

Palestinian Statehood and collective recognition by the United Nations

I Introduction

1. This briefing paper deals with questions of Palestinian Statehood and whether the recognition of a Palestinian State by other States is in accordance with international law. In September 2011 President Abbas, Chairman of the Palestinian Liberation Organisation and President of the Palestinian Authority¹ is expected to ask the United Nations' General Assembly (UNGA) to recognise Palestine as a State during its regular 65th session. This briefing paper examines the international legal aspects of the recognition of new States; the requirements an entity must fulfil in order to acquire Statehood; whether Palestine meets these criteria; the procedures that concern collective recognition by the UNGA; and those that govern the admission of a new member State to the United Nations.
2. This briefing paper concludes that the recognition of Palestinian as a State is in accordance with international law. The principal considerations which support this conclusion are:
 - a) the Palestinian people is entitled to self-determination and to Statehood in part of historic Palestine. The territory of the Palestinian State is the territory occupied by Israel in 1967, namely the West Bank, including East Jerusalem, and the Gaza Strip;
 - b) although the borders of the putative Palestinian State have not been formally delineated, and a relatively small territory currently falls under the control of the Palestinian Authority, as an entity, Palestine fulfills the legal criteria required for Statehood;
 - c) the recognition of a Palestinian State is consistent with UN Security Council (UNSC) resolutions, and with peremptory norms of international law which every State has a duty to promote and protect, namely, the right to self-determination, and the inadmissibility of the acquisition of territory through the use of armed force;
 - d) recognition would also be in accordance with the vision of a two-State solution to the Israeli-Palestinian conflict, which is shared by the international community and by the Parties themselves;
 - e) recognition should not be considered as a unilateral Palestinian act aimed at changing the status of the occupied Palestinian territories, as the legally significant act (inasmuch

¹ On 16 July 2011, a PLO official stated that President Abbas would formally submit the request, and not the Arab League as earlier media reports had suggested, see "Erekat: Abbas will submit UN bid", Ma'an News Agency, 17 July 2011 (updated), <<http://it.maannews.net/eng/ViewDetails.aspx?ID=405624>>.

as it entails legal consequences) is rather the unilateral decision by each member State of the UNGA to vote to recognise, or not, Palestine as a State. Further, Israel currently refuses to resume talks based on the 1967 borders, and continues to expand its unlawful settlement activity in the West Bank and East Jerusalem in a manner that hinders the realisation of a two-State solution by creating a *fait accompli* of “facts on the ground”. As Israel is thus in breach of its undertakings under the instruments which govern the Middle East Peace Process, it cannot complain of any perceived Palestinian departure from the terms of these instruments; and

f) admission of Palestine as a member State of the United Nations is currently unlikely due to the probable veto of a resolution recommending admission by one or more Permanent Members of the UNSC. The collective recognition of Palestine as a State by the member States of the UNGA must not to be confused with its admission to full membership of the United Nations.

II Recognition and international law

3. “Recognition” is a generic term in international law which refers to a unilateral and discretionary act by a State that takes cognisance of a given situation or claim. The legal consequence of an act of recognition is that the recognising State cannot subsequently deny or act to the prejudice of the situation thus established or any attendant legal consequences. In technical terms, by virtue of its act of recognition, the situation becomes opposable to the recognising State. In a recent study by the International Law Commission,² recognition was defined as:

A unilateral expression of will formulated by one or more States, individually or collectively, acknowledging the existence of a *de facto* or *de jure* situation or the legality of a legal claim, with the intention of producing specific legal effects, and in particular accepting its opposability as from that time or from the time indicated in the declaration itself.³

4. Recognition is not confined to the acknowledgement of the emergence of a new State or of an unconstitutional change of government within an existing State. Other situations or legal claims may be recognised, such as:

² The International Law Commission was created by the UNGA in 1947 to undertake the progressive development and codification of international law. It comprises thirty-four members who possess “recognised competence in international law” and who act in a personal capacity rather than as representatives of States. The reports and drafts produced by the International Law Commission are generally seen as possessing authority. See M Wood, “Statute of the International Law Commission” (United Nations Audiovisual Library of International Law, 2009), <http://untreaty.un.org/cod/avl/pdf/ha/silc/silc_e.pdf>.

³ International Law Commission, *Sixth report on unilateral acts of States* (V Rodriguez Cedeno, Special Rapporteur), A/CN.4/534 (30 May 2003), 17, para.67.

- the delineation or consolidation of boundaries between States: for example, the 1975 Helsinki Final Act,⁴ which was signed by most European States (all but Albania), the United States and Canada, may be seen as a collective recognition of then-existing boundaries in Europe as Principle III of the Act's *Declaration on principles guiding relations between participating States* provided:

The participating States regard as inviolable all one another's frontiers as well as the frontiers of all States in Europe and therefore they will refrain now and in the future from assaulting these frontiers.

Accordingly, they will also refrain from any demand for, or act of, seizure and usurpation of part or all of the territory of any participating State;

- another State's claim to territory: one of the most notorious unilateral recognitions of a territorial claim is the 1919 Ihlen Declaration, by which the Norwegian foreign minister, Ihlen, recognised Danish sovereignty over Greenland. This declaration formed the decisive basis of a judgment by the Permanent Court of International Justice in favour of Denmark in a case which it brought against Norway regarding title to territory in eastern Greenland;⁵ or
 - the belligerency of non-State forces engaged in an armed conflict with a State.⁶
5. Recognition is generally seen to be a declaratory act: in other words, it merely records or acknowledges an existing state of affairs rather than create that situation.⁷ As the Badinter Commission⁸ observed:

while recognition of a State by other States has only declarative value, such recognition, along with membership of international organisations, bears witness to these States' conviction that the political entity so recognised is a reality and confers on it certain rights and obligations under international law.⁹

⁴ Reproduced: <<http://www.hri.org/docs/Helsinki75.htm>>; 14 International Legal Materials 1293 (1975) It must be acknowledged that the Helsinki Final Act is, formally, not a legally binding instrument, but this does not detract from its significance in consolidating the frontiers existing in Europe at that time -- see, eg, RW Piotrowicz and SKN Blay, *The unification of Germany in international and domestic law* (Rodopi: Amsterdam: 1997) 59-61.

⁵ See *Case concerning Eastern Greenland* (Denmark v Norway), PCIJ Ser.A/B, No.53 (1933).

⁶ For an account of the traditional law, see H Lauterpacht, *Recognition in international law* (Cambridge UP: Cambridge: 1947) Part III.

⁷ See, eg, International Law Commission, *Sixth report on unilateral acts of States* (V Rodriguez Cedenno, Special Rapporteur), A/CN.4/534 (30 May 2003), 20-22, paras.82-91.

⁸ In August 1991, the EC Council of Ministers convened a peace conference on Yugoslavia and established an arbitration committee, chaired by Robert Badinter, President of France's Constitutional Court, to provide legal advice: for an overview of the work of the Commission, see A Pellet, *The opinions of the Badinter Arbitration Committee: a second breath for the self-determination of peoples*, 3 European Journal of International Law 178 (1992).

⁹ EC Conference on Yugoslavia, Badinter Arbitration Commission, Opinion No.8 (4 July 1992), 92 International

6. Recognition is a discretionary act of a State: it is under no duty to accord recognition to a new State, an unconstitutional change of government, non-State insurgent forces, or another State's legal claim. As the Badinter Commission further commented:

while recognition is not a prerequisite for the foundation of a State and is purely declaratory in its impact, it is nonetheless a discretionary act that other States may perform when they choose and in a manner of their own choosing, subject only to compliance with the imperatives of general international law.¹⁰
7. Warbrick notes that the discretionary aspect of recognition arises from its nature as a unilateral act and "in making its decision, the State may take into account purely political considerations, [but] this does not mean that its discretionary power is unfettered: a State may not use any discretionary power contrary to the rights of other States".¹¹ Further, as the recognising State may determine the method by which it confers recognition, this may be done implicitly (and thus be inferred from its behaviour) as well as by express act. In particular, and this is important in relation to the recognition of Palestine as a State, it is generally accepted that should a State enter into full diplomatic relations with an entity, then this constitutes implicit recognition of the Statehood of that entity—"The formal appointment or reception of diplomatic representatives is properly regarded both as a mode of and as an irrebuttable presumption of recognition. Persons clearly and solemnly endowed with diplomatic character represent the State in all its aspects".¹²
8. The act of recognition has legal consequences for the recognising State which arise independently of any acceptance of that act by the addressee.¹³ Many of the legal consequences of recognition, particularly the recognition of States or governments, take effect on the domestic legal level—for example, entitlement of the recognised entity to State immunity, or of members of its government to head of State or ministerial immunity, before national courts. On the international plane, by the act of recognition the recognising State indicates that relationships between it and the entity thus recognised as a State are governed by international law on a State to State basis but, more generally, "the State recognising a situation or condition may not lawfully resile from the position that it has taken unless the facts with regard to which it acted have changed".¹⁴ This is the core

Law Reports 199, para.2.

¹⁰ EC Conference on Yugoslavia, Badinter Arbitration Commission, Opinion No.10 (4 July 1992), 92 International Law Reports 206, para.4: see also International Law Commission, *Sixth report on unilateral acts of States* (V Rodriguez Cedeno, Special Rapporteur), A/CN.4/534 (30 May 2003), 11, paras.39-40.

¹¹ C Warbrick, "States and recognition in international law", in M Evans (Ed), *International law* (Oxford UP: Oxford: 2006, 2nd edn) 217 at 250.

¹² H Lauterpacht, *Recognition in international law* (Cambridge UP: Cambridge: 1947) 381, see 381-383: see also International Law Commission, *Sixth report on unilateral acts of States* (V Rodriguez Cedeno, Special Rapporteur), A/CN.4/534 (30 May 2003), 8, para.28.

¹³ International Law Commission, *Sixth report on unilateral acts of States* (V Rodriguez Cedeno, Special Rapporteur), A/CN.4/534 (30 May 2003), 16, para.62: see also 22-25, paras.93-108.

¹⁴ Warbrick, *States and recognition in international law*, 250.

of the notion of opposability: the recognising State cannot deny the legitimacy and legal consequences arising from the situation or claim which it has thus acknowledged.

