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UN Membership for a Palestinian State: Legal and Political Ramifications

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Introduction

This memorandum purports to explore the ramifications of the Palestinian state seeking membership of the United Nations (UN). It deals briefly with the international legal nature of state recognition, as well as with the required objective and subjective elements of statehood, with the trajectory that the Palestinian cause has followed on the road to becoming an independent state, and with the required procedural steps that should be taken to achieve full membership of the United Nations. It will also deal with the legal and political ramifications of pursuing UN membership and recognition of Palestinian statehood.

Legal Nature Of State Recognition

The international community is composed mainly of states. According to Article 4 of the UN Charter, membership of the United Nations is open only to “peace-loving states, 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.” This means that membership of the United Nations implies achievement of statehood that has been recognized by a certain majority of member states in conformity with the UN Charter.

Prior to considering the steps that ought to be taken by the Palestinian side seeking membership of the United Nations, and the prospects of success in light of the disposition of member countries, it would be helpful to briefly address the international legal and political nature of state recognition and the basic requirements of statehood.

Recognition is an act on the international plane that affects the mutual rights and obligations of states as well as their status or legal capacity in general.¹ In the context of recognition of states and governments, recognition is of great importance both as a device of international law and as a political act of the states granting recognition. The legal significance of recognition of states is controversial and two countervailing theoretical approaches constitute the bulk of the international legal literature on the subject: the constitutive and declaratory theories.

The constitutive theory deduces the legal existence of new states from the will of those already established. The constitutive theory provides that “a state is and becomes an international personality through recognition only and exclusively. Thus a new state can acquire rights and duties in international law only when older states formally recognize it.”² Sir H. Lauterpacht attributes the origin of the constitutive theory to Hegel, “one of the spiritual fathers of the nineteenth century doctrine of positivism and of absolute sovereignty of the State in the international sphere. States, he taught, enter into legal relations with one another in conformity with their will by virtue of the act of recognition. Prior to that act no relations of a legal nature can exist between them.”³ It was natural that that view commended itself to those who conceive of international law as a loose “law of coordination” based on agreement as distinguished from the overriding command of a superior rule of law.⁴ Strict application of the constitutive theory has been criticized on logical and moral grounds, particularly by proponents of the declaratory

¹ See *Openheimer's International Law* (9th ed.), edited by Sir R. Jennings and Sir A. Watts, Vol. 1, p. 128.

² See Comment, “Recognition in International Law: a Functional Reappraisal”, *University of Chicago Law Review*, (1967), p. 857, 859-60.

³ See H. Lauterpacht, “Recognition of States in International Law”, *Yale Law Journal* (June 1944), 53, p. 419-20.

⁴ *Ibid.* p. 420.

theory. Brierly describes the status of a state that has been recognized by state A but not by state B, becoming an “international person” and not an “international person” at the same time, as a “legal curiosity.” He sees more difficulty in accepting that “an unrecognized state has neither rights nor duties at international law, and that some of the consequences of accepting that conclusion might be startling.”⁵

Proponents of the declaratory theory proceed from the premise that international law is an objective system that dictates the material conditions upon which a state becomes a member of the international community. “When a state has fulfilled these conditions, it automatically becomes subject to the rights and duties of international law, without any formal action on the part of the other members of the international system.”⁶ Thus the “declaratory theory simply views the process of recognition as one of confirming preexisting rights.”⁷ Although the majority of legal writers lean in favor of the declaratory theory, it has not escaped valid criticism.⁸ Both theories have their shortcomings, and despite statements by proponents of either theory that its validity is supported by practice, “the record does not bear this statement out.”⁹

To recognize a community as a state is to declare that it fulfills the conditions of statehood. It stands to reason that once these conditions are present the emerging state has a right

⁵ See J. L. Brierly, *The Law of Nations: an Introduction to the International Law of Peace* (6th ed.), Oxford University Press (1963) p. 138.

⁶ See Comments, *supra*, Note 2, p. 857.

⁷ See M.A. Kaplan and N. de B. Katzenbach, *The Political Foundation of International Law*, John Wiley & Sons Inc. (1961), p. 110.

⁸ See H. Lauterpacht, *Supra* note 3, pp. 425-433; See also William T. Worster, “Law, Politics, and The Conception of the State Recognition Theory”, *Boston University Law Journal*, 27(115), p. 119.

