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PALESTINIAN STATEHOOD: TRAPPED BETWEEN RHETORIC AND
REALPOLITIK

Paul Eden*

A. Introduction

On 23 September 2011, Mahmoud Abbas, in his capacity as the Chairman of the Executive Committee of the Palestine Liberation Organization and President of the State of Palestine, applied for full membership of the United Nations (UN) on behalf of the State of Palestine. In his letter of application (addressed to the UN Secretary-General Ban Ki Moon), Mr Abbas made reference to section F of the Plan of Partition in UN General Assembly Resolution 181(II) of 29 November 1947 (where sympathetic consideration of the application for membership of the UN of both the Arab and Jewish states was urged) as well as the Declaration of Independence of the State of Palestine of 15 November 1988 and the acknowledgement by the General Assembly (GA) of this Declaration in Resolution 43/177 of 15 December 1988.¹

The UN Secretary-General immediately sent Palestine's application to the Security Council for its consideration and, on 28 September 2011, the Security Council decided to refer the application to its Committee on the Admission of New Members for 'examination and report' under rule 59² of the Security Council's Provisional Rules of Procedure.³

On 31 October 2011, while the Palestinian membership application was still under consideration by the Security Council's Committee on the Admission of New Members, UNESCO's General Conference voted to admit Palestine as a Member of the United Nations' educational, scientific and cultural organization (UNESCO). The vote was 107 votes in favour of Palestine's admission, 14 votes against and 52 abstentions. This development prompted retaliatory responses from both the United States and Israel.⁴

Earlier, in response to the armed conflict in Gaza between December 2008 and January 2009, the Minister of Justice for the Government of Palestine lodged a declaration (dated 21 January 2009) recognizing the jurisdiction of the International Criminal Court (ICC) on 22 January 2009. On 23 January 2009, the ICC's Registrar acknowledged receipt of the declaration. The Office of the Prosecutor (OTP) undertook to examine all relevant issues related to the jurisdiction of the ICC,

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¹ See 'Note by the Secretary General: Application of Palestine for admission to membership in the United Nations' (23 September 2011) UN Doc A/66/371-S/2011/592. Annex I. See also Joseph Weiler, 'The Birth of Israel and Palestine – The Ifs of History' (2011) 22 EJIL 621-3 (noting that Arab states voted against UNGA Resolution 181 and that Arab scholars spent much ink dismissing its legal significance).

² Rule 59 reads: 'The Secretary-General shall immediately place the application for membership before the representatives on the Security Council. Unless the Security Council decides otherwise, the application shall be referred by the President to a committee of the Security Council upon which each member of the Security Council shall be represented. The committee shall examine any application referred to it and report its conclusions thereon to the Council not less than thirty-five days in advance of a regular session of the General Assembly or, if a special session of the General Assembly is called, not less than fourteen days in advance of such session.'

³ UNSC Verbatim Record 6624th meeting (28 September 2011) UN Doc S/PV/6624.

⁴ See Steven Erlanger and Scott Sayre, 'Unesco Approves Full Membership for Palestinians' *New York Times* (New York 1 November 2011), at A8 and Harriet Sherwood, 'Israel rushes settlement growth after Unesco accepts Palestinians' *The Guardian* (London 2 November 2011), at 20.

including, whether the declaration by the Palestinian National Authority accepting the exercise of jurisdiction by the ICC met the requirements of Article 12(3) of the ICC's Statute, whether the alleged crimes fell within the category of crimes defined in the ICC's Statute, and whether there were national proceedings in relation to those crimes. On 3 April 2012, the OTP issued a decision in relation to its preliminary examination in Palestine.

This note considers the legal aspects of these developments with particular emphasis on the question of whether the entity under the control of the Palestinian Authority (PA) satisfies the criteria of statehood and whether the Palestinian application for membership of the United Nations and UNESCO was in accordance with its obligations under the 1993 Declaration of Principles on Interim Self-Government Arrangements ('DOP') and the 1995 Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip ('Interim Agreement').

B. The United Nations' Membership Process

1. Introduction

Membership of the United Nations (other than original membership) is governed by Article 4 of the UN Charter. Article 4(1) of the UN Charter states that membership of the United Nations is open to all peace-loving States that accept the obligations contained in the UN Charter and which, in the judgment of the United Nations, are able to carry out these obligations. Procedurally, Article 4(2) of the UN Charter states that admission to the UN requires a Security Council recommendation followed by a decision of the General Assembly.⁵ In applying Article 4 of the UN Charter, member states have frequently pursued membership policies that have sought to further their own interests but, over time, the original concept of conditional membership has been replaced by a concept of unconditional universal membership and (almost) automatic admission.⁶

In addition to membership of the UN, an observer status has also evolved through the practice of the Secretary-General and the General Assembly to enable those entities unable or unwilling to become members of the UN to participate in the work of the UN on a permanent (albeit limited) basis. Observer status can be divided into five categories:⁷

1. Permanent Observer Missions of Non-Member States,
2. Observer Status for National Liberation Movements,
3. Observer Status for Regional Organizations and Groups of States,
4. Observer Status for Specialized Agencies, and
5. Observer Status for Non-governmental Organizations (NGOs).

