

A Palestinian State: Legal Implications and Significance for Israel

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Background

On November 29, 2012, the United Nations General Assembly voted to grant Palestine the status of non-member observer state.¹ Legally speaking, such a decision cannot create a state because recognition of statehood is declarative rather than constitutive; theoretically, it therefore remains necessary to determine whether Palestine meets the required criteria for the existence of a state.² Nonetheless, on a practical level, the growing recognition of Palestine as a state by many important states, as well as the UN General Assembly, will ultimately influence whether or not such a state exists, and will therefore in the long run also have a direct impact on Israel's freedom of conduct in the Palestinian arena.

This essay does not examine whether or not Palestine meets the criteria for statehood, nor the date from which one might say such a state exists. Rather, its working assumption is the existence of a Palestinian state (albeit not recognized by Israel), and it focuses on the legal ramifications of such a situation.

The moment a state is founded, the basic right accorded it is sovereignty: the freedom to exert a range of authorities within its territory, including legislative, executive, and judicial powers, as well as freedom from control of another state.³ Furthermore, a sovereign state enjoys freedom of action in the international arena, a status distinct from that of a non-state entity.

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States are obligated to respect the sovereignty of other states. Interference in their internal affairs or otherwise operating in their territory without their consent is prohibited. International law also forbids the threat or use of force in relations between states in a way that harms their territorial integrity or political independence.⁴ In the case of an armed attack against it, a state has the right to self-defense. The incursion by one state into the territory of another is usually seen as equivalent to an armed attack, even when no use of force is involved.

Alongside rights, statehood also confers obligations. First and foremost is the state obligation to prevent the use of its territory to commit actions harming other states or international peace and security in general.⁵ Moreover, states bear a responsibility toward their citizens and residents, and must see to their needs and protect their rights.

The legal ramifications of the existence of a Palestinian state must be examined in two arenas: domestic and international.

Legal Ramifications on the Domestic Arena

Addressing the ramifications of a Palestinian state for the domestic arena (i.e., relations between Israel and the Palestinians) requires analyzing two aspects – the implications with regard to the exercise of Palestinian authorities in the area and the impact on the exercise of Israeli authorities therein. This analysis requires answering two preliminary questions: first, what is the status of the Interim Agreement (and other agreements) between Israel and the Palestinians,⁶ and second, what is Israel's legal status in the West Bank and the Gaza Strip.

The Agreements between Israel and the Palestinians

Given the fact that substantial and essential parts of the agreements between Israel and the Palestinians are no longer observed, it can reasonably be claimed that these agreements are no longer in force. Furthermore, even if they are still valid, each side has the right to abrogate them by means of a unilateral declaration at any time, given the fundamental violations by both sides. According to this approach, that some of the agreement's provisions are still being observed is merely an indication of the status quo created between the sides, but is not necessarily a basis for inferring the agreements' legal validity.

Nonetheless, the more accepted approach at present appears to be that given that the sides still refer to these agreements in their mutual

relations and neither has tried to abrogate them, the agreements are still in force and at least those parts that are still observed in practice have binding legal status. There is significance to the fact that the agreements are widely accepted as binding by the international community.

Assuming, then, that the agreements are still legally binding, does the establishment of a Palestinian state change their status?⁷ On the one hand, one could claim that a Palestinian state simply fills the shoes of the Palestinian Authority (PA), and as such is bound by all of the latter's obligations.⁸ On the other hand, one could also argue that once a new and distinct entity has come into being, it cannot be bound by agreements made before its establishment.⁹

One must bear in mind that the question of the agreements' status goes beyond the legal realm, as serious political considerations will ultimately affect the positions of both sides in this regard.