9. To summarise, the act of recognition has three constituent elements, namely:
formal unilaterality, acknowledgement of an existing situation and the intention of the author to produce specific legal effects by recognising its opposability.¹⁵

III The Palestinian people's right to self-determination: its implications for Statehood

10. Before considering the legal requirements for Statehood in international law, it must be considered if, as a matter of law, "Palestine"—namely, some territorially organised political entity of the Palestinian people—is entitled to Statehood. If not, the question of recognition would be of no moment, as there would be nothing legally entitled to recognition as a State.
11. In 2004, in the *Legal consequences of the construction of a wall* advisory opinion, the International Court of Justice ruled that "the existence of a 'Palestinian people' is no longer in issue" and affirmed its right to self-determination.¹⁶ The Court also emphasized the need to achieve as soon as possible, and on the basis of international law, a negotiated solution to the Israeli-Palestinian conflict and "the establishment of a Palestinian State, existing side by side with Israel and its other neighbours, with peace and security for all in the region".¹⁷
12. This ruling did not break new ground. In 1970 the UNGA expressly declared that the Palestinian people was entitled to self-determination in accordance with the provisions of the UN Charter.¹⁸ In 1974 the UNGA recognised the Palestinian Liberation Organisation (PLO) as the representative of the Palestinian people and subsequently granted the PLO observer status in the UN.¹⁹ In December 1988, following the Algiers Declaration of Independence by the PLO, the UNGA "acknowledged" this proclamation of the State of Palestine; decided that the designation "Palestine" should be used in the UN system in place of the "PLO"; and affirmed "the need to enable the Palestinian people to exercise their sovereignty over their territory occupied [by Israel] since 1967".²⁰ In December

¹⁵ International Law Commission, *Sixth report on unilateral acts of States* (V Rodriguez Cedeno, Special Rapporteur), A/CN.4/534 (30 May 2003), 13, para.49.

¹⁶ *Legal consequences of the construction of a wall in the occupied Palestinian territory* advisory opinion, ICJ Rep 2004, 136, para 118.

¹⁷ *Legal consequences of the construction of a wall* advisory opinion, ICJ Rep, 2004, 201, para 162.

¹⁸ General Assembly resolution 2672(XXV) C [1970]. General Assembly resolution 2535 B [1969] already affirmed "the inalienable rights of the people of Palestine".

¹⁹ General Assembly resolution 3210 (XXIX) [1974]; 3236 (XXIX) [1974].

²⁰ General Assembly resolution 43/177 [1988].

2003, the UNGA further urged “all States and the specialized agencies and organisations of the United Nations system to continue to support and assist the Palestinian people in the early realisation of their right to self-determination”.²¹

13. The International Court of Justice has declared that self-determination is “one of the essential principles of contemporary international law”.²² In the *Legal consequences of the construction of a wall* advisory opinion,²³ the International Court affirmed that self-determination is a right *erga omnes*, whose realisation all UN member States, as well as all States parties to the UN International Covenants on Human Rights, have the duty to promote. Further, the International Law Commission has concluded that the right to self-determination has *ius cogens* status and is thus peremptory—in other words, States cannot derogate from its exigencies in their international relations.²⁴
14. Like many legal concepts, the right to self-determination designates a core content and an associated, yet integral, bundle of rights and duties. The core content is clear: it entitles peoples to “determine their political status and freely pursue their economic, social and cultural development”.²⁵ The exercise of this right may result in a range of political outcomes, as enumerated in the General Assembly’s *Declaration on principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations* (1970)²⁶:

The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.

²¹ General Assembly resolution 58/163 [2003].

²² *East Timor* case (Portugal v. Australia), ICJ Rep, 1995, 90 at 102, para. 29.

²³ *Legal consequences of the construction of a wall* advisory opinion, ICJ Rep, 2004, 171-172, para.88; see also 199, paras. 155-156.

²⁴ International Law Commission, *Report of the work of its 53rd session*, UN Doc.A/56/10, *Commentary to Article 40 of its 2001 Articles on Responsibility of States for Internationally Wrongful Acts*, *ibid* 282 at 284, para. 5, available at: <http://www.un.org/law/ilc/reports/2001/english/chp4.pdf>.; and also J Crawford, *The International Law Commission’s Articles on State responsibility: introduction, text and commentaries* (Cambridge: Cambridge University Press, 2002), pp. 246-247.

²⁵ This formulation was employed in operative paragraph 2 of General Assembly resolution 1514 (XV) (15 December 1960), the *Declaration on the granting of independence to colonial countries and peoples*, which consolidated the references to self-determination contained in Articles 1(2) and 55 of the United Nations Charter. For an overview of this principle, and its development, see K. Doehring, *Self-determination*, in B. Simma (ed.), *The Charter of the United Nations: a commentary* (Oxford: Oxford UP, 2002, 2nd Ed.), p. 47 *et seq.*

²⁶ This Declaration, contained in General Assembly resolution 2625 (XXV), 24 October 1970, is recognised as an authoritative interpretation of the fundamental legal principles contained in the UN Charter. In the *Nicaragua* case, the International Court ruled that resolution 2625 expressed rules of customary international law – see *Military and paramilitary activities in and against Nicaragua case: merits judgment (Nicaragua v. United States)*, ICJ Rep, 1986, 14 at 99-100, para. 188, see also *Wall Advisory Opinion*, ICJ Rep, 2004, 171, para. 87.

15. The classic formulation of the right to self-determination reflects these possible outcomes by emphasising *process*: that is, the right of a people to determine freely its political status. Drew has pointed out that, to have meaning, this process must also have *substance*:

the right to a process does not exhaust the content of the right of self-determination under international law. To confer on a people the right of “free choice” in the absence of more substantive entitlements—to territory, natural resources, etc—would simply be meaningless. Clearly, the right of self-determination cannot be exercised in a substantive vacuum. This is both explicit and implicit in the law. For example, implicit in any recognition of a people’s right to self-determination is recognition of the legitimacy of that people’s claim to a particular territory and/or set of resources.²⁷
16. The most important substantive question is the identification of the territory over which the right to self-determination may be exercised. As Drew underlines:

Despite its text book characterisation as part of human rights law, the law of self-determination has always been bound up more with notions of sovereignty and title to territory than what we traditionally consider to be “human rights”.²⁸
17. The Palestinian people’s right to self-determination is to be fulfilled in part of the territory that constitutes “historic Palestine”. While the term “historic Palestine” refers to the territory of the former British Mandate, from the Jordan River in the east to the Mediterranean Sea in the west (and thus excluding the territory historically known as Transjordan),²⁹ the term “Palestine” refers to a Palestinian State whose exact borders with Israel are not yet formally delineated. This uncertainty thus affects both.
18. The British Mandate for Palestine was created pursuant to Article 22 of the Covenant of the League of Nations as a “sacred trust”; aimed at the well-being and development of the local inhabitants of the territory. In the *Namibia* advisory opinion, the International Court of Justice affirmed that “the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned”.³⁰
19. Article 22.4 of the League Covenant expressly recognised that “certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognised”: in accordance with this provision, Britain was entrusted with a Class A Mandate over historic Palestine.³¹ One aim of the British Mandate for Palestine was to “secure the establishment

²⁷ C. Drew, ‘The East Timor story: international law on trial’ (2001) 12 *European Journal of International Law* 651 at 663.

²⁸ Drew, *loc.cit.*

²⁹ See *Legal consequences of the construction of a wall advisory opinion*, ICJ Rep, 2004, 164, para.70.

³⁰ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970)*, advisory opinion, ICJ Rep, 1971, 16, para 53.

³¹ The Mandate for Palestine was a Class A Mandate, which Article 22 of the League of Nations Covenant

of the Jewish national home”, but Britain had an equal responsibility to safeguard “the civil and religious rights of all the inhabitants of Palestine, irrespective of race and religion”, and ensure that “the rights and position of other sections of the population are not prejudiced”.³²

20. In Resolution 181 (II), adopted in November 1947, the UNGA recommended the establishment of two independent States—Arab and Jewish—in historic Palestine and the creation of a special international regime for the City of Jerusalem (the Partition Plan). By endorsing the Partition Plan, the UNGA expressed a vision in which the two ethnic groups would fulfill their political aspirations through the creation of two independent States on the territory of historic Palestine.
21. The establishment of a sovereign and independent State is only one of the modalities by which a people may implement its right to self-determination,³³ but the UNSC has determined that the preferred solution to the Israeli-Palestinian conflict should take the form of two States, Israel and Palestine, living side by side within secure and recognised borders.³⁴ As well as being endorsed by the International Court in the *Legal consequences of the construction of a wall* advisory opinion, this vision has been constantly reiterated by the Quartet on the Middle East (the UN, the US, the EU and Russia).³⁵
22. In 1993 Israel officially recognised the PLO as the representative of the Palestinian people as well as the Palestinian people’s “legitimate and political rights”.³⁶ In the *Legal consequences of the construction of a wall* advisory opinion, the International Court interpreted these “legitimate rights” to include the right to self-determination.³⁷

reserved for territories that had previously formed part of the Ottoman Empire and had “reached a stage of development where their existence as independent nations can be provisionally recognised subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone”.

³² The Mandate for Palestine, 1922, preamble; Arts 2, and 6.

³³ See *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States* in accordance with the Charter of the UN as adopted by the General Assembly resolution 2625 (XXV) [1970].

³⁴ See Security Council resolution 1397 [2002]; 1515 [2003]; 1850 [2008]; 1860 [2009].

³⁵ See especially the Performance-Based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict issued by the Quartet (April 2003) and its June 2007 and September 2009 Statements (“The Quartet reiterates that the only viable solution to the Israeli-Palestinian conflict is an agreement that ends the occupation that began in 1967; resolves all permanent status issues as previously defined by the parties; and fulfils the aspirations of both parties for independent homelands through two States for two peoples, Israel and an independent, contiguous and viable State of Palestine, living side by side in peace and security”).

³⁶ See Israeli-Palestinian Declaration of Principles on Interim Self-Government Arrangements (13 September, 1993), preamble; The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip of 28 September 1995 also refers to the Palestinian people and its “legitimate rights”, see for example in the preamble, paras 4, 7, 8; Article II, para 2; Article III, paras 1 and 3).

³⁷ *Legal consequences of the construction of a wall* advisory opinion, ICJ Rep, 2004, 183, para.118.