⁹ See Worseter, *supra*, note 8, p. 118-119.

to be recognized and existing states are under a duty to grant recognition. However, in the absence of an international organ competent to ascertain and declare the presence of requirements of statehood, established states play that role. Unfortunately, it is national policy and self-interest that dictate their action most of the time. The majority of legal writers adhere to the view that the act of recognition as such is not a matter governed by law but by policy.¹⁰

Adherents to both constitutive and declaratory theories deny that recognition as such is a matter governed by law, but a question of policy dictated by exigencies of national interest.¹¹ Agreement, however, that recognition is primarily a matter of political discretion and not a legal duty, does not mean an unfettered discretion left totally to political expediency. Whether a state exists is a question of fact, and the state called upon to grant recognition exercises “judicial discretion...aimed at ascertaining the existence of the relevant facts,” namely the essential conditions of statehood.¹²

Conditions Of Statehood

Article 1 of the Montevideo Convention on Rights and Duties of States, which was adopted by the Seventh International Conference of American States in 1933, is commonly accepted as reflecting, in general terms, the requirements of statehood in international law. It states that “the state, a person of international law, should possess the following qualification: (a) a permanent

¹⁰ See H. Lauterpacht, *supra*, p. 386.

¹¹ *Ibid*, p. 386.

¹² *Ibid*, p. 406-407.

population; (b) a defined territory; (c) government; (d) capacity to enter into relations with other states.”¹³

Section 201 of the Third Restatement of the Foreign Relations Law of the United States (The Restatement) presents essentially the same four requirements test of statehood, but note 5 to Section 201 points out that “some writers add independence to the criteria required for statehood.”¹⁴

Customary international law on the creation of states is unclear. Objective standard for measuring state practice and *opinio juris* has been difficult to establish. Even the definition of state alone has been a challenge to leading international law specialists and has been considered “almost an impossible task”.¹⁵ If, however, we accept that discretion of states in granting or withholding recognition must be limited, then standards by which to measure criteria for status of statehood must be established. “One possible limitation on the discretion to recognize statehood is the Montevideo Convention criteria of a permanent population, defined territory, government, and the capacity to enter into relations with other states.”¹⁶

There is no clear hierarchy within these Montevideo criteria although emphasis on certain criteria at the expense of others has been proposed. James Crawford believes “there is a strong case for regarding government as the most important single criteria of statehood, since all others depend on it.”¹⁷

¹³ League of Nations Treaty Series, Vol. 165, pp. 20-43.

¹⁴ Restatement (Third) of the Foreign Relations Law of the United States §201 (1987).

¹⁵ See Worster, *supra*, note 8, p. 143.

¹⁶ *Ibid.*, p.154.

¹⁷ James Crawford, *The Creation of States in International Law* (2nd Edition, 2007), p. 42. On the same point, see Thomas Baty, “Can an Anarchy be a State?,” *American Journal of International Law*, p. 444.

We will explore the practical application of the objective and subjective criteria for state recognition and the extent that the “Palestinian State” meets these criteria through a review of the legal and political trajectory it has taken since the Partition Plan to the present time.

On The Road To Statehood

The struggle to establish an independent Arab state in Palestine recognized by the United Nations goes back to the time of the British mandate over Palestine and the UN General Assembly’s Resolution 181 taken on November 29, 1947 (also known as the Partition Plan). The Partition Plan provided that:

“3. Independent Arab and Jewish States and the Special International Regime of the City of Jerusalem, set forth in Part III of this Plan, shall come into existence in Palestine two months after the evacuation of the armed forces of the Mandatory Power has been completed but in any case not later than 1 October 1948. The boundaries of the Arab State, the Jewish State, and the City of Jerusalem shall be described in Parts II and III below.”¹⁸

The United Nations has thus recognized the right to an independent Arab state in Palestine at the same time it has allowed a Jewish state to be established. A good argument could be made that the legitimacy of establishing either state was dependent on the establishment of the other. Palestinians and other Arabs considered the Partition Plan unfair and illegal and an armed conflict followed the declaration of Israel as an independent state (1948) in which the Egyptian and Jordanian armies, *inter alia*, participated. When a ceasefire and later armistice agreements ended the conflict, territories known as West Bank and Gaza fell respectively under Jordanian and Egyptian control, and Israel expanded its territorial control far beyond what it was allotted

¹⁸ A/RES/181 of November 29, 1947 (A. Termination of Mandate. Partition and Independence).

by the Partition Plan. The establishment of an Arab state in Palestine as provided for in the Partition Plan never took place.