Usually observers do not participate in the work of the UN as a whole but only in the work of the General Assembly (including its main committees and the conferences

⁵ Decisions of the UNGA on important questions, including the admission of new Members to the United Nations, 'shall be made by a two-thirds majority of the Members present and voting.' Article 18(2) UN Charter.

⁶ See John Dugard, *Recognition and the United Nations* (Grotius Publications, Cambridge 1987) 51-80 and Thomas D Grant, *Admission to the United Nations: Charter Article 4 and the Rise of Universal Organisation* (Martin Nijhoff, Leiden 2009).

⁷ See generally K Ginther, 'Article 4' in Bruno Simma (ed), *The Charter of the United Nations* (2nd edn OUP, Oxford 2002) 187-9. See also Berit Bartram and Dørte Pardo López, 'Observer Status' in Rüdger Wolfrum (ed), *United Nations: Law, Politics and Practice*, volume 2 (C H Beck, Münch 1995) 936-46.

convened under its auspices). Generally speaking, observers do not have the right to vote or to introduce motions (participation rights). The procedural rights of observers vary and depend on the terms of their admission to observer status.

2. *The Evolving Position of Palestine in the United Nations*

On 22 November 1974, UNGA Resolution 3237 (XXIX) granted the Palestine Liberation Organization (PLO) observer status in its capacity as a national liberation movement.⁸ Resolution 3237 included the right of the PLO ‘to participate as an observer in the sessions and the work of all international conferences convened under the auspices of other organs of the United Nations’. This enabled the PLO to gain observer status in a number of specialized UN agencies, including UNESCO.

On 15 December 1988, the UNGA adopted Resolution 43/177 that, acknowledged the proclamation of the State of Palestine by the Palestine National Council on 15 November 1988,⁹ affirmed the sovereignty of the Palestinian people over their territory occupied since 1967, and decided that

effective as of 15 November 1988, the designation of “Palestine” should be used in place of the designation “Palestine Liberation Organization” in the United Nations system, without prejudice to the observer status and functions of the Palestine Liberation Organisation within the United Nations system, in conformity with relevant United Nations resolutions and practice.¹⁰

On 7 July 1998, the UNGA adopted Resolution 52/250, conferring additional rights and privileges on Palestine regarding participation in the work of the UN that had previously been reserved for Member States including the right to participate in the general debate of the GA, the right of reply, the right to raise points of order related to proceedings on Palestinian and Middle East issues, and the right to co-sponsor draft resolutions and decisions on Palestinian and Middle East issues.¹¹ Resolution 52/250 also entitled Palestine to be seated immediately after non-member States and before all the other observers, and their allocation of seats was increased to six (observers are normally allocated two seats).

Since 1975, the PLO has also been invited to participate in Security Council meetings regarding the situation in the Middle East, including the Palestinian question. The legal basis for inviting the PLO to participate in its meetings has been

⁸ ‘Observer status for the Palestine Liberation Organization’, UNGA Res 3237 (XXIX) (22 November 1974) UN Doc A/RES/3237 (XXIX) (voting record: 95-17-19).

⁹ See Palestine National Council, ‘Political Communiqué and Declaration of Independence’ (15 November 1988) reprinted in (1988) 27 ILM 1660. For a debate on the legal effect of the Algiers Declaration on Palestine, see Francis A Boyle, ‘The Creation of the State of Palestine’ (1990) 1 EJIL 301-6 and James Crawford, ‘The Creation of the State of Palestine: Too Much Too Soon?’ (1990) 1 EJIL 307-313. See also James Crawford, ‘Israel (1948-1949) and Palestine (1998-1999): Two Studies in the Creation of States’ in Guy S Goodwin-Gill and Stefan Talmon (eds), *The Reality of International Law: Essays in Honour of Ian Brownlie* (Clarendon Press, Oxford 1999) 95-124, at 110-123.

¹⁰ ‘Question of Palestine’, UNGA Res 43/177 (15 December 1988) UN Doc A/RES/43/177 (voting record 104-2-36).

¹¹ ‘Participation of Palestine in the work of the United Nations’, UNGA Res 52/250 (7 July 1998) UN Doc A/RES/52/250 (voting record 124-4-10). Only Israel, Marshall Islands, Micronesia (Federated States of) and the United States voted against Resolution 52/250. See UNGA 52nd Session, ‘89th plenary meeting’ Official Records (7 July 1998) UN Doc A/52/PV.89, at 5.

the subject of dispute.¹² Rule 37 of the Provisional Rules of Procedure of the Security Council states that Members of the United Nations who are not members of the Security Council may be invited to participate, without a vote, in the discussion of any question that specially affects the interests of that Member. By contrast, Rule 39 of the Provisional Rules of Procedure states that

The Security Council may invite members of the Secretariat or other persons, whom it considers competent for the purpose, to supply it with information or to give other assistance in examining matters within its competence.

In practice, the Security Council applies a *sui generis* approach to the participation of the Permanent Observer of Palestine in Security Council meetings ‘in accordance with the rules of procedure and previous practice in this regard’ that fails to indicate clearly the basis on which the invitation to the Permanent Observer of Palestine has been issued.¹³ Admission of Palestine to full membership of the United Nations under Article 4 of the UN Charter would end this deliberate ambiguity.

