projects in the OPT,²⁴⁶ and the World Bank which, while listing the ‘West Bank and Gaza’ as a country in the organization,²⁴⁷ overcomes the ‘sovereign state’ membership criterion by funding a trust for the OPT from its surplus income.²⁴⁸ Lastly the United Nations Educational Scientific and Cultural Organization (UNESCO) accepts Palestine as a permanent observer.²⁴⁹

²⁴¹ See the list of members: Food and Agriculture Organization of the United Nations “FAO Country Profiles” (Internet) <<http://www.fao.org/countryprofiles/default.asp?lang=en>> accessed 21/08/09.

²⁴² Riviere-Cinnamond, Ana, Food and Agriculture Organization of the United Nations “Operational Manual for Compensation Palestinian Territories Final version, May 2007” (Internet) <<http://www.fao.org/docs/eims/upload/237336/ah735e.pdf>> accessed 21/08/09.

²⁴³ The International Fund for Agricultural Development “IFAD in the West Bank and Gaza” (Internet) <<http://operations.ifad.org/web/ifad/operations/country/home/tags/gaza%20and%20the%20west%20bank>> accessed 21/08/09.

²⁴⁴ Båge, Lennart, International Fund for Agricultural Development “President’s memorandum: The West Bank, Report on the Participatory Natural Resource Management Programme financed from the IFAD Fund for Gaza and the West Bank” (Internet) <<http://www.ifad.org/gbdocs/eb/95/e/EB-2008-95-R-37.pdf>> accessed 21/08/09.

²⁴⁵ The International Monetary Fund “Macroeconomic and Fiscal Framework For The West Bank and Gaza: Third Review of Progress Staff Report February 25, 2009” (Internet) <<http://www.imf.org/external/np/wbg/2009/pdf/022509.pdf>> accessed 14/10/09.

²⁴⁶ United Nations Industrial Development Organization “Palestine Authority” (Internet) <<http://www.unido.org/index.php?id=808>> accessed 09/09/09.

²⁴⁷ The World Bank Group “Countries & Regions” (Internet) <<http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/0,,pagePK:180619~theSitePK:136917,00.html#w>> accessed 28/08/09.

²⁴⁸ The World Bank Group “West Bank and Gaza” (Internet) <<http://www.worldbank.org/ps>> accessed 27/08/09.

²⁴⁹ United Nations Educational Scientific and Cultural Organization “Member States” (Internet) <<http://erc.unesco.org/portal/PermanentDelegations.asp?language=en#P>> accessed 15/09/09.

3. Some Conceptions and Purposes of International Law

Clearly, international law is at present very state-centric with few legal persons other than states. ILP is not in practice a universally applied legal concept and the legal order remains fractured. Consequently, to a degree international law is disconnected from the social realities of the international community. This contradicts the humanistic and democratic consensus underlying the fundamental purposes of international law which rightly reject many of the core tenets of the positivist and realist approaches to international law.

(a) The State as an Institution

Firstly, the designation of the state as the supreme (and sometimes only) legal person in international law is questionable. James Brierly charged the nature of international law with causing ‘a divorce between [itself] and the ideas of justice prevailing in the society for which the law exists’.²⁵⁰ He concluded that it was entirely mistaken to view the state as having ‘mystical qualities’ or as being a *person* as opposed to a mere *institution*. With only humans truly being capable of possessing a will, a state’s will is no more than the chaotic and often irrational end product of internal politics. Consequently, he concluded that the state was no more than an institution of society, not a person constituting society.²⁵¹ For Brierly, states only gain legal personality where there is a legal unity of individuals behind the state. It is not a ‘fictitious unity’ in itself.²⁵²

This mystification of the state, Brierly contended, was based on a ‘false psychological assumption that authority over the individual human will should proceed from a separate and superior will.’²⁵³ So also, Hans Kelsen considered that the state is a product of the human tendency to reify and create second meanings to reality. The state as a person was

²⁵⁰ Nijman, above note 160 at 135.

²⁵¹ Ibid, 138, 142-143.

²⁵² Ibid, 146.

²⁵³ Ibid, 140.

merely a convenient legal fiction.²⁵⁴ Kelsen used the analogy of the atom, defined relationally as a point of unity rather than a thing, to reconceive the state as a point in the unity of law.²⁵⁵ The ‘will of the state’ was therefore only a personification of the legal norms creating that point of unity.²⁵⁶ The state was not transcendental to society and thus omnipotent, but rather no more than a unity of law providing a connection between individuals as subjects of domestic law and international law.²⁵⁷

(b) Natural Law and Policy-Orientated Conceptions of the Legal Order

With the state reduced to a mere institution of the society it represents, international law is more easily connoted with humanistic and democratic purposes. Coming from the natural law school of thought, Hersch Lauterpacht’s approach to international law viewed Article 38 of the Statute of the ICJ as incorporating values of natural law into positive law through the inclusion of general principles as a source of positive law which could then dictate how international law *should be*.²⁵⁸ He considered individuals as the ultimate subjects of international law, particularly since the creation of the UN Charter with its focus on human rights and responsibilities.²⁵⁹ His use of ILP was for the advancement of global federalism whereby states could be beneficial instruments within a ‘federal association’ that guaranteed the protection of human rights.²⁶⁰ Accordingly, state sovereignty should be curbed as this federal association expands, preserving the state only to charge it with the protection of human rights.²⁶¹ As a matter of ‘convenience and justice’ the state would be the subject of rights and duties, not the individual, much like the corporation is more conveniently the legal subject than shareholders and others.²⁶² The only exception would be where justice demands it.²⁶³

²⁵⁴ Ibid, 181.

²⁵⁵ Ibid, 183.

²⁵⁶ Ibid, 187.

²⁵⁷ Ibid, 184, 188.

²⁵⁸ Ibid, 298.

²⁵⁹ Lauterpacht, Hersch “The Subjects of the Law of Nations I” 63 L. Q. Rev. (1947) 438.

²⁶⁰ Nijman, above note 160 at 313.

²⁶¹ Ibid.

²⁶² Lauterpacht Hersch “The Subjects of the Law of Nations, II” 64 L. Q. Rev. (1948) 97, 107.

²⁶³ Nijman, above note 160 at 315; a typical example is individual liability in international criminal law.

For Lauterpacht, the attainment of personality was governed by actual practice and ‘the reason of the law’,²⁶⁴ which, in Lauterpacht’s view was ‘the furtherance of justice and the protection of the individual human being’.²⁶⁵ The attribution of legal personality to emerging entities was to meet:

‘the requirements of an expanding and developing law not limited to the niceties of international intercourse but concerned with the well-being of the individuals as the ultimate units of human society...’²⁶⁶

With the individual human being and international society as the subject of the reason of the law, certain natural law principles emerge dictating that the law serve the well-being of the individual, including through an appropriate approach to ILP. Thus the ultimate subject of international law dictates the sources and contents of the law.²⁶⁷ Here international law revolves around the well-being of the individual.

Policy-oriented approaches to international law make the same complaint of its state-centric nature. Rosalyn Higgins rejects the subject-object dichotomy,²⁶⁸ holding that it is ‘an intellectual prison of our own choosing and then declared...to be an unalterable constraint.’²⁶⁹ She proposes that international law should involve just participants. In her view, states, organizations and individuals are equal participants in the process of international law. Presuming that the ‘individual’s good is the ultimate end of the law’, she questions why an individual cannot obtain judgment before the ICJ where the ‘subject matter [is] of immediate legal interest to him.’²⁷⁰

Taking international law as a process of participation is not new. Myers McDougal saw international law in such terms, defining power as ‘participation in the making of decisions’ and formal authority as when the community expects such power to be

²⁶⁴ Ibid, 318.

²⁶⁵ Ibid.

²⁶⁶ Lauterpacht, above note 262 at 450.

²⁶⁷ Nijman, above note 160 at 321-322.

²⁶⁸ This framework for international law holds the legal order consists of subjects (who bear right and responsibilities) and objects (all those ‘things’ the law deals with), the latter including the individual.

²⁶⁹ Higgins, Rosalyn *Problems and Process: International Law and How We Use It* (Oxford University Press, 1994) 49

²⁷⁰ Ibid 50-5.

exercised, meaning the participants in international law are those with effective control and formal authority.²⁷¹ His use of ILP was democratic because it promoted the protection and subordination of a wide range of participants under international law.²⁷² The end goal being an ‘international law of human dignity’, incorporating the widest possible sharing of common interests through persuasion rather than coercion.²⁷³ MacDougal, like Georges Scelle, argued international law had to be made more democratic to prevent it from being blind in its application and prevent the silencing of the individual.²⁷⁴ Similarly, Wolfgang Friedmann considered that the growth in the substantive scope of international law into matters of universal interest²⁷⁵ demanded a vertical restructuring of international law to include new public and private participants.²⁷⁶

4. The Disparity

While there are obvious differences between the above theories on many matters, there remain several points in common. Firstly, viewing the state as a legal person hides the real nature of the state as an institution of society, which at most is no more than a convenient legal construct. Second, although natural law and policy-oriented schools of thought dispute the source of the reason of the law, we nonetheless find that international law is viewed by some as serving a higher purpose, a reason or ultimate policy. It is not a mere social contract of convenience between states. Rather we find it has incorporated egalitarian notions of human dignity and democracy.