The 1967 war between Israel, Egypt, Jordan, and Syria has brought all territories of mandatory Palestine under Israeli control. On November 22, 1967, the UN Security Council adopted Resolution 242 “emphasizing the inadmissibility of the acquisition of territory by war” and calling for the “withdrawal of Israel armed forces from territories occupied by recent conflict.”¹⁹

The 1967 war discredited the Arab states in the eyes of the Palestinians who became determined to take control of their national destiny via the Palestine Liberation Organization (PLO). In the words of one commentator, the PLO “became the only game in town in promoting the interests of the Palestinians...and it achieved widespread influences among Palestinians and Arabs generally, including Arab governments.”²⁰ The PLO pronounced, for the first time, policy for Palestinians which included the idea of self-determination for the Palestinians and a Palestinian state.²¹ A crucial development took place at the Rabat Summit meeting of the Arab League in 1974 where the PLO was designated as the sole legitimate representative of the Palestinians. This made clear that from thereon the Palestinians would represent themselves; in addition, it gave the Palestinians the legitimacy to enter into settlement negotiations and be necessary party to any such negotiations.

¹⁹ S/Res/242 (1967).

²⁰ See Arther R. Day, *East Bank, West Bank: Jordan and the Prospects for Peace* (1968), p. 122.

²¹ *Ibid.*

The idea of creating an independent Palestinian state on the West Bank and Gaza Strip was not new to the Palestinian movement, however. Members of the PLO Planning center in Beirut, under the leadership of Dr. Yousef as-Sayegh, put forth a detailed proposal for such a state to Palestinian leaders at a meeting of the Central Committee of the Palestine National Congress (PNC) on February 9, 1972.²² On November 15, 1988, Yasir Arafat, Chairman of the PLO, declared the establishment of an independent Palestinian state with Jerusalem as its capital. Although the PLO chairman did not indicate the borders of such a state, it was assumed that it included the Israeli-occupied West Bank, including the Arab Sector of Jerusalem, and the Gaza Strip.²³

The Palestinian declaration of statehood prompted swift diplomatic recognition from a number of countries.²⁴ At present, countries recognizing the Palestinian State are estimated at 114.²⁵ Notwithstanding the large number of countries that recognized the Palestinian state, there are still many countries, with important presence on the international scene, that remain reluctant to grant recognition. Political considerations and perceptions of self-interest may account for the main motivation for those who granted and those who are withholding recognition, and we know that international legal practice is quite accommodating in this regard.

²² See W. Quandt, F. Jabber and A. Lesch, *The Politics of Palestinian Nationalism* (1973) p. 135.

²³ See Ibrahim, "PLO Proclaims Palestine to be an Independent State", *The New York Times*, November 15, 1988, p. A1, Col. 4.

²⁴ See James L. Price, "The International Legal Implications of the November 1988 Palestinian Declaration of Statehood," *Stanford Journal of International Law* (1988-89), p. 681.

²⁵ See Victor Kattan, "Palestinian Statehood: a Turning Point," <http://victorkattan.com/blgDetail.php?75>; PLO sources maintain that "122 states recognize Palestine" at the present time. See *infra*, note 36.

To what extent would the application of an objective legal criteria, which are the Montevideo Convention requirements of statehood, justify the reluctance of countries that have not yet granted recognition or provide at least moral pressure on them to change their position?

Objective Requirement For Palestinian Statehood

The four basic requirements of statehood are “a) permanent population; b) a defined territory; c) government; d) capacity to enter into relations with other states.”²⁶ What follows explores the degree that the Palestinian state, in its present status, meets such requirements.

The Requirement of Permanent Population

The Palestinian state seems to fulfill the “permanent population” requirement in that its population consists primarily of long-term resident Palestinians. If the territorial limits of the Palestinian state are confined to the part of the territories of Mandate Palestine that came under Israeli occupation as a result of 1967 war, an argument could be made that strict adherence to the “permanent population” requirement would practically exclude two-thirds of the world’s Palestinians.²⁷ The chairman of the PLO, who declared the independence of the Palestinian state, has explicitly ruled out any such limitation during his speech to the UN General Assembly in Geneva in December 1988 in which “he stressed frequently that the estimated six million Palestinian refugees and exiles around the world must have a right of return to settle in any future Palestinian homeland established in the occupied territories.”²⁸ Mr. Arafat’s statement in

²⁶ See Article 1 of the Montevideo Convention, supra, note 13.

²⁷ See James Price, supra, note 24, p. 692.

²⁸ See Lewis, “Arafat, in Geneva Calls on Israelis to Join in Talks,” *The New York Times*, December 14, 1988, p. A1, Col. 6.

