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Legal Implications of the UN General Assembly Vote to Accord Palestine the Status of Observer State

By John Cerone



Introduction

On November 29, 2012, the United Nations General Assembly voted to accord Palestine the status of Non-Member State observer.^[1] As a formal matter, Palestine's designation has changed from that of an observer "entity" to that of an [observer "state."](#) In terms of Palestine's rights of participation in the

General Assembly, the resolution changes little. The significance of the resolution lies in its broader impact on the question of Palestinian statehood in international law.

This *Insight* provides follow-up to the [2011 Insight](#) by examining the significance of the vote in the context of the United Nations as it affects the broader issue of statehood. It concludes with a discussion of implications for possible investigation and prosecution by the International Criminal Court ("ICC").

Statehood, UN Membership & Observer Status

As described in the 2011 *Insight*, the issues of statehood and UN Membership are distinct. UN Membership is regulated by the UN Charter in conjunction with the practice of the Organization and its Members. Palestine has never been a Member State of the UN.

However, apart from Membership in the Organization, the UN provides for other forms of participation in its activities. Although not provided for in the Charter, the UN has developed a practice of admitting states and certain other entities and organizations to observer status.^[2] Observers have various rights of participation in UN deliberations, but may not vote. Until November 29, 2012, Palestine had the status of an observer "entity." It now has the status of observer state, or in the words of the UN Protocol Office, "Non-member States having received a standing invitation to participate as observers in the sessions and the work of the General Assembly and maintaining permanent observer missions at Headquarters."^[3]

The issue of statehood is regulated by general international law. Recognition of statehood^[4] by other states is generally not required for a state to come into being. However, collective recognition or non-recognition by an overwhelming majority of states may influence the question of the existence of a state by influencing the application and appreciation of the Montevideo criteria.^[5] Collective recognition could perfect an otherwise imperfect fulfillment

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of the criteria, and, alternatively, collective non-recognition could effectively prevent the fulfillment of the criteria.^[6]

If Palestine is a state, then it is entitled to all of the rights and subject to all of the duties of states under international law. These rights include immunities of the state and its officials, protection from the use of force by other states, the right of self-defense and collective self-defense in the event of an armed attack against it, plenary jurisdiction over its territory, the prohibition of intervention in matters essentially within its domestic jurisdiction, the possibility of membership in other intergovernmental organizations and specialized agencies, and full treaty-making capacity. Statehood could also provide access to international courts and other dispute settlement mechanisms, including the International Court of Justice.^[7]

The General Assembly Vote

On September 23, 2011, Mahmoud Abbas, President of the Palestinian Authority, presented to the UN Secretary General an application for Palestine to be admitted to the UN as a Member State. While that effort has not moved forward, blocked in the Security Council, other efforts have. For instance, on October 31, 2011, Palestine was admitted to the United Nations Education, Scientific, and Cultural Organization (“UNESCO”), a specialized agency of the United Nations, as a Member State.^[8]

In the resolution adopted on November 29, the General Assembly, *inter alia*, “[r]eaffirms the right of the Palestinian people to self-determination and to independence in their State of Palestine on the Palestinian territory occupied since 1967” and “[d]ecides to accord to Palestine non-member observer State status in the United Nations, without prejudice to the acquired rights, privileges and role of the Palestine Liberation Organization in the United Nations as the representative of the Palestinian people, in accordance with the relevant resolutions and practice.” The resolution also “[e]xpresses the hope that the Security Council will consider favourably the application submitted on 23 September 2011 by the State of Palestine for admission to full membership in the United Nations” and “[u]rges all States, the specialized agencies and organizations of the United Nations system to continue to support and assist the Palestinian people in the early realization of their right to self-determination, independence and freedom.”

The resolution does not enumerate any expanded rights of participation in the UN system. In this sense, the resolution is largely symbolic. Indeed, prior to its designation as an observer state, Palestine already enjoyed rights of participation in the General Assembly comparable to those of an observer state.^[9]

Nonetheless, the mere fact that the resolution was adopted constitutes a determination by the UN’s most representative political organ that Palestine is a state. By adopting a resolution that has little concrete significance within the framework of its own work, the General Assembly made clear that in according Palestine the status of an observer “state” it was signifying something beyond rights of participation. The issue of the day was statehood, not enhanced procedural rights in the political organs of the United Nations.