Moreover, since 2003 Israel has officially agreed and declared its commitment to the creation of a Palestinian State in the context of a permanent and final settlement of the Israeli-Palestinian conflict.³⁸

23. Thus, it is undeniable that, as a matter of law, the Palestinian people possesses a right to self-determination, and it is envisaged that this right is to be fulfilled by the creation of a sovereign and independent State.
24. Nonetheless, it is important to note that the fact that a people enjoys a right to self-determination—and is thus entitled to become a State—does not mean that a specific political entity that has been formed to represent this people and to fulfill its aspiration for self-determination in a given territory actually qualifies as a State. International law distinguishes between the *right* to self-determination (and thus, in the Palestinian case, the right to Statehood), and the *actual* achievement of Statehood.³⁹

IV The requirements of Statehood in international law

25. The existence, or not, of a State is essentially a matter of fact. The elements of Statehood are “principally matters of fact from which a legal conclusion is drawn”.⁴⁰ The traditional criteria for Statehood are set out in the 1933 Montevideo Convention on the Rights and Duties of States, which enumerates the formal factual criteria for the existence of a State, namely: 1) defined territory; 2) permanent population; 3) government; and 4) the capacity to enter into relations with other States.
26. Over time, these criteria have been subject to interpretation in the practice of States and international organisations, in decisions of courts and tribunals, and in academic commentary. As a result, the fourth criterion, the capacity to enter into relations with other States, has been reformulated as the requirement that the entity possesses independence, namely, that its actions are not subject to the authority of any other State or group of States.⁴¹ Thus, in 1986, in relation to Bophuthatswana, a “homeland” created

³⁸ Israel accepted the Performance-Based Road Map to a Permanent Two-State Solution to the Israel-Palestinian Conflict, issued by the Quartet on 30 April 2003 and endorsed by Security Council resolution 1515 [2003]; see also Israeli-Palestinian Joint Understanding on Negotiations (27 November 2007, Annapolis); Address by Israeli Prime Minister Netanyahu at Bar Ilan University (14 June 2009), where he expressed readiness to recognise a Palestinian state under certain conditions; and Netanyahu’s speech to a Joint Meeting of the U.S. Congress (24 May 2011) where he reiterated his commitment to “a solution of two states for two peoples: a Palestinian state alongside the Jewish state” and added that “they [the Palestinians] should enjoy a national life of dignity living in a free, viable and independent state”.

³⁹ J Crawford, *The creation of States in international law* (Oxford UP: Oxford:2006, 2nd edn) 446.

⁴⁰ C Warbrick, *States and recognition in international law*, 231.

⁴¹ See Crawford, *Creation of States*, 61-89; I Brownlie, *Principles of public international law* (OUP: Oxford: 2003, 6th edn) 71-72; Warbrick, *States and recognition*, 239-240. For detailed commentary on the Montevideo Convention criteria, see TD Grant, *Defining Statehood: the Montevideo Convention and its discontents*, 37 Columbia Journal of Transnational Law 403 (1998-1999).

by the South African government in furtherance of its apartheid policy, the United Kingdom government observed:

The normal criteria which the Government apply for recognition as a State are that it should have, and seem likely to continue to have, a clearly defined territory with a population, a Government who are able of themselves to exercise effective control of that territory and independence in their external relations.⁴²

The rationale for this reformulation, and substitution of the criterion of independence for the capacity to enter into relations with States, is that the latter is now seen as a consequence of rather than a criterion for Statehood and, as Crawford notes:

Capacity to enter into relations with States at the international level is no longer, if it ever was, an exclusive State prerogative⁴³...[although it] might still be said that *capacity* to enter into the full range of international relations is a useful criterion, since such capacity is independent of its recognition by other States and of its exercise by the entity concerned.⁴⁴

27. A State does not require to be recognised by other States in order to exist. Since Statehood is a matter of fact, an entity that fulfills the requisite criteria is a State notwithstanding its recognition by others. The recognition of a new State is only declaratory, as it simply acknowledges existing facts.⁴⁵ As Crawford puts it, “an entity is not a State because it is recognised; it is recognised because it is a State”.⁴⁶ Moreover, as the act of recognition is a political and discretionary act, it does not bind other States that refuse to recognise the new State.⁴⁷ For instance, Israel is not recognised by many Arab and Muslim States but there is no doubt that it exists as a State in international law.⁴⁸
28. However two important comments are in order. *First*, in practice a non-recognising State cannot ignore the Statehood of the new State and their mutual relationships are subject to

⁴² Hansard, HC, vol. 102, Written Answers, col. 977: 23 October 1986; UK Materials on International Law 1986, 57 British Year Book of International Law 507 (1986).

⁴³ For example, inter-governmental organisations may enter into treaty relations with States to regulate, eg, the privileges and immunities to be accorded to headquarters buildings and staff members, as well as matters within the competence of the organisation as this is defined in its constitutive instrument.

⁴⁴ Crawford, *Creation of States*, 61.

⁴⁵ See Institut de droit international, *La reconnaissance des nouveaux Etats et des nouveaux gouvernements* (Brussels Session, 1936) Article 1; J Kunz, *Critical Remarks on Lauterpacht's 'Recognition in International Law'*, 44 American Journal of International Law 713 (1950); JD van der Vyver, *Statehood in international law*, 5 Emory International Law Review 9 (1991) 12.

⁴⁶ Crawford, *Creation of States*, 28, 93; see also Kunz, *Critical remarks*, 718---“ a sovereign state cannot be created through recognition by other states; one of the very requirements of international law is independence. No amount of recognitions can supply the lack of the fulfilment of the requirements laid down by international law”.

⁴⁷ Kunz, *Critical remarks*, 719.

⁴⁸ See J Dugard, *Recognition and the United Nations* (Grotius: Cambridge: 1987) 62-63.

international law rules which are based on the *existence* of their respective Statehoods. For instance, the non-recognising State cannot violate the territorial integrity of the new State, interfere in its internal affairs, or completely ignore its membership in international organisations.⁴⁹

29. *Second*, despite the declaratory nature of recognition, in cases that are somewhat ambiguous, recognition by a substantial majority of States is strong evidence that a given entity actually is a State.⁵⁰ In some circumstances, often for political reasons, the international community has adopted a more flexible approach to the Montevideo criteria and recognised new States when this might be seen as premature as it is uncertain whether the political entity actually meets the formal criteria of Statehood. Indeed, in these cases, the recognition has a constitutive element as it may be argued that Statehood was dependent on recognition by other States.
30. This flexibility has been a function of the emergence and consolidation of the right to self-determination, which has had a profound effect on matters of Statehood, particularly since the decolonisation movement of the 1960s and 1970s. During the high tide of decolonisation, especially in Africa, the requirement of, for example, effective government was relaxed in relation to colonies emerging into Statehood. To an extent, this was embedded in decolonisation doctrine itself as General Assembly resolution 1514 (XV) (14 December 1960), the *Declaration on the Granting of Independence to Colonial Countries and Peoples*, provided in operative paragraph 3:

Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.
31. A striking example of this was the recognition of the former Belgian Congo as the Republic of the Congo in 1960 in circumstances where “Anything less like effective government it would be hard to imagine”.⁵¹ Crawford explains this practice on the basis that the requirement of government has two aspects—the actual exercise of authority and the right or title to exercise that authority. Once Belgium had renounced its right to govern the Congo, it had to be presumed that the new entity thus granted independence had the right to do so.
32. Another example is the independence of Guinea-Bissau, which was recognised as an independent State by more than 80 States before colonial (Portuguese) control over the territory had been terminated and before Portugal had recognised its independence. Crawford argues that where the colonial power forcibly denies self-determination, then the principle of self-determination operates in favour of the Statehood of the territory, as long as that the revolutionary government may properly be regarded as representative of the people of the territory.⁵²

⁴⁹ See Crawford, *Creation of States*, 27; Dugard, *Recognition*, 62-63.

⁵⁰ Crawford, *Creation of States*, 27; Van Der Vyver, *Statehood*, 22-23, 25-26.

⁵¹ Crawford, *Creation of State*, 57: see 56-58 generally.

⁵² Crawford, *Creation of States*, 387: see 386-388 generally.

33. Conversely, if a purported State is created in an attempt to prevent the self-determination of a people which is recognised as possessing this right, then that putative State will be regarded as an illegal creation and thus not entitled to recognition as a State, even if it otherwise fulfils the Montevideo criteria. The classic illustration of this was the international community's refusal to regard Rhodesia as a State.⁵³
34. Bearing in mind this general analysis of recognition and the criteria for Statehood, Palestine's claim to be State falls to be examined.

A. Defined Territory

35. Statehood implies exclusive control over some territory, however large or small. The territory does not have to be exactly demarcated by definite frontiers, but there must be some core territory inhabited by its population and over which its government exercises authority.⁵⁴ Accordingly, arguing in support of Israel's application for admission to membership in the UN, the United States representative to the UNSC declared that "[b]oth reason and history demonstrated that the concept of territory did not necessarily include precise delimitation of the boundaries of that territory".⁵⁵
36. As a result of the administrative separation of Palestine and Transjordan in 1922, the territory which forms the basis for the exercise of the Palestinian people's right to self-determination can only lie within the boundaries of the former Mandate Palestine situated west of the River Jordan ("historic Palestine").⁵⁶ The 1947 Partition Plan for Palestine, endorsed by UNGA Resolution 181 (II), granted the Arab-Palestinians inhabitants 43 percent of historic Palestine. The Plan was never implemented and later abandoned by the UNGA.⁵⁷
37. Although the Israeli-Jordanian and the Israeli-Egyptian Armistice Agreements, concluded as a result of the 1948-1949 armed conflict, made clear that the armistice demarcation lines they contained (the "Green Line") did not prejudice future political or territorial settlements or boundary lines between the Parties⁵⁸, in practice the armistice lines—

⁵³ See, eg, Crawford, *Creation of States*, 128-131.

⁵⁴ Crawford, *Creation of States*, 48; *Deutsche Continental Gas-Gesellschaft v Polish State*, 5 International Law Reports 11 (Germano-Polish Mixed Arbitral Tribunal, 1929); *North Sea Continental shelf cases* (Federal Republic of Germany v Denmark, Federal Republic of Germany v the Netherlands), ICJ Rep, 1969, 3, 32, para.46; *In re Dutchy of Sealand*, 80 International Law Reports 683 (Federal Republic of Germany, Administrative Court of Cologne, 1978).

