EFFECTS OF PALESTINIAN RECOGNITION OF THE JURISDICTION OF THE I.C.C.

1. This opinion was written at the request of Maître William Bourdon, barrister at the Cour de Paris. It attempts to establish whether the Palestinian Authority's recognition of the jurisdiction of the International Criminal Court on 21 January 2009 can be effective with regard to the objectives of Article of the Statutes of the International Criminal Court (hereafter 'I.C.C.' or 'the Court'.), and limit itself to a purely juridical framework, despite the obvious political undercurrent which saturates the context in which it is being applied.

2. Article 12 of the Rome Statute states as follows:

> "1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.
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> 2. In the case of article 13, paragraph (a) or (c)[1], the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
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> (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
>
> (b) The State of which the person accused of the crime is a national.
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> 3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9."

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[1] Article 13: *Exercise of jurisdiction*: The Court can exercise its jurisdiction with regard to the crimes set out in Article 5, in conformity with the present Statute: a) If a situation in which one or several of these crimes appear to have been committed is referred to a Prosecutor by a participating state, as set out in Article 14; (…); c) if the Prosecutor has opened an inquiry into one or more of these crimes, according to Article 15".
Article 14: *Referral of a situation by a participating state*: 1. Any participating state can refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed and may ask the Prosecutor to investigate the situation with a view to determining if one or more specific individuals should be accused of these crimes. 2. …"
Article 15: *The Prosecutor*: "1. The Prosecutor can open an inquiry on his own initiative on the basis of information concerning crimes within the jurisdiction of the Court. 2. The Prosecutor must establish the reliability of the information that he has received. To this end, he may seek supplementary information from U.N. states, from inter-governmental and non-governmental organizations, or from other reputable sources which he judges appropriate, and may collect oral and written evidence at the headquarters of the Court. (Paragraphs 3 to 6 are not reproduced.)"

3. The Palestinian declaration of 21 January 2009 states the following:

> "The Government of Palestine hereby recognizes the jurisdiction of the Court for the purpose of identifying, prosecuting and judging the author and accomplices of crimes committed on the territory of Palestine since 1 July 2002".

4. It is clear that from the start the question that poses itself is to know if this recognition can be effective bearing in mind the terms of Article 12 of the Statute of the I.C.C., and the controversial nature of the Palestinian entity. The reply to this question must rely on a teleological and practical approach.

I. The relevance of a practical approach

5. While it is not absurd to consider that Palestine is a State in the general and usual sense of the word, it seems to me that to adopt a categorical position with regard to this question is not useful in answering the question that has been put [2]– which is not a general and abstract question but is within the precise and particular context of Article 12 of the Statute of the I.C.C.

6. It is important besides to stress that if the Court itself is asked to consider the scope of the recognition of 21 January 2009, it should not try to decide in the abstract the nature of the Palestinian state; It should only ask itself whether the Palestinian declaration can be effective with regard to Article 12 of its Statute. It is not for the Court to take the place of States in recognizing Palestine as a State[3]. It should only pronounce on the question of whether the conditions of the exercise of its statutory jurisdiction have been fulfilled.

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2 For my position on the question, see my "Foundation Course": "*International Law at the Dawn of the 21st Century (Contemporary International Society – Permanent Features and New Tendencies)*", in *Cours euro-mediterranens Bancaja de droit international*, vol. I, 1997, Aranzadi, Pamplona, 1998, pp51-52; in essence, I show there that to describe the Palestinian Authority as a State is doubtful, inasmuch as it does not consider itself to be a state; I have not changed my mind on this point, even though one can consider that the fact that it behaves like a State in certain circumstances (for example when it formulated the present declaration) must lead one to put in perspective this position; See also P. Daillier, M. Forteau, A. Pellet, Droit international public, L.G.D.J., 8th edition, 2009, pp509-512.

3 At the present time, more than 100 states have recognized Palestine as a State (but the exact numbers vary considerably according to the source used. CF http://en.wikipedia.org/wiki/State_of_Palestine#States_recognising_the_State_of_Palestine).

7. In this regard, the problem is to some extent analogous to the question posed by the General Assembly of the United Nations at the International Court of Justice, with its resolution A/RES/63/3 of 8 October 2008, intended as advice for consultation and currently being deliberated. In this affair, the General Assembly was careful not to ask the I.C.C. about the State quality of Kosovo in general: It asked whether "the unilateral declaration of independence of the provisional institutions for the autonomous administration of Kosovo … conforms to international law?" In the same way, in the present occurrence, the I.C.C. is not called upon to "recognize" the State of Palestine but only to make sure that the conditions necessary for the exercise of its jurisdiction are fulfilled.

8. To this end, it is necessary and sufficient for the Court to interpret the provisions of its Statute with regard to its jurisdiction. It is in the light of these provisions that the Tribunal must judge the admissibility of the declaration of the government of Palestine: for this – but only for this – it is necessary to determine whether Palestine is a state *in the sense of Article 12, Paragraph 3, of the Statute*, which is equivalent to asking oneself whether Palestine could usefully make the declaration anticipated in this provision. In other words, the Court should not rely on a general and "ready made" definition of the notion of State in International Law, but should adopt a functional approach that allows it to state *in fine* whether the Palestinian declaration fulfills the conditions laid out in Article 12, Paragraph 3, to be able to exercise its statutory competencies.

9. A functional approach to concepts is extremely frequent in International Law. In this regard, one only has to think about the very many Conventions that define the concepts they are dealing with, as "for the purpose of the present Convention…" or "of the present treaty…"[4]. Such is also the approach that the International Court of Justice followed to understand the concept of an international organization: To answer the question of whether the United Nations Organisation is endowed with an international personality – a question about which it notes that 'it is not resolved using the terms in the Charter", High Jurisdiction considers that "it is necessary to consider the characteristics with which it had intended to endow the Organisation"[5].

