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MUCH ADO ABOUT NOTHING: NON-MEMBER STATE STATUS, PALESTINE AND THE INTERNATIONAL CRIMINAL COURT

*Zachary Saltzman**

INTRODUCTION

In a letter dated January 22, 2009, the Palestinian National Authority (“PNA”) recognized the International Criminal Court’s (“ICC”) jurisdiction over acts committed on Palestinian territory.¹ By that time, Palestinians had sent over 200 complaints alleging that the Israeli military committed war crimes during Operation Cast Lead, including illegally using white phosphorous in densely populated areas of Gaza.² The PNA requested that the ICC prosecutor investigate these allegations as well as all other allegations of Israeli war crimes dating back to July 1, 2002.³ The

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¹ See John Quigley, *The Palestine Declaration to the International Criminal Court: The Statehood Issue*, 35 RUTGERS L. REC. 1, 1–2 (2009) (citations omitted) (stating that Palestine recognized the jurisdiction of the International Criminal Court over all crimes that occurred after the ICC statute entered into force); see also Wendy Bremang, *Communications to the ICC Concerning the Situation in Gaza*, THE AM. NON-GOVERNMENTAL ORG. COALITION FOR THE INT’L CRIM. CT., Sept. 18, 2009, <http://www.amicc.org/docs/Gaza.pdf> [hereinafter *AMICC Communication to the ICC*] (explaining that the Palestinian National Authority formally recognized the jurisdiction of the International Criminal Court through a letter dated January 22, 2009).

² See Sebastian Rotella, *International Criminal Court to Consider Gaza Investigation*, L.A. TIMES, Feb. 5, 2009, <http://articles.latimes.com/2009/feb/05/world/fg-court-palestinians5> (noting that the ICC received 210 requests, including allegations that Israel had used illegal phosphorus shells during its fighting with Hamas); see also Marlise Simons, *Palestinians Press for War Crimes Inquiry on Gaza*, N.Y. TIMES, Feb. 10, 2009, <http://www.nytimes.com/2009/02/11/world/middleeast/11hague.html?r=3&th&mc=th&> (reporting that more than 200 requests were made with the ICC to review allegations of war crimes committed by Israel).

³ See Dan Izenberg, *ICC: Can PA Complain of Crimes on ‘Palestinian Territory’?*, THE JERUSALEM POST, Oct. 21, 2010, <http://www.jpost.com/LandedPages/PrintArticle.aspx?id=192194> (explaining that the Palestinians recognized the jurisdiction of the ICC for all crimes committed in Palestine since July 1, 2002); see also Simons, *supra* note 2

accusations were further examined in a UN investigation led by Richard Goldstone, an investigation which revealed that both Israeli forces and Hamas militants had engaged in war crimes.⁴

Despite the PNA's recognition of ICC jurisdiction, only States party to the Rome Statute are within the ICC's jurisdiction.⁵ Non-party States are not given automatic jurisdiction.⁶ Article 12 § 1 of the Rome Statute declares that a State "which becomes Party to this Statute thereby accepts the jurisdiction of the Court."⁷ As Palestine has not become a party to the Statute, it can only proceed under Article 12 § 3 of the Statute, which permits a non-party State to "accept the exercise of jurisdiction by the Court" if jurisdiction is accepted "by declaration lodged with the Registrar."⁸ Because of the Rome Statute, the ICC prosecutor has not investigated any crimes committed in the Palestinian territories. Instead, on October 20, 2010, the Office of the Prosecutor held a debate to determine whether the ICC should accept the Palestinian consent to jurisdiction.⁹ This "round table" was the culmination of many months of conflicting submissions to ICC prosecutor Luis Moreno

(providing that Palestine recognized the ICC's jurisdiction for all acts committed in Palestine since July 1, 2002).

⁴ See Richard Boudreaux, *Israelis and Palestinians Committed War Crimes in Gaza*, *U.N. Inquiry Says*, L.A. TIMES, Sept. 16, 2009, <http://articles.latimes.com/2009/sep/16/world/fg-mideast16> (noting that Richard Goldstone's report asserted that both Israel and Palestine had committed war crimes while fighting); see also Bremang, *supra* note 1 (reporting South African Judge Goldstone's statement that both Israel and Palestinian forces committed war crimes during the conflicts in Gaza).

⁵ See Rome Statute of the International Criminal Court art. 12 § 1, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) (establishing that any State that becomes a party to the Rome Statute falls under the jurisdiction of the ICC).

⁶ See *id.*

⁷ See *id.*

⁸ See *id.* at § 3 (explaining that a State that is not within the purview of the Rome Statute may accept the Court's exercise of jurisdiction by declaration). The ICC can also secure jurisdiction if the Security Council refers the Gaza situation to the Court. Bremang, *supra* note 1. However, this is extremely unlikely since "the US, an ally to Israel, as a permanent member would almost certainly veto any such referral." *Id.*

⁹ See Izenberg, *supra* note 3; see also Jonny Paul, *Amnesty Calls on ICC to Act on Cast Lead 'War Crimes'*, THE JERUSALEM POST, Sept. 29, 2010, <http://www.jpost.com/International/Article.aspx?id=189595> (recognizing that many people have long awaited the ICC prosecutor's decision regarding Palestine's declaration).

Ocampo on the issue of accepting the Palestinian submission.¹⁰ In essence, the prosecutor must determine whether the Palestinian territories constitute a State for the purposes of ICC jurisdiction. This is a decision, which has not yet been made.

The question of ICC jurisdiction over alleged Israeli war crimes in Palestine is further complicated now that the United Nations General Assembly has recognized Palestine as a non-member state. Palestine has had a presence in the United Nations since 1974 when the General Assembly first allowed Palestine to participate at the UN as a permanent observer.¹¹ In this capacity, Palestine is recognized as an “entit[y] having received a standing invitation to participate in the sessions and work of the General Assembly and maintaining permanent observer missions at Headquarters.”¹² Initially, the Palestinians were represented by the Palestinian Liberation Organization.¹³ However, after 1988, when the Palestinian National Council declared Palestinian independence, the designation “State of Palestine” was used to describe the Palestinian mission at the UN.¹⁴ Over the years, the scope of Palestinian participation at the United Nations has grown

¹⁰ See Tim Hume & Ashley Fantz, *Palestinian United Nations Bid Explained*, CNN, <http://www.cnn.com/2012/11/28/world/meast/un-palestinian-bid/index.html> (last updated Nov. 30, 2012, 5:38 AM) (noting that in 2012, there are still competing opinions as to Palestine’s request for statehood, with France, Spain, Portugal and Switzerland supporting the Palestinians’ bid for statehood, Britain and the United States opposing it); see also Izenberg, *supra* note 3 (finding that prior to the debate, numerous expert’s position papers, both supporting and opposing Palestine’s submission, was sent to the ICC).

¹¹ See Beth DeBernardi, Note, *Congressional Intent and Conflicting Treaty Obligations: United States v. Palestine Liberation Organization*, 23 CORNELL INT’L L.J. 83, 88–89 (1990) (citations omitted) (noting that the United Nations has recognized the Palestine Liberation Organization since 1974); see also Hume & Fantz, *supra* note 8 (stating that as of 1974, Palestine’s status in the U.N. was that of “permanent observer”).

¹² See U.N. Secretary-General, Participation of Palestine in the Work of the United Nations: Note by the Secretary-General (Aug. 4, 1998), <http://www.un.int/wcm/content/site/palestine/pid/11551> (noting Palestine’s invitation to partake in the daily work of the General Assembly).

¹³ See DeBernardi, *supra* note 9, at 87–88 (noting that the Palestine National Council created the PLO in 1964); see also Kathryn M. McKinney, Comment, *The Legal Effects of the Israeli-PLO Declaration of Principles: Steps Toward Statehood for Palestine*, 18 SEATTLE U. L. REV. 93, 96–97 (1994) (finding that the PLO represented Palestine internationally).

¹⁴ See generally JOHN QUIGLEY, *THE STATEHOOD OF PALESTINE* (2010).

such that its functions at the UN are “practically identical to that of an observer state.”¹⁵

Although the UN only recently recognized Palestine as a non-member state, discussion of Palestine attaining that status began in earnest in 2011. In September 2011, to advance the Palestinian claim to statehood, Palestinian President Mahmoud Abbas announced that he would seek full membership at the United Nations, a step that would require a recommendation to the General Assembly by the Security Council.¹⁶ Knowing that the United States—which sits on that council—would veto any attempt to recommend statehood, Abbas announced that if his attempts failed he would seek to upgrade Palestine’s status from UN permanent observer to UN non-member State.¹⁷ This status upgrade would allow Palestine to join the Holy See as the only other non-member State, and would confer the recognition of Palestinian statehood by the General Assembly.¹⁸ Unlike full

¹⁵ See John Cerone, *Legal Implications of the UN General Assembly Vote to Accord Palestine the Status of Observer State*, AM. SOC’Y OF INT’L L., Dec. 7, 2012, available at <http://www.asil.org/insights121208.cfm> (discussing the UN General Assembly’s progressive inclusion of the state of Palestine into the United Nations).

¹⁶ See *id.* (stating that in September 2011, President Mahmoud Abbas applied for Palestine to be granted UN Member State status); see also *Palestine to Seek UN Non-Member State Status, Abbas Tells General Assembly Debate*, UN NEWS CENTRE, Sept. 27, 2012, <http://www.un.org/apps/news/story.asp?NewsID=43083&Cr=general+debate&Cr1#.UQms2EJEOQr> (noting that in September 2011, Palestinian Authority President, Mahmoud Abbas, sought full United Nations membership and failed).

¹⁷ See Adam G. Yoffie, Comment, *The Palestine Problem: The Search For Statehood and the Benefits of International Law*, 36 YALE J. INT’L L. 497, 499 (2011) (citations omitted) (noting that the United States would most likely prevent the Security Council from giving the General Assembly a recommendation); see also Judi Rudoren, *Year After Effort at U.N., New Aim for Palestinians*, N.Y. TIMES, Sept. 20, 2012, http://www.nytimes.com/2012/09/21/world/middleeast/palestinians-aim-for-nonmember-state-status-at-united-nations-general-assembly.html?_r=0 (discussing that even though Palestine was denied UN membership in 2011, it is planning to seek non-member state status in 2012).

¹⁸ See General Assembly, 67th Sess., 44th & 45th plen. mtgs., GA/11317 (Nov. 29, 2012), available at <http://www.un.org/News/Press/docs/2012/ga11317.doc.htm> (stating that the status granted to Palestine was the same as the status afforded the Holy See); see also Yasmin Abdullah, Note, *The Holy See at United Nations Conferences: State or Church?*, 96 COLUM. L. REV. 1835, 1837 (1996) (citations omitted) (discussing that the Holy See, as a Non-Member State

membership, an upgrade to the status of non-member State would only require the approval of the United Nations General Assembly.¹⁹

Mahmoud Abbas's announcement that he would petition the General Assembly for non-member State status set off a political and media frenzy. Mahmoud Abbas fed this frenzy by authoring an op-ed in the *New York Times* in which he expressed his hope that statehood would "pave the way for us [Palestine] to pursue claims against Israel at the United Nations, human rights treaty bodies and the International Court of Justice."²⁰ Abbas' hopes were raised by comments by Christian Wenaweser, president of the ICC assembly of State Parties, who told the *Wall Street Journal* that a Palestinian observer state would be able to join the ICC and bring charges against Israel.²¹

Permanent Observer, is considered a state, despite not being a member of the General Assembly).

¹⁹ See John Cerone, *The UN and the Status of Palestine – Disentangling the Legal Issues*, AM. SOC'Y OF INT'L L., Sept. 13, 2011, available at <http://www.asil.org/pdfs/insights/insight110913.pdf> (stating that although Palestine's bid for UN membership would most likely be unsuccessful, due to a veto from the Security Council, the General Assembly could contemplate changing Palestine's status); see also Robert McMahon & Jonathan Masters, *Palestinian Statehood at the UN*, COUNCIL ON FOREIGN REL., <http://www.cfr.org/palestinian-authority/palestinian-statehood-un/p25954#p2> (last updated Nov. 30, 2012) (stating that a state only needs a majority vote from the General Assembly to attain Non-Member State standing).

²⁰ See Mahmoud Abbas, *The Long Overdue Palestinian State*, N.Y. TIMES, May 16, 2011, <http://www.nytimes.com/2011/05/17/opinion/17abbas.html> (stating that Palestine's seeking of state recognition would allow the state to pursue claims against Israel at the U.N.); see also Hussein Ibish, *Palestine's U.N. Membership Bid: How it Could Cause an International Legal Crisis Over the Potential Prosecution of Israeli Officials*, SLATE, Sept. 22, 2011, http://www.slate.com/articles/news_and_politics/foreigners/2011/09/could_a_un_upgrade_help_the_palestinians_prosecute_israeli_officials.html (recognizing that the one factor in President Abbas' efforts to secure recognition of a Palestinian state at the U.N. is to give Palestine the right to bring legal action against Israel at the ICC).

²¹ See Joe Lauria, *Palestinian Options at U.N. Lead to Legal Threat to Israel's Military*, WALL ST. J., Sept. 17, 2011, <http://online.wsj.com/article/SB10001424053111904060604576575002527221120.html> (revealing that a Palestinian observer state would be able to join the ICC and seek an investigation into any alleged war crimes committed on Palestinian territory after July 2002 against Israel); see also Jordan Sekulow, Matthew Clark & Nathanael Bennett, *The Overreach of Palestinian 'Statehood' at the United Nations*, WASH. POST, Dec. 7, 2012, <http://www.washingtonpost.com/blogs/religious-right-now/post/the-overreach-of-palestinian-statehood-at-the-united->

The most important comment came from Prosecutor Luis Moreno-Ocampo, who commented on the significance of the General Assembly's recognition of Palestine as a non-member observer state. Mr. Moreno-Ocampo, who has been undecided for the past two years about whether or not the ICC could accept the PNA's declaration of consent to ICC jurisdiction, announced: "If the General Assembly says they are an observer state, in accordance with the all-state formula, this should allow them . . . to be part of the International Criminal Court."²² While this statement has been criticized as overstating the importance of any General Assembly action,²³ Mr. Moreno-Ocampo's comment suggests that the ICC views any General Assembly action as carrying great importance.

Following what U.S. Secretary of State Hillary Clinton described as "extremely intense" diplomacy, President Abbas agreed not to proceed with a General Assembly resolution until the Security Council agreed on a final position regarding his

nations/2012/12/07/d982435a-40a5-11e2-bca3-aadc9b7e29c5_blog.html (reporting that President Abbas will try to pursue charges against Israel through the ICC). The Assembly of State Parties, composed of representative states that have acceded to the Rome Statute, is the oversight and legislative body of the ICC. See *ICC – Assembly of States Parties*, INT'L CRIMINAL CT., http://www.icc-cpi.int/en_menus/asp/assembly/Pages/assembly.aspx (last visited Feb. 11, 2013) (noting the makeup of the Assembly of States Parties).

²² See William Thomas Worster, *The Exercise of Jurisdiction by the International Criminal Court Over Palestine*, 26 AM. U. INT'L L. REV. 1153, 1157 (2011) (citations omitted) (noting that the Palestinian declaration raised questions as to whether Palestine would be considered a "state" within ICC's jurisdiction); see also Olivia Ward, *Palestinians Could Pursue War Crimes Charges Without Full Statehood: ICC Prosecutor*, THE STAR, Sept. 28, 2011, <http://www.thestar.com/news/world/article/1061595--palestinians-could-pursue-war-crimes-charges-without-full-statehood-icc-prosecutor> (revealing that as of late 2011, there was no outcome as to whether the ICC had jurisdiction over Palestine's claims against Israel).