⁵⁵ Report of the Security Council to the General Assembly, A/945/Add.1 (13 December 1949), 87.

⁵⁶ I Scobbie and S Hibbin, *The Israel-Palestine Conflict in International Law: Territorial Issues* (US/MEP: New York: 2009) 12, available at <<http://www.soas.ac.uk/lawpeacemideast/publications/file60534.pdf>>.

⁵⁷ Scobbie & Hibbin, *Territorial issues*, 34-35, and 38.

⁵⁸ Article V.2 of the Egyptian-Israeli Agreement stated that "The Armistice Demarcation Line is not to be construed in any sense as a political or territorial boundary, and is delineated without prejudice to rights, claims and positions of either Party to the Armistice as regards ultimate settlement of the Palestine question."

commonly referred to as Israel's pre-1967 borders—became Israel's functional boundaries.⁵⁹ These borders effectively added to Israeli territory 25 percent of territory that was allocated to the Arab State by the 1947 Partition Plan, and left the Palestinians with about 22 percent of historic Palestine (6 020 square km), comprising the West Bank—the territory situated between the Jordan River and the Green Line, including East Jerusalem (5 655 square km)—and the Gaza Strip (365 square km).⁶⁰

38. During the June 1967 War Israel occupied the West Bank, including East Jerusalem, and the Gaza Strip, but the international community has continuously and persistently refused to recognise these occupied territories as Israeli territory. This is in accordance with the fundamental principle of international law that prohibits the acquisition of territory by the use of force.⁶¹ Accordingly, UNSC resolution 242 (1967), adopted as a consequence of the 1967 war, emphasized the inadmissibility of acquisition of territory by the use of force and called for the "[w]ithdrawal of Israel armed forces from territories occupied in the recent conflict".⁶²
39. It is important to note that UNSC resolutions 242 (1967) and 338 (1973) call upon Israel to withdraw to the 1949 armistice lines, and not to the Partition Plan boundaries, thus indicating that the West Bank, including East Jerusalem, and the Gaza Strip occupied by Israel in 1967, constitute the territory of the Palestinian State. This has been accepted by the international community, including the UNSC⁶³, the ICJ⁶⁴ and the Quartet⁶⁵, and by

Article II.2 of the Jordanian–Israeli Agreement provided that "no provision of this Agreement shall in any way prejudice the rights, claims, and positions of either Party hereto in the peaceful settlement of the Palestine questions, the provisions of this Agreement being dictated exclusively by military considerations," while Article VI.9 stated "The Armistice Demarcation Lines defined in articles V and VI of this Agreement are agreed upon by the Parties without prejudice to future territorial settlements or boundary lines or to claims of either Party relating thereto."

⁵⁹ Crawford, *Creation of States*, 434; Scobbie and Hibbin, *Territorial issues*, 62.

⁶⁰ H Seigman, *Introduction*, in Scobbie and Hibbin, *Territorial issues*, viii; Palestinian Central Bureau of Statistics, *Palestine in Figures 2010* (May 2011) 9.

⁶¹ See *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations* as adopted by General Assembly resolution 2625 (XXV) [1970]. On the customary status of the principle of inadmissibility of acquisition of territory by the threat or use of force, see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* advisory opinion, ICJ Rep 2004, 136, para 87.

⁶² On the interpretation of resolution 242, see, eg, J McHugo, *Resolution 242: a legal appraisal of the right-wing Israeli interpretation of the withdrawal phrase with reference to the conflict between Israel and the Palestinians*, 51 *International and Comparative Law Quarterly* 851 (2002); and Scobbie and Hibbin, *Territorial issues*, 74-81.

⁶³ See for example Security Council resolution 1515 (2003), and Security Council resolution 1860 (2009)—"Stressing that the Gaza Strip constitutes an integral part of the territory occupied in 1967 and will be part of the Palestinian State...".

⁶⁴ *Legal consequences of the construction of a wall in the occupied Palestinian territory* advisory opinion, ICJ Rep 2004, 136, paras 78, 162; For a claim that the *Legal consequences of the construction of a wall* advisory opinion affirmed the Green Line formed the border between Israel and the West Bank, see R Sabel, *The International Court of Justice decision on the separation barrier and the Green Line*, 38 *Israel Law Review* 316 (2005).

the Palestinian themselves, most notably within the 1988 Algiers Declaration of Independence⁶⁶ and in the context of the mutual Israeli-PLO recognition in 1993.⁶⁷

40. While Israel has annexed East Jerusalem and views it as part of its territory, a claim which has not been recognised but rather rejected by the international community,⁶⁸ official statements on the status of the West Bank and Gaza Strip have demonstrated a degree of ambiguity. Israel's Supreme Court, however, has consistently ruled that these are areas under belligerent occupation, and thus not under Israel's sovereignty but merely under its temporary administration as the occupying power. The Supreme Court has also recognised that these areas constitute a single territorial unit.⁶⁹ Further, Israel and the PLO have agreed that negotiations on a permanent settlement of the Israel-Palestinian conflict will lead "to the implementation of Security Council Resolutions 242 and 338", both of which call for the withdrawal of Israel armed forces from territories occupied in the 1967 armed conflict.⁷⁰
41. It should be added that previous bilateral negotiations on a final and permanent agreement referred to a Palestinian State that included most of the West Bank, East Jerusalem, and the Gaza Strip. Israel has accepted the December 2000 Clinton Parameters which envisage that Arab neighbourhoods of East Jerusalem should be under Palestinian sovereignty.⁷¹ It was reported in 2008 that Israeli Prime Minister Olmert

⁶⁵ See for example Quartet Statement of September 2009---"The Quartet reiterates that the only viable solution to the Israeli-Palestinian conflict is an agreement that ends the occupation that began in 1967... The Quartet re-affirms that Arab-Israeli peace and the establishment of a peaceful state of Palestine in the West Bank and Gaza, on this basis, is in the fundamental interests of the parties, of all states in the region, and of the international community".

⁶⁶ See FA. Boyle, *The Algiers Declaration on Palestine*, 1 European Journal of International Law 301 (1990).

⁶⁷ In the 9 September 1993 letter from PLO Chairmen Arafat to Israeli Prime Minister Rabin, the PLO accepted Security Council resolutions 242 and 338, and Article I of the Israeli-Palestinian Declaration of Principles on Interim Self-Government Arrangements (13 September, 1993) declared that the aim of negotiations between the parties was to lead to "a permanent settlement based on Security Council resolutions 242 (1967) and 338 (1973)".

⁶⁸ See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* advisory opinion, ICJ Rep 2004, 136, para 75 and the sources cited there.

⁶⁹ See for example HCJ 2150/07 *Abu Safia v. Minister of Defence* [2009] (Road 443 case) para 14;; HCJ 11120/05 *Hamdan v The Southern Military Commander* [2007] para 14; HCJ 7015/02 *Ajuri v IDF Commander in the West Bank* [2002] para 22; HCJ 606/78 *Ayub v. Minister of Defence* [1979].

⁷⁰ See for example Declaration of Principles on Interim Self-Government Arrangements (September 13, 1993), Article 1; Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (28 September 1995), Preamble; The Sharm el-Sheikh Memorandum on Implementation Timeline of Outstanding Commitments of Agreements Signed and the Resumption of Permanent Status Negotiations (4 September 1999), Article 1(b).

⁷¹ According to the December 2000 Clinton Parameters, Israel will annex the "settlements blocs" leaving 94-96% of the West Bank territory for a Palestinian State. The Palestinians will be compensated by a land swap of 1-3% from Israel's own territory. The Clinton Parameters are available at <<http://www.ipcri.org/files/clinton-parameters.html>>. Both parties eventually have accepted these parameters as the basis for further efforts however expressed some reservations, see President Clinton's press conference at Sharm el-Sheikh, December 28, 2000, available at <http://www.usembassy-israel.org.il/publish/peace/archives/2000/december/me1229a.html>; see also President Clinton's speech on

offered to withdraw from 93 percent of the West Bank, keeping four major settlement blocs in the West Bank, while compensating the Palestinians by giving them Israeli land, equivalent to 5.5 percent of the West Bank, and to transfer eastern neighborhoods of Jerusalem to Palestinian sovereignty. However the parties were unable to reach an agreement.⁷²

42. Accordingly, the territory upon which a Palestinian State should be established constitutes the West Bank, including East Jerusalem, and the Gaza Strip. The 1948-1949 armistice lines delineating the West Bank and Gaza (Israel's pre-1967 borders) are the presumptive international boundaries between Israel and the Palestinian State.

B. Permanent Population

43. There has been little interpretation of the Montevideo requirement that a State possess a permanent population, and no minimum requirement is apparently prescribed by international law.⁷³ Nevertheless, the Administrative Court of Cologne in *In re Duchy of Sealand* observed:

The State, as an amalgamation of many individuals, complements the family, which consists of only a few members, and has the duty to promote community life. This duty does not merely consist of the promotion of a loose association aimed at the furtherance of common hobbies and interests. Rather it must be aimed at the maintenance of an essentially permanent form of communal life in the sense of sharing a common destiny.⁷⁴

44. According to the Palestinian Central Bureau of Statistics, there were 4.1 million Palestinians in the Palestinian Territory at the end of 2010, of whom 2.5 million were in the West Bank and 1.6 million in the Gaza Strip.⁷⁵

Middle East peace at the Israel Policy Forum in New York, January 7 2001 , <<http://usembassy-israel.org.il/publish/peace/archives/2001/january/me0108b.html>>; and statement by Israeli PM Ehud Barak, 31 December 2000, available at <<http://www.mfa.gov.il/MFA/Government/Communiques/2000/PM%20Barak-%20Israel%20has%20proven%20its%20commitment%20to%20peac>>.

⁷² See Al-Jazeera, *The Palestine Papers: Summary of Ehud Olmert's "Package" Offer to Mahmoud Abbas*, August 31, 2008, available at <<http://transparency.aljazeera.net/document/4736>>; C Swisher, *Erekat's solution for the Haram*, Al-Jazeera, 23.1.2011; A Benn, *PA Rejects Olmert's Offer to Withdraw from 93% of West Bank*, Haaretz, 12.8.2008; K Peraino, *Olmert's Lament*, Newsweek, 13.6.2009.

⁷³ Crawford, *Creation of States*, 52.

⁷⁴ *In re Duchy of Sealand* 80 International Law Reports 687.