Geneva reflected a policy well carved in the Palestine National Council (PNC) Charter.²⁹ In fact, the 1988 Declaration of an Independent Palestinian State contains no attempt to limit the permanent population of the declared state to the current residents of the West Bank and Gaza. It explicitly proclaims that “the State of Palestine is the state of Palestinians wherever they may be.”³⁰ Palestinians who were forced to abandon their homeland, homes, and property, as a result of a illegal use of force against them, by illegal occupation forces, may not lose their status as part of the “permanent population” of their homeland, nor do they lose their inalienable right of return and self determination protected by international law.

I am not aware of any declaration, statement, or document presented by the Palestinian Authority in connection with their request for “Recognizing the Palestinian State on the 1967 border and admission of Palestine as a full member of the United Nations” that could be interpreted as limiting the “Permanent Population” of the Palestinian state to those residing in the Palestinian territories that fell under Israeli control as a result of the 1967 war. Nevertheless, special efforts should be made to explicitly reiterate statements made in this regard by Mr. Arafat, as representative of the PLO and the PNC, particularly because of the narrower scope of representation of the Palestinian people by the Palestinian Authority compared with the chairman of both PNC and PLO. All possible measures should be taken so that the inalienable right of return and right of self-determination of the Palestinians who were forced to leave their

²⁹ Article 5 of the PNC Charter states that “The Palestinians are those Arab nationals who, until 1947, normally resided in Palestine regardless of whether they were evicted from it or have stayed there. Anyone born, after that date, of a Palestinian father – whether inside or outside it is also Palestinian.”

³⁰ See Palestine National Council, Palestine Declaration of Independence (Algiers, November 15, 1988), reprinted in *Journal of Palestine Studies*, Winter 1989, p. 215.

homes an property, as protected by international law and reflected in the UN General Assembly's Resolutions 194 and 3236 passed respectively on December 11 ,1948 and November 22, 1974, is not put in jeopardy.³¹

Requirement of Defined Territory

In the context of the Arab-Israeli conflict, the requirement of a defined territory is probably the most troublesome of the four factors. It has exposed the primitive and unreliable nature of the international legal order when it comes to protecting rights and settling disputes among nations. It has also unveiled the weakness and lack of determination of Palestinian and Arab leadership.

The international community has defined the territory of an Arab state in Palestine through the UN General Assembly Resolution 181 and the Partition Plan of 1947.³² The Palestinians and other Arab countries, for good legal reasons, rejected the partition of Palestine and considered the establishment of the state of Israel illegal. This Palestinian and Arab position was later reflected in the Palestine National Charter of 1968 (The Charter).³³ Article 2 of the Charter states that "Palestine, with the boundaries it had during the British mandate, is an indivisible territorial unit." Article 19 states that "the partition of Palestine in 1947 and the establishment of the state of Israel are entirely illegal, regardless of the passage of time."

The 1988 declaration of the establishment of an independent Palestinian state, however, without repudiating the Charter, states that "UN General Assembly Resolution 181 (1947), which partitioned Palestine into two states, one Arab an one Jewish ... still provides those

³¹ See A/Res/194 (iii), and A/Res/3236 (xxix).

³² See supra, note 18.

³³ See Price, supra, note 24, p. 687.

conditions of international legitimacy that ensure the right of the Palestinian Arab people to sovereignty and national independence.”³⁴

On September 9, 1993, in an exchange of letters between the chairman of the PLO and Israeli Prime Minister Rabin, Chairman Arafat stated that articles of the Charter which deny Israel’s right to exist are no longer valid. On April 26, 1996, the PNC adopted a decision “to abrogate the provisions of the Palestine National Charter that contradict the letters exchanged between Chairman Yasser Arafat and Prime Minister Yitzhak Rabin on September 9 and 10, 1993.”³⁵

Though the UN Security Council Resolution 242, adopted in the wake of the 1967 war (and confirmed by Resolution 338 of October 1975), does not in itself deal with the issue of defining the territory of the declared Palestinian state, rather calling on Israel to withdraw from territory it has occupied as a result of the 1967 war, it could be helpful in determining the territory where the declared Palestinian state could be established. In fact, numerous resolutions were passed by the UN General Assembly and Security Council considering all settlement activities carried out by Israel in the Palestinian territories that fell under its control as a result of the 1967 war illegal. In its bid for seeking recognition of the Palestinian state and full membership of the United Nations, the Palestinian Authority seems to be removing all ambiguity about defining the territories where the Palestinian state would be established. A document published by the PLO Negotiations Office in July 2011 states that: “In 1988, the Palestine

³⁴ See supra, note 30.

³⁵ See statement published by the “Permanent Observer Mission of Palestine to the United Nations” electronically at <http://www.UN.INT/WEM/content/site/Palestine/Cache/offence/pid/12362;jsessionid=4166B2>.