Israel's Legal Status in Territories of the Palestinian State

The accepted position in the international arena is that as a result of the capture of the West Bank and the Gaza Strip in 1967, Israel has acquired the status of occupier. This is by virtue of these areas coming under Israel's effective control as a result of the armed conflict.¹⁰ By contrast, some assert these areas are not "occupied," but "disputed territories," based on the fact that these territories were not subject to the sovereignty of any state and that their status and borders were never defined.¹¹

Over the years, Israel has in practice applied the laws of occupation with regard to these territories, and this approach is reflected in many judgments of Israel's Supreme Court.¹² Under the laws of occupation, the occupier bears responsibility for the welfare of the residents of the occupied areas. At the same time, the occupier is allowed to impose its authority over this population, including by deploying military forces in order to maintain security and public order. The occupying force also has governing authority in all areas of life, including legislative, executive, and judicial authority.

Even after the establishment of the PA and the transfer of some parts of the territory to its control,¹³ most of the international community continued to view the West Bank and the Gaza Strip as occupied, including areas from which the IDF had redeployed and does not enter, such as Area A in the West Bank and even the Gaza Strip.¹⁴ While good arguments can be made that since the 2005 disengagement Gaza is no

longer occupied by Israel, many contend that it remains occupied given Israel's ongoing control of Gaza's external perimeter (ignoring the fact that Israel does not in fact control the Gaza Strip's land border with Egypt), the Gaza Strip's dependence on Israel, and the political linkage between the Gaza Strip and the West Bank.¹⁵

The question that arises then is, how does the establishment of a Palestinian state affect Israel's status in the territories, especially in the West Bank? According to the position of the Levy Committee report, Israel has a sovereign right to be present in these areas and therefore clearly the founding of the Palestinian state cannot in and of itself impinge on Israel's rights and authority there. It is doubtful that this claim will gain support in the international arena. Nonetheless, even according to the position that sees Israel as the occupying force in all or part of these areas, there are several reasons why the existence of a Palestinian state would not necessarily affect Israel's status in the territories.

First, there is a solid basis for claiming that the territory of a Palestinian state can be said to exist only in those areas that are in practice under effective Palestinian control, because effective control and governance over a particular area are among the conditions for the existence of a

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state. All other areas (i.e., all of Area C, most of Area B, and obviously East Jerusalem) remain, as before, under Israeli control. Furthermore, even if the territory of the Palestinian state is thought to include all of the areas occupied in 1967, one still cannot conclude that this nullifies the Israeli occupation of the entire territory. The Palestinian state is established while under the control of another state – Israel – already operating in that territory, whether by virtue of prior agreements or otherwise. An analysis of Israel's status in the territory where a Palestinian state is established must take into consideration the reality on the ground on the eve of the founding.

Therefore, a possible conclusion is that Israel will continue to be considered an occupier, at least with regard to the areas under its de facto control. The main consequence would be that while currently the occupation is of territory not belonging to another state, it would now be

considered as the occupation of part of the Palestinian state (at least in the view of those recognizing that state).

Parenthetically, it should be noted that the question of the extent to which the establishment of a Palestinian state will affect the categorization of the situation in the Gaza Strip depends on whether or not the said state will have any real authority there. This question in turn depends on the essence of the relations between the central government of the Palestinian state and the government controlling the Gaza Strip.

Of course, the issue of the territory's status is not determined by legal considerations alone, although they provide a framework for discussion. The decisive considerations are political, in both the internal Israeli arena and the international arena.

Exercising Palestinian Authority in the Territory

According to existing agreements, the PA is currently restricted from exerting certain forms of authority, such as security in Areas B and C, authority over infrastructures in Area C, authority over airspace, and authority over Israeli citizens. Furthermore, the PA has no authority whatsoever in East Jerusalem. In the economic sphere, the PA is subject to Israel's import policies and customs and tariffs. In addition, Israel oversees the population registry and the granting of Palestinian residency. The legal force of these restrictions depends on the current validity of the agreements and their status after the establishment of the Palestinian state. If the stipulations of the agreements are no longer binding, whether because today they are no longer valid or because they lose validity upon the establishment of the Palestinian state, only the restrictions stemming from the above analysis on the status of the territory will apply to this state.¹⁶