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[4] See among very numerous examples: The Vienna Convention on Diplomatic Relations 1961, and the Vienna Convention on Consular Relations (1963, Art.1); the Vienna Conventions on the Law of Treaties (1969 or 1986 (Art. 2)); the Convention against Torture (1984 (Art. 1)), the United Nations Convention on the Law of the Sea (1982 (Art. 1)); the United Nations Framework Convention on Climate Change (1992 (Art. 1)); the Convention on the Law of Non-Navigational Uses of International Watercourses (1997 (Art. 2)); or the 1998 (Art. 2) Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.

[5] Consultative opinion, 11 April 1949, *Reparation for damages suffered in the service of the United Nations*, Reports. 1949, P.179; See also *infra*, paragraph 19.

Commenting on this "praetorian revolution" – which today is generally accepted, Professor Pierre-Marie Dupuis stresses in his General Cursus for the International Law Academy that "[i]f the personality may vary, in reach as in content, there is no reason for the number of topics not to expand in function of the normative development of international legal order, which itself is a reflection of the expansion of social necessities which this "hunger for rights" will answer. Thanks to this opinion from the Court, different entities can be granted a personality without this constituting a crime against sovereignty"[6]; and the author continues by giving numerous examples of the recognition of a functional legal personality given to individuals before international criminal courts[7], to companies in Investment Law[8], to armed non-State entities[9], to micro-States whose dependency with regard to their neighbours leaves one to wonder about their true sovereignty[10].

10. Besides, certain conventional definitions of the State itself pertain to this functional approach. Such is the case, for example, of Article 44 of the Convention on the Rights of Persons with Disabilities (on "Regional Integration Organizations"), which states that

> "1. "Regional integration organization" shall mean an organization constituted by sovereign States of a given region, to which its member States have transferred competence in respect of matters governed by the present Convention (…)
>
> 2. References to "States Parties" in the present Convention shall apply to such organizations within the limits of their competence".

In the same way, according to the 1972 Convention on International Liability for Damage Caused by Space Objects:

> "1. In this Convention, with the exception of Articles XXIV to Articles XXVII, references to States shall be deemed to apply to any international intergovernmental organization which conducts space activities if the organization declares its acceptance of the rights and obligations provided for in this Convention and if a majority of the States members of the organization are States Parties to this Convention and to the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies"[11].

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[6] P.-M. Dupuy, "Unity of the International Legal Order", *RCADI* 2002-I, vol.297, pp.108-109 – note at the bottom of page omitted

[7] *Ibid*, p111

[8] *Ibid*, p112.

[9] *Ibid*, p112

[10] The example of Monaco is given on page 111; on the same subject one can think of the example of Andorra before its constitution of 1993.

[11] See also the definition of a "country' in the explanatory Notes of the Agreement establishing the World Trade Organization, dated 15 April 1994:
"The terms "country" or "countries" as used in this Agreement and the Multilateral Trade Agreements are to be understood to include any separate customs territory Member of the WTO".

11. As Mr. Advocate General Sir Francis Geoffrey Jacobs noted in the so-called *Stardust* affair:

> "The concept of the State has to be understood in the sense most appropriate to the provisions in question and to their objectives; the Court rightly follows a functional approach, basing its interpretation on the scheme and objective of the provisions within which the concept features"[12].

This functional concept of the State and its break-up is omnipresent, for example in the jurisprudence of the E.C. Court of Justice, with regard to the direct impact of its directives:

> "…It should be noted that a directive cannot be relied on against individuals, whereas it may be relied on as against a State, regardless of the capacity in which the latter is acting, that is to say, whether as employer or as public authority. The entities against which the provisions of a directive that are capable of having direct effect may be relied upon include a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals"[13].

12. It is also on this idea that rests the principle retained by the European Court of Human Rights in the case *Drozd and Janousek*. Although it recognized in this case that the preliminary exception regarding its lack of jurisdiction *ratione loci* had a basis, it specified that this was only because it had not received from Andorra a declaration establishing its consent to the application of the Convention on its territory; but it admitted that the Principality could have formulated such a declaration on the basis of Article 5 of the Statute of the Council of Europe[14], despite its character as *sui generis*, which the Court stresses robustly[15]. It is remarkable that the Strasbourg Court, guided by the wish to ensure a broad application of the Convention and through this, a better protection of human rights desired by its authors, does not doubt that its jurisdiction may extend to *sui generis* entities such as the Principality.

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[12] *French Republic v Commission of the European Communities*, Case C-482/99, Conclusions by the Advocate-General on 13 December 2001, para. 56, see Ruling of the Court in this affair (Ruling of 16 May 2002, para.55).

[13] European Court of Justice, Farrell, Case C-356/05, Ruling of the Court of 19 April 2007, para. 40; see also Rulings of 12 July 1990, *Foster and Others*, (Case C-188/89, ECR I-3313, paragraph 20; Ruling of 14 September 2000, *Collino and Chiappero*, Case C-343/98, ECR I-6659, paragraph 23; and Ruling of 5 February 2004, *Rieser Internationale Transporte*, Case C-157/02, ECR I-1477, paragraph 24.

[14] Which anticipates the possibility for "countries" to become associate Members.

[15] ECHR, Plenary, Req.Number 12747/87, *Drozd and Janousek v. France and Spain*, Ruling of 16 June 1992, Para. 67 and 87.