²³ See Megan A. Fairlie, *Palestine's Upgraded Status and the International Criminal Court*, JURIST – Forum, Jan. 22, 2013, <http://jurist.org/forum/2013/01/megan-fairlie-palestine-icc.php> (opining that it was beyond the power of the Office of the Prosecutor to resolve the issue of Palestine's statehood); see also Milan Markovic, Comment to Kevin Jon Heller, *The Tone-Deaf ICC Prosecutor*, OPINIO JURIS, (Sept. 29, 2011, 10:12 PM), <http://opiniojuris.org/2011/09/29/the-tone-deaf-icc-prosecutor/> (questioning whether Moreno-Ocampo is putting too much weight on the General Assembly's determination).

application for full Palestinian membership in the UN.²⁴ Israel and the United States strongly opposed General Assembly recognition of Palestine as a non-member State out of fear that it would allow the ICC to proceed with Palestine's request that the ICC investigate Israeli war crimes.²⁵ However, now that President Abbas has succeeded in securing recognition of Palestine as a non-member state,²⁶ the significance of a General Assembly vote upgrading Palestinian status from permanent observer to non-member state is a pressing issue.

This Essay argues that contrary to the opinions expressed by Mr. Moreno-Ocampo and others against Palestine's request for ICC jurisdiction, the General Assembly recognition of Palestine as a non-member state would have a minimal impact on ICC jurisdiction over Palestinian war crime charges against Israel. Part I argues that Palestine is not a state within the meaning of

²⁴ See *Chronology of Events: Israel/Palestine*, SECURITY COUNCIL REP., <http://www.securitycouncilreport.org/chronology/israelpalestine.php?page=all&print=tre> (last modified Jan. 4, 2013) (noting that on September 23, 2011, Palestinian President Abbas submitted an application for membership, and that on September 28, 2011, the Security Council referred the application to the Committee on the Admission of New Members); see also Flavia Krause-Jackson & Bill Varner, *Palestinians Give UN Time Amid Pressure to Drop State Bid*, BLOOMBERG, Sept. 22, 2011, <http://www.bloomberg.com/news/2011-09-21/palestinian-authority-may-delay-call-for-an-immediate-un-vote-on-statehood.html> (quoting Palestinian negotiator, Nabil Shaath, who stated that time would be given to the Security Council to contemplate Palestine's request for membership before heading to the General Assembly).

²⁵ See Markovic, *supra* note 21 (recognizing the U.S. and Israel's fear that upon Palestine getting observer-state status, it would be able to prompt an investigation into the circumstances of Gaza); see also Ewen MacAskill & Chris McGreal, *UN General Assembly Makes Resounding Vote in Favour of Palestinian Statehood*, THE GUARDIAN, Nov. 29, 2012, <http://www.guardian.co.uk/world/2012/nov/29/united-nations-vote-palestine-state> (reporting that Israel and the U.S. criticized the U.N.'s resolution to recognize Palestine as a state).

²⁶ See David Ariosto & Michael Pearson, *U.N. Approves Palestinian 'Observer State' Bid*, CNN, Nov. 30, 2012, <http://www.cnn.com/2012/11/29/world/meast/palestinian-united-nations/index.html> (reporting that the U.N. approved Palestine's change in status from "nonmember observer entity" to "non-member observer state"); see also Ethan Bronner & Christine Hauser, *U.N. Assembly, in Blow to U.S., Elevates Status of Palestine*, N.Y. TIMES, Nov. 29, 2012, http://www.nytimes.com/2012/11/30/world/middleeast/Palestinian-Authority-United-Nations-Israel.html?pagewanted=all&_r=0 (proclaiming that the U.N. approved Palestine's status as a non-member observer state).

international law and that the word “state” should be defined in accordance with its ordinary meaning. Part II assesses the impact that non-member status has on Palestine’s sovereignty, and that the attainment of non-member status does not alter Palestine’s statehood, as it is traditionally understood. Further, Part II concludes that only a grant of full UN membership would affect Palestine’s statehood as it relates to ICC jurisdiction.

I. Definition of Statehood Under Article 12(3)

Whether the International Criminal Court can assert jurisdiction over Palestine’s charges turns on the answer to two questions: First, is Palestine a state under the generally-accepted definition of “state” in international law? Second, should the ICC define the term “state” as used in Article 12(3) of the Rome Statute in accordance with its traditional meaning under international law? Affirmative answers to these questions support ICC jurisdiction.

First, if Palestine is a state, it is entitled to accept ICC jurisdiction through a declaration under Article 12(3) of the Rome Statute.²⁷ Therefore, the ICC could accept jurisdiction over crimes committed in the Palestinian territories. Second, if Article 12(3) of the Rome Statute is not constrained by the traditional definition of “state” in international law, Palestine could also have ICC jurisdiction.²⁸ This argument proposes that the word “state” should

²⁷ See AMBASSADOR DORE GOLD & DIANE MORRISON, *AVERTING PALESTINIAN UNILATERALISM: THE INTERNATIONAL CRIMINAL COURT AND THE RECOGNITION OF THE PALESTINIAN AUTHORITY AS A PALESTINIAN STATE* 6 (2010) (acknowledging that Palestine invoked Article 12(3) of the Rome Statute when seeking the ICC’s jurisdiction); see also Kevin Jon Heller, *Yes, Palestine Could Accept the ICC’s Jurisdiction Retroactively*, OPINIO JURIS, Nov. 29, 2012, <http://opiniojuris.org/2012/11/29/yes-palestine-could-accept-the-iccs-jurisdiction-retroactively/> (reiterating that Palestine can accept the ICC’s jurisdiction through the Rome Statute’s Articles 11(2) and 12(3)).

²⁸ See Dapo Akande, *ICC Assembly of States Parties Urged to Decide on Status of Palestine*, EJIL: TALK!, Sept. 24, 2012, <http://www.ejiltalk.org/icc-assembly-of-states-parties-urged-to-decide-on-status-of-palestine/> (quoting the Prosecutor, who was suggesting that the term “state” in Article 12 is defined by the U.N. Secretary General); see also Michael Kearney & Stijn Denayer, *Al-Haq Position Paper on Issues Arising from the Palestinian Authority’s Submission of a Declaration to the Prosecutor of the International Criminal Court under Article 12(3) of the Rome Statute*, AL-HAQ, ¶ 21, Dec. 14, 2009, available at [http://www.alhaq.org/attachments/article/273/position-paper-icc-\(14December2009\).pdf](http://www.alhaq.org/attachments/article/273/position-paper-icc-(14December2009).pdf) (demonstrating that the term “state”, as used in the Rome Statute, may be different from its meaning within international law).

be interpreted not in accordance with its standard definition under international law but instead with reference to the object and purpose of the treaty.²⁹ Using this approach, the ICC would make an independent determination as to whether it should consider Palestine a state for purposes of the Rome Statute. The crux of this argument is that the definition of “state” for purposes of Article 12(3) of the Rome Statute does not require statehood at all, but only the necessary “capacity” to transfer its jurisdiction to the ICC.³⁰

This Part argues that the Palestinian Authority’s declaration under 12(3) does not provide the ICC with jurisdiction over alleged Israeli war crimes committed in Palestinian territories. Section I.A argues that Palestine is not a state under the traditional international law definition. Section I.B argues that, for the purposes of determining ICC jurisdiction, the traditional international law definition of a state is the correct one. Finally, Section I.C rebuts the argument that the ICC can exercise jurisdiction over Palestine on the basis of Palestine’s capacity to enter treaties and bring criminal charges.

A. Palestinian State Status Prior to General Assembly Recognition

Statehood is determined using the traditional requirements of the Montevideo Convention,³¹ and to a degree, the international

²⁹ See Malcolm N. Shaw, *The Article 12(3) Declaration of the Palestinian Authority, the International Criminal Court and International Law* 6 (Mar. 10, 2011) (working paper), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1782668 (noting that there is an issue as to whether “state” should be defined according to international law or according to the interpretation of the statute as a whole); see also Chantal Meloni, *Palestine and the ICC: Some Notes on Why It is Not a Closed Chapter*, OPINIO JURIS, Sept. 25, 2012, <http://opiniojuris.org/2012/09/25/palestine-and-the-icc-some-notes-on-why-it-is-not-a-closed-chapter/> (discussing that the term “state” in Article 12(3) should be defined with regard to Article 12(1) of the ICC statute).

³⁰ See Kearney & Denayer, *supra* note 26 (demonstrating that the definition of “state” can simply mean having the “capacity” to “transfer jurisdiction to the court”).

³¹ See Thomas D. Grant, *Defining Statehood: The Montevideo Convention and its Discontents*, 37 COLUM. J. TRANSNAT’L L. 403, 413–14 (1999) (citations omitted).

recognition of a State's existence.³² Employing the traditional definition, Palestine was not a state prior to the United Nations General Assembly's declaration. Moreover, the two main arguments made before the ICC in favor of Palestinian statehood fail because they abandon the consensus definition of statehood and because they are unpersuasive under their own alternative criteria.³³

1. Statehood Prior to General Assembly Declaration

The Montevideo Convention on Rights and Duties of States contains the most commonly accepted formulation for statehood.³⁴ Under the Montevideo Convention a state must possess "(a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states."³⁵ The Montevideo Convention enshrines the declaratory theory of statehood. The declaratory theory argues that recognition of a state

³² The criteria of the Montevideo Convention are flexible depending on the strength of recognition and other factors such as exercising the right to self-determination. *See id.* at 446–47 (noting that there are other criteria for statehood in addition to those elicited in the Montevideo Convention, including, though debatable, recognition).

³³ This paper does not address a third major argument, namely that the declaration of 1988 was not a declaration of a new state, but the declaration of a state that existed since the mandatory period. This third argument "is based on a series of legally disconnected steps and distortions of the historical record." *See* Malcolm N. Shaw, *In the Matter of the Jurisdiction of the International Criminal Court with Regard to the Declaration of the Palestinian Authority*, SUMMARY OF SUBMISSIONS ON WHETHER THE DECLARATION LODGED BY THE PALESTINIAN NATIONAL AUTHORITY MEETS STATUTORY REQUIREMENTS, ¶ 12 (Oct. 18, 2010), <http://www.icc-cpi.int/NR/rdonlyres/D3C77FA6-9DEE-45B1-ACC0-B41706BB41E5/283639/SupplementaryOpinionMalcolmShaw2010.pdf> (explaining the "distortion of the historical record"). *See generally* HOWARD M. SACHAR, *A HISTORY OF ISRAEL: FROM THE RISE OF ZIONISM TO OUR TIME* (3d ed. 2007) (detailing the history of the mandatory period).

³⁴ *See* MALCOLM N. SHAW, *INTERNATIONAL LAW* 198 (6th ed. 2008) (citations omitted) (outlining the Montevideo Convention qualifications); *see also* J. D. van der Vyver, *Statehood in International Law*, 5 *EMORY INT'L L. REV.* 9, 12 (1991) (citations omitted) (explaining that the declaratory theory, consisting of the Montevideo Convention requirements, is widely accepted).

³⁵ *See* Montevideo Convention on the Rights and Duties of States art. 1, Dec. 26, 1933, 49 Stat. 3097, *available at* avalon.law.yale.edu/20th_century/intam03.asp (noting the four qualifications under the Montevideo Convention); *see also* Grant, *supra* note 29, at 414 (1999) (citations omitted) (discussing the four criteria for statehood under the Montevideo Convention).

is not the operative factor in the creation of a state.³⁶ Rather, a state exists whether it is recognized or not depending on whether it meets certain requirements.³⁷

Experience with decolonization and the rise of independence movements has complicated the use of Montevideo Convention in determining statehood, and its four criteria are no longer considered the exclusive and determinative hallmarks of statehood.³⁸ Rather than focus on a mechanical application of the four Montevidean criteria, the determination of statehood must also consider the degree of internal control over a territory free from outside influence³⁹ and to some degree, recognition.⁴⁰

This Essay does not re-evaluate whether Palestine is a state under the traditional consensus definition of statehood. Rather it relies on the consensus analysis of international law scholars who

³⁶ See William Thomas Worster, *Law, Politics, and the Conception of the State in State Recognition Theory*, 27 B.U. INT'L L.J. 115, 118 (2009) (citations omitted) (recognizing that the declaratory theory does not equate recognition with status).

³⁷ See Dimitrios Lalos, Note, *Between Statehood and Somalia: Reflections of Somaliland Statehood*, 10 WASH. U. GLOB. STUD. L. REV. 789, 797–98 (2011) (citations omitted) (describing the requirements for statehood under the declaratory theory); see also M. Kelly Malone, Comment, *The Rights of Newly Emerging Democratic States Prior to International Recognition and the Serbo-Croatian Conflict*, 6 TEMP. INT'L & COMP. L.J. 81, 91 (1992) (citations omitted) (declaring that under the declarative theory, recognition is separate and independent from a state's "international legal personality").

³⁸ See James Crawford, *The Creation of the State of Palestine: Too Much Too Soon*, 1 EUR. J. INT'L L. 307, 309 (1990) (posing that one should look at state independence rather than at the four criteria of the Montevideo Convention to determine whether statehood exists); see also Grant, *supra* note 29, at 434 (stating that scholars are now questioning the validity of the Montevideo criteria in establishing statehood because the criteria are over-inclusive).

³⁹ See Crawford, *supra* note 36, at 309 (noting that territories of an organized, self-governing community may fall short of meeting the first requisite of the Montevideo Convention); see also Alison K. Eggers, *When is a State? The Case for Recognition of Somaliland*, 30 B.C. INT'L & COMP. L. REV. 211, 215 (2007) (proposing that international law emphasizes the importance of state integrity and that sovereign states should decide the disposition of national territory).

⁴⁰ See SHAW, *supra* note 32 (conveying the idea that the four requirements of statehood in the Montevideo Convention are not exhaustive, with self-determination and recognition as other important factors); see also Milena Sterio, *A Grotian Moment: Changes in the Legal Theory of Statehood*, 39 DEN. J. INT'L L. & POL'Y 209, 210 (2011) (adding that subparts to the four pillars of the Montevideo Convention exist, including recognition by regional partners and powerful states).

apply the traditional definition of statehood. Applying the traditional criteria, the consensus among international scholars is that Palestine is not a state. Simply put, "Palestinian statehood has clearly not been accepted by the international community" because Palestine does not meet the requirements for statehood.⁴¹ In addition, scholars focusing on the ICC also do not recognize Palestine as a state. William Schabas, in his *Introduction to the International Criminal Court*, made clear that Palestine is not a state.⁴² In discussing the possibility of ICC jurisdiction over crimes committed in the Palestinian territories he noted that, "Palestine is not generally recognized as an independent state."⁴³ He concluded that "before Palestinian independence" the ICC could only exercise jurisdiction if it determined that the West Bank was still Jordanian territory and thus could exercise jurisdiction through Jordanian acceptance ICC jurisdiction.⁴⁴

⁴¹ See Crawford, *supra* note 29, at 309 (commenting that though the PLO exercises considerable influence over its occupied territory, this control falls short of constituting an organized, self-governed community); see also SHAW, *supra* note 32, at 247 (claiming that the Palestinian Authority now possesses limited international personality though the international community does not accept it as a state).

⁴² See WILLIAM SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 87 (4th ed. 2011) (mentioning that Palestine is not a member state of the UN and that its article 12(3) claim under the Statute of the International Criminal Court is debatable); see also William Schabas, *Assembly of State Parties Should Consider Palestine State Issue*, HUM. RTS. DOCTORATE BLOG (Jan. 25, 2003, 2:53 PM), <http://humanrightsdoctorate.blogspot.com/2012/09/assembly-of-states-parties-should.html> (adding that the International Criminal Court should decide whether Palestine should be recognized as a state).

⁴³ See SCHABAS, *supra* note 40, at 87–88 (opining that even if Palestine became a state in the future, the jurisdiction of the International Criminal Court would still be in dispute); see also William Schabas, *Palestine Should Accede to the Rome Statute*, HUM. RTS. DOCTORATE BLOG (Jan. 25, 2003, 2:36 PM), <http://humanrightsdoctorate.blogspot.com/2011/11/palestine-should-accede-to-rome-statute.html> (noting that though Palestine was admitted as a member of UNESCO, it can still take a number of steps to further its chances of gaining recognition as a state).