Theoretically, once a Palestinian state is established, its authorities should have greater freedom of action than today and be exempt from existing restrictions. Thus, for example, a Palestinian state would be free to establish its own army or choose to invite foreign armies onto its territory; it could attempt to extract mining resources independently; it would be able to set up telecommunications systems while ignoring existing restrictions on frequencies; and so on. In addition, a Palestinian state could try to impose its authority on Palestinians in Area C beyond what is stipulated by the agreements (e.g., with regard to infrastructures). Similarly, it could try to impose its authority on Israelis in its territory,

e.g., arresting Israelis committing crimes there, in contravention of stipulations in the current agreements. The Palestinian state could also try to enforce its legislation and exert governing authority on East Jerusalem. It could also decide to mint its own currency and adopt an independent economic policy. Naturally, such measures would carry economic consequences with them, given the Palestinian economy's dependence on the Israeli economy.

As far as exerting authority in areas under Israeli control while deviating from the status quo (e.g., exerting authority over security in Area C), Israel could maintain that even if it can't base its claims on the agreements, it still has authority in the territory by virtue of the laws of occupation (or by virtue of its inherent rights to the territory), whether because the Palestinian state does not extend to territory outside of Palestinian control, or whether because it is the occupier of the new Palestinian state. Accordingly, Israel has the right to prevent other elements (including the occupied state) from exerting their authority insofar as that authority would clash with Israel's authority as occupier. Nonetheless, with the passage of time, and assuming that the status of the Palestinian state grows stronger, the impact of the Palestinian state's claim to realize its sovereignty and exert its authority on issues and in areas currently under Israeli control is likely to intensify.

Furthermore, there are authorities that when exercised, constitute the realization of political sovereignty without conflicting with the

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occupier's authority. A classic example is in the realm of citizenship. Currently there is no concept of "Palestinian citizenship," only "Palestinian residency." The test of residency is one of fact, while the right to determine who is granted citizenship is one of state authority. Thus, the Palestinian state theoretically would be able to extend citizenship, without restriction, to both residents as well as to people who are currently non-residents. Citizens usually have a vested right to enter the state of which they are citizens, and arguments could therefore be made against Israel should it try to

prevent the entry of citizens who are not residents when they come to an international border crossing under its control. Nevertheless, Israel would be able to argue that it is only obligated to allow entry to residents

of the occupied territory, and not to new citizens simply by virtue of their citizenship.

Needless to say, the practical implementation of the various forms of authority could be a source of friction. Practically speaking, Israel could stop most of the measures toward the realization of its sovereignty that the Palestinian state may strive to realize. The way in which the international arena regards such steps taken by Israel would depend on political considerations, going beyond the scope of legal analysis.

Exerting Israeli Authorities in the Territory

Among the features of state sovereignty is the principle of non-intervention, which prohibits other states from operating in the state's territory or imposing governmental authority on it without its consent. From the moment a Palestinian state is established, the imposition of Israeli authority in its territory (including its airspace, naval space, and electromagnetic field) without some basis, such as an agreement or the laws of occupation, would violate Palestinian sovereignty. Use of force in the territory of the Palestinian state might be considered an act of aggression prohibited by international law and invoking the right of self-defense. Nonetheless, there are three essential caveats to this conclusion:

- a. Inasmuch as any contentious activity is carried out according to agreements, if these agreements are indeed still valid they constitute the authoritative source for such activity, which is therefore not forbidden.
- b. If the territory of the Palestinian state is accepted as limited to areas that are under its control in practice, then Israeli activity in the rest of the territory (e.g., Areas B and C) in no way contravenes the principle of Palestinian state sovereignty or the state's right to territorial integrity, and the entire discussion focuses on activity in the territory under its effective control (generally Area A and perhaps some of Area B).
- c. Israel will apparently continue to wield authority in the territory of the Palestinian state by virtue of its status as occupier (or by virtue of rights to the territory, according to the Levy Committee). Accordingly, exerting part of its authority in the territory, both in the security field and in the civilian realm, would not necessarily be considered a violation of the sovereignty of the newly established state, but rather the continuation of the realization of authority it had before

the establishment of the Palestinian state, which continues to exist because of Israel's enduring practical control of the territory.¹⁷

The third claim may also be presented with regard to Israeli activity in Area A, if it continues to be considered as occupied by Israel. Nonetheless, Israel may have more restrictions there than at present. Such restrictions also exist in the Interim Agreement, which in principle prohibits the entry of Israeli military forces into Area A and the application of Israel's authority there (except in very limited fields). However, since 2002, these constraints have not been observed, and it is therefore doubtful whether the mere fact of the establishment of a Palestinian state would bring them back to life.