As for the vote,^[10] the General Assembly resolution enjoyed broader support than did the UNESCO resolution. Of the Assembly’s 193 Member States, 138 voted in favor of the resolution, nine voted against, forty-one abstained, and five did not record any vote (owing to absence or otherwise). The 138 ‘yes’ votes comprised a broad cross-section of the globe, representing all regions and levels of development.^[11] The nine ‘no’ votes consisted of Israel, Canada, the Czech Republic, Panama, the United States, the Marshall Islands, Micronesia (Federated States of), Nauru, and Palau.^[12] Thus, the ‘yes’ votes greatly outnumbered the ‘no’ votes, and were representative of all regions. Weighing against these

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considerations is the significant number of abstentions, constituting just over 20% of the membership. In addition, several of the states that voted in favor of the resolution underscored that statehood could only be achieved through dialogue between the parties, implying that Palestine had not yet achieved statehood.[13]

While this vote certainly bolsters the claim that Palestine is a state, it might not be sufficient to cure any defects in Palestine's satisfaction of the Montevideo criteria.[14]

ICC Jurisdiction

As noted above, one sensitive issue is whether Palestine can consent to the exercise of ICC jurisdiction over conduct that took place in Gaza and the West Bank. Article 12(3) of the ICC Statute allows a "State which is not a Party to this Statute" to accept the exercise of the Court's jurisdiction over crimes committed by its nationals or within its territory. During the Israel–Gaza armed conflict in late 2008 and early 2009 ("Operation Cast Lead"), the Palestinian National Authority lodged a declaration with the ICC Registrar stating that it recognizes "the jurisdiction of the Court for the purpose of identifying, prosecuting and judging the authors and accomplices of acts committed on the territory of Palestine since 1 July 2002 [the entry into force date of the Rome Statute, the treaty establishing the ICC]."[15] If Palestine is a state, it can enable the ICC to exercise jurisdiction over crimes committed on its territory, even if those crimes have been committed by nationals of states that are not States Parties to the Rome Statute, such as Israel.[16]

After the Palestinian Authority lodged its declaration with the ICC Registrar, the ICC Prosecutor reported that he was examining "first, whether the declaration accepting the exercise of jurisdiction by the Court meets statutory requirements, and second, whether crimes within the Court's jurisdiction have been committed." [17] The phrase "statutory requirements" presumably includes the question of whether or not Palestine is a "state" for the purposes of Article 12(3).[18]

On April 12, 2012, the Office of the Prosecutor of the ICC ("OTP") released a statement indicating that it, for the moment, would not be considering allegations of crimes committed in Palestine.[19] The analysis referred, *inter alia*, to the practice of the UN Secretary-General as treaty depositary[20] and noted in particular that "the current status granted to Palestine by the United Nations General Assembly is that of 'observer' (sic), not as a 'Non-member State'"[21]

The statement concluded that the OTP "could in the future consider allegations of crimes committed in Palestine, should competent organs of the United Nations or eventually the Assembly of States Parties resolve the legal issue relevant to an assessment of article 12 or should the Security Council, in accordance with article 13(b), make a referral providing jurisdiction."

The Prosecutor's reference to the treaty practice of the United Nations may add some weight to the significance of the UNESCO and General Assembly votes. As with UN membership, the issue of treaty participation is distinct from the question of statehood. Negotiating states can decide to make treaty participation available to entities other than fully independent or UN Member States.[22] Even where the text of a treaty limits participation to states (as does the ICC Statute), there may be a grey zone in which the treaty depositary is afforded a degree of discretion. On this latter point, the Prosecutor's statement refers to an understanding adopted by the General Assembly at its 2202nd plenary meeting on December 14, 1973.[23]

According to that understanding, "the Secretary-General, in discharging his functions as depositary of a convention with an 'all States' clause, will follow the practice of the

