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The UN and the Status of Palestine – Disentangling the Legal Issues

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Introduction

A number of international media outlets have taken note of the anticipated United Nations deliberations concerning the status of Palestine. The issue has been characterized variously as Palestinian representation at the UN, the admission of Palestine to UN membership, the recognition of Palestine as a state, and

the question of the existence of the State of Palestine.^[1] While these issues are all inter-related, they are conceptually, analytically, functionally, and legally distinct. The confusion is understandable as it remains uncertain which issues will be discussed and in what form.

This *Insight* examines the legal, organizational, and procedural issues raised by the anticipated deliberations. It concludes with a discussion of possible legal consequences should the UN affirm Palestinian statehood.

Distinguishing the Issues of Statehood and UN Membership

As an initial matter, the question of statehood is distinct from the question of UN Membership. Indeed, it is possible to be a sovereign state without being a Member State of the United Nations (as Switzerland was for many years), and it is also possible to be a UN Member State without being a fully independent state (as India was prior to achieving complete independence from the United Kingdom).

The existence of states is regulated by general international law, while UN membership is regulated by the UN Charter in conjunction with the practice of the Organization and its Members. An important consequence of these different regulatory frameworks is that while certain states, i.e. any permanent Member of the UN Security Council, can block any application for admission to the UN, they cannot alone prevent a state from coming into being or from being recognized by the international community in general.

Statehood

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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.[2] The latter two criteria are generally understood to incorporate a requirement of independence. The government criterion also entails a requirement of effective control over the territory and its population.

Recognition of statehood by other states is a distinct issue. While in earlier times recognition was considered by some jurists to be an essential element of statehood, the dominant position among international lawyers today is that recognition is merely declaratory. A state comes into being if it meets the Montevideo criteria. Recognition then merely declares an already existing legal reality. Whether a state chooses to recognize another state is a political, discretionary act, and a state's act of recognizing another state, or withholding recognition, does not by itself affect the legal existence of the other state.

However, a caveat to this position is that *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. Collective recognition could perfect an otherwise imperfect fulfillment of the criteria, and, alternatively, collective non-recognition could effectively prevent the fulfillment of the criteria.[3]

UN Membership

Membership in the United Nations is regulated by Articles 3 to 6 of the UN Charter. Pursuant to Article 4(1) of the Charter, UN membership is open to all "peace-loving states[[4]] which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations." The admission of any such state to membership is "effected by a decision of the General Assembly upon the recommendation of the Security Council." [5] In its first Advisory Opinion, *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, the International Court of Justice found that this provision imposed legally binding criteria on the Member States in casting their votes in favor of or against admission. In particular, the Court found that Member States were not free to condition their consent to admission on conditions other than those expressly set forth in Article 4(1).[6] The Court rejected out of hand the argument that the political character of the UN organs dealing with admission precluded the application of legal restraints. To the contrary, the Court found that these Charter provisions imposed limitations on their power.

For a state to gain admission to the UN, the recommendation of the Security Council must be in favor of admission.[7] China, France, the Russian Federation, the United Kingdom, and the United States, as permanent members of the Council, each wield a veto. As such, any of these states can block admission. If the Security Council recommends admission, it is then up to the General Assembly to decide whether to admit the candidate as a Member State. As an "important question" under Article 18(2) of the Charter the admission of new Members to the UN must be decided by the General Assembly "by a two-thirds majority of the members present and voting." In the General Assembly, each of the UN's 193 Member States gets one vote, and no Member State has a veto.

The most recently admitted UN Member State was South Sudan. Its admission was uncontroversial and the Security Council and General Assembly resolutions were both adopted by consensus in July 2011.[8] Kosovo, on the other hand, has not been admitted to UN membership. The likelihood of a veto in the Security Council eliminates any chance of

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UN membership in the foreseeable future.[9]

Other Forms of Participation in the UN System

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.[10] Observers have various rights of participation in UN deliberations, but may not vote.

The various categories of observer status described in the “Blue Book” of the UN Protocol and Liaison Service[11] 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).[12] Even within each category, different observers may have different rights of participation.