As for carrying out security operations in Palestinian territory, a claim might be made that this impinges on the integrity and sovereignty of the Palestinian state, and could therefore be justified only on the basis of Israel realizing its right to self-defense. Against this assertion stands the claim that there is an ongoing state of occupation that entails the right to use force in certain circumstances. But beyond this, according to Israel's position, it is involved in a longstanding, ongoing armed conflict and therefore has the right to use force as long as it adheres to the laws of warfare. Since the situation is not that of a transition from a state of peace

to a state of war, the rules regulating the question of when it is allowed to use force (*jus ad bellum* rules) do not apply. The right to use force cannot therefore be restricted to cases of self-defense.

In practice, despite the legal analysis above, assertions could be made against Israeli security activities in the territory that would be considered part of the Palestinian state, and Israel is liable to find itself accused of violating the sovereignty and territorial integrity of the new state in contravention of the United Nations charter. Therefore, in the long term, the establishment of a Palestinian state could limit Israel's activities in the territory, at least in terms of allegations made on the international arena.

Alongside its sovereign rights, the establishment of a Palestinian state would also engender responsibility for activities taking place in or from its territory, although no international forum for enforcing the fulfillment of that responsibility exists.

The establishment of a Palestinian state will also increase the pressure on Israel to reduce the manifestations of the occupation, especially displays of authority undermining the status of the Palestinian

state in non-security contexts, such as the exploitation of resources in the occupied territory, pumping water, and so on. Indeed, the laws of occupation already limit Israel's freedom of action in these areas, because the status of the occupier is that of a trustee who must use the resources of the territory on behalf of the local population and for the sake of the occupation only (and not for the sake of the occupying state), and there are various bodies, including human rights organizations, monitoring these issues.¹⁸ Still, the Palestinian state would presumably see itself as being in a better position from which to make demands in this field. It may also enjoy more convenient access to international forums and judicial instances.

Accordingly, the pressure on Israel to allow the Palestinian state to realize its sovereignty in the external envelope (i.e., the border crossings on land in the West Bank, aerial and maritime zones, including the electromagnetic sphere) is liable to increase. In addition, any activity connected to the establishment of new Israeli settlements or the expansion of existing settlements – currently an object of much international criticism – is liable to be seen as a violation of the sovereignty of the Palestinian state that cannot be justified on the basis of the laws of occupation and legal pressure may be expected to increase on these issues as well.

Legal Ramifications on the International Arena

The UN General Assembly voted to bestow on Palestine the status of non-member observer state.¹⁹ It is important to note that there is no essential difference between a “member” and a “non-member” observer, and the change is primarily symbolic.

Nonetheless, internationally, there are implications for an entity being considered a state. For example, there are various international bodies in which only states can be members, such as the International Civil Aviation Organization; similarly there are treaties to which only states can be a party. If the Palestinian state joins multilateral international treaties to which Israel is a party and other international organizations of which Israel is a member, it could invoke obligations on Israel toward the Palestinian state by virtue of these treaties and by virtue of obligations incurred by membership in international organizations. In aviation, for example, this could require recognition of Palestinian airspace, or in telecommunications, the allocation of frequencies to the

Palestinian state. The practical ramifications of Palestinian membership in international treaties and organizations depend in large part on how the international arena conducts itself on these issues and the pressure it exerts on Israel to revise its current conduct.

A Palestinian state would also be able to make bilateral treaties with various states, whereupon claims could be made against Israel, should Israel take any action to undermine the possibility of realizing those treaties. Furthermore, the Palestinian state could conclude military treaties with other states and join existing allegiances.