Thus a disparity emerges between the presently state-centric international system and a number of widely held conceptions of international law. The membership criteria for many key international organizations entirely contradict notions of wider participation in international law and embrace the state as the prime and necessary entity. If international law aims to be inclusive of many participants and ultimately serve human dignity, then

²⁷¹ Nijman, above note 160 at 326.

²⁷² McDougal Myers S. “Perspectives for an International Law of Human Dignity” in McDougal et al (eds) *Studies in World Public Order* (Yale University Press 1960) 1010

²⁷³ Nijman, above note 160 at 328.

²⁷⁴ *Ibid*, 233, 333

²⁷⁵ Namely social and economic matters as part of ‘cooperative international law’

²⁷⁶ Friedmann, Wolfgang *The Changing Structure of International Law* (Stevens, 1964) 61-64, 67-69

one cannot understand the current position of the Palestinians, a self-governed people²⁷⁷ with the same important interests and dignity as any other state but without the direct connection to international law. If the state has value as a bureaucratic link between international law and the individual, the question begs as to whether this bureaucratic link *has to* be a state? Could human dignity and democracy in international law be served by a departure from this fixation on the state? Do any developments in positive international law connote the introduction of new legal persons to the legal order? Or is there something about the state which makes its place in the legal order essential?

²⁷⁷ Although, as discussed in Chapter II, Part 3, the PA is by no means the supreme authority in that territory.

CHAPTER V: THE TRUE ROLE OF THE STATE AND A CALL FOR INTERNATIONAL LEGAL PERSONALITY IN THE INTERIM

This chapter will consider the role of the state in international law against that of ILP. In doing so, it will be shown that it is ILP, and not the characteristics of the state (in itself), which makes the state the prime legal person in international law. The criteria of statehood, when looked at against ILP, ensure that states are insubordinate within the legal order.²⁷⁸ The PA is subordinate to Israel. However, as will be discussed, its endowment with ILP would not infringe upon Israel's ILP.²⁷⁹

1. The Perceived Role of the State

Nationality links the individual to the state which in turn links the individual to international law. Unsurprisingly the state is described as essential to the protection of individuals internationally.²⁸⁰ For stateless persons 'international law is essentially rendered inoperable...'²⁸¹ For example, it was argued that independence was necessary in Kosovo, so that there could exist an entity responsible for connecting Kosovars to international law. In context, then, while most individuals have standing before the European Court of Human Rights, Kosovars were without remedy because of the judicial immunities of United Nations Mission in Kosovo (UNMIK).²⁸²

Turning to the principle of self-determination for a moment, we see it has three possible outcomes from its exercise: independence, integration and association.²⁸³ The exercise of self-determination is primarily a process, being the ascertainment of the freely chosen

²⁷⁸ In other words subject only to international law.

²⁷⁹ Unlawful secession, by a territorial entity, from a state of course would.

²⁸⁰ Weis, above note 13 at 162.

²⁸¹ Blackman, Jeffrey L. "State Succession and Statelessness: The Emerging Right to an Effective Nationality Under International Law" (1997-8) 19 Mich. Jour. Int'l L. 1141, 1150.

²⁸² Islami, Iliriana "The Insufficiency of International Legal Personality of Kosovo as Attained Through the European Court of Human Rights: A Call for Statehood" 80 Chi. -Kent. L. Rev. (2005) 83, 84-85, 89, 95

²⁸³ Raič, above note 34 at 211.

will of the people as to their political future, rather than a particular outcome.²⁸⁴

Typically, then, regardless of the choice so made, a people exercising their right will come under the protection of a state, whether it is their own independent state or not. Equally, then, self-determination seeks to place people within an entity or institution linking them to and protecting them under international law. Presently, then, the state links individuals to international law. However, to say that the state must be this 'link' is circular, so far as it is only as true as the extent to which the present structure of international law remains state-centric.

It is more accurate to view ILP, and not the state, as the 'link'. Using the example of Kosovo, it is obvious that Kosovo's acceptance as a state has allowed it to begin to gain access to institutions such the IMF and World Bank,²⁸⁵ thus beginning to provide Kosovars with direct participation in and protection under international law. But it is the accrual of rights, duties and *jus standi* by Kosovo which permits these positive developments. A key policy objective of self-determination, as exemplified by Article 55 of the UN Charter, is the creation of economic stability and peaceful and friendly relations among nations 'based on respect for the principle of...self-determination of peoples'.²⁸⁶ As the IMF and World Bank have broadly the same policy objectives,²⁸⁷ extending their membership to Kosovo supports these ends by introducing a population into an economic and financial system that is conducive of stability and well-being.²⁸⁸ Why, then, should any entity with the adequate legal capacity, and in turn ILP, be prevented from participating equally along side states? Critical to this claim is the

²⁸⁴ *Western Sahara, Advisory Opinion*, above note 41 para 55-58.

²⁸⁵ IMF External Relations Department "Kosovo Becomes the International Monetary Fund's 186th Member" (Internet) <<http://www.imf.org/external/np/sec/pr/2009/pr09240.htm>> accessed 20/07/09; The World Bank Group "Kosovo Joins World Bank Group Institutions" (Internet) <<http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/ECAEXT/KOSOVOEXTN/0,,contentMDK:22230081~menuPK:297775~pagePK:2865066~piPK:2865079~theSitePK:297770,00.html>> accessed 20/07/09.

²⁸⁶ Charter of the United Nations, Article 55, above note 47.

²⁸⁷ International Monetary Fund Articles of Agreement Article 1, June 28, 1990 (Internet) <<http://imf.org/external/pubs/ft/aa/aa.pdf>> accessed 02/09/09; The World Bank Group "About Us" (Internet) <<http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,pagePK:50004410~piPK:36602~theSitePK:29708,00.html>> accessed 02/09/09.

²⁸⁸ Faith need not be placed in the rationale laid out in Article 55 of the UN Charter. Economic stability and peace have long been considered related: Morganthau Hans "Bretten Woods and International Cooperation" (1945)23 *Foreign Affairs* 182, 185

suggestion that the ‘adequate legal capacity’ here is something narrower than that of states. To the extent that this is true, ILP is unduly restricted to possession among independent states.²⁸⁹

2. The Wider Rationale behind the Criteria for Statehood

The criteria of statehood (or legal capacities) exhibit a wider rationale than a purely ‘bureaucratic rationale’. As discussed earlier, with ‘effective government’ incorporating the other three Montevideo criteria and ‘independence’ incorporating ‘effective government’, it is obvious that an important requirement of statehood is being an organized political community to the *exclusion* of any other. Yet this criterion is surely wider than what is required for a state to link its population to international law. Surely, a self-governing entity, in the position of the PA, does not need such *absolute* independence to connect a population to international law? While the state’s insubordination makes it the ideal bureaucratic institution for a society, one can still ask can this institution not be something less? The capacity to conduct foreign relations, which entails the capacity to put international obligations into effect,²⁹⁰ is obviously a necessary capacity, but can the same be said of absolute independence? Although not independent, the PA does have a small sphere of governmental authority. Why then should it be prevented from connecting its four million inhabitants²⁹¹ to international law, when they comprise a population larger than any of the South Pacific nations?

3. The Anomalous Position of an Occupied but Stateless Territory

There is no valid reason. Rather, the present legal order incorrectly assumes all entities, less than states, are within the jurisdiction of a superior (state) entity, charged with the protection of that lesser entity’s constituents, leaving no population outside international

²⁸⁹ Bearing in mind the exceptions of some international organizations and some peculiar entities like the Holy See.

²⁹⁰ Crawford, above note 9 at 62.

