



The Legal Status of Palestine under International Law

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ÚTDRÁTTUR

Réttarstaða Palestínu að þjóðarétti

Réttarstaða Palestínu að þjóðarétti hefur í áratugi verið mjög umdeild. Langt er liðið frá því að alþjóðasamfélagið viðurkenndi fyrst rétt Palestínumanna til sjálfsákvörðunarréttar og á síðustu 15-20 árum hefur það einnig viðurkennt rétt Palestínumanna til þess að stofna sitt eigið fullvalda og sjálfstætt ríki. Þrátt fyrir þá staðreynd nýtur Palestína enn ekki óumdeildrar viðurkenningar sem ríki og er ekki fullgildur meðlimur Sameinuðu þjóðanna. Markmið ritgerðar þessarar er að kanna réttarstöðu Palestínu að þjóðarétti. Til þess að veita heildaryfirsýn yfir málið þá er fyrst stuttlega fjallað um sögu Palestínu og ýmsar umdeildar aðgerðir Ísraels í Palestínu. Þá er kannað hvort Palestína uppfylli hin hlutlægu skilyrði þjóðaréttar fyrir tilvist sjálfstæðra ríkja eða þau skilyrði sem tilgreind eru í Montevideo sáttmálanum frá árinu 1933 (þ.e. um fólk, landsvæði, skipulegt ríkisvald og getu til milliríkjasamskipta). Önnur helstu einkenni ríkja eru jafnframt skoðuð, eins og viðurkenning og sjálfstæði auk þess sem einnig er vikið að sjálfsákvörðunarrétti Palestínumanna. Helstu niðurstöður eru þær að Palestína uppfyllir öll þau hefðbundnu skilyrði fyrir tilvist ríkis að þjóðarétti sem lýst er í Montevideo sáttmálanum. Eina „skilyrðið“ sem Palestína uppfyllir þó ekki að fullu er „skilyrðið“ um sjálfstæði, sem sumir fræðimenn vilja meina að sé í reynd viðbótarskilyrði fyrir tilvist ríkis. Það er hins vegar ein af grundvallarreglum þjóðaréttar að ólögmætar gjörðir ríkja geta ekki skapað rétt þeim til handa (*ex injuria jus non oritur*) og því getur ólögmætt hernám Ísraels ekki skert lagalegan rétt Palestínu. Það er meginniðurstaða mín í ljósi þeirrar rannsóknar sem hér fylgir að þrátt fyrir að Palestína uppfylli öll skilyrði fyrir tilvist ríkis að þjóðarétti þá njóti Palestína ekki fulls sjálfstæðis vegna hernámsins og pólitískra hagsmuna Ísrael og Bandaríkjanna.

ABSTRACT

The Legal Status of Palestine under International Law

The question of Palestinian statehood is and has been for decades a very controversial matter. Having long recognized the right of the Palestinian people to self-determination the international community has for the last 15 to 20 years also recognized the right of the Palestinian people to establish their own independent state. Despite that, Palestine does still not today enjoy full-undisputed statehood or a United Nations membership. The objective of this thesis is to analyze the legal status of Palestine under international law. In order to get full perspective of the matter the history of Palestine is first briefly addressed as well as few controversial Israeli actions in Palestine. Palestine is then considered under the traditional criteria for statehood under international law, found in the 1933 Montevideo Convention. Other prescribed features of statehood are also examined, such as the issues of recognition and independence and the notion of self-determination is also addressed. The main conclusions are that Palestine seems to satisfy all the four traditional criterias mentioned in the Montevideo Convention (i.e. people, land, government, and capacity to uphold international relations). I found that the only suggested 'criterion' that Palestine does not completely fulfill is the notion of independence, which according to some writers should be the additional criterion for statehood. However, given that one of the basic principles in international law is the principle of *ex injuria jus non oritur*, Palestine's lawful claim to statehood cannot be diminished due to Israel's illegal acts. Accordingly, it is my main conclusion that Palestine now fulfills all the conditions as a state under international law, while it is still not enjoying full independence as a state due to the occupation and the geopolitical views of Israel and the United States.

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European Union	EU
International Court of Justice	ICJ
International Criminal Court	ICC
International Labor Organization	ILO
Palestinian Authority	PA
Palestinian Legislative Council	PLC
Palestinian Liberation Organization	PLO
Palestinian National Council	PNC
Occupied Palestinian Territories	OPT
Soviet Union	USSR
United Nations	UN
United Nations Educational, Scientific and Cultural Organization	UNESCO
United Nations General Assembly	UNGA
United Nations Relief and Works Agency for Palestine Refugees	UNRWA
United Nations Security Council	UNSC
United States	US
World Health Organization	WHO

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Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A (III) (UDHR) art 13(2)

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International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)

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UNGA Res 2792 (6 December 1971) UN Doc A/RES/2792(XXVI)B
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UNGA Res 33/20 (25 November 1977) UN Doc A/RES/32/20
UNGA Res 33/29 (7 December 1978) UN Doc A/RES/33/29

United Nations Security Council

UNSC Res 237 (17 June 1967) UN Doc S/RES/237
UNSC Res 242 (22 November 1967) UN Doc S/RES/242
UNSC Res 271 (15 September 1969) UN Doc S/RES/271
UNSC Res 446 (22 March 1979) UN Doc S/RES/446
UNSC Res 681 (20 December 1990) UN Doc S/RES/681
UNSC Res 799 (18 December 1992) UN Doc S/RES/799
UNSC Res 1397 (12 March 2002) UN Doc S/RES/1397
UNSC Res 1860 (8 January 2009) UN Doc S/RES/1860

1. INTRODUCTION

The subject matter of this dissertation is the relationship between Palestine and international law. More precisely, the relevant research question is - what is the legal status of Palestine under international law? The topic mainly falls under the scope of public international law as well as international human rights law.

As for the structure, Chapter 2 will address the development of Palestine in the world community. It will briefly explain the history, mostly as concerns issues that are relevant to the question of statehood of Palestine today, such as regarding the situation in Palestine during the Ottoman period, under the British Occupation and then the events that lead up to the partition of Palestine. It will further address the creation of the state of Israel and the events that followed. The Oslo Accords will be explained and the situation in Palestine today will be addressed. I found it to be necessary to reveal first the history briefly so that the reader would from the outset get a clear picture on the historical background of the conflict. Chapter 3 will focus on the relationship between Palestine and international law. Many events that have occurred in Palestine have been very controversial as to whether they are in violation of various international law instruments. The occupation, the settlements, the wall, the issue of refugees and the issue of apartheid will all be addressed. Lastly the relationship between the International Criminal Court and Palestine will be discussed. Chapter 4 will then directly address the core issue of this paper, which is the subject of Palestinian statehood under international law. First, Palestine will be considered under the test of the traditional criteria for statehood, which is the criterion found in the so-called 1933 Montevideo Convention. Then the issues of recognition, independence and self-determination will be discussed and the benefits that would follow from Palestinian statehood. Finally, the main objections to Palestinian statehood will be analyzed and evaluated.

As stated above, the topic will be dealt with under the scope of public international law first and foremost. However, due to the nature of public international law it is sometimes difficult to separate issues of law and international politics. Therefore I found it to be necessary to also deal some with the historic and political facts of the matter in order to further understand the legal situation as it is today.

The question of Palestinian statehood is and has been for decades a very controversial matter. While working on this research that belief of mine has only strengthened. Due to the political nature of the subject it was very hard to find sources that address the subject only from an objective legal point of view. As the matter has been extremely politicized from the beginning it has lead to the fact that the issue of law has, as it seems, almost been subservient to politics and interests of the parties involved. However, there are at least two well-known international scholars that have written substantially about the subject of Palestinian statehood, namely James Crawford and John Quigley. They however also completely disagree on the status of Palestine. Crawford finds that Palestine is far from statehood while Quigley holds that Palestine is already a state. Books written by those scholars were thoroughly analyzed along with other books. Also, there is no lack of written papers and studies regarding the Israeli-Palestinian conflict. The problem is however, due to the fact that the matter is so controversial, that very few are objectively addressing legal issues. Therefore, when conducting this research I had to be very much aware of this fact and therefore tried to read all the materials with at least two pairs of censorship glasses! In addition to this I also used various web pages available, mainly the United Nations web page, the International Court of Justice web page, besides many others official or trustworthy web pages being updated with relevant additional information.

2. PALESTINE AND THE WORLD COMMUNITY – FROM OTTOMAN TO PRESENT

2.1. The Ottoman Empire and the British Occupation

Palestine was a part of the Ottoman Empire from the 16th century until the beginning of the 20th century. The Empire expanded westward in Europe to the borders of Austria and along the southern rim of the Mediterranean Sea into Algeria.¹ The Empire's independence was recognized by states and no other state denied the Empire's supremacy over its extended territory and subjects and no other state claimed sovereign rights over Palestine.² During the Ottoman rule, central governance was usually weak, leaving the people mostly under their own local rule.³ It didn't change the fact that the inhabitants of Palestine were Ottoman subjects, like all other inhabitants in other territories that were under the Empire. Ottoman nationality was first codified by the Ottoman Nationality Law, enacted on January 19th 1869. Prior to the 1869 Law, nationality was based on the Islamic law that was applicable in the Ottoman Empire and individuals were classified along religious lines. Under the 1869 Law, Ottoman Muslims and non-Muslims belonged to the same political community on equal footing.⁴

At the end of the First World War, Great Britain and France worked with the Arabs to bring the Ottoman Empire to an end. The Ottoman Turkish forces were defeated in 1917. When the war ended, Palestine was one of the states that were liberated from the Ottoman Turks without getting independence. France and Great Britain administrated different sectors of the former Empire and Palestine fell under British administration.⁵ The British occupation did not change the status of Palestine as an occupied Turkish territory. Article 43 of both the Hague Regulations Respecting the Laws and Customs of War on Land of 1899 and the Hague Regulations Concerning the Laws and Customs of Land Warfare of 1907, obliged the occupant to

¹ Mutaz M. Qafisheh, *The international law foundations of Palestinian nationality. A Legal Examination of Nationality in Palestine under Britain's Rule* (Martinus Nijhoff Publishers 2008) 25

² Ibid 43

³ John Quigley, *The Statehood of Palestine - International Law in the Middle East Conflict* (Cambridge University Press 2010) 40

⁴ Gianluca Paolo Parolin, *Citizenship in the Arab World: Kin, Religion and Nation-state* (Amsterdam University Press 2008) 74

⁵ Viðar Þorsteinsson, 'Saga Palestínu og Ísraels' (*Félagið Ísland-Palestína*, 2002)

<<http://www.palestina.is/upplýsingar/saga-palestinu-og-israels/>> accessed 10 February 2012

respect the laws in force in the country. Occupation can therefore not provide any title to the occupying power over the occupied territory. Palestine's inhabitants therefore continued to be Ottoman citizens in accordance with the 1869 Law even when under British occupation.⁶ Even though the inhabitants of Palestine remained Ottoman citizens according to public international law, in practice they started to be gradually regarded as Palestinians. The territory of Palestine and its inhabitants became distinct from its neighboring countries. The citizens of the neighboring countries were treated as foreigners in Palestine while Palestinian citizens were likewise treated as foreigners in those countries.⁷

2.2. The Zionist Movement

The Zionist movement that began in the nineteenth century was formed with the main purpose to establish a new 'Nation' for Jews and acting against persecutions that Jews were starting to sense in Europe. The Zionist movement took official shape in 1897 with the First Congress held in Basel, Switzerland. At the Congress the aims of the movement were formulated. To attain the movement's main aim, to create a home in Palestine for the Jewish people, the Congress saw the need to promote 'suitable lines of the colonization of Palestine by Jewish agricultural and industrial workers'.⁸ This is exactly what happened. At the end of the nineteenth century and in the beginning of the twentieth, Jews started migrating to Palestine, buying Palestinian land and settling there.

In the course of fifty years, or from the end of the Nineteenth century until the beginning of the Second World War in 1939, the Jewish population in Palestine grew enormously. Between 1882 and 1904 about 35,000 Jewish immigrants migrated to Palestine and by 1904, it is estimated that the total Jewish population in Palestine was 50,000, which means that before 1882, the Jewish Population in Palestine was about 15,000. During 1904–1914 about 40,000 more Jews migrated to Palestine and during the years 1919–1923 around 35,000 Jews came to live in Palestine.⁹

⁶ Mutaz M. Qafisheh, *The international law foundations of Palestinian nationality. A Legal Examination of Nationality in Palestine under Britain's Rule* (Martinus Nijhoff Publishers 2008) 53

⁷ Ibid 51

⁸ Sami Hadawi, *Bitter Harvest* (Olive Branch Press 1991) 33

⁹ Paul G. Pierpaoli, 'Second Aliya' in Spencer C. Tucker (ed) *The Encyclopedia of the Arab-Israeli Conflict: A Political, Social, and Military History* (ABC-CLIO 2008) 85-90

2.3. The Balfour Declaration

On November 2, 1917, the British cabinet issued a declaration of support for the Zionist movement. The declaration was conveyed in a letter signed by the British Foreign Secretary A.J. Balfour.¹⁰ The declaration read: 'His Majesty's government view with favor the establishment in Palestine of a national home for the Jewish people'. It also stated that 'nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country.'¹¹ It should be noted that in 1917, the 'non-Jewish' population consisted of 92% of the total population in Palestine. To refer to the Arabs in this way, can easily give the erroneous impression that they were an insignificant minority occupying a position subordinate to the Jews.¹²

There were varieties of motives for the declaration. One of them was Britain's desire to exercise its influence in post-war Palestine. Britain believed that Palestine was a critical overland bridge to British possessions in the East. Furthermore, the Brits wished that the support of Russian Jews would help keep Russia allied with Britain in the war.¹³ The declaration represented the first political recognition of Zionist aims by a Great Power. The decision to help Jews establish a national home for Jews in Palestine was however not consistent with promises the Brits had given the Arabs. The Brits had promised support for Arab independence in return for Arab military cooperation against the Ottomans (author-translated).¹⁴ For this reason critics have stated that the Balfour declaration was invalid as it conflicted with prior commitments of Britain for Arab independence in the Middle East.

As the declaration was not a treaty nor an agreement between states the legal status is quite unclear. The International Court of Justice (ICJ) has held that unilateral declarations can be legally binding on the basis of good faith, if it's made with the

¹⁰ John Quigley, *The Statehood of Palestine - International Law in the Middle East Conflict* (Cambridge University Press 2010) 14

¹¹ 'The Balfour Declaration' (Israel Ministry of Foreign Affairs)
<http://www.mfa.gov.il/MFA/Peace%20Process/Guide%20to%20the%20Peace%20Process/The%20Balfour%20Declaration> Accessed February 17th, 2012

¹² Sami Hadawi, *Bitter Harvest* (Olive Branch Press 1991) 14

¹³ Geoffrey R. Watson, *The Oslo Accords: International Law and the Israeli-Palestinian Peace Agreements* (Oxford University Press 2000) 7

¹⁴ Viðar Þorsteinsson, 'Saga Palestínu og Ísraels' (*Félagið Ísland-Palestína*, 2002)
<<http://www.palestina.is/upplýsingar/saga-palestinu-og-israels/>> accessed 10 February 2012

intent to be bound.¹⁵ It is difficult to assess whether the intent was to be bound, as it did not go in hand with promises the Brits had given the Arabs. Still, most scholars have concluded that the Balfour Declaration was generally incorporated into the League of Nations Mandate for Palestine, which was legally binding.¹⁶ There is still ongoing debate about the legal status of the Balfour Declaration and the topic is too extensive to analyze fully as such in this paper. Nonetheless, it cannot be denied that the political consequence of the declaration was enormous.

2.4. Palestine as a Mandate

Article 22 of the Covenant of the League of Nations established the mandate system. The individual mandates were classified differently based on what was considered to be a country's readiness for self-rule. Syria, Lebanon, Trans-Jordan, Iraq and Palestine, were all placed in class A, implying the ability of these territories to govern themselves and that the period of the mandate was to be relatively short.¹⁷ Article 22 of the Covenant of the League of Nations was clear as to what would happen to Palestine as a mandated territory to Great Britain. Paragraph 1 read:

To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization and that securities for the performance of this trust should be embodied in this Covenant.¹⁸

Further, article 22(4) read:

Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The

¹⁵ Nuclear Tests (Australia. v. France) [1974] ICJ Rep 253

¹⁶ Geoffrey R. Watson, *The Oslo Accords: International Law and the Israeli-Palestinian Peace Agreements* (Oxford University Press 2000) 7

¹⁷ Mutaz M. Qafisheh, *The international law foundations of Palestinian nationality. A Legal Examination of Nationality in Palestine under Britain's Rule* (Martinus Nijhoff Publishers 2008) 53

¹⁸ League of Nations, The Covenant of the League of Nations (adopted 29 April 1919, entered into force 10 January 1920) UKTS 4

wishes of these communities must be a principal consideration in the selection of the Mandatory.¹⁹

In other words, Great Britain was to administrate Palestine ‘until such time as they [e.g. Palestine] are able to stand alone’. The wording indicates that the intention with the mandate was for the benefit of the people who were the ultimate holders of sovereignty.²⁰ Britain was forbidden to claim title to the territory it mandated under the mandate system. The operative principle was no annexation. That principle distinguished the mandate system from the colonial system. Ergo, Britain did not hold sovereignty in Palestine.²¹ Despite their power to self-government was restricted and exercised by a Mandatory the entities under the mandates became or were to become states.²² The ICJ has confirmed this interpretation of the mandates system, explaining that the ultimate objective of the mandate system was the ‘self-determination and independence of the peoples concerned.’²³

2.4.1. The Mandate for Palestine

The League Council confirmed the British Mandate for Palestine on July 24, 1922 and it entered into force on September 29, 1923. The Mandate was based on the principles contained in article 22 of the Covenant of the League of Nations. In many ways the Mandate appeared to endorse a Jewish ‘national home’ more vigorously than the Balfour Declaration. The preamble of the Mandate specifically mentions the declaration. It read:

Whereas the Principal Allied Powers have also agreed that the Mandatory should be responsible for putting into effect the declaration originally made on November 2nd, 1917, by the Government of His Britannic Majesty, and adopted by the said Powers, in favour of the establishment in Palestine of a national home for the Jewish people, it being clearly understood that nothing should be done which might prejudice the civil and religious rights of existing

¹⁹ Ibid

²⁰ John Quigley, ‘Summary of submissions on whether the declaration lodged by the Palestinian National Authority meets statutory requirements’ (*The International Criminal Court*, 3 May 2010) <<http://www.icc-cpi.int/NR/rdonlyres/D3C77FA6-9DEE-45B1-ACC0-B41706BB41E5/281882/QuigleyPalestinedeclarationandtheICC1.pdf>> 8 accessed 2 March 2012

²¹ Ibid 6.