⁷⁵ Palestinian Central Bureau of Statistics, *Special Statistical Bulletin On the 63rd anniversary of the Palestinian Nakba* (May 2011) 2; see also United Nations Secretariat, *World Population Prospects: The 2010 Revision* (Department of Economic and Social Affairs, Population Division), <http://esa.un.org/unpd/wpp/unpp/panel_population.htm> that estimates the Palestinian population in the Occupied Territory at 4.03 million.

C. Government

45. This criterion requires the existence of a political entity which is able to govern a given territory effectively. One aspect of this requirement is *independence*, namely that the entity exercises governmental control in a specific territorial unit, unimpeded by any special claim to exercise governmental authority, or claim to discretionary authority to intervene in its internal affairs, by another State. Belligerent occupation does not give rise to such a special claim or discretion.⁷⁶
46. The requirement that the entity be independent presents particular concerns in the context of occupation as there is a presumption against the independence of a putative State created during an occupation.⁷⁷ This presumption is, however, directed against the creation of a “puppet” State by an occupying power. In essence, a puppet State is a non-independent entity established as an agent of the occupant:

Such agencies are supposed to commit, for the benefit of the occupying power, all unlawful acts which the latter does not want to commit openly and directly. Such acts may range from mere violations of the occupation regime...to a disguised annexation of the occupied territory...the establishment of puppet governments and puppet States is a means of circumventing the limitations of belligerent occupation.⁷⁸

This presumption is not operative in the instant case. The claim to Statehood for Palestine is not being advanced by Israel, the occupying power, but is currently being opposed by it. The fact that the PA appears intent on doing something that Israel contests moreover is evidence of a desire to assert its autonomy in the conduct of international relations, and is thus evidence of some degree of independence.

47. Although more than 114 States recognised Palestine following the 1988 Palestinian Declaration of Independence, the PLO did not exercise effective control—governmental power—over the West Bank or Gaza at that time. These acts of recognition ignored the requirement of effectiveness, were inconsistent with the facts on the ground, and accordingly were premature.⁷⁹ Conversely, since 1993, when the Palestinian Interim Self-Government Authority was created in the West Bank and Gaza, Israel has transferred to the Palestinian National Authority (PA) certain governmental powers and responsibilities.⁸⁰

⁷⁶ Crawford, *Creation of States*, 71-73; see also Kunz, *Critical remarks*, 715---“It is exactly the positive norm of effectivity of international law which validates the new state or government”.

⁷⁷ See Crawford, *Creation of States*, 74-83; and K Marek, *Identity and continuity of States in public international law* (Droz: Geneva: 1968, 2nd edn) 110-122.

⁷⁸ Marek, *Identity and continuity of States*, 110-111.

⁷⁹ J. Crawford, *The creation of the State of Palestine: too much too soon?*, 1 *European Journal of International Law* 307 (1990).

⁸⁰ Agreement on the Gaza Strip and Jericho Area (4 May 1994); Agreement on Preparatory Transfer of Powers and Responsibilities (29 Aug 1994); Interim Agreement between Israel and the Palestinians (September 28, 1995).

48. It is true that the transfer of control to the PA is partial and limited both in terms of comprehensive governmental powers and in its territorial scope. According to the 1995 Israel-PLO Interim Agreement on the West Bank and the Gaza Strip, in the region designated as Area A and in the Gaza Strip, the PA exercises full civil and security responsibilities. Area A includes the major towns of the West Bank and covers about 18 percent of the West Bank. In Area B (22 percent of the West Bank), the PA possesses only civil responsibilities while responsibility for security remains in the hands of Israel. Area C (60 percent of the West Bank) covers the Jewish settlements, Israeli military bases and their surroundings. Area C is fully controlled by Israel.⁸¹ Since June 2007 the Gaza Strip has been controlled by the Harakat al-Muqāwama al-Islāmiyya (Islamic Resistance Movement, that is, Hamas), but some services are still provided by the PA. For example, the salaries of about 78,000 public sector employees in Gaza are paid by the PA.⁸² The PA also provides other public services to the Gaza population, for instance electricity, health, population registry and the reconstruction and rehabilitation of the Gaza Strip following the Israeli “Cast Lead” military operation.⁸³ Israel retains control of some aspects of government in relation to both Areas A and B and even in Gaza, despite its “disengagement” in 2005. For instance, Israel controls Gaza’s airspace, maritime areas, and border access points.
49. Despite the over-arching structure of Israeli control resulting from the occupation, there is no question that the PA provides services to the Palestinian population in a defined territory, especially in the West Bank, in most aspects of daily life, and that it has an effective and functioning government, its own legislature and a judicial system.
50. In April 2011, the International Monetary Fund stated “that the PA is now able to conduct the sound economic policies expected of a future well-functioning Palestinian State, given its solid track record in reforms and institution-building in the public finance and financial areas”.⁸⁴ A similar observation was made by the World Bank, which noted that despite continued stringent Israeli restrictions on access to resources and markets, the PA has continued to strengthen its institutions, delivering public services and promoting reforms that many existing States struggle to achieve. The World Bank’s report admitted

⁸¹ See the 1995 Interim Agreement, especially arts XI, XIII, XVII; Btselem, *Land Grab: Israel's Settlement Policy in the West Bank* (May 2002) 93, <http://www.btselem.org/sites/default/files/publication/200205_land_grab_eng.pdf>; World Bank, *The Economic Effects of Restricted Access to Land in the West Bank* (October 2008) para 4, <http://www.ochaopt.org/documents/opt_agri_worldbank_eco_%20effects_restricted_access_land_oct_2008.pdf>.

⁸² See HCJ 1169/09 *Legal Forum for Erez-Israel v Prime Minister* [2009]; *Israel Gives Gaza Banks NIS 100M*, Ynet (21 July 2010).

⁸³ See Gisha, *Electricity Shortage in Gaza: Who Turned Out the Lights?* (May 2010), available at <<http://www.gisha.org/UserFiles/File/publications/ElectricitypaperEnglish.pdf>>; *Hamas: Palestinian Authority stopped Gaza medical shipments*, Haaretz (21 January 2011); *Fayyad asks donors to channel Gaza aid through him*, Ynet (26 February 2009); Gisha, *Rafah Crossing: who holds the keys?* (March 2009) 171.

⁸⁴ IMF, *Macroeconomic and fiscal framework for the West Bank and Gaza: seventh review of progress* (April 2011), para 22, <<http://www.imf.org/external/country/WBG/RR/2011/041311.pdf>>.

that significant reforms still lie ahead for the PA, but these were no more than those facing other middle income countries. It concluded that “if the PA maintains its performance in institution-building and delivery of public services, it is well-positioned for the establishment of a State at any point in the near future”.⁸⁵

51. Similarly, an April 2011 UN report, entitled “Palestinian State-building: a decisive period”, concluded that “in the limited territory under its control and within the constraints on the ground imposed by unresolved political issues, the PA has accelerated progress in improving its governmental functions”. In six areas where the UN is most engaged (governance, rule of law and human rights, employment, education and culture, health, social protection, and infrastructure and water), “governmental functions are now sufficient for a functioning government of a State”.⁸⁶
52. The UN report nevertheless pointed out that significant difficulties face the PA. Despite the progress achieved, the persistence of occupation and the continuing Palestinian divide between the West Bank and Gaza deprives the PA of the ability to extend its institutional authority to areas outside its reach and thus of the ability to provide governmental services to people in those areas. The Report cautioned that “the institutional achievements of the Palestinian State building agenda are approaching their limits within the political and physical space currently available”. The space for real progress regarding Area C of the West Bank and East Jerusalem remains very limited, and an additional concern remains due to the lack of a PA presence in Gaza, which results in a disconnect between Gazans and many PA institutions.⁸⁷
53. A recent report by the Quartet Representative also acknowledged that “since 2007 the PA has greatly enhanced its capability to govern and to deliver services. The PA’s achievements have been substantial, as has been recognised by the international community”. However, the Report admitted that this progress does not cover Area C that “remains vital for sustained Palestinian economic development and for Palestinian livelihoods”.⁸⁸ It also observed that East Jerusalem neighbourhoods “exhibit urban and economic decay and are disconnected from their natural economic surroundings in the

⁸⁵ World Bank, *Building the Palestinian State: sustaining growth, institutions, and service delivery*, Economic monitoring Report to the Ad Hoc Liaison Committee (April 2011), 5, 24, 30, <<http://siteresources.worldbank.org/INTWESTBANKGAZA/Resources/AHLCReportApril2011.pdf>>.

⁸⁶ Office Of The United Nations Special Coordinator For The Middle East Peace Process, *Palestinian State-building: a decisive period* (April 2011) iii-iv, <http://www.unsco.org/Documents/Special/UNs%20Report%20to%20the%20AHLC%2013_April_2011.pdf>.

⁸⁷ Office Of The United Nations Special Coordinator For The Middle East Peace Process, *Palestinian State-building: a decisive period* (April 2011) iii-iv, <http://www.unsco.org/Documents/Special/UNs%20Report%20to%20the%20AHLC%2013_April_2011.pdf>.

⁸⁸ Office Of The Quartet Representative, Report for the meeting of the ad hoc Liaison Committee on OQR, *Action in support of Palestinian Authority State-building* (April 2011) 4, 10, <http://blair.3cdn.net/fc1b9c12114abb4bc6_z3m6becz7.pdf>.

West Bank”.⁸⁹

54. As noted earlier, contemporary international law shows a more flexible approach to the effectiveness expected from the government of a new State given the primordial importance accorded to the realisation of the right to self-determination.⁹⁰ Crawford indeed asserts that “the requirement of “government” is less stringent than has been thought, at least in particular contexts”.⁹¹
55. To conclude, it is clear that there is an effective Palestinian government in Areas A and B of the West Bank. The Hamas government in Gaza delivers services to the local population, but it remains largely unrecognised by the international community. Nevertheless, some services in Gaza are still provided by, or in cooperation with, the PA. The role and control of the PA in Gaza may be extended in the near future in light of the conciliation agreement recently signed in Cairo between Palestinian factions which might lead to a national unity government that will control both the West Bank and Gaza.⁹²
56. It is conceded that the application of the effective government criterion of Statehood in the Palestinian context raises some difficulty due to the continuous Israeli occupation and the division of the exercise of governmental authority in the West Bank and Gaza. Nonetheless, as an effective Palestinian government exists in Areas A and B of the West Bank and in Gaza, together with the lack of Israeli control in these areas, it must be concluded that the government criterion is met in *some* of Palestine's defined territory. Despite this difficulty, recognition of a Palestinian State would be lawful given the status of self-determination as “one of the essential principles of contemporary international law”⁹³ which, moreover, all States have the duty to promote.