A Palestinian state would be also able to enjoy full diplomatic relations with other states (the PA already maintains diplomatic relations with many nations), and one may assume that other official embassies will open in the Palestinian state. As a result, friction could arise over Israel's attitude to diplomats trying to enter Palestinian territory through border crossings controlled by Israel. The legal difficulty would arise primarily with regard to diplomats of countries with which Israel itself has diplomatic relations. Legally, Israel would have an easier time refusing the entry of representatives of states with which it has no diplomatic relations.

The bottom line is that there would be far more potential legal claims against Israel on the international arena than at present, on the basis that the rights of the Palestinian state are being violated. Israel's lack of recognition of this state would not preclude such claims (similar to the claims raised over the years against Arab nations for violating Israel's rights, even though they do not recognize Israel).

A Palestinian state would also be able to appeal to the International Court of Justice (ICJ) in The Hague. However, the court's authority in proceedings between nations depends on the consent of all the nations party to those proceedings. Therefore, Israel could not be forced into a proceeding against its wishes.

The situation is different, however, with regard to the International Criminal Court (ICC). The Palestinian state would probably be able to join the court's statute,²⁰ and even before joining, it may be able to give it ad hoc consent to investigate all war crimes it claims have been committed in the West Bank and the Gaza Strip. The PA already submitted such a request in January 2009, which referred to all actions taken since July 2002 (when the court's statute went into effect).²¹ The opinion of the court's previous prosecutor, who rejected the request, implied that the

General Assembly's recognition of a Palestinian state could serve as the basis for validating this Palestinian request in the future.²²

Should a request by a Palestinian state for such an investigation be accepted, the prosecutor and the International Criminal Court would have to decide whether or not to start investigations and proceedings against all those who have acted in that territory – Israelis and Palestinians – for their actions there.²³ The ICC prosecutor and the court itself have the discretion to decide whether or not to begin such an investigation into alleged war crimes. According to the principle of complementarity (one of the court's underlying principles), if a nation's legal system is both willing and able to genuinely investigate such allegations, as Israel's is, there may be good cause for the court to decline a case's admissibility.²⁴ One of the crimes included in the Rome Statute – in addition to war crimes and crimes against humanity – is "the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population to the territory it occupies."²⁵ By virtue of this paragraph, the Palestinians would be able to request that the ICC take up the matter of the Israeli settlements in the West Bank (including the Jewish neighborhoods in East Jerusalem). However, it is highly doubtful that the ICC would want to take up so politically loaded an issue as the settlements. Nonetheless, it is clear that a Palestinian state joining the statute would open the door to the possible involvement of an external court on very sensitive matters.

Another legal aspect of the establishment of the Palestinian state has to do with a possible confrontation between Israel and Palestinian security forces: if such a conflict occurred, the Palestinians could demand the right to be considered prisoners of war. One ramification of this is the inability to try them for their mere participation in hostilities. On the other hand, a Palestinian state would also be required to grant Israeli soldiers prisoner of war status, should they fall into Palestinian hands.

The Responsibility of the Palestinian State

The existence of a Palestinian state would also mean it is responsible for what happens in and from its territory. Therefore, if it fails to prevent hostile activity from its territory or harms Israeli interests in any other illegal manner, Israel would be able to make claims against it. Nevertheless, no international legal mechanism exists that would automatically allow proceedings or the imposition of sanctions against

a state failing to uphold its responsibilities. The only channel of action through which to deal with such issues is the political-diplomatic channel.

Conclusion

The state's basic right is sovereignty, meaning the right to act and enforce governing authority freely and independently, and prohibiting other states from operating in its territory without its consent.

The implications of the existence of a Palestinian state domestically, i.e., on relations between Israel and the Palestinians, will depend on whether or not the agreements signed previously between Israel and the Palestinians will be considered valid. They will also depend on Israel's legal status in the territory, and whether or not it is still considered an occupying force of the established Palestinian state. Based upon the agreements between the sides (inasmuch as they are considered to be in force), and upon Israel's status in the territory (if it is still considered the occupier or otherwise seen as having sovereign rights therein), the freedom of action of the Palestinian state would be restricted and Israel would retain freedom of action even after the establishment of the new state. Nonetheless, a Palestinian state would have a stronger status than the PA does at present, and this status would allow it to make further claims against action taken on its territory, especially with regard to the exploitation of its resources and Israel's settlement policy there. In addition, the stronger the international status of a Palestinian state grows, the more the pressure leveled on Israel will grow to allow the Palestinian state to exercise its authority and limit Israeli activity.