²² Henry Cattán, *The Palestine Question* (Croom Helm 1988) 23

²³ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276* (Advisory Opinion) 1970 <<http://www.icj-cij.org/docket/index.php?p1=3&p2=4&code=nam&case=53&k=a7&p3=0>> accessed 2 February 2012

non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country.²⁴

The provisions of the Mandate elaborate considerably on the declaration's favorable attitude towards a Jewish national home in Palestine. On the other hand, the Mandate also elaborated on the Balfour Declaration's provision that the rights of non-Jewish communities should be respected.²⁵

2.5. The Treaty of Lausanne

The Treaty of Lausanne was a peace treaty signed at Lausanne on July 24th, 1923 between Turkey and the British Empire, Italy, France, Japan, Greece, Romania and the Serb-Croat-Slovene State. The Treaty officially ended the World War I. It gained ratification and entered into force on August 6th, 1924. With the treaty, Turkey gave up all claims to the remainder of the Ottoman Empire and in return the other signatories recognized Turkish sovereignty within its new borders.²⁶ When Palestine was legally separated from Turkey, the Ottomans who resided in the territory of Palestine became *ipso facto* Palestinian citizens.²⁷ Article 30 of the Treaty of Lausanne read;

Turkish subjects habitually resident in territory which in accordance with the provisions of the present Treaty is detached from Turkey will become ipso facto, in the conditions laid down by the local law, nationals of the State to which such territory is transferred.²⁸

The phrase 'State to which such territory is transferred' meant the newly constituted States, not the mandatories.²⁹ Ergo, article 30 stated that Palestine was the state to which territory was transferred. National courts have confirmed this understanding of

²⁴ 'The Mandate for Palestine' (Israel Ministry of Foreign Affairs) <<http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/The+Mandate+for+Palestine.htm>> accessed 15 February 2012

²⁵ Geoffrey R. Watson, *The Oslo Accords: International Law and the Israeli-Palestinian Peace Agreements* (Oxford University Press 2000) 17

²⁶ John Quigley, *The Statehood of Palestine - International Law in the Middle East Conflict* (Cambridge University Press 2010) 40

²⁷ Mutaz M. Qafisheh, *The international law foundations of Palestinian nationality. A Legal Examination of Nationality in Palestine under Britain's Rule* (Martinus Nijhoff Publishers 2008) 26

²⁸ Lausanne Peace Treaty (signed 24 July 1923, entered into force on 6 August 1924) 28 LNTS 11

²⁹ John Quigley, *The Statehood of Palestine - International Law in the Middle East Conflict* (Cambridge University Press 2010) 40

the phrase. In 1940 case before a British court, *King v. Ketter*³⁰, the issue was whether Ketter, a man who was a resident of Palestine, did also held a British nationality. Upon appeal the Court of Criminal Appeal ruled that: ‘There was no provision in art. 30 for the transfer of territory to Great Britain. If there had been, there would have been no need for the mandate.’ So the court read article 30 of the Treaty, to mean that Palestine was the ‘state’ to which territory was transferred. In other words, with the ratification of the Treaty, the former Ottoman territories were set up as states as international moral persons, subjects of international law, capable of rights and bearing obligations.³¹ In international law, when a former state ceases to exist and a new state is established the population follows the change of sovereignty in matters of nationality.³² But this didn’t happen right away, as even though the Ottoman Empire ceased to exist after the ratification of the Treaty of Lausanne, the *de facto* status of the Palestinian nationality didn’t change to *de jure* until the enforcement of the Palestinian Citizenship Order on August 1st, 1925. Article 1 of the order granted the inhabitants of Palestine Palestinian nationality.³³

2.6. The Second World War

The Second World War had substantial consequences for Palestine. It brought the Nazi Holocaust, which killed at least around six million Jews and led to increased migration of Jews to Palestine. Between the years 1924-1939 some 310,000 Jews migrated to Palestine. The Jewish population in Palestine grew from around 15,000 people in 1882 to 435,000 people in 1939.³⁴ In 1947, a year before the creation of the Jewish state, the Jewish population were 649,500 out of total 1.95 million inhabitants in Palestine. By this time the Jews represented 31.1% of the total population in Palestine, compared to 11.1% in 1922. This massive increase of migration of Jews to Palestine, led to intensified conflicts between the Jews and the Arabs. All efforts to mediate the conflict failed.³⁵ At the same time the world was starting to realize that

³⁰ *King v. Ketter* [1940] 1 KB 787, 789-790

³¹ John Quigley, *The Statehood of Palestine - International Law in the Middle East Conflict* (Cambridge University Press 2010) 41

³² Ian Brownlie, *Principles of Public International Law* (University Press 2008) 220

³³ Mutaz M. Qafisheh, *The international law foundations of Palestinian nationality. A Legal Examination of Nationality in Palestine under Britain's Rule* (Martinus Nijhoff Publishers 2008) 52

³⁴ Spencer C. Tucker, *The Encyclopedia of the Arab-Israeli Conflict: A Political, Social, and Military History* (ABC-CLIO 2008) 85-90

³⁵ Geoffrey R. Watson, *The Oslo Accords: International Law and the Israeli-Palestinian Peace*

the days of the British World Power was coming to an end, with the United States (US) and the Soviet Union (USSR) replacing them and France as the new Great Powers (Author-Translated).³⁶ Faced with the problems surrounding Palestine and the political and economic costs, the Brits decided to turn the matter over to the United Nations (UN), which was established in 1945.

2.7. The United Nations and the Question of Palestine

The UN was founded in 1945, in the aftermath of the Second World War. The UN inherited many features of the League of Nations, which dissolved on the onset of the Second World War since it had failed its primary purpose, to avoid any future conflicts.³⁷ The UN has six principle organs: the General Assembly (UNGA), the Security Council (UNSC), the Economic and Social Council, the Secretariat, the ICJ and the United Nations Trusteeship Council (now de-functional). The UNSC consists of 5 permanent members and ten non-permanent members, who are elected by the UNGA for two-year terms at a time. The permanent members are China, France, Russia, the United Kingdom and the US. Each UNSC member has one vote. The UNSC is the only body that can make decisions, which all UN members are obligated under the Charter to carry out. Other bodies, like the UNGA, can simply make recommendations.³⁸ Decisions on substantive matters in the UNSC require nine affirmative votes, including concurring votes of all the 5 permanent members. This is often referred to as the 'veto power'.³⁹

The veto has in many instances blocked the ability of the UNSC to take a proper action against threats to world peace and violations of international law. Since the early 1970's the US has been by far the most frequent user of the veto, almost predominantly (over 40 times) when it comes to proposed resolutions criticizing Israel in one way or another.⁴⁰

Agreements (Oxford University Press 2000) 19

³⁶ Viðar Þorsteinsson, 'Saga Palestínu og Ísraels' (*Félagið Ísland-Palestína*, 2002)

<<http://www.palestina.is/upplýsingar/saga-palestinu-og-israels/>> accessed 10 February 2012

³⁷ Paul Kennedy, *The Parliament of Man, The Past, Present and Future of the United Nations* (Random House 2006) 10-23

³⁸ UN Security Council 'UN Security Council' <<http://www.un.org/sc/members.asp>> accessed 5 March 2012

³⁹ Ibid

⁴⁰ Tarik Kafala, 'The veto and how to use it' (*BBC*, 17 September 2003)

<http://news.bbc.co.uk/2/hi/middle_east/2828985.stm> accessed 4 March 2012

2.7.1. The Mandates under the United Nations

The mandates were not terminated by the dissolution of the League of Nations, but were placed under the trusteeship system of the UN. Article 77 of the UN Charter provided that: ‘The trusteeship system shall apply to such territories in the following categories as may be placed thereunder by means of trusteeship agreements: a. territories now held under mandate....’⁴¹ Article 80(1) was a default provision, persevering mandates rights:

1. Except as may be agreed upon in individual trusteeship agreements, made under Articles 77, 79, and 81, placing each territory under the trusteeship system, and until such agreements have been concluded, nothing in this Chapter shall be construed in or of itself to alter in any manner the rights whatsoever of any states or any peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties.⁴²

In its Advisory Opinion ‘International Status of South-West Africa’⁴³ in 1950, the ICJ affirmed that the mandates were not terminated by the dissolution of the League of Nations, and stated that the rights of states survived the demise of the League.⁴⁴

2.7.2. General Assembly’s Resolution 181

Soon after Britain referred the matter of Palestine to the UN a Special UN Commission of Palestine met for the first time in Jerusalem. It eventually recommended partition of Palestine into a Jewish State and an Arab State and shortly after the UNGA put this recommendation on its agenda.⁴⁵ Then on November 29 1947 the UNGA resolution 181(II)⁴⁶ was approved, often referred to as the Partition Plan. The resolution was to resolve the ongoing conflict in Palestine by dividing the country in such a way that each state, one Jewish and one Arab, would get about half

⁴¹ United Nations, Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter)

⁴² Ibid

⁴³ *International Status of South-West Africa* (Advisory Opinion) 1950 <<http://www.icj-cij.org/docket/index.php?p1=3&p2=4&code=sswa&case=10&k=30&p3=0>> accessed 3 March 2012 [128]

⁴⁴ John Quigley, *The Statehood of Palestine - International Law in the Middle East Conflict* (Cambridge University Press 2010) 88

⁴⁵ Geoffrey R. Watson, *The Oslo Accords: International Law and the Israeli-Palestinian Peace Agreements* (Oxford University Press 2000) 21

⁴⁶ UNGA Res 181 (29 November 1947) UN Doc A/RES/181(II) A

of the land but Jerusalem would be administered by the UN. A two-third majority of the UNGA at that time voted for the resolution, being so adopted. The Palestinians opposed the resolution from the outset⁴⁷ but the Jews on the other hand accepted it instantly.⁴⁸ Resolution 181 was a non-binding proposal, simply a recommendation. As noted above, the UNSC is the only UN body that can make binding decisions within its competence. UNGA's resolutions are only recommendations like article 10 of the UN Charter clearly states:

The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters.⁴⁹

The resolution urged the Arab and the Jewish communities to create states but did not require them to do so. The intention was not to divide Palestine with force.⁵⁰ The resolution stated that the UNGA:

[R]ecommends to the United Kingdom, as the mandatory Power for Palestine, and to all other Members of the United Nations the adoption and implementation, with regard to the future government of Palestine, of the Plan of Partition with Economic Union set out below.⁵¹

Again, the crucial word here is 'recommends'. The resolution was never adopted by the UNSC nor turned into a binding treaty of any kind and therefore had really no formal legal standing. It was soon clear that the implementation of resolution 181 was *de facto* impossible. The situation in Palestine at this time was chaotic and the Palestine Commission that had been set up by resolution 181 declared that the implementation of the resolution would not work out unless the UN used armed force.

⁴⁷ Palestinian President Mahmoud Abbas has stated that the Arab world erred in rejecting the Partition Plan. Source: 'Abbas: Arab world was wrong to reject 1947 Partition Plan' (The Haaretz, 28 October 2011) <<http://www.haaretz.com/news/diplomacy-defense/abbas-arab-world-was-wrong-to-reject-1947-partition-plan-1.392560>> accessed 5 April 2012

⁴⁸ Joseph Massad, 'The rights of Israel' (*Al Jazeera*, 6 May 2011) <<http://english.aljazeera.net/indepth/opinion/2011/05/20115684218533873.html>> accessed 2 March 2012

⁴⁹ United Nations, Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter)

⁵⁰ John Quigley, *The Statehood of Palestine - International Law in the Middle East Conflict* (Cambridge University Press 2010) 94

⁵¹ UNGA Res 181 (29 November 1947) UN Doc A/RES/181(II) A

Not long after, Britain left Palestine and Israel declared independence, which led to the first war between the Arab states and Israel. The resolution was never implemented and after 1948, UN resolutions did not generally rely on the Partition Plan. Moreover, UNSC resolution 242 (that will be discussed later), which is legally binding, implicitly superseded the territorial formula in resolution 181, since it called only for Israeli withdrawal from territories occupied in the 1967 War, not withdrawal to the borders envisioned by resolution 181.⁵²

2.8. Israel's Declaration of Independence

Israel declared independence on May 14th 1948. The declaration read:

On the 29th November 1947, the United Nations General Assembly passed a resolution calling for the establishment of a Jewish State in Eretz-Israel; the General Assembly required the inhabitants of Eretz-Israel to take such steps as were necessary on their part for the implementation of that resolution. This recognition by the United Nations of the right of the Jewish people to establish their State is irrevocable.⁵³

The new State of Israel invoked resolution 181 as a basis for the legitimacy of the new Jewish state and claimed that the 'right of the Jewish people to establish their State is irrevocable'. Irrevocable is an interesting word of choice as the resolution in question was solely a recommendation as pointed out above. Still the Jews relied upon the resolution and the majority of states followed. The declaration did not mention the borders of the state it was declaring but its reference to resolution 181 gave strong evidence that the resolution's borders would provide the borders of the new state.⁵⁴ Only 10 minutes after Israel's declaration of independence was issued the then US President Harry Truman, on the behalf of the US, endorsed the declaration by giving *de facto* recognition to Israel. Many other states followed soon after. Then in 1949, Israel was accepted into the UN, the first state to be admitted on conditions.

⁵² Geoffrey R. Watson, *The Oslo Accords: International Law and the Israeli-Palestinian Peace Agreements* (Oxford University Press 2000) 24

⁵³ 'The Declaration of Establishment of State of Israel' (Israel Ministry of Foreign Affairs) <<http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Declaration+of+Establishment+of+State+of+Israel.htm>> Accessed 15 February 2012

⁵⁴ John Quigley, *The Statehood of Palestine - International Law in the Middle East Conflict* (Cambridge University Press 2010) 102

The conditions were that Israel should comply with UNGA resolutions 181⁵⁵ and 194⁵⁶ from December 11 1948, which called for the return of refugees, both of which Israel has still not complied to. Since the admission the international community has dealt with Israel as a state.⁵⁷ Following the founding of the State of Israel a period of mass migration took place through 1951, as the arrival of nearly 700,000 Jews during this period doubled the total Jewish population. This amounts to almost the same number of people as the number of Palestinians who were expelled from their homes around the creation of the Jewish state.⁵⁸

Some commenters have argued that the establishment of the state of Israel was illegal under international law. They mainly point out two issues: First, that Israel didn't at the time fulfill the criterion for statehood when it was established and secondly, that the Partition Plan was adopted by the UNGA not the UNSC, which meant that the resolution didn't have any mandatory force. Professor James Crawford is of the opinion that Israel was lawfully established as a state by secession from Palestine by about January 1949 (after the armistice agreements) and considers that because Israel wasn't a state until then; the recognition by the US was premature.⁵⁹ Today it seems evident that Israel is a state.

2.9. The two Israeli-Arab Wars in the Middle East

2.9.1. The 1948 War

After a period of tension between the Jews and the Palestinians, a war broke out between Israel and neighboring Arab states on May 15th 1948, only a day after Israel's declaration of independence. The war is known to the Israelis as the War of Independence and it certainly changed the dynamic in the region. Forces from Egypt, Iraq, Jordan, Lebanon and Syria invaded the territory of the brand new state, on May 15th. The official motives for their intervention were set out in a statement dated the same day:

⁵⁵ UNGA Res 181 (29 November 1947) UN Doc A/RES/181(II) A

⁵⁶ UNGA Res 194 (11 December 1948) UN Doc A/RES/194(III)

⁵⁷ John Quigley, *The Statehood of Palestine - International Law in the Middle East Conflict* (Cambridge University Press 2010) 121

⁵⁸ Ibid 467

⁵⁹ James R. Crawford, *The Creation of States in International Law* (Oxford University Press 2006) 109

Security and order in Palestine have become disrupted. The Zionist aggression resulted in the exodus of more than a quarter of a million of its Arab inhabitants from their homes and in their taking refuge in the neighboring Arab countries.⁶⁰

The war lasted for a little over a year and ended with the General Armistice Agreements. Israel who had won the war, signed four separate pacts, with Egypt, Lebanon, Jordan and Syria. As a result of its military gains Israel now controlled nearly 75% of mandatory Palestine, a much larger area than the 1947 Partition Plan had granted to the Jewish state.⁶¹ The remaining Palestinian territory fell under occupation by Jordan and Egypt, where Jordan occupied the West Bank and East Jerusalem and Egypt the Gaza Strip. This occupation lasted until the 1967, when, as a result of the Six Day War, the territories went under Israel occupation.⁶² The armistice lines are known today as the 'Green Line' or the 'Pre-1967 borders' and represent the borders now officially claimed by the Palestinians.

2.9.2. The 1967 War

The next two decades after the 1948 war, did not bring any improvement in Arab-Israeli relations. The Suez crisis of 1956 worsened Arab-Israeli relations but did not change the legal situation of territory. Israel, France, and Britain jointly invaded Egypt, only to be forced to retreat in the face of determined opposition from the US, the USSR and the international community.⁶³ After period of tension between Israel and neighboring Arab countries, a war broke out on June 5th, 1967, after Israel launched an airstrike in Egypt.⁶⁴ June 5th and the next five days that followed would be come known to the world as the Six-Day War.⁶⁵ Even though it was not immediately apparent at that time, the war's aftermath would have huge impact on the Middle East and the world.

⁶⁰ '5 Arab League declaration on the invasion of Palestine- 15 May 1948'
(Israel Ministry of Foreign Affairs)

<<http://www.mfa.gov.il/MFA/Foreign+Relations/Israels+Foreign+Relations+since+1947/1947-1974/5+Arab+League+declaration+on+the+invasion+of+Pales.htm>> accessed 17 February 2012

⁶¹ Spencer C. Tucker, *The Encyclopedia of the Arab-Israeli Conflict: A Political, Social, and Military History* (ABC-CLIO 2008) 771

⁶² James R. Crawford, *The Creation of States in International Law* (Oxford University Press 2006) 425

⁶³ Geoffrey R. Watson, *The Oslo Accords: International Law and the Israeli-Palestinian Peace Agreements* (Oxford University Press 2000) 28

⁶⁴ Matthew Broyles, *The Six-Day War* (Rosen Publishing Group 2004) 36

⁶⁵ Ibid 4

With the war, Israel seized the remaining 22% of the Palestinian land and therefore began the world's longest running occupation.⁶⁶ The occupation has led to a great deal of unrest in the Middle East and some say it's the reason for the huge gap between the Arab world and the Western world. The continuing occupation is in fact illegal under international law as will be discussed later. Few months after the Six-Day War the UNSC adopted resolution 242⁶⁷ which urged the withdrawal of the Israeli forces from the territories occupied in the war. As a political matter, the 'land-for-peace' scheme of the resolution remains the cornerstone of peace plans for the Middle East. As a legal matter, it is the most significant plank of the legal framework underlying the Oslo Accords.⁶⁸ Resolution 242 will be further discussed in Chapter 3.1.

2.10. The Palestinian 1988 Declaration of Independence

On November 15th 1988, despite the ongoing occupation, an independent state of Palestine was proclaimed by the Palestinian National Council (PNC)⁶⁹ in a meeting in Algiers. The declaration invoked UNGA resolution 181 in support of its claim to a 'State of Palestine on our Palestinian territory with its capital Jerusalem'. It did also note the recognition given to Palestine by the Covenant of the League of Nations and the Treaty of Lausanne.⁷⁰

The state of Palestine was widely recognized by states but was still rejected by the US, Israel and many European countries. Consequently, the declaration did not lead to international recognition and independence for Palestine. The declaration however had numerous positive influences. The then UN Secretary-General, Javier Perez de Cuellar, said that the declaration opened opportunities for peace by virtue of its acceptance of Israel and soon after the UNGA invited the then PLO leader Yasser Arafat to address it. Significantly, the UNGA adopted resolution 43/177 which acknowledged 'the proclamation of the State of Palestine by the Palestinian National

⁶⁶ Jón Ormur Halldórsson, 'Hvaða yfirráðarétt hefur Ísrael á hernumdum svæðum Palestínu? Hvernig hefur alþjóðasamfélagið tjáð sig um þessi yfirráð?' (*Vísindavefurinn*, 12 April 2002) <<http://visindavefur.hi.is/svar.php?id=2295> > accessed 12 February 2012 (author-translated)

⁶⁷ UNSC Res 242 (22 November 1967) UN Doc S/RES/242

⁶⁸ Geoffrey R. Watson, *The Oslo Accords: International Law and the Israeli-Palestinian Peace Agreements* (Oxford University Press 2000) 34

⁶⁹ The Palestinian National Council is the legislative body of the Palestinian Liberation Organization, which will be addressed in Chapter 2.12.1.

⁷⁰ John Quigley, *The Statehood of Palestine - International Law in the Middle East Conflict* (Cambridge Press 2010) 153-157

Council'. The resolution also stated that the 'designation 'Palestine' should be used in the place of the designation 'Palestine Liberation Organizations' in the United Nations system.' One hundred and four states voted in favor of the resolution, thirty-six abstained and only the US and Israel voted against.⁷¹

2.11. The Oslo Accords

The Oslo Accords represented a major change in the relationship between Israel and the Palestinians. The road to Oslo was a long one and there were many factors and events that lead the parties down that road.

