

Palestine Statehood and International Law

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Abstract

The November 2012 action of the UN General Assembly in designating Palestine's UN observer mission as that of a state is fully justified in law. Palestine has long been a state, even as control over its territory has changed hands. This formal acceptance of that fact allows Palestine to participate more fully as a member of the international community. The General Assembly action makes clear that Palestine statehood does not depend on a successful completion of negotiations between Palestine and Israel. The path is open for Palestine membership in international organizations and for its accession to major multilateral treaties through which it can pursue its legitimate interests. The path is likewise open for the International Criminal Court to investigate war crimes in Palestine, in particular the war crime of facilitating civilian settlements in territory under belligerent occupation.

Policy Implications

- Palestine is now poised for admission to the United Nations as a member state. That admission should be effected by the UN General Assembly, even if the UN Security Council fails to make a favorable recommendation.
- The major powers that to date have not accorded diplomatic recognition to Palestine should do so at the earliest opportunity.
- The United States should cease exacting financial sanctions against international organizations that admit Palestine to membership.
- The International Criminal Court should initiate investigation of war crimes committed in Palestine.
- The UN Security Council should take decisive action to compel Israel to surrender its control of Palestine territory.

By Resolution 67/19 of 29 November 2012, the United Nations General Assembly denominated the observer mission of Palestine at the UN as the observer mission of a state. In the most important operative clause of Resolution 67/19, the General Assembly 'decides to accord to Palestine non-member observer State status in the United Nations.' Previously, the observer mission had for many purposes been treated as that of a state, but without a formal designation to that effect. States voting in favor of Resolution 67/19 numbered 138, while nine voted against. Forty-one states abstained.

This successful approach to the General Assembly by Palestine followed a less successful effort in 2011 to gain admission to the United Nations as a member state. That effort became stalled in the Security Council because of opposition by the United States to Palestine membership. The US opposition kept the issue from coming to a vote in the Security Council (McGreal, 2011).

The General Assembly's Resolution 67/19 has been assessed largely for its implications for the long-unresolved Israel-Palestine negotiations – whether it hammers a final nail into the coffin of those negotiations or, to the contrary, provides a new element that may get these negotiations back on track. In the General Assembly debate preceding and immediately following the adoption of Resolution 67/19, state representatives focused on this aspect. Many of the states that abstained feared that the prospect for negotiations might be damaged. Absent in the debate was discussion of the question of whether the reference in Resolution 67/19 to Palestine as a state was proper as a matter of legal categorization. The categorization is, however, fully justified on the merits, since Palestine has long been a state.

Palestine as a state dating from World War I

In one operative clause of Resolution 67/19, the 'hope' is expressed that the Security Council will 'consider favorably the application submitted on 23 September 2011 by the State of Palestine for admission to full membership in the United Nations.' That formulation assumes the statehood of Palestine as a fact pre-dating Resolution 67/19. The resolution did not purport to turn Palestine into

a state anew. Rather, it referenced an existing Palestine statehood.

Palestine has been accepted as a state since the 1920s. In 1988, the Palestine Liberation Organization made a statement to affirm Palestine statehood, and in that statement dated Palestine statehood to that era (Declaration of Independence, 1988). In 1924 the Treaty of Peace (Lausanne) entered into force, marking the formal end to World War I between Turkey and the Allies. The Treaty of Peace provided for the territorial disposition, upon the breakup of the Turkish (Ottoman) Empire, of Turkey's Arab territories. By the Treaty of Peace, three states -- Iraq, Syria, and Palestine -- were formed out of these territories (Lausanne, 1923). Several provisions of the Treaty of Peace referred to these territories as states. Article 9 of Protocol XII, for example, provided for continuity of obligations under concessions that had been granted by the Ottoman Empire to foreign businesses: 'In territories detached from Turkey under the Treaty of Peace signed this day, the State which acquires the territory is fully subrogated as regards the rights and obligations of Turkey towards the nationals of the other Contracting Powers, and companies in which the capital of the nationals of the said Powers is preponderant, who are beneficiaries under concessionary contracts entered into before the 29th October, 1914, with the Ottoman Government or any local Ottoman authority.' When litigation ensued a few years later over the meaning of this provision, the Permanent Court of International Justice identified Palestine as the state in question, calling it a 'successor state' to Turkey in the territory of Palestine. Said the Court, 'Palestine is subrogated as regards the rights and obligations of Turkey' (Permanent Court, 1925). The Court read Article 9 to refer to Palestine as a state, even as Palestine was administered by Great Britain under a 'mandate' arrangement under the League of Nations.