²⁹¹ Central Intelligence Agency “West Bank” (Internet) <<https://www.cia.gov/library/publications/the-world-factbook/geos/we.html>> accessed 04/09/09; Central Intelligence Agency “Gaza Strip” (Internet) <<https://www.cia.gov/library/publications/the-world-factbook/geos/gz.html>> accessed 04/09/09.

law. This assumption appears in, for example, Article 305 of the United Nations Convention on the Laws of the Sea²⁹² which deals with the scope of entities able to sign the Convention (UNCLOS), such as self-governing associated states and internally self-governing territories with the requisite competence to treat on matters in the convention.²⁹³ Also catered for, at the time, was ‘Namibia, represented by the United Nations Council for Namibia.’²⁹⁴ The common trait to all these entities is that they are competent to join the Convention themselves, *or else they have a superior entity representing their interests in those matters*, reflecting the assumption attributing subordinate entities with rights, duties and procedural capacities is a transfer of legal personality from a state to that entity. To allow an entity to exercise legal rights rightly held by its superior is disruptive to the legal order and a derogation from the sovereignty of states.

But whose rights are abrogated by the endowing of such rights, duties and capacities on the PA? Israel has no valid claim to sovereignty over the OPT, being a mere belligerent occupant. Palestinians are not nationals of Israel. This question arises in the issue of who may grant the ICC jurisdiction in the OPT. The Court’s personal and territorial jurisdiction over member states and their nationals may be extended by Security Council referral or non-member state recognition.²⁹⁵ However, it is not clear whether the prerogative to recognize the Court’s jurisdiction in the OPT belongs to the PA.²⁹⁶ Regardless, however, of this uncertainty, it is clear in practice that Israel does not conduct itself as an institutional link for the Palestinians to international law. Israel has classified Gaza as a hostile territory²⁹⁷ and crippled its economy through economic sanctions.²⁹⁸ Similarly, Israel is dragging its feet on releasing airwaves for use in a new cellular phone

²⁹² United Nations Convention on the Law of the Sea with Annexes I-IX, Article 305, above note 239.

²⁹³ Ibid, Article 305(a), (c), (d), (e).

²⁹⁴ Ibid, Article 305(b).

²⁹⁵ Ibid, Article 12(2)-(3) and Article 13(c) ICC.

²⁹⁶ Regardless of whether the PA actually has the competence to act in this context, it may just be that the plain wording of Article 12(3) of the Rome Statute insists on the entity concerned being a state. But the answer to this question is not the object of this piece.

²⁹⁷ Carey, above note 156 at 649.

²⁹⁸ Macintyre Donald, The Independent “Poverty Pushing People into Hamas Militia” (Internet) <<http://www.independent.co.uk/news/world/middle-east/poverty-pushing-people-into-hamas-militia-877804.html>> accessed 04/09/09.

network of great potential value to the West Bank economy.²⁹⁹ Unlike the picture painted by Article 305 of UNCLOS, the PA does not comprehensively have either the formal competence to adequately participate in international law or the benefit of such representation by a superior entity.

4. The Inadequate Interim Status

State-centrism and the assumption that all non-states are directly or indirectly represented by a state leave Palestinians in a legal void. This is compounded by the near equation of ILP to statehood, which in turn treats statehood as the only solution. Ultimately this may be correct, *but in the interim* this anomaly cannot continue. As Judge Weeramantry rightly stated in the *Case Concerning East Timor (Portugal v Australia)*,³⁰⁰ in reference to the necessity that Portugal be able to represent the interests of East Timor:

‘any other view would result in the anomalous situation of the current international system leaving a territory and a people, who admittedly have important rights opposable to all the world, defenceless and voiceless...’³⁰¹

The Palestinian people remain defenceless and voiceless under international law. Article 48 of the Draft Articles on State Responsibility allows a state, not injured by another state’s actions, to invoke responsibility where there exists an ‘established... collective interest’ amongst a group of states or where the obligation is ‘owed to the international community as a whole’,³⁰² This does not provide much scope for the protection of Palestinian interests by third party states. Firstly, Article 40 narrows the operation of Article 48 to where a ‘serious’ breach of a peremptory norm has occurred. Secondly, although Article 48(1)(b) encompasses obligations *erga omnes* and therefore bypasses the

²⁹⁹ Eldar Akiva, Haaretz “Blair Concerned Israel Damaging major PA Economic Project” (Internet) <<http://www.haaretz.com/hasen/spages/1110506.html>> accessed 30/08/09; and see also Issacharoff Avi, Haaretz “Israel Demands PA Drop War Crimes Suit at the Hague” (Internet) <<http://www.haaretz.com/hasen/spages/1117296.html>> accessed 29/09/09 where Israel is using the cellular network to attempt to persuade the PA from reporting Operation Cast Lead to the International Criminal Court.

³⁰⁰ *Case Concerning East Timor (Portugal v. Australia)*, Judgment, I. C.J. Reports 1995, 90

³⁰¹ Judge Weeramantry, Sep. Op. *ibid*, 181.

³⁰² Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001, Article 48(1)(a) and (b) (2001) Y.B. Int'l. L. Comm's vol. II, 126.

nationality principle in the invocation of state responsibility,³⁰³ practice suggests its operation will be rare. In the *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda)* a counter claim by Uganda that the Congo was treating certain individuals inhumanely was rejected, and rightly in the context of diplomatic protection, for want of a link of nationality.³⁰⁴ Yet the Court did not consider the application of Article 48(1)(b), it not being argued by Uganda, and it was only applied in the dissenting opinion of Judge Simma.³⁰⁵ Thirdly, political realities make this discretionary mechanism unlikely to be invoked by states for the protection of Palestinian interests.

A full list of examples demonstrating the Palestinians' precarious position is not possible here. However, the uncertainty over the legal validity of the PA's recognition of the ICC's jurisdiction is a cogent example. The ability of Palestinians to enforce international criminal law beyond their own courts is subject to the will of the Security Council and the Judiciary of the ICC. Yet they constitute a discrete people and territory no less than any other state.

In summary, the PA remains unnecessarily and unjustifiably without ILP. Over four million people remain disconnected from the benefits and protections of international law as a result of treating statehood in itself, rather than ILP, as an essential attribute of an entity acting as an intermediary between individuals and international law.

5. The Problematic Alternatives

If one concludes the OPT must be governed by an entity with ILP, one may look to the imposition of an international territorial administration (ITA). However, in the context of the Israeli-Palestinian conflict several issues make this solution questionable.

³⁰³ Vermeer-Kunzli, Annemarieke "A Matter of Interest: Diplomatic Protection and State Responsibility *Erga Omnes*" (2007) 56 Int'l Comp L. Quart. 553, 579-580.

³⁰⁴ *Case Concerning Armed Activities on the Territory of the Congo*, above note 222 para 333.

³⁰⁵ *Ibid*, paras 19 and 37.

Firstly, it is often presumed UN ITAs carry a valuable air of legitimacy.³⁰⁶ While UN legitimacy stems from its rejection of colonialism, its dedication to peaceful and friendly relations among nations and a wide membership base, its ability to install an ITA still typically hinges on the consent of all parties concerned.³⁰⁷ One may also question the impartiality and benevolence of the UN, which acts under the Security Council's Chapter VII powers, exercised by a small group of states, to implement ITAs.³⁰⁸ Additionally, the UN in general suffers from 'inherent political factors and technocratic limitations.'³⁰⁹ Indeed, the UN itself has questioned how capable it is to perform such tasks.³¹⁰ Some sceptics also brand the UN and ITAs as fronts for the creation of liberal democracies worldwide.³¹¹ It is quite likely both Israel and the PA would oppose any such administration, thus eroding its legitimacy from the outset.

Secondly, with the pressure to succeed placed on these administrations and the obvious convenience of monopolizing power for speeding reconstruction, an 'authority creep' tends to occur in the mission mandate.³¹² In Kosovo, UNMIK responded to criticisms of being ineffectual by interpreting its powers very broadly to bypass local consensus-building measures and to ignore local concerns so as to speed up the process of restoring Kosovo to a functioning area.³¹³ UNMIK was then heavily criticized for disrespecting democracy, human rights and the rule of law.³¹⁴ Again, after the UN Territorial Administration in East Timor (UNTAET) appointed a foreign civil service, local consensus building consisted of only a consultative council. Consequently, it had the ability to act decisively and quickly, but created local resentment for its authoritarian

³⁰⁶ Dickerson, Hollin K. "Assumptions of Legitimacy: And the Foundations of International Territorial Administration" (2006) 34 *Denv. J. Int'l L. & Pol'y* 161, 162.

³⁰⁷ *Ibid*, 172-179.

³⁰⁸ *Ibid*, 174.

³⁰⁹ *Ibid*, 190.

³¹⁰ Brahimi Lakhdar *Report of the Panel on United Nations Peace Operations* U.N. Doc. 5/2000/809 A/55/305 (Aug 21, 2000) (Internet) <http://www.un.org/peace/reports/peace_operations> accessed 22/08/09

³¹¹ Dickerson, above note 306 at 191.

³¹² Ford, Christian E. and Oppenheim, Ben A. "Neotrusteeship or Mistrusteeship? The 'Authority Creep' Dilemma in the United Nations Transitional Administration" (2008) 41 *Vand. J. Transnat'l L.* 55, 95-96.