In 1988 the PLO changed its political position greatly where in November, the PNC accepted UNSC resolution 242 and condemned terrorism. In the next month, Arafat held a speech at the UNGA where he recognized Israel's right to exist in peace and security. This meant that for the first time the PLO had accepted the two-state solution, where the Palestinian state would get only about 22% of original mandated Palestine. This major policy change was perhaps the most significant factor that led to Oslo.⁷² Also, the world order was starting to change. The end of the Cold War was approaching which spurred the PLO and Arab states to support some sort of peace talks, as the breakup of the Soviet Union deprived the Arab world of a military and political ally. At the same time the Bush senior Administration threatened to hold back US financial support for Israel, which put pressure on Israel to engage in peace talks.⁷³

It was under these conditions that representatives from Israel and Palestinian representatives met at the Madrid conference in October 1991. No agreements were reached during the conference but it established a framework for peace negotiations on many fronts.⁷⁴ The parties started negotiations soon after but there was no serious breakthrough for over twenty months. Then, under a lot of pressure the PLO and the Israelis started secretly negotiating face to face in Oslo, Norway. These negotiations took place in a series of talks over nearly a year. Then on September 13th 1993, at a ceremony with US President Bill Clinton on the White House lawn, the PLO and the

⁷¹ Ibid 160

⁷² Galia Golan, *Israel and Palestine: Peace Plans and Proposals from Oslo to Disengagement* (Markus Weiner Publishing Inc, 2008) 9-10

⁷³ Geoffrey R. Watson, *The Oslo Accords: International Law and the Israeli-Palestinian Peace Agreements* (Oxford University Press 2000) 38

⁷⁴ Ibid 38

Israeli government formally signed 'The Declaration of Principles' also often called 'Oslo I'.⁷⁵

2.11.1. Oslo I (The Declaration of Principles)

Oslo I provided for a gradual transfer of power from Israel to Palestinians in the West Bank and the Gaza Strip, with 'permanent status' negotiations on the most difficult issues, like Jerusalem, final borders, settlements, refugees, security arrangements, etc., to begin two years after Israel's initial withdrawal from Jericho and the Gaza Strip.⁷⁶ Implementation of Oslo I was not easy. The agreements did not take place on schedule, often due to intervening violence and disputes over interpretation.⁷⁷ However, in the spring of 1994 the parties finally came to an agreement over how to implement Israel's promise to withdraw from the Gaza Strip and Jericho and on April 4th, 1994 the Israeli Defense Forces began the process of evacuating from their headquarters in Jericho and the Gaza Strip. Then on 29 April Israel and the PLO signed a Protocol on Economic Relations that today still forms the basis for economic relations between the parties. Finally, on 4 May 1994, the parties signed the Agreement on the Gaza Strip and the Jericho Area, which called on Israel to withdraw from the Gaza Strip and Jericho within three weeks. The Gaza-Jericho Agreement also established a Palestinian self-governing entity called the Palestinian Authority (PA), and it obliged Israel to transfer some civil authority to the Authority.⁷⁸ The Gaza-Jericho Agreement was incorporated into and superseded by the so-called Interim Agreement or Oslo II.

2.11.2. Oslo II (The Interim Agreement)

The next major step in implementing Oslo I came on 28 September 1995, when the parties met in Washington to sign Oslo II or the Interim Agreement.⁷⁹ The Interim Agreement established important organs of Palestinian self-government and provided for the creation of elected 82-person Palestinian Council. It also provided that

⁷⁵ Christine Bell, *Peace Agreements and Human Rights* (Oxford University Press 2004) 83

⁷⁶ Geoffrey R. Watson, *The Oslo Accords: International Law and the Israeli-Palestinian Peace Agreements* (Oxford University Press 2000) 42

⁷⁷ Christine Bell, *Peace Agreements and Human Rights* (Oxford University Press 2004) 83

⁷⁸ Geoffrey R. Watson, *The Oslo Accords: International Law and the Israeli-Palestinian Peace Agreements* (Oxford University Press 2000) 43

⁷⁹ Ibid 44

President would be elected to serve as head of a 24-person Executive Authority. In addition, it established new and more detailed arrangements for the withdrawal of Israeli forces from areas of the West Bank.⁸⁰ The agreement introduced a wide variety of other obligations on the parties, for example that the parties needed to respect human rights and Israel was obligated to permit some form of safe passage for Palestinians from the West Bank to Gaza, not being geographically connected. Further, the PLO were obliged to amend its Charter to remove anti-Semitic and anti-Israel clauses, particularly those calling for the destruction of the state of Israel.⁸¹

The parties did move forward to implement some important provisions of the Interim Agreement. In 1995 Israel started to withdraw from towns in the West Bank and the Palestinians held their first elections to the Palestinian Legislative Council (PLC). Yasser Arafat was elected President of the new PA and by the end of 1995 Israel had withdrawn its forces from six urban areas. This development meant that Israel had withdrawn from seven of the eight major populated areas of the West Bank.⁸² But on November 4th, 1995, Israel Prime Minister, Rabin was assassinated by Zionist extremist, Yigal Amir, who strongly opposed the Oslo agreements which led to the Likud party coming to power in Israel in June 1996 and Benjamin Netanyahu became prime minister. With this change, the peace process froze, maybe not a big surprise, as Netanyahu had openly been against the Oslo Accords.⁸³ During the next years, some aspects of the agreement were implemented but far from all of them.

The Interim Agreement is by far the most ‘legal’ document of the Oslo Accords as unlike the Declaration of Principles, it creates immediate and specific obligations for both parties. In the views of some writers the Interim Agreement is actually a treaty in almost every sense of the 1969 Vienna Convention on the Law of Treaties. The only exception, according to writers, is that it is not an agreement between ‘states’ as the Palestinian statehood was then and still remains controversial. It is however, in the views of many, binding in customary law as an agreement between a state and a subject of international law.⁸⁴

⁸⁰ Ibid 45

⁸¹ Ibid 46

⁸² Ibid 47

⁸³ Christine Bell, *Peace Agreements and Human Rights* (Oxford University Press 2004) 83

⁸⁴ Geoffrey R. Watson, *The Oslo Accords: International Law and the Israeli-Palestinian Peace Agreements* (Oxford University Press 2000) 72

2.11.3. The Status of the Oslo Accords today

Today, the Oslo Accords have not been implemented fully as was expected. Nonetheless, the Oslo accords still govern virtually all aspects of the relations between Israel and the PA.⁸⁵ For example, the clause; ‘Neither side shall initiate or take any step that will change the status of the West Bank and the Gaza Strip pending the outcome of the Permanent Status negotiations’ found in Oslo II or the so-called Interim Agreement, is very often referred to regarding the ongoing Israel’s settlement constructions, which is of course also in violation of international law. Also, both the Israelis and the Palestinians have threatened to revoke the Oslo Accords. Israel last did so during last year (2011) when the PA applied for UN membership for the state of Palestine, claiming that the PA’s was unilaterally trying to get the international community to recognize Palestine, without first settling issues with Israel.

2.12. Key Actors and the Current Status in Palestine

2.12.1. The Palestinian Liberation Organization

The PLO was set up in May 1964. It is a national liberation organization, widely recognized as such and is considered by the UN to be the legitimate representative of the Palestinian people.⁸⁶ The legislative body of the PLO is the Palestinian National Council (PNC). It elects its Executive Committee that is made up of 18 people. The Executive Committee has the most actual power and controls most decisions. After 1967, the PLO underwent a radical transformation that turned it into an authentic Palestinian national organization. The PLO very soon gained the recognition of the major part of the Palestinian people.⁸⁷ At a meeting in Cairo 1969, Yasser Arafat was appointed leader of the PLO and remained to be the PLO’s leader until his death in 2004.

Interestingly enough, the PLO was actually recognized as a national liberation movement representing the people of Palestine at the time when it had literally no control over any territory. The PLO managed to reshape a Palestinian national identity, despite the diversity, fragmentation and dispersion of the Palestinians in

⁸⁵ Ibid 46

⁸⁶ James R. Crawford, *The Creation of States in International Law* (Oxford University Press 2006) 444

⁸⁷ Avraham Sela and Moshe Ma’o, *The Plo and Israel: From Armed Conflict to Political Solution, 1964-1994* (Palgrave MacMillan 1997) viii

various countries. It also managed to conduct a comprehensive mobilization of the community and to build an institutional infrastructure, with diplomatic and civic attributes, that functioned as a state in the making.⁸⁸

2.12.2. The Palestinian Authority

The PA is an interim local government with restricted powers, limited to civil matters and internal security. Originally the PA was only supposed to function for a period of five years or during the time when the final status negotiations between Israel and Palestine were to take place. As of 2012, more than seventeen years following the formulation of the PA, a final status has yet to be reached.⁸⁹

The Oslo Accords provided the transfer of many spheres of civil authority to the PA. It included: education and culture, health, social welfare, tourism, direct taxation, Value Added Tax on local production, labor, commerce and industry, gas and petroleum, insurance, postal Services, local Government and agriculture.⁹⁰ Ever since its establishment of the PA, Palestinian officers have been in control of inter-governmental issues in Palestine, with some limitation though due to Israel's occupation. Elections for members in the Palestinian Legislative Council (PLC), responsible for legislation, were held in 1996 and the PLC passed the Basic law⁹¹ in 1997. The Basic law was adopted to function as a temporary constitution until the establishment of an independent state and a permanent constitution for Palestine could be achieved. The Basic Law provided for the three traditional branches of government, executive, legislative and judicial and characterized the political system as a parliamentary democracy. A cabinet was set up, including finance ministry, economic ministry, interior ministry and others.⁹² Numerous other actions were taken in order to establish a sustainable intern-governmental control in Palestinian territory.

⁸⁸ Ibid

⁸⁹ James R. Crawford, *The Creation of States in International Law* (Oxford University Press 2006) 444

⁹⁰ Geoffrey R. Watson, *The Oslo Accords: International Law and the Israeli-Palestinian Peace Agreements* (Oxford University Press 2000) 44

⁹¹ 'The Basic Law was passed by the Palestinian Legislative Council in 1997 and ratified by President Yasser Arafat in 2002. It has subsequently been amended twice; in 2003 the political system was changed to introduce a prime minister. In 2005 it was amended to conform to the new Election Law. The 2003 reform was comprehensive and affected the whole nature of the Palestinian political system, whereas the 2005 amendment was only minor and affected only a few paragraphs.' Source: 'About' (The Palestinian Basic Law) < <http://www.palestinianbasiclaw.org/> > accessed 10 April 2012

⁹² John Quigley, *The Statehood of Palestine - International Law in the Middle East Conflict* (Cambridge Press 2010) 215

The PA is not to be confused with the PLO. The PLO has never functioned as a government, like the PA does and the PA's functions are independent of the PLO.

2.12.3. Fatah

The Fatah movement, founded in 1959, is a Palestinian national movement that since the 1970's has been the dominant faction in the PLO. Yasser Arafat served as the party's leader for much of its official history. When Arafat was elected the first PA's president he also held the positions of PLO chairman and the leader of Fatah. Today, Mahmoud Abbas holds all three positions.

In the beginning Fatah was a combination of a political organization and paramilitary cells which had the objective to liberate Palestine, hold out an armed resistance to Israel and to create a Palestinian state. Since 1974, most members in Fatah have supported the two-state solution. The Fatah's leadership concluded that armed conflict was not moving the organization towards its goal of a Palestinian state which led to Arafat recognizing Israel's right to exist in 1988, where he also proposed the pursuit of diplomacy and land for peace arrangement.⁹³

The Oslo Accords witnessed the relocation of the PLO and Fatah to Gaza and the West Bank. Before, both had been functioning from outside of Palestine, first in Lebanon then in Tunisia. This finally centered the Palestinian Power base in Palestine after almost 50 years of transience. In the years that followed fissures within Fatah started to become clear. Some members of Fatah were opposed the two state solution and they began to sabotage Arafat. The Second Intifada saw the embattled Fatah become even more divided.⁹⁴ The Second Intifada broke out in September 2000, after the collapse of the Camp David peace talks that summer. Soon riots and demonstrations erupted while Israel troops launched attacks in Gaza. In 2002, the al-Aqsa Martyrs Brigades, a faction that consists of local militias and theoretically aligned with Fatah, began launching major attacks against Israeli forces, which led to the Israelis to reoccupy much of the West Bank. Arafat was trapped in his own headquarters and most of the rebuilding and the infrastructure in the West Bank were destroyed. The unrest remained until 2004. Around 1,000 Israelis died during this time and 6,700 were left wounded. Around 4,000 Palestinians were killed and 30,000

⁹³ Spencer C Tucker, *The Encyclopedia of Middle East Wars [5 Volumes]: The United States in the Persian Gulf, Afghanistan, and Iraq Conflicts* (ABC-CLIO 2010) 447

⁹⁴ Ibid 448

wounded.⁹⁵ Then when Arafat died in November 2004, things got more chaotic which led up to the 2006 legislative elections, where Fatah lost to Hamas.

2.12.4. Hamas

Hamas, which is an Islamic movement, was founded following the eruption of the first intifada in 1987, but it traces its roots back to the Muslim Brotherhood, a group set up in Egypt in 1928. The European Union (EU), Israel, the US and others classify Hamas as a terrorist organization.⁹⁶ Hamas does not belong to the PLO and has refused to its claim as the sole representative of the Palestinian people.⁹⁷

The stated basis for Hamas is the creation of an Islamic way of life and the liberation of Palestine through Islamic resistance. In 1988 Hamas issued its charter, who condemns world Zionism and the efforts to isolate Palestine, defined the mission of the organization and locates that mission within Palestinian, Arab and Islamic elements. Before the elections in 2006, Hamas main source of funding included donations from Palestinians living abroad, Saudi Arabia, Bahrain, Kuwait and most importantly Iran. Much aid was directed to renovation of the Palestinian territories and was badly needed. Unfortunately a great deal of the rebuilding was destroyed in the Israeli campaign in the West Bank in 2002, which in turn was intended to combat suicide bombing. After Arafat's death, many Palestinians have begun to lean more to Hamas than the PA, namely because Hamas provided people with everyday needs, providing funding for hospitals, schools, mosques, orphanages, food distribution and aid to the families of Palestinian prisoners, while the PA did not.⁹⁸

2.12.5. The 2006 Legislative Elections

Legislative elections were held on 25 January 2006 in Palestine, the first legislative elections since 1996. The results of the elections were extremely unexpected. Hamas won 74 seats, or 65% while Fatah secured only 45 seats or 34%. Other smaller parties

⁹⁵ Spencer C. Tucker, *The Encyclopedia of the Arab-Israeli Conflict: A Political, Social, and Military History* (ABC-CLIO 2008) 476

⁹⁶ 'Who are Hamas?' (*BBC News*, 1 January 2009)

<http://news.bbc.co.uk/2/hi/middle_east/1654510.stm > accessed 23 March 2012

⁹⁷ Spencer C Tucker, *The Encyclopedia of Middle East Wars [5 Volumes]: The United States in the Persian Gulf, Afghanistan, and Iraq Conflicts* (ABC-CLIO 2010) 448-450

⁹⁸ Spencer C. Tucker, *The Encyclopedia of the Arab-Israeli Conflict: A Political, Social, and Military History* (ABC-CLIO 2008) 417-418

divided the rest of seats between them.⁹⁹ Hamas had not participated in the initial PLC elections of 1996 as the group had been against the Oslo Accords that created the PA and the PLC. The result of the elections was obviously a shock for the Fatah leadership who had dominated Palestinian politics since the late 1960s. Analysts have stated that the reason for this unexpected results were mainly the widespread dissatisfaction among Palestinians over the failure of the peace process and rumors about a widespread corruption in Fatah.¹⁰⁰

The Quartet¹⁰¹ promptly rejected the verdict and withheld financial aid. Also, the US cut off \$420 million and the EU cut off \$600 million in aid, which created lot of problems for ordinary Palestinians.¹⁰² So Hamas began its term leading the PA government without access to US and European aid. Instead, Hamas turned to Gulf states, Iran, and Russia (Russia is still a member of the Quartet), both of which were willing to provide funding under the rationale that Hamas had entered power legitimately through the established political process. Many analysts saw the US and EU cut offs as inconsistent with the principle of democracy that both the US and the EU had claimed to advocate for the region.¹⁰³

To prevent total collapse, the US and the EU promised relief funds, but they were not allowed to go through the Hamas lead PA. On March 17, 2007, Abbas broke the unity government that included both Hamas and Fatah in which Hamas leader Ismail Haniyeh served as prime minister. In May that same year armed clashes between Hamas and Fatah escalated and on June 14 Hamas seized the control of Gaza. On June 18th, after having been assured of EU support, Abbas dissolved the National Security Council and swore in an emergency Palestinian government. That same day the aid started coming in again from the US, limited to the West Bank.¹⁰⁴ Since then, Fatah has held power in the occupied West Bank while Hamas controls the Gaza strip.

⁹⁹ Ibid 791-792

¹⁰⁰ Ibid 793

¹⁰¹ The United States, the European Union, Russia, and the United Nations

¹⁰² Jimmy Carter, 'Support the Palestinian unity government' (*The Washington Post*, 5 May 2011) <http://www.washingtonpost.com/opinions/support-the-palestinian-unity-government/2011/05/03/AFSbd6iF_story.html> accessed 15 March 2012

¹⁰³ 'Hamas: Background and Issues for Congress' (*United States Congressional Research Service*, 2 December 2010) <<http://www.unhcr.org/refworld/docid/4cff4531d2.html>> accessed 2 April 2012

¹⁰⁴ Spencer C. Tucker, *The Encyclopedia of the Arab-Israeli Conflict: A Political, Social, and Military History* (ABC-CLIO 2008) 418

In April 2011, Fatah and Hamas met in Egypt to talk about reconciliation. Many praised the talk and considered it an important step to strengthen the Palestinian cause but not everyone saw the possible reconciliation as good news. Benjamin Netanyahu, Israel's prime minister responded to the news with huge disapproval and said 'The Palestinian Authority must choose either peace with Israel or peace with Hamas. There is no possibility for peace with both,' adding that Israel would never negotiate with Hamas.¹⁰⁵ US President Barrack Obama also addressed the reconciliation, calling it an 'enormous obstacle to peace' and added 'How can one negotiate with a party that has shown itself unwilling to recognize your right to exist?'¹⁰⁶ It is worth mentioning that when the Israelis negotiated with the PLO in Oslo the PLO's Charter had similar provision. The Charter was altered years later. Jimmy Carter, the former US President, was one of many who praised the reconciliation talks and called upon the international community to support Hamas and Fatah's reconciliation agreement, saying that the support could help Palestinian democracy and establishment for a unified Palestinian state in the West Bank and Gaza that can make secure peace with Israel. Carter added that in his talks with Hamas leader Khaled Meshal, he said that Hamas would accept a two-state agreement given that it would be approved in a Palestinian referendum.¹⁰⁷ After the April 2011 meeting not much was achieved, as both sides failed to carry out promised goodwill gestures and disagreed over the composition of an interim government. Then in February 2012, talks between the parties resumed when they meet in Doha and agreed on a unity government.¹⁰⁸ Latest news states that the parties are having difficulties coming to together and blame each other for stalling the reconciliation.

¹⁰⁵ 'Fatah and Hamas sign reconciliation deal' (*Al Jazeera*, 27 April 2011)
 <<http://english.aljazeera.net/news/middleeast/2011/04/2011427152119845721.html>> accessed 15 March 2012

¹⁰⁶ Ibid.

¹⁰⁷ Jimmy Carter, 'Support the Palestinian unity government' (*Washington Post*, 4 May 2011)
 <http://www.washingtonpost.com/opinions/support-the-palestinian-unity-government/2011/05/03/AFSbd6iF_story.html> accessed 2 March 2012

¹⁰⁸ 'Abbas proposed as PM in unity government' (*Al Jazeera*, 6 February 2012)
 <<http://www.aljazeera.com/news/middleeast/2012/02/20122513407504737.html>> accessed 4 March 2012

2.12.6. Palestine's bid for United Nations Membership

In September 2011, at the 66th session of the UNGA, Abbas formally applied for a UN Membership for Palestine and while doing so he was also requesting international recognition of the state of Palestine based on the 1967 border.

Article 4 of the UN Charter sets out the conditions and the procedure for admission of new members to the UN. According to paragraph 1 an applicant must be, (a) a state, (b) peace-loving, (c) willing to accept the obligations of the Charter, (d) willing to carry them out and (e) able to carry them out.¹⁰⁹ In 1948, in its advisory opinion, 'Conditions of Admission of a State to Membership in the United Nations'¹¹⁰, the ICJ confirmed that an applicant must fulfill those conditions and stressed that they suffice, ruling out any further interpretation beyond the wording of article 4.¹¹¹ The Palestinians have declared that they are and will be a state that will exercise peaceful manners, that they are committed to human rights, the rule of law and the principles of the UN Charter.¹¹² However, according to new news about the Fatah-Hamas reconciliation agreements, Hamas will participate in future elections and most likely become a full partner in the future government of a Palestinian State. As some states consider Hamas to be a terrorist organization, its role in the politics in Palestine might cause some to argue that Palestine cannot be regarded as a 'peace-loving State.' Nevertheless, the biggest uncertainty about the membership qualifications are whether Palestine can be regarded a state under international law. This issue will be thoroughly addressed in Chapter 4.

