

ICJ Jurisdiction and Necessary Parties in *State of Palestine v. United States of America*

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I. INTRODUCTION

Can the location of an embassy violate international law? The International Court of Justice (“ICJ” or “the Court”) has an opportunity to answer that question.¹ Palestine is currently suing the United States in the ICJ in response to the Trump administration’s decision to move the United States’ Israeli embassy from Tel Aviv to Jerusalem.² The case is entitled *Relocation of the American Embassy to Jerusalem (Palestine v. United States of America)*.³ Palestine claims Jerusalem does not constitute Israeli territory under international law, and therefore, the United States has violated Article 3 ¶ 1, Article 21 ¶ 1 and Article 41 ¶ 3 of the Vienna Convention on Diplomatic Relations (VCDR), which Palestine argues requires that embassies be located in the territory of the countries for which they are established.⁴

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1. This note concerns an ongoing case before the International Court of Justice. Consequently, there may be major developments in the case in the near term. As discussed elsewhere in the paper the United States was required to submit a memorial on the issues covered in this paper by November 18, 2019. The State of Palestine was required to submit a memorial in May of 2019. However, as of March 28, 2020, neither American nor Palestinian memorials have been published on the ICJ website. *See* Relocation of the United States Embassy to Jerusalem (Palestine v. U.S.), Order, 2018 I.C.J. 708, 709 (Nov. 15, 2018).

2. *See* Palestine v. U.S., Application Instituting Proceedings, ¶ 22 (Sept. 28, 2018), <https://www.icj-cij.org/files/case-related/176/176-20180928-APP-01-00-EN.pdf>; *see also* Mark Landler, *Trump Recognized Jerusalem as Israel’s Capital and Orders U.S. Embassy to Move*, N.Y. TIMES (Dec. 6, 2017), <https://www.nytimes.com/2017/12/06/world/middleeast/trump-jerusalem-israel-capital.html>.

3. Palestine v. U.S., Order, 2018 I.C.J. 708.

4. Palestine v. U.S., Application Instituting Proceedings, ¶¶ 36–48 (Sept.

The first of these articles notes that an embassy should serve the purpose of “representing the sending State in the receiving State”⁵ The second declares “[t]he receiving State shall either facilitate the acquisition on its territory, in accordance with its laws, by the sending State of premises necessary for its mission or assist the latter in obtaining accommodation in some other way.”⁶ The final provision of the VCDR cited by Palestine prohibits signatories from establishing embassies in a manner which violates the Convention.⁷ Palestine argues all of these provisions of the VCDR require embassies to be located within the territory of the country towards which the embassy’s diplomatic mission is directed.⁸ Palestine and the United States are parties to the Optional Protocol of the VCDR, which grants jurisdiction to the ICJ over disputes arising under the Convention.⁹ Palestine argues these treaty provisions permit a suit against the United States in the ICJ for placing the American embassy to Israel in Jerusalem which is outside of Israeli territory in Palestine’s view.¹⁰ The United States responded to the suit, in part, by withdrawing from the Optional Protocol.¹¹

On November 2, 2018, Jennifer Newstead, the Legal Advisor to the U.S. Department of State wrote a letter to the ICJ, denying that the ICJ had the jurisdiction to hear the case.¹² Newstead claimed that neither the VCDR nor the Optional Protocol could serve as the basis for a suit before the court.¹³ The

28, 2018), <https://www.icj-cij.org/files/case-related/176/176-20180928-APP-01-00-EN.pdf>; *see also* Vienna Convention on Diplomatic Relations, art. 3, ¶ 1, art. 21, ¶ 1, art. 41, ¶ 3, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95 [hereinafter Vienna Convention].

5. Vienna Convention, *supra* note 4, art. 3 ¶ 1.

6. *Id.* art. 21 ¶ 1.

7. *Id.* art. 41 ¶ 3.

8. Palestine v. U.S., Application Instituting Proceedings, ¶¶ 36–51 (Sept. 28, 2018), <https://www.icj-cij.org/files/case-related/176/176-20180928-APP-01-00-EN.pdf>.

9. *See id.* ¶¶ 31–32.

10. *Id.*; *see also* Marko Milanovic, *Palestine Sues the United States in the ICJ re Jerusalem Embassy*, EJIL: TALK! (Sept. 30, 2018), <https://ejiltalk.org/palestine-sues-the-united-states-in-the-icj-re-jerusalem-embassy>.

11. Roberta Rampton, Lesley Wroughton & Stephanie van den Berg, *U.S. Withdraws from International Accords: Says U.N. World Court ‘Politicized’*, REUTERS (Oct. 3, 2018), <https://www.reuters.com/article/us-usa-diplomacy-treaty/u-s-withdraws-from-international-accords-says-u-n-world-court-politicized-idUSKCN1MD2CP>.

12. Palestine v. U.S., Order, 2018 I.C.J. at 709.

13. *Id.*

United States therefore requested that the Court dismiss Palestine's complaint.¹⁴ Since the United States denied that the ICJ had jurisdiction to hear the case, the Court has requested that both parties submit memorials on the issues of jurisdiction and admissibility.¹⁵ The State of Palestine's memorial was due on May 15, 2019.¹⁶ The United States memorial was due on November 18, 2019.¹⁷

Palestine faces two hurdles in appearing before the ICJ. The Court is expressly designed to adjudicate disputes between states, and whether "the State of Palestine" qualifies as a "state" as understood by the ICJ remains questionable.¹⁸ Although statehood represents a prerequisite for ICJ jurisdiction, statehood alone would not be sufficient to secure ICJ jurisdiction over this dispute.¹⁹ Palestine is not a party to the ICJ Statute, having neither been admitted to full membership in the United Nations nor having otherwise become a party to the statute.²⁰ Therefore, Palestine relies upon Article 35 ¶ 2 of the ICJ Statute to secure jurisdiction.²¹ Even satisfying the basic requirements of jurisdiction is insufficient to ensure the ICJ will reach a decision on the merits.²² Under ICJ precedent first articulated in *Monetary Gold*, Israel may be considered an "essential party" to the Palestinian-American dispute, without whose participation the case will not be permitted to proceed.²³

Palestine's claim before the ICJ raises three important questions of international law: (1) What constitutes a state for the purposes of the ICJ Statute? (2) When may a state which is

14. *Id.*

15. *Id.* at 710.

16. *Id.* (Although both memorials were due in 2019, as of March 28, 2020 neither memorial has been published on the ICJ website).

17. *Id.*

18. See Statute of the International Court of Justice, art. 34 ¶ 1, Apr. 18, 1946, 59 Stat. 1055, 33 U.N.T.S. 933; see also Jure Vidmar, *Palestine and the Conceptual Problem of Implicit Statehood*, 12 CHINESE J. INT'L. L. 19, 20 (2013).

19. See Statute of the International Court of Justice, *supra* note 18, art. 35, ¶ 2.

20. See Vidmar, *supra* note 18, at 35.

21. Palestine v. U.S., Application Instituting Proceedings, ¶ 30 (Sept. 28, 2018), <https://www.icj-cij.org/files/case-related/176/176-20180928-APP-01-00-EN.pdf>; see also Statute of the International Court of Justice, *supra* note 18, art. 35 ¶ 2.

22. See Milanovic, *supra* note 10.

23. See *id.*; see also MALCOM N. SHAW, *ROSENNE'S LAW AND PRACTICE OF THE CRIMINAL COURT: 1925–2015*, VOLUME II, 560–68 (Shabtai Rosenne ed., 5th ed. 2016) (defining the term "Essential Party" in the context of the ICJ.)

otherwise not a party to the ICJ Statute assert ICJ jurisdiction and bring a case before the court? (3) What constitutes a necessary party for the purposes of a dispute before the ICJ? This note will attempt to resolve these questions and assess the implications their answers have for Palestine's effort to bring a case against the United States before the ICJ. This note begins with a summary of the history of the Trump administration's Jerusalem embassy policy, how the ICJ likely understands the definition of statehood, and when a nonmember state may obtain jurisdiction before the Court. This will be followed by an analysis of how the ICJ considers an absent state to have such a strong interest in a dispute that the case cannot continue without that state's participation.²⁴ This study will then apply the analysis of how the ICJ approaches key jurisdictional issues to the State of Palestine and Palestine's claim against the United States. Finally, the note will conclude that although Palestine may satisfy the basic jurisdictional requirements of the ICJ, Israel's nonparticipation will nonetheless prevent the Court from hearing Palestine's claim under precedent established by *Monetary Gold* and upheld in other ICJ cases.²⁵

II. BACKGROUND

In December of 2017, the Trump administration ordered the American embassy to Israel to move from Tel Aviv to Jerusalem as Congress requested in 1995.²⁶ In announcing the move, President Trump recognized Jerusalem as the capital of Israel and claimed Jerusalem's status as Israel's capital was "obvious."²⁷ President Trump framed his decision as the fulfillment of a domestic political promise and argued the embassy's relocation would promote the peaceful resolution of the Israeli-Palestinian conflict.²⁸ The administration invoked statutory authority to delay the implementation of the policy in order to secure enough time for the State Department and the Embassy Staff to prepare for the move from Tel Aviv to

24. SHAW, *supra* note 23.

25. *Id.*

26. See Jerusalem Embassy Act of 1995, 109 Stat. 398 (1995), § 3 (determining that the United States Embassy in Israel should be located in Jerusalem) [hereinafter Jerusalem Embassy Act of 1995]; see also Landler, *supra* note 2.