³¹³ *Ibid*, 85-90.

³¹⁴ Steiner, Michael "Ombudsperson Institution in Kosovo, *Second Annual Report 2001-2002*" (Internet) <<http://www.ombudspersonkosovo.org/repository/docs/E6020710a.pdf>> accessed 05/09/09.

approach.³¹⁵ With Fatah and Hamas being already widely supported political groups in the OPT, an imposed and authoritarian ITA would surely arouse local resentment.

Thirdly, past ITAs have shown themselves to lack accountability. Both UNMIK and UNTAET are widely reported to have committed extensive human rights violations.³¹⁶ They maintained complete immunities from judicial review because the missions lacked checks and balances to prevent the creation of self-serving immunities.³¹⁷

In summary, an ITA in the OPT appears inappropriate. They are typically useful only where there is a complete political vacuum (the failed state), where the political players have resorted to widespread violence, or where the unanimous consent of the local population is gained.³¹⁸ The OPT do not seem to fit any of the above situations. Only the adequate inclusion of the PA in the legal order will remove the Palestinians from the fringes of international law.

³¹⁵ Ford and Oppenheim, above note 312 at 92-95.

³¹⁶ Dickerson, above note 306 at 181, 184.

³¹⁷ Ibid, 184-185; Islami, Iliriana, above note 282 at 90.

³¹⁸ Ford and Oppenheim, above note 312 at 98.

CHAPTER VI: INCLUSION AND PARTICIPATION: THE CONNOTATIONS OF THE CONTEMPORARY EMERGENCE OF SELF-DETERMINATION AS A GENERAL PRINCIPLE OF INTERNATIONAL LAW

The emergence of the principle of self-determination is surely not without significance to the legal order. Self-determination is already the source of limited subjectivity for national liberation movements, but it has not yet effected structural changes to international law.³¹⁹ While it does not mandate any vertical expansion of the participants in international law, it is argued that the collective actions of states, in developing the principle of self-determination as it stands today, have obliquely brought about a vertical expansion of the participants in international law at least as far as to entities in the legal position of the PA.

1. The Ambiguous Contents and Status of Self-Determination

Self-determination is an ambiguous, yet fundamental, principle of international law. While arguably a *jus cogens* and *erga omnes* norm, its exact influence upon international law is unclear.

(a) Self-Determination as Jus Cogens

A peremptory norm is a norm ‘recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.’³²⁰ Such norms must emerge as customary international law prior to attaining a peremptory status.³²¹

³¹⁹ Cassese, above note 40 at 165-167; Noortman, above note 83, 67.

³²⁰ Vienna Convention on the Law of Treaties, Article 53, above note 79.

³²¹ Andre de Hoogh *Obligations Erga Omnes and International Crimes* (Kluwer Law International, 1996)

Views are mixed as to whether self-determination is *jus cogens*.³²² While supporters of self-determination as *jus cogens*³²³ commonly cite two leading opinions,³²⁴ those opinions alone do not establish self-determination as *jus cogens*.³²⁵ Rather it is hinged upon consensus among the community of states ‘as a whole’ and the norm’s operation against contradictory treaties and other norms not of a *jus cogens* status.³²⁶ While in the 1960’s and 1970’s a number of socialist and developing states expressed support for self-determination as *jus cogens*, there was no equivalent support expressed by Western states.³²⁷ From this, for some, the norm cannot be *jus cogens*.³²⁸ However, others argue that Western states’ acceptance of the principle ‘as fundamental and universal’ in several declarations, indicates an implicit acceptance of its *jus cogens* status.³²⁹ Less controversially, self-determination has been argued as *jus cogens* in the narrower context of colonialism and alien domination.³³⁰

(b) Self-Determination as Erga Omnes

The concept of rights *erga omnes* in international law was first discussed in the *Barcelona Traction Case* where the ICJ explained:

‘an essential distinction should be drawn between the obligations of a state towards the international community as a whole, and those arising vis-a-vis another State...By their very

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³²² Cassese, above note 40 at 134-140; Raič, above note 34 at 218-224; Simma, Bruno *The Charter of the United Nations: A Commentary* (2nd ed, Oxford University Press, 2002) 62; Summers, above note 44 at 387-392.

³²³ Brownlie, Ian *The Principles of Public International Law* (6th ed, Oxford University Press, 2003) 489; Simma, *ibid*, 62.

³²⁴ G Arangio-Ruiz, *Fourth Report on State Responsibility* (A/CN.4/444 and Add.1-3) (1992) Y.B. Int'l. L. Comm's 11, pt.1 p.34 para 91; Judge Ammoun, Sep. Op. *Barcelona Traction, Light and Power Company, Limited, Judgment (Second Phase)*, I.C.J. Reports 1970, 3, 304.

³²⁵ Cassese, above note 40 at 135; Summers, above note 44 at 388-389.

³²⁶ Summers, above note 44 at 389-391.

³²⁷ Support was expressed in UN General Assembly discussions on the Draft Articles on the Law of Treaties and the Declaration on Friendly Relations, discussions at the Vienna Conference on the Law of Treaties, and various submission before the ICJ in reference to Western Sahara: Cassese, above note 40 at 136-137.

³²⁸ Summers, above note 44 at 389.

³²⁹ Cassese, above note 40 at 139-140.

³³⁰ Raič, above note 34 at 218-219; *ibid*, 139-140.

nature the former are the concern of all States. In the view of the importance of the rights involved, all states can be held to have a legal interest in their protection; they are obligations *erga omnes*.³³¹

The ICJ has held self-determination to be *erga omnes* on two occasions: In *East Timor*,³³² and the *Wall Advisory Opinion*.³³³ This is unsurprising given that self-determination is central to our present system of international law and the UN Charter, it obliges all states to respect it as a right held by all peoples, and it is entwined with principles which are ‘the concern of all states’.³³⁴

(c) A Principle that Confers a Right

Self-determination is inconsistently described as a right, a principle or both. The ICJ has tended to refer to it alternatively as a right or a principle³³⁵ and has even implied it could simultaneously be both.³³⁶ Equally so the UN Charter, many General Assembly resolutions and the ICCPR and ICESCR all appear to use both terms.³³⁷ However, it is best understood as a principle that endows a right upon peoples once those subjects are identified, rather than simply a right or a principle.³³⁸ As to whether it is the right (and its rules) or the principle which is *jus cogens* and *erga omnes*, some suggest, that without more state practice, it would be improper to consider either elevated without the other.³³⁹

³³¹ *Barcelona Traction, Light and Power Company, Limited, Judgment (Second Phase)*, I.C.J. Reports 1970, 3, para 33.

³³² *Case Concerning East Timor (Portugal v Australia)*, above note 300 para 29

³³³ *Legal Consequences of the Construction of a Wall in the Palestinian Occupied Territory, Advisory Opinion*, above note 37 para 88

³³⁴ Summers, above note 44 at 393-394.

³³⁵ See for example: *Western Sahara Advisory Opinion*, above note 41 paras 55, 57, 59, 70, 161-162; *Case Concerning East Timor (Portugal v Australia)*, above note 300 at para 29.

³³⁶ *Western Sahara Advisory opinion*, above note 41 para 55.

³³⁷ Summers, above note 44 at 379-382.

³³⁸ *Ibid*, 383.

³³⁹ Cassese, above note 40 at 140.

(d) Self-Determination in the Jurisprudence of the International Court of Justice

Self-determination has been recognized in two significant respects by the ICJ. Firstly, the norm gives rise to a right of self-determination, for all peoples, to freely choose their future political status, whatever that result may be.³⁴⁰ Secondly, it has been declared a right *erga omnes*.³⁴¹ However its effect against other norms remains unclear. *Erga omnes* norms give rise to an interest, held by all states, in their observance. Yet this was of little significance in *East Timor*. The ICJ refused to pass judgment on the case because it would have ‘amount[ed] to a determination that Indonesia’s entry into and continued presence in East Timor [was] unlawful’.³⁴² Consequently, with Indonesia absent from the proceedings, the rule of consent prevailed over Portugal’s interest in the observance of the obligation on states to respect the right of all peoples to self-determination. Additionally, Judge Weeramantry, in a separate opinion, seemed to base Portugal’s standing before the court on its status as the administrator for East Timor, not its interest in the observance of an *erga omnes* norm per se.³⁴³ In the *Wall Advisory Opinion*, as pointed out by Judge Higgins, the majority of the court, incorrectly viewed the doctrine of collective non-recognition, as arising from the breach of *erga omnes* norms, rather than independently.³⁴⁴ Accordingly, some conclude that the jurisprudence of the ICJ has not shown self-determination to be more than a norm of customary international law.³⁴⁵

In summary, self-determination is ambiguously placed in the corpus of international law, being recognized by the ICJ on the one hand, and yet of little consequence on the other.