D. Relations with Other States

57. While the capacity to enter into relations with other States is no longer seen as a key criterion of Statehood, as Crawford notes “the *capacity* to enter into the full range of international relations is a useful criterion, since such capacity is independent of its

⁸⁹ Office Of The Quartet Representative, Report for the meeting of the ad hoc Liaison Committee On OQR, *Action in support of Palestinian Authority State-building* (April 2011) 11, <http://blair.3cdn.net/fc1b9c12114abb4bc6_z3m6becz7.pdf>.

⁹⁰ Warbrick, *States and recognition in international law*, 233-235, and at 247—“The incorporation of a law of external self-determination into international law... has diluted the requirement of effectiveness of government necessary to comply with the established criterion in cases where the demands of self-determination have been met”.

⁹¹ Crawford, *Creation of States*, 57.

⁹² See *Hamas and Fatah agree to form a caretaker government* (27 April 2011), <<http://www.guardian.co.uk/world/2011/apr/27/hamas-fatah-agree-government-deal>>.

⁹³ *East Timor case (Portugal v. Australia)*, ICJ Rep, 1995, 90 at 102, para. 29.

recognition by other States and of its exercise by the entity concerned".⁹⁴

58. The PA possesses the capacity to enter into relations with other States and international organisations, although this is often exercised through the PLO. The overwhelming majority of States formally recognise the PLO as the representative of the Palestinian people and maintain bilateral relations with it, sometimes to the level of full diplomatic relations.⁹⁵ The PLO (or the PA) maintains permanent representative offices in more than 70 States.⁹⁶ More than 114 States recognised Palestine following its 1988 Declaration of Independence,⁹⁷ and 105 States now formally recognise Palestine "at the diplomatic level".⁹⁸ Palestine has observer status in international organisations, such as UNESCO and the World Health Organisation, and full membership in the Movement of Non-Aligned Countries, the Islamic Conference, the Group of 77 and China, and the League of Arab States.⁹⁹
59. In 1974, the PLO was granted observer status in the UN and was invited to participate in all sessions and the work of all international conferences convened under the auspices of the UN.¹⁰⁰ The PLO has been granted a unique position in the UN with more extensive rights of participation than other entities participating in an observer capacity.¹⁰¹ Since 1988 the Palestinian representation in the UN has been referred to as "Palestine".¹⁰² Additional rights and privileges of participation were granted to Palestine by the UNGA in 1998.¹⁰³ Palestine is invited to participate in UNSC debates on the situation in the Middle East. This is similar to the invitation accorded to member States, which are not members of the UNSC, to participate in debates when the UNSC considers that the interests of that member are specially affected by a matter on its agenda.¹⁰⁴
60. In recent months, several States have upgraded their diplomatic relations with the PA. For

⁹⁴ Crawford, *Creation of States*, 61.

⁹⁵ *Status of the Palestine Liberation Organisation in the UN*, UN Juridical Yearbook 156 (1982) 159.

⁹⁶ Palestinian National Authority, Ministry of Foreign Affairs website, <http://www.mofa.pna.ps/ar/index.php?p=foreign_relations>.

⁹⁷ Boyle, *Algiers Declaration*, 302.

⁹⁸ J Quigley, *US should recognise Palestine*, Maan, 26 December 2010.

⁹⁹ *Status of the Palestine Liberation Organisation in the UN*, UN Juridical Yearbook 156 (1982) 158; Permanent Observer of Palestine to the UN, Status of Palestine at the United Nations, <<http://www.un.int/wcm/content/site/palestine/pid/11550>>.

¹⁰⁰ General Assembly resolution 3237 (XXIX) [1974].

¹⁰¹ *Status of the Palestine Liberation Organisation in the UN*, UN Juridical Yearbook 156 (1982) 157.

¹⁰² General Assembly resolution 43/177 [1988].

¹⁰³ These rights and privileges include, for instance, the right to raise points of order and the right to co-sponsor draft resolutions on Palestinian and Middle East issues, although resolutions and decisions can only be put to a vote at the request of a Member State, see General Assembly resolution 52/250 [1998].

¹⁰⁴ *Status of the Palestine Liberation Organisation in the UN*, UN Juridical Yearbook 156 (1982) 158.: see also United Nations Charter, Article 32.

example Chile, Brazil, India, Ireland and Italy have upgraded Palestinian diplomatic representations to embassy status.¹⁰⁵ It may be recalled that the creation of full diplomatic relations amounts to an implied recognition of Statehood. The USA and some European countries, including the UK, France, Spain and Norway, have announced a symbolic upgrade of diplomatic relations with the PA although these do not amount to full embassy status.¹⁰⁶

61. Professor Shaw disputes that this criterion for Statehood is fulfilled. He focuses on the formalistic distinction between the PLO, as the signatory to the relevant agreements with Israel that established the PA, and the PA itself. According to the 1995 Interim-Agreement, the PA does not have powers in the sphere of foreign relations, including the establishment abroad of foreign missions or their establishment in the West Bank or the Gaza Strip, and the exercise of diplomatic functions.¹⁰⁷ However, the PLO may conduct negotiations and sign agreements with states or international organisations for the benefit of the PA, mainly economic, cultural, scientific and educational agreements.¹⁰⁸
62. In practice, there is no strict distinction between the PLO and PA. Due to the fruitless and prolonged negotiations, during the course of which the Parties have been unable to reach an agreement on the permanent status issues, the PA, which was originally envisaged by the Parties to have only a transitional character, has become largely accepted as the representative government of the Palestinian people and of Palestine. Other States or international organisations refer to the PA, the PLO, or simply to Palestine interchangeably while interacting with the Palestinian government.¹⁰⁹ As a factual matter, and in light of the extensive relations already conducted with other States, it is

¹⁰⁵ *President lays cornerstone of Palestine Embassy in India*, Wafa, 7 October 2008; *Brazil hosts first Palestinian 'embassy' in Americas*, Haaretz, 31 December 2010; *Ireland upgrades Palestinian diplomatic status*, Maan, 25 January 2011; *President of Chile arrives in Ramallah for official visit*, Wafa, 5 March 2011; *Italy to upgrade Palestinian delegation to full diplomatic mission*, Haaretz, 16 May 2011.

¹⁰⁶ *PLO missions upgraded in France, US*, Maan, 23 July 2010; *Norway upgrades Palestinian mission*, Ynet, 17 December 2010; *Palestinian flag in Washington ruffles feathers*, The Jerusalem Post, 19 January 2011; *Palestinian diplomatic status in the UK upgraded*, The Guardian, 7 March 2011; *Italy upgrades Palestine's diplomatic status*, Maan, 16 May 2011.

¹⁰⁷ M, Shaw, *Supplementary opinion in the matter of the jurisdiction of the International Criminal Court with regard to the Declaration of the Palestinian Authority* (October 2010), available at <<http://www.icc-cpi.int/NR/rdonlyres/D3C77FA6-9DEE-45B1-ACC0-B41706BB41E5/282851/OTP2010000035449SupplementaryOpinionMalcolmShaw.pdf>>, paras 52-58.

¹⁰⁸ Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (1995) Article IX, sec 5.

¹⁰⁹ See for example, Government of Canada, *Canada-West Bank/Gaza Strip relations* (March 2011), <http://www.canadainternational.gc.ca/west_bank_gaza-cisjordanie_bande_de_gaza/bilateral_relations_bilaterales/canada-wbg-cg.aspx?lang=eng>; Interim Free Trade Agreement Between the Republic of Turkey and The PLO for the benefit of the Palestinian Authority (12 February 2004), <<http://www.met.gov.ps/MneModules/agreements/Atur-pal.pdf>>; *Palestinian and French Ministers of Justice Sign Cooperation Agreement*, MAAN (20 September 2008); *Germany, Palestinian Authority Sign Education Support Agreement*, WAFA (9 February 2011); *Palestine Signs Joint Statement with Uruguay*, WAFA (30 March 2011); but see *Palestine and China Sign Aid Agreement Worth \$5.5M*, WAFA (1 March 2011); *Japan Supports Jericho Wastewater Treatment System*, WAFA (1 March 2011); *European Union Opens Up its Market to Palestinian Exports*, WAFA (14 April 2011).

clear the PA has the capacity to enter into relations with other States on its own behalf or through the PLO acting on its behalf.

V Statehood as a Unilateral Act?

63. Israel and the Palestinians have agreed that the questions of borders and Jerusalem are among the issues that will be determined within the permanent status negotiations.¹¹⁰ Moreover, the Parties agreed to refrain from unilateral acts that will change the status of the West Bank and the Gaza Strip or prejudice the outcome of the permanent status negotiations.¹¹¹ The international community has also demanded that the Parties avoid unilateral actions which may prejudice final status issues, and in this regard has consistently called upon Israel to freeze all settlement activity.¹¹² Thus doubts have been expressed whether Palestinian Statehood is legally possible while the negotiations with Israel continue, in light of this explicit agreement precluding unilateral acts which change the status of the territory or which might speak to permanent status issues.¹¹³
64. These considerations are not, however, determinant. *First*, the unilateral act would presumably be a Palestinian initiative to ask member States of the UNGA to recognise Palestinian Statehood. According to the generally accepted declaratory doctrine, the existence or non-existence of a Palestinian State is a matter of fact which is not dependent on recognition, but rather on the question whether it fulfills the criteria for Statehood. Thus the mere act of recognition cannot change the status of the West Bank and the Gaza Strip.
65. *Second*, the recognition of Palestine as a State may in any event be undertaken *sua sponte* by States that are not bound by the bilateral agreements between the Parties, nor are the

¹¹⁰ See for example, Israeli-Palestinian Declaration of Principles on Interim Self-Government Arrangements (13 September 1993) Article V.3.

¹¹¹ See Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (1995) Article XXXI.7; Wye River Memorandum (1998) Article V; Sharm el-Sheikh Memorandum on Implementation Timeline of Outstanding Commitments of Agreements Signed and the Resumption of Permanent Status Negotiations (4 September 1999) Article 10; Trilateral Statement on the Middle East Peace Summit at Camp David (25 July 2000) Article 4.