By this arrangement with the League of Nations, Britain administered Palestine and conducted its foreign relations, similar to the fashion in which outside states historically have handled the affairs of a protectorate state (Palestine Mandate, 1922). Britain did not claim sovereignty over Palestine. Palestine's citizenship

was separate from that of Britain. A Palestine citizen who might enter the territory of Britain was considered to be an alien. Palestine's statehood was accepted by the international community. In 1932, Palestine's statehood was acknowledged by the United States in a discussion with Britain over tariffs. In the Import Duties Act of 1932, Britain enacted new tariffs for goods entering Britain from foreign countries. A 'colonial preference' was to be given, however, to goods entering Britain 'from any part of the British Empire.' The Import Duties Act authorized the Government to accord this 'colonial preference' to 'any territory in respect of which a mandate of the League of Nations is being exercised by the Government of the United Kingdom.' Parliament did not want to disadvantage its mandate territories by imposing the new tariffs on their exports.

The British government worried, however, that if it extended this tariff treatment to Palestine, states with which Britain had a bilateral most favored nation treaty might, on the premise that Palestine was a state, claim that goods entering Britain from their own territories were entitled to the same preference. The United States had a most favored nation treaty with Britain that accorded to the United States the lowest tariff Britain might charge to goods entering Britain from any other 'foreign country.' Britain consulted the United States confidentially to ascertain whether the United States would claim the preference to be accorded to Palestine. 'The Government of the United States,' came the reply from US Secretary of State Henry Stimson, 'considers that Palestine is a 'foreign country', hence 'any tariff privileges accorded to Palestine should also accrue to the United States' (Secretary of State, 1932). The United States thus regarded Palestine as a state.

It is in such ways that one determines whether an entity is a state. Acceptance by the states of the international community is key. That acceptance may come through diplomatic recognition. It may come through acceptance of acts by the entity that may be performed only by a state. It may come through the acceptance as a party to treaties that are open only to states. It may come through admission to organizations that are open only to states.

Number of states deeming Palestine to be a state

Diplomatic recognition implies an understanding that the entity being recognized is a state. Palestine has been recognized by states presently numbering 131. But a failure to recognize does not imply an understanding that an entity is not a state. Recognition is said to involve an element of discretion on the part of a recognizing state; a state is under no obligation to recognize a given entity, even if the latter is a state. Indeed, 28 states that have not recognized Palestine nonetheless voted in favor of Resolution 67/19. By those votes, these 28 states affirmed their understanding that Palestine is a state. Hence, 159 states, either via recognition or via their affirmative vote on Resolution 67/19, have indicated that Palestine is a state.

The figure 159 does not necessarily reflect the sum total of states that regard Palestine as a state. Since recognition is discretionary, and since states abstaining or voting in the negative on Resolution 67/19 may have taken that stance for reasons apart from a consideration of Palestine's status, additional states may well consider Palestine to be a state. Indeed, there is a plausible case for the proposition that virtually all states consider Palestine a state, given the insistence in the international community that Palestine negotiate with Israel, in particular with respect to borders. The Declaration of Principles, negotiated between Israel and the Palestine Liberation Organization in 1993, contains a list of items on which the two parties commit to negotiate, one of which is the border separating their respective territories (Declaration of Principles, 1993). By calling for negotiation of a border, the Declaration of Principles implies that both Israel and Palestine are states, since a border separates states.