3. *The scope of Article 4(1) of the UN Charter*

In its *Admission of a State to the United Nations* (Advisory Opinion),¹⁴ the International Court of Justice (ICJ) acknowledged that Article 4(1) of the UN Charter lays down five conditions to be admitted to membership of the United Nations i.e. an applicant must:

- be a State,
- be peace-loving,
- accept the obligations of the Charter,
- be able to carry out these obligations, and
- be willing to do so.

In its *Admission* (Advisory Opinion) the ICJ stated that the natural meaning of the words used in Article 4(1) led to the conclusion that these five conditions constituted an exhaustive enumeration and were not merely stated by way of guidance or example.¹⁵ Indeed, in the ICJ’s view, it could not be argued that political considerations could be superimposed upon an applicant that fulfilled the five conditions enumerated in Article 4(1) of the UN Charter because

Such an interpretation would be inconsistent with the terms of paragraph 2 of Article 4, which provide for the admission of ‘*tout État remplissant ces conditions*’ – ‘any such State’.¹⁶

¹² See Leo Gross, ‘Voting in the Security Council and the PLO’ (1976) 70 AJIL 470-91. See also John Quigley, *The Statehood of Palestine* (CUP, Cambridge 2010) 141-4.

¹³ See, for example, ‘The situation in the Middle East, including the Palestinian question’, UNSC 6706th meeting (24 January 2012) UN Doc S/PV.6706.

¹⁴ [1948] ICJ Rep 57.

¹⁵ At 62.

¹⁶ At 62-3 (emphasis in original).

However the ICJ acknowledged that the exhaustive character of the conditions laid down in Article 4(1) did not preclude taking into account, in good faith, a political factor connected with the very wide and very elastic conditions prescribed in Article 4(1).¹⁷

Rule 58 of the Provisional Rules of Procedure of the Security Council¹⁸ states that any State that desires to become a Member of the United Nations must include in its application ‘a declaration made in a formal instrument that it accepts the obligations contained in the Charter.’ The Palestinian application for UN membership duly included a formal declaration that ‘the State of Palestine is a peace-loving nation and that it accepts the obligations contained in the Charter of the United Nations and solemnly undertakes to fulfil them’.¹⁹

4. *The effect of article 4(2) of the UN Charter on the Palestinian application*

In its *Competence of the General Assembly regarding admission to the United Nations* (Advisory Opinion),²⁰ the ICJ confirmed (by twelve votes to two) that a necessary pre-requisite for the admission of a State to the United Nations was a positive recommendation by the Security Council. Article 27(3) of the UN Charter makes it clear that decisions of the Security Council require the affirmative votes of nine members including the concurring votes of the permanent members.

Although President Obama had called for an independent Palestinian state within twelve months in an address to the UN General Assembly in 2010,²¹ political pressure compelled him to oppose the Palestinian bid for statehood²² and, even before the Palestinian application was delivered to the UN Secretary General, the White House Office of the Press Secretary confirmed that:

we would have to oppose any action of the Security Council, including, if necessary, vetoing any resolutions associated with the declaration of a Palestinian state in the Security Council.²³

In his remarks to the UNGA on 21 September 2011, President Barak Obama reaffirmed his belief that the Palestinian people deserved a State of their own but that a peace agreement providing Israel with security guarantees was a necessary (and as yet unattained) pre-requisite.²⁴ In his remarks to the same meeting, the Israeli Prime Minister (Benjamin Netanyahu) made it clear that a peace agreement was unlikely.²⁵

¹⁷ At 63.

¹⁸ See Provisional Rules of Procedure of the Security Council UN Doc S/96/Rev.7 <<http://www.un.org/Docs/sc/scrules.htm>> accessed 21 September 2012.

¹⁹ UN Doc A/66/371-S/2011/592, Enclosure.

²⁰ [1950] ICJ Rep 4.

²¹ See UNGA 65th session, 11th plenary meeting (23 September 2010) UN Doc A/65/PV.11, at 12.

²² Helene Cooper, ‘Obama Says Palestinians are Using Wrong Forum’ *New York Times* (New York 22 September 2011), at A12.

²³ Press Briefing by Press Secretary Jay Carney and Deputy NSA for Strategic Communications on the President’s Meetings at the UN’ (21 September 2011) <<http://www.whitehouse.gov/the-press-office/2011/09/22/press-briefing-press-secretary-jay-carney-and-deputy-nsa-strategic-commu>> accessed 21 September 2012.

²⁴ UNGA 66th session, 11th plenary meeting (21 September 2011) UN Doc A/66/PV.11, at 12.

²⁵ UNGA 66th session, 19th plenary meeting (23 September 2011) UN Doc A/66/PV.19, at 36-41.

Although the United States had indicated that it would veto any resolutions associated with the declaration of a Palestinian state in the Security Council, this action would only have been necessary if Palestine had been able to obtain nine affirmative votes on a SC resolution recommending its membership. In the vote to admit Palestine as a member of UNESCO on 31 October 2011, nine states that were members of the Security Council at the time when the Palestinian application was being considered voted in favour of admitting Palestine as an UNECSO member.²⁶ However, one of the nine states, France, subsequently announced that it intended to abstain on any Security Council vote to admit Palestine as a member of the United Nations as US resistance had rendered the Palestinian bid for UN membership futile.²⁷ The Security Council never formally voted on the issue of Palestinian membership and the Report of the UN Security Council Committee on the Admission of New Members relating to the Palestinian application for UN membership reveals the extent of the deep divisions between the members of the UNSC on the issue.²⁸