13. Similarly, a CIRDI Tribunal noted that,

> "74. Under the ICSID Convention, the Centre's jurisdiction extends only to legal disputes arising directly out of an investment between a Contracting State and a national of another Contracting State. Just as the Centre has no jurisdiction to arbitrate disputes between two States, it also lacks jurisdiction to arbitrate disputes between two private entities. Its main jurisdictional feature is to decide disputes between a private investor and a State.53 However, neither the term "national of another Contracting State" nor the term "Contracting State" are defined in the Convention. (…)
>
> 75. Accordingly, the Tribunal has to answer the following two questions: first, whether or not SODIGA is a State entity for the purpose of determining the jurisdiction of the Centre and the competence of the Tribunal, and second, whether the actions and omissions complained of by the Claimant are imputable to the State. While the first issue is one that can be decided at the jurisdictional stage of these proceedings, the second issue bears on the merits of the dispute and can be finally resolved only at that stage"[16].

It is interesting to note that in this case, the Tribunal concerned itself with the question of the nature of State identity at the level of appreciation of its jurisdiction, considering that there lay a difficulty regarding its jurisdiction *ratione personae*. Therefore he treated it "from an angle distinct from that of attribution in the sense of the law of responsibility, for 'State' can have a specific meaning in the context of a dispute"[17].

14. As has been stressed in doctrine,

> "[f]ollowing in effect a 'functional approach', in fact already invoked by the Court of The Hague in its opinion of 1949 given in the case of the Reparation of Damages, contemporary International Law draws the State under the form of a variable-geometry shape, whose outline depends on the material involved, and relegates it to the rank of mere 'notion' whose interpretation depends on 'the economy and the aims of the arrangements within which' it finds itself (…)
>
> A State's confines are no less in movement because of this and its 'perimeter' in no way an intangible and physically limited barrier. International Law sees the State as an entity which it can itself reshape (as shown by the recourse to conventional definitions of the

[16] *Maffezini v Spain*, Case Number ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000*, ICSID Rev. – For. Investment L. Jl.*, pp.27-28, paras.74-75.

[17] Mathias Forteau, « L'État selon le droit international : une figure à géométrie variable ? », *R.G.D.I.P*. 2007-4, pp.762-763.

> State)[18] or the jurisprudential formula with which international or foreign jurisdictions decide that such entity 'must be considered as' an emanation of the State) and the latter is, in contemporary International Law, more and more often understood differently according to the norm being applied."[19].

15. It is therefore by taking into account the general economy of the provisions of the Statute of Rome and of the object and aim of Article 12 that the Court is called upon to give a meaning to the term 'State' within the framework of this disposition.

II. The validity of the Palestinian declaration of 21 January 2009

16. It is for the I.C.C. to define its jurisdiction and the limits imposed on its exercise of it, using as a base its interpretation of the provisions of the Stature, in accordance with the principle of the *kompetenz kompetenz*, according to which it judges its own jurisdiction. We have here a general principle of international dispute[20], whose specific conditions of implementation by the I.C.C. are anticipated in Articles 18 and 19 of the Statute.

17. This appreciation must be effected in accordance with the famous 'General Rule of Interpretation' codified in Article 31, Paragraph 1, of the Vienna Convention on the Law of Treaties of 23 May 1969:

> "1.A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

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[18] [note 118] Of which, besides, one of the most obvious manifestations is Article 3 of the Charter of the United Nations, on the basis of which the federated entities of Ukraine or Byelorussia have been considered as original member *States* of the UNO (…).

[19] M. Forteau, *op. cit.* note 17, p.768; See also Rosalyn Higgins, "The Concept of the 'State': Variable Geometry and Dualist Perceptions", in Laurence Boisson de Chazournes and Vera Gowlland-Debbas (dirs), *L'ordre juridique international, Un système en quête d'équité et d'universalité :* Liber Amicorum *Georges Abi-Saab*, Nijhoff, 2001, pp 547-562.

[20] See I.C.J., Ruling, 21 March 1953, *Nottebohm (Lichtenstein v. Guatemala),* Preliminary Exception, Reports. 1953, p.7, Para. 119 or I.C.T.Y., Appeals Chamber, Ruling of 2 October 1995, IT-94-1-T, *Prosecutor v. Dusko Tadič*, Para. 17.

18. In this occasion, the context, as well as the object and aim of the Statute (and of Article 12 therein) take on a particular importance due to the "variable geometry"[21] of the very notion of State that makes it difficult to keep to a unambiguous meaning and, from that point on, to an "ordinary meaning". Furthermore, determining the jurisdiction of international authorities (organizations and jurisdictions – the I.C.C. being both) is a privileged area of teleological interpretation of treaties.

19. The case of *Comte Bernadotte* represents a remarkable illustration of the recourse to reasoning of this type. There, the International Court of Justice justifies thus the recourse to the doctrine of the implicit powers of the UNO:

> "It must be acknowledged that its members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable these functions to be effectively discharged"[22].

And, regarding more precisely the elements required for presenting an international claim with a view to obtaining reparation for damages caused to its agents:

> "Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties"[23].[23]

20. With regard more particularly to the appreciation of their own competence, international judges usually opt for a teleological interpretation of the statutory provisions upon which it is founded. As the I.C.T.Y. noted in its founding ruling:

> "10. [J]urisdiction is not merely an ambit or sphere (better described in this case as "competence"); it is basically - as is visible from the Latin origin of the word itself, *jurisdictio* - a legal power, hence necessarily a legitimate power, "to state the law" (*dire le droit*) within this ambit, in an authoritative and final manner.
> (…)
> 11. A narrow concept of jurisdiction may, perhaps, be warranted in a national context but not in international law. International law, because it lacks a centralized structure, does not provide for an integrated judicial system operating an orderly division of labour among a number of tribunals, where certain aspects or components of jurisdiction as a power could be centralized or vested in one of them but not the others.