⁴⁴ See WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 81 (3rd ed. 2007) (noting that, prior to the independence of Palestine, the International Criminal Court may only exercise jurisdiction over Palestinian territory by its connection to the neighboring state of Jordan); see also Daniel A. Blumenthal, *Recent Development: The Politics of Justice: Why Israel Signed the International Court Statute and What the Signature Means*, 30 GA. J. INT'L & COMP. L. 593, 612 (2002) (determining that ICC jurisdiction may

Additionally, internal Palestinian documents as well as interactions with other states indicate “systematic Palestinian resolve not to declare and establish a Palestinian state” until peace talks with Israel were successfully concluded.⁴⁵ The Palestinian Authority has repeatedly declared its intention to assert Palestinian independence.⁴⁶ Yet, throughout the Oslo Peace Process and subsequent negotiations Palestinian leadership acknowledged the absence of Palestinian independence.⁴⁷ Indeed, during Oslo, Palestinian leadership promised to take no steps to change the non-state status of the West Bank and Gaza Strip until negotiations were completed.⁴⁸ The “Roadmap to Peace” further speaks of a future Palestinian state.⁴⁹

extend to certain territories because of their relation to signatories of the ICC statute).

⁴⁵ See Daniel Beoliel & Ronen Perry, *Israel, Palestine, and the ICC*, 32 MICH. J. INT’L L. 73, 97 (2010) (demonstrating the existence of Palestinian documents, which indicate that the Palestinian leadership would not seek independent statehood without formal recognition by Israel); see also Steven Erlanger, *Abbas Declares War with Israel Effectively Over*, N.Y. TIMES, Feb. 14, 2005, at A1 (publishing statements of the Palestinian leader Mahmoud Abbas declaring that he would prefer prolonged negotiations on permanent statehood for Palestine rather than obtaining immediate preliminary statehood status without Israel guarantees).

⁴⁶ See Beoliel & Perry, *supra* note 43, at 98–100 (establishing numerous examples of Palestinian attempts to achieve independence in recent decades); see also John Quigley, *The Israel-PLO Interim Agreements: Are They Treaties?*, 30 CORNELL INT’L L.J. 717, 726 (1997) (providing an example of the Palestinian leadership pursuing independence for Palestine from Israel).

⁴⁷ See George E. Bisharat, *The Legal Foundations of Peace and Prosperity in the Middle East: Peace and the Political Imperative of Legal Reform in Palestine*, 31 CASE W. RES. J. INT’L L. 253, 260–61 (1999) (asserting the lack of recognition of Palestinian independence following the Oslo Accords); see also Michael M. Karayanni, *The Quest for Creative Jurisdiction: The Evolution of Personal Jurisdiction Doctrine of Israeli Courts Toward the Palestinian Territories*, 29 MICH. J. INT’L L. 665, 668 (2008) (holding that it is generally accepted by the parties to the Oslo Peace Process that Palestine lacks independence).

⁴⁸ See Charles F. Martel, *Give Peace a Chance: How Considering Peace Process Obligations Would Have Improved the Rulings of the International Court of Justice and the Israeli Supreme Court on the Israeli Security Barrier*, 17 DUKE J. COMP. & INT’L L. 305, 321–22 (2007) (outlining that the general agreement made between Israel and Palestine in the Oslo Accords does not to alter the territorial status of the West Bank and the Gaza Strip); see also Malcolm N. Shaw, *The Article 12(3) Declaration of the Palestinian Authority, The International Criminal Court and International Law*, 9 J. INT’L CRIM. JUST.

These statements make clear that Palestinian leadership did not consider Palestine to be an independent entity. Instead, it saw itself negotiating towards independence. It is axiomatic that absent independence, a state cannot exist.⁵⁰ Since Palestine did not consider itself to be an independent state, other state actions with regard to the Palestinian Authority are of no significance.⁵¹

The position that the Palestinian National Authority does not consider Palestine an independent state is of crucial importance to the argument that Palestine is not a state. The lack of self-recognition cuts off a discussion of the Montevideo criterion at the outset. If the 1988 declaration was ineffective and if the PNA does not now consider itself a state, then the question of statehood is answered at the outset. Thus opponents of ICC jurisdiction over crimes committed in the Palestinian territories have acknowledged that, “[t]here is no doubt that the PNA is very close to becoming a state However, at the time of the declaration in question the Palestinian leadership does not assert statehood.”⁵² These scholars

301, 307–08 (2011) (describing the pledge made by Palestinian leadership to Israel to not alter the territorial status of the West Bank or the Gaza Strip).

⁴⁹ See Shaw, *supra* note 46, at 309–10 (detailing the future of a hypothetical Palestinian state as held in the “Roadmap to Peace”); see also Justus Reid Weiner & Diane Morrison, *Legal Implications of “Safe Passage” Reconciling a Viable Palestinian State With Israel’s Security Requirements*, 22 CONN. J. INT’L L. 233, 268–69 (2007) (explaining the Roadmap’s step-by-step process for an independent Palestine).

⁵⁰ See Crawford, *supra* note 36, at 309 (arguing that it is preferable to look to a state’s independence as a prerequisite for statehood); see also Robert A. Caplen, *Rules of “Disengagement:” Relating the Establishment of Palestinian Gaza to Israel’s Right to Exercise Self-Defense as Interpreted by the International Court of Justice at the Hague*, 18 FLA. J. INT’L L. 679, 704 (2006) (emphasizing that Palestine’s inability to independently offer decisions and resolutions for a vote supports the conclusion that it is not a state).

⁵¹ See Robert Weston Ash, *Is Palestine a “State?” A Response to Professor John Quigley’s Article, “The Palestine Declaration to the International Criminal Court: The Statehood Issue,”* 36 RUTGERS L. REC. 186, 193 (2009) (stating that because a sovereign Palestine “State” does not currently exist, Palestine does not exercise sovereign authority over territories in the Gaza Strip or the West Bank); see also Major Joshua L. Kessler, *The Goldstone Report: Politicization of the Law of Armed Conflict and Those Left Behind*, 209 MIL. L. REV. 69, 95–96 (2011) (explaining that because Palestine authority has shown an unwillingness to pursue a unilateral route to statehood and no lasting political compromise exists, it is not clear if it retains sovereignty of the territories).

⁵² See Yael Ronen, *ICC Jurisdiction over Acts Committed in the Gaza Strip: Art. 12(3) of the ICC Statute and Non-State Entities*, 8(1): 3 J. INT’L CRIM. JUST. 234, 239 (2010) (acknowledging that the PNA is very close to becoming a state but at

do not admit that statehood necessarily follows from Palestinian assertion of statehood. They do, however, place great importance on the absence of such a declaration in arguing that the ICC cannot accept jurisdiction pursuant to the Palestinian request.⁵³

2. Statehood Through Declaration and International Recognition

Despite the general consensus that Palestine is not a state, several scholars have argued that Palestine is a state by relying on alternative definitions of statehood or misapplying the traditional criteria. Professor Quigley, for example, argues that Palestine became a state in 1988. In that year, the Palestine National Council declared “the establishment of the State of Palestine in the land of Palestine with its capital in Jerusalem.”⁵⁴ Following this declaration, the United Nations General Assembly adopted a resolution recognizing the proclamation of an independent Palestinian state by a vote of one-hundred four yeses, forty-four abstentions and 2 nos.⁵⁵ Further, Professor Quigley argues, the United Nations implicitly signaled its recognition of a Palestinian

this point Palestinian leadership does not assert statehood); *see also* SHAW, *supra* note 32 (noting that despite the State of Palestine’s declaration in November 1988, it is not regarded as a valid state since Palestinian organizations were not in control of any part of the territory they claimed).

⁵³ *See* Worster, *supra* note 20, at 1207 (discussing that membership and acceptances of jurisdictions of the Rome Statute of the ICC are limited to “states,” and the criteria of Palestine satisfying the conditions for statehood are clearly not met); *see also* Larry D. Johnson, *Palestine’s Admission to UNESCO: Consequences Within the United Nations?*, 40 *DENV. J. INT’L L. & POL’Y* 118, 126 (2011–2012) (indicating that the Rome Statute of the ICC allows States, not Parties, to the Rome Statute to accommodate acceptances of jurisprudence).

⁵⁴ *See* Quigley, *supra* note 1, at 4 (stating that it was in the 1988 declaration that Palestine proclaimed its establishment as a state); *see also* John Quigley, *Sovereignty in Jerusalem*, 45 *CATH. U. L. REV.* 765, 776 (1996) (commenting that in 1988, the Palestine National Council declared a Palestinian state with its capital at Jerusalem).

⁵⁵ *See* Quigley, *supra* note 1 (indicating that there were one hundred and four votes for the resolution of the United Nations General Assembly, two votes against it and forty-four abstentions); *see also* Dore Gold, *Israel, the Palestinians, and the UN General Assembly*, ISREALSEEN.COM (May 4, 2011), <http://israelseen.com/2011/05/04/israel-the-palestinians-and-the-un-general-assembly-dore-gold/> (recognizing that the 1988 UN General Assembly resolution was backed by one hundred and four countries, with only the United States and Israel in opposition).

state by failing to condemn or declare as invalid the Palestinian declaration.⁵⁶

In addition to recognizing the Palestinian declaration, Professor Quigley argues that subsequent treatment of Palestinian representatives to the UN demonstrates that the UN recognizes a Palestinian state.⁵⁷ For example, the UN Security Council routinely allowed Palestine to participate in relevant sessions despite the fact that Council rules only allow a “state” to participate.⁵⁸

Lastly, Professor Quigley notes that following the 1988 declaration, eighty-nine states recognized Palestine as a state, the vast majority of which were from the Third World.⁵⁹ While the United States clearly refused to recognize a Palestinian state, European countries showed ambivalence. Although the vast majority of European states did not recognize a Palestinian state, some signaled that they viewed the question as far more nuanced than the United States viewed it.⁶⁰

Despite these arguments, the 1988 declaration and subsequent actions do not establish the existence of a Palestinian

⁵⁶ See Quigley, *supra* note 1 (arguing that the fact that 104 states voted for Palestinian statehood indicated that Palestine was regarded as a state); see also JOHN QUIGLEY, *THE STATEHOOD OF PALESTINE: INTERNATIONAL LAW IN THE MIDDLE EAST CONFLICT* 161 (2010) (asserting that although Resolution 43/177 did not admit Palestine as a member state, it affirmed Palestine’s statehood).

⁵⁷ See WORLD JEWISH CONGRESS, *ISRAEL’S RIGHTS AS A NATION-STATE IN INTERNATIONAL DIPLOMACY* 118 (Alan Baker ed., 2011) (stating that the international perception of Palestine as a state is strong); see also ALAN DOWTY, *ISRAEL/PALESTINE* 215 (2012) (documenting that since 1988, over 130 nations have recognized Palestinian nationhood in one way or another).

⁵⁸ See Quigley, *supra* note 1, at 5 (showing that the U.N. Security Council let Palestine participate in sessions when relevant even though only states are eligible to participate); see also *IS THERE A COURT FOR GAZA?: A TEST BENCH FOR INTERNATIONAL JUSTICE* 451 (Chantal Meloni & Gianni Tognoni eds., 2012) (admitting that Palestinian officials actively participate in the U.N.).

⁵⁹ See *IS THERE A COURT FOR GAZA?: A TEST BENCH FOR INTERNATIONAL JUSTICE*, *supra* note 56, at 434 (showing that 89 states recognized Palestine shortly after the 1988 declaration); see also AMOS SHAPIRA & MALA TABORY, *NEW POLITICAL ENTITIES IN PUBLIC AND PRIVATE INTERNATIONAL LAW: WITH SPECIAL REFERENCE TO THE PALESTINIAN ENTITY* 195 n. 48 (1990) (stating that many Third World and Eastern Bloc countries recognized Palestine).

⁶⁰ See G.A. RES. 43/177, U.N. GAOR, 43rd Sess. (showing a large list of countries who abstained on the question of Palestine’s nationhood in the General Assembly); see also Quigley, *supra* note 1, at 5 (quoting the French President as not ready to recognize a Palestinian state).

state. Applying a declaratory theory of state recognition, the 1988 declaration failed because at the time of the declaration Palestine did not meet even a looser interpretation of Montevideo criterion.⁶¹ At the time of the recognition, the PLO did not control any band of territory in the areas now known as the West Bank and Gaza.⁶² Additionally the declaration failed under a purely constitutive understanding of statehood—a theory that proposes that recognition is sufficient to create a state—since the lack of European and American recognition prevents the 1988 declaration from creating a Palestinian state.⁶³

The 1988 declaration's failure to create a Palestinian state is obvious given that Montevideo criteria were not met at the time of the declaration.⁶⁴ That Palestine was not a state at the time of the 1988 declaration is obvious since “[a]pplying the Montevideo Convention in accordance with its terms, Palestine before 1993, could not possibly have constituted a State.”⁶⁵ This is because “its whole territory was occupied by Israel, which functioned as a government there and claimed the right to do so

⁶¹ See JUSTUS REID WEINER & DIANE MORRISON, LINKING THE GAZA STRIP WITH THE WEST BANK: IMPLICATIONS OF A PALESTINIAN CORRIDOR ACROSS ISRAEL 14 (2007) (explaining that Palestine did not meet the Montevideo Convention criteria to be deemed a state); see also Joel Singer, *Aspects of Foreign Relations Under the Israeli-Palestinian Agreements on Interim Self-Government Arrangements for the West Bank and Gaza*, in PALESTINE AND INTERNATIONAL LAW: ESSAYS ON POLITICS AND ECONOMICS 174, 176 (Sanford R. Silverburg ed., 2009) (showing that Palestine met none of the criteria for the Montevideo Convention).

⁶² See SHAW, *supra* note 32 (stating that Palestine's declaration at the conference in Algiers did not validate its statehood); see also Crawford, *supra* note 36, at 309 (establishing that the PLO lacked substantial control over necessary territories).

⁶³ See SHAW, *supra* note 32 (emphasizing the constitutive theory of recognition); see also Crawford, *supra* note 36, at 309 (arguing that the United States and Israel's absence of Palestinian recognition nullifies the constitutive argument).

⁶⁴ See Robert Weston Ash, *Is Palestine A "State"? A Response To Professor John Quigley's Article, "The Palestine Declaration to the International Criminal Court: The Statehood Issue,"* 36 RUTGERS L. REC. 186, 193 (2009) (concluding that there is no State of Palestine); see also William Thomas, *The Exercise of Jurisdiction by the International Criminal Court Over Palestine*, 26 AM. U. INT'L L. REV. 1153, 1174 (2011) (stating that Palestine does not meet the criteria of the Montevideo Convention).

⁶⁵ See JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 437 (2d ed. 2006).

until further agreement. The PLO had never functioned as a government there and lacked the means to do so.”⁶⁶

Attempts to compare Palestine to the statehood of the former Belgian Congo and Guinea-Bissau, which were recognized as states under a declaratory theory despite limited governmental control, are unconvincing.⁶⁷ Unlike the situation in the former Belgian Congo, there was no breakdown in Israeli control in 1988, and unlike Guinea-Bissau, the PLO exercised no control over any territory.⁶⁸ Also unconvincing is the argument that Palestine is similar to an occupied, existing state and that therefore, traditional criteria need not apply.⁶⁹ A Palestinian state did not exist prior to Israeli occupation. Absent a pre-existing state, occupation cannot vitiate the pre-existing requirement.⁷⁰ Because it lacked one of the two elements of statehood, the PLO could not have established a state under international law.⁷¹

⁶⁶ *Id.*

⁶⁷ See Quigley, *supra* note 1, at 6 (arguing that the absence of effective government does not harm Palestinian claim to statehood).

⁶⁸ See Crawford, *supra* note 36, at 310 (1990) (finding that the National Liberation Organization's extensive control over territories in Guinea-Bissau was a substantial factor in establishing Guinea-Bissau as its own state); see also Howard French, *Mobutu Gives Up, Leaving Kinshasa and Ceding Power*, N.Y. TIMES (May 17, 1997), <http://www.nytimes.com/1997/05/17/world/mobutu-gives-up-leaving-kinshasa-and-cedingpower.html?pagewanted=all&src=pm> (stating that President Mobutu relinquished control of the Belgian Congo after 32 years in power).