27. Landler, *supra* note 2.

28. See *id.*

Jerusalem.²⁹ The decision to relocate the embassy was met with significant criticism from various segments of the international community.³⁰

A. THE TRUMP ADMINISTRATION'S JERUSALEM POLICY DID
NOT VIOLATE DOMESTIC AMERICAN LAW

Under recent Supreme Court precedent, the Trump administration likely possessed the capacity to unilaterally recognize Jerusalem as Israeli territory, and by extension, the right to recognize Jerusalem as Israel's capital, as a matter of American law.³¹ In *Zivotofsky v. Kerry*, the Supreme Court was faced with the question of whether the Executive branch could prohibit a Jerusalem-born individual from listing Israel as his place of birth.³² The Court found the Executive branch possessed the sole responsibility for determining when the United States would recognize a location as a foreign nation's legal territory.³³ The Court recognized "the exclusive power of the President to control recognition determinations, including formal statements by the Executive Branch acknowledging the legitimacy of a state or government and its territorial bounds."³⁴ The Court therefore concluded the Executive branch possessed the authority to determine Jerusalem's status as Israeli territory for the purposes of domestic law.³⁵ This authority likely included the authority to declare that Jerusalem was Israeli territory.³⁶ In 1995, Congress had passed the Jerusalem Embassy Act.³⁷ The law required the United States to move the American embassy from Tel Aviv to Jerusalem, both signaling and ensuring that Jerusalem would thereafter be considered the capital of Israel as a matter of American policy.³⁸ However, the law also permitted the Executive branch to continually preempt the move on an ostensibly temporary basis.³⁹ The law therefore did not

29. Jerusalem Embassy Act of 1995, *supra* note 26, § 7; *see also* Landler, *supra* note 2.

30. Landler, *supra* note 2.

31. *Zivotofsky v. Kerry*, 135 U.S. 2076, 2094–96 (2015).

32. *Id.* at 2083.

33. *Id.* at 2094–96.

34. *Id.* at 2096.

35. *Id.*

36. *See id.* at 2086.

37. *See generally* Jerusalem Embassy Act of 1995, *supra* note 26, §§ 3–7.

38. *Id.*

39. *Id.*

guarantee American foreign policy would subsequently consider Jerusalem to be the capital of Israel.⁴⁰

B. PALESTINE'S CLAIM FACES THE PROBLEM OF ICJ JURISDICTION

Whatever the legality of the Trump administration's policy in a domestic context, the same policy still potentially represents a violation of international law.⁴¹ The potential violation of international law by the Trump administration served as the basis for Palestine's decision to bring suit against the United States over the policy.⁴² In Palestine's Application to the court, it argued Jerusalem was not Israeli territory under international law, and the United States was therefore in violation of the VCDR, which appears to mandate that embassies be placed inside the country to which they are directed.⁴³ Palestine faces two unambiguous problems in bringing any claim before the ICJ. First, Palestine is not a party to the ICJ Statute, the treaty which established the ICJ and the scope of its jurisdiction.⁴⁴ Second, Palestinian statehood remains an ambiguous issue under international law, and the court must determine that Palestine is a state before the court will hear any dispute Palestine brings, including its current claim against the United States.⁴⁵ According to Article 34 ¶ 1 of the ICJ Statute, "only states may be parties before the Court."⁴⁶

The ICJ Definition of Statehood is Open to Interpretation

The question of whether Palestine is a state for the purposes of international law remains unresolved.⁴⁷ Due to the

40. *Id.*

41. *See generally* Palestine v. U.S., Application Instituting Proceedings in the International Court of Justice, (Sept. 28, 2018), <https://www.icj-cij.org/files/case-related/176/176-20180928-APP-01-00-EN.pdf>.

42. *Id.*

43. *Id.* ¶¶ 3–19, ¶¶ 36–50.

44. *See* Charles F. Whitman, Comment, *Palestine's Statehood and Ability to Litigate in the International Court of Justice*, 44 CAL. W. INT'L L. J. 73, 77, 90 (2013).

45. *See id.*; *see also* Vidmar, *supra* note 18, at 20.

46. Statute of the International Court of Justice, *supra* note 18, art. 34 ¶ 1.

47. *See* Vidmar, *supra* note 18; *see also* Milanovic, *supra* note 10. *Contra* Estates of Ungar ex rel Strachman v. Palestinian Auth., 315 F. Supp. 2d 164, 176–77 (D.R.I. 2004).

requirements of Article 34 of the ICJ Statute, without statehood, Palestine cannot bring a claim to the ICJ, no matter how persuasive Palestine's case may otherwise be.⁴⁸ However, since the text of Article 34 of the ICJ Statute does not provide a definition of the term "state," the outer limits of which entities may meet the threshold statehood qualification is open to considerable interpretation.⁴⁹ Pierre-Marie Dupuy, an author interpreting the meaning of Article 34 in a larger scholarly analysis of the ICJ Statute, notes that the provision amounts to an exclusionary rule, which prohibits the court from exercising contentious jurisdiction over any non-state actor.⁵⁰ However, since the provision does not provide a definition of a non-state actor just as it does not provide a definition of state, Dupuy's interpretation of Article 34 of the ICJ Statute does not resolve the issue of whether Palestine is a state for its purposes.⁵¹ The question of whether Palestine has access to the ICJ can therefore only be resolved by determining its standard for assessing statehood.⁵²

Malcolm N. Shaw, a scholar who analyzed the issue of jurisdiction in *Rosenne's Law and Practice of the International Court*, provides one potential explanation for how the ICJ defines statehood.⁵³ Shaw argues that the Court is meant to use a definition of statehood framed by how "the term is understood by the context and the practice of the United Nations."⁵⁴ Shaw indicates the ICJ will view an entity as a state when the U.N. has provided some recognition of statehood status, or potentially when an entity's characteristics are significantly analogous to other entities to which the U.N. has afforded such status.⁵⁵ Unfortunately, the U.N. Charter does not provide a clear indication of when an entity should be considered a state despite not being a member.⁵⁶ A member state is a state which has been accepted into the United Nations by the General Assembly after

48. See Statute of the International Court of Justice, *supra* note 18; see also SHAW, *supra* note 23, at 610.

49. See Statute of the International Court of Justice, *supra* note 18.

50. Pierre-Marie Dupuy, *Chapter II: Competence of the Court: Article 34*, in THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 585, 586 (Andreas Zimmermann et al. eds., 2nd ed. 2012).

51. Statute of the International Court of Justice, *supra* note 18.

52. See SHAW, *supra* note 23, at 610.

53. SHAW, *supra* note 23, at 610.

54. *Id.*

55. See SHAW, *supra* note 23, at 610.

56. See generally U.N. Charter art. 4 ¶ 1.

the Security Council has decided to recommend the state's inclusion.⁵⁷

Shaw's argument that statehood can be inferred from the U.N.'s past actions raises the question of what U.N. behavior is sufficient for the ICJ to consider an entity capable of bringing a claim before the court.⁵⁸ The Vienna Convention on the Law of Treaties (VCLT) may provide an example of circumstances in which a potential state's relationship with the United Nations provides evidence of statehood status.⁵⁹ The VCLT permits entities which participated in U.N. organizations, but otherwise did not satisfy other standards of statehood, to sign the Convention, and qualify as a state within the scope of the treaty.⁶⁰ According to Jure Vidmar, an Oxford University Professor of Law, this interpretation of statehood has been broadly applied in international law and may apply in the context of the ICJ.⁶¹ If both Shaw and Vidmar's view of the relationship between U.N. behavior and how the ICJ views statehood is correct, when the potential state is a participant in an U.N. organization, the "context and practice of the United Nations" militates in favor of finding statehood. However, statehood under international law does not necessarily depend on the kinds of inferences upon which both authors' definitions rely.⁶² There are less nebulous conceptions of what constitutes a state under international law which may amount to a preexisting standard.⁶³

Arguably, there is an operating definition of statehood under international law, stemming from the Montevideo Convention on the Rights and Duties of States (Montevideo).⁶⁴ The 1933 treaty between the United States and various Latin American nations was designed to ensure that the United States

57. *Id.* at ¶¶ 1–2.

58. *See* SHAW, *supra* note 23, at 610.

59. *See* Vidmar, *supra* note 18, at 33; *see also* Vienna Convention on the Law of Treaties, art. 81, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention on the Law of Treaties].

60. *See* Vidmar, *supra* note 18, at 33; *see also* Vienna Convention on the Law of Treaties, *supra* note 59, art. 81.

61. Vidmar, *supra* note 18, at 9, 33.

62. *Id.*; *see also* SHAW, *supra* note 23, at 610.

63. ROBERT KOLB, THE EDGAR COMPANION TO THE INTERNATIONAL COURT OF JUSTICE 179 (2014); *see also* Montevideo Convention on the Rights and Duties of States, Dec. 26, 1933, 165 L.N.T.S. 19, art. 1 [hereinafter Montevideo Convention]; JOHN QUIGLEY, THE STATEHOOD OF PALESTINE: INTERNATIONAL LAW IN THE MIDDLE EAST CONFLICT 206 (2010).