The issue of who represents a state or other entity at the UN is a separate issue. The designation of representatives is generally an internal matter for states. The designated representatives are then recognized by the UN through a credentialing process, administered by the Credentials Committee of the General Assembly. The acceptance of credentials is usually a routine matter, though issues may arise when more than one group purports to be the legitimate government of a state.[13]

UN Practice Regarding Palestine

In 1974, the General Assembly invited the Palestine Liberation Organization (“PLO”) to participate as an observer. In December 1988, following the Palestinian National Council’s declaration of the independence of Palestine, the UN General Assembly decided that “the designation ‘Palestine’ should be used in place of the designation ‘Palestine Liberation Organization’ in the United Nations system”[14]

Over the years, the General Assembly has increased the scope of this participation to the point where Palestine’s status is practically identical to that of an observer *state*. [15] The UN Secretariat’s description of its status has similarly evolved. While the Blue Book initially listed the “Palestine Liberation Organization” as an “organization” maintaining permanent “offices” at UN headquarters, it now classifies “Palestine” as an “entity” maintaining a permanent “mission” at headquarters.[16]

Possible Forms of UN Deliberation and Implications for Statehood

There are a number of ways in which discussion of this issue might arise. The most obvious would be if Palestine applies for UN membership. Its membership bid would likely fail, given the lack of unanimity among the permanent members of the Security Council. On September 8, a State Department spokesperson made clear that the United States would veto any such initiative.[17] Nonetheless, an application for membership could lead to deliberation of the issue in both the Security Council and the General Assembly. Another possibility would be for the General Assembly to consider changing Palestine’s official observer status from that of “Entity” to “Non-Member State” or “Observer State.” There could also be any number of other resolutions that raise the issue of the status of

Palestine. Depending on the subject matter of the resolution, it may or may not be an “important question” within the meaning of Article 18(2) of the Charter, requiring a 2/3 vote. (Other questions, including whether an issue constitutes an “important question,” are decided by majority vote of those present and voting.)

According to the Observer Mission of Palestine to the UN, a majority of states in the General Assembly support Palestinian statehood.^[18] Indeed, about half of them already maintain diplomatic relations with Palestine.^[19] In whatever form the upcoming discussion takes place (if it takes place), it will likely give the General Assembly an opportunity to opine on the status of Palestine. An act of collective recognition by the General Assembly, even in the face of strong opposition by a few states, could have implications for the legal assessment of Palestinian statehood.

Implications of Statehood

Confirmation of statehood by the General Assembly, even if not providing member state status to Palestine, could have important legal consequences.

If Palestine is a state, then it is entitled to all of the rights of states under international law.^[20] 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. 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.

A collective determination of statehood could also have more immediate legal implications. During the Israel–Gaza armed conflict in late 2008 and early 2009, the Palestinian National Authority lodged a declaration with the Registrar of the International Criminal Court (“ICC”) 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].” Article 12(3) of the ICC Statute allows for 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. The ICC Prosecutor has since been 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.”^[21] 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.

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Endnotes:

[1] See, e.g., *Palestinians to Bid for UN State Recognition Next Month*, BBC News (Aug. 13, 2011), <http://www.bbc.co.uk/news/world-middle-east-14519654>; *Palestinian Leaders to Seek UN Recognition as Independent Nation*, CNN (June 26, 2011), http://articles.cnn.com/2011-06-26/world/palestinians.statehood_1_palestinian-state-palestinian-leaders-ramallah?_s=PM:WORLD; *In Israel, Time for Peace Offer May Run Out*, N.Y. Times (Apr. 2, 2011), <http://www.nytimes.com/2011/04/03/world/middleeast/03mideast.html?pagewanted=all>; *Palestinian Statehood Vote Looms Over U.S.-Israel Rift*, Wall St. J. (May 24, 2011), <http://online.wsj.com/article/SB10001424052702303654804576341323663415578.html>.

[2] The Montevideo criteria, 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>; 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>. See also *Knox v. PLO*, 306 F. Supp. 2d 424 (S.D.N.Y. 2004) (a U.S. court applying the Montevideo criteria to Palestine).

[3] 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.