⁶⁹ See Quigley, *supra* note 1 at 6 (2009) (arguing that applying the traditional criteria to Palestine would be like arguing that Kuwait ceased to exist as a state when it was invaded); see also John Quigley, *Palestine Statehood and International Law*, GLOBAL POL'Y, Jan. 2013, at 4 (explaining that Palestine is denied statehood because it lacks factual control over its affairs and not due to Israeli occupation).

⁷⁰ See Shaw, *supra* note 31, at ¶22 (providing that the requirement of effective control was not negated where one State occupies part of the territory of another state).

⁷¹ See D. RAIČ, STATEHOOD AND THE LAW OF SELF-DETERMINATION 49 (2002) (enumerating the four traditional criteria required for statehood); see also David Davenport, *Palestinian Statehood: Politics Trumps International Law – Again*, FORBES MAGAZINE (Dec. 14, 2012), <http://www.forbes.com/sites/david-davenport/2012/12/04/palestinian-statehood-politics-trumps-international-law-again/> (arguing that if Palestine does not meet the required criteria it is not a state despite being voted a nonmember observer state by the United Nations General Assembly).

Even if Quigley adopts a purely constitutive theory,⁷² the PLO declaration and subsequent recognition failed to create a Palestinian state because recognition was insufficient under the constitutive theory.⁷³ Despite the fact that many developing countries recognized the Palestinian declaration, most European countries and the United States did not.⁷⁴ In 1999, the European Union's Minister of Foreign Affairs reiterated the European position on the 1988 declaration in a letter to Yasser Arafat.⁷⁵ In that letter, the Minister of Foreign Affairs referred to "the continuing and unqualified Palestinian right to self-determination including the option of a state" while expressing hope that peace would derive from a "negotiated solution."⁷⁶

⁷² See Crawford, *supra* note 63, at 438; see also Raphael Ahren, *Is Palestine a State?: That May Depend on the Palestinians*, THE TIMES OF ISRAEL (Dec. 12, 2012), available at <http://www.timesofisrael.com/is-palestine-a-state-that-may-depend-on-the-palestinians/> (explaining that the constitutive theory suggests that international law recognizes an entity as a state if it is recognized by other states).

⁷³ See Crawford, *supra* note 63, at 438 (discussing that before 1993, Palestine was recognized as a State by approximately one hundred States, but has never garnered the support required to establish a rule of international law to create Palestinian statehood); see also Kathryn M. McKinney, *The Legal Effects of the Israeli-PLO Declaration of Principles: Steps Toward Statehood for Palestine*, 18 Seattle U. L. Rev. 93, 97 (1994) (noting that a declaratory or constructive theory is insufficient to establish statehood for Palestine).

⁷⁴ See I Beoliel & Perry, *supra* note 43, at 82–83 (noting that while most countries within the Arab League and Soviet bloc, as well as several non-identifying states recognized Palestine's declaration of statehood, the United States and European Union refused to recognize Palestine as a state); see also *U.S. Informs U.N. It Will Close PLO Mission*, L.A. TIMES, Mar. 11, 1988, http://articles.latimes.com/1988-03-11/news/mn-1412_1_united-states (discussing that the United States, still not recognizing Palestine as a state, sought to shut down the PLO mission at the U.N. after it unilaterally declared statehood in 1988).

⁷⁵ See Berlin European Council, Presidency Conclusions, at E.U. Doc. D/99/1 at 24 (Mar. 25, 1999) (discussing the European Union's position regarding the future of Palestine's statehood); see also John Quigley, *Palestine: The Issue of Statehood*, in PALESTINE AND INTERNATIONAL LAW: ESSAYS ON POLITICS AND ECONOMICS 37, 42 (Sanford R. Silverburg ed., 2002) (noting that even though some states recognized Palestine's declaration of statehood, most European states declined to do so at that time).

⁷⁶ See Beoliel & Perry, *supra* note 43, at 82–83 (discussing that in 1999, just before Israeli-Palestinian negotiations began, the European Union's Minister of Foreign affairs sent a letter to Chairman Arafat discussing Palestine's unqualified right to self-determination); see also Berlin European Council,

The United Nation's treatment of Palestine is likewise conflicting. Palestine is not recognized as a member state or as a non-member state; rather, it has permanent observer status.⁷⁷ Many regional and international organizations enjoy observer status at the United Nations, so this status does not indicate UN recognition of statehood.⁷⁸ Further, the UN General Assembly's declaration changing the PLO's designation from "Palestinian Liberation Organization" to Palestine was made "without prejudice to the observer status and function of the Palestinian Liberation Organization within the United Nations system."⁷⁹

Still, from 1989-1992 the Security Council allowed only two non-state parties to address the Security Council without reference to Rules 39 or 37.⁸⁰ While Professor Quigley overstates

Presidency Conclusions, at 24, E.U. Doc. D/99/1 (Mar. 25, 1999) (reaffirming the call of the Minister's letter in support of negotiation).

⁷⁷ See G.A. Res. 3237, U.N. Doc. A/RES/3237 (1974) (inviting the PLO to participate in General Assembly sessions as an observer); see also DeBernardi, *supra* note 9, at 88-89 (explaining that Palestine has retained observer status within the United Nations since 1974).

⁷⁸ See M. A. Thomas, *When the Guests Move in: Permanent Observers to the United Nations Gain the Right to Establish Permanent Missions in the United States*, 78 CALIF. L. REV. 197, 224 (1990) (discussing that those members with "observer" status in the United Nations are not officially recognized states, and as such are not entitled to diplomatic privileges or immunities); see also *Permanent Observers*, UNITED NATIONS, <http://www.un.org/en/members/aboutpermobservers.shtml> (last visited Feb. 2, 2013) (explaining the role of a permanent observer within the United Nations, expanding upon the role of non-member states and organizations that are not recognized states).

⁷⁹ See Shaw, *supra* note 31, at 8-9 (emphasizing that the United Nations has merely changed Palestine's observer title without any effect on their statehood claim); see also Press Release, General Assembly, General Assembly Votes Overwhelmingly to Accord Palestine 'Non-Member Observer State' Status in United Nations, U.N. Press Release GA/11317 (Nov. 29, 2012) (noting the United Nation's continued recognition of Palestine as a non-member observer rather than a member).

⁸⁰ See U.N. DEP'T OF POLITICAL AFFAIRS, REPERTOIRE OF THE PRACTICE OF THE SECURITY COUNCIL: PARTICIPATION IN THE PROCEEDINGS OF SECURITY COUNCIL 1989-1992, 58 (2007), available at http://www.un.org/en/sc/repertoire/89-92/89-92_c.pdf (noting that an invitation was extended to Palestine and the Federal Republic of Yugoslavia who are neither UN members nor Secretariat members); see also Friedrich Soltau, *The Right to Participate in the Debates of the Security Council*, ASIL, Oct. 2000, <http://www.asil.org/insigh52.cfm> (discussing the Security Council's ability to invite non-member participants to their sessions without express authorization under rule 37 and 39).

the degree to which the UN treats Palestine as a state,⁸¹ it is fair to characterize UN treatment of Palestinian statehood as more complicated than simple non-recognition as argued by Professor Shaw.⁸² Still, ambivalent treatment by the United Nations does not create a state.⁸³

Even though the 1988 declaration is an assertion of statehood on the part of the Palestinians, it fails to demonstrate Palestinian statehood for three reasons. First, Palestine did not meet the traditional statehood requirements. Second, while there was wide international support, many of the key parties including the United States, Israel, and most European countries did not recognize Palestine's declaration. Lastly, while the UN General Assembly has accorded Palestine unique treatment, it has not explicitly recognized Palestinian to be a state.

3. The Limits of a "Course of Dealing" Argument for Statehood

Some scholars have argued that European and Israeli interactions with Palestinian leadership indicate recognition of a Palestinian state.⁸⁴ Recognition, they argue, need not be formal.⁸⁵

⁸¹ See Press Release, General Assembly, General Assembly Votes Overwhelmingly to Accord Palestine 'Non-Member Observer State' Status in United Nations, U.N. Press Release GA/11317 (Nov. 29, 2012) (quoting Turkey's Foreign Affairs Minister as he acknowledges that Palestine unfortunately still holds an observer status); see also Beoliel & Perry, *supra* note 43, at 84–85 (2010) (describing the UN General Assembly's satisfaction with the progress of negotiations and adherence to the Oslo framework towards the working creation of the Palestinian state).

⁸² See UNITED NATIONS, THE QUESTION OF THE PALESTINE AND THE UNITED NATIONS 24 (2008) (noting the United Nations continuous efforts in expanding Palestine's role within the General Assembly sessions); see also Shaw, *supra* note 31 at 8–9 (noting that the United Nations' has not recognized Palestinian statehood although it has granted them a special observer status).

⁸³ See Ash, *supra* note 49, at 194–95 (claiming Palestinian statehood is a fiction evidenced by their classification as an "entity" permitted to participate in sessions); see also Worster, *supra* note 20, at 1173 (noting the UN General Assembly's refusal to explicitly acknowledge Palestine as a state despite granting them observer status).

⁸⁴ See John Quigley, *Palestine is a State: A Horse with Black and White Stripes is a Zebra*, 32 MICH. J. INT'L L. 749, 758–59 (2011) (arguing Israeli recognition of Palestinian statehood when Israel agreed to negotiate borders with Palestinian leaders); see also Worster, *supra* note 20, at 1169–1171 (noting European

Instead, recognition can be demonstrated through the “attitude” of other states.⁸⁶ “If states treat an entity as a state, then they are considered to recognize it” even if “those states did not recognize Palestine in a formal way.”⁸⁷ The international community, the argument goes, clearly recognizes a Palestinian state because it encourages Israel to negotiate over territory and recognize a Palestinian right to statehood.

This argument is wrong for two reasons. First, even if states can be considered to have recognized one another despite formally withholding recognition, American and Israeli recognition of Palestine does not follow. These states have not merely refrained from formally recognizing Palestine, but have also specifically announced that they do not consider Palestine to be an independent state.⁸⁸ As noted, the United States and Israel voted against the UN General Assembly’s change in reference to the PLO and the United States has repeatedly disapproved of all of

recognition of Palestinian statehood followed by the European Union’s participation in international treaties with Palestine).

⁸⁵ See Convention on Rights and Duties of States, art. 7, Dec. 26, 1933, 165 L.N.T.S. 19 (proclaiming that “[t]he recognition of a state may be express or tacit”); see also Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 167 (July 9) (detailing agreements that have taken place between Israel and Palestine even though Palestine’s statehood was not formally recognized).

⁸⁶ See Quigley, *supra* note 1, at 7 (highlighting how the efforts of the United States and USSR to initiate dialogue between Palestine and Israel reflect a recognition of Palestine as a state); see also Paul Lewis, *Arabs at U.N. Relax Stand on P.L.O.*, N.Y. TIMES, Dec. 6, 1989, at A3 (articulating that although there was opposition, 89 of the UN’s 159 members recognized the Palestine Liberation Organization as a representation of the Palestine State).

⁸⁷ See Quigley, *supra* note 1, at 5 (noting that the UN’s 1989 drafted resolution was supported by a previous resolve in which the Palestine Liberation Organization was accepted as an observer of the United Nations and dealt with as a state); see also Quigley, *supra* note 1, at 260 (emphasizing Palestine’s invitation to a 1998 meeting for the Rome Statute of the International Criminal Court when only states and state organizations were invited).

⁸⁸ See Press Release, General Assembly, General Assembly Votes Overwhelmingly to Accord Palestine ‘Non-Member Observer State’ Status in United Nations, U.N. Press Release GA/11317 (Nov. 29, 2012) (listing Israel and the United States as among the nine members voting against “non-member observer state” status for Palestine); see also MacAskill & McGreal, *supra* note 23, at 32 (expressing Israel’s belief that the Palestinian statehood can only be achieved through direct negotiations, and not the proposed resolution).

Palestine's unilateral declarations of statehood.⁸⁹ Likewise, the European Union announced its "readiness, *when appropriate*, to recognize a Palestinian state,"⁹⁰ suggesting that it has not gone so far as to formally recognize a Palestinian state thus far. Palestine should be considered a National Liberation Movement, which has international personality but not statehood.⁹¹

Second, as discussed above in Part I.A.1, prior to the United Nations General Assembly vote, it was not clear whether Palestine considered itself a state. If Palestine did not consider itself a state, then no interactions could make it a state.⁹²

The arguments for Palestinian statehood are ultimately unconvincing. Palestine did not meet the traditional criteria for statehood at the time of its 1988 declaration.⁹³ The United States, Israel, and most European countries explicitly announced that they do not recognize a Palestinian state despite their negotiations with the Palestinian Authority.⁹⁴ Finally, even the Palestinians do not

⁸⁹ See *Obama Says Palestinians Are Using Wrong Forum*, N.Y. TIMES (Sept. 21, 2011), available at http://www.nytimes.com/2011/09/22/world/obama-united-nations-speech.html?_r=0.

⁹⁰ See Council of the European Union, *Council Conclusion on the Middle East Peace Process*, 3058th Foreign Affairs Council Meeting, Brussels (Dec. 13, 2010) (stating that the European Union lauds Palestine's efforts in creating the framework for its future recognition as a State); see also Shaw, *supra* note 46 at 309–10 (asserting that the European Union will likely support Palestine in its quest for statehood once it demonstrates clear and formal action).

⁹¹ See SHAW, *supra* note 32, at 245 (examining whether National Liberation Movements are recognized within the context of international law); see also Arab Parliaments, *National Liberation Movement "Fateh"*, U.N. DEV. PROGRAM (Nov. 9, 2009), <http://www.arabparliaments.org/whatwedo/parties.aspx?cid=14&pid=186> (discussing the political agenda of National Liberation Movement also known as Fateh).

⁹² See Worster, *supra* note 20, at 1160–65 (noting that the Palestinian National Authority consciously chose not take a definitive position on the status of Palestinian statehood); see also Alain Pellet, *The Palestinian Declaration and the Jurisdiction of the International Criminal Court*, J. INT'L CRIM. JUST. 8 (4), 981 (2010) (declaring that the Court cannot declare Palestine a state).

⁹³ See Omar M. Dajani, *Stalled Between Seasons: The International Legal Status of Palestine During the Interim Period*, 26 DENV. J. INT'L L. & POL'Y 27, 81–89 (1997) (explaining the requirements for statehood under the Montevideo Convention Criteria); but see Quigley, *supra* note 82, at 760–61 (arguing that the negotiations between Palestine and Israel over borders infers that Israel recognizes Palestine as a state).

⁹⁴ See Ariosto & Pearson, *supra* note 24 (quoting Susan Rice, U.S. Ambassador to the U.N., in stating that the upgraded U.N. status for Palestine Authority did

consider themselves a state.⁹⁵ Arguments for Palestinian statehood should not persuade the ICC to break with the clear consensus of international scholars and find that Palestine is a state.

B. Rome Statute's Definition of Statehood

If Palestine is not a state under traditional criteria, the ICC can only assert jurisdiction if the Rome Statute's use of the term "state" can be interpreted contrary to its traditional meaning. The Rome Statute does not define the term "state." Other international courts have interpreted the word "state" in the context of the object and purpose of the treaty.⁹⁶ In dispute is whether those court opinions interpreting "state" in the context of the object and purpose of the treaty are relevant to interpreting the ICC and whether the ordinary meaning of the word controls the definition of "state" as used by the Rome Statute.