64. Montevideo Convention, *supra* note 63, art. 1.

would “respect their territorial integrity.”⁶⁵ Under the standard established by Montevideo, an entity is considered a state when the entity can demonstrate possession of four characteristics: “territory, population, [effective] government, and sovereignty.”⁶⁶ Collectively, these are referred to as the Montevideo criteria.⁶⁷ The treaty represents “[t]he source most often cited as a textual basis for statehood. . . .”⁶⁸ The ICJ might therefore be expected to be influenced by the definition of statehood that Montevideo provides.⁶⁹ Article 2 of the Montevideo Convention declares, “[t]he political existence of the state is independent of recognition by the other states,” specifically disregarding recognition as one of the requirements for statehood status under the Montevideo Convention.⁷⁰

There are likely a few approaches the ICJ might take to determining statehood. It could rely on the Montevideo Convention standard or infer an entity’s statehood from the U.N.’s behavior towards it.⁷¹ The statehood issue represents a preliminary barrier, in which the potential party is not a party to the ICJ Statute.⁷² A positive resolution of the statehood question does not necessarily mean that a potential party will obtain access to the court.⁷³

C. THE ICJ STATUTE ESTABLISHES MORE THAN ONE PATH FOR STATES TO GAIN ACCESS TO THE COURT

Article 35 of the ICJ Statute provides two approaches that a state, which is not a member of the United Nations and has not independently ratified the Statute, may gain access to the

65. KOLB, *supra* note 63; *see also* Montevideo Convention, *supra* note 63, art. 1; QUIGLEY, *supra* note 63, at 206.

66. KOLB, *supra* note 63; *see also* Montevideo Convention, *supra* note 63, art. 1.

67. *See* Whitman, *supra* note 44; *see also* Montevideo Convention, *supra* note 63, art. 1; QUIGLEY, *supra* note 63, at 218; Thomas D. Grant, *Defining Statehood: The Montevideo Convention and its Discontents*, 307 COLUM. J. TRANSNAT’L L. 403 (1999).

68. Grant, *supra* note 67, at 413.

69. *See* Whitman, *supra* note 44; *see also* Montevideo Convention, *supra* note 63, art. 1; QUIGLEY, *supra* note 63, at 218; Grant, *supra* note 67, at 413.

70. Montevideo Convention, *supra* note 63, art. 2.

71. *See* SHAW, *supra* note 23, at 610; *see also* Vidmar, *supra* note 18, at 33.

72. SHAW, *supra* note 23, at 632–40.

73. *Id.*

court.⁷⁴ One option for such a party to obtain access to the ICJ is to rely solely on treaty provisions which grant jurisdiction to the court.⁷⁵ Article 35 ¶ 2 contains the “treaties in force” provision, which provides that the conditions for nonparty access can be “subject to special provisions treaties in force.”⁷⁶ A nonparty may use a treaty as the basis for ICJ jurisdiction.⁷⁷ The “treaties in force provision” is an isolated exemption within a broader clause that expressly grants the U.N. Security Council the right to determine when and how a state, which would otherwise not have access to the ICJ, might obtain such access.⁷⁸ The Security Council invoked this authority and established conditions for nonmember access to the ICJ in U.N. Security Council Resolution (UNSCR) 9.⁷⁹ Article 35 ¶ 2 suggests “special provisions in treaties in force” may be sufficient for the purposes of jurisdiction even in the absence of compliance with the conditions established by the Security Council.⁸⁰ However, under ICJ precedent, the “treaties in force” provision only applies when the treaty at issue predates the ICJ Statute.⁸¹ Most potential parties would be unable to obtain access solely on the basis of the “treaties in force” clause.⁸²

The most relevant case on the question of when a treaty provision permits a state to invoke the “treaties in force” provision is *Legality of the Use of Force (Serbia and Montenegro v. Belgium)*.⁸³ In this case, Serbia and Montenegro filed suit against Belgium after the collapse of the Federal Socialist Republic of Yugoslavia—to which each nation had previously

74. See Whitman, *supra* note 44, at 89–90; see also Statute of the International Court of Justice, *supra* note 18, art. 35, ¶ 2.

75. Statute of the International Court of Justice, *supra* note 18, art. 35, ¶ 2; see also SHAW, *supra* note 23, at 632.

76. Statute of the International Court of Justice, *supra* note 18, art. 35, ¶ 2; see also SHAW, *supra* note 23, at 632.

77. Statute of the International Court of Justice, *supra* note 18, art. 35, ¶ 2; see also Whitman, *supra* note 44, at 89–90.

78. Statute of the International Court of Justice, *supra* note 18, art. 35, ¶ 2.

79. S.C. Res. 9, ¶ 1 (Oct. 15, 1946).

80. Statute of the International Court of Justice, *supra* note 18, art. 35, ¶ 2.

81. See *Legality of Use of Force (Serb. & Montenegro v. Belg.)*, Preliminary Objections, Judgment, 2004 I.J.C. Rep. 279, ¶ 113 (Dec. 15) [hereinafter *Legality of Use of Force (Serb. & Montenegro v. Belg.)*].

82. *Id.* (holding that the Genocide Convention does not provide jurisdiction for Serbia and Montenegro because it had been entered into force after the ICJ Statute).

83. *Id.* ¶ 113.

belonged—but before either countries, or a new collective entity containing both countries, was admitted to the United Nations.⁸⁴ The Security Council found that Serbia and Montenegro did not inherit Yugoslavia’s membership, a view echoed by the General Assembly.⁸⁵ In 2000, the Federal Republic of Yugoslavia (FRY), which included both Serbia and Montenegro, asked for and was granted admission to the U.N.⁸⁶ However, Serbia and Montenegro’s suit against Belgium predated the FRY’s formal admittance to the United Nations.⁸⁷ The ICJ found this readmittance, combined with the earlier actions of the Security Council and the General Assembly, meant neither FRY nor Serbia and Montenegro, which collectively served as the constituent parts of the FRY, were members of the United Nations at the time the suit against Belgium was initiated.⁸⁸ They were not otherwise parties to the ICJ statute.⁸⁹ Consequently, the court found FRY was a nonparty attempting to appear before the ICJ, which meant the FRY could not appear in front of the Court.⁹⁰

FRY expressly refused to adhere to the standards established by UNSCR 9 for nonparty access to the ICJ.⁹¹ Since FRY had no other way to establish access to the ICJ, FRY relied upon a treaty provision as the sole basis for jurisdiction.⁹² The ICJ found that the provision, in isolation, did not extend jurisdiction to FRY.⁹³ In the court’s view:

Article 35, paragraph 2, must be interpreted, *mutatis mutandis*, in the same way as the equivalent text in the Statute of the Permanent Court, namely as intended to refer to treaties in force at the date of the entry into force of the new Statute, and providing for the jurisdiction of the new court.⁹⁴

In the absence of UNSCR compliance, treaties are generally

84. *Id.* ¶¶ 40–45

85. *Id.* ¶¶ 57–60.

86. *Id.* ¶ 75.

87. *Id.* ¶ 79.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* ¶ 92.

92. *Id.* ¶ 1.

93. *Id.* ¶ 113.

94. *Id.*

insufficient to secure access to the ICJ. The “treaties in force” provision of the ICJ statute creates a limited exception to this rule when the treaty which putatively grants ICJ jurisdiction predates the existence of the court. In such a case, a state can obtain access to the court through the treaty even if it would not otherwise have access to the ICJ.⁹⁵ In practice, few, if any, potential parties can gain access on that basis.⁹⁶ Since the “treaties in force” provision represents an alternative method of obtaining jurisdiction in the absence of a state’s compliance with UNSCR 9, the question of whether the “treaties in force” provision has been satisfied is not determinative of whether a state that would otherwise not be able to appear before the ICJ may nonetheless procure such an opportunity.⁹⁷

Since few parties will be able to assert jurisdiction on the basis of the treaties in force provision that predates the Court, nonparty access will almost certainly depend on the state’s ability to satisfy the other requirements for nonparty access established in Article 35 ¶ 2 of the ICJ Statute.⁹⁸ Article 35 unequivocally grants the Security Council the authority to design the process by which a nonparty could obtain access to the Court.⁹⁹

In UNSCR 9, the Security Council used its authority to expand ICJ access to nonparties who notified the Registrar of the Court of their willingness to accept ICJ jurisdiction and judgement, as well as their intent to adhere to Article 94 of the U.N. Charter, which requires states to adhere to ICJ decisions.¹⁰⁰ A state can notify the Registrar of its recognition of ICJ jurisdiction over singular issue or of its acceptance of ICJ jurisdiction over “all disputes or of a particular class or classes of disputes”¹⁰¹ Under ¶ 2 of the resolution, a state may also notify the Registrar of its acceptance of ICJ jurisdiction over a preexisting dispute. Regardless of the nature of the dispute or disputes which a nonparty intends to bring before the ICJ,

95. *Id.*; see also Andreas Zimmeran, *Part Three: Statute of the International Court of Justice, Article 35*, in *THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY* 607, 623–27 (Andreas Zimmerman et al. eds., 2012).