A Palestinian state would be able to join international organizations and treaties. The practical meaning of this depends on the way the organizations choose to act toward Israel and the extent to which they would try to use practical tools to put pressure on Israel, such as threatening sanctions, in order to realize the rights of the Palestinian state (e.g., allocating telecommunications frequencies and recognizing Palestinian airspace). Furthermore, a Palestinian state would be able to enter into bilateral treaties with other states, including military treaties, and would likewise be able to strengthen and upgrade its diplomatic relations with other nations.

A Palestinian state may also be able to join the Rome Statute of the International Criminal Court and give its consent to the court to investigate war crimes committed in its territory – by all relevant parties

– since July 2002 (when the court was convened), including regarding the settlements issue. However, the court has the discretion to decide whether or not to investigate and is not automatically required to do so once a request is made.

The establishment of a Palestinian state could also invite the demand to bestow prisoner of war status on members of Palestinian security forces, should they be detained in the course of an armed conflict with Israel.

Alongside its sovereign rights, the establishment of a Palestinian state would also engender responsibility for activities taking place in or from its territory, although no international forum for enforcing the fulfillment of that responsibility exists.

The legal ramifications of the establishment of a Palestinian state would therefore seem to be limited, at least in the initial stage. The main effect would be felt in the international arena and the field of international criminal law. Nevertheless, even with regard to the situation in the territory itself, as long as there is no progress in the negotiations between the sides, the pressure on Israel to allow more freedom of action to the Palestinian authorities and to curtail its own activities in the territory of the Palestinian state is likely to increase.

Notes

- 1 UN General Assembly decision A/67/L.28, http://www.un.org/ga/search/view_doc.asp?symbol=A/67/L.28.
- 2 For an analysis of the conditions of statehood, see Malcolm Shaw, *International Law*, 6th ed. (New York: Cambridge University Press, 2008), ch. 5, pp. 195-234. For a discussion on recognition, see ch. 9, pp. 445-86.
- 3 Ibid., pp. 489-92.
- 4 This basic principle is enshrined in the UN Charter, Chapter 1, Article 2(4).
- 5 The rules governing state responsibility are covered in "Draft Articles on Responsibility of States for Internationally Wrongful Acts," in: *Report of the International Law Commission on the Work of its Fifty-third Session*, UN GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10 (2001), available at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf. Also see UN Security Council Resolution 1373, stating that nations are obligated to "prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or other citizens," Resolution 1373, SC Res 1373, UN SCOR, 56th sess., 4385th mtg., UN Doc S/RES/1373, September 28, 2001.