Paragraph 2 states that the application must get receive recommendation of the UNSC before it can go for a vote in the UNGA. In 1950, the ICJ¹¹³ was asked whether the UNGA could admit a state, which fulfilled the criteria defined in article 4(1), when the UNSC failed to approve admission applicant by a majority or by a veto or if a recommendation by the UNSC was necessary for admission. In its advisory

¹⁰⁹ United Nations, Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter)

¹¹⁰ *Admission of a State to the United Nations (Charter, Art. 4)* (Advisory Opinion) 1948 <<http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=2e&case=3&code=asun&p3=4>> accessed 1 April 2012 [57]

¹¹¹ Anna Kaczorowska, *Public International Law* (Routledge 2010) 234

¹¹² Mahmoud Abbas, 'The Long Overdue Palestinian State' (*New York Times*, 16 May 2011) <<http://www.nytimes.com/2011/05/17/opinion/17abbas.html>> accessed 2 April 2012

¹¹³ *Competence of the General Assembly for the Admission of a State to the United Nations* (Advisory Opinion) 1950 <<http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=31&case=9&code=gaun&p3=4>> accessed 1 April 2012 [128]

opinion the Court stated that in all cases a UNSC recommendation is necessary. Accordingly, the UNSC must first make a positive recommendation before the matter can proceed into voting at the UNGA. As of April 2012, the UNSC has not yet made a recommendation in this regard. Palestine's current status at the UNGA remains to be 'observer'.

2.12.6.1. The Consequence of denial of Membership at the UN or any other International Organization

A denial of membership at the UN or any other organization does not necessarily mean that an entity is not regarded to fulfill the criterion of statehood. It does also not mean that an entity is not regarded a state. Even though an entity is considered a state and to be 'peace-loving' and fulfills other criteria laid out for membership there can be other reasons why it is not allowed membership. A good example of this is Taiwan. Taiwan, the world's 18th largest economy and seventh largest investor, is viewed by most states as a *de facto* independent state. It is however *de jure* not a member of the UN. Since the 1990's, Taiwan has tried to join the UN more than fourteen times, but has always been rejected. Taiwan only has official diplomatic relations with around 20-30 states.¹¹⁴ The reason is not because the rest of the states in the world don't recognize Taiwan as a state but because the People's Republic of China (PRC) refuses to have diplomatic relations with any nation that recognizes the Republic of China (ROC) in Taiwan. Further, during the Cold War, a deadlock on admission was created when the former Soviet Union vetoed any pro-Western applicant and the Western countries vetoed any Communist applicant. This didn't mean that the states that didn't get admission weren't recognized as states. The matter was considered to be strictly political - not legal.

Palestine was admitted into the United Nations Educational, Scientific and Cultural Organization (UNESCO) on October 31st, 2011. Moments later, the US State Department announced that the US had cut its funding to the UNESCO because of the vote, a painful cut for the UNESCO whereas the US provides UNESCO with more than \$80 million a year, covering about 22% of its budget.¹¹⁵ But this wasn't the first

¹¹⁴ 'UN rejects Taiwan membership bid' (*BBC*, 24 July 2007) <<http://news.bbc.co.uk/2/hi/asia-pacific/6913020.stm>> accessed 11 March 2012.

¹¹⁵ Colum Lynch, 'UNESCO votes to admit Palestine; U.S. cuts off funding' (*The Washington Post*, 31 October 2011) <<http://www.washingtonpost.com/world/national-security/unesco-votes-to-admit->

time Palestine had asked for admission at the UNESCO or other UN agencies. The PLO applied for membership in the World Health Organization (WHO) and the UNESCO in 1998. In both cases the application was deferred after the US threatened to cut all its funding to the WHO¹¹⁶ and foreclose any consideration of re-joining UNESCO if Palestine would be admitted as a member state (the US had withdrawn from the organization in 1984 but at the time of Palestine's application it was considering re-joining as it later did). It is obvious that a fair and neutral voting under the threat of the US was impossible.¹¹⁷ In his book, *The Creation of States in International Law*, published in 2006, Professor James Crawford states that WHO's and UNESCO's rejection in 1989 should be seen as 'a continuous reservation of the international community about the status of Palestine'.¹¹⁸ He however fails to mention the reason why the matter was deferred. True, before Oslo it was more difficult to argue that Palestine was a state, at least if it was put under the legal test for statehood (a whole nother story is whether the Palestinians deserved its own state according to promises given or just due to fairness). However, it didn't seem to really matter at this time. Palestine's application and its rejection at the WHO and UNESCO in 1989, had basically nothing to do with whether Palestine was considered a state or not.¹¹⁹ It was purely a political matter and thus maybe not fair to interpret WHO's and UNESCO's decision solely as 'a continuous reservation of the international community about the status of Palestine'. Crawford forgets to tell the whole story, as it seems. With its membership in UNESCO in 2011, its possible to argue that more and more states believe that Palestine deserves to be treated as a state and should be able to participate in the international arena. Or maybe it just means that the power status of the US is diminishing. Anyway, the original argument of Crawford doesn't hold any longer considering his own methodology.

palestine-over-us-objections/2011/10/31/gIQAMleYZM_story.html> accessed 3 April 2012.

¹¹⁶ Arafat called the US threat 'blackmail' and Cuba, who voted against the resolution to postpone, said that the country 'voted against the blackmail reflected in the arrogant declarations to withdraw funds when we are speaking about health and about the right of people to be in a health-oriented organization' John Quigley, *The Statehood of Palestine - International Law in the Middle East Conflict* (Cambridge University Press 2010) 167

¹¹⁷ Ibid

¹¹⁸ James R. Crawford, *The Creation of States in International Law* (Oxford University Press 2006) 440

¹¹⁹ John Quigley, *The Statehood of Palestine - International Law in the Middle East Conflict* (Cambridge University Press 2010) 167

3. PALESTINE AND INTERNATIONAL LAW

3.1. Israel's Occupation

In the wake of the 1967 war, Israel had seized all the remaining land that was allocated to the Palestinians according to the Partition Plan and thus began the world's longest running occupation (author-translated).¹²⁰ UNSC resolution 242, adopted in November 1967, few months after the Six-Day War, urged the withdrawal of Israeli forces from the territories occupied in the war and the termination of:

All claims or states of belligerency and respect for and acknowledgment of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force.¹²¹

The resolution explicitly called for the withdrawal of Israeli armed forces from territories occupied. Israel has not complied with this resolution, which is one of the most commonly referred UN resolutions in negotiations between the parties.

UNGA resolution 2625¹²² on the 'Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States' provides that 'the territory of a State shall not be the object of military occupation resulting from the use of force in contravention of the provisions of the Charter', characterizing foreign occupation as illegal. Nevertheless it is generally accepted that temporary military occupation in self-defense can be necessary to secure security. The crucial word here is temporary. Professor Antonio Cassese has stated that

Self-determination is violated whenever there is a military invasion of belligerent occupation of a foreign country, except where the occupation, although unlawful, is of minimal duration or is solely intended as a measure of repelling, under Article 1 of the UN Charter, an armed attack initiated by the vanquished Power and consequently is not protected.¹²³

¹²⁰ Jón Ormur Halldórsson, 'Hvaða yfirráðarétt hefur Ísrael á hernumdum svæðum Palestínu? Hvernig hefur alþjóðasamfélagið tjáð sig um þessi yfirráð?' (*Vísindavefurinn*, 12 April 2002) <<http://visindavefur.hi.is/svar.php?id=2295> > accessed 12 February 2012 (author-translated)

¹²¹ UNSC Res 242 (22 November 1967) UN Doc S/RES/242

¹²² UNGA Res 2625 (24 October 1970) UN Doc A/RES/2625(XXV)

¹²³ Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press 1999) 99

He says that the use of force in self-defense can provide legal justification for an occupation's existence, subject to temporal limitation. Israel has claimed that its occupation is only temporary and for security reasons. Now, after the occupation has lasted for almost 45 years it is difficult to argue that it is temporal act. Further, the Israeli settlements and the continuation of construction of them in Palestine, makes it even more difficult to view the occupation as temporal, not to mention the wall, which cuts through the occupied territory. As a matter of fact, it is impossible to agree with Israel's statements that the occupation is temporal. In spite of this, the term 'illegal occupation' has not often been used in UN resolutions. The only example is UNGA resolution 32/20¹²⁴ from 1977 that expressed concern 'that the Arab territories occupied since 1967 have continued, for more than ten years, to be under illegal Israeli occupation', a language also used in UNGA resolution 33/29¹²⁵ from 1978.¹²⁶ However, the UNGA has also said that the occupation is in 'violation of the Charter of the United Nations, the principles of international law and relevant resolutions of the United Nations'.¹²⁷ Further, the former UN secretary-general, Kofi Annan, did in 2002 call for Israel to 'end the illegal occupation'.¹²⁸

It's worth mentioning that the international community also still regards the Gaza Strip to be under occupation by Israel, even after Israel withdrew from the Gaza Strip in September 2005 as the Israelis still maintain the control of access to the Strip by air, sea and the Israeli border.¹²⁹ UNSC resolution 1860¹³⁰, adopted in 2009 stressed that the Gaza strip constitutes to be an integral part of the territory occupied in 1967 by Israel.

¹²⁴ UNGA Res 33/20 (25 November 1977) UN Doc A/RES/32/20

¹²⁵ UNGA Res 33/29 (7 December 1978) UN Doc A/RES/33/29

¹²⁶ Emma Playfair, *International Law and the Administration of Occupied Territories* (Clarendon Press 1999) 54

¹²⁷ John Quigley, *The Statehood of Palestine - International Law in the Middle East Conflict* (Cambridge University Press 2010) 223

¹²⁸ Sarah Left, 'UN security council backs Palestinian state' (*The Guardian*, 13 March 2002) <<http://www.guardian.co.uk/world/2002/mar/13/israelandthepalestinians.unitednations>> accessed 2 April 2012

¹²⁹ The man behind the withdrawal was Ariel Sharon, the then Israeli prime minister. The disengagement received a lot of opposition from Ariel Sharon's own Likud Party, which believed that Sharon had betrayed his previous policies supporting the Gaza settlements. The now Israel's prime minister, Benjamin Netanyahu, who was at this time finance minister, accused the Israeli government of destroying Jewish towns and villages while receiving nothing in return. He resigned as a finance minister in protest. The disengagement was however, greatly cheered by the EU, the UN and the US. Source: Spencer C. Tucker, *The Encyclopedia of the Arab-Israeli Conflict: A Political, Social, and Military History* (ABC-CLIO 2008) 384.

¹³⁰ UNSC Res 1860 (8 January 2009) UN Doc S/RES/1860 (2009)

3.1.1. The Applicability of International Humanitarian Law at the OPT

As the occupying power in the West Bank and Gaza Strip, Israel's obligations are set out in the 1907 Hague Regulations annexed to the Convention (IV) Respecting the Laws and Customs of War on Land (the Hague Regulations) and the Fourth 1949 Geneva Convention Concerning the Protection of Civilian Persons in Time of War (the Fourth Geneva Convention). Israel's High Court has long recognized that the Hague Regulations form part of customary international law and that as a result Israel is legally bound by them. However, the Israeli government does not believe that the Fourth Geneva Convention is applicable in the OPT.¹³¹ The great majority of the provisions of the Geneva Conventions are considered to be part of customary international law. Furthermore, as there are now 194 parties to the Geneva Conventions, they are binding on nearly all states as a matter of treaty law.¹³² Israel ratified the Fourth Geneva Convention in 1951.¹³³

The Israeli High Court has assumed that the Convention applies only on a case-by-case basis, without ever ruling on the question of its application and on its legal status as customary international law.¹³⁴ The Israelis argue that the Conventions do not apply to the occupied Palestinian territories (OPT) because the territory was not under legitimate sovereignty of any state before Israel started 'administering' it, a term that Israel uses instead of 'occupies'.¹³⁵ It's worth mentioning that the applicability of the Fourth Geneva Convention to the OPT is universally recognized by the international community. The International Committee of the Red Cross,¹³⁶ various UN bodies (UNSC resolutions 237 from 1967¹³⁷, 271 from 1969¹³⁸, 446 from

¹³¹ M.N. Schmitt, Louise Arimatsu and T. McCormack, *Yearbook of International Humanitarian Law – 2010* (T.M.C. Asser Press, 2011) 251

¹³² Jean-Marie Henckaerts, 'Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict' (2005) 87 ICCR 175, 187

¹³³ 'Geneva Conventions of 12 August 1949' (The International Red Cross)

<<http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P>> accessed March 12, 2012

¹³⁴ M.N. Schmitt, Louise Arimatsu and T. McCormack, *Yearbook of International Humanitarian Law – 2010* (T.M.C. Asser Press, 2011) 252

¹³⁵ Emma Playfair, *International Law and the Administration of Occupied Territories* (Clarendon Press 1992) 46

¹³⁶ The ICRC has affirmed the de jure applicability of the Fourth Geneva Convention to the territories occupied since 1967 by the State of Israel, including East Jerusalem. Source: 'Implementation of the Fourth Geneva Convention in the occupied Palestinian territories: history of a multilateral process (1997-2001)' (ICRC, 30 September 2002)

<<http://www.icrc.org/eng/resources/documents/misc/5fldpj.htm>> accessed 3 March 2012

¹³⁷ UNSC Res 237 (17 June 1967) UN Doc S/RES/237

¹³⁸ UNSC Res 271 (15 September 1969) UN Doc S/RES/271

1979¹³⁹, 681 from 1990¹⁴⁰ and 799 from 1992¹⁴¹ all urged Israel to respect the provisions in the Fourth Geneva Convention) and the ICJ¹⁴² have all declared that the Fourth Geneva Convention is applicable in the OPT.

3.2. The Israeli Settlements

What is commonly referred to, as the ‘settlements’ are residential communities and neighborhoods that were built by Jews in the areas occupied by Israel after the Six-Day War. These areas include the Golan Heights, the Sinai Peninsula, the West Bank and the Gaza Strip until 2005. There are approximately 250,000 Jewish settlers living in the West Bank, a number that rises to more than 400,000 if the Settlements of East Jerusalem are included, which is also occupied territory according to international law but has been formally annexed by Israel.¹⁴³

The settlements in the OPT are illegal according to international law. Article 49 of the Fourth Geneva Convention states: ‘The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.’¹⁴⁴ The International Red Cross delegation to Israel and the Palestinian territories has stated that the settlements are grave breaches of the Fourth Geneva Convention and thus a war crime.¹⁴⁵ The UNSC has also taken the view that the settlements have no legal validity and constitute an obvious violation of the Fourth Geneva Convention.¹⁴⁶ The ICJ also concluded in its advisory opinion on the ‘Legal Consequences of the

¹³⁹ UNSC Res 446 (22 March 1979) UN Doc S/RES/446

¹⁴⁰ UNSC Res 681 (20 December 1990) UN Doc S/RES/681

¹⁴¹ UNSC Res 799 (18 December 1992) UN Doc S/RES/799

¹⁴² In its advisory opinion of July 9th, 2004, the ICJ stated; ‘The Court considers that the Fourth Geneva Convention is applicable in any occupied territory in the event of an armed conflict arising between two or more High Contracting Parties. Israel and Jordan were parties to that Convention when the 1967 armed conflict broke out. The Court accordingly finds that the Convention 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’. Source: *Legal Consequences of the Construction of a Wall* (Advisory Opinion) 2004 <<http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm>> accessed 3 March 2012 [121] 90-101

¹⁴³ Spencer C. Tucker, *The Encyclopedia of the Arab-Israeli Conflict: A Political, Social, and Military History* (ABC-CLIO 2008) 898

¹⁴⁴ Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (Fourth Geneva Convention)

¹⁴⁵ ‘Press Release- US Response to ICRC Statement on Illegal Israeli Settlements’ (Permanent Observer Mission of Palestine to the United Nations) <<http://www.un.int/wcm/content/site/palestine/cache/offonce/pid/11838;jsessionid=BDA36D4EF581D FDDEBE96B33A6C965E2>> accessed 2 March 2012

¹⁴⁶ UNSC Res 446 (22 March 1979) UN Doc S/RES/446

Construction of a Wall' that the Israeli settlements have been established in breach of international law.¹⁴⁷

The settlements and the continuation of building new settlements are among the big issues that remain unresolved in the Israeli-Palestinian conflict. In February 2011 the US vetoed a UNSC resolution condemning Israel's settlements in the West Bank. All the other members of the UNSC supported the resolution that was sponsored by over 130 members of the UN.¹⁴⁸ This was the first veto exercised by the Obama administration. At the occasion Britain, France and Germany (who openly disapproved US's action) issued a joint statement that their views on the settlements were clear, 'they are illegal under international law, an obstacle to peace, and constitute a threat to a two-state solution. All settlement activity, including in east Jerusalem, should cease immediately.'¹⁴⁹ In April 2012, Israel still approved three more settlement outposts in the occupied West Bank.¹⁵⁰

3.3. The Palestinian Wall

The Israeli government began building the separation wall in June 2002. The wall is approximately 760 kilometer long and is made up of a concrete base with a five-meter-high wire and mesh superstructure. Rolls of razor wire and four meter deep ditch are placed on one side. The structure is also fitted with electronic sensors and has an earth covered 'trace road' beside it where footprints of anyone crossing can be seen.¹⁵¹ In some areas the wall is an eight-meter high structure of solid concrete, which is twice the height of the Berlin Wall and many of these sections have armed sniper towers every 300 meters. Almost 75% of its total length is inside the West Bank, rather than along the 1967-borders. Opponents have argued that despite Israel's claims that the wall is a temporary security banner, it is set to become a *de facto*

¹⁴⁷ *Legal Consequences of the Construction of a Wall* (Advisory Opinion) 2004 <<http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm>> accessed 3 March 2012 [139]–[142]

¹⁴⁸ 'Israeli settlements: US vetoes UNSC resolution' (*BBC News*, 15 February 2011) <<http://www.bbc.co.uk/news/world-middle-east-12512732>> accessed 15 March 2012

¹⁴⁹ Ed Pilkington, 'US vetoes UN condemnation of Israeli settlements' (*The Guardian*, 19 February 2012) <<http://www.guardian.co.uk/world/2011/feb/19/us-veto-israel-settlement>> accessed 24 April 2012

¹⁵⁰ 'Israel approves three West Bank settlements' (*Al Jazeera*, 24 April 2012) <<http://www.aljazeera.com/news/middleeast/2012/04/201242484751503415.html>> accessed 24 April 2012

¹⁵¹ 'Q&A: What is the West Bank barrier?' (*BBC*, 15 September 2005) <http://news.bbc.co.uk/2/hi/middle_east/3111159.stm> accessed 2 March 2012

border, preventing final status negotiations between Israel and the Palestinians and incorporating illegal settlements into Israel.¹⁵²

3.3.1 The ICJ's Advisory Opinion

UNGA resolution ES-10/14 from 8 December 2003, requested the ICJ to give an Advisory Opinion on the following question:

What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?¹⁵³

The Court delivered the Advisory Opinion on 9 July 2004. The key point of the Opinion was that the construction of the wall and its associated régime are contrary to international law. The Court found that the wall infringed upon the rights of the Palestinian people to self-determination as laid down in article 1 of the UN Charter. Israel has claimed that the wall is a temporary security banner, which can be taken down at any time, mainly to prevent Palestinian suicide bombers from entering Israel, and is without any political significance. The Court rejected this argument and stated that the route of the wall does not seem to have anything to do with Israel's security but instead it seems that the aim is to include as many settlers as possible within the Closed Area.¹⁵⁴ The Court also considered that the wall was a first step towards annexation of the Closed Area and that its construction 'severely impedes the exercise by the Palestinian people of its right self-determination, and is therefore a breach of Israel's obligation to respect that right.'¹⁵⁵

Even though the 1949 Fourth Geneva Convention was ratified by Israel on 6 July 1951, Israel has claimed that the Convention is not applicable on the OPT, because, Israel says, these areas are not occupied territories within the meaning of the Convention. In paragraphs 90-101 of the above mentioned Advisory Opinion the Court argues and concludes that the West Bank and Gaza are occupied territories

¹⁵² Tim Morris, 'Just a Wall?' (2006) *Forced Migration Review* 30

¹⁵³ *Legal Consequences of the Construction of a Wall* (Advisory Opinion) 2004 <<http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm>> accessed 3 March 2012 [139]–[142]

¹⁵⁴ *Ibid* [121]

¹⁵⁵ *Ibid* [122]

within the meaning of the Convention and therefore the Convention is applicable. The Court found that with the construction of the wall Israel has breached the Fourth Geneva Convention.¹⁵⁶ Israel is not a member to the Fourth Hague Convention of 1907, to which the Hague Regulations are annexed. The Court still considered, that the provisions of the Hague Regulations have become part of customary law. Section III of the Hague Regulations includes articles 43 and 46 which are applicable in the OPT according to the Court. Article 43 imposes a duty on the occupant to take all measures within its power to restore and as far as possible to insure public order and life, respecting the laws in force in the country. Article 46 states that private property must be respected and that it cannot be confiscated.