¹¹² See *A Performance-Based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict* (30 April 2003) issued by the Quartet and endorsed by UNSC resolution 1515 [2003]; see also for example Quartet Statements of June 2003, January 2006, September 2009, March 2010, September 2010, February 2011.

¹¹³ Crawford, *Creation of States*, 448; see also Israel's Ministry of Foreign Affairs, *The dangers of premature recognition of a Palestinian State* (30 June 2011), available at <<http://www.mfa.gov.il/MFA/About+the+Ministry/Behind+the+Headlines/The+Dangers+of+Premature+Recognition+of+a+Palestinian+State-15-Jun-2011.htm>>, where it is argued that a declaration of Palestinian Statehood outside the context of a negotiated settlement would violate previous agreements between the Parties, most importantly the 1995 Interim-Agreement that expressly prohibits unilateral actions by either side.

addressees of relevant UNSC resolutions that preclude unilateral acts. The unilateral aspect of any act of recognition is that of the recognising State, not that of the entity seeking recognition. In his *Sixth report on unilateral acts of States*, Rodríguez Cedeño, the special rapporteur of the International Law Commission stated:

Acts of recognition are unilateral in the strict sense of the term, and they are perhaps the most important type of unilateral act, in view of their content and their legal effects, including their political effects. However, fundamentally what determines their unilateral nature is that they are discretionary.¹¹⁴

In particular, in the legal obligation which arises through the unilateral act of the recognition of an entity as a State, devolves principally upon the recognising State which binds itself to act consistently with that determination in the future.¹¹⁵ In other words, the legal consequences of recognition are essentially asymmetric as “a State which has recognised a certain claim or an existing state of affairs cannot contest its legitimacy in the future”¹¹⁶ and, it should be recalled, these consequences are not dependent on their acceptance by the entity to which the act of recognition is addressed.¹¹⁷

66. *Third*, a Palestinian request for collective recognition cannot be considered separately from the broader context of the deadlock in the bilateral negotiations between Israel and the Palestinians. These negotiations aim to end the occupation and to create a Palestinian State, but have continued for almost 20 years and yet a final and permanent agreement has still not been reached. Since 2008 there has been no substantial progress and the Parties have not been engaged in direct negotiations. Thus far, the current Israeli government has dismissed calls to impose a permanent freeze on settlement activity. It also refuses to resume negotiations based on the 1967 borders with mutually agreed land swaps.¹¹⁸

¹¹⁴ International Law Commission, *Sixth report on unilateral acts of States* (Victor Rodríguez Cedeño, Special Rapporteur), A/CN.4/534 (30 May 2003), 11, para.39.

¹¹⁵ International Law Commission, *Sixth report on unilateral acts of States* (Victor Rodríguez Cedeño, Special Rapporteur), A/CN.4/534 (30 May 2003), 24, para.101.

¹¹⁶ International Law Commission, *Sixth report on unilateral acts of States* (Victor Rodríguez Cedeño, Special Rapporteur), A/CN.4/534 (30 May 2003), 23, para.96.

¹¹⁷ International Law Commission, *Sixth report on unilateral acts of States* (V Rodriguez Cedeno, Special Rapporteur), A/CN.4/534 (30 May 2003), 16, para.62.

¹¹⁸ *Netanyahu: Extending settlement freeze will cause government to collapse*, Haaretz, 29 July 2009; *Netanyahu: No peace until Palestinians accept Israel as Jewish State*, Haaretz, 24 September 2009; U.S. official: *Netanyahu's focus on 1967 borders misses the point*, Haaretz, 22 May 2011; by way of analogy it should be noted that during the proceedings in front of the International Court of Justice regarding the 2008 Declaration of Independence by Kosovo, it was argued that the Declaration was a unilateral action in violation of Security Council resolution 1244 (1999) that established the UN Interim Administration Mission in Kosovo (UNMIK). While the International Court rejected this argument, *inter alia*, because the resolution addressed only UN organs and member States rather than the authors of the Declaration, and also did not concern the final status of Kosovo, the Court's advisory opinion was given against the background of the failure of Serbia and Kosovo to reach an agreement regarding the future status of Kosovo despite intensive negotiations between 2006-2007, *Accordance with International Law of the Unilateral Declaration Of Independence in respect of Kosovo* advisory opinion (July 2010) paras 69, 72.

67. *Fourth*, Israel's continuing and expanding settlement activity is creating a *fait accompli* in the West Bank and East Jerusalem which hinders the realisation of the two-State solution previously agreed between the Parties and endorsed by the international community. The continuous Israeli settlement activity is not just in violation of Article 49.6 of 1949 Geneva Convention IV¹¹⁹ and of bilateral agreements between the Parties, but is in itself a unilateral act. It aims to change the status of areas of the West Bank and East Jerusalem. Israel cannot rely on agreements to demand that the Palestinians avoid unilateral acts, while at the same time violating the self same agreements. This selective approach appears to breach the principle that one cannot take benefits from an instrument while denying the obligations it imposes.¹²⁰ The mutual renunciation of unilateral acts by Israel and the Palestinians forms part of a structure of synallagmatic obligations, namely, a set of legal relationships "where it is clear that performance of an obligation by one party is either a precondition or a concurrent condition to the performance of the same or a related obligation by the other party".¹²¹ As such it is susceptible to the operation of the principle of *exceptio inadimplenti non est adimplendum*:

the idea that a condition for one party's compliance with a synallagmatic obligation is the continued compliance of the other party with that obligation. It is connected with a broader principle, that a party ought not to be able to benefit from its own wrong.¹²²

In the *Diversion of waters from the Meuse* case, Judge Anzilotti observed that this doctrine was "so just, so equitable, so universally recognised, that it must be applied in international relations also. In any case, it is one of these 'general principles of law recognised by civilized nations' which the Court applies in virtue of Article 38 of its Statute".¹²³ By virtue of its continuing and unlawful settlement activity, which seeks unilaterally to change the status of the territory which these settlements are built, Israel cannot complain of any attempt it perceives that the Palestinians may try to effect in order to change the status of the West Bank, including East Jerusalem, and Gaza.

¹¹⁹ See *Legal consequences of the construction of a wall* advisory opinion, ICJ Rep, 2004, 183-184, para.120.

¹²⁰ Compare *International status of South West Africa* advisory opinion, ICJ Rep, 128 (1950) 133. Israel accepted the Roadmap that expressly demands Israel to immediately dismantle settlement outposts and freeze all settlement activity, see *A performance-based Roadmap to a permanent two-State solution to the Israeli-Palestinian conflict* (30 April 2003) issued by the Quartet and endorsed by UNSC resolution 1515 [2003]; Israel Ministry of Foreign Affairs, *Government meeting about the Prime Minister's statement on the Roadmap*, 25 May 2003. Israel re-affirmed its commitment to the Roadmap in the *Annapolis Israeli-Palestinian Joint Understanding on Negotiations* (November 2007).

¹²¹ International Law Commission, *Second report on State responsibility, addendum 2* (James Crawford, Special Rapporteur), A/CN.4/498/Add.2 (30 April 1999), 43, para.318.

¹²² International Law Commission, *Second report on State responsibility, addendum 2* (James Crawford, Special Rapporteur), A/CN.4/498/Add.2 (30 April 1999), 40, para.314: on this doctrine, see 40-48, paras.314-329; also II.i Yearbook of the International Law Commission 78-82, paras.316-331 [1999], A/CN.4/SER.A/1999/Add.1(Part 1).

¹²³ *Diversion of waters from the Meuse* case (Belgium v the Netherlands), PCIJ Ser.A/B, No.70 (1937), Dissenting Opinion of Judge Anzilotti, 45 at 50.

68. In sum, Israel's reluctance to resume negotiations based on the 1967 borders, as well as its continuous and unlawful settlement activity, cannot deny the Palestinians their right to self-determination and to Statehood. As Crawford contends, in some circumstances the international community should recognise a new State, despite some doubts, instead of letting another State prevent this recognition by its wrongful conduct:

There may come a point where international law may be justified in regarding as done that which ought to have been done, if the reason it has not been done is the serious default of one part and if the consequence of its not being done is serious prejudice to another. The principle that a State cannot rely on its own wrongful conduct to avoid the consequences of its international obligations is capable of novel applications, circumstances can be imagined where the international community would be entitled to treat a new State as existing on a given territory, notwithstanding the facts.¹²⁴

It must be emphasised that the recognition of Palestine as a State would be a unilateral act undertaken by each State affording recognition. It is an act done at the discretion of these States, and whether Palestine requests recognition is legally irrelevant. Recognition is an act they have a prerogative to confer at any time when they consider that Palestine fulfils the legal requirements for Statehood.

VI Peremptory Norms: the Duties of Third States

69. Even if some uncertainty regarding Palestinian Statehood still remains, the evolution of the principles of the inadmissibility of the acquisition of territory by the use of force and the right to self-determination as peremptory norms of international law must be taken into account. States bear a duty to *not recognise* acts that involve a violation of peremptory norms, and on the other hand bear a duty to promote acts that protect and promote the realisation of peremptory norms, which may include the recognition (and thus legal consolidation) of these acts.
70. According to Article 1 of the UN Charter, one of the purposes of the UN is "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples". Article 1 common to the International Covenant on Economic, Social and Cultural Rights (1966) and to the International Covenant on Civil and Political Rights (1966) reaffirms the right of all peoples to self-determination by which they "freely determine their political status and freely pursue their economic, social and cultural development". The Covenants lay upon States Parties the obligation to promote the realisation of that right and to respect it in conformity with the provisions of the UN Charter.
71. By resolution 2625 (XXV) (1970), the UNGA adopted the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in

¹²⁴ Crawford, *Creation of States*, 447-8.

accordance with the Charter of the UN. The Declaration determines that:

No territorial acquisition resulting from the threat or use of force shall be recognised as legal...

Every State has the duty to promote, through joint and separate action, realisation of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter...

...In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.