96. See *Legality of Use of Force (Serb. & Montenegro v. Belg.)* at 113; see also Zimmeran, *supra* note 95, at 627.

97. See *Legality of Use of Force (Serb. & Montenegro v. Belg.)* at 113; see also Zimmeran, *supra* note 95, at 623–27.

98. Statute of the International Court of Justice, *supra* note 18, art. 35, ¶ 2.

99. *Id.*

100. S.C. Res. 9, *supra* note 79, ¶ 1; see also U.N. Charter art. 94.

101. S.C. Res. 9, *supra* note 79, ¶ 2.

notification is what permits jurisdiction under UNSCR 9.¹⁰²

D. THE ABSENCE OF A THIRD PARTY CAN PRECLUDE THE ICJ
FROM REACHING A DECISION

Beyond the jurisdictional questions, Palestine's claim raises the issue of whether the dispute necessarily involves Israel's interests, and whether Israel's absence from the dispute precludes the ICJ from reaching a decision on the merits of the case.¹⁰³ If the Court concludes a dispute involves the interest of an absent third party, the Court is unlikely to proceed with a case.¹⁰⁴ The principle that the absence of such a third party should prevent the ICJ from proceeding may have been established as early as 1948 in the *Corfu Channels* case, in which the Court refused to hear evidence of Yugoslavia's responsibility for the mines because Yugoslavia was not participating in the dispute.¹⁰⁵ The view was more precisely articulated in the *Monetary Gold* case.¹⁰⁶

Monetary Gold was concerned with whether gold, which had been seized from Italy by Nazi Germany, was the rightful property of Albania and could therefore be taken by Albania's creditor nations as payment for the nation's debts.¹⁰⁷ Albania was not a party to the dispute, and the ICJ was faced with the question of what Albania's absence meant for the Court's jurisdiction.¹⁰⁸ The Court found:

[w]here, as in the present case, the vital issue to be settled concerns the international responsibility of a third State, the Court cannot, without the consent of that third State, give a decision on that issue binding upon

102. *Id.* at ¶ 2.

103. See SHAW, *supra* note 23, at 560; Milanovic, *supra* note 10; see generally Palestine v. U.S., Application Instituting Proceedings, 2018 I.C.J. 180, ¶ 30 (Sept. 28).

104. See SHAW, *supra* note 23, at 560; Milanovic, *supra* note 10; see generally Palestine v. U.S., Application Instituting Proceedings, 2018 I.C.J. 180, ¶ 30 (Sept. 28).

105. See Natalie S. Klein, *Necessary Parties in the East Timor Case* 21 YALE J. INT'L L. 305, 334–35 (1996); see also *Corfu Channel Case* (U.K. v. Alb.), Judgment, 1949 I.C.J. Rep. 4, 17 (Apr. 9).

106. *Monetary Gold Removed from Rome in 1943* (It. v. Fr., U.K., and U.S.), Judgment, 1954 I.C.J. Rep. 19, 33 (June 15).

107. *Id.* at 21.

108. *Id.* at 32.

any State, either the third State, or any of the parties before it.¹⁰⁹

The ICJ returned to this rule in the *Case Concerning East Timor*, finding a dispute between Australia and East Timor could not proceed because the dispute inherently involved the interests of Indonesia, which was not a party to the dispute.¹¹⁰

The *Corfu* case provided a clear precedent that the Court will not hear evidence of a party's violation of international law when the party is not present before the Court.¹¹¹ Under the standard set by *Monetary Gold*, a dispute which inevitably involved the core interests of an absent third party is precluded from proceeding.¹¹² The Court has since upheld the *Monetary Gold* view in subsequent cases.¹¹³ However, the ICJ has also stressed a third party is not "essential" merely because the third party would be impacted in some respect by a potential judgment.¹¹⁴ For the absence of a state to preclude the ICJ from reaching a judgment, the absent third party's interests must be an inherent part of the dispute, not merely incidentally related.¹¹⁵

III. ANALYSIS

Palestine must overcome three significant jurisdictional problems before the ICJ will be convinced to hear the substance of *State of Palestine v. United States of America*. These issues can be summarized as (1) whether Palestine qualifies as a state from the perspective of the ICJ, (2) whether Palestine—as a nonparty—has access to the Court assuming it is a state, and

109. *Id.* at 33.

110. *East Timor (Port. v. Austl.)*, Judgment, 1995 I.C.J. Rep. 90, ¶¶ 34–35 (June 30).

111. *Corfu Channel Case (U.K. v. Alb.)*, Judgment, 1949 I.C.J. Rep. 4, 17 (Apr. 9).

112. *Monetary Gold Removed from Rome in 1943 (It. v. Fr., U.K., and U.S.)*, Judgment, 1954 I.C.J. Rep. 19, 33 (June 15); *see also Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1984 I.C.J. Rep. 392 ¶ 88 (Nov. 26).

113. *East Timor (Port. v. Austl.)*, Judgment, 1995 I.C.J. Rep. 90, ¶¶ 34–35 (June 30).

114. *See, e.g., Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1984 I.C.J. Rep. 392 ¶ 88 (Nov. 26).

115. *Id.*; *see also SHAW, supra* note 23, at 564–65.

(3) whether Israel is an essential party to Palestine’s claim.¹¹⁶ To obtain access to the ICJ, Palestine must demonstrate an ability to qualify as a state under the Court’s working definition of statehood.¹¹⁷ Since Palestine is not a party to the ICJ Statute, Palestine must also satisfy the requirements for nonparty access to the Court established under Article 35 ¶ 2 of the Statute.¹¹⁸ Finally, Palestine must persuade the Court there is no third party with such an obvious inherent interest in the dispute that their absence would preclude the Court from reaching any determination on the core of Palestine’s claim.¹¹⁹ As shall be demonstrated, Palestine likely satisfies the Court’s statehood requirement and has likely fulfilled the requirements of Article 35 ¶ 2 of the Statute.¹²⁰ However, the Court is likely to find Israel has an inherent interest in the dispute and therefore will likely determine the ICJ cannot adjudicate Palestine’s claim against the United States.¹²¹

A. IS PALESTINE A STATE FOR THE PURPOSES OF THE ICJ?

For the ICJ to be persuaded to hear Palestine’s case against the United States, the ICJ must first be convinced Palestine is a state.¹²² A contrary conclusion would mean the immediate end of the case.¹²³ Palestine is likely to meet this criterion. If the ICJ’s view of whether or not an entity is a state can be inferred from the U.N.’s behavior, then “the state of Palestine” has arguably satisfied the requirement since 2012 when the General

116. See SHAW, *supra* note 23, at 560–67 (discussing the term “Essential Party” in the context of the ICJ).

117. See Statute of the International Court of Justice, *supra* note 18, art. 34, ¶ 1.

118. *Id.* art 35, ¶ 2.

119. See Monetary Gold Removed from Rome in 1943 (It. v. Fr., U.K., and U.S.), Judgment, 1954 I.C.J. Rep. 19, 33 (June 15); see also Milanovic, *supra* note 10.

120. See Statute of the International Court of Justice, *supra* note 18, art. 34, ¶ 1, art. 35, ¶ 2; see also Whitman, *supra* note 44, at 77 (indicating that Palestine is not a party to the ICJ Statute).

121. See Monetary Gold Removed from Rome in 1943 (It. v. Fr., U.K., and U.S.), Judgment, 1954 I.C.J. Rep. 19, 33 (June 15); see also Milanovic, *supra* note 10.

122. See Statute of the International Court of Justice, *supra* note 18, art. 34, ¶ 1; see also SHAW, *supra* note 23, at 610; Dupay, *supra* note 50, at 586.

123. See Statute of the International Court of Justice, *supra* note 18, art. 34, ¶ 1.

Assembly passed resolution 67/19.¹²⁴ The resolution recognizes Palestine as an observer state.¹²⁵ The United States' opposition effectively forecloses the Security Council from admitting Palestine as a new member of the U.N.¹²⁶ However, Palestine's failure to attain membership in the U.N. is unlikely to be the determinative issue for whether the ICJ will determine Palestine to be a state. Even if ICJ relies upon the U.N.'s view of statehood, the ICJ must recognize entities which have not achieved membership status as states.¹²⁷ If the term "state" only referred to the U.N.'s members, then there would be no need for either Article 35 ¶ 2 or UNSCR 9, since all qualified states would be parties to the ICJ Statute precisely because they are members of the U.N.¹²⁸

Aside from the resolution's implications for Palestine's status within the U.N., Resolution 67/19 was also indicative of a larger shift in international opinion towards an acceptance of Palestine's statehood status.¹²⁹ The widespread international opinion in favor of Palestinian statehood, which the resolution represented, could influence the ICJ into accepting Palestine as a State in the eyes of the Court.¹³⁰ Significantly, in 2003, the ICJ permitted Palestine to submit material to the Court in the *Legal Consequences of the Construction of a Wall* ("Construction of a Wall") because the U.N. previously recognized Palestine as an observer in the General Assembly.¹³¹ According to Shaw, the ICJ "cannot admit as an intervenor in any capacity an entity that is not a state in the United Nations sense."¹³² Palestine's

124. See generally G.A. Res. 67/19 (Nov. 29, 2012).

125. *Id.* ¶ 2.

126. See, e.g., Alex Spillius, *Palestinian Authority to Lodge Statehood Bid in UN*, TELEGRAPH (Sept. 23, 2011), <https://www.telegraph.co.uk/news/worldnews/middleeast/palestinianauthority/8783351/Palestinian-Authority-to-lodge-statehood-bid-at-UN.html>.

127. See Statute of the International Court of Justice, *supra* note 18, art. 35 ¶ 2; see also S.C. Res. 9, *supra* note 79, ¶ 2; G.A. Res. 67/19, *supra* note 124, ¶ 3.

128. See Statute of the International Court of Justice, *supra* note 18; see also S.C. Res. 9, *supra* note 79, ¶ 1; G.A. Res. 67/19, *supra* note 124, ¶ 3.