Assembly in implementing such a clause and, whenever advisable, will request the opinion of the Assembly before receiving a signature or an instrument of ratification or accession.”^[24] The OTP essentially used this understanding as a justification for punting the issue to the political organs of the United Nations, stating that “it is for the relevant bodies at the United Nations or the Assembly of States Parties to make the legal determination whether Palestine qualifies as a State....”^[25]

In any event, the General Assembly has now determined that Palestine is a state. Given the OTP’s reliance on the practice of the Secretary General as treaty depository and, in turn, on determinations by the “competent organs” of the United Nations, and by the General Assembly in particular, it would now seem more difficult for the OTP to maintain the position that it may not proceed with an examination of international crimes alleged to have been committed in Gaza and the West Bank. The pressure on the OTP to move forward will further increase if the situation in Palestine is referred to the OTP by a State Party to the ICC Statute.

It should be noted, however, that the ICC has a new Prosecutor and she may reject the approach of her predecessor.^[26] The OTP might rely less on the practice of the Secretary General as treaty depository and political determinations by the General Assembly,^[27] and instead frame the issue purely in terms of general international law, assessing the General Assembly vote through the lens of recognition rather than giving it determinative weight.

In addition, even assuming that Palestine is a state for the purposes of Article 12(3), there remain a number of unresolved legal issues. Even if Palestine is now a state, was it a state at the time that it lodged its declaration of consent? Is it necessary that Palestine have been a state at that time, or is it sufficient that it is now a state? Could Palestine now submit a new declaration of consent with respect to past conduct? While Article 12(3) contemplates declaring consent in relation to prior conduct,^[28] is it necessary that Palestine have been a state at the time of the alleged conduct?

As a practical matter, these legal ambiguities afford the ICC a degree of latitude in deciding whether to move forward. However, they also allow room for political choices. The challenge for the ICC will be to demonstrate that its decision is not a political choice, but that it is the result of legal analysis. Whatever decision it makes, it will likely be decried as a political choice by the opposing camps (either as yet another example of anti-Israel bias in international organizations or as caving to political pressure exerted by the United States). It will thus be all the more important for the ICC to provide a thorough, well-reasoned legal analysis in support of its course of action.

Ultimately, whether or not the General Assembly vote was sufficient to affirm the statehood of Palestine in general or to satisfy statutory requirements in the context of the ICC, it will likely have a snowball effect. The resolution increases the ability of Palestine to act like a state. The more it does so, the more clearly Palestine will satisfy the criteria for statehood. The train to statehood has clearly left the station.

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Endnotes:

[1] G.A. Res 67/19, U.N. Doc. A/RES/67/19 (Nov. 29, 2012), *available at* <http://www.un.org/Depts/dhl/resguide/r67.shtml>

[2] The various categories of observer status described in the “Blue Book” of the UN Protocol and

Liaison Service include: non-Member States maintaining permanent observer missions at UN Headquarters (e.g., the Holy See/Vatican City); Entities maintaining permanent observer missions at UN Headquarters (e.g., Palestine); Intergovernmental Organizations maintaining permanent offices at UN Headquarters (e.g., regional intergovernmental organizations); and Other Entities maintaining permanent offices at UN Headquarters (e.g., the Sovereign Military Order of Malta and the International Committee of the Red Cross). Even within each category, different observers may have different rights of participation. Nongovernmental organizations are eligible for a more limited status, known as "consultative status," which is regulated by Resolution 1996/31 of the UN's Economic and Social Council. See E.S.C. Res. 1996/31, U.N. Doc. E/RES/1996/31 (July 25, 1996), available at <http://www.un.org/documents/ecosoc/res/1996/eres1996-31.htm>.

[3] The term "non-Member State observer" seems to have caused a degree of confusion. The prefix "non" modifies only "Member," and does not refer to all observers that are not Member States (which would of course be redundant in any event). It is perhaps for that reason that the General Assembly was careful to formulate the designation for Palestine as "non-member observer State".