Liberation Organization (PLO) declared the establishment of the state of Palestine over the territory occupied by Israel in 1967 (the West Bank, including East Jerusalem, and the Gaza strip). By limiting the national aspirations to 22% of the Palestinian people's historic homeland, the PLO made a historic compromise in the interest of peace."³⁶ It is obvious that all Palestinians would not consent to recovering only 22% of Palestine, even though according to one reporter "the most recent poll shows that 65% of Palestinians support a bid for statehood."³⁷

International practice does not indicate that the absence of well-defined territories has been an impediment to recognition of emerging states. Israel itself is a shining example. To date, it has not defined boundaries for its territories, nor is there a consensus within Israel as to where the boundaries of the state of Israel should be, yet it has been recognized by certain countries precipitously before it was even established.³⁸

Government in Control and Capable of Entering into Relations with Other States

Because they are interconnected, the last two requirements of statehood, namely a government effectively in control and has the capacity of entering into relations with other states will be dealt with together. According to Lauterpacht, the existence of a government of the entity seeking recognition, acting independent of any other state, and exercising effective authority, is one of

³⁶ See PLO Negotiations Office, "Recognizing the Palestinian State on the 1967 Border and Admission of Palestine as a Full Member of the United Nations," p. 2, www.NAD-PLO.org.

³⁷ See Ibrahim Sharqieh, "Why the US Must Support Bid for Palestinian State," *The Christian Science Monitor*, August 9, 2011; also, see http://www.brookings.edu/opinions/w11/0809_Palestine_Sharqieh.asp?p=1.

³⁸ See Oppenheim's International Law, supra, note 1. "Recognition of Israel by the United States on May 14, 1948 has been regarded as precipitate. It was granted...notwithstanding that the existence of the State of Israel was not by then firmly established." p. 144.

the most important requirements of statehood.³⁹ International law is relatively flexible in its definition of a government in the context of determining statehood. Restatement S201, comment (d), points out that “a state need not have any particular form of government,” but goes on to require that there be “some authority exercising governmental functions and able to represent the entity in international relations.”⁴⁰

The bulk of the international legal literature of an independent government exercising effective control deals with new states that have seceded from existing ones where the legitimacy of sovereign control over the seceding territory plays an important role. In the Palestinian State case, the claim the Israeli authorities and legal scholars have made, or may make, claiming that Israel is the only state that was established over the territories of the British Mandate Palestine, and, consequently, is vested with sovereign control legitimacy of a parent state, has never been accepted by the international community. At least with respect to territories occupied by Israel as a result of the 1967 war, all resolutions emanating from an organ of the United Nations on the subject consider Israel as an illegal occupier and under a legal obligation to end its occupation. The International Court of Justice (ICJ), probably the highest judicial authority in the world, in a 2004 advisory opinion considered Israel as an occupier and all settlement activities it carried out in the Palestinian territories occupied in 1967, including East Jerusalem, as illegal.⁴¹

³⁹ See Lauterpacht, *supra*, Note 3, p. 408.

⁴⁰ See Restatement, *supra*, Note 14, §201.

⁴¹ See Advisory opinion on “The Legal Consequences of the Constructor of a Wall on the Occupied Palestinian Territories” ICJ, 9, July 14, 2004.

The challenge to the independence, effectiveness, and control of the Palestinian Authority, as representative of the Palestinian collective will, may not come from Israel. The effective control exercised by Israel over the West Bank and Gaza Strip is the control of an illegal occupier that should end. Besides, on no single occasion has the ICJ held that “mere factual situation influenced, by itself and without further legal requirements, the rights and duties of the relevant actors. Factual effectiveness never creates the legal positions on its own, but only if coupled with agreement and consent between states.”⁴²

The problem of legitimacy, control, and scope of representation of the Palestinian people resides on the Palestinian side. Many Palestinians believe that the Palestinian Authority and its head do not represent Palestinians in the Diaspora. Even within the Occupied West Bank and Gaza Strip, the Palestinian government is marked by a dysfunctional legislative authority, and the Palestinian Authority’s control does not extend to the Gaza Strip which is under the effective control of Hamas, which has a totally different position on the two-state solution – the territories need to be liberated from Israeli occupation, and what they view as the effective way to follow for their liberation. The representative legitimacy of Mr. Abbas as head of the Palestinian Authority is even questioned after the expiration of his term without either electing a replacement or renewing his term.