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[21] See *supra*, Note 17

[22] Advisory Opinion, Note 5, p.179.

[23] *Ibid*., p.182; see also in particular: P.C.I.J., Advisory Opinion number 13, 23 July 1926, *Competence of the International Labour Organization to regulate, incidentally, the personal work of the employer*, Series B, Number 13, p.18.

> In international law, every tribunal is a self-contained system (unless otherwise provided). This is incompatible with a narrow concept of jurisdiction, which presupposes a certain division of labour. Of course, the constitutive instrument of an international tribunal can limit some of its jurisdictional powers, but only to the extent to which such limitation does not jeopardize its "judicial character", as shall be discussed later on. Such limitations cannot, however, be presumed and, in any case, they cannot be deduced from the concept of jurisdiction itself"[24].

21. The I.C.J. has faced problems of this kind in the cases of *Genocide* and *Legality of Use of Force* which were submitted to it within the framework of the Yugoslav crisis[25]. Without entering into the meanderings (and contradictions) of the successive arguments of the Court in these cases that are endowed with great emotional force and exceptionally delicate politically, one can note that *in fine*, except in the cases where the Applicant himself had, in reality, questioned the competence of the High Jurisdiction to pronounce itself[26], the latter has, in the end, always retained its competence. It is quite plain that, by doing this, despite the legal "difficulties" of which it was aware and that it made constant efforts to minimize[27], the I.C.J. cause the provisions regarding its jurisdiction to bear their full effect, in cases regarding what is doubtless the most serious if international crimes, that of genocide.

22. In fact, it would be out of the question for the I.C.J. to go beyond the mission that the States that are Party to the Rome Statute have given it, or to substitute its will to theirs by thus making itself into a legislator, which it certainly is not. Nor is it a problem that relates to

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[24] Judgment Summary, Note 20, paras. 10-11. For another illustration of this approach, see for example: I.C.J., advisory opinion, 16 October 1975, *Western Sahara*: "the references to 'any legal question' in the abovementioned provisions of the Charter and Statute are not to be interpreted restrictively" (*Reports* 1975, p20, para. 19).

[25] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro), ((Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro), Request for the Indication of Provisional Measures, Order of 8 April 1993, Preliminary Objections,* 11 July 1996*, Merits,* 26 February 2007*; Application for revision of the Judgment of 11 July 1996 in the Case concerning* Application of the Convention on the Prevention and Punishment of the crime of genocide (Bosnia and Herzegovina v. Yugoslavia), *Preliminary Objections (Yugoslavia v. Bosnia and Herzegovina),* Judgment of 3 February 2003.*Legality of Use of Force (Serbia and Montenegro v. Belgium), Request for the Indication of Provisional Measures*, 2 June 1999*;Preliminary Objections,* 15 December 2004 (and seven other similar cases); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Preliminary Objections,* Judgment of 18 November 2008.

[26] Even though there was no formal discontinuance (*Reports* 2004, pp. 293-295, paras. 31-36), See also the Judgment of 28 November 2008, para. 89; for the decision on being without a jurisdiction, see pp.327-328, paras. 127-129: In its judgment delivered in 2007, in the case of *Genocide* (Bosnia and Herzegovina), the Court notes that **"**No finding was made in those [eight similar] judgments on the question whether or not the Respondent was a party to the Genocide Convention at the relevant time" (*Report*s 2007, para. 83).

[27] See in particular *Reports* 1993, p.14, para. 18; see also the Judgment of 2007, para. 130, or that of 2008, para. 75.

"extensive" or "restrictive" interpretation of the Statute[28]. This is only a question of interpreting one of its provisions within its context and within the framework of the exact problem upon which the I.C.C. might be called to pronounce, in order to determine the scope (and the limits) of its jurisdiction in the circumstances in question. To this end, it is necessary to bear in mind the common-sense directive featuring in the report of the International Law Commission on its final draft articles on the Law of Treaties:

> "When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted"[29].

23. Article 12 of the Statute[30], by its very title, establishes the "preconditions to the exercise of jurisdiction" of the I.C.C. Becoming a Party to the Statute (Paragraph 1) or the Declaration envisaged in Paragraph 3 are therefore conditions/actions whose non-existence paralyses the exercise of its jurisdiction by the Court. For it is only if this declaration is formulated[31] that the Court can acquit itself of its mission (to which Paragraph 1 of Article 12 refers expressly, evoking "the crimes referred to in Article 5"[32]): the judgment of persons accused of the crime of genocide, of a crime against humanity or of a war crime. We have here, to quote the wording used in the Preamble, crimes of such gravity that they "threaten the peace, security and well-being of the world", which being "of concern to the international community as a whole must not go unpunished" and "that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation".

24 It is also telling that according to the terms in Article 12, Paragraph 3, the jurisdiction of the Court is established so long as a State able to lay claim to a territorial

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[28] On all these points, see Charles de Visscher, *Problèmes d'interprétation judiciaire en droit international public*, Pedone, Paris 1963, 263 p. or Denys Simon, *L'interprétation judiciaire des traité s d'organisations internationales – Morphologie des conventions et fonction jurisdictionnelle*, Paris, Pedone, 1981, XV-936 p., *passim* – In particular pp. 319-466.

[29] I.L.C., Yearbook 1966, Vol. II, p. 219 [Translator's note: English version], para. 6, of the commentary on Draft Article 28

[30] Pre. Para.2

[31] The problem of the participation of Palestine to the Statute does not arise at this time, but might eventually arise.