129. Whitman, *supra* note 44, at 85.

130. Brad R. Roth, *Reconceptualizing Recognition of States and Governments*, in RECOGNITION IN INTERNATIONAL RELATIONS: RETHINKING A POLITICAL CONTEXT IN A GLOBAL CONTEXT 141, 155–56 (Christopher Daase et al. eds., 2015).

131. *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, Request for Advisory Opinion, Order*, 2003 I.C.J. 428, ¶ 2 (Dec. 19).

132. SHAW, *supra* note 23, at 610.

submission of material to the Court suggests Palestine was permitted to intervene in the *Construction of a Wall* case.¹³³ If Shaw’s view—that only states are permitted to participate, to any degree, in ICJ cases—is valid, then the ICJ’s 2003 decision to permit Palestine to submit material to the Court could imply a previous recognition of Palestinian statehood by the Court.¹³⁴ If observer status was sufficient for the Court to permit Palestine to submit material to the Court, Resolution 67/19’s use of the term ‘state’ may be sufficient for the ICJ to consider Palestine a state, which would allow Palestine to bring a dispute before it.¹³⁵

Jure Vidmar, however, expressed a contrary view.¹³⁶ Vidmar argued, “despite the term ‘State’ being on the label, the status of a non-member State does not carry an implicit confirmation of statehood analogous to UN membership.”¹³⁷ Presuming Vidmar’s analysis of the persuasive value of Resolution 67/19 is accurate, Palestine will have to demonstrate statehood status through another approach, such as demonstrating that it possesses “(a) a permanent population; (b) a defined territory; (c) a government and (d) the capacity to enter into relations with other states” and therefore meets the standard for statehood established by the Montevideo Convention.¹³⁸

In *Estates of Ungar v. Palestinian Authority*, a Federal District Court found the Palestinian authority lacked “sovereign immunity,” because Palestine failed to satisfy the Montevideo Convention.¹³⁹ This Court’s ruling is a useful summary of an argument against Palestine’s satisfaction of the Montevideo criteria, and is therefore worth analyzing in some detail.

The Federal District Court found Palestine lacked a “defined

133. Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, Order, *supra* note 131; *see also* SHAW, *supra* note 23, at 610.

134. Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, Order, *supra* note 131; *see also* SHAW, *supra* note 23, at 610.

135. Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, Order, *supra* note 131; *see also* SHAW, *supra* note 23, at 610.

136. Vidmar, *supra* note 18, at 19.

137. *Id.* at 31.

138. *Id.* at 34; *see also* Montevideo Convention, *supra* note 63, art. 1; KOLB, *supra* note 63, at 179; Whitman, *supra* note 44, at 85; QUIGLEY, *supra* note 63, at 218; Grant, *supra* note 67, at 413–14.

139. *Estates of Ungar*, 315 F. Supp. 2d 164, 176–77 (D.R.I. 2004).

territory”, a “permanent population”, and a “government that has the capacity to enter into foreign relations” and, therefore, failed to satisfy three of the four Montevideo statehood criteria.¹⁴⁰ The Court saw the second category as dependent upon the first, finding that if no Palestinian territory existed, there also could not be a “permanent population” of Palestinians.¹⁴¹ The Court based this conclusion on a reading of the 1995 *Interim Agreement on the West Bank and the Gaza Strip*, which the Court found left the ultimate nature of the Palestinian Authority’s (PA) sovereignty over those territories unclear.¹⁴² The Court found “[t]he PA lacks a defined territory under its control because the Interim Agreement provides that the West Bank and Gaza Strip will remain undefined areas until a final status agreement is achieved and, in the meantime, any territorial boundaries are subject to change by Israeli redeployment.”¹⁴³ However, as the Court acknowledged, the Montevideo “defined territory” criteria does not preclude any ambiguity surrounding the borders of or other aspects of the relevant “territory.”¹⁴⁴ Whether the Court reached the proper conclusion on the question of the existence of a defined Palestinian territory under the Interim Agreement, and by extension, whether Palestine can be considered a state for the purposes of the ICJ depends on whether the ambiguity surrounding the nature of the territory is so great as to deny any sense of reality to territory’s existence.

1. Palestine Likely Possesses a Defined Territory

Contrary to the *Unger* court’s view, the text of the Interim Agreement does not appear to support the view that no Palestinian territory exists.¹⁴⁵ The relevant provision of the Interim Agreement notes, “[t]he two sides agree that West Bank and Gaza Strip territory, except for issues that will be negotiated in the permanent status negotiations, will come under the

140. *Id.* at 168; *see also* Montevideo Convention, *supra* note 63, art. 1.

141. *Estates of Ungar*, 315 F. Supp. 2d 164 at 179–80 (D.R.I. 2004).

142. *Id.* at 179; *see generally* Israel-Palestinian Interim Agreement on the West Bank and Gaza Strip, 36 I.L.M. 551, Sept. 28, 1995, [hereinafter Israel-Palestinian Interim Agreement].

143. *Estates of Ungar*, 315 F. Supp. 2d 164 (D.R.I. 2004) at 179.

144. *Id.*

145. Israel-Palestinian Interim Agreement, *supra* note 142, art. XI ¶ 2.

jurisdiction of the Palestinian Council.”¹⁴⁶ Although the treaty notes that the full extent of the Palestinian territory was subject to a future renegotiation with Israel, the treaty appears to indicate both the West Bank and the Gaza Strip would become Palestinian territory upon the implementation of the treaty, or, at least, that the land would be under jurisdiction of the Palestinian Authority.¹⁴⁷ The “issues that will be negotiated in the permanent status negotiations” appear to relate to disputes about the precise boundaries of Palestinian authority over the West Bank and the Gaza strip and not whether such authority will exist in any form.¹⁴⁸

As John Quigley noted, “Palestine has a defined territory, even if its exact borders remain to be clarified.”¹⁴⁹ The ambiguity over the *existence* of a defined Palestinian territory is not as large as the Court in *Estates of Unger* found.¹⁵⁰ Indeed, the General Assembly’s initial partition plan for the Palestinian mandate arguably should be considered as a basis for a “defined” Palestinian territory under international law.¹⁵¹ As in the Interim Agreement, the initial General Assembly partition plan placed the Gaza Strip and the West Bank in the Arab or Palestinian territory.¹⁵² The General Assembly’s partition plan therefore included a defined Arab territory which encompassed the territory stated to be under Palestinian authority jurisdiction according to the Interim Agreement.¹⁵³

However, under the U.N. Charter, the General Assembly plan was a recommendation and, therefore, did not carry the full weight of a Security Council approved policy as a matter of international law.¹⁵⁴ Nevertheless, the Security Council recognized the territories occupied by Israel since 1967, which include the West Bank, Gaza Strip, and East Jerusalem, as Palestinian in UNSCR 2334—a Security Council Resolution which condemned Israeli settlement in that territory.¹⁵⁵ The ICJ

146. *Id.*

147. *Id.*; see also *Estates of Ungar*, 315 F. Supp. 2d 164 (D.R.I. 2004) at 179.

148. Israel-Palestinian Interim Agreement, *supra* note 142, art. XI ¶ 2.

149. QUIGLEY, *supra* note 63, at 209.

150. See *Estates of Ungar*, 315 F. Supp. 2d 164 (D.R.I. 2004) at 179.

151. Whitman, *supra* note 44, at 79–80; see generally G.A. Res. 181 (Nov. 29, 1947).

152. See G.A. Res. 181, *supra* note 151.

153. Whitman, *supra* note 44, at 80; see also G.A. Res. 181, *supra* note 151.

154. G.A. Res. 181, *supra* note 151; see also U.N. Charter, *supra* note 100, art. 10.

155. S.C. Res. 2334, ¶ 1 (Dec. 23, 2016).

found the same territory to be occupied Palestinian territory in *Construction of a Wall*.¹⁵⁶ If both the U.N. and the ICJ have recognized the territory as “Palestinian,” the ICJ is unlikely to find that Palestine lacks statehood status because no such territory exists.¹⁵⁷ Thus, the ICJ appears to have acknowledged the existence of a defined Palestinian territory.¹⁵⁸ Even if the partition plan alone does not constitute evidence of a “defined territory,” subsequent U.N. action provides clear support to the argument that the West Bank and the Gaza Strip constitute such a territory.¹⁵⁹ Palestine, therefore, likely satisfies the “defined territory” criterion in the Montevideo Convention.¹⁶⁰ In turn, Palestine is therefore likely also able to satisfy the Convention’s “permanent population” requirement.¹⁶¹ As the *Ungar* finding suggests, the defined territory and permanent population conditions are arguably intertwined in the case of Palestine.¹⁶²

2. A Permanent Palestinian Population Exists

Assuming a defined “Palestinian” territory exists, there is little doubt there is a permanent population of Palestinians present in the territory.¹⁶³ For example, UNSCR 1860, a Security Council Resolution—which focused on the issue of violence in the Gaza strip—references the “Palestinian civilian population.”¹⁶⁴ To acknowledge the existence of such a population is likely to acknowledge the existence of a permanent Palestinian population.¹⁶⁵ The Court in *Ungar* found there was no such permanent population because, in the Court’s eye, there

156. Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, Order, *supra* note 131, ¶¶ 72–77.

157. *Id.*

158. G.A. Res. 181, *supra* note 151; *see also* U.N. Charter, *supra* note 100, art. 10; Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, Order, *supra* note 131, ¶¶ 71–77.