5. Conclusion

On 21 September 2011, during the same UNGA session where President Obama confirmed that the United States would not support the Palestinian application for UN membership, the then French President (Nicolas Sarkozy) suggested that an intermediate stage, offering Palestine the status of a UN Observer State and allowing them to join the subsidiary bodies and treaties of the United Nations, might be an important step forward.²⁹ In so far as this can be accomplished by a UNGA resolution, it avoids the threat of a US veto. Given the current impasse in the peace process, it appears increasingly likely that Palestine will seek to exercise this option.³⁰ In an address to the UN General Assembly on 27 September 2012, Mahmoud Abbas stated that his government would continue its efforts to obtain full membership for Palestine at the United Nations and that

we have begun intensive consultations with various international organizations and Member States aimed at having the General Assembly adopt a resolution considering the State of Palestine as a non-Member State of the United Nations during this session.³¹

²⁶ Of the then members of the UNSC, China, France, Russia Brazil, Gabon Lebanon, India, Nigeria and South Africa voted in favour of UNECO membership for Palestine. The United Kingdom, Bosnia and Herzegovina, Columbia and Portugal abstained and the United States and Germany voted against.

²⁷ Neil MacFarquhar, 'Palestinians Inch Closer to Rejection at U.N. Body', *New York Times* (New York 3 November 2011), at A10.

²⁸ See 'Report of the Committee on the Admission of New Members concerning the application of Palestine for Admission to membership in the United Nations' (11 November 2011) UN Doc S/2011/705 (hereinafter 'Palestinian Admission Report').

²⁹ UNGA 66th session, 11th plenary meeting (21 September 2011) UN Doc A/66/PV.11, at 23. See also Neil MacFarquhar, 'France Breaks with Obama on Palestinian Statehood Issue', *New York Times* (New York 21 September 2011) < <http://www.nytimes.com/2011/09/22/world/middleeast/france-breaks-with-obama-on-palestinian-statehood-issue.html> > accessed 21 September 2012. See also Palestinian Admission Report (n 28) para 20.

³⁰ Jodi Rudoren, 'Year After Effort at U.N., New Aim for Palestinians', *New York Times* (21 September 2012), at A10.

³¹ UNGA 67th session, 12th plenary meeting (27 September 2012) UN Doc A/67/PV.12.

*C. The Legal Dimension of the Palestinian application for United Nations'
Membership*

1. Introduction

Notwithstanding the bleak prospects for full UN membership for Palestine at present, it should be remembered that Israel's first bid to become a member of the United Nations in 1948 also failed and thus the legal merits of the Palestinian application for UN membership remain relevant. As Rosalyn Higgins notes,³² it is instructive to consider United Nations practice in relation to subsequent membership in terms of the traditional legal criteria of statehood,³³ although, as Dugard observes

While the traditional criteria for statehood are still invoked, it appears that strict compliance with the requirements of independence and effective government have on occasions been overlooked in the interests of self determination.³⁴

2. Permanent Population and Defined Territory

Higgins acknowledges that no claims to admission to United Nations membership have ever raised questions concerning the criterion of permanent population.³⁵ The issue of a defined territory was, however, central to the controversy regarding Israel's original application for UN membership in 1948.³⁶ In his 2011 address to the UNGA's annual general debate, Mr Abbas stated that Palestine's application for full membership of the UN was on the basis of the so-called 4 June 1967 borders with Al-Quds Al-Sharif as its capital.³⁷

Although the exact boundaries of any future Palestinian State remain to be decided definitively there is ample evidence in state practice (not least in the example of Israel itself) to conclude that a State does not require exactly defined or undisputed borders to exist or to become a member of the United Nations.³⁸

³² Rosalyn Higgins, *The development of International Law through the political organs of the United Nations* (Oxford University Press, Oxford 1963) 17.

³³ Article 1 of the Convention on Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1933) (Montevideo Convention) 165 LNTS 19 stipulates that 'The State as a person of international law should possess the following qualifications: (a) permanent population; (b) defined territory; (c) government; and (d) capacity to enter into relations with the other States.' See also Palestinian Admission Report (n 28) para 9 ('On the criteria of statehood, reference was made to the 1933 Montevideo Convention'). For criticism of the so-called Montevideo criteria see, *inter alia*, Thomas D Grant, 'Defining Statehood: The Montevideo Convention and its Discontents' (1999) 37 *Columbia Journal of Transnational Law* 403-457 and Quigley (n 12) 205-8. But see also Vaughan Lowe *International Law* (Oxford University Press, Oxford 2007) 153 ('The definition was a child of its time... [b]ut... while its four criteria have been added to, no-one has suggested that any of them is dispensable.').

³⁴ Dugard, (n 6) 78.

³⁵ Higgins (n 32) 17.

³⁶ See Higgins (n 32) 17-18.

³⁷ UNGA 66th session 19th plenary meeting (23 September 2011) UN Doc A/66/PV.19, at 30.

³⁸ See, for example, *Deutsche Gas Gesellschaft v Polish State* (1929) 5 Annual Digest 11, at 15 and *North Sea Continental Shelf Cases* [1969] ICJ Rep 3, at 32 (para 46).