The Court also found that Israel had acted contrary to various international conventions. It found that the construction of the wall interfered the liberty of movement of the inhabitants of the OPT as guaranteed under article 12, paragraph 1, of the International Covenant on Civil and Political Rights.¹⁵⁷ The Court also found that the construction of the wall interfered with the people's right to work, to health, to education and to an adequate standard of living as proclaimed in the International Covenant on Economic, Social and Cultural Rights¹⁵⁸ and in the United Nations Convention on the Rights of the Child.¹⁵⁹

The key answers to the question asked to the Court were that the construction of the wall and its associated régime are contrary to international law and Israel is under the obligation to terminate its breaches under international law and to cease the construction of the wall. Further, all States are under the obligation not to recognize the illegal situation resulting from the construction of the wall, while all States parties to the Fourth Geneva Convention have in addition the obligation to ensure compliance by Israel with international humanitarian law. Lastly, the UN and especially the UNGA and the UNSC should consider further actions to bring an end to the illegal situation resulting from the construction of the wall.¹⁶⁰

¹⁵⁶ Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (Fourth Geneva Convention)

¹⁵⁷ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)

¹⁵⁸ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESC)

¹⁵⁹ United Nations Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC)

¹⁶⁰ *Legal Consequences of the Construction of a Wall* (Advisory Opinion) 2004 <<http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm>> accessed 2 March 2012 [163]

Despite the Courts opinion the international community has taken no substantive action to stop the construction of the wall in the OPT. The response from the Israeli government was that it would not abide to the ICJ's finding but they would however abide to its own High Court opinion. On 30 June 2004, the Israeli High Court ruled on a proposed 40 kilometers of the wall in the northwest Jerusalem areas in the Beit Sourik case.¹⁶¹ The Court totally dismissed the question of determining the general *de jure* applicability of the Fourth Geneva Convention in general in the OPT by finding that 'the parties agree that the humanitarian rules of the Fourth Geneva Convention apply to the issue under review'. Nevertheless, the High Court found that approximately 30 kilometers of the 40 sections before it violated the principle of proportionality because they would separate large numbers of Palestinians from their cultivated lands, the permits to access their land would not substantially decrease harm and the gate system and security checks were not compatible with farmers needs.¹⁶² The result was that the Israelis had to move the route of the wall in order to fulfill the Courts findings.

Eight years after the ICJ issued its opinion, the wall construction continues.

3.4. Palestinian Refugees

May 14th 1948, the day that Israel declared independence, marked the beginning of what Palestinians refer to as the Nakba (Catastrophe). The Nakba refers to the mass deportation of Palestinians from their homelands, murders of civilians and the destruction of Palestinian villages. Before Israel declared independence the Israelis had expelled more than 400,000 people from their homelands. In the months after they would expel another 350,000 people.¹⁶³ The Israelis barred their return to their original homes (under several military and civil laws) and instead encouraged their permanent settlement in Arab countries. In 1950 the Israeli government adopted the Law of Return¹⁶⁴, which allowed any Jewish person to immigrate and obtain

¹⁶¹ Beit Sourik Village Council v. The Government of Israel, HCJ 2056/04

¹⁶² Eugene Cotran and Martin Lau, *Yearbook of Islamic and Middle Eastern Law 2003-2004* (Brill 2005) 467

¹⁶³ Joseph Massad, 'The rights of Israel' (*Al Jazeera*, 6 May 2011) <<http://english.aljazeera.net/indepth/opinion/2011/05/20115684218533873.html>> accessed 23 January 2012

¹⁶⁴ Law of Return 5710-1950 [Israel] 5 July 1950

citizenship in Israel. Some of these refugees resettled in formerly Palestinian villages, towns, or new settlements.¹⁶⁵

The United Nations Relief and Works Agency for Palestine Refugees (UNRWA) defines Palestinian refugees as; ‘people whose normal place of residence was Palestine between June 1946 and May 1948, who lost both their homes and means of livelihood as a result of the 1948 Arab-Israeli conflict.’ Originally these Palestinian refugees numbered 750,000 but today 5 million Palestine refugees are eligible for UNRWA services.¹⁶⁶ That makes the population one of the biggest displaced populations in the world. The refugees live in refugee camps in Jordan, Lebanon, in Syria, on Gaza and at the West Bank, including East Jerusalem.¹⁶⁷

The Jews based the legal foundation of their new state on UNGA resolution 181 or the so-called Partition Plan. Like was mentioned above, Israel’s declaration of independence was based on that resolution. However, the Israelis displacement, dispossession and dispersal of the Palestinian people, had no legal standing as far as the resolution was concerned, as article 8 in Chapter 2 of the resolution specifically stressed that:

No expropriation of land owned by an Arab in the Jewish State (by a Jew in the Arab State) shall be allowed except for public purposes. In all cases of expropriation full compensation as fixed by the Supreme Court shall be said previous to dispossession.¹⁶⁸

From this it is crystal clear that Israel’s claim to the new state that established demographic majority by the mass deportation of Palestinians was not authorized under the Partition Plan. The Palestinians were also never compensated for their dispossession. Furthermore the Balfour Declaration of 1917 specifically stated that ‘nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country.’¹⁶⁹

¹⁶⁵ Spencer C. Tucker, *The Encyclopedia of the Arab-Israeli Conflict: A Political, Social, and Military History* (ABC-CLIO 2008) 796

¹⁶⁶ ‘Palestine refugees’ (The United Nations Relief and Works Agency for Palestine Refugees) <<http://www.unrwa.org/etemplate.php?id=86>> accessed February 2nd, 2012

¹⁶⁷ ‘Overview’ (The United Nations Relief and Works Agency for Palestine Refugees) <<http://www.unrwa.org/etemplate.php?id=85>> accessed February 2nd, 2012

¹⁶⁸ UNGA Res 181 (29 November 1947) UN Doc A/RES/181(II) A

¹⁶⁹ ‘The Balfour Declaration’ (Israel Ministry of Foreign Affairs) <<http://www.mfa.gov.il/MFA/Peace%20Process/Guide%20to%20the%20Peace%20Process/The%20B>

The UNGA has adopted numerous resolutions urging Israel to allow the Palestinians forced from their homes to return. The one most cited has to be UNGA resolution 194, adopted in 1948. Article 11 of the resolution clearly states the rights of the Palestinian refugees to return to their homes. The article reads:

Resolves that the refugees wishing to return to their homes and live at peace with their neighbors should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and for loss of or damage to property which, under principles of international law or in equity, should be made good by the Governments or authorities responsible.¹⁷⁰

UNGA resolution 2792¹⁷¹ from 1971 called for the implementation of resolution 194 and stressed the ‘inalienable rights of the people of Palestine’. UNGA resolution 3236¹⁷² from 1974 reaffirmed ‘the inalienable right of the Palestinians to return to their homes and property from which they have been displaced and uprooted, and calls for their return’. Many more UNGA resolutions have similar clauses. Israel has to date not complied with these resolutions, and the Palestinians have not been given the right to return to their homelands. Furthermore, article 13(2) of the 1948 Universal Declaration of Human Rights¹⁷³ states that; ‘Everyone has the right to leave any country, including his own, and to return to his country’ and article 12(4) of the International Covenant on Civil and Political Rights¹⁷⁴ reads; ‘No one shall be arbitrarily deprived of the right to enter his own country’. This means that the Palestinians have the right to live in the now ‘Jewish’ state from which they were expelled.¹⁷⁵ As of today the refugees have not been allowed to return and the issue of refugees has been one of the biggest obstacles in the negotiations between the Israelis and the Palestinians.

alfour%20Declaration> accessed 17 February 2012

¹⁷⁰ UNGA Res 194 (11 December 1948) UN Doc A/RES/194(III)

¹⁷¹ UNGA Res 2792 (6 December 1971) UN Doc A/RES/2792(XXVI)B

¹⁷² UNGA Res 3236 (22 November 1974) UN Doc A/RES/3236(XXIX)

¹⁷³ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 13(2)

¹⁷⁴ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 12(4)

¹⁷⁵ Joseph Massad, ‘The rights of Israel’ (*Al Jazeera*, 6 May 2011)

<<http://english.aljazeera.net/indepth/opinion/2011/05/20115684218533873.html>> accessed 2 March 2012

3.5. The Question of Apartheid

Over the years, the Israelis treatment of the Palestinians has been compared to the treatment of whites of the blacks during the Apartheid era in South Africa. With the Jewish-only settlements, military checkpoints, separate roads, the wall, discriminatory access to resources and different legal rights, many have come to the conclusion that the Israelis are acting in a discriminative manner against the Palestinians. This covers both the Israeli treatment of the Palestinians living in the OPT and the Palestinian Arabs who now live in Israel. Desmond Tutu, the former archbishop of Cape Town and chairman of South Africa's truth and reconciliation commission, visited the OPT in 2003 and described what he found as 'much like what happened to us black people in South Africa'.¹⁷⁶ Furthermore, in 1961 Hendrik Verwoerd, the then South African prime minister said 'The Jews took Israel from the Arabs after the Arabs had lived there for thousand years. Israel like South Africa is an apartheid state.'¹⁷⁷

According to the Partition Plan neither party was authorized to give special privileges to their own. Article 2 of Chapter 2 in it stated; 'No discrimination of any kind shall be made between the inhabitants on the ground of race, religion, language or sex'. The Jews were not authorized under the Partition Plan to establish a Jewish State that gave privileges to Jewish citizens over non-Jewish citizens legally and institutionally. Still, over 20% of Israel's populations are Palestinian Arabs who suffer from institutionalized discrimination by Israelis against them as non-Jews. As of today there are over 30 laws discriminatory against the Palestinian Arabs who live in Israel.¹⁷⁸ Below I mention 3 examples.

The Law of Return¹⁷⁹

In 1950 the Israeli government adopted the Law of Return, which allowed any Jewish person to immigrate and obtain citizenship in Israel. Some of these refugees resettled in formerly Palestinian villages, towns, or new settlements.¹⁸⁰ At the same time, non-Jewish native-born Palestinians, most of them expelled before and in the aftermath of

¹⁷⁶ Chris McGreal, 'Worlds apart' (*The Guardian*, 6 February 2006)

<<http://www.guardian.co.uk/world/2006/feb/06/southafrica.israel>> accessed 2 March 2012

¹⁷⁷ Ibid

¹⁷⁸ Joseph Massad, 'The rights of Israel' (*Al Jazeera*, 6 May 2011)

<<http://english.aljazeera.net/indepth/opinion/2011/05/20115684218533873.html>> accessed 2 March 2012

¹⁷⁹ Law of Return 5710-1950 [Israel] 5 July 1950

¹⁸⁰ Spencer C. Tucker, *The Encyclopedia of the Arab-Israeli Conflict: A Political, Social, and Military History* (ABC-CLIO 2008) 796

Israel's declaration of independence, are to date not permitted to return to their homelands.

The Nationality Law¹⁸¹

In 1952 the Israeli government adopted the Nationality Law. It gives automatic citizenship to all who immigrate under the Law of Return. For others than Jews, they must prove residency and pass other tests. Then in 2003, a new interim policy was set in Israel that bans Palestinians who marry Israelis from gaining Israeli citizenship. In January 2012, the Israeli Supreme Court¹⁸² upheld the new law.¹⁸³

Absentee Property Law¹⁸⁴

The Absentee Property law was passed in 1950. It classified the personal property of Palestinians who were expelled or who fled their homelands during 1947/1948, and placed it within the power of so-called Custodian of Absentee Property. The law gave power to the Israelis to control the properties of the Palestinians who left during this period.¹⁸⁵

3.5.1. The International Convention on the Elimination of All Forms of Racial Discrimination

Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination, adopted by the UNGA on December 21st of 1966¹⁸⁶ of 1966 defines 'racial discrimination' as meaning:

[A]ny distinction, exclusion, restriction preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

¹⁸¹ Nationality Law 5712-1952 [Israel] 1 April 1952

¹⁸² MK Zahava Gal-On v. Attorney General et al, HCJ 466/07

¹⁸³ 'Israel upholds citizenship bar for Palestinian spouses' (*BBC*, 12 January 2012)
<<http://www.bbc.co.uk/news/world-middle-east-16526469>> accessed 10 March 2012

¹⁸⁴ Absentees Property Law 5710-1950 [Israel] 1 April 1952

¹⁸⁵ 'Absentee Property Law' (The United Nations Information System on the Question of Palestine)
<<http://unispal.un.org/UNISPAL.NSF/0/E0B719E95E3B494885256F9A005AB90A>> accessed 11 March 2012

¹⁸⁶ UNGA Res 2106 (21 December 1966) UN Doc A/RES/2106(XX) A

Israel is a State Party to the Convention but still strongly denies the application of the Convention to its laws and practices in the OPT. Despite this denial, it is difficult to resist the conclusion that many of Israel's laws and practices violate articles in the Convention. To this conclusion came the former United Nations Special Rapporteur for Palestine, John Dugard. In his 2007 report, 'Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967' he also suggested that the ICJ should answer the question of what are the legal consequences of a prolonged occupation with features of colonialism and apartheid.¹⁸⁷

3.6. The International Criminal Court and Palestine

The International Criminal Court (ICC) is the first treaty based, permanent, international criminal court. The prime motive for the establishment of the Court was to end impunity for the perpetrators of the most serious crimes of concern to the international community. The Court is governed by the Rome Statute, which was adopted in 1998 by 120 States and entered into force in 2002 after ratification by 60 countries.¹⁸⁸ Article 1 of the Rome Statute states that the Court has the power to exercise its jurisdiction over persons for the most serious crimes of international concern and is complementary to national criminal jurisdictions.¹⁸⁹ The ICC is an independent international organization and is not part of the UN system.¹⁹⁰ As of today, 121 countries are States Parties to the Rome Statute.¹⁹¹

The ICC only has jurisdiction in situations specified in the Rome Statute. According to article 5 of the Rome Statute, the ICC can prosecute individuals for genocide, crimes against humanity, war crimes and the crime of aggression¹⁹², committed on the territory of a state party or by a national of a state party (article

¹⁸⁷ 'Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, John Dugard' (*The United Nations General Assembly*, 24 January 2007) <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/105/44/PDF/G0710544.pdf?OpenElement>> accessed 2 March 2012

¹⁸⁸ 'About the Court' (The International Criminal Court) <<http://www.icc-cpi.int/Menus/ICC/About+the+Court/>> accessed 10 February 2012

¹⁸⁹ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS. 90 (Rome Statute)

¹⁹⁰ 'About the Court' (The International Criminal Court) <<http://www.icc-cpi.int/Menus/ICC/About+the+Court/>> accessed 10 February 2012

¹⁹¹ 'The States Parties to the Rome Statute' (The International Criminal Court) <<http://www.icc-cpi.int/Menus/ASP/states+parties/>> accessed 10 February 2012

¹⁹² The Court can however not exercise jurisdiction over the crime of aggression until at least, in the year 2017. Source: Resolution RC/Res.6. The Crime of Aggression. International Criminal Court. <http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf> accessed 22 February 2012

12(2)). In addition to that, alleged crimes can come under investigation and prosecution if a relevant non-state party or parties voluntarily accept(s) the jurisdiction of the Court on an ad hoc basis according to article 12(3) of the Statute or if the UNSC refers the situation to the Prosecutor according to article 13(b).

Palestine is not a State Party to the Rome Statute. However, in January 2009, in the aftermath of the Gaza war, the PA filed a declaration according to article 12(3) of the Statute, accepting the jurisdiction of the ICC in the territory of Palestine.¹⁹³ The declaration read:

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

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

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

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

Signed in The Hague, the Netherlands, 21 January 2009. For the Government of Palestine Minister of Justice s/Ali Khashan.¹⁹⁴

Many embraced the PA's move as it might lead to the fact that for the first time since the conflict broke out more than half a century ago, there would be a proper investigation on acts committed on Palestinian ground and individuals might have to face consequences for their actions. Further, it might help to resolve the issue regarding the continuation of the settlement activity, but many are of the opinion that the Israelis are committing war crimes under article 8(b)(viii)¹⁹⁵ of the Rome Statute, with its ongoing settlements building.

As to be expected the declaration raised many legal questions concerning the status of Palestine and the powers of the PA. As article 12(3) of the Rome Statute

¹⁹³ 'Palestinian National Authority' (International Criminal Court) <<http://www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279777/20090122PalestinianDeclaration2.pdf>> accessed 9 February 2012

¹⁹⁴ 'The declaration' (The International Criminal Court) <<http://www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279777/20090122PalestinianDeclaration2.pdf>> accessed 9 February 2012

¹⁹⁵ Article 8(b)(viii) of the Rome Statute defines any 'transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory' to be a war crime.

provides that only states can accept the jurisdiction of the ICC, the core question was whether or not Palestine could be regarded as a state under article 12(3)?

The Office of the Prosecutor (the Office) received many submissions on whether the declaration lodged by the PA met statutory requirements.¹⁹⁶ The European Centre for Law and Justice (ECLJ), for example, expressed concerns regarding non-state entities attempts to accede to the ICC's jurisdiction. The ECLJ was of the opinion that because the international community does not recognize Palestine as a state the PA's attempt to recognize the Court's jurisdiction was therefore *ipso facto* invalid.¹⁹⁷ John Quigley, a known international law scholar, on the other hand came to a different conclusion. He believes that there is a solid base in international law for the conclusion that Palestinian statehood already exists. He said that if Palestine is not a state then there is no state that has the capacity to grant the ICC jurisdiction in Gaza and added: 'Gaza would be a virtual dead zone from the perspective of the ICC'.¹⁹⁸ Other submissions considered the Palestinian statehood to be irrelevant as the criminal jurisdiction within Palestine rests with the PA, which can transfer such jurisdiction to the ICC through an ad hoc declaration under article 12(3) of the Statute. Others argued that the PA cannot transfer a jurisdiction it does not possess fully, as it has entered into a bilateral agreement (Oslo) through which it has accepted not to exercise jurisdiction over Israeli nationals. Therefore the PNA has no authority to exercise jurisdiction over the criminal conduct of Israeli nationals on Palestinian territory and transfer it to the ICC. Then again, some submissions argued that Palestine is recognized as a State by many States and many institutions and can therefore be regarded a state under article 12(3) of the Statute.¹⁹⁹ So the submissions were actually almost as different as they were many.

¹⁹⁶ John Quigley, 'Summary of submissions on whether the declaration lodged by the Palestinian National Authority meets statutory requirements' (The International Criminal Court) <<http://www.icc-cpi.int/NR/rdonlyres/D3C77FA6-9DEE-45B1-ACC0-B41706BB41E5/281882/QuigleyPalestinedeclarationandtheICC1.pdf>> accessed 2 February 2012

¹⁹⁷ 'Legal Memorandum Opposing Accession to International Criminal Court Jurisdiction by Non-State Entities' (The International Criminal Court) <<http://www.icc-cpi.int/NR/rdonlyres/D3C77FA6-9DEE-45B1-ACC0-B41706BB41E5/281869/OTPlgalmemorandum1.pdf>> accessed 4 February 2012

¹⁹⁸ John Quigley, 'Summary of submissions on whether the declaration lodged by the Palestinian National Authority meets statutory requirements' (The International Criminal Court) <<http://www.icc-cpi.int/NR/rdonlyres/D3C77FA6-9DEE-45B1-ACC0-B41706BB41E5/281882/QuigleyPalestinedeclarationandtheICC1.pdf>> accessed 3 February 2012

¹⁹⁹ 'Situation in Palestine' (The International Criminal Court) <<http://www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf>> 4 April 2012

The Office issued a statement on April 3rd, 2012; three years after the PA first lodged the declaration, which explained that the Office would not to accept PA's transfer of the jurisdiction to the ICC, under article 12(3). The fact that Palestine has been recognized as a state by more than 130 governments and by certain international organizations, including UN bodies was not as important, in the opinion of the Office, as the fact that the current status granted to Palestine by the UNGA is that of 'observer', not as a 'Non-member State'. The statement further stated that even though the Palestine's application for admission to the UN as a Member State does not have direct link with the declaration lodged by Palestine it informs the current legal status of Palestine for the interpretation and application of article 12. Lastly the statement noted that the Office could in the future consider allegations of crimes committed in Palestine if competent organs of the UN or eventually the Assembly of States Parties resolve the legal issue relevant to an assessment of article 12 or should the UNSC, in accordance with article 13(b), make a referral-providing jurisdiction.²⁰⁰

²⁰⁰ Ibid

4. STATEHOOD UNDER INTERNATIONAL LAW

4.1. Introduction

The 1933 Montevideo Convention on Rights and Duties of States (the Montevideo Convention) is probably the best-known formulation of the basic criteria for statehood.²⁰¹ Article 1 of the Convention spells out the requirements that a state should possess or a permanent population, a defined territory, a government and the capacity to enter into relations with the other states.