159. *See, e.g.*, S.C. Res. 2334, *supra* note 155, ¶ 1; *see also* Whitman, *supra* note 44, at 79–80.

160. Whitman, *supra* note 44, at 80; *see also* Montevideo Convention, *supra* note 63, art. 1.

161. *See, e.g.*, *Estates of Ungar*, 315 F. Supp. 2d at 180; *see also* Montevideo Convention, *supra* note 63, art. 1; QUIGLEY, *supra* note 63, at 209.

162. *Estates of Ungar*, 315 F. Supp. 2d 164 (D.R.I. 2004) at 180.

163. *Id.*; *see also* QUIGLEY, *supra* note 63, at 209; Whitman, *supra* note 44, at 79.

164. S.C. Res. 1860 (Jan. 8, 2009).

165. QUIGLEY, *supra* note 63, at 209; *see also* Whitman, *supra* note 44, at 79.

was no defined territory for the Palestinian population to permanently inhabit.¹⁶⁶ Even a Court which found Palestine failed to satisfy any of Montevideo's requirements did not argue there was no "Palestinian" population in the disputed territory, and did not argue the population's presence was somehow temporary.¹⁶⁷

The fact that a Federal District Court inclined to deny Palestinian statehood did not necessarily deny the existence of Palestinians as a distinct population implies the existence of such a population.¹⁶⁸ The reasoning found in *Ungar* indicates even if the ICJ was to conclude Palestine did not constitute a state under the Montevideo standard, the Court would almost certainly not base such a conclusion on the permanent population criterion alone.¹⁶⁹ Furthermore, the ICJ would likely have to defy its own precedent to conclude there was no Palestinian population.¹⁷⁰ The Court has arguably already concluded such a population exists as a matter of international law.¹⁷¹ In *Construction of a Wall*, the Court found there was a "Palestinian people."¹⁷² If the ICJ is to conclude Palestine was not a state on the basis of the nonexistence of Palestinians, then the Court would therefore have to violate its own recent precedent.¹⁷³ Consequently, if the ICJ is to conclude that Palestine does not satisfy the Montevideo standard for statehood, then it will likely have to conclude that Palestine has failed to satisfy the remaining elements of the standard.¹⁷⁴ For example, the Court may find that Palestine fails to satisfy Montevideo's requirement that a putative state possess a "government."¹⁷⁵

166. *Estates of Ungar*, 315 F. Supp. 2d 164 (D.R.I. 2004) at 180.

167. *See id.*

168. *See id.*

169. *See id.*

170. *See Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory*, Order, *supra* note 131, ¶ 122.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*; *see also* Montevideo Convention, *supra* note 63, art. 1.

175. *See* Montevideo Convention, *supra* note 63, art. 1.

3. Palestine May Have More Difficulty Satisfying the Government Criterion

The government requirement of the Montevideo Convention may be more difficult for “the state of Palestine” to satisfy than either the defined territory or permanent population criteria.¹⁷⁶ As the Court in *Unger* noted, the Interim Agreement permitted Israel to maintain control over the West Bank and the Gaza Strip’s borders with other nations in the region-control, which may undermine the claim that Palestine satisfies the “government” criterion.¹⁷⁷ If the connotation of “[effective] government” is control, ICJ precedent suggests the criterion is not satisfied in the case of Palestine.¹⁷⁸ In *Construction of a Wall*, the ICJ found that “Israel exercises control in the Occupied Palestinian territory.”¹⁷⁹ A strong argument can therefore be made that Palestine’s lack of control prevents Palestine from satisfying at least one of the Montevideo convention criteria for statehood.¹⁸⁰ However, the government criteria in the Montevideo convention does not directly indicate a state must have full control over the nation’s borders in order to have a government.¹⁸¹

While a requirement for control may be implicit in a requirement that a potential state possess a “government,” the words “effective” and “control” do not appear in the text of the relevant Article of the Convention.¹⁸² The Montevideo Convention does, however, contain a provision that states “[n]o State has the right to intervene in the internal or external affairs of another.”¹⁸³ The provision is not included within the Article which defines the term “state.”¹⁸⁴ Contrary to the conclusion of

176. *See id.*

177. *Estates of Ungar*, 315 F. Supp. 2d 164 (D.R.I. 2004) at 180; *see also* Israel-Palestinian Interim Agreement, *supra* note 142, art. XII ¶ 1.

178. *See* Montevideo Convention, *supra* note 63; *see also* Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J Rep. 136, ¶ 139 (July 9).

179. Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, *supra* note 178, ¶ 139.

180. *See* Montevideo Convention, *supra* note 63; *see also* QUIGLEY, *supra* note 63, at 213; Whitman, *supra* note 44, at 79.

181. *See* Montevideo Convention, *supra* note 63; *see also* Whitman, *supra* note 44, at 80.

182. *See* Montevideo Convention, *supra* note 63.

183. *Id.* art. 8.

184. *See id.* art. 1.

the Federal District Court in *Estates of Unger*, the administrative duties of the Palestinian authority detailed in the Interim Agreement is sufficient to satisfy the government criterion.¹⁸⁵ As Quigley noted, “[w]ith the peace process the PNA became a governing institution in Gaza and the West Bank. Its scope of control was limited by Israel, but a belligerent occupant need not necessarily displace existing institutions. Israel had not done so in Gaza or the West Bank.”¹⁸⁶ Some degree of authority on the part of the potential Palestinian government in the territory may, therefore, be sufficient to satisfy the government criteria, even if the government’s authority does not amount to full control in the eyes of the Court.¹⁸⁷

However, the existence of a Palestinian government which governs a defined Palestinian population within a defined Palestinian territory would not be enough to satisfy the Montevideo criteria. To satisfy Montevideo, Palestine would also need to possess the capacity to act on the international stage before being considered a state; Palestine’s capacity to act on the international stage, and therefore its satisfaction of the Montevideo criteria, is not necessarily precluded by the provision of the Interim Agreement that permits continuing Israeli control over Palestine’s external border.¹⁸⁸ However, the border issue naturally raises the question of whether Palestine possesses the “capacity to enter into relations with the other states” and is thereby able to satisfy the final remaining element in the Montevideo definition of statehood.¹⁸⁹

4. Palestine Can Engage Diplomatically with Other States

Palestine may have the requisite international capacity under Montevideo since:

[t]he *State* of Palestine is a member of several international organizations, including UNESCO and the

185. See Israel-Palestinian Interim Agreement, *supra* note 142; see also Whitman, *supra* note 44, at 80.

186. QUIGLEY, *supra* note 63, at 214.

187. *Id.* at 213–14; see also Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, *supra* note 179, ¶ 139.

188. See Israel-Palestinian Interim Agreement, *supra* note 142, art. XII ¶ 1; see also QUIGLEY, *supra* note 63, at 211–13; Whitman, *supra* note 44, at 80.

189. Montevideo Convention, *supra* note 63; see also QUIGLEY, *supra* note 63, at 211–13.

Arab League, and is also a 'Non-Member Observer State' to the U.N. Palestine, as a member of these organizations, demonstrates that it has the ability to enter into relations with other States.¹⁹⁰

Whether Palestine possesses capacity to "enter into relations with the other states"¹⁹¹ is likely not solely dependent upon Palestine's membership in such multilateral international organizations.¹⁹² As John Quigley noted, Palestine "has diplomatic or quasi-diplomatic relations with many states. It maintains representative offices in other states and, in turn, Palestine hosts representative offices of other states."¹⁹³ Quigley also noted that the Palestinian Authority has issued passports on behalf of Palestinians and is party to treaties related to the recognition of passports.¹⁹⁴ If the final Montevideo criteria refers to an ability to engage with the international community, the actions that Quigley cites likely constitute sufficient evidence of such engagement for the purposes of the ICJ.¹⁹⁵

Even if Resolution 67/19 does not prove statehood, the willingness of the General Assembly to support nonmember observer status may be enough to satisfy the international engagement criteria of the Montevideo convention.¹⁹⁶ Palestine's territory and population has been acknowledged by both the U.N. and the ICJ.¹⁹⁷ Palestine has a local political authority.¹⁹⁸ Palestine's local political authority has engaged with various nations in the international community.¹⁹⁹ Palestine likely satisfies the Montevideo standard for statehood.²⁰⁰

Additionally, Palestine's participation in U.N. organizations may be sufficient evidence of statehood for the purposes of the

190. Whitman, *supra* note 44, at 81.

191. Montevideo Convention, *supra* note 63.

192. *Id.*; see also Whitman, *supra* note 44, at 81. *But see* Vidmar, *supra* note 18, at 35.

193. QUIGLEY, *supra* note 63, at 211.

194. *Id.* at 212.

195. See *id.* at 211–12.

196. See Vidmar, *supra* note 18, at 20; see also G.A. Res. 67/19, *supra* note 124.

197. Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, *supra* note 179, ¶¶ 71, 122; see also S.C. Res. 1860, *supra* note 164.

198. See QUIGLEY *supra* note 63, at 211–12.

199. *Id.*

200. *Id.* at 218.