3. *Stable and Effective Government*

One of the key policy objectives of the Palestinian Authority has been to develop its governmental institutions. In April 2011, the Ad Hoc Liaison Committee (AHLIC) of the Office of the United Nations Special Co-ordinator for the Middle East Peace Process joined the IMF and the World Bank in acknowledging that in the limited territory under its control and within the constraints of the unresolved political issues, the Palestinian Authority had demonstrated that its governmental functions were now sufficient for a functioning government of a state.³⁹

However, in an article published on the *Foreign Policy* website on 3 August 2011 provocatively entitled 'The Palestinians' Imaginary State',⁴⁰ Steven J Rosen argued that although

Both the Hamas-controlled Palestinian entity in Gaza and the rival Fatah-governed Palestinian entity in the West Bank can be said to meet all four of [the Montevideo] criteria of the law of statehood. The one on which the United Nations will vote does not.

In Rosen's view, the entity which the majority of the General Assembly would be happy to recognize as a State does not actually exist as it has two rival Presidents and two rival Prime Ministers pursuing incompatible policies.⁴¹ Professor Guy Goodwin-Gill has also drawn attention to the constitutional problems raised by the Palestinian bid for full UN membership noting that 'statehood carries the *risk* of fragmentation and disenfranchisement'.⁴²

4. *Independence*

One of the key problems with the assertion that the entity under the control of the Palestinian Authority (PA) is a State for the purposes of international law is the fact that both the 1993 Declaration of Principles on Interim Self-Government Arrangements ('DOP')⁴³ and the 1995 Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip ('Interim Agreement')⁴⁴ clearly indicate that the Palestinian Authority lacks the capacity to conduct foreign relations. Article 3(b) of Annex II of the DOP states that foreign relations are outside the PA's powers and

³⁹ Office of the United Nations Special Co-ordinator for the Middle East Peace Process, 'Palestinian State-Building: A Decisive Period', Ad Hoc Liaison Committee Meeting Brussels, 13 April 2011 <<http://domino.un.org/UNISPAL.NSF/0/19e5539f9124ab2085257870004d8264?OpenDocument>> accessed 21 September 2012. See also Palestinian Admission Report (n 28) para 13.

⁴⁰ Steven J Rosen, 'The Palestinians' Imaginary State' <http://www.foreignpolicy.com/articles/2011/08/03/the_palestinians_imaginary_state?page=full> accessed 21 September 2012.

⁴¹ See also Farse Akram and Ethan Bronner, 'A Nervous Hamas Voices Its Issues With a Palestinian Bid for U.N. Membership', *New York Times* (18 September 2011), at A6.

⁴² Guy Goodwin-Gill, 'Palestine, Statehood and the Challenges of Representation', the revised text of a talk given on 28 November 2011 at the seminar "Discussing the Palestinian bid for Statehood" <<http://www.ejiltalk.org/palestine-statehood-and-the-challenges-of-representation/#more-4249>> accessed 21 September 2012. See also Palestinian Admission Report (n 28) paras 11-12.

⁴³ Israel-Palestine Liberation Organization: Declaration of Principles on Interim Self-Government Arrangements, signed 19 September 1993, reprinted in (1993) 32 ILM 1525.

⁴⁴ Israel-Palestine Liberation Organization: Interim Agreement on the West Bank & the Gaza Strip, signed 28 September 1995, reprinted in (1997) 36 ILM 551.

responsibilities and article IX(5)(a) of the Interim Agreement expressly provides that, ‘[i]n accordance with the DOP, the Council will not have powers and responsibilities in the sphere of foreign relations’.⁴⁵

Recent US cases involving claims by US citizens under the Anti-Terrorism Act⁴⁶ have rejected the assertion that the Palestinian Authority is entitled to sovereign immunity on the grounds that the Palestinian Authority (PA) lacks independent government control with regard to crucial areas such as foreign relations, control of territorial borders, the right to create or maintain an army or navy, control over airspace or the freedom to enact laws that contravene the provisions of the DOP.⁴⁷ In *Ungar v. Palestinian Liberation Organization*, the First Circuit of the United States Court of Appeal concluded⁴⁸ that

It is, therefore, transparently clear that the PA has not yet exercised sufficient governmental control over Palestine to satisfy the third element of the Restatement test.⁴⁹

5. Conclusion

There can be little doubt that the Palestinians have a right of self determination⁵⁰ but the powers currently possessed by the Palestinian Authority fall short of the independence necessary for Palestine (as currently constituted) to be regarded as a sovereign State.⁵¹ The fact that over two thirds of the member states of the United Nations currently recognise the existence of the State of Palestine is more indicative of a rhetorical commitment to the realisation of Palestinian self-determination than anything else.⁵² As Crawford notes, ‘[s]elf-determination, while it may and often does lead to statehood, is not the same thing as statehood.’⁵³

D. The Admission of Palestine to UNESCO

1. Introduction

Article 2(2) of the Constitution of the United Nations Educational, Scientific and Cultural Organisation (UNESCO) provides that

⁴⁵ Article I (2) of the Interim Agreement notes that ‘the term “Council” throughout this Agreement shall, pending the inauguration of the Council, be construed as meaning the Palestinian Authority.’

⁴⁶ 18 USC §§2331-2338.

⁴⁷ *Gilmore v The Palestinian Interim Self-Government Authority* 422 F Supp 2d 96 (DDC, 2006) at 101 and *Ungar v Palestinian Liberation Organization* 402 F 3d 274 (CA 1 (RI), 2005) at 291-2.