[4] It has been suggested that the term “states” as used in Article 4 of the Charter is broader than in general international law. A number of states that are less than fully independent have been admitted to UN Membership in recent years.

[5] U.N. Charter art. 4, para. 2.

[6] Some Security Council members had sought to condition their affirmative votes for Membership on a quid pro quo basis; hence the request for the Advisory Opinion.

[7] Pursuant to Article 27(3) of the Charter, “Decisions of the Security Council on all other matters [other than purely procedural matters] shall be made by an affirmative vote of nine members including the concurring votes of the permanent members” The ICJ, in a 1950 Advisory Opinion, affirmed that the Security Council’s recommendation must be in favor of admission in order for a state to be admitted to Membership by the General Assembly. *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion, 1950 I.C.J. 4 (Mar. 3), available at <http://www.icj-cij.org/docket/files/9/1883.pdf>.

[8] See G.A. Res. 65/308, U.N. Doc. A/RES/65/308 (July 14, 2011), available at <http://www.un.org/depts/dhl/resguide/r65.shtml>.

[9] It is arguable that Kosovo satisfies the Montevideo criteria. If Kosovo’s statehood were to be affirmed by the overwhelming majority of Member States in the General Assembly, Kosovo would be a state, despite the objections of at least one permanent member of the Security Council. However, a majority of states have withheld recognition from Kosovo, making such an affirmation unlikely.

[10] 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. 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>.

[11] *Permanent Missions to the United Nations No. 301 (“Blue Book”)*, U.N. Doc. ST/SG/SER.A/301 (Mar. 2011), available at <http://www.un.int/protocol/bluebook/bb301.pdf> [hereinafter UN Blue Book].

[12] There are a number of other organizations that have observer status with the UN, but do not maintain permanent offices at UN headquarters.

[13] See, e.g., Human Rights Council Res. 5/1, Rep. of the UN Human Rights Council on the

Situation of Human Rights in Honduras Since the Coup d'état on 28 June 2009, 12th Sess., Oct. 1, 2009, A/HRC/12/50, ¶ 7, *available at* http://www2.ohchr.org/english/bodies/hrcouncil/12session/docs/A_HRC_RES_12_14_AEV.pdf. There is also some precedent for the rejection of credentials in protest of a government's policies. See, e.g., G.A. Res. 3151 (XXVIII), U.N. Doc. A/RES/3151 (Dec. 14, 1973), *available at* <http://www.un.org/Depts/dhl/resguide/r28.htm> (General Assembly refusing to accept the credentials of the designated representative of the government of South Africa during Apartheid).

[14] G.A. Res. 43/177, U.N. Doc. A/RES/43/177 (Dec. 15, 1988), *available at* <http://unispal.un.org/UNISPAL.NSF/0/146E6838D505833F852560D600471E25>.

[15] Palestine's rights of participation largely correspond to those of the Holy See, a non-Member state observer. Compare G.A. Res. 58/314, U.N. Doc. A/RES/58/314 (July 16, 2004), with G.A. Res. 52/250, U.N. Doc. A/RES/52/250 (July 13, 1998), and G.A. Res. 43/160, U.N. Doc. A/43/160 (Dec. 9, 1988).

[16] See UN Blue Book, *supra* note 11.

[17] U.S. State Dept, Daily Press Briefing (Sept. 8, 2011), *available at* <http://www.state.gov/r/pa/prs/dpb/2011/09/171954.htm>.

[18] *Palestinians Ready, Would Prefer to Reach Peace Treaty with Israel by September, Paving Way for Independence, UN Membership, Palestinian Rights Committee Told*, UN News, GA/PAL/1195 (Apr. 19, 2011). <http://www.un.org/News/Press/docs/2011/gapal1195.doc.htm>.

[19] See, e.g., Directory of Palestine Embassies, Missions, Delegations Abroad, <http://www.un.int/wcm/content/site/palestine/pid/11548>.

[20] It would of course also be subject to all of the duties of states under general international law.

[21] Rep. of the Int'l Crim. Ct. to the UN General Assembly, ¶ 81, A/65/313 (Aug. 19, 2010), *available at* http://www.humansecuritygateway.com/documents/UNGA_A65313_ReportOfTheICC.pdf.