³⁴⁰ *Western Sahara Advisory opinion*, above note 41 para 55-58.

³⁴¹ Cassese, above note 40 at 136-137.

³⁴² *Concerning East Timor (Portugal v. Australia)*, above note 300 at para 29, 34.

³⁴³ Judge Weeramantry, Sep. Op. above note 301 at 182 (although he did make use of its *erga omnes* character in other respects)

³⁴⁴ *Legal Consequences of the Construction of a Wall in the Palestinian Occupied Territory, Advisory Opinion*, above note 37 para 155-159; Judge Higgins Sep. Op. Para 38.

³⁴⁵ Summers, above note 44 at 394.

2. Obligation and Self-Determination

Leaving aside the uncertain status of the principle of self-determination, one might ask whether the obligation on states to respect the right of all peoples to self-determination require that states endow an entity like the PA with ILP? This would, after all, advance the Palestinians' right to self-determination. However, such a structural modification of international law does not sit sensibly *as an obligation on states, in the strictly legal sense*.

(a) *Some Key Obligations on States*

A fundamental general obligation upon states is to respect the right of all peoples to self-determination. This is the corollary of Article 1(1) of the ICCPR (and Article 2 of the Declaration on the Granting of Colonial Independence).³⁴⁶ Similarly, states are to 'promote...[the] realization of the principle of...self-determination of peoples.'³⁴⁷ In the specific context of economic development, Articles 55 and 56 of the UN Charter require the UN and its member states to promote economic development based on respect for the principle of self-determination.

(b) *Breaching Obligations*

A 'breach of an international obligation' occurs when a state acts 'not in conformity with what is required by that obligation.'³⁴⁸ The international community does, however, promote the Palestinians' right to self-determination and economic development in the OPT. Many of the UN Specialized Agencies are heavily involved in developing the West Bank and Gaza economy.³⁴⁹ Similarly, the 'Quartet'³⁵⁰ has long sought to broker a two-

³⁴⁶ International Covenant on Civil and Political Rights, Article 1(1), above note 53. and UNGA 1514

³⁴⁷ G.A. Res. 2625 (XXV), above note 50.

³⁴⁸ Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001, Article 12, above note 302 at 54.

³⁴⁹ See the previous discussion in Chapter 4, and in particular, the extent of the World Bank's involvement in the OPT: The World Bank Group "The World Bank's Operations in the West Bank and Gaza" (Internet) <<http://siteresources.worldbank.org/INTWESTBANKGAZA/Resources/PortfolioJune08.pdf>> accessed 21/08/09.

state solution to the Israeli-Palestinian conflict under a final status peace agreement. While these efforts are somewhat misguided, so far as they neglect to provide an adequate solution in the interim, they are by no means ‘not in conformity with’ the aforementioned obligations. The principle of self-determination does not sensibly *denote* the *precise means* by which its broad policy objectives should be realized. Nor, then, can the efforts of states to realize them be warped into breaches of international law.

Of course this is not to say that without specific legal ‘directions or prohibitions’ the principle (or right) of self-determination is incapable of founding obligation. In *East Timor*, Judge Weeramantry stated:

‘If the right of self-determination is to be taken seriously, attention must focus on the underlying principles implicit in the right, rather than the itemization of unspecified incidents of direction and prohibition which...are not a complete statement of the duties that follow from the right.’³⁵¹

He concluded that self-determination, as a general principle of international law, was not ‘exhausted by the enumeration of particular itemized duties’, but rather, operated like the duty of care in domestic legal systems.³⁵²

3. The Vertical Expansion of Participation in International Law

(a) The Premise

The international community’s focus upon a two-state solution for Palestine reflects our deeply state-centric understanding of international law. Fulfilling the pressing need to link all peoples to international law, and serve the ends of self-determination, are considered best achieved through the proliferation of the state entity. However, as explained, this preference for statehood is largely circular. Equally so, opposing the vertical expansion of participation in international law, on the basis that it derogates from

³⁵⁰ The United States, the United Nations, the European Union and Russia.

³⁵¹ Judge Weeramantry, Sep. Op. above note 301 at 211.

³⁵² Ibid.

the ILP and sovereignty of states, appears unfounded because the PA would not derogate the ILP of any legal person. With these two propositions in mind, one can see that the humanistic and democratic conceptions of international law, and the end goals of self-determination, appear frustrated by the state-centric structure of international law.

(b) The Collective Actions of States

In the *Reparations Advisory Opinion* the ICJ stated:

‘...the progressive increase in the collective activities of state has already given rise to certain instances of action upon the international plane by certain entities which are not states.’³⁵³

One must therefore ask at what point it can be concluded the collective activities of states, in developing the contents of international law, have necessarily brought about structural developments in international law? There must surely come a point where orthodoxy is estopped from denying the reconciliation of international law with social realities. Recalling the efforts by institutions like the World Bank to accommodate the PA, and the open-mindedness of the ICC to consider the PA’s acceptance of jurisdiction, one can see the international community has already taken some steps towards treating the PA with greater parity to that of states. Such actions begins to bridge the gap between the PA as an actor in international relations and its near non-existence in international law. However they remain actions from within the state-centric paradigm. What is suggested here is a move away from it.

In *East Timor*, the ICJ described self-determination as ‘one of the essential principles of contemporary international law.’³⁵⁴ Judge Weeramantry stressed its centrality to the UN Charter. He noted its placement in Article 1(2) of the UN Charter as a basis to friendly relations among nations, and the need to respect self-determination under Article 55 in the ‘creation of conditions of stability and well-being...necessary for peaceful and friendly relations’. Lastly, he noted the UN is *now* a ‘superstructure’ aimed at

³⁵³ *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion*, above note 165 at 178.

³⁵⁴ *Case Concerning East Timor (Portugal v Australia)*, above note 300 para 29.

implementing friendly relations among nations built on respect for self-determination.³⁵⁵ Indeed Higgins has pointed out that the UN Charter in itself was not drafted with our present understanding of self-determination in mind, but rather the development has subsequently come from elsewhere.³⁵⁶

Nonetheless, self-determination grew from the 1950s into a means of decolonization, vastly expanding the number of sovereign states in the legal order.³⁵⁷ Prior to this, the ICJ had recognized that the collective actions of states had created a new legal person in the form of the UN. The legal order is frequently expanding both vertically and horizontally, accommodating the interests of actors and entities other than states.³⁵⁸ In parallel, there has been a steady growth in human rights oriented laws and institutions. As has been noted, recent decades have seen developments from the acceptance by the Security Council that gross human rights violations ‘may constitute a threat to international peace and security’, to the (not so recent) standing of individuals in the European Human Rights Court.³⁵⁹ The significance of these developments against self-determination should not be overlooked. Recalling the ‘bureaucratic rationale’ to statehood, one may argue that the evolution of these areas of international law found a ‘bureaucratic rationale’ to expanding ILP to encompass a broader range of entities, such as the PA, and thus extend the direct jurisdiction of human rights norms and institutions into the OPT.

Therefore, ‘if’, using the words of Judge Weeramantry, ‘self-determination is to be taken seriously’ and ‘the current international system’ is not to leave ‘a territory and a people...defenseless and voiceless’ and excluded from genuine participation in international law, the PA and any equivalently placed entity, will need to be incorporated into the legal order as fully endowed international legal persons.

³⁵⁵ Judge Weeramantry, Sep. Op. *ibid*, 194-196.

³⁵⁶ Higgins, above note 269 at 112-113.

³⁵⁷ *Ibid*, 113-114; Nijman, above note 160 at 340.

³⁵⁸ Meron, Theodor *The Humanizing of International Law* (Martinus Nijhoff, 2006) 314-318.

³⁵⁹ *Ibid*, 318.

CONCLUSION

The PA is an entity on the fringes of international law. The Palestinians have an undoubted right to sovereignty over and self-determination within the OPT. The PA is a self-governing authority with all the structural hallmarks of a state. Its subordination to and sharing of authority with Israel, however, disqualifies it from being an (independent) state.

If a territorial entity must be an independent state in order to be an international legal person, then the PA is denied ILP because it is not an independent state. This is at least true in our present legal order. The criteria of statehood primarily look for the existence of an independent political community existing to the exclusion of any other. Yet we have seen that this prerequisite bears little relation to an entity's ability to represent itself internationally. More fundamentally, the theoretical role of the state vis-à-vis international law is largely one of providing an institutional link between its constituent population and international law. States do not exist omnipotently under a law unto themselves. Their central status in the present international legal system should be seen in light of international law as a social phenomena ultimately serving and advancing human dignity.