[32] Article 5, paragraph 1: "The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:
(a) The crime of genocide;
(b) Crimes against humanity;
(c) War crimes;
(d) The crime of aggression"
See also the introduction to Article 13, to which Paragraph 2 of Article 12 also refers, "The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute…"

title *or* a personal title has accepted its jurisdiction[33]. The result is that the Court can exercise its jurisdiction for events that have occurred under the jurisdiction of States that have not ratified the Statute nor formulated the declaration anticipated in Paragraph 3 of Article 12, or with regard to nationals of States that are not a Party or have nor formulated a declaration[34]. Consequently, the reciprocity of consent, essential before certain jurisdictions (in particular the I.C.J.) is not a condition of the exercise of the jurisdiction of the I.C.C. The possibility available to the Security Council acting by virtue of Chapter VII of the United Nations Charter, by Article 13.b) of the Statute, to refer to the Prosecutor a "situation in which one or more of such crimes appears to have been committed" confirms this conclusion. In this regard, the I.C.C. can be compared with regional jurisdictions for the protection of human rights and the observation, made for example by the European Court of Human Rights in the case Loizidou v. Turkey, in which the Court stressed forcefully that non-recognition, by one of the affected parties, of the government of the other party, cannot be an obstacle to the exercise of its jurisdiction, can on the whole be transposed, in its principle, to the problem under review:

> "41. In any event recognition of an applicant Government by a respondent Government is not a precondition for either the institution of proceedings under Article 24 of the Convention or the referral of cases to the Court under Article 48 (see Application no. 8007/77, loc. cit., pp. 147-148). If it were otherwise, the system of collective enforcement which is a central element in the Convention system could be effectively neutralized by the interplay of recognition between individual Governments and States"[35].

25. Far from ruling only on relations between states, "the Statute deals with the collective reaction of its State Parties to the breach by an individual of its obligations *erga omnes*"[36]. This puts into perspective not the importance that a consent should be granted by the holder of a territorial or personal title but that of the legal qualification of this entity: whether one is dealing with a State – which is what most countries in the world that have recognized Palestine as[37] – or not – as considered by a minority of other States, the fact is that only the Palestinian Authority possesses, by virtue of international law, an exclusive territorial title to the Palestinian territory and the population that is established there.

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33 For a clear account of the preparatory work that led to the adoption of this principle despite the determined opposition of some states, foremost among which the United states, see Hans-Peter Kaul, "*Preconditions to the Exercise of Jurisdiction*", in Antonio Cassese, Paola Gaeta and John W. D. Jones eds., The *Rome Statute of the International Criminal Court: A Commentary*, OUP, 2002, pp. 593-605

34 See In particular Luigi Condorelli, "La Cour Pénale Internationale en débat », R.G.D.I.P. 1999-1, p. 18

35 European Court of Human Rights, Case *Loizidou v. Turkey, Preliminary objections*, req. Number 15318/89, Judgment of 23 March 1995, Para. 41.

36 *Ibid*. p.609

37 See *supra*, Note 3

26. Besides, it is indeed as territorial sovereign that Palestine made the Declaration of Article 12, Paragraph 3 on 21 January 2009:

> "The Government of Palestine hereby recognizes the jurisdiction of the Court for the (…) acts committed *on the territory* of Palestine since 1 July 2002"[38].

27. There is no doubt that the West Bank and Gaza are occupied territories and are internationally recognized as such. As the I.C.J. noted in its Advisory Opinion of 9 July 2004:

> "The territories situated between the Green Line (see paragraph 72 above) and the former eastern boundary of Palestine under the Mandate were occupied by Israel in 1967 during the armed conflict between Israel and Jordan. Under customary international law, these were therefore occupied territories in which Israel had the status of occupying Power. Subsequent events in these territories, as described in paragraphs 75 to 77 above, have done nothing to alter this situation. All these territories (including East Jerusalem) remain occupied territories and Israel has continued to have the status of occupying Power.[39]"

28. The present paper does not constitute the appropriate framework to draw all the consequences of this hard-to-challenge position. It suffices to note that:

- In no way does occupation of a territory confer upon the occupying power sovereignty over it: "Whatever the effects of occupation upon a territory caused by the adversary before peace is restored, it is certain that on its own, such an occupation could not effect the transfer of sovereignty"[40].
- On the contrary, the *de facto* annexation of Palestinian territories infringes territorial sovereignty and the rights of Palestinians to self-determination[41].
- Besides Israel does not claim the exercise of territorial sovereignty upon occupied territories[42]: thus for example, in its report to the Committee on Economic and Social Rights of 19 October 2001, it argued that "Israel has consistently maintained that the Covenant does not apply to areas that are not subject to its sovereign territory and jurisdiction"[43] (i.e. the West Bank and Gaza)[44].

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38 For the complete text of the declaration, see *supra*, para. 3.

39 Advisory Opinion, 9 July 2004, *Legal Consequences of the Construction of a Wa11 in the Occupied Palestinian Territory*, I. C. J. Reports 2004, p. 167, para.78.

40 International Arbitral Award by Eugène Borel in the case of *The Ottoman Public Debt*, Reports of International Arbitral Awards, Vol. I, p. 555; See A. Pellet "The destruction of Troy will not happen – There is only one criterion for the implementation of the Law of War Occupation: the respect of the sovereign rights of the people under occupation" (Pal. Y.B.I.L., 1987-88, pp.51-58) (in English in E. Playfair ed., *The Administration of Occupied Territories: The West Bank,* Clarendon Press, Oxford, 1992, pp. 174-180) and jurisprudence for quoted doctrine.