However, the original purpose of article 1 was not to codify the term statehood but to make clear that any territorial entity with a population and a government capable of relating to other states should be free from intervention. The Convention was concluded at the initiative of Latin American states that were seeking to end the role played by the US in the hemisphere in the early years of the 20th century. They wanted a commitment by the US to respect their territorial integrity. This aim is also clear from the content of the Convention's articles.²⁰²

This is why not all agree on the authority of this criterion when assessing statehood. Many feel that a formula, that was not formulated as part of a project to ascertain standards for statehood but was written in the context of a political struggle in the Western Hemisphere, should not be used to define statehood. What at least some commenters also do find to be disturbing is the fact that little is known why the drafters chose the adopted wording. At the time of the negotiation as the Convention was being adopted the US delegation didn't once mention article 1 as the focus was on the issues in contention between the US and the Latin states, not to codify requirements for statehood. According to Quigley this lack of attention to article 1 has left uncertainty as to whether the criteria found in the article is actually required for statehood as it was not intended to be part of a global standard setting for statehood.²⁰³ Even though the purpose of the Convention was not to codify the requirements for statehood the criterion found in the Convention has still become the touchstone for defining what can be a state and the primary point of reference in

²⁰¹ James R. Crawford, *The Creation of States in International Law* (Oxford University Press 2006) 4

²⁰² John Quigley, *The Statehood of Palestine - International Law in the Middle East Conflict* (Cambridge Press 2010) 206.

²⁰³ Ibid 207.

efforts to define statehood.²⁰⁴ It has become an established customary international law, as it seems.²⁰⁵

If the criterion found in the Montevideo Convention is antiquated, what tools are there to use when assessing statehood? What makes a state? There is no easy answer to this question. To date no proposals have been accepted to re-codify statehood. But there have been efforts made in order to do so. The codification of a definition of statehood was debated during drafting sessions for a Declaration of the Rights and Duties of States in 1949; also for the Vienna Convention on the Law of Treaties in 1956 and 1966; and for proposed articles on Succession of States in Respect of Treaties in 1974.²⁰⁶ Still, no new criterion has been accepted. It seems that the relevant actors are not ready to agree on a precise definition of statehood.

So what in fact does determine statehood? If the majority of states in the world recognize an entity, should it not then be considered to be a state? Is an entity a state if it fulfills the criteria found in the Montevideo Convention? Is it possible that an illegal occupation can prevent an entity to gain statehood? The issue is extremely controversial. This chapter will try to answer the above questions and determine what in fact are the crucial factors that an entity has to fulfill in order to be considered a state. It will further examine whether or not Palestine fulfills the criteria for statehood. It will begin with addressing the traditional criteria for statehood, or the Montevideo conditions and then later also address other proposed features of statehood.

4.2. The Traditional Criteria for Statehood – The Montevideo Convention

According to article 1 of the Convention a state, as a person of international law should possess the following qualifications,

- a) A permanent population
- b) A defined territory
- c) Government
- d) The capacity to enter into relations with the other states.

²⁰⁴ Thomas D. Grant, *The Recognition of States: Law and Practice in Debate and Evolution* (Greenwood Press, 1999) 7

²⁰⁵ John Dugard, *International Law: A South African Perspective* (3rd edn, Juta Legal and Academic Publishers 2006) 82

²⁰⁶ Thomas D. Grant, *The Recognition of States: Law and Practice in Debate and Evolution* (Greenwood Press, 1999) 11

4.2.1. Population

A permanent population is necessary for statehood, though, as in the case of territory, no minimum limit is prescribed.²⁰⁷ A state can be a state even if the population is very small. For example, Iceland has a population of only 320.000 people. Nevertheless Iceland is considered to be a state. Palestine has a permanent population inhabiting its territory that has been inhabited there for centuries. An estimated four million Palestinians live in the West Bank and the Gaza Strip. Another estimated five million Palestinians are refugees living in Lebanon, Syria, Jordan and elsewhere.²⁰⁸ Those are the people who were forced from their land in 1948 and their families. More Palestinians also live in different countries around the world, but are of course entitled to Palestinian nationality and to live in Palestine. Even if only the four millions living in the West Bank and Gaza can be considered a permanent population that is enough to fulfill this criteria.

4.2.2. Defined Territory

Under the British Mandate, Palestine's territory was bounded by Lebanon on the North, Syria and Transjordan on the east, Egypt on the south and the Mediterranean Sea on the West.²⁰⁹ Resolution 181 changed Palestine's territory as it was under the mandate so what was left was about half of mandated Palestine. After the 1948 war the Palestinian territory had shrunken to 22% of the former total and after the 1967 war Israel had seized all the of original mandated Palestinian land under its occupation. However, it is only the last 22% of the land that is generally regarded as occupied land by the international community, even though the state of Israel actually lies on occupied land since the 1948 war. (Author-translated).²¹⁰ So as of today, the land that rightfully belongs to the Palestinians according to international law is the land that comprised by the pre-1967 borders, often also called 'Green Line borders' or the '1949 armistice lines'. The UN²¹¹ and the EU²¹² have called for the two-state

²⁰⁷ Ibid 52

²⁰⁸ 'UNRWA In Figures' (Public Information Office, 30 December 2010)

<<http://www.unrwa.org/userfiles/2011080123958.pdf>> accessed 15 March 2012

²⁰⁹ John Quigley, *The Statehood of Palestine - International Law in the Middle East Conflict* (Cambridge Press 2010) 209

²¹⁰ Jón Ormur Halldórsson, 'Hvaða yfirráðarétt hefur Ísrael á hernumdum svæðum Palestínu? Hvernig hefur alþjóðasamfélagið tjáð sig um þessi yfirræð?' (*Visindavefurinn*, 12 April 2002)

<<http://visindavefur.hi.is/svar.php?id=2295>> accessed 12 February 2012 (author-translated)

²¹¹ For example UNSC resolution 242 called for the withdrawal of Israeli forces from the occupied

solution based on the 1967 borders and in 2011 US President Barack Obama, declared that the borders of Israel and Palestine should be based on the 1967 borders.²¹³

It is important to note that the fact that the Palestinian land is not geographically united it does not change its status. The criterion of a defined territory does not require that a state possess geographical unity. On the contrary, a state can consist of disconnected territorial areas and many states are indeed not geographically united. Many states are comprised of a mainland and islands, such as Australia and Greece. Other states are comprised of many islands, like Indonesia and the Marshall Islands.²¹⁴ Even the US is not geographically united. Further, UNSC resolution 242, which was adopted few months after the Six-Day War and called for a resolution of the final status of the territories, made no mention of a territorial link between Gaza and the West Bank.²¹⁵ Also, there is no rule that prescribes the minimum area of a territory. Although a state must possess some territory it can be very large or very small.²¹⁶

It has been argued that Palestine does not fulfill this criterion because it does not have certain and fixed territory due to its ongoing border disputes with Israel. However, even though the wording of this criterion talks about a 'defined territory' there is no requirement that the boundaries of a territory must be fixed or certain. The state of Israel actually demonstrates this principle. Israel does not have fixed or permanent borders and yet it was admitted to the United Nations in 1948 and is generally considered to be a state by a large majority of states in the world.²¹⁷ This was also confirmed in a German-Polish Mixed Arbitral Tribunal²¹⁸ that stated the rule succinctly:

territories after the Six-Day War.

²¹² 'Council conclusions on the Middle East Peace Process' (*Council of the European Union*, 23 January 2012)
<http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/127466.pdf> accessed 10 April 2012

²¹³ 'Obama seeks Palestine state on 1967 borders' (*Al Jazeera*, 19 May 2011)
<<http://english.aljazeera.net/news/americas/2011/05/2011519145837856559.html>> accessed 12 April 2012

²¹⁴ Justus Reid Weiner and Diane Morrison, *Linking the Gaza Strip with the West Bank: Implications of a Palestinian Corridor Across Israel* (Jerusalem Center for Public Affairs 2007) 12

²¹⁵ *Ibid* 13

²¹⁶ James R. Crawford, *The Creation of States in International Law* (Oxford University Press 2006) 46

²¹⁷ Justus Reid Weiner and Diane Morrison, *Linking the Gaza Strip with the West Bank: Implications of a Palestinian Corridor Across Israel* (Jerusalem Center for Public Affairs 2007) 12

²¹⁸ *Deutsche Continental Gas-Gesellschaft v Polish State* (1929) 5 ILR 11, 14–15

Whatever may be the importance of the delimitation of boundaries, one cannot go so far as to maintain that as long as this delimitation has not been legally effected the State in question cannot be considered as having any territory whatever... In order to say that a State exists... it is enough that this territory has a sufficient consistency, even though its boundaries have not yet been accurately delimited, and that the State actually exercises independent public authority over that territory.²¹⁹

The ICJ has also confirmed this principle. In the North Sea Continental Shelf cases²²⁰, the ICJ claimed that, 'There is for instance no rule that the land frontiers of a State must be fully delimited and defined, and often in various places and for long periods they are not.' Many states have had disputes with neighboring states over borders and territories and they often change over time. For example, India and Pakistan have been disputing the Kashmir region since partition. Lastly, when Israel was admitted into the UN in 1949 the US representatives to the UNSC, arguing in support of Israel's application for UN membership, declared, 'both reason and history demonstrated that the concept of territory did not necessarily include precise delimitation of the boundaries of that territory.' Ergo, even when there is a substantial territory dispute with another state, that itself is not enough to bring statehood into question.²²¹

Other writers have argued that Palestine does not fulfill this criterion because it does not have full control over its territory. Professor Crawford is of the opinion that in order to fulfill this criterion, the requirements are: 1) the state must consist of a certain coherent territory and 2) be effectively governed, a formula that Crawford believes suggests that the requirement of territory is rather a constituent of government and independence than a distinct criterion of its own.²²² It is true that normally the easiest way to assume the relationship between a state and its territory is to determine who holds the control of territory. As was addressed here above, Palestine has a distinctive geographic area, the territory that belonged to the Palestinians before the 1967 war. That territory rightfully belongs the Palestinians under international law, even though it's illegally occupied by Israel. Due to the occupation, the Palestinians do not possess 'full' control over that territory, but still

²¹⁹ James R. Crawford, *The Creation of States in International Law* (Oxford University Press 2006) 49

²²⁰ North Sea Continental Shelf (Judgment) I.C.J. Reports 1969 <<http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=cc&case=51&p3=0>> [46] accessed 10 April 2012

²²¹ James R. Crawford, *The Creation of States in International Law* (Oxford University Press 2006) 52

²²² Ibid

have ‘effective’ control, which according to Crawford’s wording is enough. The fact that the Palestinians do not have ‘full’ control over its territory due to Israel’s illegal occupation cannot diminish the legitimate rights of the Palestinian people to statehood, as one of the basic principles in international law is the principle of *ex injuria jus non oritur*, or that acts contrary to international law are invalid and cannot become a source of legal rights for the wrongdoers.²²³ Thus, Israel can never assume legitimate permanent control over these territories, even though the occupation prevails for years to come.²²⁴ Furthermore, no other state can claim sovereignty over the territories. The only legitimate holders of these territories are the Palestinians. The Palestinians have a legitimate right to self-determination, as has been stated by the ICJ and in numerous UN resolutions and the right to choose to establish their own state - the state of Palestine. Israel’s occupation cannot diminish that right. It’s worth mentioning that Professor Quigley does not agree with Professor Crawford’s assumption that in order to fulfill this criterion, an effective control of the territory is needed. He believes that the territory criterion should be considered apart from the government criterion.²²⁵ However, even if we apply Crawford’s requirements the outcome would be the same as the Palestinians have ‘effective’ control over the territories that belong to them, even if they don’t have ‘full’ control. This will however be analyzed further when assessing the ‘government’ criterion.

That being said, it must be concluded that according to international law, Palestine’s defined territory is the territory occupied by Israel in 1967, namely the West Bank, including East Jerusalem and the Gaza Strip. Palestine therefore validly fulfills this criterion of a territory, not belonging to any other state.

4.2.3. Government

The governance in Palestine has changed drastically during the last two decades. Before Oslo, it was difficult to claim that the Palestinian people had effective control in the OPT. However, with Oslo, the PA became a governing institution in the OPT. Even though its control was and is limited because of Israel’s occupation, it today administrates most intra-governmental issues in Palestine. More drastic changes

²²³ John Dugard, *International Law: A South African Perspective* (3rd edn, Juta Legal and Academic Publishers 2006) 99

²²⁴ John Quigley, *The Statehood of Palestine - International Law in the Middle East Conflict* (Cambridge University Press 2010) 220

²²⁵ *Ibid* 211

followed Oslo. Elections for members in the Palestinian Legislative Council (PLC) were held in 1996 and the Basic law was passed in 1997, which provided for the three traditional branches of government, executive, legislative and judicial and characterized the political system as a parliamentary democracy. A cabinet was set up, including finance ministry, economic ministry, interior ministry and others.²²⁶ Numerous other actions were taken in order to establish a sustainable inter-governmental control in Palestinian territory. Fatah, the dominant fraction in the PLO, won the 1996 elections and held the power in Palestine until the 2006 elections, in which the results came as a surprise. Hamas won the elections and with Fatah, it formed a coalition government. However, after the unity government collapsed, Hamas seized control of Gaza while Fatah took control of the West Bank. Even though there have been talks about reconciliation, as was addressed in chapter 2.12.5, the situation is still very much the same - the government still seems divided. However, despite being divided, Palestinian officials still exercise intra-governmental issues, even though they come from two different political parties and despite that the territory is occupied. That being said, it cannot be denied that to secure full potential a united Palestine would of course be preferable, but even though being divided it doesn't mean that Palestine does not fulfill this criterion.

According to professor Crawford, in order for an entity to be a state (to fulfill this criterion), there are few conditions that have to be met. First, the entity must possess a government or a system of government in general control of its territory, to the exclusion of other entities not claiming through or under it. Secondly, he points out that international law lays down no specific requirements as to the nature and extent of this control, except that it include some degree of maintenance of law and order and the establishment of basic institutions.²²⁷ If we first look into those two requirements it seems clear that Palestine fulfills them. There is a functioning government operating in Palestine. Palestinian officials exercise intra-governmental issues and Palestine is governed by the rule of law. Before Oslo, one could argue that Israel functioned very much like a government in Palestine as the PLO never really functioned as a proper government even though it operated a number of aid programs

²²⁶ John Quigley, *The Statehood of Palestine - International Law in the Middle East Conflict* (Cambridge Press 2010) 215

²²⁷ James R. Crawford, *The Creation of States in International Law* (Oxford University Press 2006) 59

in the communities in the West Bank and Gaza.²²⁸ But ever since the Oslo Accords, Palestinian officials have exercised almost all intra-governmental issues. Excluded are only the issues that according to the Interim Agreement were to be negotiated in the permanent status negotiations, that is the question of the status of Jerusalem, settlements, military locations, and Israelis.²²⁹ As the second point stipulates, there are no requirements as to the nature and extent of how much control there has to be, except that it includes some degree of maintenance of law and order and the establishment of basic institutions. So even if Palestine does not have complete control of all the functions inside its territory that does not mean it doesn't fulfill this criterion, as it is enough that the control entails 'degree of maintenance of law and order and the establishments of basic institutions' which there is no question about that Palestine does. Strengthening this argument, Palestine recently got recognition from the International Monetary Found (IMF), the World Bank and the UN Special Coordinator for the Middle East peace process when it was concluded by them that Palestine's governmental functions were now sufficient for the functioning of a state. More specifically, the IMF declared that the PA were capable of handling the financial affairs of an independent state and the World Bank recognized the fiscal responsibility of the PA when it concluded; 'If the Palestinian Authority maintains its performance in institution-building and delivery of public services, it is well positioned for the establishment of a state at any point in the near future.'²³⁰ Furthermore, in a UN report that the UN Special Coordinator for the Middle East peace process prepared it is assessed that 'in six areas where the UN is most engaged, government functions are now sufficient for a functioning government of a state'.²³¹

Crawford also holds that when applying the above general principle to specific cases, it is necessary to consider the following:

²²⁸ John Quigley, *The Statehood of Palestine - International Law in the Middle East Conflict* (Cambridge Press 2010) 214

²²⁹ James R. Crawford, *The Creation of States in International Law* (Oxford University Press 2006) 443

²³⁰ 'World Bank: Palestinian Institutions Performing; Sustainable Growth Still Absent' (*The World Bank*, 7. 4 2011)
<<http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/MENAEXT/WESTBANKGAZAEXTN/0,,contentMDK:22878372~pagePK:1497618~piPK:217854~theSitePK:294365,00.html>> accessed 5 April 2012

²³¹ 'Special Coordinator Statements' (*The United Nations Special Coordinator for the Middle East Peace Process*, 12 April 2011)
<<http://www.unsco.org/Documents/Statements/SC/2008/AHLC%20FINAL%20PRESS%20RELEASE%2012%20April%202011%20.pdf>> accessed April 5th, 2012

- (1) whether the statehood of the entity is opposed under title of international law: if so, the requirement of effectiveness is likely to be more strictly applied;
- (2) whether the government claiming authority, if it does not effectively control the territory in question, has obtained authority by consent of the previous sovereign and exercises a certain degree of control;
- (3) there is a distinction between the creation of a new State on the one hand and the subsistence or extinction of an established State on the other. In the former situation, the criterion of effective government may be applied more strictly.²³²

Firstly, it has been concluded that Palestine indeed has ‘effective government’ so even if the requirement of effectiveness is strictly applied Palestine still fulfills that criteria. Section 2 is therefore not relevant, as it has been concluded that Palestine has effective control. Regarding section 3, writers do not agree on whether Palestine is a state or not. Professor Quigley for example argues that Palestine is a state and has been so ever since the Ottoman Empire seized to exist.²³³ However, for the purpose of this analysis, it really doesn’t matter whether or not Palestine is already a state or a state in the making, as even when applying the requirement of effectiveness strictly Palestine still fulfills the criterion.

As Crawford also points out statehood is not simply a factual situation but also legally circumscribed claim of right, specifically to the competence to govern a certain territory. Whether that claim of right is justified as such depends both on the facts and on whether it is disputed.²³⁴ Under international law it is clear that Palestine is the only legitimate holder of the OPT and thus the only entity that can legally have control over it. Even though Israel believes that those territories are disputed, it has firmly been established under international law that the territory that lies inside the pre-1967 borders legally belongs to the Palestinians. Israel can therefore never assume legitimate control over these territories. That being said, it is clear that Palestine fulfills this criterion.

²³² James R. Crawford, *The Creation of States in International Law* (Oxford University Press 2006) 60

²³³ ‘Summary of submissions on whether the declaration lodged by the Palestinian National Authority meets statutory requirements’ (The International Criminal Court) <<http://www.icc-cpi.int/NR/rdonlyres/D3C77FA6-9DEE-45B1-ACC0-B41706BB41E5/281882/QuigleyPalestinedeclarationandtheICC1.pdf>> accessed 10 April 2012

²³⁴ James R. Crawford, *The Creation of States in International Law* (Oxford University Press 2006) 61

4.2.4. The Capacity to Enter into Relations with Other States

The requirement of a capacity to enter into relations with other states is probably the most controversial criterion of the four. Writers do not agree on whether this criterion should be a requirement to statehood. Some, like professor Crawford, even say that the capacity to enter into relations with other states is a consequence of statehood, not a criterion for it.²³⁵ Others, for example professor Quigley, question the logic behind including this requirement in the criterion for statehood, as opposed to a requirement for recognition.²³⁶ However, while it is still used when assessing the qualification for statehood it is necessary to evaluate whether Palestine has indeed the capacity to enter into relations with other states.

The capacity to enter into relations with other states is very much affiliated with the requirement of government. If an entity does not have a functioning government then most likely it doesn't either have the capacity of entering into relations with other states. The capacity to enter into relations with other states is also very much linked with recognition of other states which will be addressed later. Diplomatic or consular representation is a strong evidence of a state's existence. Palestine has diplomatic or quasi-diplomatic relations with many states and has embassies and mission in more than 100 countries around the world. Palestine's missions perform different services for its nationals in different countries and different states perform consular functions in Palestine's territory for its nationals.²³⁷ Further, Palestinian passports are accepted in other countries to enter their territories. Palestine started to issue Passports to Palestinian nationals in 1995. The issuance of passport is an accepted function of governments in the conduct with foreign relations and states normally don't accept passport by entities that they do not recognize. Palestinian passports are even accepted in the US, who still does not recognize Palestine as a state. The US Department of State has determined that the Palestinian Authority Passport/Travel Document meets the requirements of a passport and therefore is acceptable for visa issuing purposes and travel to the US.²³⁸ The fact that the US and many other states generally accept Palestinian passports demonstrates that states look at Palestine as a *de facto* state even though they officially deny

²³⁵ Ibid 61

²³⁶ John Quigley, *The Statehood of Palestine - International Law in the Middle East Conflict* (Cambridge Press 2010) 211

²³⁷ Ibid

²³⁸ Ibid 212

recognizing Palestine *de jure* as such. One could suggest that there is an inconsistency that states are willing to accept Palestinian Passport but do not recognize Palestine as a state.