Part B.1 argues that the word "state" in the Rome Statute should be interpreted in accordance with its general definition in international law. This section rejects the argument that the ICC should adopt a functional definition of "state" in place of the general definition of "state" under international law. Part B.2 applies the functional approach and argues that this approach does not support the recognition of Palestine as a state, and therefore that the ICC does not exercise jurisdiction over crimes committed

not establish Palestine as a state); *but see U.N. Grants Palestine Status of Nonmember Observer State*, N.Y. TIMES, Jan. 3, 2013, http://topics.nytimes.com/topics/reference/timestopics/organizations/p/Palestinian_authority/index.html (reporting that on Nov. 29, 2012, the U.N., against the vote of the United States, granted Palestine recognition as a nonmember observer state).

⁹⁵ See Interview by Guy Raz with Ehud Olmert, former Israeli Prime Minister (Dec. 1, 2012) (arguing the Palestinians' proposal for statehood shows that they do not recognize themselves as a state); *see also* Alan Dershowitz, *Why the U.N. Should Not Recognize the Proposed Palestinian State*, HUFFINGTON POST, Sep. 21, 2011, *available at* http://www.huffingtonpost.com/alan-dershowitz/the-united-nations-should_b_973792.html (acknowledging that the proposal to recognize Palestine as a state indicates that they do not even recognize themselves as a state).

⁹⁶ Compare MALCOLM N. SHAW, INTERNATIONAL LAW 309–10 (6th ed. 2008) with Pellet, *supra* note 90, at 985–89; *see also* Situation in Palestine, INT'L CRIM. CT. (Apr. 3, 2012), *available at* <http://icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf> (finding that the General Assembly may rely on the Rome Statute to define state).

in Palestine. Part B.3 argues that even if a proper application of the functional approach results in a definition of “state” that is distinct from the term’s ordinary meaning, the ICC does not have jurisdiction over crimes committed in Palestine.

1. The Ordinary Meaning is the Correct Meaning

Absent any express indication that the term “state” has a special meaning, the term must be interpreted to conform to its definition under general international law. This result is mandated by Article 31(1),⁹⁷ and 31(4),⁹⁸ of the Vienna Convention, which govern the interpretation of international treaties, including the Rome Statute.⁹⁹ When other treaties sought to define “state” more broadly than its ordinary meaning, those constitutive documents explicitly defined the term “state” to include entities that did not meet the traditional definition of “state.”¹⁰⁰ Resort to the functional approach is only appropriate where the meaning of term to be interpreted is ambiguous.¹⁰¹ Since the use of “state” in the

⁹⁷ See Vienna Convention art. 31(1), 23 U.S.T. 3227 (“[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”); see also Evan Criddle, *The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation*, 44 VA. J. INT’L L. 431, 458 (stating that the Vienna Convention allows states’ rights to be construed liberally by courts).

⁹⁸ See Art. 31(4) Vienna Convention, 23 U.S.T. 3227, (“[a] special meaning shall be given to a term if it is established that the parties so intended.”).

⁹⁹ Compare MALCOLM N. SHAW, INTERNATIONAL LAW, 310–11 (6th ed. 2008) with Michael Kourabas, *A Vienna Convention Interpretation of the “Interests of Justice” Provision of the Rome Statute, the Legality of Domestic Amnesty Agreements, and the Situation in Northern Uganda: A “Great Qualitative Step Forward,” or a Normative Retreat?*, 14 U.C. DAVIS J. INT’L L. & POL’Y 59, 69 (2007) (recognizing that the Rome Statute’s interpretation is guided by the Vienna Convention).

¹⁰⁰ See Yuval Shany, *In Defence Of Functional Interpretation of Article 12(3) of the Rome Statute: A Response to Yael Ronen*, 8 J. INT’L CRIM. JUST. 329, 335 (2010) (broadening the definition of the term “state” to allow “quasi-state” participation in proceedings normally reserved for states); see also Trademark Law Treaty art. 1, Oct. 27, 1994, 112 Stat. 3064, 2037 U.N.T.S. 35 (displaying how States are often held separate from other entities under the Law of Treaties).

¹⁰¹ See Dana L. Christensen, *The Elusive Exercise of Jurisdiction Over Air Transportation Between the United States and South Korea*, 10 PAC. RIM L. & POL’Y J. 653, 667–68 (2001) (declaring that Article 31 of the VCLT deliberately put the textual approach to interpretation ahead of the functionalist view); see also Criddle, *supra* note 95, at 440 (noting that the functional approach is also

Rome Statute is unambiguous there is no need to employ a functional approach that defines state more broadly by searching for the object and purpose of the treaty.¹⁰²

Courts employing a functional approach in defining “state” more broadly often do so where the treaty itself suggests a broader definition. Thus, while there are examples of courts adopting a functional approach,¹⁰³ these decisions do not indicate that “[t]he functional view of the state and its subdivisions [are] omnipresent.”¹⁰⁴ Rather, it appears the more common approach is to define state in accordance with its general meaning unless a treaty specifically indicates an intention to define “state” more broadly, or the term is ambiguous and an alternative definition is necessary to allow the statute to fulfill its stated purpose.¹⁰⁵

The ordinary meaning should be employed unless the treaty itself explicitly defines the term “state” to include entities not considered a state under general international law. When the ordinary meaning of “state” is not intended, the treaty will explicitly define the term “state.”¹⁰⁶ For example, the Convention

appropriate where ordinary interpretation of terms would result in an absurd or unreasonable outcome).

¹⁰² See Anthony Clark Arend, *Who's Afraid of the Geneva Conventions? Treaty Interpretation in the Wake of Hamdan v. Rumsfeld*, 22 AM. U. INT'L L. REV. 709, 723–24 (2007) (arguing that Article 31 of the VCLT only endorses use of other sources to find a treaty's object and purpose when they provide material that is authoritative of interpretation); see also ALEXANDER ORAKHELASHVILI & SARAH WILLIAMS, 40 YEARS OF THE VIENNA CONVENTION ON THE LAW OF TREATIES 197 (2010) (theorizing that the functionalist approach is not a feasible means of interpretation).

¹⁰³ See Pellet, *supra* note 90, at 986 (noting Advocate General Geoffrey Jacobs believed the ECJ correctly followed a functional approach when deciding the outcome of the *Stardust Marine* case); see also Shany, *supra* note 98, at 335 (examining the use of the functional approach to allow the participation of “quasi-states” Palestine and Kosovo in advisory proceedings).

¹⁰⁴ IS THERE A COURT FOR GAZA?: A TEST BENCH FOR INTERNATIONAL JUSTICE, *supra* note 56, at 413.

¹⁰⁵ See Alfred P. Rubin, *The Theology of Arms Control - and US Politics*, CHRISTIAN SCIENCE MONITOR, Jun. 2, 1987, <http://www.csmonitor.com/1987/0602/eabm.html> (illustrating the dangers of interpreting a treaty's terms in discord with their traditional meaning); see also *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 47 (2d Cir. 1991) (refusing to broaden the Federal interpretation of “state” from the traditional definition).

¹⁰⁶ See Ola Kristian Fauchald, *The Legal Reasoning of ICSID Tribunals – An Empirical Analysis*, 19 EUR. J. INT'L L. 301, 327 (2008) (concluding that the use of ordinary meaning of words is in accordance with the rules of the Vienna Convention); see also Worster, *supra* note 20, at 1188 (stating that according to

on the Rights of Persons with Disabilities and the Convention on International Liability for Damages Caused by Space Objects defined the term “state” broadly.¹⁰⁷ In doing so, it authorizes courts to define “state” in a manner that differs from its traditional meaning.¹⁰⁸ The fact that the Rome Statute’s use of “state” should be given its ordinary meaning is especially convincing in light of International Criminal Tribunal for the Former Yugoslavia Rules of Procedure and Evidence. Rule 2(iii) of the International Criminal Tribunal for the Former Yugoslavia Rules of Procedure and Evidence defines “state” to include “a self-proclaimed entity de facto exercising governmental functions, whether recogni[z]ed as a State or not.”¹⁰⁹ The parties to the ICC, however, did not include any explicit language indicating that the term “state” should carry a meaning other than its ordinary meaning.

Supporters of employing a functional approach rather than the ordinary meaning point to two cases where they believe a functional approach was employed to define “state” beyond its ordinary meaning, even where the treaty did not explicitly support a broader definition. One example is the supposed endorsement by The European Court of Human Rights of a functional approach,¹¹⁰ in the *Drozdz and Janousek v. France and Spain* case.¹¹¹ Alain

the rules of the Vienna Convention, a term’s ordinary meaning controls in light of a treaty’s overall purpose).

¹⁰⁷ See Pellet, *supra* note 90, at 985–86 (citing the broad definitions of the term “state” given by various conventions, including the Convention on the Rights of Persons with Disabilities and the 1972 Convention on International Liability for Damage Caused by Space Objects).

¹⁰⁸ See Restatement (Third) of Foreign Relations Law § 201 (1987) (defining statehood as consisting of a permanent population with the capacity to formally engage with foreign entities); see also Thomas D. Grant, *Defining Statehood: The Montevideo Convention and its Discontents*, 37 COLUM. J. TRANSNAT’L L. 403, 409–10 (1999) (citing to various narrow definitions of statehood, including one that defines statehood as an association of a considerable number of men living within a definite territory).

¹⁰⁹ United Nations Extraordinary Plenary Session, *International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991: Rules and Procedures*, IT/32/Rev.43 (July 24, 2009).

¹¹⁰ See Pellet, *supra* note 90, at 986–87 (noting that the European Court of Human Rights acknowledged that the Principality of Andorra could have claimed jurisdiction over the defendants if it had consented to the Convention).

¹¹¹ *Drozdz and Janousek v. France and Spain*, 240 Eur. Ct. H.R. (ser. A) at 2, 4, 6 (1992) (writing that Mr. Jordi Drozd and Mr. Pavel Janousek, citizens of Spain the Czechoslovakia respectively, were convicted by a court of the Principality of

Pellet suggests that the ECHR opinion demonstrates that the court has no doubts about its ability to extend its jurisdiction over non-state entities such as Andorra even though the treaty only explicitly covers state entities.¹¹² This suggestion is flatly contradicted by language of the court:

[T]he Principality is not one of the members of the Council of Europe, and this prevents it being a party to the Convention in its own right. . . . It could no doubt have sought to be admitted as an "associate member" of the organi[z]ation under Article 5 of the Statute; if its application had been accepted by the Committee of Ministers, it would have had the right, as Saarland had in 1950, to sign and ratify the Convention. But it appears never to have taken any steps to do this.¹¹³

The court's language does not indicate an endorsement of a functional approach that expands the definition of "state." Instead, the court reasoned that if the Principality was admitted under Article 5, which allows "associate membership" to non-sovereign countries, including non-state entities, then Andorra could, consistent with precedent, sign on to the Convention.¹¹⁴ This is hardly a bold endorsement of the functional approach to interpreting the meaning of "state." Instead, the court held that had Andorra joined the Council of Europe as a non-state member in

Andorra of armed robbery in response to which they argued that during their trial they were deprived of certain rights).

¹¹² See Statute of the Council of Europe art. 5, Aug. 3, 1949, E.T.S. 001 (describing the associate member admission process to the Council of Europe); see also Pellet, *supra* note 90, at 986–87 (describing the functional view of the state as applied in ECJ case law and the *Drozd and Janousek* case).

¹¹³ *Drozd and Janousek v. France and Spain*, 14 Eur. Ct. H.R. (ser. A) 22–23 (1992).

¹¹⁴ See Statute of the Council of Europe art. 5, Aug. 3, 1949, E.T.S. 001 (highlighting the role that Article 5 played in the court's reasoning on the Andorra question); see also Thomas Giegerich, *The Palestinian Autonomy and International Human Rights Law: Perspectives on an ongoing Process of Nation-Building*, in *NEW POLITICAL ENTITIES IN PUBLIC AND PRIVATE INTERNATIONAL LAW: WITH SPECIAL REFERENCE TO THE PALESTINIAN ENTITY* 183, 189–91 (Amos Shapira & Mala Tabory eds., 1999) (describing characteristics of Israeli and Palestinian governance that suggest statehood in the international legal arena).

accordance with Article 5 then it could also join the Convention.¹¹⁵ This holding did not expand the meaning of state in any way.

A second argument that the ICC can abandon the ordinary meaning, despite the absence of any clear indication that a different meaning was intended, rests on the International Court of Justice's ("ICJ") opinion in the *Reparations Case*.¹¹⁶ However, this case did not support the use of the functional approach in this instance.¹¹⁷ In the *Reparations Case* the ICJ cited Articles 104 and 2(5) of the UN Charter in deciding that the United Nations had objective international legal personality even though the charter did not explicitly provide the UN with objective international legal personality.¹¹⁸ This decision cannot support the proposition that a functional approach is appropriate in all circumstances.¹¹⁹

In fact, the ICJ opinion is easily distinguishable from the task of interpreting the Rome Statute that confronts the ICC. In the *Reparations Case* the ICJ noted that the very concept of international legal personality is inherently flexible.¹²⁰ Pellet acknowledges that this definitional ambiguity is central to an

¹¹⁵ *Drozdz and Janousek v. France and Spain*, 14 Eur. Ct. H.R. (ser. A) 22–23 (1992) (reasoning that Andorra, as a non-state member of the Council of Europe in a similar position to Saarland in 1950, possessed capability to join the other European agreements).

¹¹⁶ *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. 174 (Apr. 11) (describing the mode of interpretation the ICJ is using to attribute international personality to international organizations).

¹¹⁷ *Id.* (outlining the functions of the United Nations and the attendant affects of functions on the international legal personality analysis).

¹¹⁸ *Id.* at 178–79 (Apr. 11) (determining that the Charter's intended characteristics of the United Nations were exercise and enjoy, functions and rights that can only be explained by its objective international legal personality); see also Michael Singer, *Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns*, 36 VA. J. INT'L L. 53, 67–69 (1995) (discussing how the United Nations, as an organization, established its objective legal personality).

¹¹⁹ See SHAW, *supra* note 32, at 1307 (discussing the narrowness of this approach and how any attempt at inferring a power would fail if it was inconsistent with an express power); see also F.A. Mann, *International Corporations and National Law*, 42 BRIT. Y.B. INT'L L. 145, 158 (1967) (explaining that the *Reparations Case* was unique and cannot be generalized).

¹²⁰ See Jan Klabbers, *The Concept of Legal Personality*, 11 IUS GENTIUM 35, 47 (2005) (discussing the ambivalence of objective UN legal personality and its flexibility while highlighting the needs of the community in determining legal nature).

argument for the functional approach.¹²¹ Despite some ambiguities around the edges, it is clear that any decision on statehood must be made with reference to either the Montevideo Convention and international recognition or independence.¹²² The definition of state that would allow the ICC to exercise jurisdiction does not fall within the traditional meaning of state, however ambiguities in that definition are resolved.¹²³

Further the ICJ decision rested on the proposition that for the UN “to achieve [its specified] ends and the attribution of international personality is indispensable.”¹²⁴ Under the Rome Statute the ICC has an avenue for exercising jurisdiction over alleged Israeli crimes, even under a more narrow definition of state. It allows the Security Council to refer crimes committed by non-member states to the ICC.¹²⁵ Frustration with the temporary political reality should not persuade the ICC to adopt a more expansive but less convincing approach to interpreting the Rome Statute. Therefore, the *Reparations Case* provides no support for a functional approach that re-interprets an unambiguously defined term that fulfills the statute’s objective as defined.

¹²¹ See Pellet, *supra* note 90, at 988 (discussing the difficulties of keeping to a clear, and ordinary meaning for the concept of the state due to its “variable geometry”); see also Shany, *supra* note 98, at 336 (advocating for a functional approach to help offer quasi-states with international legal personality, such as the Palestinian National Authority, the opportunity to participate in ICC’s delegated jurisdictions, on a case-by-case basis).

¹²² See SHAW, *supra* note 32, at 445–48 (examining two different theories relevant to recognition of states); see also Grant, *supra* note 106, at 413–14 (reiterating the four criteria for determining statehood as promulgated by the Montevideo Convention: state must possess a permanent population, defined territory, effective government over the extent of its territory, and capacity to engage in international relations).