Even Israel has arguably accepted Palestine as a state. When the Declaration of Principles was signed in 1993, Benjamin Netanyahu, then a Member of Knesset and an opponent of the Declaration of Principles, criticized it on precisely this ground, namely, that by embarking upon a path of negotiation, Israel had tacitly recognized Palestine as a state (Quigley, 2011).

A number of states that have not to date recognized Palestine have said that they would do so were Palestine to come to terms with Israel. That stance implies that Palestine is a state. Palestine would hardly be a different entity the day after an agreement with Israel in contrast to the day before. Such a position on the part of a state reflects an understanding that Palestine is presently a state.

The International Criminal Court as a factor behind Resolution 67/19

Palestine's approach to the General Assembly for Resolution 67/19 was in part a response to a 2012 pronouncement by the Prosecutor of the International Criminal Court. In January 2009, in the wake of the 2008-09 assault by the Israel Defense Force on the Gaza Strip, Palestine lodged with the Court a declaration accepting the Court's jurisdiction over internationally defined crimes committed in Palestine. Under the Court's Statute, the Court has jurisdiction over acts committed in the territory of a state that is party to the Statute, which is the founding treaty of the Court. The Statute further provides that a state that is not party to the Statute may lodge a declaration to confer jurisdiction over crimes committed in its territory. Palestine, which is not a party, filed under this provision.

The Prosecutor did not act immediately to initiate any investigation, saying that it needed to be ascertained whether Palestine qualified as a "state" (Meloni and Tognoni, 2012). The Prosecutor took considerable information on that question, posting pro and con views on the ICC website (ICC Submissions on Palestine, 2013). Ultimately, however, the Prosecutor determined not to decide the question himself. In a statement issued in April 2012, the Prosecutor said that the issue of Palestine statehood was not up to him to resolve, but rather that the question should be decided either by the "competent organs of the United Nations" or by the Assembly of States Parties to the ICC Statute (Prosecutor, 2012). The Prosecutor's stance was questionable, since the Statute's reference to a "state" and the Prosecutor's obligation to accept a declaration from a state would seem to require the Prosecutor to act on his own (Meloni, 2012). Nonetheless, the

Prosecutor's statement read almost as an invitation to Palestine to approach the UN General Assembly.

Arguments against Palestine statehood

The fact that Palestine's territory is under the belligerent occupation of Israel does not deprive Palestine of status as a state. When the territory of a state is occupied by a foreign army, status is unaffected. Both the United States and Israel have nonetheless asserted that Palestine cannot be a state for lack of factual control over its affairs. They have also called Palestine's 2011 approach to the United Nations for membership and its 2012 approach to the UN General Assembly as violations of Palestinian commitments towards Israel under the 1993 Declaration of Principles. Israel and the United States take the position that the negotiation process envisaged in the Declaration of Principles must be concluded before Palestine is a state. The Declaration of Principles is not, however, open to such a reading. The Declaration lists certain issues to be negotiated. The status of neither party is listed. As correctly explained by Yossi Beilin, who was involved in elaborating the Declaration of Principles on the Israeli side, that document makes no mention of the statehood of Israel or of Palestine as an item of negotiation (Beilin, 2012).

Even earlier, when Palestine statehood was asserted in the 1988 Declaration of Independence, Israel and the United States objected. At that time, Palestine sought admission to two UN-affiliated international organizations whose membership is open only to states. In 1989, Palestine applied for membership to the World Health Organization and to the UN Economic, Social and Cultural Organization (UNESCO). In each instance, the effort faltered when the United States threatened financial reprisals against the organization. WHO Director-General Hiroshi Nakajima pleaded with the WHO membership to postpone Palestine's application. Nakajima said that the WHO would cease to exist without the US contribution. As for UNESCO, the United States at the time was boycotting the organization but threatened not to re-join if Palestine were admitted. Both the WHO and UNESCO deferred action on the Palestine membership application (Quigley,

2010). In November 2011, shortly after Palestine applied for admission to the UN, it also sought admission again to UNESCO, and this time UNESCO ignored US threats and admitted Palestine. The United States did withdraw funding, but the admission to UNESCO held.