Palestine has been granted full membership in many organizations of states, such as the Non-Aligned Movement, the Organization of Islamic Cooperation, the Economic and Social Commission for Western Asia, the Group of 77 and the League of Arab States. Maybe most significantly, Palestine was accepted as a full member in UNESCO in October 2011, as was mentioned before in chapter 2.12.6.1. In addition, a total of 141 states have some form of diplomatic relations with Palestine besides over 130 States have already recognized Palestine as an independent sovereign State, including Iceland.²³⁹ Palestine has also signed many international treaties regarding trade, investment and commerce.²⁴⁰ In some of those treaties Palestine is referred to as a contracting state.²⁴¹ Palestine has a tariff agreement with the EU and a bilateral treaty on investment concluded with the US.²⁴² Palestine even made a treaty with the mandatory power, Great Britain, in 1922, regarding exchange of money orders, which indicates that Great Britain didn't think of Britain and Palestine to constitute a single sovereignty. If they would have, there would have been no point in making a treaty between them.²⁴³

Many states have also strengthened its recognition of Palestine by upgrading the Palestinian General Delegation in their capitals to diplomatic missions and embassies, status normally only reserved for states. Among those states are Iceland Denmark, France, Italy, Norway, Portugal, Spain and the UK.²⁴⁴ According to this

²³⁹ 'Report of the Committee on the Admission of New Members concerning the application of Palestine for admission to membership in the United Nations' (UNSC, 11 November 2011) S/2011/705 <<http://www.unhcr.org/refworld/docid/4ec618b52.html>> accessed 22 February 2012

²⁴⁰ John Quigley, *The Statehood of Palestine - International Law in the Middle East Conflict* (Cambridge Press 2010) 213.

²⁴¹ Palestine was a party to the International Agreement for the Establishment of an International Bureau of Intelligence on Locusts, concluded in 1926. The contracting parties in that agreement were referred in its text as the 'contracting states.' Source: 'Summary of submissions on whether the declaration lodged by the Palestinian National Authority meets statutory requirements' (The International Criminal Court) <<http://www.icc-cpi.int/NR/rdonlyres/D3C77FA6-9DEE-45B1-ACC0-B41706BB41E5/281882/QuigleyPalestinedeclarationandtheICC1.pdf>> accessed 10 April 2012

²⁴² John Quigley, *The Statehood of Palestine - International Law in the Middle East Conflict* (Cambridge Press 2010) 213.

²⁴³ 'Summary of submissions on whether the declaration lodged by the Palestinian National Authority meets statutory requirements' (The International Criminal Court) <<http://www.icc-cpi.int/NR/rdonlyres/D3C77FA6-9DEE-45B1-ACC0-B41706BB41E5/281882/QuigleyPalestinedeclarationandtheICC1.pdf>> accessed 10 April 2012

²⁴⁴ Victor Kattan, 'A State of Palestine: The Case for UN Recognition and Membership' (6 March 2011) <<http://www.victorkattan.com/blogDetail.php?72>> accessed 10 April 2012

Palestine does not only have the capacity to enter into relations with other states but does in fact actively engage in foreign relations.

4.3 Recognition

4.3.1. Introduction

Recognition by other states might be the most important feature when it comes to statehood. According to the traditional criteria for statehood, found in the Montevideo Convention, recognition of other state is still not necessary for an entity in order to be considered a state. An entity is a state if it fulfills the objective criterion. However, if an entity is widely recognized as a state by other states, it is difficult to argue that it is not a state by reference to the Montevideo Convention.²⁴⁵ But what does recognition mean then? Does it take place when states have formal relations with other states, for example diplomatic cooperation? Or does recognition have to involve an official recognition? There is no easy answer to these questions as there is no international rule on at which point recognition becomes official or valid. Accordingly, the issue of recognition is all but simple.

4.3.2. Relations Between States

In some cases bilateral relations between states provides good evidence on whether the states recognize each other as such. Ever since the mid 1990's states have acted in regards to Palestine as they consider it to be a state. The US and many other states have had relations with Palestine on many levels and Palestine is a member of various international organizations and has made agreements and treaties with other states. Professor Ian Brownlie once said that; 'informal relations, without intent to recognize in the political sense, specially if these persist have probative value on the issue of statehood.'²⁴⁶ However, the US and many other states have still not officially recognized Palestine as a state.

²⁴⁵ John Quigley, *The Statehood of Palestine - International Law in the Middle East Conflict* (Cambridge University Press 2010) 226

²⁴⁶ Ibid

4.3.3. Recognition vs. the Montevideo Convention

Professor Crawford is of the opinion that an entity is not a state because it is recognized; it is recognized because it is a state.²⁴⁷ If this is true, why isn't Palestine, who fulfills the criterion in the Montevideo Convention, recognized? And why was Israel recognized at a time when it did not fulfill the same criterion? It is not hard to argue that the reason Israel became a state is because the US recognized it as such few minutes after its declaration of independence back in 1948. Many have argued that Israel was recognized in spite of not being a state, at least according to the Montevideo criterion. Recognition therefore may trump the Montevideo criteria in certain situations. Likewise, states can fulfill the Montevideo criterion without being recognized by the international community, as in the case of Palestine.

Crawford, who does not see Palestine as a state, writes that although Palestine has been recognized by over hundreds states (which is in fact 133 states as of April 2012²⁴⁸) it has never commanded anything like the level of quasi-unanimous support that would be required to establish a particular rule of international law to the effect that Palestine is a state.²⁴⁹ As mentioned above there is no international rule about at what point recognition becomes official or valid. There is also no universal agreement or a treaty that addresses the significance of recognition regarding statehood.²⁵⁰ The only thing that comes close to such a rule is the framework of admission to the UN, where a two-third majority is needed in the UNGA, not a quasi-unanimous support.²⁵¹

However, there is a significant inverse relationship between recognition and the existence of an entity as a state for the purpose of international law. Writers have argued that the greater the degree of international recognition that an entity enjoys, the less may be demanded in terms of fulfillment of the Montevideo criteria for statehood. On the other hand, if an entity is not widely recognized as a state the more strictly will the criteria be assessed. According to this, given that Palestine is very

²⁴⁷ James R. Crawford, *The Creation of States in International Law* (Oxford University Press 2006) 93

²⁴⁸ 'Committee Report on a Proposal for a Parliamentary Resolution on the recognition of the independence and sovereignty of Palestine' (Foreign Affairs Committee, Parliamentary document No 358-Parliamentary item No 31, 22 November 2011)
<http://www.utanrikisraduneyti.is/media/MFA_pdf/Nefndaralit-meiri-hluta-um-Palestinu_enska.pdf>
accessed 10 April 2012

²⁴⁹ James R. Crawford, *The Creation of States in International Law* (Oxford University Press 2006) 438.

²⁵⁰ John Quigley, *The Statehood of Palestine - International Law in the Middle East Conflict* (Cambridge University Press 2010) 226

²⁵¹ Ibid 234.

widely recognized, less should be demanded of the Palestinians in terms of adherence to the Montevideo criteria for statehood.²⁵²

4.3.4. The Declaratory Theory and the Constitutive Theory

There are two theories of recognition: the declaratory theory and the constitutive theory. The declaratory theory states that an entity claiming to be a state would in fact be one if it fulfills the criteria of statehood articulated in article 1 of the Montevideo Convention and therefore completely independent of recognition.²⁵³ This theory however doesn't add up in reality. Many entities fulfill the criteria of the Montevideo Convention and are still not regarded as states. Professor Crawford does not agree with this theory. He claims that where a state actually exists, the legality of its creation or existence should be an abstract issue. He states that the law must take account of the new situation, despite its illegality. Equally, he believes that where a state does not exist, rules treating it as existing are pointless, a denial of reality.²⁵⁴

The constitutive theory is grounded on the assumption that statehood necessitates the entity in question being recognized as a state by other states.²⁵⁵ In theory, this should add up. A state must be a state if other states recognize it as such. However, if statehood should solely depend on the recognition of other states then shouldn't Palestine be a state by now, as it is recognized by more than two-third of the states in the UN? Also, many states in the UN do not recognize each other. South Korea and North Korea do not recognize each other and over 30 states do not recognize Israel. Nonetheless those are all states and recognized as such. So in practice this theory doesn't either works out. Recognition is an optional political act. UN membership does not bind other states that refuse to recognize the new state. Further, while an UN membership is recognition of statehood, as UN membership is only open to States, it does not work the other way – recognition of statehood does not guarantee UN membership.

²⁵² Justus Reid Weiner and Diane Morrison, *Linking the Gaza Strip with the West Bank: Implications of a Palestinian Corridor Across Israel* (Jerusalem Center for Public Affairs 2007) 20

²⁵³ James R. Crawford, *The Creation of States in International Law* (Oxford University Press 2006) 4

²⁵⁴ Ibid

²⁵⁵ Ibid

4.3.5. A Political Weapon?

In regard to Palestine, it seems that some states withhold recognition (mostly European states and the US) in order to pressure the Palestinians to first negotiate a settlement with Israel. They appear to be ready to recognize Palestine but are holding back recognition while using it as a carrot to encourage Palestine to reach a settlement with Israel. Therefore it seems that in reality recognition can be used more as a political weapon, than an act that must conform with the rule of law.²⁵⁶

The subject of recognition is very contradictory. Given that Palestine is widely recognized as a state it seems that it is not the amount of states that have recognized Palestine that matters, but which states have done so. Most European states do not officially recognize Palestine and the US does not. The theory of recognition actually doesn't lead anywhere as it is evident that the crucial actors here are the US and Israel.²⁵⁷ Palestine is not officially recognized as a state because Israel is against it, not because it doesn't fulfill the criteria for statehood. This is the fact of the matter and as long as the US does not change its position and recognize Palestine it will be very hard for the Palestinians to gain official undisputed statehood through normal channels.

4.4. Independence

According to some scholars (including professor Crawford), independence should also be a criterion for statehood, while others simply view independence as equivalent to and the foundation of the 'capacity to enter into relations with other states'.²⁵⁸ No doubt, the notion of state independence is vital for statehood. If Palestine were an independent state there wouldn't be any problem. But Palestine is occupied by Israel, which consequently means that Palestine is not fully independent. However, the issue of independence is not absolute. The lack of independence does not automatically negate statehood. Nor does it mean that a 'new state' cannot gain statehood if it's not independent. However, sometimes the lack of independence is so complete that the entity concerned can by no means be seen as a state but an internationally

²⁵⁶ John Quigley, *The Statehood of Palestine - International Law in the Middle East Conflict* (Cambridge University Press 2010) 227

²⁵⁷ James R. Crawford, *The Creation of States in International Law* (Oxford University Press 2006) 438.

²⁵⁸ Justus Reid Weiner and Diane Morrison, *Linking the Gaza Strip with the West Bank: Implications of a Palestinian Corridor Across Israel* (Jerusalem Center for Public Affairs 2007) 16

indistinguishable part of another dominant state.²⁵⁹ That is however not the fact in the case of Palestine.

According to Crawford, it is necessary to distinguish independence as an initial factor of qualification for statehood and as a condition for continued existence.²⁶⁰ As the relevant matter here is the qualification for statehood, independence for continued existence will not be addressed. Crawford holds that if independence should in fact be a criterion for statehood then a new state attempting to secede will have to demonstrate substantial independence, both formal and actual, from the state of which it formed part before it will be regarded as definitively created.²⁶¹ The crucial word here is 'substantial'. The new state is not required to possess complete independence, merely 'substantial'.

There are two recognized forms of independence - formal independence and actual independence. Formal independence exists where the power of a territory is vested in the separate authorities of the territory. The power may arise from the law in force in the territory, for example its constitution or it may be the result of a grant of full power from the previous sovereign. It may also be established, or recognized, by bilateral or multilateral treaty.²⁶² Actual independence refers to the effective independence of the putative state or the real governmental power at the disposal of its authorities.²⁶³ Palestine can indeed demonstrate the existence of both forms of independence. Palestine is a parliamentary democracy that consists of the three traditional branches of government, executive, legislative and judicial and Palestinian officials exercises stable and substantial governmental control over its territory, which according to Crawford should be enough to fulfill the criterion of independence. Israel's governmental power and authority over the OPT does not amount to a claim of sovereignty.²⁶⁴ According to relevant UNSC resolutions, moreover, such a claim of sovereignty would never be recognized.²⁶⁵

As pointed out above Palestine possesses substantial independence while due to Israel's illegal occupation it still does not exercise full and complete independence.

²⁵⁹ James R. Crawford, *The Creation of States in International Law* (Oxford University Press 2006) 63

²⁶⁰ Ibid

²⁶¹ Ibid

²⁶² Ibid 67

²⁶³ Justus Reid Weiner and Diane Morrison, *Linking the Gaza Strip with the West Bank: Implications of a Palestinian Corridor Across Israel* (Jerusalem Center for Public Affairs 2007) 17

²⁶⁴ John Quigley, *The Statehood of Palestine - International Law in the Middle East Conflict* (Cambridge University Press 2010) 220

²⁶⁵ Ibid 226

However, citing again one of the basic principles in international law, the principle of *ex injuria jus non oritur*, Palestine's lawful claim to statehood should not and cannot be diminished due to Israel's illegal acts. To further sustain this argument it is interesting to mention that Phase II of the 2003 'Performance-Based Roadmap Towards a Permanent Two-State Solution to the Israel-Palestine Conflict'²⁶⁶, called for 'creating an independent Palestinian state with provisional borders and attributes of sovereignty, based on the new constitution, as a way station to a permanent status settlement'. As part of Phase II (June–December 2003), Quartet members were supposed to 'promote international recognition of Palestinian state, including possible UN membership'. The Quartet found that a Palestinian state could be established prior to the conclusion of the final status negotiations with Israel. Ergo, it was accepted that Palestine did not have to wait until Israel had agreed to completely withdraw from the territory before asserting its claim to statehood. Thus one might argue that the criterion of independence is not absolute and may in certain circumstances be relaxed where the exigencies of the situation so require.²⁶⁷

4.1. The Case of Namibia

In this context it is interesting to mention the issue of Namibia before the country gained independence in 1990. The status of Namibia was in many aspects very similar to the Palestinian status. Namibia was under occupation by South Africa in the 1970s. It had been under a League of Nations mandate, like Palestine, but administrated by South Africa, which had never brought Namibia to independence.²⁶⁸ The status of Namibia was a Class C mandate, different from Palestine's Class A mandate status. Like Palestine, Namibia enjoyed the status at the UN just short of membership. The issue of Namibia's statehood arose when it applied for membership to the International Labor Organization (ILO). The ILO found that occupied Namibia was a state on the rationale that its legitimate rights should not be diminished by occupation. Namibia's occupation was regarded as unlawful, like Palestine's occupation. Various

²⁶⁶ Performance-Based Roadmap Towards a Permanent Two-State Solution to the Israel-Palestine Conflict' (*The United Nations Security Council*, 7 May 2003) <<http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/IP%20S%202003%20529.pdf>> accessed 2 April 2012

²⁶⁷ Victor Kattan, 'Review of The Statehood of Palestine: International Law in the Middle East Conflict' (2001) 105 AJIL 407, 413

²⁶⁸ James R. Crawford, *The Creation of States in International Law* (Oxford University Press 2006) 223

UN-related organizations found Namibia to be a state even though it was controlled by South Africa and consequently lacked independence.²⁶⁹

4.5. Self-Determination

The principle of self-determination is one of the most essential elements of customary international law. The principle enshrines in the UN Charter. Article 1(2) states the purposes of the UN and reads, ‘To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples...’²⁷⁰ Further, article 1 in both the 1966 International Covenant on Economic, Social and Cultural Rights²⁷¹ and the 1966 International Covenant on Civil and Political Rights²⁷² affirm the right of all people to self-determination and the obligation of state parties to promote the realization of that right and to respect it, in conformity with the provisions of the UN Charter.

There is still some controversy on the status of self-determination as a legal norm. Some commenters have argued that it is nothing more than a principle, and something less than a norm of customary international law.²⁷³ However, most agree that self-determination is a right and the ICJ has confirmed it as such. In its advisory opinion ‘Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)’,²⁷⁴ the Court analyzed the UN Charter’s provision of self-determination and said that self-determination was a right. The Court reaffirmed this view in its advisory opinion ‘Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory’²⁷⁵ where the Court stated ‘that the principle of self-determination of peoples has been enshrined in the United Nations Charter’, thus

²⁶⁹ Ibid 224

²⁷⁰ United Nations, Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter)

²⁷¹ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESC)

²⁷² International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)

²⁷³ John Quigley, ‘Self-determination in the Palestine context’ in Susan M. Akram, Michael Dumper, Michael Lynk and Iain Scobbie (eds), *International Law and the Israeli-Palestinian Conflict: A Rights-Based Approach to Middle East Peace* (Routledge 2010) 212

²⁷⁴ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276* (Advisory Opinion) 1970 <<http://www.icj-cij.org/docket/index.php?p1=3&p2=4&code=nam&case=53&k=a7&p3=0>> accessed 2 February 2012

²⁷⁵ *Legal Consequences of the Construction of a Wall* (Advisory Opinion) 2004 <<http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm>> accessed 28 April 2012

indicating its view of the normative character of self-determination.²⁷⁶

Pursuant to these basic rights, the Palestinians have the undeniable right to self-determination, as the indigenous people of Palestine. With resolution 2672 from 1970²⁷⁷, the UNGA declared that the Palestinian people were entitled to self-determination in accordance with the provisions of the UN Charter. Citing again ICJ's advisory opinion in 'Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory'²⁷⁸, the ICJ found that 'the existence of a 'Palestinian people' is no longer in issue' (if it ever was) and reaffirmed that respecting the right of the Palestinians to self-determination is an obligation *erga omnes*. The Court also emphasized the need to establish a 'Palestinian State, existing side by side with Israel and its other neighbours, with peace and security for all in the region.'²⁷⁹ The implementation of Palestinian right to self-determination has been, from a legal as well as a political point of view, the key element in the conflict.²⁸⁰

International law distinguishes between the right to self-determination and the actual achievement of Statehood. The establishment of a sovereign and independent State is only one of the modalities by which people may implement its right to self-determination. However in the case of the Palestinian people, it has not only been confirmed that they have the undeniable right of self-determination but also the right to establish their own state. The UNSC has determined that the preferred solution to the Israeli-Palestinian conflict should take the form of two States, Israel and Palestine, living side by side within secure and recognized borders.²⁸¹ Also almost the whole world community seems to see it as the solution to the conflict to establish a sovereign and independent state of Palestine.²⁸²

As a matter of law it is undeniable that the Palestinian people possesses the right to self-determination and in order to exercise its right the Palestinians are entitled to the creation of a sovereign and independent Palestinian state.

²⁷⁶ John Quigley, 'Self-determination in the Palestine context' in Susan M. Akram, Michael Dumper, Michael Lynk and Iain Scobbie (eds), *International Law and the Israeli-Palestinian Conflict: A Rights-Based Approach to Middle East Peace* (Routledge 2010) 212

²⁷⁷ UNGA Res 2672 (8 December 1970) UN Doc A/RES/2672(XXV)[A-D]

²⁷⁸ *Legal Consequences of the Construction of a Wall* (Advisory Opinion) 2004 <<http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm>> accessed 28 April 2012

²⁷⁹ Ibid

²⁸⁰ James R. Crawford, *The Creation of States in International Law* (Oxford University Press 2006) 435

²⁸¹ See for example UNSC Res 1397 (12 March 2002) UN Doc S/RES/1397

²⁸² Joseph Hotung, 'Palestinian Statehood and collective recognition by the United Nations' (School of Oriental and African Studies, 27 July 2011) <<http://www.soas.ac.uk/lawpeacemideast/file70357.pdf>> accessed 29 April 2012

4.6. The Benefits of Statehood

Some writers have argued that recognition of Palestinian statehood will not change much for the Palestinian people, as it will not change things on the ground. It will now be addressed how recognition of statehood and consequent UN membership, might change the situation for the Palestinians.

First, the Palestinians would be able to negotiate with Israel from the position of one state with another. Not as an unrecognized entity without all rights against a sovereign, independent and powerful state. The main problem with the negotiations to date is the imbalance in power between the parties. They can actually be compared to negotiations between a prisoner and its prison guard. It is hard to get a fair and just result under that kind of power-imbalance. If Palestine were to be recognized as a state the negotiations could be more effective and credible.