¹²³ See Pellet, *supra* note 90, at 983 (arguing that a position on Palestinian statehood need not be reached since, even if it isn’t a state under the traditional definition it is under the definition of state he proposes using the functional approach); but see Ronen, *supra* note 50, at 11–16 (analyzing whether there is a legitimate Palestinian state, concluding there is not since there has never been a Palestinian claim of statehood).

¹²⁴ See Shaw, *supra* note 46, at 313 (citing *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. 174 (Apr. 11)).

¹²⁵ See Press Release, Security Council, Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court, SC/8351 (Mar. 31, 2005), <http://www.un.org/News/Press/docs/2005/sc8351> (showing that through a narrow definition of state the ICC exercised jurisdiction over crimes committed in Sudan).

2. Proper Use of Functional Approach

Even if a functional approach is employed, recognizing that Article 12 was the result of a carefully constructed jurisdictional balance militates against a definition of state that diverges from its ordinary meaning. Applied properly, the functional approach recognizes that the jurisdictional provisions of the Rome Statute, including article 12, were carefully negotiated to balance competing objects and purposes.¹²⁶ ICC President Philippe Kirsch explained the compromise that resulted in the current version of 12(3) “[a]s a compromise between these widely divergent positions, the Statute allows the Court to exercise jurisdiction with the acceptance of either the territorial *State* or the *State* of nationality of the accused.”¹²⁷ This careful balance, which is part of the object and purpose of the treaty, would be destroyed by a definition of state that extends to non-state entities.¹²⁸ Properly stated then, the object and purpose of the Rome Statute is to “promote the fight against impunity *within* the jurisdictional framework of the statute.”¹²⁹

The object and purpose of the treaty to fight against impunity is not frustrated by the more narrow interpretation of state. Article 12 still provides the Security Council an opportunity

¹²⁶ See OTTO TRIFFTERER, COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 11 (2d ed. 2008) (showing that President Kirsch stated that the provision will be regarded by some as too restrictive, and by others as too permissive; see also IS THERE A COURT FOR GAZA?: A TEST BENCH FOR INTERNATIONAL JUSTICE, *supra* note 56, at 503 (arguing that the functional approach should be applied on a case-by-case basis).

¹²⁷ Interview by Citizens for Global Solutions with Philippe Kirsch, ICC President (Feb. 12-13, 2009), available at <http://archive2.globalsolutions.org/node/1175> (demonstrating Philippe Kirsch’s belief that enforcement by the ICC will require further cooperation from independent states).

¹²⁸ See UNITED NATIONS TREATY COLLECTION, ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (showing the signatories to the Rome Treaty are all states); see also Office of the Prosecutor of the International Criminal Court, *Situation in Palestine* (2012), available at <http://icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf> (declining to recognize Palestine as a state for the purposes of the Rome Statute).

¹²⁹ See SHAW, *supra* note 32, at 314; see also Kourabas, *supra* note 97, at 71–73 (restating the object and purpose of the Rome Statute and listing way in which states cannot be deprived from the object and purpose).

to refer any crimes to the ICC.¹³⁰ The fact that the United States very likely would exercise its veto power is of no concern. The drafters of the ICC knew the possibility of political decision-making and agreed to tolerate it.¹³¹ Further, Israel could accept the jurisdiction of the ICC either through acceding to the treaty or by filing its own 12(3) declaration.¹³² In addition, there are many legal avenues that exist even if the ICC cannot exercise jurisdiction.¹³³

The good faith and practice requirement further militate in favor of a functional approach that adopts the ordinary meaning. Practice under the Rome Statute since establishment of the ICC indicates that the parties understand state to have its ordinary meaning.¹³⁴ Indeed, M. Cherif Bassiouni unambiguously stated,

¹³⁰ See Remigius Chibueze, *United States Objection to the International Criminal Court: A Paradox of "Operation Enduring Freedom,"* 9 ANN. SURV. INT'L & COMP. L. 19, 31 (2003) (stating that, if the Security Council does not refer a case, the ICC's jurisdiction is limited to acts that occur within territories of a member state); see also Ruth Wedgwood, *The United States and the International Criminal Court: Achieving a Wider Consensus Through the "Ithaca Package,"* 32 CORNELL INT'L L.J. 535, 540 (1999) (illustrating that the ICC has jurisdiction in any case referred to it by the Security Council).

¹³¹ See Michael A. Newton, *Harmony or Hegemony? The American Military Role in the Pursuit of Justice,* 19 CONN. J. INT'L L. 231, 250 (2004) (recognizing how the drafters of the Rome statute knew the ICC would have limited resources and political capital and, therefore, its jurisdiction was limited to more severe and difficult prosecutions); see also Michael P. Scharf & Patrick Dowd, *No Way Out? The Question of Unilateral Withdrawals of Referrals to the ICC and Other Human Rights Courts,* 9 CHI. J. INT'L L. 573, 582 (2009) (discussing the procedural safeguards created to protect the ICC from only receiving frivolous or politically motivated referrals).

¹³² See Beoliel & Perry, *supra* note 43, at 75 (explaining how opinions began to change after Palestine filed its Article 12(3) declaration even though it was not a signatory to the statute); see also Goran Sluiter, *The Surrender of War Criminals to the International Criminal Court,* 25 LOY. L.A. INT'L & COMP. L. REV. 605, 610 (2003) (stating that Article 12(3) of the ICC statute provides an option for non-member states to unconditionally accept the ICC's jurisdiction on an *ad hoc* basis).

¹³³ See Noah Weisboard, *Prosecuting Aggression,* 49 HARV. INT'L L.J. 161, 203 (2008) (providing three uncommonly used alternatives in which the ICC may exercise jurisdiction when the Security Council does not make an explicit referral). For a discussion of different avenues that the ICC may use to exercise its jurisdiction, see generally MALCOLM N. SHAW, *INTERNATIONAL LAW* 411–14 (6th ed. 2008).

¹³⁴ See SHAW, *supra* note 32, at 411–12 (specifying how the ICC's territorial jurisdiction may only be exercised over crimes committed within states who have become parties to the statute); see also Worster, *supra* note 20, at 1192

“[a]s Chairman of the Diplomatic Conference’s Drafting Committee, I can attest to the fact the referrals under Article 12(3) were intended to be by states only.”¹³⁵ This statement is further supported by the status accorded Palestine at the Rome Conference. There, Palestine was not listed as a “participating state,” but instead listed under “other organizations.”¹³⁶ A good faith interpretation of the object and purpose of the treaty should take into account such a clear statement of the context in which the object and purpose of the treaty should be understood.¹³⁷

Properly understood the full object and purpose of the Rome Statute suggests that the ICC should employ the ordinary meaning of “state.” This ordinary meaning of state does not leave Israel free to act; indeed under the current framework the Security Council could refer Israel to the ICC. While it is true that the current political and legal climate the ICC cannot exercise jurisdiction, at a future time Israel very well may be subject to the

(suggesting that the term “state” should be interpreted liberally to provide a forum for each party to voice concerns).

¹³⁵ See M. Cherif Bassiouni, *Comment on the Gaza Question: “Does the Prosecutor of the ICC Have the Authority To Open an Investigation into Alleged Crimes Committed in the 2008–2009 Gaza Conflict?”*, HUMAN RIGHTS & INT’L CRIM. LAW ONLINE FORUM, <http://uclalawforum.com/forum/permalink/859> (last visited Jan. 31, 2013) (discussing that Palestine may not be considered a state for purposes of Article 12(3) of the ICC statute if it has not declared itself a state); see also Solon Solomon, *Occupied or Not: The Question of Gaza’s Legal Status After the Israeli Disengagement*, 19 CARDOZO J. INT’L & COMP. L. 59, 81 n.91 (2011) (demonstrating how the issue over whether Palestine is a state “erupted” when it filed a declaration under Article 12(3) with the ICC).

¹³⁶ See United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, June 15–July 17, 1998, *Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole*, U.N. Doc. A/CONF.183/13 (Vol. 2), at 44 (1998), available at http://untreaty.un.org/cod/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf (listing Palestine under “other organizations” as opposed to “participating states”).

¹³⁷ Mr. Bassiouni, in his post on the UCLA forum, concluded that “Article 12(3) does not apply.” Bassiouni, *supra* note 133. However, he also stated that he signed onto Pellet’s submission to the ICC arguing that a functional approach allows the ICC to accept jurisdiction pursuant to 12(3). *Id.* It is unclear why he signed a submission that contradicts the position he publicly took in his UCLA post. *Id.* Also confusing, is his claim that “there is no doubt that all of the elements of statehood exist for Palestine to declare itself a state. And, indeed it did so in 1988.” *Id.* According to Bassiouni, if not for Palestinian withdrawal of this declaration during Oslo, Palestine would clearly be a state. *Id.* This position was roundly criticized by James Crawford. See Crawford, *supra* note 36, at 309.

ICC jurisdiction. The temporary reality does not “mean that the rules on jurisdiction are inadequate, but merely demonstrates that the ICC is not omnipotent.”¹³⁸

Thus the proper application of the functional approach mandates concluding that the object and purpose of the treaty, taken together with subsequent practice, makes clear that “state” does not include non-state entities. Surely the purpose of the Rome Statute is to help “put an end to impunity for the perpetrators of [grave] crimes” by creating “an independent permanent International Criminal Court.”¹³⁹ It does not follow, however, that the Statute’s purpose demands an interpretation of “state” in a manner contrary to its ordinary meaning.

Perhaps recognizing these arguments, many of those who argue for a functional approach argue that, even if the larger Statute does not bear the more expansive definition of state, 12(3) does.¹⁴⁰ Article 12(3), they claim, must be interpreted broadly because the purpose of the ICC is “to protect the basic interests of the international community as a whole.”¹⁴¹ If state is interpreted to exclude Palestine, then the Rome Statute “will remain irreversibly (except if the Security Council takes action)¹⁴²

¹³⁸ See *Israel & International Treaty Adherence*, RULE OF LAW IN ARMED CONFLICTS PROJECT, http://www.genevaacademy.ch/RULAC/international_treaties.php?id_state=113 (explaining that while Israel signed the Rome Statute, they are not a party to the treaty); see also *Israel and the International Criminal Court*, ISRAEL MINISTRY OF FOREIGN AFFAIRS (2002), http://www.mfa.gov.il/MFA/MFAArchive/2000_2009/2002/6/Israel%20and%20the%20International%20Criminal%20Court (last visited January 29, 2013) (depicting Israel’s tenuous relationship with the ICC and its reluctance to ratify the Treaty of Rome).

¹³⁹ See Rome Statute of the International Criminal Court, Preamble, July 17, 1998, 2187 U.N.T.S. 90, available at <http://www.unhcr.org/refworld/docid/3ae6b3a84.html> (outlining the objective of the Rome Statute); see also *Implementation of the Rome Statute*, COALITION FOR THE INTERNATIONAL CRIMINAL COURT, <http://www.iccnw.org/?mod=romeimplementation> (stating that the main purpose of the Rome Statute is to close the gap on the most heinous of international crimes such as genocide and crimes against humanity).

¹⁴⁰ See, e.g., Pellet, *supra* note 90 (arguing that even if the Statute as a whole uses a more limited definition of “state, 12(c) by itself uses an expansive definition); see also Shany, *supra* note 98 (explaining the expansive definition of “state” in section 12(c) of the Rome Statute).

¹⁴¹ IS THERE A COURT FOR GAZA? A TEST BENCH FOR INTERNATIONAL JUSTICE, *supra* note 56, at 423.

¹⁴² As I will discuss further below this claim is wrong. However, it is worth noting that Pellet recognizes that the Rome Statute provides a means of

ineffective in the Palestinian occupied territories.”¹⁴³ Thus, even though the ordinary meaning of 12(3),¹⁴⁴ “militates in favour of a traditional understanding of the term” a broader reading is required since that reading “would contribute to the fulfillment of the Court’s mandate to end impunity.”¹⁴⁵

Article 31 of the Vienna Convention makes clear that the proper application of the functional approach must interpret the term “state” in its context and in good faith in accordance with the object and purpose of the Rome Statute taking into account subsequent agreements or practices in applying the treaty.¹⁴⁶ A proper functional approach asks how to interpret “state” given the Statute’s purpose of fighting against impunity, but recognizing that the use of the object and purpose is “circumscribed by the other

exercising jurisdiction over crimes committed in Palestine and then proceeds to claim that Israel could act with impunity. *See Pellet, supra* note 90, at 995 (stating that the Rome Statute reflects the intention not to permit a State to unilaterally block the exercise of jurisdiction by the ICC).

¹⁴³ *See Pellet, supra* note 90, at 996 (suggesting that such a result would be intolerable because the very purpose of the Rome statute is to protect the interests of the international community as a whole). This conclusion is in part the result of Pellet’s erroneous claim that “only the Palestinian authority possesses, under international law, an exclusive territorial title over the Palestinian territory and the population established therein.” *Id.* As Shaw points out, “[t]itle to territory is held by states.” *See Shaw, supra* note 31 (arguing that sovereign title was always recognized as being held by the administering State). If Pellet’s arguments truly proceed on the assumption that Palestine is not a state then this claim is “replete with hazard for the international community, as well as being legally dubious.” This is especially so in the case of Palestine where the Oslo Accords make clear that “the question of territorial title to the Palestinian territories is a matter that can only be resolved by agreement [between] the relevant parties, including Israel.” *Id.* at ¶ 46 (asserting that these matters should be resolved in peace process negotiations).

¹⁴⁴ Article 12(3) reads: “If the acceptance of a State which is not a Party to the Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime.” *See Rome Statute of the International Criminal Court* art. 12, July 17, 1998, 2187 U.N.T.S. 90 (listing preconditions to the exercise of jurisdiction).

¹⁴⁵ *See Shany, supra* note 98, at 336 (explaining how the object and purpose of the Rome Statute is well-served by a functional approach).

¹⁴⁶ *See Vienna Convention on the Law of Treaties* art. 31, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (establishing the general rule of treaty interpretation); *see also* David S. Jonas & Thomas N. Saunders, *The Object and Purpose of a Treaty: Three Interpretive Methods*, 43 VAND. J. TRANSNAT’L L. 565, 578 (2010) (stating that treaty interpretation must rely primarily on the terms of a treaty while context and the treaty’s object and purpose must inform its meaning).

required elements of article 31(1).¹⁴⁷ It cannot ignore these elements in favor of an interpretation that looks at the object and purpose of the treaty in the broadest sense.

3. Arguing in the Hypothetical

Even if the ICC accepts the ultimately unconvincing position that state should be defined contrary to its ordinary meaning, the ICC still may not have the authority to accept jurisdiction pursuant to the Palestinian application under 12(3).¹⁴⁸ This is because the Oslo Accords limit the scope of the Palestinian Authority's delegable criminal jurisdiction. Under the Oslo Accords the PNA cannot exercise jurisdictions over certain areas of the West Bank and, more importantly, over Israeli nationals.¹⁴⁹ Since under Oslo the PNA does not have jurisdiction it cannot transfer that jurisdiction to the ICC.¹⁵⁰ Indeed, the Al-Haq position paper submitted to the ICC admits that, in order to show

¹⁴⁷ See Shaw, *supra* note 31, at ¶ 37 (demonstrating that the object and purpose of a treaty cannot be used to alter the clear meaning of terms).

¹⁴⁸ See Fairlie, *supra* note 21; see also Linda M. Keller, *The International Criminal Court and Palestine: Part I*, JURIST, (Jan. 29, 2013), <http://jurist.org/forum/2013/01/linda-keller-palestine-icc-part1.php> (citing a General Assembly decision to upgrade Palestine to "non-member observer State" status, though Palestine had not yet achieved statehood status and therefore still may not fall under ICC jurisdiction)..

¹⁴⁹ See Shany, *supra* note 98, at 340–41 (explaining that article IX(5) of the Oslo Accords seriously limits the powers of the PNA over Gaza); see also Keller, *supra* note 146 (discussing that Israel is also not a party to the Rome Statute and does not fall under the ICC's jurisdiction).