The criteria of statehood, as a prerequisite to ILP for territorial entities, reflect the assumption that the emergence of a legal person of a territorial nature will always be at the expense of a state. Rightly, then, a secessionist entity cannot legally emerge as an international legal person unless exercising a valid right to self-determination. To do otherwise would cause an abrogation of part of the parent-state's ILP. However, this presumption does not apply to the position of the PA. It would seem questionable whether Israel is the holder of ILP for the OPT. Without sovereignty over the OPT, and with only the rights and duties of a belligerent occupier, it is not likely the contents of Israel's ILP encompasses the OPT. Regardless, however, Israel does not in practice act as the Palestinians' institutional link to international law.

From there, then, the state clearly does not hold a *necessarily* exclusive position in the

international legal system. The status quo cannot substantiate itself. Therefore, if the PA does not have to be a state to function as the international legal person of the Palestinian people, its general exclusion from participation in the processes of international law is revealed to be entirely unfounded. To conclude otherwise does not accord well with the more humanistic and democratic understandings of international law.

Ultimately, when one considers many developments in the contents of international law, there is a reasonable basis to suggest the extension of ILP to the PA and like entities³⁶⁰ is a necessary corollary development. Should Israel's desire to restrict the PA from participation in international law be tolerated? After all, the effect of self-determination was to set aside the ambitions and rights of colonial powers in the 1950s and 1960s. Does not the importance of the principle of self-determination, and the value of universally applicable human rights norms, suggest the institutional inclusion of all societies in international law is essential today? If these substantive developments in international law are to have 'teeth' they must be given effect to through the structural modification of international law. If international law is to advance human dignity, and if ILP is to seek to reflect social realities, then they must account for the *ad hoc* attempts and efforts of the international community to include the Palestinian people in the processes of international law. The state-centric nature of international law should not be taken to frustrate such a development.

What is the true essence or purpose of international law if this conclusion is not acceptable?

³⁶⁰ Of course in this regard the OPT appear on their own.

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APPENDIX

Israel-Palestine Liberation Organisation, Declaration of Principles on Interim Self-Government Arrangements, signed at Washington D.C. 13 September, 1993, (1993) 32 ILM 1527

DECLARATION OF PRINCIPLES ON INTERIM SELF-GOVERNMENT ARRANGEMENTS

September 13, 1993

The Government of the State of Israel and the P.L.O. team (in the Jordanian-Palestinian delegation to the Middle East Peace Conference) (the "Palestinian Delegation"), representing the Palestinian people, agree that it is time to put an end to decades of confrontation and conflict, recognize their mutual legitimate and political rights, and strive to live in peaceful coexistence and mutual dignity and security and achieve a just, lasting and comprehensive peace settlement and historic reconciliation through the agreed political process. Accordingly, the two sides agree to the following principles:

ARTICLE I

AIM OF THE NEGOTIATIONS

The aim of the Israeli-Palestinian negotiations within the current Middle East peace process is, among other things, to establish a Palestinian Interim Self-Government Authority, the elected Council (the "Council"), for the Palestinian people in the West Bank and the Gaza Strip, for a transitional period not exceeding five years, leading to a permanent settlement based on Security Council Resolutions 242 and 338.

It is understood that the interim arrangements are an integral part of the whole peace process and that the negotiations on the permanent status will lead to the implementation of Security Council Resolutions 242 and 338.

ARTICLE II

FRAMEWORK FOR THE INTERIM PERIOD

The agreed framework for the interim period is set forth in this Declaration of Principles.

ARTICLE III

ELECTIONS

In order that the Palestinian people in the West Bank and Gaza Strip may govern themselves according to democratic principles, direct, free and general political elections will be held for the Council under agreed supervision and international observation, while the Palestinian police will ensure public order.

An agreement will be concluded on the exact mode and conditions of the elections in accordance with the protocol attached as Annex I, with the goal of holding the elections not later than nine months after the entry into force of this Declaration of Principles.

These elections will constitute a significant interim preparatory step toward the realization of the legitimate rights of the Palestinian people and their just requirements.

ARTICLE IV

JURISDICTION Jurisdiction of the Council will cover West Bank and Gaza Strip territory, except for issues that will be negotiated in the permanent status negotiations. The two sides view the West Bank and the Gaza Strip as a single territorial unit, whose integrity will be preserved during the interim period.

ARTICLE V

TRANSITIONAL PERIOD AND PERMANENT STATUS NEGOTIATIONS

The five-year transitional period will begin upon the withdrawal from the Gaza Strip and Jericho area.

Permanent status negotiations will commence as soon as possible, but not later than the beginning of the third year of the interim period, between the Government of Israel and the Palestinian people representatives.

It is understood that these negotiations shall cover remaining issues, including: Jerusalem, refugees, settlements, security arrangements, borders, relations and cooperation with other neighbors, and other issues of common interest.

The two parties agree that the outcome of the permanent status negotiations should not be prejudiced or preempted by agreements reached for the interim period.

ARTICLE VI

PREPARATORY TRANSFER OF POWERS AND RESPONSIBILITIES

Upon the entry into force of this Declaration of Principles and the withdrawal from the Gaza Strip and the Jericho area, a transfer of authority from the Israeli military government and its Civil Administration to the authorised Palestinians for this task, as detailed herein, will commence. This transfer of authority will be of a preparatory nature until the inauguration of the Council.

Immediately after the entry into force of this Declaration of Principles and the withdrawal from the Gaza Strip and Jericho area, with the view to promoting economic development in the West Bank and Gaza Strip, authority will be transferred to the Palestinians on the following spheres: education and culture, health, social welfare, direct taxation, and tourism. The Palestinian side will commence in building the Palestinian police force, as agreed upon. Pending the inauguration of the Council, the two parties may negotiate the transfer of additional powers and responsibilities, as agreed upon.

ARTICLE VII

INTERIM AGREEMENT

The Israeli and Palestinian delegations will negotiate an agreement on the interim period (the "Interim Agreement")

The Interim Agreement shall specify, among other things, the structure of the Council, the number of its members, and the transfer of powers and responsibilities from the Israeli military government and its Civil Administration to the Council. The Interim Agreement shall also specify the Council's executive authority, legislative authority in accordance with Article IX below, and the independent Palestinian judicial organs.

The Interim Agreement shall include arrangements, to be implemented upon the inauguration of the Council, for the assumption by the Council of all of the powers and responsibilities transferred previously in accordance with Article VI above.

In order to enable the Council to promote economic growth, upon its inauguration, the Council will establish, among other things, a Palestinian Electricity Authority, a Gaza Sea Port Authority, a Palestinian Development Bank, a Palestinian Export Promotion Board, a Palestinian Environmental Authority, a Palestinian Land Authority and a Palestinian Water Administration Authority, and any other Authorities agreed upon, in accordance with the Interim Agreement that will specify their powers and responsibilities.

After the inauguration of the Council, the Civil Administration will be dissolved, and the Israeli military government will be withdrawn.

ARTICLE VIII

PUBLIC ORDER AND SECURITY

In order to guarantee public order and internal security for the Palestinians of the West Bank and the Gaza Strip, the Council will establish a strong police force, while Israel will continue to carry the responsibility for defending against external threats, as well as the responsibility for overall security of Israelis for the purpose of safeguarding their internal security and public order.

ARTICLE IX

LAWS AND MILITARY ORDERS

The Council will be empowered to legislate, in accordance with the Interim Agreement, within all authorities transferred to it.

Both parties will review jointly laws and military orders presently in force in remaining spheres.

ARTICLE X

JOINT ISRAELI-PALESTINIAN LIAISON COMMITTEE In order to provide for a smooth implementation of this Declaration of Principles and any subsequent agreements pertaining to the interim

period, upon the entry into force of this Declaration of Principles, a Joint Israeli-Palestinian Liaison Committee will be established in order to deal with issues requiring coordination, other issues of common interest, and disputes.

ARTICLE XI

ISRAELI-PALESTINIAN COOPERATION IN ECONOMIC FIELDS Recognizing the mutual benefit of cooperation in promoting the development of the West Bank, the Gaza Strip and Israel, upon the entry into force of this Declaration of Principles, an Israeli-Palestinian Economic Cooperation Committee will be established in order to develop and implement in a cooperative manner the programs identified in the protocols attached as Annex iii and Annex iv.

ARTICLE XII

LIAISON AND COOPERATION WITH JORDAN AND EGYPT The two parties will invite the Governments of Jordan and Egypt to participate in establishing further liaison and cooperation arrangements between the Government of Israel and the Palestinian representatives, on the one hand, and the Governments of Jordan and Egypt, on the other hand, to promote cooperation between them. These arrangements will include the constitution of a Continuing Committee that will decide by agreement on the modalities of admission of persons displaced from the West Bank and Gaza Strip in 1967, together with necessary measures to prevent disruption and disorder. Other matters of common concern will be dealt with by this Committee.