Prior to its admission to membership in UNESCO, Palestine had an observer mission there. That observer mission, like Palestine's at the United Nations, was not specifically designated to be that of a state. UNESCO has a procedure for the listing of culturally significant sites as world heritage sites, rendering them eligible for various measures of protection. By UNESCO rules, only a state may request such a listing. The Palestine observer mission at UNESCO requested that the Church of the Nativity in Bethlehem, West Bank, be so listed. In June 2012, eight months after Palestine was admitted to UNESCO membership, the organization finalized the listing of the Church.

Implications of Resolution 67/19 for International Criminal Court indictments

It remains to be seen how the acceptance of Palestine as a state, first by UNESCO and now by the UN General Assembly, will play out. A number of practical consequences could follow (Qafisheh, 2012). One is the initiation of investigation by the International Criminal Court of war crimes or other internationally defined offenses committed in the territory of Palestine. Israeli officials could be investigated for possible crimes committed during the 2008-2009 assault by the Israel Defense Force on Gaza. Investigation might also be initiated against Hamas-related Palestinian officials for missile launches into Israel (Azarov, 2012).

The Prosecutor might also investigate Israeli officials for Israel's settlements in the West Bank. The ICC Statute defines offenses within the Court's jurisdiction. Under the category 'war crimes,' the Statute includes as an offense 'the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies' (ICC Statute, 1998). Promotion of Israel's settlements in the West Bank, which is under Israel's belligerent occupation, would seem to fall under this provision, hence rendering Israeli officials potentially guilty of a war crime.

Initiation of any such investigation would not require further action on the part of Palestine. Once the Court has jurisdiction, the Prosecutor may initiate an investigation based on information from any source and may indict individuals determined to be responsible for internationally defined offenses. Palestine's 2009 declaration lodged with the Court suffices as a basis for the Court's jurisdiction. Palestine would not need to accede to the ICC Statute for the Court to have jurisdiction over offenses committed in Palestine. If Palestine were to accede to the ICC Statute, jurisdiction for commission of internationally defined offenses in the territory of Palestine would, from the date of accession, be based on the accession. The ICC Statute provides that jurisdiction based on a state's ratification or accession of the ICC Statute begins on the date of ratification or accession. Jurisdiction for offenses pre-dating the accession would continue to fall under the 2009 declaration, because when a state lodges such a declaration and later accedes to the ICC Statute, the validity of the declaration is not affected. Jurisdiction under such a declaration applies even to conduct pre-dating the declaration.

Accession to the ICC Statute would bring one additional right. Were Palestine to accede, it could, as a state party, 'refer' any investigation relating to Palestine territory to the Prosecutor. Under the ICC Statute, a state party may make such a reference. Such a reference would place additional pressure on the Prosecutor to act, but even without such, as indicated, the Prosecutor is fully authorized to investigate and to indict.

Implications of Resolution 67/19 for Palestine's admission to the United Nations

The understanding expressed by the General Assembly that Palestine is a state is relevant to the eventual possible admission of Palestine to membership in the United Nations (Al Haq, 2011). It is somewhat anomalous that Palestine is a member of UNESCO, one of the UN's specialized agencies, but not a member of the UN itself. The membership of UNESCO is identical to the membership of the United Nations. For UNESCO admission, a vote of the membership suffices. For the United Nations, admission is by a vote of the

membership (General Assembly), but the Security Council is to make a recommendation. It was there that Palestine's admission application was held up in 2011 owing to opposition from the United States. Resolution 67/19, as noted, asks the Security Council to take up the matter again and, of course, Resolution 67/19 makes a finding on one critical requirement for admission, namely, that the applicant entity be a state.