The issue of representative legitimacy or effective control of the Palestinian Authority might have no impact on the position taken by those countries, which may, out of solidarity with the Palestinian cause, recognize a Palestinian state and support its membership of the United

⁴² See Alexander Orakhelashvili, “Statehood, Recognition and the United Nations System: A Unilateral Declaration of Independence of in Kosovo,” in Max Planck *Yearbook of United Nations Law*, Vol. 12, 2008 p. 9.

Nations, but it may provide a legal excuse to justify reluctance of countries not inclined to grant recognition. More worrisome is the impact the disorganization, lack of cohesion, and absence of well-defined common objectives among all Palestinians will have on their effectiveness in protecting their interests, recovering their rights, and meeting their national objectives.

The lack of cohesion among Palestinian organized groups in finding common objectives and a means to achieve those objectives, will not only embolden Israel in disregarding Palestinian rights and interests, but also weaken their capacity to engage in meaningful relations with other states.

How To Become A Member Of The United Nations

Article 4 of the Charter of the United Nations (UN) provides that membership in the international organization “is open to all peace-loving states that accept the obligations contained in the United Nations Charter and, in the judgment of the Organization, are able to carry out these obligations.” The same article also provides that [“2 – The] admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council.”

Recognition of new states is the privilege of existing states as persons of international law. It is an act that other states can either grant or withhold. The United Nations as an international legal entity does not possess the authority to recognize states. As an organization of independent states it may either admit or deny membership of other states. Procedurally, a state seeking membership of the United Nations submits an application to the Secretary-General accompanied by a letter stating that it accepts the obligations under the Charter. The Security

Council considers the application referred to it by the Secretary-General. It will be considered recommended for admission by the General Assembly if it receives the affirmative vote of 9 of the 15 members of the Council, provided none of its five permanent members has voted against the application. Membership becomes effective on the same day admission is voted on by the two-third majority required for admission in the General Assembly.⁴³

The main threat to the admission of the Palestine state as a full member of the United Nations seems, at the present time, comes from the US's announced determination to veto any recommendation for admission by the Security Council. "The American Ambassador to the UN, Susan Rice, said there was 'no greater threat' to the US support and funding of the UN than member states possibly approving Palestinian statehood."⁴⁴ On June 29, 2011, the US Senate passed a resolution threatening to suspend financial aid to the Palestinian Authority if they pursue statehood at the United Nations.⁴⁵

Some suggest resorting to "uniting for peace" resolution procedure to circumvent the American veto if it takes place.⁴⁶ Uniting for peace is a rarely applied mechanism in which a two-third majority in the General Assembly can potentially overrule the Security Council's veto in certain circumstances. Such course of action is risky and wasteful of efforts and time. More

⁴³ About the procedure to be followed to gain state membership see, in addition to the UN Charter, UN publication "Member States – About UN Membership," Retrieved August 8, 2011, <http://www.UN.ORG/en/members/about.shtml>.

⁴⁴ See "Palestinian Statehood at the United Nations: An Information Resource," Quaker United Nations Office on July 27, 2011, p. 2.

⁴⁵ Ibid, p. 2.

⁴⁶ See UN GA Resolution (A-Res-337(v)) of Nov. 3, 1950, which basically states that in cases where the Security Council, because of lack of unanimity of the permanent members, fails to act in order to maintain international peace and security, the General Assembly shall consider the matter immediately and may issue non binding recommendations.

likely than not, voices in the General Assembly opposed to the deployment of the uniting for peace mechanism would prevail in obtaining a decision to seek an advisory opinion from the International Court of Justice (ICJ) on whether the uniting for peace resolution may be resorted to in membership issues. The ICJ will very likely confirm its advisory opinion of March 3, 1950 in which it states that a Security Council majority with no veto was required on membership issues even though it was issued a few months before the uniting for peace resolution of the General Assembly.⁴⁷

A more helpful course of action, in case the US uses its veto to block the Palestinian application, would be to seek to upgrade the Palestinian observer status to that of a non-member state. An observer state would be equivalent to the status the Holy See (Vatican) has held since 1964, and similar to that of Switzerland prior to 2002, when it became a member state. “Such status, UN envoys say, would constitute implicit UN recognition of Palestinian statehood.”⁴⁸

Pursuing such option would obviate the need to secure approval of the Security Council and avoid the consequences of the US veto. The advantage of this approach would be its likelihood of succeeding because it would only require the approval of the General Assembly by “two-third majority of the members present and voting.”⁴⁹ Assuming all members of the UN are present and voting, this would require at the present time the approval of 129 members.

⁴⁷ ICJ advisory opinion on “Competence of the General Assembly for the Admission of a State to the United Nations of March 3, 1950.