ARTICLE XIII

REDEPLOYMENT OF ISRAELI FORCES

After the entry into force of this Declaration of Principles, and not later than the eve of elections for the Council, a redeployment of Israeli military forces in the West Bank and the Gaza Strip will take place, in addition to withdrawal of Israeli forces carried out in accordance with Article XIV.

In redeploying its military forces, Israel will be guided by the principle that its military forces should be redeployed outside populated areas.

Further redeployments to specified locations will be gradually implemented commensurate with the assumption of responsibility for public order and internal security by the Palestinian police force pursuant to Article VIII above.

ARTICLE XIV

ISRAELI WITHDRAWAL FROM THE GAZA STRIP AND JERICHO AREA

Israel will withdraw from the Gaza Strip and Jericho area, as detailed in the protocol attached as Annex ii.

ARTICLE XV

RESOLUTION OF DISPUTES

Disputes arising out of the application or interpretation of this Declaration of Principles, or any subsequent agreements pertaining to the interim period, shall be resolved by negotiations through the Joint Liaison Committee to be established pursuant to Article X above.

Disputes which cannot be settled by negotiations may be resolved by a mechanism of conciliation to be agreed upon by the parties.

The parties may agree to submit to arbitration disputes relating to the interim period, which cannot be settled through conciliation. To this end, upon the agreement of both parties, the parties will establish an Arbitration Committee.

ARTICLE XVI

ISRAELI-PALESTINIAN COOPERATION CONCERNING REGIONAL PROGRAMS

Both parties view the multilateral working groups as an appropriate instrument for promoting a "Marshall Plan", the regional programs and other programs, including special programs for the West Bank and Gaza Strip, as indicated in the protocol attached as Annex iv .

ARTICLE XVII

MISCELLANEOUS PROVISIONS

This Declaration of Principles will enter into force one month after its signing.

All protocols annexed to this Declaration of Principles and Agreed Minutes pertaining thereto shall be regarded as an integral part hereof.

Done at Washington, D.C., this thirteenth day of September, 1993.

For the Government of Israel
For the P.L.O.

Witnessed By:

The United States of America
The Russian Federation

Israel-Palestine Liberation Organisation, Interim Agreement on the West Bank and the Gaza Strip, 28 September 1995, (1997) 36 ILM 557 (Extracts Only)

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CHAPTER I - THE COUNCIL

ARTICLE I

Transfer of Authority

1. Israel shall transfer powers and responsibilities as specified in this Agreement from the Israeli military government and its Civil Administration to the Council in accordance with this Agreement. Israel shall continue to exercise powers and responsibilities not so transferred.
2. Pending the inauguration of the Council, the powers and responsibilities transferred to the Council shall be exercised by the Palestinian Authority established in accordance with the Gaza-Jericho Agreement, which shall also have all the rights, liabilities and obligations to be assumed by the Council in this regard. Accordingly, the term "Council" throughout this Agreement shall, pending the inauguration of the Council, be construed as meaning the Palestinian Authority.
3. The transfer of powers and responsibilities to the police force established by the Palestinian Council in accordance with Article XIV below (hereinafter "the Palestinian Police") shall be accomplished in a phased manner, as detailed in this Agreement and in the Protocol concerning Redeployment and Security Arrangements attached as Annex I to this Agreement (hereinafter "Annex I").
4. As regards the transfer and assumption of authority in civil spheres, powers and responsibilities shall be transferred and assumed as set out in the Protocol Concerning Civil Affairs attached as Annex III to this Agreement (hereinafter "Annex III").
5. After the inauguration of the Council, the Civil Administration in the West Bank will be dissolved, and the Israeli military government shall be withdrawn. The withdrawal of the military government shall not prevent it from exercising the powers and responsibilities not transferred to the Council.
6. A Joint Civil Affairs Coordination and Cooperation Committee (hereinafter "the CAC"), Joint Regional Civil Affairs Subcommittees, one for the Gaza Strip and the other for the West Bank, and District Civil Liaison Offices in the West Bank shall be established in order to provide for coordination and cooperation in civil affairs between the Council and Israel, as detailed in Annex III.
7. The offices of the Council, and the offices of its Ra'ees and its Executive Authority and other committees, shall be located in areas under Palestinian territorial jurisdiction in the West Bank and the Gaza Strip.

ARTICLE II

Elections

1. In order that the Palestinian people of the West Bank and the Gaza Strip may govern themselves according to democratic principles, direct, free and general political elections will be held for the Council and the Ra'ees of the Executive Authority of the Council in accordance with the provisions set out in the Protocol concerning Elections attached as Annex II to this Agreement (hereinafter "Annex II").

2. These elections will constitute a significant interim preparatory step towards the realization of the legitimate rights of the Palestinian people and their just requirements and will provide a democratic basis for the establishment of Palestinian institutions.

3. Palestinians of Jerusalem who live there may participate in the election process in accordance with the provisions contained in this Article and in Article VI of Annex II (Election Arrangements concerning Jerusalem).

4. The elections shall be called by the Chairman of the Palestinian Authority immediately following the signing of this Agreement to take place at the earliest practicable date following the redeployment of Israeli forces in accordance with Annex I, and consistent with the requirements of the election timetable as provided in Annex II, the Election Law and the Election Regulations, as defined in Article I of Annex II.

ARTICLE III

Structure of the Palestinian Council

1. The Palestinian Council and the Ra'ees of the Executive Authority of the Council constitute the Palestinian Interim Self-Government Authority, which will be elected by the Palestinian people of the West Bank, Jerusalem and the Gaza Strip for the transitional period agreed in Article I of the DOP.

2. The Council shall possess both legislative power and executive power, in accordance with Articles VII and IX of the DOP. The Council shall carry out and be responsible for all the legislative and executive powers and responsibilities transferred to it under this Agreement. The exercise of legislative powers shall be in accordance with Article XVIII of this Agreement (Legislative Powers of the Council).

3. The Council and the Ra'ees of the Executive Authority of the Council shall be directly and simultaneously elected by the Palestinian people of the West Bank, Jerusalem and the Gaza Strip, in accordance with the provisions of this Agreement and the Election Law and Regulations, which shall not be contrary to the provisions of this Agreement.

4. The Council and the Ra'ees of the Executive Authority of the Council shall be elected for a transitional period not exceeding five years from the signing of the Gaza-Jericho Agreement on May 4, 1994.

5. Immediately upon its inauguration, the Council will elect from among its members a Speaker. The Speaker will preside over the meetings of the Council, administer the Council and its committees, decide on the agenda of each meeting, and lay before the Council proposals for voting and declare their results.

6. The jurisdiction of the Council shall be as determined in Article XVII of this Agreement (Jurisdiction).

7. The organization, structure and functioning of the Council shall be in accordance with this Agreement and the Basic Law for the Palestinian Interim Self-government Authority, which Law shall be adopted by the Council. The Basic Law and any regulations made under it shall not be contrary to the provisions of this Agreement.

8. The Council shall be responsible under its executive powers for the offices, services and departments transferred to it and may establish, within its jurisdiction, ministries and subordinate bodies, as necessary for the fulfillment of its responsibilities.

9. The Speaker will present for the Council's approval proposed internal procedures that will regulate, among other things, the decision-making processes of the Council.

ARTICLE IV

Size of the Council

The Palestinian Council shall be composed of 82 representatives and the Ra'ees of the Executive Authority, who will be directly and simultaneously elected by the Palestinian people of the West Bank, Jerusalem and the Gaza Strip.

ARTICLE V

The Executive Authority of the Council

1. The Council will have a committee that will exercise the executive authority of the Council, formed in accordance with paragraph 4 below (hereinafter "the Executive Authority").
2. The Executive Authority shall be bestowed with the executive authority of the Council and will exercise it on behalf of the Council. It shall determine its own internal procedures and decision making processes.
3. The Council will publish the names of the members of the Executive Authority immediately upon their initial appointment and subsequent to any changes.
4. a. The Ra'ees of the Executive Authority shall be an ex officio member of the Executive Authority.

b. All of the other members of the Executive Authority, except as provided in subparagraph c. below, shall be members of the Council, chosen and proposed to the Council by the Ra'ees of the Executive Authority and approved by the Council.

c. The Ra'ees of the Executive Authority shall have the right to appoint some persons, in number not exceeding twenty percent of the total membership of the Executive Authority, who are not members of the Council, to exercise executive authority and participate in government tasks. Such appointed members may not vote in meetings of the Council.

d. Non-elected members of the Executive Authority must have a valid address in an area under the jurisdiction of the Council.