¹⁵⁰ Shany, *supra* note 98, at 340–41 (asserting that the PNA efforts to authorize the ICC to exercise jurisdiction are futile under the Oslo Accords). Shany and Shaw also argue that the ICC cannot assert jurisdiction because under Oslo the PLO, not the PA, has authority to conduct international relations. This argument lacks force because the line between PA and PLO actions in international diplomacy has blurred significantly. In any event, the declaration could be more accurately characterized as a declaration made by the PA, through the PLO. See Dr. Michael Kearney, AL-HAQ POSITION PAPER ON ISSUES ARISING FROM THE PALESTINIAN AUTHORITY'S SUBMISSION OF A DECLARATION TO THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT UNDER ARTICLE 12(3) OF THE ROME STATUTE at ¶¶ 27–28 (2009), available at [http://www.alhaq.org/attachments/article/273/position-paper-icc-\(14December2009\).pdf](http://www.alhaq.org/attachments/article/273/position-paper-icc-(14December2009).pdf) (examining the relationship between the PA, the PLO and the ICC).

Palestinian jurisdiction it must “overcome this prima facie obstacle.”¹⁵¹

In addition to the Oslo Accords, the political reality in Gaza poses an obstacle to a jurisdictional argument. The Palestinian Authority has no internal control over Gaza.¹⁵² Since 2006 Hamas has exercised control over the Gaza strip.¹⁵³ Despite current reconciliation talks, at the time of the declaration Hamas rejected the Palestinian Authority and has embarked on a systematic policy of persecuting, killing, and expelling PA sympathizers.¹⁵⁴

C. Jurisdictional Capacity Does Not Satisfy the 12(3) Statehood Requirement

In an argument submitted to the Office of the Prosecutor, Al-Haq argues that the ICC can exercise jurisdiction pursuant to the Palestinian declaration if the Palestinian Authority: 1) Has the capacity to enter into international agreements 2) Has the capacity to try Palestinians on criminal charges and 3) Has the capacity to try Israeli citizens on criminal charges.¹⁵⁵ Al-Haq argues that this position is “in keeping with the purpose of the Court as an

¹⁵¹ Kearney, *supra* note 148 at ¶ 32 (analyzing the Palestinian Authority’s obstacles to obtain jurisdiction to hold Israelis responsible for criminal acts in occupied Palestinian territories).

¹⁵² See Mark Joseph Stern, *How Did Hamas Come to Power in Gaza?*, SLATE, (Nov. 19, 2012), http://www.slate.com/articles/news_and_politics/explainer/2012/11/hamas_in_gaza_how_the_organization_beat_fatah_and_took_control_of_the_gaza.html (detailing Hamas’s rise to power in Gaza after the Palestinian Authority called an election in which Hamas gained control of Parliament); see also *Palestine, Israel and the UN: Nerves are jangling again*, THE ECONOMIST, Nov. 17, 2012 (indicating the violence between Islamists and Palestinians in the Hamas controlled Gaza strip).

¹⁵³ See Conal Urquart, Ian Black, et al., *Hamas takes Control of Gaza*, THE GUARDIAN, Jun. 15, 2007, available at <http://www.guardian.co.uk/world/2007/jun/15/israel4> (reporting the complete takeover of Gaza by Hamas fighters); see also Bryony Jones, *Q&A: What is Hamas?*, CNN, (Nov. 24, 2012), <http://www.cnn.com/2012/11/16/world/meast/hamas-explainer/index.html> (noting that Hamas first participated in Palestinian parliamentary polls for the first time in 2006 which led to their takeover in Gaza).

¹⁵⁴ See Matthew Kalman, *Hamas Executes Suspected Fatah Traitors in Gaza*, SAN FRANCISCO CHRONICLE, Jan. 22, 2009 (showing Hamas officials concession that they are executing innocent Palestinians).

¹⁵⁵ See KEARNEY, *supra* note 148, at ¶ 23 (proposing that jurisdictional capacity affords Palestine the right to grant jurisdiction to the International Criminal Court).

'international jurisdictional safety net' which starts to work when national jurisdictions are unable or unwilling to deal with the crimes committed."¹⁵⁶ Instead of asking whether Palestine is a state for the purposes of 12(3), it asks whether Palestine has jurisdiction over the alleged crimes, and since the answer is in the affirmative, then it can transfer that jurisdiction to the ICC under 12(3).

This approach is not supported by any interpretive method that conforms to the Vienna Convention.¹⁵⁷ To the extent that the arguments elucidated above counsel against a functional approach, they apply doubly to this suggested reading of 12(3).¹⁵⁸ Nothing in the Rome Statute, subsequent practice, or drafting history suggests that this meaning of state is correct.¹⁵⁹ To the extent that the ICC is seriously considering this approach, it is worth noting the absence of Palestinian jurisdiction over crimes committed by Israeli citizens mentioned in Section I.A.3.¹⁶⁰

¹⁵⁶ See *id.* (positing that a functional approach be applied to Palestine's bid for statehood).

¹⁵⁷ See INT'L CRIM. CT., SUMMARY OF SUBMISSIONS ON WHETHER THE DECLARATION LODGED BY THE PALESTINIAN NATIONAL AUTHORITY MEETS STATUTORY REQUIREMENTS (May 3, 2010), available at <http://unispal.un.org/unispal.nsf/9a798adbf322aff38525617b006d88d7/66e55a48cd5049c1852579dc00644adf?OpenDocument&Highlight=0,ICC,Rome,Statute> (maintaining that the Vienna Convention on the Law of Treaties should be interpreted narrowly); but see Worster, *supra* note 20, at 1188 (elucidating that the Vienna Convention on the Law of Treaties can be read to confer statehood on Palestine).

¹⁵⁸ Bassiouni, *supra* note 133 (stating that Article 12(3) of the Rome Statute was intended to be read narrowly rather than liberally); see also George P. Fletcher, *No Jurisdictional Basis for an Investigation Pursuant to the Palestinian Declaration*, HUMAN RIGHTS & INT'L CRIM. LAW ONLINE FORUM, <http://uclalawforum.com/gaza> (last visited Jan. 31, 2013) (reiterating that Palestine was not categorized as a state during the Rome Conference establishing the International Criminal Court).

¹⁵⁹ See INT'L CRIM. CT., SUMMARY OF SUBMISSIONS ON WHETHER THE DECLARATION LODGED BY THE PALESTINIAN NATIONAL AUTHORITY MEETS STATUTORY REQUIREMENTS (May 3, 2010), available at <http://unispal.un.org/unispal.nsf/9a798adbf322aff38525617b006d88d7/66e55a48cd5049c1852579dc00644adf?OpenDocument&Highlight=0,ICC,Rome,Statute> (noting that the Rome Statute defines statehood by standards of customary international law); see also Beoliel & Perry, *supra* note 43, at 79 (articulating that the Rome Statute does not contain provisions transcending the state-based system).

¹⁶⁰ See *A Question of Security Violence Against Palestinian Women and Girls*, HUM. RIGHTS WATCH, Nov. 2006, at 1, 19 (reiterating that, under the Oslo

As long as the Palestinian Authority does not declare its independence there can be no argument that a Palestinian state exists.¹⁶¹ Therefore, the ICC cannot exercise jurisdiction pursuant to 12(3) if the term state is understood to carry its ordinary meaning.¹⁶² Arguments that 12(3) should not carry its ordinary meaning are unconvincing.¹⁶³ The remaining question is whether a General Assembly resolution upgrading Palestine to non-member state status changes the above-described calculus.¹⁶⁴

II. *Attainment of Non-Member State Status*

This Part argues that attainment of UN non-member status does not affect the conclusion that Palestine is not a state for the

Accords, Palestinian courts lack jurisdiction over Israeli citizens); *see also* Shany, *supra* note 98, at 340 (noting that the Oslo Accords limit Palestinian courts from imposing jurisdiction over Israelis).

¹⁶¹ *See International Recognition of a Unilaterally Declared Palestinian State: Legal and Policy Dilemmas*, JERUSALEM CENTER FOR PUBLIC AFFAIRS, <http://jcpa.org/art/becker2.htm> (last visited Jan. 31, 2013) (indicating that the Palestinian Authority's declaration of independence must be based on meeting the UN's requirements for statehood); *see also* Madeleine Moregenstern, *U.N. Grants Palestinians Historic Statehood Recognition Status*, THE BLAZE, <http://www.theblaze.com/stories/2012/11/29/u-n-grants-palestinians-historic-statehood-recognition-status/> (Nov. 29, 2012 5:04pm) (reiterating that even though Palestine recently obtained nonmember observer state status, that vote does not create a Palestine state).

¹⁶² *See International Criminal Court – Declarations Article 12(3)*, INTERNATIONAL CRIMINAL COURT, http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/registry/Pages/declarations.aspx (last visited Jan. 31, 2013) (emphasizing access to Article 12(3) exceptions is also limited to states); *see also* Fletcher, *supra* note 156 (stressing that Palestine does not qualify as a “state” under the ICC statutes, a clear requirement for accepting the ICC's jurisdiction).

¹⁶³ *See* Fletcher, *supra* note 156 (concluding that any argument such argument would fall in light of the unequivocal language of ICC requirements); *see also* *International Recognition of a Unilaterally Declared Palestinian State: Legal and Policy Dilemmas*, JERUSALEM CENTER FOR PUBLIC AFFAIRS, <http://jcpa.org/art/becker2.htm> (last visited Jan. 31, 2013) (stating that those arguments simply evade the requirements of statehood because Palestine fails to satisfy any of the traditional criterions for statehood).

¹⁶⁴ *See* McMahon & Masters, *supra* note 17 (reiterating that non-member statehood would merely be a symbolic victory for Palestine, because it would not have any legal recognition of sovereignty, borders, or full UN membership); *see also* Moregenstern, *supra* note 159 (finding that non-member states, like Palestine, may very well be entitled to access international bodies, including the ICC, through this new non-member state status).

purpose of the Rome Statute or otherwise confer ICC jurisdiction over Palestine's charges against Israel. Section II.A argues that non-member status does not render Palestine a state under the traditional definition. Section II.B argues that non-member status does not alter the conclusion that the functional approach, properly applied, mandates the determining that Palestine is not a state.

A. Attainment of Non-Member State Status Does Not Create a Palestinian State

As noted above, the consensus approach is that Palestine is not a state.¹⁶⁵ While United Nations recognition can be important in determining statehood, the path to full membership in the United Nations runs through the Security Council.¹⁶⁶ The Security Council must recommend the admission of a state before the General Assembly can vote, by a 2/3 majority, on whether to accept a state as a member a full member.¹⁶⁷ If Palestine attained full state status, that achievement would strongly support Palestinian statehood.¹⁶⁸ However, President Abbas' decision to avoid the Security Council and instead receive an upgrade from observer entity to non-member observer state has little effect on

¹⁶⁵ See Davenport, *supra* note 69 (asserting that the only reason Palestine was recognized as a non-member state was for political reasons, usurping international law requirements for statehood); see also McMahon & Masters, *supra* note 17 (describing major leaders in that consensus against Palestinian statehood which include the United States and Israel).

¹⁶⁶ See Davenport, *supra* note 69 (reiterating the Security Council chose not to do so for Palestine); see also *Rules of Procedure*, GENERAL ASSEMBLY OF THE UNITED NATIONS, <http://www.un.org/en/ga/about/ropga/adms.shtml> (providing that the Security Council must recommend a new state applicant to the General Assembly prior to any vote).

¹⁶⁷ See *Fact Sheet: Becoming a New Member State of the United Nations*, UNITED NATIONS VISITORS CENTRE, http://visit.un.org/wcm/content/site/visitors/lang/en/new_memberstate/ (last visited Jan. 31, 2013) (providing the source of the requirements, *i.e.* Paragraph 1 of Article 4 of UN Charter); see also *Rules of Procedure*, GENERAL ASSEMBLY OF THE UNITED NATIONS, <http://www.un.org/en/ga/about/ropga/adms.shtml> (detailing the rubric for the General Assembly vote, *i.e.* applicant's peaceful relationships with other states and ability to carry out UN obligations).

¹⁶⁸ See Crawford, *supra* note 36, at 311–12 (discussing the status of Palestine in the International community as being unclear); see also McMahon & Masters, *supra* note 17 (asserting that non-member state status for Palestine would be a large step forward for Palestinians in the international community and a short way from member state of the United Nations).

Palestine's status as a state and thus the ICC's jurisdiction under 12(3).¹⁶⁹

Arguments for the proposition that the General Assembly can recognize Palestine as a State, with an effect that is "constitutive, definitive, and universally determinative" are ultimately unconvincing.¹⁷⁰ When the PLO announced statehood in 1988 104 states supported a resolution supporting Palestinian statehood. In the months after that resolution, eighty-nine state recognized a Palestinian state. Since then, the total number of states recognizing Palestine as a state has grown to 112 countries.¹⁷¹ Despite this broad number of states recognizing Palestine, the consensus position was that Palestine did not constitute a state. The General Assembly vote upgrading Palestinian observer status was approved by 138 states and largely reflected the views of those states that already recognized Palestine as a state.¹⁷² It did not add the recognition of the several crucial

¹⁶⁹ See Lauren DeHaan, *Palestinian Statehood Bid Passes United Nations Vote*, CHIMES (Dec. 9, 2012), <http://www.calvin.edu/chimes/2012/12/09/palestinian-statehood-bid-passes-united-nations-vote/> (characterizing the upgrade as more of a symbolic victory than a tangible one); see also McMahon & Masters, *supra* note 17 (quoting a UN statement that the decision elevated Palestine to somewhere between a normal observer and a member state, which was a unique position).

¹⁷⁰ See Crawford, *supra* note 36; see also, Joe Lauria et. al., *U.N. Gives Palestinians 'State' Status*, WALL ST. J. (Nov. 29, 2012, 11:13 PM), (providing a statement from the United States arguing that it is impossible to create a state with a resolution).

¹⁷¹ See Haukur Holm, *Palestinian Statehood Recognized by More Than 100 Countries*, NAT. POST (Dec. 15, 2011, 10:39 AM), <http://news.nationalpost.com/2011/12/15/palestinian-statehood-recognized-by-more-than-100-countries/> (reporting that at least 112 countries around the world have formally recognized Palestine as a state); see also John V. Whitbeck, *The State of Palestine Exists*, MIDDLE E. POL'Y COUNCIL (2013), <http://www.mepc.org/journal/middle-east-policy-archives/state-palestine-exists?print> (asserting that Palestine qualifies as a state because it is recognized as one by 112 states).

¹⁷² See Bronner & Hauser, *supra* note 24 (stating that Palestine has been upgraded to observer status in a 138-9 vote); see also *A List of Nations Which Voted For, Against, or Abstained on Granting Non-Member State Status in the UN*, AL-JAZEERAH: CROSS-CULTURAL UNDERSTANDING (Nov. 29, 2012), <http://www.ccun.org/News/2012%20News%20Links.htm> (follow "November 2012 News Links" hyperlink; then follow hyperlink under "November 29, 2012) (listing the 138 states that approved of Palestine attaining observer status).

states that do not recognize Palestine as a state such as the United States, Canada, the United Kingdom, and Germany.¹⁷³

This is not to say that a General Assembly resolution carries no importance.¹⁷⁴ Rather, it is to point out that in this case the General Assembly recognition is of little import since the recognition demonstrates only a slightly greater support for Palestinian statehood.¹⁷⁵ Even under a declarative model that recognizes the political importance of state recognition, this greater recognition is insufficient to alter the facts on the ground that caused the leading scholars to conclude that Palestine was not a state prior to the General Assembly declaration.¹⁷⁶ Additionally, under a constitutive theory of statehood the General Assembly vote

¹⁷³ See Lauria et. al., *supra* note 168 (relaying that the United States feels that Palestine's recognition of a raised status is an obstacle to peace and that a state cannot be created where none exists); see also *A List of Nations Which Voted For, Against, or Abstained on Granting Non-Member State Status in the UN.*, *supra* note 170 (including the United States and Canada as voting against the upgrade and Germany and the United Kingdom as abstaining from voting).