[4] The Montevideo criteria, described in the previous *Insight* and set forth in the 1933 Montevideo Convention, are now widely accepted as the definitive criteria for the establishment of statehood. Montevideo Convention on the Rights and Duties of States, Dec. 26, 1933, 49 Stat. 3097, 165 U.N.T.S. 21, available at <http://www.oas.org/juridico/english/signs/a-40.html>; see also Stephen McCaffrey, Dinah Shelton & John Cerone, *Public International Law: Cases, Problems, & Texts* 439 (2010). The United States referred to the Montevideo criteria in asserting the statehood of Kosovo at a time when fewer than sixty states had recognized Kosovo. See Written Statement of the United States of America Concerning the Request of the UN General Assembly for an Advisory Opinion on the Question of the *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo* (Apr. 17, 2009), available at <http://www.icj-cij.org/docket/files/141/15640.pdf>. For one U.S. court's assessment of whether Palestine satisfied the Montevideo criteria as of 2004, see *Knox v. PLO*, 306 F. Supp. 2d 424 (S.D.N.Y. 2004).

[5] In order for a new state to come into existence, it must meet the so-called Montevideo criteria: a) a permanent population; b) a defined territory; c) a government; and d) capacity to enter into relations with other states.

[6] For example, collective non-recognition could effectively prevent fulfillment of the fourth Montevideo criterion. Collective recognition, on the other hand, reflects an authoritative opinion that the criteria have been met, even if, from a more "scientific" perspective, there might appear to be a shortfall.

[7] While it cannot be a party to the Statute of the International Court of Justice ("ICJ") without Security Council approval, it may be able to access the ICJ under Article 35(2) of its Statute and pursuant to Security Council Resolution 9 (1946), which allows states not parties to the ICJ Statute to file a declaration accepting the Court's jurisdiction. Israel has not accepted the compulsory jurisdiction of the ICJ. Nonetheless, many multilateral treaties contain compromissory clauses, conferring jurisdiction on the ICJ for disputes arising under those treaties. While Israel is a party to several such treaties, it frequently enters reservations to the compromissory clauses. Israel did not enter reservations to the Genocide Convention or the Convention on the Political Rights of Women. However, those treaties do not use the all "states formula." Accession to those treaties is open only to UN Member States and other states invited by the General Assembly to accede, which would not include Palestine at this time.

[8] Palestine's membership application received 107 "yes" votes at the UNESCO General Conference. Even though there were 185 UNESCO Member States entitled to vote, the 107 "yes" votes were sufficient to meet the 2/3 bar for membership, since the 2/3 calculation is based on UNESCO Member States present and voting. (Of the 173 Member States present, fifty-two states abstained, meaning that Palestine only needed eighty-one "yes" votes to be admitted.) Overall, Palestine's membership bid attracted the supporting votes of approximately 58% of the total UNESCO membership. See *Introductory Note to the Admission of Palestine into the United Nations*, 51 I.L.M. 606 (2012).

[9] Indeed, until 2004, Palestine enjoyed greater rights of participation in the General Assembly than did the Holy See, which has had the status Observer State since 1964.

[10] The legal significance of the General Assembly vote can be assessed strictly within the framework of the United Nations Charter, where it has its most immediate impact, and it can also be assessed in the broader context of international law. Assessing the resolution's legal value in this broader context requires an examination of both its content and the conditions of its adoption.

[11] Satisfying even the 2/3 bar were this issue to be regarded as an "important question." "Important questions" must be decided by the General Assembly "by a two-thirds majority of the

members present and voting." See U.N. Charter ch. IV, art. 18.

[12] The latter four states are former Trust Territories of, or have been in association with, the United States and tend to support its positions in the UN.

[13] In addition, a handful of states, including some that had voted in favor of the resolution, asserted that their vote should not be construed as recognition of the state of Palestine. See, e.g., the statement of the New Zealand delegation that "the question of recognition of a Palestinian State was a separate issue." Press Release, General Assembly, General Assembly Votes Overwhelmingly to Accord Palestine "Non-Member Observer State" Status in United Nations, U.N. Press Release GA/11317 (Nov. 29, 2012), *available at* <http://www.un.org/News/Press/docs//2012/ga11317.doc.htm>.