ARTICLE VI

Other Committees of the Council

1. The Council may form small committees to simplify the proceedings of the Council and to assist in controlling the activity of its Executive Authority.
2. Each committee shall establish its own decision-making processes within the general framework of the organization and structure of the Council.

ARTICLE VII

Open Government

1. All meetings of the Council and of its committees, other than the Executive Authority, shall be open to the public, except upon a resolution of the Council or the relevant committee on the grounds of security, or commercial or personal confidentiality.
2. Participation in the deliberations of the Council, its committees and the Executive Authority shall be limited to their respective members only. Experts may be invited to such meetings to address specific issues on an ad hoc basis.

ARTICLE VIII

Judicial Review

Any person or organization affected by any act or decision of the Ra'ees of the Executive Authority of the Council or of any member of the Executive Authority, who believes that such act or decision exceeds the authority of the Ra'ees or of such member, or is otherwise incorrect in law or procedure, may apply to the relevant Palestinian Court of Justice for a review of such activity or decision.

ARTICLE IX

Powers and Responsibilities of the Council

1. Subject to the provisions of this Agreement, the Council will, within its jurisdiction, have legislative powers as set out in Article XVIII of this Agreement, as well as executive powers.
2. The executive power of the Palestinian Council shall extend to all matters within its jurisdiction under this Agreement or any future agreement that may be reached between the two Parties during the interim period. It shall include the power to formulate and conduct Palestinian policies and to supervise their implementation, to issue any rule or regulation under powers given in approved legislation and administrative decisions necessary for the realization of Palestinian self-government, the power to employ staff, sue and be sued and conclude contracts, and the power to keep and administer registers and records of the population, and issue certificates, licenses and documents.
3. The Palestinian Council's executive decisions and acts shall be consistent with the provisions of this Agreement.
4. The Palestinian Council may adopt all necessary measures in order to enforce the law and any of its decisions, and bring proceedings before the Palestinian courts and tribunals.
5. a. In accordance with the DOP, the Council will not have powers and responsibilities in the sphere of foreign relations, which sphere includes the establishment abroad of embassies, consulates or other types of foreign missions and posts or permitting their establishment in the West Bank or the Gaza Strip, the appointment of or admission of diplomatic and consular staff, and the exercise of diplomatic functions.
b. Notwithstanding the provisions of this paragraph, the PLO may conduct negotiations and sign agreements with states or international organizations for the benefit of the Council in the following cases only:
 - (1) economic agreements, as specifically provided in Annex V of this Agreement:
 - (2) agreements with donor countries for the purpose of implementing arrangements for the provision of assistance to the Council,
 - (3) agreements for the purpose of implementing the regional development plans detailed in Annex IV of the DOP or in agreements entered into in the framework of the multilateral negotiations, and
 - (4) cultural, scientific and educational agreements. Dealings between the Council and representatives of foreign states and international organizations, as well as the establishment in the West Bank and the Gaza Strip of representative offices other than those described in subparagraph 5.a above, for the purpose of implementing the agreements referred to in subparagraph 5.b above, shall not be considered foreign relations.
6. Subject to the provisions of this Agreement, the Council shall, within its jurisdiction, have an independent judicial system composed of independent Palestinian courts and tribunals.

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Annex IV

ARTICLE I

Criminal Jurisdiction

1. a. The criminal jurisdiction of the Council covers all offenses committed by Palestinians and/or non-Israelis in the Territory, subject to the provisions of this Article.

For the purposes of this Annex, "Territory" means West Bank territory except for Area C which, except for the Settlements and the military locations, will be gradually transferred to the Palestinian side in accordance with this Agreement, and Gaza Strip territory except for the Settlements and the Military Installation Area.

b. In addition, the Council has criminal jurisdiction over Palestinians and their visitors who have committed offenses against Palestinians or their visitors in the West Bank and the Gaza Strip in areas outside the Territory, provided that the offense is not related to Israel's security interests.

c. Notwithstanding the provisions of subparagraph a. above, the criminal jurisdiction of each side over offenses committed in Area B shall be in accordance with the provisions of paragraph 2.a of Article XIII of this Agreement.

d. Individuals arrested by the Palestinian Police in Area B for public order and other reasons shall be tried before the Palestinian courts, provided that these courts have criminal jurisdiction.

2. Israel has sole criminal jurisdiction over the following offenses:

a. offenses committed outside the Territory, except for the offenses detailed in subparagraph 1. b above; and

b. offenses committed in the Territory by Israelis.

3. a. In exercising the criminal jurisdiction of their courts, each side shall have the power, inter alia, to investigate, arrest, bring to trial and punish offenders.

b. Activities of the Palestinian Police and the Israeli military forces for the implementation of subparagraph a. above shall be as set out in the Agreement and Annex I thereto.

4. In addition, and without derogating from the territorial jurisdiction of the Council, Israel has the power to arrest and to keep in custody individuals suspected of having committed offenses which fall within Israeli criminal jurisdiction as noted in paragraphs 1.c, 2 and 7 of this Article, who are present in the areas under the security responsibility of the Council, where:

a. The individual is an Israeli, in accordance with Article II of this Annex; or

b. (1) The individual is a non-Israeli suspected of having just committed an offense in a place where Israeli authorities exercise their security functions in accordance with Annex I, and is arrested in the vicinity in which the offense was committed. The arrest shall be with a view to transferring the suspect, together with all evidence, to the Palestinian Police at the earliest opportunity.

(2) In the event that such an individual is suspected of having committed an offense against Israel or Israelis, and there is a need for further legal proceedings with respect to that individual, Israel may retain him or her in custody, and the question of the appropriate forum for prosecuting such a suspect shall be dealt with by the Legal Committee on a case by case basis.

5. In the case of an offense committed in the areas under the security responsibility of the Council by a non-Israeli against Israel or an Israeli, the Council shall take measures to investigate and prosecute the case, and shall notify Israel of the result of the investigation and any legal proceedings.

6. When a suspicion arises against a tourist in transit to or from Israel through the Territory in the West Bank and the Gaza Strip, that the tourist has committed an offense in the Territory and that tourist is present on roads or in Jewish holy sites specified in Article V, paragraph 7, Article VII, paragraph 9 and Appendix 4 of Annex I, the Palestinian Police may detain him in place and immediately notify the Israeli military forces which shall be authorized to arrest and question him. Where an offense has been committed by a tourist in violation of the prevailing law and further legal proceeding in respect of the tourists are required, such proceedings shall be taken by the Council.

Where such a tourist present outside these areas is detained or arrested by the Council, it shall notify the Israeli authorities within a reasonable time, not exceeding 24 hours, and shall enable them at the earliest opportunity to meet the detainee and to provide any necessary assistance, including consular notification, requested by the detainee.

7. a. Without prejudice to the criminal jurisdiction of the Council, and with due regard to the principle that no person can be tried twice for the same offense, Israel has, in addition to the above provisions of this Article, criminal jurisdiction in accordance with its domestic laws over offenses committed in the Territory against Israel or an Israeli.

b. In exercising its criminal jurisdiction in accordance with subparagraph a. above, activities of the Israeli military forces related to subparagraph a. above shall be as set out in the Agreement and Annex I thereto.

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ARTICLE III Civil Jurisdiction

1. The Palestinian courts and judicial authorities have jurisdiction in all civil matters, subject to this Agreement.

2. In cases where an Israeli is a party: the Palestinian courts and judicial authorities have jurisdiction over civil actions in the following cases:

a. the subject matter of the action is an ongoing Israeli business situated in the Territory (the registration of an Israeli company as a foreign company in the Territory being evidence of the fact that it has an ongoing business situated in the Territory);

b. the subject matter of the action is real property located in the Territory;

c. the Israeli party is a defendant in an action and has consented to such jurisdiction by notice in writing to the Palestinian court or judicial authority,

d. the Israeli party is a defendant in an action, the subject matter of the action is a written agreement, and the Israeli party has consented to such jurisdiction by a specific provision in that agreement;

e. the Israeli party is a plaintiff who has filed an action in a Palestinian court. If the defendant in the action is an Israeli, his consent to such jurisdiction in accordance with subparagraphs c. or d. above shall be required, or

f. actions concerning other matters as agreed between the sides.

3. The jurisdiction of the Palestinian courts and judicial authorities does not cover actions against the State of Israel including its statutory entities, organs and agents.

4. Israelis, including registered companies of Israelis, conducting commercial activity in the Territory are subject to the prevailing civil law in the Territory relating to that activity. Enforcement of judicial and administrative judgments and orders issued against Israelis and their property shall be effected by Israel, within a reasonable time, in coordination and cooperation with the Council.

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