⁴⁸ *Ungar* (n 47) at 292.

⁴⁹ According to *Restatement (Third) of Foreign Relations* §201 (1987) a State is ‘an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities.’

⁵⁰ See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep136, at 182-3 (para 118).

⁵¹ See also James Crawford, *The Creation of States in International Law* 2 ed (Clarendon Press, Oxford, 2006) 442-448.

⁵² See, for example, the Omani recognition of the ‘State of Palestine’ in 1988 as quoted in Stefan Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile* (Clarendon Press, Oxford 1998) 41-2.

⁵³ Crawford (n 51) 435.

States not members of the United Nations Organisation may be admitted to membership of the Organisation, upon recommendation of the Executive Board, by a two-thirds majority vote of the General Conference.

On 31 October 2011 UNESCO's General Conference voted to admit Palestine as a Member of the United Nations' educational, scientific and cultural organization. The vote was 107 votes in favour of Palestine's admission, 14 votes against and 52 abstentions.

Article 15(1) of UNESCO's constitution states that membership is subject to acceptance and that instruments of acceptance shall be deposited with the Government of the United Kingdom. The Depositary section of the Foreign and Commonwealth Office website gives 23 November 2011 as the effective date of Palestine's acceptance of the UNESCO constitution and also records an objection from Israel (received on 14 December 2011).⁵⁴ The Israeli objection to the United Kingdom's acceptance of the UNESCO Constitution by Palestine states that

The Government of the State of Israel objects to that accession as it contradicts Article II of the Constitution of UNESCO as well as the established norms and practices of International Law. The United States' decision to withdraw funding from UNESCO

Immediately after the vote admitting Palestine to membership of UNESCO, the United States declared that the decision was 'regrettable, premature and undermines our shared goal of a comprehensive, just and lasting peace in the Middle East.'⁵⁵ Palestinian membership of UNESCO also triggered long-standing legislative restrictions which compelled the United States to refrain from continuing to make financial contributions to UNESCO. These legislative restrictions are US laws dating from the early 1990s prohibiting US government funding to any United Nations agency or affiliated organization that 'accords the Palestine Liberation Organization the same standing as member states'.⁵⁶ The Obama administration subsequently announced (in a footnote in the administration's proposed budget in February 2012) that

The Department of State intends to work with Congress to seek legislation that would provide authority to waive restrictions on paying the U.S. assessed contributions to UNESCO.⁵⁷

The prospects of co-operation from a Republican dominated body seems remote but the Obama administration has re-affirmed its support for UNESCO's programmes.⁵⁸

⁵⁴ See < <http://www.fco.gov.uk/resources/en/pdf/3706546/3892723/TrUNESCO>> accessed 21 September 2012.

⁵⁵ US Department of State Press Statement 'Palestinian Admission to UNESCO' (31 October 2011) <<http://www.state.gov/r/pa/prs/ps/2011/10/176418.htm>> accessed 21 September 2012.

⁵⁶ Public Law 101-246 Title IV [1990]. See also Public Law 103-236 Title IV [1994].

⁵⁷ See 'Contributions to International Organisations' 582 fn 1 <

<http://www.state.gov/documents/organization/181130.pdf>> accessed 21 September 2012.

⁵⁸ On the issue of the potential US international responsibility for withholding UNESCO membership dues see Christiane Ahlborn, 'UNESCO Approves Palestinian Membership Bid – A Case for US

2. *The Israeli Response to the UNESCO decision to admit Palestine as a member*

The Israeli Government reacted to the UNESCO vote by announcing the accelerated construction of 1,557 new housing units in East Jerusalem and 673 housing units in other areas of the West Bank as well as freezing the transfer of value-added tax and customs revenues that it collects on behalf of the Palestinian Authority. Those funds amount to approximately US\$100 million per month and constitute two-thirds of the Palestinian Authority's annual revenues.⁵⁹ On 30 November 2011, the Israeli Government decided to renew the transfer of tax and customs revenues owed to the Palestinian Authority but approval for construction on occupied Palestinian territory continues unabated.⁶⁰

Interestingly, Article IX (5)(b)(4) of the Interim Agreement states that the PLO may conduct negotiations and sign agreements with states or international organizations with regard to cultural, scientific, and educational matters.⁶¹ It is therefore arguable that Palestine's recent admission to UNESCO did not violate its agreements with Israel and that Israel's retaliation (withholding customs revenues and expediting the construction of over 2,000 settler homes in the West Bank and East Jerusalem) was consequently unjustified.

It should be noted that Article IX (5)(b)(4) of the Interim Agreement refers to the PLO and that the Oslo Accords 'reflect the existence of two Palestinian entities, one (the PLO) with the power to engage in foreign relations but not to control territory, and the other (the PA) with the power to govern territory but not to engage in foreign relations.'⁶² However, since the signing of the Oslo Accords, the distinction between the two entities (always difficult to sustain given the degree of overlap between the two organisations) has become 'exponentially blurred in practice, and the reality is that the PA has entered into various agreements with international organizations and states.'⁶³

Countermeasures Against the Organization' *EJIL: Talk!* (8 November 2011)

<<http://www.ejiltalk.org/unesco-approves-palestinian-membership-bid-%e2%80%93-a-case-for-us-countermeasures-against-the-organization/#more-4052>> accessed 21 September 2012.