If the Security Council does not respond to this request from the General Assembly, the matter of admission of Palestine could be taken up by the General Assembly itself. UN Charter Article 4, which governs admission of states to the United Nations, lacks precision on the role of the Security Council in the admission process. Under Article 4, admission is effected by the General Assembly 'upon the recommendation of the Security Council.' Whether that recommendation must be favorable is left unsaid. The issue of the Security Council's role in the admission process was hotly debated in the early years of the United Nations, as the USSR and United States vied to gain admission for states within their respective orbits. The United States could prevent majorities in the Security Council for the Soviet-backed aspirants, but the USSR had to use the veto to forestall the admission of the US-backed aspirants. The United States, along with others, argued that the veto did not apply to an admission recommendation. Some states argued, moreover, that the Security Council role was advisory only, and that the General Assembly had the power to admit the states with respect to which a veto was cast by the USSR. In 1955, an accommodation was reached, whereby both groups of states were admitted. But the issues of principle were never resolved definitively, neither that of whether the veto applied, nor that of whether the Security Council's role, with or without veto, was advisory only.

The rationale for a role for the Security Council in the admission process was that the Council was to vet an applicant state for its 'peace-loving' character. Such a character is a requirement for admission under Article 4. That rationale suggests that the Security Council role in admissions is less than 50-50 with the General Assembly. The Security Council gives its opinion as to whether an applicant state is peace-loving, and

the General Assembly takes that view into consideration but need not necessarily agree. During the drafting of the Charter, it was recorded in the elaboration of Article 4 that the meaning was precisely to that effect. 'Recommendation' needed to be requested from the Security Council, but if it declined to take action, or if it recommended against, the General Assembly might nonetheless admit an applicant (Quigley, 2012).

The issue of the veto also came in for intense discussion during the drafting conference. States that were not to enjoy a right of veto in the Security Council expressed concern about potential over-use of the veto. UN Charter Article 27 was written to deal with the veto. The idea behind the veto was to ensure that the Security Council not take military action over and against the objection of one of the five permanent members. But that was to be the extent of the veto. In response to the non-veto-wielding states, the five states that were to enjoy the right of veto issued a declaration, giving assurance that the veto as provided for in Article 27, applied only to war and peace decisions.

Whether the General Assembly would assert a power for itself to admit Palestine without a favorable Security Council recommendation puts one in the realm of major-power politics. Such independent action by the General Assembly to admit Palestine would also depend on a sufficient number of UN member states deciding that the General Assembly indeed has the power under Article 4 to admit a state in the absence of a favorable Security Council recommendation. But there is a highly plausible case that Article 4 allows it to do so.

Implications of Resolution 67/19 for Palestine at the United Nations

Even without an admission to UN membership, Resolution 67/19 might be expected to lead to increased rights for Palestine's observer mission at the United Nations. Any difference is likely to be minimal, however, for the simple reason that Palestine's observer mission is already for significant purposes treated as the representative of a state, even as that of a member state. Both the Security Council and General Assembly have allowed participation by Palestine's observer

mission in ways that are normally reserved for representatives of member states.

On 4 December 1975, a session on the Middle East was being held in the Security Council, and several member states proposed that the Palestine Liberation Organization, as the Palestine observer mission was then called, be invited to participate. Under Security Council Rule 37, only a UN member state may participate in debate. The Security Council President explained that if the proposal were adopted, the PLO would participate as if it represented a member state.

The United Kingdom objected to the proposal on the ground that participation under Rule 37 is open only to member states, and that the PLO did not represent a member state. Over the UK objection, the Council voted to invite a PLO representative on the basis of the President's explanation. A PLO representative was seated and participated in the debate.