41 See prev. Advisory Opinion, pp.181-182, para.115 and p.184, para.122

42 Even if it denies, wrongly to my mind, the statute of occupied territories to certain portions of territories, annexed after the armed conflict of 1967 (Golan Heights, East Jerusalem). Among the numerous resolutions of the General Assembly condemning the occupation, one can mention: A/RES/63/29 of 26 November 2008, A/RES/61 of 1 December 2006, A/RES/58/21 of 3 December 2003 (*Peaceful settlement of the question of Palestine*), A/RES/43/58 of 6 December 1988(*Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories*). A very large number of Security Council resolutions also remind Israel of its obligations as an occupying power; See in particular: 446 (1979) of 22 March 1979, 452 (1979) of 20 July 1979, 465 (1980) 0f 1 March 1980, 904 (1994) of 18 March 1994.

43 E/1990/6/Add.32, para.5; See also previous Advisory Opinion, note 39, Reports 2004, pp. 173-174, para.93 and the Judgment of Israel's Supreme Court on 20 May 2004 cited ibid., pp 175-176, para.100.

44 This is the position constantly maintained by Israel before the Monitoring Committees on universal human-rights instruments. See CERD, *Concluding Observations of the Committee on the Elimination of Racial Discrimination* : Israel, 14 June 2007, Doc. CERD/ISR/CO/13, para.3; CEDAW, *Report on the Committee on the Elimination of Discrimination Against Women*, 31 August 2005, Doc. A/60/38, p.143, para.243; Human Rights Committee, *Concluding observations of the Human Rights Committee Israel*, 21 August 2003, Doc. CCPR/CO/78/ISR, para.11.

- On very many occasions, the General Assembly[45] and the Security Council[46] have affirmed the applicability throughout the occupied territories of the *jus in bello* regarding occupation and, in particular, of the Fourth Geneva Convention of 1949, as the I.C.J. noted in its Opinion on the *Wall* in 2004[47].

- By the Cairo Agreement on Jericho and the Gaza strip of 4 May 1994, and the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip signed in Washington on 25 September 1995, Israel recognizes[48] Palestinian jurisdiction in legal (including penal)[49] and human-rights[50] matters; by accepting the jurisdiction of the I.C.C. with regard to crimes anticipated in Article 5 of the Rome Statute, Palestine partly discharges this responsibility[51].

29. Furthermore, it is not uninteresting to note that, in its Advisory of 2004, the World Court stressed that Section III of the Regulations annexed to the Fourth Hague Convention of 1907, "which concerns military authority over the territory of *the hostile State*, is particularly pertinent in the present case"[52]; thus, the I.C.J. clearly considers Palestine as a State for the purposes of the application of the Regulations. Besides, *mutatis mutandis*, the reasoning followed by the World Court to decide that the Fourth Geneva Convention of 1949 "is applicable in the Palestinian territories which before the conflict lay to the east of the Green Line and which, during that conflict, were occupied by Israel, there being no need for any enquiry into the precise prior status of those territories"[53] can be transposed to the present case:

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45 See General Assembly resolution A/ES-1012 dated 23 April 1997: "[R]epeated violations by Israel, as occupying power, of International Law, and its non-compliance with the relevant Security Council and General Assembly resolutions, and the agreements reached by the parties, infringes the peace process in the Middle east and constitute a threat to international peace and security". see also A/RES/63/29 dated 26 Novembre 2008, prev. Note 42.

46 See Resolution 242 (1967) of 22 November 1967, which underscores the inadmissibility of territorial acquisition through war and calls for the "[w]ithdrawal of Israel armed forces from territories occupied in the recent conflict" and the termination of all claims or states of belligerency"; See also Resolution 446 (1979) and more resent resolutions, see Note 42.

47 Advisory opinion prev. Note 39, Reports 2004, p.176, paras.98-99.

48 This could in no way refer to a transfer of jurisdiction: the occupying power is certainly not the original owner; on this subject, see for example G. Bastid-Burdeau, 'Les references au droit international dans la question des titres de competence dans les territories de la Palestine sous mandate : incertitudes et confusion in SFDI, *Colloque de Rennes, Les compétences de l'État en droit international*, Pedone, 2006, p.169

49 See Articles IV and VII if the Washington Interim Accord and Annex IV, Article I (See also Article VII, para.2, of the Oslo Accord of 13 September 1993)

50 see Article XIX, *ibid*.

51 It is true that the agreements between Israel and Palestine exclude Israeli citizens from the jurisdiction of Palestinian tribunals (see Article XVII.4.ii) of the Interim Accord of 1995 and Article 1.3.ii) of Annex IV); but it is doubtful that bilateral agreements could over-ride the jurisdiction of the I.C.C. as foreseen by its Statute.

52 Advisory opinion, see prev., Note 39, Reports 2004, p.171, para.89 – *my italics*.

53 *Ibid*., p.177, para.101. It is true that the I.C.J. points out that "Israel and Jordan were parties to that Convention when the 1967 armed conflict broke out" (*ibid*. – see also p.173, para.91) but this consideration plays no apparent role in the reasoning leading to the conclusion set out above.

- The I.C.J. applies to the interpretation of Article 2 of the Convention of 1949 "customary international law as expressed in Article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969"[54];

It then notes

> "that, according to the first paragraph of Article 2 of the Fourth Geneva Convention, that Convention is applicable when two conditions are fulfilled: that there exists an armed conflict (whether or not a state of war has been recognized); and that the conflict has arisen between two contracting parties. If those two conditions are satisfied, the Convention applies, in particular, in any territory occupied in the course of the conflict by one of the contracting parties (…).
>
> This interpretation reflects the intention of the drafters of the Fourth Geneva Convention to protect civilians who find themselves, in whatever way, in the hands of the occupying Power. Whilst the drafters of the Hague Regulations of 1907 were as much concerned with protecting the rights of a State whose territory is occupied, as with protecting the inhabitants of that territory, the drafters of the Fourth Geneva Convention sought to guarantee the protection of civilians in time of war, regardless of the status of the occupied territories, as is shown by Article 47 of the Convention"[55].