⁴⁸ See Louis Charbonneau, “Q&A – Can Palestine become a United Nations member state?,” *Reuters*, August 25, 2011, <http://www.trust.org/Alertnet/news/qa-can-palestine-become-a-united-nations-member-state/>.

⁴⁹ See Article 18(2) of the Charter of the United Nations. Some scholars believe that voting on observer status is not among the “important questions” specifically referred to in Article 18(2) of the Charter, which include “admission of new members,” and, consequently, a simple majority vote would be sufficient for an observer status issue resolution. Getting a two-third majority vote in the General Assembly, however, is tantamount to an implicit admission to UN membership even if not strictly required as suggested.

Palestinian leadership sources maintain that “122 UN member states recognize Palestine.”⁵⁰ If the Palestinian leadership, the Arab League, and Arab states would not underestimate the efforts the US and other Israeli friends would deploy to defeat such move at the General Assembly, and would put the required efforts and resources to secure the required votes, getting a non-member state observer status could have tangible benefits, such as signing and becoming beneficiaries of certain important international treaties they can’t currently sign.⁵¹

Legal And Political Ramifications

In the absence of adequate and reliable information about all contemplated objectives of seeking recognition and membership of the United Nations, the content of the application and related documents to be submitted, as well as the adopted strategy that would guarantee success of this endeavor, one would need to resort to speculations and assumptions in many instances before drawing conclusions. A more helpful and thorough assessment of the ramifications of going to the UN would probably have to wait until the conclusion of the upcoming UN meetings.

Seeking membership of the UN implies seeking recognition as a Palestinian state by at least two-third of the world community represented in the international organization. It should be clear to us that recognition is mere acknowledgement of reality; it does not make reality. It is human struggle and the fruits of human efforts and perseverance that make reality, generate rights and obligations, and call for recognition. It should be equally clear to us that the prevailing international legal order is still fairly primitive in terms of protecting rights of states, communities, and individuals. In its making and its enforcement, international law is more

⁵⁰ See supra, Note 36, p. 1.

⁵¹ See supra, Note 48.

responsive to the interest of the powerful, the law of the jungle and the survival of the fittest, than to principles of justice and equity. This is well reflected in the interaction among nations and in the United Nations structure, where some countries enjoy privileges that immunize them against any accountability for their transgressions against international law and enable them to deprive weaker people and nations from enjoying basic inalienable rights.

Back in 1947, the United Nations partitioned Palestine into two states, one Jewish and one Arab, in violation of international law and of natural equity, if we only consider demography and land ownership prevailing at the time, in assessing the fairness of the Partition Plan. Palestinians and other Arab countries rightly rejected the Partition Plan but did not invest the required efforts and resources over time to achieve their rightful objectives, nor were they able to establish an Arab state in Palestine in conformity with the Partition Plan; on the opposite side, through tireless efforts and dedication, Israel has become a recognized reality that has never ceased growing and trampling on Palestinian and other Arab rights and interests in the face of powerless verbal complaints of the victims of its transgressions.

Seeking and achieving Palestinian statehood, recognized by the world community and reflecting a tangible basis for recovering Palestinian rights and interests, is a commendable objective. To guarantee success of such undertaking, however, certain conditions ought to be present and efforts mobilized.

Unity of the Palestinians behind such endeavor seems essential, both to achieve success at the United Nations, and for the implementation of any follow up measures that need to be taken to make of a Palestinian state a reality. Consequently, the representative authority of the Palestinian leadership undertaking the management of the recognition and membership process

at the United Nations is of vital importance. It is the PLO chairman who declared the independent Palestinian state back in 1988. The PLO has been recognized by the UN General Assembly as the legitimate representative of all Palestinians and was, in fact, the only representative body of Palestinians. Rights of all Palestinians to self-determination, as well as the right of return and to national independence, have been recognized by the UN General Assembly as inalienable rights, the respect of which was considered an indispensable element in the establishment of a just and lasting peace in the Middle East.⁵²

If the representation of the Palestinians in establishing their state would be limited to those who are under the effective jurisdiction of the Palestinian Authority, then the majority of the Palestinians would be unrepresented and their inalienable rights to “self-determination,” “national independence,” and “right of return” might be seriously compromised. It is assumed that all measures that secure representation of all Palestinians will be taken, and all protections and safeguards of the inalienable rights of all Palestinians will be put in place. Any act or failure to act that is likely to put in jeopardy any inalienable right of the Palestinians would be a grave failure, a “gross negligence tantamount to willful misconduct,” to use a legal term.