Second, the uncertainty of whether Palestine should be treated as a state and therefore a full-blown player in the community of nations would come to an end. As of today, Palestine has not been admitted into all international organizations, even though it is a member in many, which has lead to the fact that Palestine is not as active player in the world community as it would be.

Third, it would enhance Palestine's human rights accountability. Palestine would as a UN member state become a subject of the Human Rights Council, which conducts a review for each member state every four years. Palestine would therefore be required to present a self-study report on human rights in the country and would be cross-examined about it in Geneva.²⁸³

Fourth, Palestine would be able to ratify the Rome Statute of the ICC. This would mean that for the first time since the conflict broke out more than sixty years ago, the parties could be held accountable for the wrong doings. As of today Palestine has very limited resources to address Israel's behavior in the OPT. If Palestine would be recognized as a state, that would enable the ICC to exercise jurisdiction to prosecute Israeli war crimes in Palestinian territory, including, under article 8(b)(viii), the continuation of settlement activity.²⁸⁴

²⁸³ John Quigley, *The Statehood of Palestine - International Law in the Middle East Conflict* (Cambridge University Press 2010) 249-250.

²⁸⁴ Omar M Dajani, 'September Song' (*The Middle East Channel*, 24 May 2011) <http://mideast.foreignpolicy.com/posts/2011/05/24/september_song> accessed 30 April 2012

Fifth, the Palestinians would be able to ratify the Geneva Conventions of 1949, like they tried to do in 1989, but were rejected 'due to the uncertainty within the international community as to the existence or non-existence of a State of Palestine.'²⁸⁵

Finally, recognition of statehood for the Palestinians would not automatically end the conflict and the occupation. It might not lead to full independence for Palestine and there is no guarantee that it would immediately lead to significant changes on the ground. However, the recognition of Palestinian statehood will without doubt change the status quo and be a step in the right direction. The Palestinians have stated that even though Palestine would gain UN membership and consequently un-disputed statehood, they realize that they still would have to negotiate with the Israel about the issues regarding the permanent status. Recognized statehood for Palestine would pave the way to put the conflict under international control as a legal matter, not solely as a political matter and would be very beneficial for both the Palestinians and also the Israelis. It would be a step in the right direction.

4.7. The Main Objections to Palestinian Statehood

Professor Crawford is of the opinion that Palestine is not a state and is not yet ready for statehood. His main argument for this conclusion is that PA's power derives from agreements between Israel and the PLO, which the PA cannot alter and which the PLO committed not to alter unilaterally in the interim period. He states that a unilateral action can only be harmful to the peace process. He further believes that the only way to change the status quo is through negotiations between the parties concerned.²⁸⁶

Crawford's conclusions are emphasizing almost solely on the status before the Oslo Accords and he, in my opinion, puts too much emphasis on rejecting the 1988 declaration of independence. Therefore, when searching for answers regarding whether or not Palestine fulfills the Montevideo criterion today (or more accurately in 2006 when his book was published), whether it possess formal and actual

²⁸⁵ 'Geneva Conventions of 12 August 1949 and Additional Protocols of 8 June 1977 : Ratifications, accessions and successions as at 31 December 1995' (International Review of the Red Cross) <<http://www.icrc.org/eng/resources/documents/misc/57jn3h.htm>> accessed 30 April 2012

²⁸⁶ James R. Crawford, *The Creation of States in International Law* (Oxford University Press 2006) 446

independence, whether the acts of recognition of other states have a different meaning after Oslo or just the fact whether or not Palestine functions like a state today or at least after Oslo, his answers are nowhere to be found. It is puzzling why Crawford doesn't address any of these issues. In fact the only issue he seems to address, relating to the status after Oslo, is that under Oslo, both parties agreed on that unilateral action must not be taken in the meantime to change the status quo.²⁸⁷

I also miss not seeing Crawford putting Palestine under the test of the Montevideo Criterion. As has been pointed out above, Crawford does not believe that the Montevideo Criterion is the necessarily the right tool to assess statehood, at least not solely. He believes that other features must be analyzed as well, for example independence. However, he does agree that even though controversial, the Montevideo is the touchstone for assessing statehood today, mainly because of lack of other tools. That is why it is troubling that he doesn't put Palestine, under the criterion. He actually does it at one point, but he analyzes it according how the situation in Palestine was in 1988, when the PLO presented its declaration for independence. As I find, he completely discards all the enormous changes that have occurred since Oslo.

Further, like mentioned here above, it has been argued that a Palestinian recognition bid at the UN is in breach of its commitment under the Oslo agreements - to refrain from unilateral acts, which might change the permanent status issues. The Israelis have stated, that a unilateral measure of either party frees the other party from the obligations under the Oslo accords. However, it can easily be argued that any act of recognition is a unilateral act that lies with the states giving the recognition not with the PA. As of today, over 130 states have recognized Palestine as a state and have done so without any special request from the Palestinians.²⁸⁸ Recognition cannot be considered anything else than a unilateral act of the state that gives out the

²⁸⁷ Like was addressed in chapter 2.11.3 both parties agreed, under the interim agreement, that 'Neither side shall initiate or take any step that will change the status of the West Bank and the Gaza Strip pending the outcome of the Permanent Status negotiations'. The Israelis believe that when asking for recognition the Palestinians are breaking the agreement, as recognition will change the status quo. However it has been held that the Israelis have repeatedly broke agreement with its ongoing settlement constructions.

²⁸⁸ 'Committee Report on a Proposal for a Parliamentary Resolution on the recognition of the independence and sovereignty of Palestine' (Foreign Affairs Committee, Parliamentary document No 358-Parliamentary item No 31, 22 November 2011)
<http://www.utanrikisraduneyti.is/media/MFA_pdf/Nefndaralit-meiri-hluta-um-Palestinu_enska.pdf>
accessed 10 April 2012

recognition, not a unilateral act of the Palestinians, which aim to change the status of the occupied territories.²⁸⁹

Furthermore, if the act of the Palestinians is in fact an unilateral act and that such an act frees the other party from the Oslo accords obligation, then the Palestinians were freed of the Oslo's obligations long time ago, as the Israelis have not stopped its settlements building which is not only a breach of the Oslo agreements as it changes the status of territory, but also illegal under international law. The Israelis cannot complain of unilateral Palestinian acts, claiming that the act represents a breach of the Oslo agreements, which it has itself disregarded.²⁹⁰

Crawford's views that peace should come through negotiations between the parties are in line with the view presented by the US and many European states, which have stated that the Palestinians deserve its own state but that goal cannot be reached without first reaching an agreement with Israel. The problem is however, that the so-called 'permanent status negotiations' have continued for almost 20 years and still the final permanent agreement is nowhere in sight. Since all negotiations between Israel and Palestine stopped in late 2010, when Israel refused to freeze its settlements building in the OPT, the peace process has been in a complete deadlock. Further, both sides have often put out preconditions for sitting down to negotiate, which has stalled the negotiations massively. Preconditions that both parties are not willing to comply to. As of today, the Palestinians refuse to sit down with the Israelis until they formally freeze all settlements constructions. Last year, Israel refused to negotiate before the Palestinians agreed to recognize Israel as a 'Jewish state', which the Palestinians have refused to do. If the Palestinians were to recognize Israel as solely a 'Jewish state' they would be jeopardizing the 'right to return' for the millions of people who were expelled from their homes during the 'Nakba' and their relatives. It would also mean that the Palestinians that now live in the state of Israel (about 1.5 million people or around 20% of Israel's population) would continue to live under discrimination as non-Jews, being interior according to Israeli law.

In his speech at the UNGA in September 2011, US President Obama, stated that the he was 'convinced that there is no short cut to the end of a conflict that has endured for decades', referring to the PA's UN bid. He said that the Palestinians and

²⁸⁹ Joseph Hotung, 'Palestinian Statehood and collective recognition by the United Nations' (School of Oriental and African Studies, 27 July 2011) <<http://www.soas.ac.uk/lawpeacemideast/file70357.pdf>> accessed 29 April 2012

²⁹⁰ Ibid

the Israelis were the ones who have to come to an agreement and it is not in the hands of the international community (the UN).²⁹¹ The argument that the UN is not the appropriate venue for bringing about Palestinian statehood is interesting. First, the UN was set up to deal with issues of war and peace and has the primary goal to maintain international peace and security. The prolonged conflict has had a huge impact on world peace, especially in the Middle East and many argue that the huge gap and intolerance between the Middle East and the Western World has its roots in the Israel/Palestine conflict. Secondly, the conflict between the Israelis and the Palestinians is practically 'homemade' in the UN, whereas it was a UNGA resolution that partitioned the territory and established the legitimacy of a Jewish State in Palestine, a fact celebrated in Israel's Declaration of Independence. Thirdly, the UN has set out the legal point of reference for negotiations between the parties, according to UNSC resolution 242.²⁹²

In the same speech President Obama on the other hand called for the UNSC to immediately take action against the Syrian regime. He said that there was no excuse for the UN to sit and watch when people were being killed. The US also approved the UNSC no fly-zone resolution regarding Libya. One could argue about inconsistency when it comes to what Obama believes should fall under UN's umbrella. Perhaps international politics are bound to dominate over international law - yet only if it is allowed to do so!

²⁹¹ 'Obama's Address to the UN General Assembly, 2011' (*Council on foreign relations*, September 21st, 2011) < <http://www.cfr.org/united-states/obamas-address-un-general-assembly-2011/p25984> > accessed 12 April 2012

²⁹² UNSC Res 242 (22 November 1967) UN Doc S/RES/242

5. CONCLUSIONS

Palestine was a part of the Ottoman Empire from the 16th century until the beginning of the 20th century. At the end of the First World War, the Ottoman Turkish forces were defeated and Palestine was one of the states that were freed from the Ottoman Turks without getting independence. Palestine fell under British administration. On 2 November 1917, the British cabinet issued a declaration of support, the so-called Balfour Declaration, for the Zionist movement, which was formed with the main purpose to establish a new 'Nation' for Jews.²⁹³ The decision to help Jews establish a national home for Jews in Palestine was not consistent with promises the Brits had given to the Arabs. The Brits had promised support for Arab independence in return for Arab military cooperation against the Ottomans.²⁹⁴

The Second World War had substantial consequences for Palestine. The Jewish population in Palestine grew from around 15,000 people in 1882 to 435,000 people in 1939. In 1947, the Jewish population was 649,500 out of total 1.95 million inhabitants in Palestine.²⁹⁵ On November 29 1947 the UNGA resolution 181(11) was approved, often refereed to as the Partition Plan. The resolution was to resolve the ongoing conflict in Palestine by dividing the country in such a way that each state, one Jewish and one Arab, would get about half of the land but Jerusalem would be administered by the UN. Resolution 181 was a non-binding proposal under international law, simply a recommendation. Less than a year later, Israel declared independence and the day after a war broke out between Israel and neighboring Arab states which lead to Israel controlling nearly 75% of the original Palestine. Another war broke out in 1967, the Six-Day War, whereas Israel seized the remaining 22% of the Palestinian land and began the world's longest running occupation.

On September 13th 1993, at a ceremony with US President Bill Clinton on the White House lawn, the PLO and the Israeli government formally signed 'The Declaration of Principles' also often called 'Oslo I'.²⁹⁶ Then in 1995 the so-called Interim Agreement was signed or Oslo II. The Oslo Accords were a framework for

²⁹³ John Quigley, *The Statehood of Palestine - International Law in the Middle East Conflict* (Cambridge University Press 2010) 14

²⁹⁴ Viðar Þorsteinsson, 'Saga Palestínu og Ísraels' (Félagið Ísland-Palestína 2002)

<<http://www.palestina.is/upplýsingar/saga-palestinu-og-israels/>> accessed February 10th 2012

²⁹⁵ Spencer C. Tucker, *The Encyclopedia of the Arab-Israeli Conflict: A Political, Social, and Military History* (ABC-CLIO 2008) 85-90

²⁹⁶ Christine Bell, *Peace Agreements and Human Rights* (Oxford University Press 2004) 83

the future relations between the two parties. The Accords provided for a gradual transfer of power from Israel to Palestinians in the West Bank and the Gaza Strip and represented a major change in the relationship between Israel and the Palestinians. Today, the final status has yet to be reached.

The PLO was set up in May 1964. The PLO is a national liberation organization, widely recognized as such and is considered by the Arab League and by the UN to be the legitimate representative of the Palestinian people. The PA is an interim local government with restricted powers, limited to civil matters and internal security. The Fatah movement, founded in 1959, is a Palestinian national movement that since the 1970's has been the dominant faction in the PLO. Hamas, which is an Islamic movement, was founded in 1987. The party was a surprise winner in the 2006 elections in Palestine, which resulted in the division of the governance in Palestine. Fatah controls the West Bank and Hamas controls Gaza. In September 2011 Mahmoud Abbas formally applied for a UN Membership for Palestine and while doing so also requesting international recognition of the state of Palestine within the 1967 border. As of April 2012, the UNSC has not yet made a recommendation in this regard. Palestine's current status at the UNGA remains to be 'observer'.

UNSC resolution 242, adopted in November 1967 urged the withdrawal of Israeli forces from the territories occupied in the 1967 war. Israel has not complied with the resolution and maintains strongly its view that the territories are not occupied but merely administrated by Israel. As the occupying power in the West Bank and Gaza Strip, Israel's obligations are set out in the Hague Regulations annexed to the Convention (IV) Respecting the Laws and Customs of War on Land (the Hague Regulations) and the 1949 Fourth Geneva Convention. However, the Israeli government does not believe that the Fourth Geneva Convention is applicable in the OPT, an opinion not shared with the rest of the world community as it seems. The ICJ concluded in its advisory opinion in 'Legal Consequences of the Construction of a Wall' that the Israeli settlements have been established in breach of international law. The Court also confirmed that the construction of the wall and its associated régime are contrary to international law. The Court found that the wall infringed upon the rights of the Palestinian people to self-determination as laid down in article 1 to the

UN Charter and held it to be a violation of the Fourth Geneva Convention and the Hague Regulations.²⁹⁷

Originally, Palestinian refugees numbered 750,000. Today, 5 million Palestine refugees are eligible for UNRWA services.²⁹⁸ That makes the population one of the biggest displaced populations in the world. The UNGA has adopted numerous resolutions urging Israel to allow the Palestinians forced from their homes to return. Over the years, the Israeli treatment of the Palestinians has been compared to the treatment of whites of the blacks during the Apartheid era in South Africa. With the 'Jewish-only' settlements, military checkpoints, separate roads, the wall, discriminatory access to resources and different legal rights, many have come to the conclusion that the Israelis are acting in a discriminative manner against the Palestinians. In January 2009, in the aftermath of the Gaza war, the PA filed a declaration according to article 12(3), accepting the jurisdiction of the ICC in the territory of Palestine. The Office of the Prosecutor issued a statement on April 3rd 2012, which explained that the Office would not to accept PA's transfer of the jurisdiction to the ICC, under Article 12(3).²⁹⁹

Not all agree on the legality or the relevance of the Montevideo Convention criterion when assessing statehood. However, the criterion has become the touchstone for defining state and the primary point of reference in efforts to define statehood. According to article 1 of the Convention a state, as a person of international law should possess the following qualifications; a permanent population, a defined territory, a government and the capacity to enter into relations with the other states. Palestine does fulfill all the criteria, as this author finds. It has a permanent population. About four million Palestinians live in the West Bank and the Gaza Strip. Another estimated five million Palestinians are refugees living in Lebanon, Syria, Jordan and elsewhere. Palestine also has a defined territory, or the territory as it had before the 1967 war. The fact that the land is not geographically united does not change that fact nor does the fact that the land is disputed. Maybe most importantly, no other state claims sovereignty over the territory. The world community has

²⁹⁷ *Legal Consequences of the Construction of a Wall* (Advisory Opinion) 2004 <<http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm>> accessed 28 April 2012

²⁹⁸ 'Palestine refugees' (The United Nations Relief and Works Agency for Palestine Refugees) <<http://www.unrwa.org/etemplate.php?id=86>> accessed 2 February 2012

²⁹⁹ 'Situation in Palestine' (The International Criminal Court) <<http://www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf>> 4 April 2012

confirmed that the territory belongs to the Palestinians; the US³⁰⁰, the EU³⁰¹ and the UN³⁰² have all declared that the Palestinians have at least right to the land as it was before the 1967 war. Palestine also fulfills the government criterion. Even though the control is limited because of Israel's occupation, Palestinian officials today administrate most intra-governmental issues in Palestine. The governance is not complete but it is effective, which is enough to fulfill this criterion. Further, Palestine does not only have the capacity to enter into relations with other states but does actively engage in foreign relations.

Recognition by other states might be the most important feature when it comes to statehood. In some cases relations between states is good evidence on whether the states recognize other states. Ever since the mid 1990's states have acted in regard to Palestine as they consider it to be a state. Still Palestine is not recognized by all states. It seems that some states withhold recognition in order to pressure the Palestinians to first negotiate a settlement with Israel. They appear to be ready to recognize Palestine but are holding back recognition and even using it as a carrot to encourage Palestine to reach a settlement with Israel. Therefore it seems that recognition can be used as a political weapon rather than an act that must conform with the rules of law. There is no universal agreement or a treaty that addresses the significance of recognition regarding statehood.³⁰³

According to some scholars, independence should also be a criterion for statehood. No doubt, the notion of state independence is vital for statehood. If Palestine were an independent state there wouldn't be any problem. But Palestine is occupied by Israel, which consequently means that Palestine is not fully independent. However, the issue of independence is not absolute. The lack of independence does not automatically negate statehood. There are two recognized forms of independence - formal independence and actual independence. Palestine can indeed demonstrate the existence of both forms of independence.

³⁰⁰ 'Obama seeks Palestine state on 1967 borders' (*Al Jazeera*, 19 May 2011)
<<http://english.aljazeera.net/news/americas/2011/05/2011519145837856559.html>> accessed 12 April 2012

³⁰¹ 'Council conclusions on the Middle East Peace Process' (*Council of the European Union*, 23 January 2012)
<http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/127466.pdf> accessed 10 April 2012

³⁰² For example UNSC resolution 242 called for the withdrawal of Israeli forces from the occupied territories after the Six-Day War.

³⁰³ John Quigley, *The Statehood of Palestine - International Law in the Middle East Conflict* (Cambridge Press 2010) 213

The principle of self-determination is one of the most essential elements of customary international law. The principle enshrines in the UN Charter. Article 1(2) states the purposes of the UN. Pursuant to these basic rights, the Palestinians have the undeniable right to self-determination, as the indigenous people of Palestine. International law still distinguishes between the right to self-determination and the actual achievement of Statehood. The establishment of a sovereign and independent State is only one of the modalities by which people may implement its right to self-determination.³⁰⁴ However in the case of the Palestinian people, it has not only been confirmed that they have the undeniable right of self-determination but also the right to establish their own state.

Statehood for Palestine would pave the way to put the long-lasting conflict under international control as a legal matter, not solely as a political matter and would be very beneficial for both the Palestinians and the Israelis. The Palestinians would be able to negotiate with Israel from the position of one state to another. Palestine could become a full member of the community of nations with UN membership. Such undebated statehood would enhance Palestine's human rights accountability and Palestine would be able to ratify the Rome Statute of the ICC besides the Geneva Conventions as a full member. Recognition of statehood for Palestine will not automatically end the conflict and the occupation but it would be a vital step in the right direction.

To sum up key conclusions, it is my view that Palestine seems to satisfy fully the traditional criteria for a state prescribed in the 1933 Montevideo Convention. Further, Palestine has been recognized officially as a sovereign and independent state by over 130 states, which constitute more than two-third of the member-states of the UN. Also, as a matter of law, it is undeniable that the Palestinian people possess the right to self-determination and in order to exercise that right the Palestinians are entitled to the creation of a sovereign and independent Palestinian state. The only thing perhaps still missing today is the notion of complete independence, which is considered by James Crawford as an additional criterion for statehood. So, accordingly Palestine possesses substantial independence while due to Israel's illegal occupation it still does not exercise full and complete independence. However, citing

³⁰⁴ Joseph Hotung, 'Palestinian Statehood and collective recognition by the United Nations' (School of Oriental and African Studies, 27 July 2011) <<http://www.soas.ac.uk/lawpeacemideast/file70357.pdf>> accessed 29 April 2012

again one of the basic principles of international law, the principle of *ex injuria jus non oritur*, Palestine's lawful claim to statehood should not and cannot be diminished due to Israel's illegal acts.

So considering the above it is my conclusion after conducting this research that Palestine fulfills all the conditions as a state under international law, while still not enjoying full independence or UN membership, mainly due to the occupation and the geopolitical views of Israel and the US. That is the present situation as it is.

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