- Finally to reach the conclusion noted above.

30. The same reasoning can be transposed to the present case:

- It is appropriate to apply the general rule of interpretation reflected in Article 31 of the Vienna Convention of 1969 to Article 12 of the Rome Statute[56];
- This provision is applicable so long as a State (in possession of a territorial or personal title) lodges the declaration planned in Paragraph 3[57];
- It reflects the intention of the authors of the Statute not to permit a State to block unilaterally the exercise of its jurisdiction by the I.C.C. and to render as effective as possible challenges to impunity for the crimes enumerated in Article 5, which is the fundamental role of the Treaty[58].
- It can be deduced that one or more contracting Parties would not be able to prevent the Palestinian Declaration of 21 January 2009 from being effective on the Palestinian territory; For, by depriving it of an effect, the Court would give its blessing to a zone of impunity in the territories occupied by Israel, which is contrary to the intentions of the authors of the Rome Statute, and to its aim and purpose, since, in this hypothesis, *no* State could confer upon it jurisdiction within these territories.

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54 *Ibid*., p.174, para.94

55 *Ibid*., pp.174-175, para.95

56 See *supra*, para.17

57 See *supra*, para 23

58 See *ibid*.

31 The situation that would ensue from a refusal by the I.C.C. to give effect to the Palestinian declaration of 2009 accepting its jurisdiction, would be infinitely more shocking and would have consequences far more serious than that resulting from the position – moreover quite open to criticism[59] – of Switzerland following the request for accession by Palestine to the Fourth Red Cross Convention, formulated in 1989. For, as the I.C.J. explained:

> "Palestine gave a unilateral undertaking, by declaration of 7 June 1982, to apply the Fourth Geneva Convention. Switzerland, as depositary State, considered that unilateral undertaking valid. It concluded, however, that it "[was] not -- as a depositary -- in a position to decide whether" "the request [dated 14 June 1989] from the Palestine Liberation Movement in the name of the 'State of Palestine' to accede" *inter alia* to the Fourth Geneva Convention "can be considered as an instrument of accession"[60].

In other words, the unilateral undertaking of Palestine – which certainly binds it[61] – mitigated in great part[62] the inconvenience resulting from the –undeniable – breach of its obligations by Switzerland as depositary[63]: by its declaration of 1982, Palestine was (and is) obliged to respect the rules of the Fourth Convention of 1949. On the other hand, implementation of the Rome Statute is not for Palestine, but for the Court[64]: if the latter declares the Palestinian Declaration invalid, it will (barring an intervention by the Security Council) remain an irreparable dead letter with regard to the occupied Palestinian territories.

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[59] For some examples of these justified criticisms, see for example: Vera Gowland-Debbas, "Collective Responses to the Unilateral Declarations of Independence of Southern Rhodesia and Palestine: An Application of the Legitimizing Function of the United Nations", B.Y.B.I.L., Vol. LXI (1990), esp. p. 141 or Fatsah Ouguergouz, 'La Palestine et les conventions de Genève du 12 août 1949 ou l'histoire d'une adhésion avortée » in *op. cit*. Note 19, pp.507-543.

[60] Advisory note, prev. Note 39, *Reports* 2004, p.173, para.91

[61] See I.C.J., Judgments, 20 December 1974, *Nuclear Tests*, Reports 1974, p.267, para.43, and p.472, para.46; See also the Guiding Principles applicable to unilateral declarations of States susceptible of creating legal obligations, adopted by the International Law Commission in 2006 and, in particular, Guiding Principles Numbers 3 and 5 (see Report of the International Law Commission, Fifty-eighth session (1 May-9 June and 3 July-11 August 2006), General Assembly, Official Documents, Sixty-first session, Supplement Number 10 (A/61/10), p.367.

[62] However, this situation could prove very unfair to Palestine if one reckoned that its undertaking had been entered into independently from any reciprocity – for reasons that it is not useful to develop here, this is not my position.

[63] See Article 77 of the Vienna Convention of 1969 on the Law of Treaties, which shows clearly that Switzerland – for whom in fact it was not to pronounce itself on the nature of the request by the P.L.O. – should have informed the Parties to the Conventions of 1949, as well as the States qualifying to become such.

[64] Moreover, the Swiss government had sheltered behind the fact that "as the depository of the Geneva Conventions and their Additional Protocols, [it was not] in a position to decide whether the letter constituted an instrument of adhesion in the sense of the conventional provisions relevant to the Conventions and their Additional Protocols" (Information note from the Swiss government, Bern, 13 September 1989, para.2). The Court, which without any doubt has 'the competence of its competence" (See *supra*, para.16) would not be able to shelter behind such an argument.

32. This situation would be all the more intolerable since [by] its very nature the Statute aims to safeguard fundamental interests of the International Community as a whole and indeed recalls the Convention on Genocide of 1948, of which the I.C.J. observed that:

> "In such a convention the contracting States do not have any interests of their own ; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties"[65].

And, as the World Court later stated in the same Advisory (which is equally true in the present case):

> "The object and purpose of the Genocide Convention imply that it was the intention of the General Assembly and of the States which adopted it that as many States as possible should participate. The complete exclusion from the Convention of one or more States would not only restrict the scope of its application, but would detract from the authority of the moral and humanitarian principles which are its basis"[66].