¹⁷⁴ See Mark Memmott, *What Will a U.N. Upgrade Mean for Palestinians?*, NPR (Nov. 29, 2012, 8:10 AM), <http://www.npr.org/blogs/thetwo-way/2012/11/29/166144480/what-will-an-u-n-upgrade-mean-for-palestinians> (stating that obtaining non-member observer status at the U.N. allows Palestine to file cases with the International Criminal Court); see also *UN Upgrades Palestinian Status, Bolstering Statehood Claim*, NBCNEWS.COM, http://worldnews.nbcnews.com/_news/2012/11/29/15546351-un-upgrades-palestinian-status-bolstering-statehood-claim?lite (Nov. 29, 2012, 3:26 PM) (suggesting Palestine's new status at the U.N. may afford it standing to use the International Criminal Court and other international legislative bodies).

¹⁷⁵ See *US Objects to "State of Palestine" Title*, ANADOLU AGENCY, Jan. 24, 2013, <http://www.aa.com.tr/en/news/125418--us-objected-quot-state-of-palestine-quot-title> (indicating U.S. ambassador Rice does not recognize the General Assembly's vote acknowledging Palestine as a state); see also Marc Pitzke, *Palestinian Recognition Marks Triumph over Israel*, SPIEGEL ONLINE INT'L (Nov. 30, 2012, 10:00 AM), <http://www.spiegel.de/international/world/palestinians-granted-non-member-observer-status-at-united-nations-a-870150.html> (opining that the General Assembly's vote grants Palestine only the right to speak at the U.N. and that nothing else will change because of Americans' permanent veto at the U.N. Security Council).

¹⁷⁶ See Frederic L. Kirgis Jr., Comment, *Admission of "Palestine" as a Member of a Specialized Agency and Withholding the Payment of Assessments in Response*, 84 AM. J. INT'L. L. 218, 219-20 (1990) (concluding that Palestine does not meet the requirements for statehood because it lacks defined borders and complete control over the claimed territory); see also *Predictable Preoccupations*, MIDEAST MIRROR, June 29, 2011 (arguing there are 4 preconditions for statehood, and that Palestine does not meet them because it does not rule an entire population within a designated territory).

carries little weight.¹⁷⁷ Of the major players in the Palestinian peace process only France added itself to the ranks of states that recognize a Palestinian state.¹⁷⁸

The only importance of the General Assembly resolution on Palestine was, surprisingly, not the outcome of the vote on that resolution, but the very fact that the Palestinian Authority requested to be recognized as a state.¹⁷⁹ In doing so it proclaimed its view that it is an independent state.¹⁸⁰ In so doing, it openly and clearly declared that it views itself as a state.¹⁸¹ This is critical because, as discussed in Section II.B.2, many commentators

¹⁷⁷ See Thomas D. Grant, *International Responsibility and the Admission of States to the United Nations*, 30 MICH. J. INT'L L. 1095, 1155–57 (2009) (indicating that although membership at the U.N. may function as a collective recognition of statehood, it does not create a state); see also *State of Palestine Name Change Shows Limitations*, USA TODAY (Jan. 7, 2013, 9:06 PM), <http://www.usatoday.com/story/news/world/2013/01/07/state-palestine-name/1816083/> (opining that Palestine's symbolic recognition at the U.N. does not alter its status because Palestine cannot exert full control over the West Bank).

¹⁷⁸ See Clare Byrne, *France to Support Palestinian Statehood at UN*, DPA INT'L SERV. IN ENGLISH, Nov. 27, 2012 (expressing the French president would support Palestine's U.N. bid to be recognized as a non-member state); see also U.N. General Assembly, *General Assembly Votes Overwhelmingly to Accord Palestine 'Non-Member Observer State' Status in United Nations; Objective to 'Breathe New Life' Into the Peace Process, Says Palestinian President; Israel's Delegate Counters, Without Direct Negotiations, Peace Remains 'Out of Reach'* (Nov. 29, 2012), <http://www.un.org/News/Press/docs/2012/ga11317.doc.htm> (displaying France voted in favor of Palestine as a non-member observer state).

¹⁷⁹ See Daoud Kuttab, *Abbas' Newfound Courage*, PALESTINE NEWS NETWORK, Jan. 11, 2013 (showing that after a winning bid to be recognized as a non-member observer state, Abbas widened his reach by representing all Palestinians and not just those residing at the West Bank); see also *Early Start with John Berman and Zoraida Sambolin: Fiscal Cliff Finger-Pointing; Palestinians Win Historic U.N. Recognition* (CNN television broadcast Nov. 30, 2012) (alleging the vote at the General Assembly strengthened the image of the Palestinian Authority, which had been injured by the violence in Gaza).

¹⁸⁰ See Hume & Fantz, *supra* note 8 (acknowledging that the Palestinian Authority declared a bid to be recognized as an independent state to the U.N. General Assembly); see also CNN Wire Staff, *Palestinian President Requests Statehood; Israel Calls for Talks*, CNN.COM (Sept. 23, 2011, 4:39 PM), <http://www.cnn.com/2011/09/23/world/meast/un-middle-east/index.html> (stating that the Palestinian Authority's bid for independence was their acknowledgement of independence).

¹⁸¹ See Hume & Fantz, *supra* note 8; see also CNN Wire Staff, *supra* note 178 (stating that the Palestinian Authority's bid for independence was their acknowledgement of independence).

argued that until Palestine declared itself an independent state any discussion of whether Palestine meets the criterion for statehood was premature.¹⁸²

However, even this aspect of a General Assembly resolution is not of great importance.¹⁸³ President Abbas already declared that the Palestinian Authority views itself as governing an independent Palestinian state on September 23, 2011 when he submitted an application for full member status in the UN to the Secretary General of the United Nations. In this application he declared: "I have the profound honour, on behalf of the Palestinian people, to submit this application of the State of Palestine for admission to membership in the United Nations."¹⁸⁴ While President Abbas noted that, "the State of Palestine affirms its commitment to the achievement of a just, lasting and comprehensive resolution of the Israeli- Palestinian conflict based on the vision of two-States living side by side in peace and security" he also signaled that the Palestinian Authority was no longer operating under the Oslo framework.¹⁸⁵ Instead, it would

¹⁸² See Ronen, *supra* note 50, at 3 (illustrating scholars' reluctance to discuss Palestinian statehood because the Palestinians had not yet declared independence); see also Robert Satloff, *Don't Legitimate Arafatistan*, WALL ST. J., June 19, 2002, at A18 (noting that Palestine could not be a state without a declaration of independence).

¹⁸³ See Isabel Kershner, *Israel Heightens Warnings Over Palestinians' U.N. Bid*, N.Y. TIMES (Nov. 14, 2012), <http://www.nytimes.com/2012/11/15/world/middleeast/israel-heightens-warnings-over-palestinians-un-bid.html> (arguing that the vote will only illicit moral support for statehood); see also Jordan Sekulow & Matthew Clark, *The Legal Impossibility of Limited Palestinian Statehood at the U.N.*, WASH. POST (Nov. 28, 2012, 5:31 PM), http://www.washingtonpost.com/blogs/religious-right-now/post/the-legal-impossibility-of-limited-palestinian-statehood-at-the-un/2012/11/28/96697738-39a6-11e2-b01f-5f55b193f58f_blog.html (asserting that the U.N. bid cannot grant statehood under international law).

¹⁸⁴ See U.N. Secretary-General, Letter dated Sept. 23, 2011 from the President of Palestine to the Secretary-General, U.N. DOC. S/2011/592 (Sept. 23, 2011), <http://unispal.un.org/UNISPAL.NSF/0/F6CF1ED25A5D8FE9852579170050C37F> (documenting the Palestinian Authority's bid to the U.N.); see also Neil MacFarquhar & Steven Lee Myers, *Palestinians Request U.N. Status; Powers Press for Talks*, N.Y. TIMES (Sept. 23, 2011), <http://www.nytimes.com/2011/09/24/world/palestinians-submit-statehood-bid-at-un.html?pagewanted=all> (demonstrating that the Palestinian Authority had requested U.N. status and recognition).

¹⁸⁵ See Kershner, *supra* note 181 (alleging that the Palestinian bid could lead to a termination of the Oslo Accords); see also Chris McGreal, *Palestinians Warn: Back UN Statehood Bid or Risk Boosting Hamas*, THE GUARDIAN (Nov. 27,

seek to negotiate a lasting peace from a position of statehood, not with the aspiration of becoming a state.¹⁸⁶

The General Assembly resolution upgrading Palestine to a non-member state status thus has little effect on ICC jurisdiction pursuant to 12(3).¹⁸⁷ The criteria for statehood were either met or not met prior to the General Assembly's vote.¹⁸⁸ The vote did little to change the existing calculus prior to the vote.¹⁸⁹

B. Importance of Attaining Non-Member State Status

Attainment of non-member state status does not support interpreting state so as to include non-state entities.¹⁹⁰ In fact, to

2012, 14:04 PM), <http://www.guardian.co.uk/world/2012/nov/27/palestinians-un-statehood-bid-hamas/print> (noting that the Palestinian's bid threatened the Oslo Accords).

¹⁸⁶ See Winston P. Nagan & Aitza M. Haddad, *The Legal and Policy Implications of the Possibility of Palestinian Statehood*, 18 U.C. DAVIS J. INT'L L. & POL'Y 343, 407 (2012) (highlighting the sovereign control Israel enjoyed over Palestine under the Oslo Accords); see also *Abbas' Speech to the UN General Assembly, November 2012*, COUNCIL FOREIGN REL. (last updated Nov. 29, 2012), <http://www.cfr.org/palestinian-authority/abbas-speech-un-general-assembly-november-2012/p29579> (stating the President's intention to affirm the legitimacy of the State of Palestine).

¹⁸⁷ See Shaw, *supra* note 46, at 301 (indicating that non-state entities cannot accept the jurisdiction of the ICC); see also George P. Fletcher, *Don't Go There*, N.Y. TIMES (July 22, 2009), <http://www.nytimes.com/2009/07/23/opinion/23iht-edfletcher.html> (arguing that only "full-blooded states" can accept the jurisdiction of the ICC under the Rome Statute).

¹⁸⁸ See Dajani, *supra* note 91, at 81 (referencing a criteria for statehood widely accepted among the international community); see also Iain Scobbie, Alon Margalit & Sarah Hibbin, *Recognizing Palestinian Statehood*, YALE J. INT'L AFF. (Aug. 25, 2011), available at <http://yalejournal.org/2011/08/recognizing-palestinian-statehood/> (referring to Palestine's failure to meet all criteria for statehood under the Montevideo convention).

¹⁸⁹ See General Assembly Votes Overwhelmingly to Accord Palestine Non-Member Observer State Status in United Nations, General Assembly, U.N. DOC. GA/11317 (Nov. 20, 2012), available at <http://www.un.org/News/Press/docs/2012/ga11317.doc.htm> (referencing the lack of confidence representatives had on the vote's effect); see also Cerone, *supra* note 13 (presenting the General Assembly resolution as symbolic rather than significant for Palestinians).

¹⁹⁰ See *Permanent Observers*, UNITED NATIONS (last visited Jan. 31, 2013), <http://www.un.org/en/members/aboutpermobservers.shtml> (indicating that becoming a non-member state observer is based purely on practice); see also Victoria Nuland, *Interview with United Nations Representatives*, U.S. DEP'T ST. (Nov. 28, 2012), <http://www.state.gov/r/pa/prs/dpb/2012/11/201168.htm>

the extent that attainment of non-member state status moves Palestine closer to recognized statehood it counsels against a divergent reading of “state.”¹⁹¹ The alternate readings clearly depart from the ordinary meaning of the term state and there is ample evidence that the drafters intended “state” to carry its ordinary meaning.¹⁹² The closer Palestine is to achieving statehood, the closer it is to being able to accept ICC jurisdiction.¹⁹³ The ICC should refrain from doing injustice to the clearest reading of the Rome Statute in order to hold Israel accountable since it will likely be able to move forward in the near future without endorsing an alternative reading that is unfaithful to the clear language of the Rome Statute.¹⁹⁴

To the extent that the Oslo Accords serve as a bar to the assertion of ICC jurisdiction, the Palestinian application to join the UN as a full member should remove that obstacle.¹⁹⁵ Such an

#ISRAEL (indicating that attainment of such status might even interfere with Palestine’s quest for statehood).

¹⁹¹ See Grant, *supra* note 175, at 1167–69 (referring to a U.N. membership as the conclusive evidence of the statehood of an admitted entity); see also Thomas, *supra* note 76, at 223–24 (highlighting that permanent observers of non-member States lack any officially recognized status).

¹⁹² See United Nations Diplomatic Conference on Plenipotentiaries on the Establishment of an International Criminal Court, Rome, It., June 15-17, 1998, A/CONF.183/13 (Vol. III), art. 3, part 2 (indicating that the ordinary meaning of “state” was meant to apply in the Rome Statute, as evidenced by a lack of explanation otherwise); see also Drozd v. France, App. No. 12747/87, 14 Eur. Comm’n H.R. 745, ¶ 89 (1992), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57774> (providing an example of how Courts read ‘state’ in accord with its ordinary meaning).

¹⁹³ See Quigley, *supra* note 1, at 3 (asserting that Palestine’s declaration of state status brings it under ICC jurisdiction); see also Fairlie, *supra* note 21 (stating that Palestine’s newer status is likely but not certain to make it susceptible to ICC jurisdiction).

¹⁹⁴ See Beoliel & Perry, *supra* note 43 (explaining that in the occasion that Palestine is considered to fall under ICC jurisdiction, the ICC Prosecutor can demand that international criminals be tried); see also George Bisharat, Op-Ed., *Why Palestine Should Take Israel to Court in the Hague*, N.Y. TIMES, Jan. 2, 2013, available at http://www.nytimes.com/2013/01/30/opinion/why-palestine-should-take-israel-to-court-in-the-hague.html?_r=0 (opining that Israel would expose itself to liability for its international crimes if the ICC considers Palestine a state for purposes of jurisdiction).

¹⁹⁵ See Pellet, *supra* note 90, at 993 (asserting that Palestine’s conformance with the Oslo Accords does not mean that Palestine forgoes its right to self-determination of state status); see also Worster, *supra* note 20, at 1203 (noting

application, which contradicts the obligations undertaken under Oslo, signals that those who question the continuing validity of Oslo¹⁹⁶ are likely correct. Once again, however, it is not the outcome of the vote that is of importance; rather the crucial act occurred when Palestine submitted its application to the Secretary General.¹⁹⁷

CONCLUSION

The International Criminal Court cannot assert jurisdiction over alleged war crimes in Palestine since Palestine is not a state and Article 12(3) of the Rome Statute requires statehood before an international entity can recognize ICC jurisdiction. Article 12(3) employs the ordinary meaning of “state” which requires statehood under traditional concepts of international law. Even if it employed a functional definition of “state” a proper application of the functional approach excludes the possibility of Palestinian statehood. The fact that the General Assembly recognized Palestine as a non-state entity does not change Palestine’s non-state status, and it does not allow the ICC to extend jurisdiction under Palestine’s attempted 12(3) declaration.

that through self-recognition Palestine has the power to accede to treaties and ICC jurisdiction irrespective of the Oslo Accords).

¹⁹⁶ See Louis René Beres, *Why the Oslo Accords Should be Abrogated by Israel*, 12 AM. U. J. INT'L L. & POL'Y 267, 267 (providing one example of the view that the Oslo Accords should be abrogated); see also Shany, *supra* note 98, at 342 (noting that there is some doubt as to whether Oslo still has binding force).

¹⁹⁷ See Hume & Fantz, *supra* note 8 (explaining that Palestine’s application to the United Nation is of significant importance); see also Isabel Kershner, *Palestinians Try to Rally Support*, N.Y. TIMES, Nov. 9, 2012, at A6, available at <http://www.nytimes.com/2012/11/10/world/middleeast/palestinians-renew-push-for-enhanced-un-status.html> (expressing that Palestine’s application to the U.N. was of noteworthy importance to its recognition as a state).