ICJ statute.²⁰¹ As has been noted, the VCLT standard for statehood indicates such participation can serve as evidence of statehood in the context of the ICJ Statute. Palestine has been a member of UNESCO since 2011.²⁰² Palestine therefore likely satisfies both the Montevideo and the alternative Vienna Convention standards and has been recognized as a kind of state by the General Assembly.²⁰³ For the purposes of the ICJ Statute, Palestine likely qualifies as a state.²⁰⁴

B. DOES PALESTINE HAVE ACCESS TO THE COURT?

While Palestine may well constitute a state as understood by the ICJ, the Palestinian state is not a party to the ICJ Statute.²⁰⁵ Palestine is not a full member of the United Nations, and therefore does not have direct access to the ICJ.²⁰⁶ Palestine's access to the Court depends on the extent to which that state has satisfied the requirements for nonparty access to the Court under Article 35, ¶ 2.²⁰⁷ According to ¶ 25 of Palestine's application, Palestine claims ICJ jurisdiction on the basis of a treaty which postdates the ICJ Statute.²⁰⁸ The VCDR and the Optional Protocol upon which Palestine relies date from 1961 and 1963, respectively.²⁰⁹ In contrast, the ICJ Statute dates from 1945.²¹⁰ Although Palestine spends much of its application

201. See Vidmar, *supra* note 18, at 39.

202. See Whitman, *supra* note 44, at 84.

203. See Statute of the International Court of Justice, *supra* note 18; see also G.A. Res. 67/19, *supra* note 124; QUIGLEY, *supra* note 63, at 218; Vidmar, *supra* note 18, at 33–34.

204. Cf. QUIGLEY, *supra* note 63, at 218; see also Statute of the International Court of Justice, *supra* note 18; G.A. Res. 67/19, *supra* note 124; Vidmar, *supra* note 18, at 33–34.

205. See Whitman, *supra* note 44, at 89–90.

206. See G.A. Res. 67/19, *supra* note 124; see also *id.*

207. Statute of the International Court of Justice, *supra* note 18, art. 4, ¶ 3.

208. See Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 500 U.N.T.S. 95 [hereinafter Vienna Convention on Diplomatic Relations]; Optional Protocol on the Compulsory Settlement of Disputes, Apr. 24, 1963, 596 U.N.T.S. 487 [hereinafter Optional Protocol on Compulsory Settlement]; see also Palestine v. U.S., Application Instituting Proceedings, ¶ 25 (Sept. 28, 2018), <https://www.icj-cij.org/files/case-related/176/176-20180928-APP-01-00-EN.pdf>; Legality of Use of Force (Serbia & Montenegro v. Belgium).

209. See Vienna Convention on Diplomatic Relations, *supra* note 208; see also Optional Protocol on the Compulsory Settlement, *supra* note 208; Palestine v. U.S., Application Instituting Proceedings, ¶ 25 (Sept. 28, 2018), <https://www.icj-cij.org/files/case-related/176/176-20180928-APP-01-00-EN.pdf>.

210. See, e.g., *History*, INT'L COURT OF JUSTICE, <https://www.icj->

in justifying jurisdiction based on the relevant portions of the VCDR and the associated Optional Protocol, those treaty provisions cannot provide the basis for jurisdiction in isolation, precisely because those provisions postdate the ICJ Statute.²¹¹ While Palestine claims the Court has jurisdiction based upon Article 35, ¶ 2 of the ICJ Statute, Palestine cannot rely upon the “treaties in force” provision in the paragraph to establish the Court’s jurisdiction.²¹²

As has been noted, the provision would not permit a state to use a treaty as the sole basis for jurisdiction where the treaty granting jurisdiction postdates the ICJ Statute.²¹³ Consequently, neither the VCDR nor the Optional Protocol can likely serve as the sole basis for jurisdiction. Palestinian access to the ICJ depends upon the extent to which Palestine satisfies the requirements found within UNSCR 9, since the only practical path available for a state which is not otherwise party to the ICJ Statute to obtain access to the Court is adherence to the resolution.²¹⁴ As has been previously discussed, for the resolution to be satisfied, a state must submit notice of the state’s acceptance of ICJ jurisdiction over a dispute to the Registrar of the Court.²¹⁵

Despite the contrary impression which Palestine’s emphasis on treaty-based jurisdiction may create in its application, Palestine appears to have satisfied the requirements of UNSCR 9.²¹⁶ According to ¶ 30 of Palestine’s complaint to the ICJ, Palestine may have provided the requisite notice. The paragraph notes:

the State of Palestine submitted on 4 July 2018, in

cij.org/en/history (last visited Apr. 11, 2019).

211. See Vienna Convention on Diplomatic Relations, *supra* note 208; Optional Protocol on the Compulsory Settlement, *supra* note 208; see also Palestine v. U.S., Application Instituting Proceedings, ¶¶ 25–33 (Sept. 28, 2018); Legality of Use of Force (Serb. & Montenegro v. U.K.), Judgment, 2004 I.C.J. Rep. 297, ¶ 113 (Dec. 15).

212. See Statute of the International Court of Justice, *supra* note 18, at art. 35, ¶ 2; see also Palestine v. U.S., Application Instituting Proceedings, ¶¶ 25–33 (Sept. 28, 2018).

213. Legality of Use of Force (Serb. and Montenegro v. Germ.), Preliminary Objections, Judgment, 2004 I.C.J. Rep. 297, ¶ 113 (Dec. 15).

214. See, e.g., Statute of the International Court of Justice, *supra* note 18, art. 35, ¶ 2; see also S.C. Res. 9, *supra* note 79, ¶ 1.

215. S.C. Res 9, *supra* note *supra* note 79.

216. Palestine v. U.S., Application Instituting Proceedings, ¶¶ 25–33, (Sept. 28, 2018).

accordance with Security Council resolution [sic] 9 (1946) and Article 35 (2) of the Statute of the Court, a 'Declaration recognizing the Competence of the International Court of Justice' for the settlement of all disputes that may arise or that have already arisen covered by Articles I and II of the Optional Protocol.²¹⁷

The Declaration was included as an annex to the application.²¹⁸ Although neither the Application nor the Declaration mention the registrar of the Court, the language of the Declaration indicates the terms of UNSCR 9 are satisfied.²¹⁹ The Declaration asserts:

the State of Palestine hereby declares that it accepts with immediate effect the competence of the International Court of Justice for the settlement of all disputes that may arise or that have already arisen covered by Article I of the Optional Protocol to the Vienna Convention on Diplomatic Relations Concerning the Compulsory Settlement of Disputes (1961), to which the State of Palestine acceded on 22 March 2018. In doing so, the State of Palestine declares that it accepts all the obligations of a Member of the United Nations under Article 94 of the Charter of the United Nations.²²⁰

This language nearly mirrors the text of UNSCR 9.²²¹ UNSCR 9 requires the notifying party to inform the Registrar of the Court that the party has accepted jurisdiction and of the party's intention to abide by Article 94 of the U.N. Charter.²²² Palestine's "Declaration" contains both the required notification and a pledge to abide by the Article of the U.N. Charter which potential parties are required to adhere to under UNSCR 9.²²³ Although neither the application nor the Declaration indicate to whom the Declaration was made, both mention the Declaration

217. *Id.* ¶ 30.

218. Relocation of United States Embassy to Jerusalem (Palestine v. U.S.), Application Instituting Proceedings, Annex 5: Declaration Recognizing the Competence of the International Court of Justice, 4 July 2018, (Sept. 28, 2018).

219. *Id.*

220. *Id.*

221. S.C. Res. 9, *supra* note 79, at ¶¶ 1–2.

222. *Id.*

223. Palestine v. U.S., Application Instituting Proceedings, Annex 5, (Sept. 28, 2018).

was made to accord with UNSCR 9.²²⁴ Given Palestine's emphasis on adherence to UNSCR 9 in both its Declaration and application to the ICJ, it would be implausible to argue that the Declaration was not submitted to the registrar of the court as required by the resolution.²²⁵ Assuming the Declaration was, in fact, properly submitted and Palestine meets the threshold statehood requirement, in theory, there is no impediment to Palestine appearing before the ICJ, despite not being a party to the statute.²²⁶

C. CAN PALESTINE'S CLAIM SURVIVE THE *MONETARY GOLD* PRECEDENT?

Because Palestine's claim relies upon the assertion that Jerusalem is not Israeli territory, the ICJ would need to reject much of the Court's precedent to adjudicate the merits of Palestine's claim against the United States.²²⁷ Palestine's claim is arguably reminiscent of the one at issue in *Corfu Channel*.²²⁸ Palestine claims that Israel has acted in violation of international law in asserting jurisdiction over Jerusalem.²²⁹ In *Corfu Channels*, the ICJ refused to hear evidence that a third party violated international law because the third party was absent.²³⁰ This precedent may preclude the Court from assessing Palestine's evidence that Israel violated international law in asserting sovereignty over Jerusalem because Israel is absent.²³¹ Much of the information contained within Palestine's application to the Court is designed to support such a claim, including citations to the Vienna Convention on Diplomatic Relations and the Optional Protocol, which appear to condemn

224. *Id.* ("pursuant to Security Council Resolution 9"); *see also id.* ¶ 30 ("in accordance with Security Council resolution [sic] 9").

225. *Id.*

226. *See* Statute of the International Court of Justice, *supra* note 18, art. 35, ¶ 2; S.C. Res. 9, *supra* note 79, ¶¶ 1–2.

227. *See* Palestine v. U.S., Application Instituting Proceedings, ¶¶ 3–20 (Sept. 28, 2018); *see also* Monetary Gold Removed from Rome in 1943 (It. v. Fr., U.K., and U.S), Judgment, 1954 I.C.J. Rep. 19, 33 (June 15).