⁵⁹ See Robert Sperry, 'The Situation in the Middle East, including the Palestinian Question', UNSC Verbatim Record 6662nd meeting (21 November 2011) UN Doc S/PV/6662.

⁶⁰ See, for example, Jodi Rudoren, 'Israel Retroactively Legalizes 3 Settlements in West Bank' *New York Times* (New York 25 April 2012), at A9 and Associated Press 'Israel to Build West Bank settlements' *The Guardian* (London 7 June 2012), at 20.

⁶¹ Article IX (5)(b)(4) of the Interim Agreement also provides that: '[d]ealings between the Council and representatives of foreign states and international organizations, as well as the establishment in the West Bank and the Gaza Strip of representative offices other than those described in subparagraph 5.a above, for the purpose of implementing the agreements referred to in subparagraph 5.b above, shall not be considered foreign relations.'

⁶² Geoffrey Watson, *The Oslo Accords: International Law and the Israeli-Palestinian Peace Agreements* (Oxford University Press, Oxford 2000) 245.

⁶³ Michael Kearney and Stijn Denayer, 'Al-Haq Position Paper on Issues Arising from the Palestinian Authority's Submission of a Declaration to the Prosecutor of the International Criminal Court under Article 12(3) of the Rome Statute' (14 December 2009) 13 (para 26) <[http://www.alhaq.org/attachments/article/273/position-paper-icc-\(14December2009\).pdf](http://www.alhaq.org/attachments/article/273/position-paper-icc-(14December2009).pdf)>.

E. Palestine and the ICC

On 22 January 2009, the Minister of Justice for the Government of Palestine lodged a declaration (dated 21 January 2009) recognizing the jurisdiction of the International Criminal Court (ICC).⁶⁴ On 23 January 2009, the ICC's Registrar acknowledged receipt of the declaration and noted the reference to Article 12(3) of the ICC Statute.⁶⁵ The Office of the Prosecutor (OTP) undertook to examine all relevant issues related to the jurisdiction of the ICC, including whether the declaration by the Palestinian National Authority accepting the exercise of jurisdiction by the ICC met the requirements of Article 12(3) of the ICC's Statute,⁶⁶ whether the alleged crimes fell within the category of crimes defined in the ICC's Statute, and whether there were national proceedings in relation to those crimes

During its examination, the OPT received over 400 communications on crimes allegedly committed in Palestine as well as representations from the Palestinian National Authority and other interested parties on the fulfilment of the statutory requirements for opening an investigation. On 3 May 2010, the OPT published a summary of the submissions on whether the declaration lodged by the Palestinian National Authority met the statutory requirements.⁶⁷

On 3 April 2012, the OPT indicated that it could not accept the Palestinian declaration on the grounds that only a 'State' can make a declaration accepting the ICC's jurisdiction.⁶⁸ In the view of the OPT, recognition by more than 130 governments and certain international organisations including UNESCO was insufficient evidence that Palestine constituted a State for the purposes of article 12(3) of the Rome Statute.

However, the current status granted to Palestine by the United Nations General Assembly is that of 'observer', not as a 'Non-member State'. The Office understands that on 23 September 2011, Palestine submitted an application for admission to the United Nations as a Member State in accordance with article 4(2) of the United Nations Charter, but the Security Council has not yet made a recommendation in this regard. While this process has no direct link with the declaration lodged by Palestine,

⁶⁴ The operative part of the Palestinian declaration reads: 'In conformity with Article 12, paragraph 3 of the Statute of the International Criminal Court, the Government of Palestine hereby recognizes the jurisdiction of the Court for identifying, prosecuting and judging the authors and accomplices of acts committed on the territory of Palestine since 1 July 2002.' For the full text of the declaration, see <<http://www.icc-cpi.int/NR/ronlyres/74EEE201-0FED-4481-95D4-C8071087102C/279777/20090122PalestinianDeclaration2.pdf>> accessed 21 September 2012.

⁶⁵ Letter by ICC Registrar (Silvana Arbia) to the Minister of Justice, Palestinian National Authority dated 23 January 2009 (ICC Ref 2009/404/SA/LASS) <<http://www.icc-cpi.int/NR/ronlyres/74EEE201-0FED-4481-95D4-C8071087102C/279778/20090123404SALASS2.pdf>> accessed 21 September 2012.

⁶⁶ Article 12(3) of the ICC Statute reads (in part): If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question.

⁶⁷ See <<http://www.icc-cpi.int/NR/ronlyres/D3C77FA6-9DEE-45B1-ACC0-B41706BB41E5/282852/PALESTINEFINAL201010272.pdf>> accessed 21 September 2012.

⁶⁸ The Office of the Prosecutor, International Criminal Court, 'Situation in Palestine' (3 April 2012) <<http://www.icc-cpi.int/NR/ronlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf>> accessed 21 September 2012.

it informs the current legal status of Palestine for the interpretation and application of article 12.⁶⁹

The OPT also indicated that it would consider allegations of crimes committed in Palestine in the future should competent organs of the UN or eventually the Assembly of ICC States Parties resolve the legal issue relevant to an assessment of article 12 or (more implausibly) should the Security Council, in accordance with article 13(b), make a referral providing jurisdiction.⁷⁰ The tenor of the OPT's decision dated 3 April 2012 makes it clear that the anticipated application by Palestine for non-member observer State status has the potential to be very much more than largely symbolic.