At the 12 January 1976 meeting of the Security Council, the same issue arose when it was again proposed to invite the PLO representative to participate in debate. This time it was the United States that objected, arguing, 'The PLO is not a State. It does not administer a defined territory. It does not have the attributes of a Government of a State.' The Security Council disregarded the US objection and again the PLO participated in the debate.

The General Assembly, likewise in the 1970s, treated the PLO observer mission as that of a state. On 10 October 1977, Moshe Dayan, representing Israel, made a statement in a plenary meeting of the General Assembly. The following day, the Assembly President called on Farouk Kaddoumi, PLO representative, so that he might reply to Dayan. Under Rule 73 of the General Assembly Rules of Procedure, the Assembly president may accord the right of reply only to a member state. The US delegate objected 'that only representatives of Member States are qualified to participate in the general debate.' Overriding this objection, the President called on Kaddoumi, who then replied to Dayan.

In 1988, when the PLO asserted Palestine statehood by the Declaration of Independence, the General Assembly, in Resolution 43/177 of 15 December 1988, acknowledged this assertion and resolved to consider the observer mission to be that of 'Palestine,' rather than of the PLO. Ten years later, in July 1998, the General Assembly adopted Resolution 52/250 titled 'Participation of Palestine in the Work of the United Nations,' by which it gave Palestine 'the right to participate in the general debate of the General Assembly,' thereby re-affirming the ruling of the President from the 10 October 1977 meeting. Resolution 52/250 also gave Palestine a series of further enhancements of its role in participating in General Assembly proceedings.

Implications of Resolution 67/19 for UN action to end Israel's occupation

One operative clause of Resolution 67/19 affirms for the Palestinian people a right to 'independence in their State of Palestine on the Palestinian territory occupied since 1967.' This specification of territory is not without significance. Any claims on the Palestinian side beyond the 1967-occupied portions of Palestine (Gaza Strip and West Bank) are not being acknowledged. On the other hand, this specification of territory backs Palestine in its efforts to gain independence in territory that would include the entirety of the West Bank. Israel seeks to take for itself those West Bank areas where it has built settlements.

If Israel continues to decline to end its occupation, Resolution 67/19 could set the stage for UN action to compel it to withdraw. A number of Palestinian officials have pointed out that with this acknowledgement of Palestine's status as a state, Israel is in the position of occupying not, as it has asserted, territory in dispute, but the territory of a foreign state. Despite the powers it has under UN Charter Chapter VII in regard to war, the Security Council has never imposed sanctions on Israel for its 1967 entry into the Gaza Strip and West Bank, or for its refusal to withdraw. That failure on the part of the Security Council is the more striking given that Israel's entry lacked a legal basis. Documents declassified by the major powers in recent years confirm a lack of evidence that Egypt was about to attack Israel when Israel sent troops into the

Egyptian Sinai and show, in fact, that the Israeli leadership so understood. Israel's action constituted aggression, and under Article 39 of Chapter VII the Security Council has the responsibility to restore the peace. The Council may employ diplomatic, economic, or military measures to that end (Quigley, 2013).

Overall impact of Resolution 67/19

The adoption of Resolution 67/19 represents a step in a process that has been in motion for some decades. Resolution 67/19 comes at a time when political change in the Arab world presages stronger support for Palestine from governments in its immediate neighborhood. It also comes at a time when the United States may be backing away from a central role in peace efforts, in favor of the European Union (Bamya, 2012). These contextual developments hold the promise of a break in the impasse of recent years.

The question of bringing about independence for the State of Palestine has been on the international agenda since the 1920s. It was the first major territorial issue to confront the United Nations when the organization came into being. The United Nations failed to act decisively when Israel took control of the Gaza Strip and West Bank in 1967, resulting in a long-term occupation that has proved destructive. The United Nations still seeks a way out. Resolution 67/19 is its latest effort in that process.

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