- 6 The agreements under discussion are the Israeli-Palestinian Interim Agreement about the West Bank and Gaza Strip, September 28, 1995, <http://www.knesset.gov.il/process/docs/heskemb1.htm>, and other agreements derived from it. For particulars and a description of these agreements, see the Foreign Ministry's website at <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Israel-Palestinian+Negotiations.htm>.
- 7 On a similar issue, of state succession, there are different legal approaches. See, e.g., Shaw, *International Law*, ch. 17, pp. 956-1009.
- 8 Formally speaking most of the agreements were signed between Israel and the Palestinian Liberation Organization (PLO) and the PA is not a party to them, but neither side attributes any special meaning to this fact.
- 9 A separate question is whether the founding of a state justifies the abrogation of agreements. One could certainly argue that the very fact of the founding of Palestine is a violation of the Interim Agreement, which stipulates that the sides must refrain from taking unilateral steps changing the status quo on the ground, and therefore the door is now open for Israel to abrogate the agreements because of this violation or to engage in certain violations of its own as counter steps. This essay does not examine Israeli reactions of this type.
- 10 The definition of occupation appears in Regulation 42 of the 1907 Hague Convention, *1907 Hague Convention IV Respecting the Laws and Customs of War on Land*, available at <http://www.icrc.org/ihl.nsf/full/195>.
- 11 The committee on the status of construction in Judea and Samaria, headed by retired Justice Edmond Levy, recently referred to this position. The committee was established in early 2012 by the Israeli government to make recommendations on the regulation of illegal Israeli construction in that area. The committee report, published on June 21, 2012, stated that Judea and Samaria should not be considered occupied territory (discussion in Paragraphs 5-9), <http://www.pmo.gov.il/Documents/doch090712.pdf>.
- 12 See, e.g., Supreme Court 1661/05, "Gaza Shore Regional Council Versus Israeli Knesset," PD 59(2), 481, 2005, pp. 558-59. While the Levy Committee report determined in a brief sentence that the laws of occupation do not apply to these areas on the basis of its above-mentioned position, it did not clarify which laws do apply there.
- 13 The Interim Agreement divides the territories into Areas A, B, and C. The distribution of authority in each of the areas was determined by Articles 11, 13, and 17 of the agreement and is detailed in the agreement's appendices.
- 14 See, e.g., the determination by the International Court of Justice in *The Hague* in its opinion on the legality of the security fence: "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory," July 9, 2004, Para. 78, <http://www.icj-cij.org/docket/files/131/1671.pdf>.

- 15 For a discussion about the different positions, see Pnina Sharvit Baruch, "Is the Gaza Strip Occupied by Israel?" in Alan Baker, ed., *Israel's Rights as a Nation-State in International Diplomacy*, 2011, <http://www.jcpa.org/text/israel-rights/kiyum-sharvit-baruch.pdf>; Yuval Shany, "Law Applicable to Non-Occupied Gaza: A Comment on Bassiouni v. the Prime Minister of Israel," *Israel Law Review* 42, no. 1 (2009): 101-16; Sari Bashi, "Disengaged Occupiers: The Legal Status of Gaza," *Gisha Legal Center for Freedom of Movement*, 2007, <http://www.gisha.org/UserFiles/File/Report%20for%20the%20website.pdf>.
- 16 Even if one accepts the position that the agreements in general are binding on the Palestinian state, it can be argued that some of their stipulations, which are incongruent with the essence of a state (as distinct from a non-state entity such as the PA) are not inherited by the Palestinian state and are therefore not binding on it.
- 17 As noted above, as the occupier of the territory, Israel may also have the right to restrict the activity of others, including elements representing the Palestinian state, if their activity compromises the realization of Israel's authority as occupier.
- 18 In this context, see the discussion about the exploitation of resources in the West Bank in the Supreme Court Petition 2164/09, "Yesh Din v. The Commander of the Israeli Forces in the West Bank et al," <http://elyon1.court.gov.il/files/09/640/021/n14/09021640.n14.htm>.
- 19 The appeal to the General Assembly followed the failed attempt to become a UN member following the lack of Security Council support for this measure.
- 20 "Rome Statute of the International Criminal Court," July 17, 1998, 2187 UNTS 3 (henceforth "Rome Statute").
- 21 Ali Khashan, "Declaration Recognizing the Jurisdiction of the International Criminal Court," Palestinian National Authority, Ministry of Justice, January 21, 2009, <http://www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279777/20090122PalestinianDeclaration2.pdf>.
- 22 "OTP Report on Preliminary Examinations," April 3, 2012, <http://www.icc-cpi.int/NR/rdonlyres/9B651B80-EC43-4945-BF5A-FAFF5F334B92/284387/SituationinPalestine030412ENG.pdf>.
- 23 As part of an investigation, the actions of all parties are investigated, and therefore the investigation would also relate to the Palestinian side. The investigation could only relate to what was done within the territory of the state. It is unclear if the investigation could be retroactive and relate to actions done before the state's establishment.
- 24 Rome Statute, Articles 17-19.
- 25 Rome Statute, Article 8(2)(b)(viii).