228. *Corfu Channel Case* (U.K. v. Alb.), Judgment, 1949 I.C.J. Rep. 4, 17 (Apr. 9).

229. Palestine v. U.S., Application Instituting Proceedings, ¶¶ 3–20 (Sept. 28, 2018).

230. *Corfu Channel Case* (U.K. v. Alb.), Judgment, 1949 I.C.J. Rep. 4, 17 (Apr. 9).

231. *See id.*; *see generally* Palestine v. U.S., Application Instituting Proceedings, 2018 I.C.J. at ¶¶ 3–20.

Israel for asserting sovereignty over Jerusalem.²³²

Even if the principle established by *Corfu Channels* does not apply here, the standard for preclusion set by *Monetary Gold*, and rearticulated by the *Case Concerning East Timor* case does seem to apply to *State of Palestine v. United States of America*.²³³ In *Monetary Gold*, the Court refused to adjudicate where an absent third party would be “the very subject matter of the decision.”²³⁴ This precedent may make Palestine’s claim contentious.²³⁵ The core of Palestine’s claim would require the ICJ to adjudicate whether or not Jerusalem constitutes Israeli territory, and, by implication, the extent of Israeli territory generally, meaning Israel is “the very subject matter of the decision.”²³⁶ Although the ICJ has stated the *Monetary Gold* preclusion rule only applies where a third party is “truly indispensable to the pursuance of the proceedings,” there is little doubt that Israel’s participation is indispensable to the Court’s ability to adjudicate Palestine’s claim since the claim is based on an argument concerning the extent of Israeli borders under international law.²³⁷ While the Court has found that a mere incidental interest is insufficient to preclude under the *Monetary Gold* standard, the question of whether Jerusalem is Israeli territory is more than an incidental question for Israel.²³⁸

The ICJ cannot adjudicate Palestine’s claim without ruling on the extent of Israeli territory.²³⁹ The ICJ also cannot rule the American embassy in Jerusalem is not in Israeli territory without ruling that Jerusalem is not Israeli territory.²⁴⁰

232. See *Palestine v. U.S.*, Application Instituting Proceedings, 2018 I.C.J. at ¶¶ 36–50.

233. See *Monetary Gold Removed from Rome in 1943 (It. v. Fr., U.K., and U.S.)*, Judgment, 1954 I.C.J. Rep. 19, 33 (June 15); see also *East Timor (Port. v. Austl.)*, Judgment, 1995 I.C.J. Rep. 90, ¶¶ 34–35 (June 30).

234. *Monetary Gold Removed from Rome in 1943 (It. v. Fr., U.K., and U.S.)*, Judgment, 1954 I.C.J. Rep. 19, 32 (June 15).

235. See *Milanovic*, *supra* note 10.

236. *Monetary Gold Removed from Rome in 1943 (It. v. Fr., U.K., and U.S.)*, Judgment, 1954 I.C.J. Rep. 19, 32–33 (June 15); see *Palestine v. U.S.*, Application Instituting Proceedings 2018 I.C.J. at ¶¶ 3–20, 51; *Milanovic*, *supra* note 10.

237. *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1984 I.C.J. Rep. 392 ¶ 88 (Nov. 26); see also *Milanovic*, *supra* note 10.

238. See *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1984 I.C.J. Rep. 392 ¶ 88 (Nov. 26); *Milanovic*, *supra* note 10.

239. *Milanovic*, *supra* note 10.

240. *Id.*

Palestine's claim is therefore likely precluded under the doctrine articulated in *Monetary Gold*.²⁴¹ However persuasive the argument for Palestine's access to the ICJ may otherwise be:

[t]he Court will not have jurisdiction over a duly constituted bilateral contentious case introduced by unilateral application if it appears that the principal issue to be decided, whatever the title of jurisdiction, requires the Court to pass on the legal position of a third state which is not a party to the proceedings.²⁴²

The Court is therefore unlikely to reach a decision on the merits of Palestine's claim against the United States for the Trump administration's decision to move the embassy to Jerusalem.²⁴³

IV. CONCLUSION

While Palestine may possess the theoretical capacity to bring a dispute to the ICJ, *State of Palestine v. United States* is most likely not a claim which the ICJ will hear. A plausible argument can be made that Palestine satisfies at least some of the basic requirements for ICJ jurisdiction. Palestine likely constitutes a state for the purposes of the ICJ Statute.²⁴⁴ Palestine likely satisfies the Montevideo requirements of statehood.²⁴⁵ Even if the Court concludes one of the Montevideo criteria remains unsatisfied, Palestine likely qualifies for statehood under both the U.N. recognition of statehood status standard and the VCLT standard articulated by Jure Vidar.²⁴⁶ Palestine has almost certainly satisfied all of the requirements for nonparty access to the Court established by Article 35 of the ICJ Statute, and ¶ 1 and ¶ 2 of UNSCR 9.²⁴⁷

241. *Id.*; see also *Monetary Gold Removed from Rome in 1943 (It. v. Fr., U.K., and U.S.)*, Judgment, 1954 I.C.J. Rep. 19, 33 (June 15).

242. SHAW, *supra* note 23, at 560; see also Whitman, *supra* note 44, at 90.

243. See Milanovic, *supra* note 10; see generally *Palestine v. U.S.*, Application Instituting Proceedings, 2018 I.C.J. at ¶¶ 3–20.

244. See Statute of the International Court of Justice, *supra* note 18, art. 35 ¶ 2; S.C. Res. 9, *supra* note 79, ¶¶ 1–2; see also QUIGLEY, *supra* note 63, at 213.

245. QUIGLEY, *supra* note 63, at 218.

246. See Vidmar, *supra* note 18, at 33; see also SHAW, *supra* note 23, at 610.

247. See Statute of the International Court of Justice, *supra* note 18, art. 35 ¶ 2; see also *Palestine v. U.S.*, Application Instituting Proceedings, 2018 I.C.J. at ¶ 30; S.C. Res. 9, *supra* note 79, ¶¶ 1–2.

Despite these likely conclusions on the jurisdictional issues, however, the ICJ will most likely be unable to reach a decision on the merits of Palestine's claim.²⁴⁸ Palestine's argument is based on the claim that Jerusalem is not Israeli territory, and the ICJ's precedent appears to indicate it cannot hear the claim without Israel's participation in the proceedings.²⁴⁹ Therefore, while a plausible argument can be made that Palestine has satisfied the other jurisdictional requirements, there is likely no plausible argument that can be made against the conclusion that Israel is a necessary party under the standard first articulated in *Monetary Gold*.²⁵⁰ The Court is likely to reiterate that even a party which is otherwise able to bring a case before the Court cannot base a claim on an underlying argument related to the extent of a nonparticipating state's territory.²⁵¹

As the ICJ has repeatedly done in the past, the Court is likely to use *State of Palestine v. United States of America* to rearticulate the *Monetary Gold* principle that when an absent third party has an inherent interest in a claim, the Court cannot reach a decision on the merits of the claim without the third party's participation.²⁵² Since the absence of Israel is such a crucial issue, *State of Palestine v. United States* represents an opportunity for the ICJ to remind future potential parties that when a third party has an inherent interest in a claim, the third party must, therefore, be involved if the Court is to reach a judgment on the merits.²⁵³ *State of Palestine v. United States* is therefore likely to represent another case in the long tradition of ICJ cases applying *Monetary Gold*.²⁵⁴ Consequently, the ICJ is

248. See Milanovic, *supra* note 10.

249. See *Palestine v. U.S.*, Application Instituting Proceedings, 2018 I.C.J. at ¶¶ 3–23; see also *East Timor (Port. v. Austl.)*, Judgment, 1995 I.C.J. Rep. 90, ¶¶ 34–35 (June 30); *Monetary Gold Removed from Rome in 1943 (It. v. Fr., U.K., and U.S.)*, Judgment, 1954 I.C.J. Rep. 19, 33 (June 15); SHAW, *supra* note 23, at 560; Milanovic, *supra* note 10.

250. See Milanovic, *supra* note 10; see also *Monetary Gold Removed from Rome in 1943 (It. v. Fr., U.K., and U.S.)*, Judgment, 1954 I.C.J. Rep. 19, 33 (June 15).

251. See *East Timor (Port. v. Austl.)*, Judgment, 1995 I.C.J. Rep. 90, ¶¶ 34–35 (June 30); *Monetary Gold Removed from Rome in 1943 (It. v. Fr., U.K., and U.S.)*, Judgment, 1954 I.C.J. Rep. 19, 33 (June 15); see also SHAW, *supra* note 23, at 560; Milanovic, *supra* note 10.

252. See Milanovic, *supra* note 10.

253. See also *East Timor (Port. v. Austl.)*, Judgment, 1995 I.C.J. Rep. 90, ¶¶ 34–35 (June 30); *Monetary Gold Removed from Rome in 1943 (It. v. Fr., U.K., and U.S.)*, Judgment, 1954 I.C.J. Rep. 19, 33 (June 15); SHAW, *supra* note 23, at 560; Milanovic, *supra* note 10.

254. See generally *Monetary Gold Removed from Rome in 1943 (It. v. Fr.,*

almost certain to dismiss *State of Palestine v. United States*.

U.K., and U.S.), Judgment, 1954 I.C.J. Rep. 19, 33 (June 15); *see also* SHAW, *supra* note 23 at 560.