33. Consequently, at the end of this examination, I am led to conclude that the Palestinian Declaration of 21 January 2009 accepting the jurisdiction of the I.C.C. for the purposes of identifying, prosecuting and judging the authors, and their accomplices, of crimes listed in Article 5 of the Rome Statute, that have been committed on the territory of Palestine since 1 July 2002, can be effective according to the provisions of Article 12 of the Statute and, in particular, that all conditions for the Court to exercise its jurisdiction in application of Article 13 have been met:

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[65] Advisory Opinion, 28 May 1951, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, *Reports* 1951, p.23; See also, Judgment*, Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Reports* 1996, p.611, para22, and, in the same case, the Judgment of 26 february 2007, para.161; and the Advisory Opinion, 8 July 1996, *Legality of the Threat or Use of Nuclear Weapons*, Reports 1996, p.257.

[66] *Reports* 1951, p.24; See also for example *Reports* 1996, p.612, para.22

- *Ratione materiae*, the Goldstone Report – to mention only this document – allows one to consider reasonably that crimes that could fall under the jurisdiction of the Court may have committed by both sides[67] during Operation "Cast Lead[68]";
- *Ratione temporis,* by its retroactive recognition of the jurisdiction of the I.C.C. for events posterior to 1 July 2002 (Date on which the Rome Statute came into force), the Declaration respects the terms of Article 11[69];
- *Ratione loci* (and in consequence *ratione personae*), it extends the jurisdiction of the Court to crimes committed on Palestinian territory, within which only the Palestinian Authority benefits from territorial sovereignty[70] (and to persons having committed them), in conformity with the provisions of Article 12, paragraph 2.b), which envisages the jurisdiction of the Court with regard to a State "on the territory of which the conduct in question occurred" and
- These mechanisms can be set into motion, *ratione conventionis* so to speak, by virtue of the declaration made by a competent Palestinian authority[71] on 21 January 2009.

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[67] It is not without interest to note that Palestine intends to pursue the recommendations of the Goldstone Report, by establishing an independent commission of inquiry on its territory (See letter dated 29 January 2009, addressed to the General Secretary by Palestine's Permanent Observer to the United Nations Organisation, Annex II, General Secretary's *Report Follow-up to the report of the United Nations Fact-Finding Mission on the Gaza Conflict* (Document A/64/651). This undertaking, which can only be founded on The Palestinian Authority's territorial sovereignty on the occupied territories, forms part of the same approach as that which led to the declaration of 21 January 2009.

[68] Other international reports allow one to think that war crimes and/or crimes against humanity may have been committed on Palestinian territory since 1 July 2002; See in particular Amnesty International, *Israel/Gaza, Operation "Cast Lead": 22 Days of Death and Destruction*, report of 2 July 2009 (http://www.amnesty.org/fr/library/asset/MDE15/015/2009/fr/cf9d4615-ef4b-451c-9ee7-f25762509c2f/mde150152009fra.pdf) [http://www.amnesty.org/en/library/asset/MDE15/015/2009/en/8f299083-9a74-4853-860f-0563725e633a/mde150152009en.pdf] and Human Rights Watch, *Rain of Fire, Israel's Unlawful Use of White Phosphorus in Gaza*, Report of 25 March 2009 (http://hrw.org/fr/reports/2009/03/rain-fire) [http://www.hrw.org/en/node/81726/section/1].

[69] Article 11 Jurisdiction *ratione temporis*

1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.
2. If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3.

[70] See *supra*, paras. 25-28

71 The declaration is signed by the Justice Minister but, as noted by the I.C.J., "with increasing frequency in modern international relations other persons representing a State in specific fields may be authorized by that State to bind it by their statements in respect of matters falling within their purview. This may be true, for example, of holders of technical ministerial portfolios exercising powers in their field of competence in the area of foreign relations, and even of certain officials" (Judgment, 3 February 2006, *Armed Activities on the Territory of the Congo (new Application 2002) (D.R.C. v. Rwanda) Jurisdiction of the Court and Admissibility of the Application*, para.47).

34. On this last point, which is at the core of the questions raised in the present paper, it seems to me that the Court has, for the reasons outlined above, no need to pronounce *in abstracto* on whether 'in the absolute' Palestine is or is not a State – which would lead to the need for it to decide between the sovereign assessments of the States that constitute the international community (and which benefit from powers of assessment for this purpose) while they are deeply divided. It suffices, rather, to note that, whatever the situation may be under other hypotheses, for the objectives of the Rome Statute this declaration could be formulated in conformity with the provisions of Article 12 and it could put in place the effects envisaged by Article 13.

35. Besides I remain no less convinced that Palestine exhibits all the attributes of a sovereign State (even if its territory is entirely occupied[72]) and that it would suffice for it to proclaim itself as such for the State quality of this entity not to be doubted. I also believe that one could consider that, by formulating the declaration under review, Palestine has indeed behaved as a State in the eyes of General International Law[73] in reason of the absence of State *animus* of the Palestinian Authority since the conclusions of the Oslo Accords of 1993, and of those of Cairo in 1994[74]. But, once again, I do not believe that it would be useful to ponder these legally difficult and politically controversial questions; in any event, for the purposes of the application of the Rome Statute, Palestine can – and must – be considered a State.

Done at Garches, 14 February 2010

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[72] With the doubts one can entertain with regard to Gaza – but it is not useful to raise here
[73] See *supra*, Note 2
[74] These accords are concluded "between the Government of the State of Israel and the PLO representing the Palestinian people" – thus showing that it does not consider itself a State government