72. In 1995, the International Court of Justice declared in the *East Timor* case that self-determination is “one of the essential principles of contemporary international law”¹²⁵, and in the 2004 *Legal consequences of the construction of a wall* advisory opinion, held that the right of peoples to self-determination is today a right *erga omnes*. It is a right that is by its very nature of “concern of all States” and in view of its importance, all States can be held to have a legal interest in its protection.¹²⁶
73. The Jewish settlements that Israel has built in the occupied territories since 1967, and its annexation of East Jerusalem both violate international law. This is not only because of the inadmissibility of the acquisition of territory by the use of force, but also as they breach international humanitarian law, in particular Article 49.6 of 1949 Geneva Convention IV, that prohibits the transfer of the occupant’s own civilian population to occupied territory. The UNSC accordingly has determined that “the policy and practices of Israel in establishing settlements in the Palestinian and other Arab territories occupied since 1967 have no legal validity”.¹²⁷
74. The recognition of a Palestinian State in the territory occupied by Israel in 1967 is therefore consonant with the protection of peremptory norms. It serves the duty of *non-recognition* in relation to the annexation of East Jerusalem and to the settlements established in the West Bank. Both violate peremptory norms, namely: the prohibition on the acquisition of territory by the use of force; and the denial or obstruction of the exercise of self-determination.¹²⁸

¹²⁵ *East Timor case* (Portugal v. Australia), ICJ Rep, 1995, 90, para 29.

¹²⁶ *Legal consequences of the construction of a wall in the occupied Palestinian territory* advisory opinion, ICJ Rep, 2004., 171-172, para.88, and 199, para.155.

¹²⁷ Security Council Resolution 446 [1979], para 1; see also for example Security Council Resolution 298 [1971] (“*Confirms* in the clearest possible terms that all legislative and administrative actions taken by Israel to change the status of the City of Jerusalem... are totally invalid and cannot change that status”), 452 [1979], 465 [1980], 478 [1980]; see also Statement by the Quartet, September 2010.

¹²⁸ See Crawford, *Creation of States*, 160-161; J. Dugard, *Recognition*, 155-156, 162; van der Vyver, *Statehood*, 64. ; International Law Commission, *Commentary to Article 41 of its 2001 Articles on Responsibility of States for Internationally Wrongful Acts*, UN Doc.A/56/10 (2008) 113 at 114 - 115, paras.5 - 8, <http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf>.

75. As the Palestinian people possesses the right to self-determination which shall be implemented in the form of a separate State, recognition of Palestine's Statehood would contribute to the realisation of both peoples'—the Jewish/Israeli and Palestinian—right to self-determination, and thus the fulfillment of a peremptory norm of international law.

VII Procedural aspects: admission to the UN v. Collective Recognition

76. As recognition is an act that only acknowledges a Statehood which already exists, if Palestine already meets the formal criteria for Statehood, it is a State regardless of its recognition by other States. Given the special circumstances of Palestine, however, challenged as it is by the Israeli occupation and an internal divide, collective recognition by member States of the UN would constitute clear evidence that Palestine is nevertheless a State. It would affirm the fulfillment of the requirements laid down by international law. Thus a somewhat ambiguous Palestinian Statehood may be consolidated by a UNGA resolution that receives unequivocal support by member States.

77. Recognition of Palestine as a State does not automatically entail its admission to the UN. Although the issue of membership in the UN is related to the issue of collective recognition of Statehood, these are distinct issues. Admission to the UN is, by definition, recognition of Statehood as, according to the UN Charter, membership is open only to States:

Membership in the United Nations is open to all...peace-loving States which accept the obligations contained in the present Charter and, in the judgement of the Organisation, are able and willing to carry out these obligations.¹²⁹

78. As the International Law Commission concluded, recognition of Statehood can be done collectively through an act adopted by an international organisation, "particularly acts whereby a State is admitted to membership in the United Nations". Admission has legal and political consequences which are similar to those arising from a unilateral act of recognition of Statehood, and:

States participating in the decision would be implicitly recognising the entity admitted by the United Nations. An act of recognition formulated by means of a resolution on admission to membership in the United Nations would even be opposable with respect to States that reject such recognition. In such a case, there would be a State that has effectiveness.¹³⁰

¹²⁹ UN Charter, Article 4.1: for commentary, see K Ginther, *Commentary to Article 4*, in B Simma (Ed), *The Charter of the United Nations: a commentary* (Oxford UP: Oxford: 2002, 2nd edn) 177; and Warbrick, *States and recognition in international law*, 260-261.

¹³⁰ International Law Commission, *Sixth report on unilateral acts of States* (V Rodriguez Cedenno, Special Rapporteur), A/CN.4/534 (30 May 2003), 9, paras.30-31.

79. Nevertheless, a political entity may meet the formal criteria of Statehood without being admitted to the UN or applying for membership. This was, for example, the case with the Republic of Korea that was established in 1948 but only became a member of the UN in 1991, as its previous applications for membership were blocked by a Soviet veto in the UNSC.¹³¹ Also, Switzerland did not apply for UN membership until 2002 because it was concerned that membership would compromise its permanently neutral status,
80. By virtue of Article 4.2 of the UN Charter, admission to the UN requires “a decision of the General Assembly upon the recommendation of the Security Council”.¹³² A decision of the UNSC requires an affirmative vote of 9 (out of 15) members, including the concurring votes of the Permanent Members of the UNSC.¹³³ Based on a recommendation of the UNSC, the application for membership will be voted upon by the UNGA, but an affirmative decision on admission requires a two thirds majority.¹³⁴
81. Nonetheless, one or more other Permanent Members of the UNSC may block any application by Palestine for membership by vetoing a resolution that it should be admitted. In the absence of a UNSC recommendation should an application for membership be made, Palestine could seek an alternative affirmation in the form of a collective recognition of its Statehood in a resolution adopted by the UNGA. This procedure does not require a prior application to the UNSC.
82. It should be noted that the question of the required majority for a UNGA resolution that recognises a Palestinian State is more nuanced than first appears. Article 18.2 of the UN Charter contains a list of “important questions” that require a two thirds majority in the UNGA. It includes “recommendations with respect to the maintenance of international peace and security” and “the admission of new Members to the United Nations”. The question of recognition of an entity as a State by the UNGA is not classified *a priori* as “an important question” and thus by default it requires only a simple majority.
83. Nonetheless, member States or the UNGA President may argue that a motion which seeks the recognition of Palestine as a State is a matter that constitutes an “important question” and thus requires a two thirds majority. In this situation, there will be two votes: 1) a procedural vote to determine whether the matter is “an important question”. This vote requires a simple majority of the States present and voting;¹³⁵ 2) a substantive vote on the

¹³¹ Dugard, *Recognition*, 59-60.

¹³² For commentary, see Ginther, *Commentary to Article 4*, 184-185.

¹³³ UN Charter, Article 27.3: an abstention on a vote by a Permanent Member is not considered to be a veto.

¹³⁴ UN Charter, Article 18.2: for commentary, see R Wolfrum, *Commentary to Article 18*, in B Simma (Ed), *The Charter of the United Nations: a commentary* (Oxford UP: Oxford: 2002, 2nd edn) 352.

¹³⁵ UN Charter, Article 18.3. The GA may decide whether the issue falls within the already recognised categories of “important questions” or decide on an ad-hoc basis that the issue of recognition is “an important question”—see Wolfrum, *Commentary to Article 18*, 355-356 and 357-360. It is important to note that even if the recognition issue falls within the broader question of “admission of new Members to the United Nations”, the GA determination is valid only for the procedural purpose and it does not amount to an actual admission to the UN as that requires a prior Security Council recommendation.

draft resolution on recognition which will require a simple majority or a two thirds majority according to the outcome of the procedural vote.

84. Occasionally, the UNGA President rules before the vote that a specific question requires a two thirds majority. This determination may be disputed by member States, and the UNGA will have to vote on this procedural issue in a simple majority vote.¹³⁶
85. Collective recognition by the UNGA however would only “certify” the Statehood of Palestine by that body, and strengthen its case for membership should Palestine subsequently apply or re-apply to the UNSC in an attempt to obtain a recommendation for its admission as a member State to the UN. Resolutions by the UNGA are non-binding recommendations and do not bind the UNSC. Similarly, Israel, or other States, would not be obliged to recognise the State of Palestine only because it was recognised by other member States of the UNGA in a resolution. This is consistent with the notion that the recognition of other States in international law is a political act, a prerogative of the recognising State.

VIII Conclusion

86. To conclude, it is submitted that the recognition of Palestine as a State would be in accordance with international law because:
 - a) the Palestinian people has a right to self-determination that is to be fulfilled in the form of a sovereign and independent State in part of historic Palestine. The right of the Palestinian People to self-determination and the vision of a two-State solution to the Israeli-Palestinian conflict is recognised and shared by the international community, including by Israel;
 - b) Palestine fulfills the legal criteria for Statehood. According to international law, Palestine's defined territory is the territory occupied by Israel in 1967, namely the West Bank, including East Jerusalem, and the Gaza Strip. The Palestinian Authority exercises stable and substantial governmental control in Areas A and B of the West Bank and in some aspects also in Gaza. It maintains, usually under the aegis of the Palestine Liberation Organisation, bilateral diplomatic relations with an overwhelming majority of States;
 - c) the recognition of Palestine as a State would not be a unilateral Palestinian act which aims to change the status of the occupied territories. The unilateral act which entails legal consequences is the decision by other States to recognise Palestine as a State. In any event, because of Israel's continuing and expanding settlement activity—in itself a unilateral act which aims to change the status of territory and a breach of agreements between the Parties— Israel cannot complain of unilateral Palestinian acts as this would

¹³⁶ Wolfrum, *Commentary to Article 18*, 357.

seek to rely on the instruments which Israel has itself disregarded;

d) a collective recognition of Palestine as a State would contribute to the implementation of the UNSC resolutions 242 and 338, which have been agreed by the Parties to constitute the basis for the permanent status settlement, and also of UNSC resolution 1515;

e) all States have the duty to promote and protect peremptory norms of international law. A collective recognition of Palestine as a State would affirm the inadmissibility of the acquisition of territory by the use of force, and the legal invalidity of the Israeli annexation and settlement activity in occupied territory. Further, it would contribute to the realisation of the right to self-determination by both peoples. While the Jewish population of historic Palestine has fulfilled its own right to self-determination with the declaration of Israel's independence, the Palestinian people has yet to do so; and

f) as the application of Palestine to be admitted to the UN may be blocked in the UNSC, a collective recognition of Palestine as a State by the UNGA is an alternative course available for the Palestinians, although not sufficient in itself to guarantee its admission to the UN as this cannot be done without a prior UNSC recommendation.