[14] Speaking before the vote Israel's representative asserted that the "Palestinian Authority . . . clearly fails to meet the criteria for statehood."

[15] Declaration Recognizing the Jurisdiction of the International Criminal Court (Jan. 21, 2009) (submitted on behalf of the Palestinian National Authority), *available at* <http://www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279777/20090122PalestinianDeclaration2.pdf>.

[16] The ICC has jurisdiction only to prosecute individuals and has no authority to bring proceedings against a state. It would be able to exercise jurisdiction over all international crimes committed in Gaza and the West Bank, as well as over all international crimes committed by Palestinian nationals anywhere.

[17] Rep. of the Int'l Crim. Ct. to the UN General Assembly, ¶ 81, A/65/313 (Aug. 19, 2010).

[18] It might also include the question of the territorial scope of Palestine, and whether the Palestinian Authority is legally competent to represent Palestine in the international legal system or whether its authority extends to Gaza.

[19] Contrary to some reports, the OTP did not state that it was rejecting Palestine's declaration of consent or that it lacked jurisdiction to proceed.

[20] Int'l Crim. Ct. Office of the Prosecutor, Statement: Situation in Palestine (Apr. 3, 2012), *available at* <http://www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf> [hereinafter Situation in Palestine].

[21] *Id.* ¶ 7. Presumably they meant "observer entity".

[22] See, e.g., United Nations Convention on the Law of the Sea [UNCLOS] art. 305, Dec. 10, 1982, 1833 U.N.T.S. 3, 21 I.L.M. 1261 (1982).

[23] See Situation in Palestine, *supra* note 20, n.3.

[24] See *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*. However, the *Summary of Practice* also includes reference to the so-called "Vienna formula." The "Vienna formula" is drawn from the Vienna Convention on the Law of Treaties. According to Article 81 of that instrument, "[t]he present Convention shall be open for signature by all States Members of the United Nations or of any of the specialized agencies or of the International Atomic Energy Agency or parties to the Statute of the International Court of Justice, and by any other State invited by the General Assembly of the United Nations to become a party to the Convention" The *Summary of Practice* seems to indicate that the Secretary-General will only seek the guidance of the General Assembly where a purported state does not fall within this formula (i.e., that a treaty open to participation by "all states" will presumably be open to any purported state that falls within the Vienna formula). Following its admission into UNESCO, a specialized agency of the United Nations, Palestine arguably falls within the Vienna formula. *Introductory Note to the Admission of Palestine into the United Nations*, *supra* note 8; see also Larry D. Johnson, *Palestine's Admission to UNESCO: Consequences Within the UN?*, 40 *Denv. J. Int'l L. & Pol'y* 1-3, 118 (2012).

[25] "In interpreting and applying article 12 of the Rome Statute, the Office has assessed that it is for the relevant bodies at the United Nations or the Assembly of States Parties to make the legal determination whether Palestine qualifies as a State for the purpose of acceding to the Rome Statute and thereby enabling the exercise of jurisdiction by the Court under article 12(1). The Rome Statute provides no authority for the Office of the Prosecutor to adopt a method to define the term 'State' under article 12(3) which would be at variance with that established for the purpose of article 12(1)."

[26] In September 2012, the ICC Prosecutor suggested that the OTP would re-visit its assessment if the General Assembly were to act on the matter. See "The International Criminal Court: A New Approach to International Relations," Speaker Fatou Bensouda, Prosecutor, International Criminal

Court, Sept. 21, 2012, Council on Foreign Relations (“But what we have also done is to leave the door open and to say that if this -- if Palestine is able to pass over that hurdle, of course, under the General Assembly, then we will revisit what the ICC can do.”).

[27] Underlying the issue of whether it is appropriate for the OTP to analogize to the practice of the Secretary General as treaty depositary is the more theoretical question of whether the OTP is more of a political organ or a judicial organ. The role of prosecutors in this respect varies significantly among states.

[28] See Rome Statute of the International Criminal Court art. 11(2), 2187 U.N.T.S. 90 (entered into force July 1, 2002).