On 7 August 2012, a group of 30 international legal scholars sent a letter to the President of the Assembly of States Parties to the ICC Statute requesting the Bureau of the ICC Assembly of States Parties place the issue of whether Palestine qualifies as a State for the purposes of acceding to the ICC Statute on the agenda of the Assembly of States Parties for its November 2012 session in the Hague.⁷¹

F. Conclusion

Although the 1988 Palestinian Declaration of Independence can be seen as a triumph of rhetoric over reality, the continuing efforts to deny the Palestinian people the statehood that the international community acknowledges they are entitled to risks subjugating the legal criteria for statehood to *realpolitik*. In other words, the charge of cognitive distortion can today more easily be levelled against those who deny the existence of a Palestinian State than those who assert it. As Brownlie notes,

In exceptional circumstances, a people may be recognized by the international community, and by interested parties, as having an *entitlement* to statehood, and thus to being a state *in statu nascendi*. Normally, this transitional status leads, without too much delay, to independence under the auspices of the United Nations.⁷²

Both the 1993 Declaration of Principles on Interim Self-Government Arrangements ('DOP')⁷³ and the 1995 Israeli-Palestinian Interim Agreement on the

⁶⁹ Ibid at para 7. For a comprehensive discussion of the legal issues regarding the Palestinian Declaration pursuant to Article 12(3) see Chantal Meloni and Gianni Tognoni (eds), *Is There a Court for Gaza? A Test Bench for International Justice* (T M C Asser Press, The Hague 2012). See also Michael Kearney and John Reynolds, 'Palestine, and the politics of international criminal justice' in William A Schabas et al (eds), *The Ashgate Research Companion to International Criminal Law: Critical Perspectives* (Ashgate, Aldershot 2013) forthcoming.

⁷⁰ Ibid at para 8.

⁷¹ Letter by 30 international legal scholars to the President of the Assembly of States Parties to the Rome (ICC) Statute (Ambassador Tiina Intelmann) dated 7 August 2012. See Dapo Akande, 'ICC Assembly of States Parties Urged to Decide on the Status of Palestine' (EJIL: Talk! 24 September 2012) < <http://www.ejiltalk.org/icc-assembly-of-states-parties-urged-to-decide-on-status-of-palestine/>>.

⁷² James Crawford, *Brownlie's Principles of Public International Law* (8th edn OUP, Oxford 2012) 136 (emphasis in original).

⁷³ See Article I of the Israel-Palestine Liberation Organization: Declaration of Principles on Interim Self-Government Arrangements, signed 19 September 1993, reprinted in (1993) 32 ILM 1525 ('a transitional period not exceeding five years').

West Bank and the Gaza Strip ('Interim Agreement')⁷⁴ envisaged a five year transition period leading to a permanent settlement based on Security Council Resolutions 242 and 338. The Oslo Accords were originally signed over 19 years ago and, in the absence of a permanent settlement based on Security Council Resolutions 242 and 338, the Palestinian Authority faces a financial crisis that could threaten its stability.⁷⁵ Crawford acknowledges that

There may come a point where international law may be justified in regarding as done that which ought to have been done, if the reason that it has not been done is the serious default of one party and if the consequence of it not being done is serious prejudice to another. The principle that a State cannot rely on its own wrongful conduct to avoid the consequences of its international obligations is capable of novel applications and circumstances can be imagined where the international community would be entitled to treat a new State as existing on a given territory, notwithstanding the facts.⁷⁶

Although Crawford (writing in 2005) stated that this possibility did not yet apply in the case of Palestine, the recognition of the statehood of Palestine by more than 130 governments and various international organisations including UNESCO indicates that, for a significant proportion of the world, this point has long since been reached.

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ADDITIONAL PARAGRAPH – NOT INCLUDED (AUTHOR'S DECISION)

On 22 March 2012, Palestine deposited its instrument of accession to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict⁷⁷ and its two Protocols⁷⁸ with the UNESCO Director-General. It is noteworthy that although the accession of Palestine to these treaties is recorded on the UNESCO website it is missing from the information on the online UN Treaty Database although the accession by Benin to the same three treaties on 17 April 2012 is recorded.

⁷⁴ See Preamble para 5 of the Israel-Palestine Liberation Organization: Interim Agreement on the West Bank & the Gaza Strip, signed 28 September 1995, reprinted in (1997) 36 ILM 551 ('a transitional period not exceeding five years from the date of signing the Agreement on the Gaza Strip and the Jericho Area (hereinafter "the Gaza-Jericho Agreement") on May 4, 1994').

⁷⁵ See Isable Kershner, 'Financial Strains Said to Threaten Stability of Palestinian Authority' *New York Times* (New York 18 September 2012), at A10. See also EU DG Trade Statistics, Occupied Palestinian Territories: EU Bilateral Trade and Trade with the World' (21 March 2012) <http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_113382.pdf> accessed 21 September 2012.

⁷⁶ Crawford (n 51) 447-8.

⁷⁷ Convention for the Protection of Cultural Property in the Event of Armed Conflict (adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 240.

⁷⁸ (First) Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict (adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 358 and Second Protocol to the the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (adopted 26 March 1999, entered into force 9 March 2004) 2253 UNTS 172.