Assuming all protective measures have been taken, or will be taken, with regard to the application by Palestinians for UN membership of their state, succeeding in such endeavor is of vital importance. Success, however, requires substantial efforts and resources to be deployed by the Palestinian leadership, Arab states, and the Arab League in the implementation of an

⁵² See A/Res/3236 (xxix); See also A/Res/2649 (xxv) confirming Palestinians right to self determination and national independence. A/Res/2672 (xxv) A+D states declared that respecting Palestinian inalienable rights is an indispensable element in the establishment of a just and lasting peace in the Middle East.

effective strategy to reach the sought objective. The level of preparedness for the expected upcoming battle at the United Nations would probably have the most important ramifications of this exercise.

The US has already promised to veto any Security Council resolution that would approve admission of a Palestinian state by the General Assembly and there is no reason to doubt the US determination in this regard. This should not, however, be thought of as the limit of the US efforts in obstructing any decision by the UN that might enhance the Palestinian status in struggling for their rights. It should be expected that the US, Israel, and their friends and supporters would spare no effort, at the Security Council first, to prevent the Palestinian admission from getting the approval of nine members, the required minimum vote to pass a resolution by the Security Council, thus sparing the US the need to resort to its veto privilege. Very careful attention should be given to the procedural pitfalls and delays that determined opponents of the Palestinian bid could resort to at the Security Council level.⁵³ It is strongly recommended that specialists on the procedural issues in international organizations, especially the UN, be consulted on any likely loopholes that could be benefited from or pitfalls that should be avoided.

The next and very important battle is expected to take place in the General Assembly where the Palestinian side would most likely seek the admission to a non-member state observer status. Palestinian sources claim that 122 states recognize the Palestinian state. Obtaining the

⁵³ For example, Article 12(1) of the UN Charter states that “While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendations with regard to that dispute or situation unless the Security Council so requests.” It is possible that the Security Council takes hold of the application of membership and refrains from taking any decision, or establishes committees to study and report on any related issue and in general resort to procedural loopholes to delay decision on the issue of membership.

approval of two-third majority of the General Assembly's members present and voting would amount to implicit admission by the UN and an overarching recognition of the Palestinian statehood internationally. To achieve that objective, seven more votes would be needed to reach the two-third majority of 129 states. Some Palestinian and other observers believe that the support of significantly more than the two-third of the General Assembly's members could be comfortably secured. Again, the efforts the US and Israel are likely to exert should not be underestimated because the stakes are too high for Israel in this regard. Losing the voting battle at the UN, with all the sympathy the Palestinian cause has generated internationally, would leave a miserable impression of the seriousness, determination, and level of preparedness Palestinian and Arab leaders have put in place to achieve a very important goal at the United Nations.

UN membership, or an upgrade to a non-member state observer status, would hold advantages if careful attention is paid not to compromise any of the inalienable Palestinian rights already recognized by the United Nations during the process of gaining membership or enhanced status, or in pursuing follow-up actions needed to make of the Palestinian state a sovereign political reality. In general, UN membership and recognized statehood would significantly improve the ability to promote the rights and interests of the Palestinian people compared with the current situation.

A Palestinian state, recognized internationally through the auspices of the United Nations, would be able to join some international organizations, such as the IMF and the World Bank, and to become a signatory party to important multilateral treaties, especially those protective of human rights. It would most likely have standing in the International Criminal Court, in addition to domestic courts of countries that recognized the Palestinian state. New fora

would be open to sue Israeli officials who may be responsible for committing crimes against humanity against Palestinians.

UN membership or recognized statehood will help in taking steps that would make a Palestinian independent sovereign state a reality. It would strengthen the Palestinian position in taking all legitimate steps to end the Israeli occupation of an internationally recognized Palestinian state while weakening the Israeli claim that it is contested territory. Much will depend, however, on the steps the Palestinian leadership is willing to take to liberate a country and establish an independent sovereign state able to enter into all kinds of international relations with other states. Seeking UN membership and recognition of statehood should imply a commitment by the Palestinian leadership that it will take all lawful measures to recover and protect Palestinians' rights and interests. As we said earlier, recognition is merely an acknowledgement of reality; it does not create reality. A state under occupation has very little of the attributes of a state except probably the ability to exercise a right of self-defense and end the occupation.

UN membership and recognition of statehood will not, per se, effectively establish an independent Palestinian state capable of exercising territorial sovereignty and entering into inter-state relations with other countries. Knowing what we know about the UN structure and the bias some decision makers within the Security Council have, first among them is the United States, the UN is not likely to force Israeli withdrawal from occupied Palestinian territories. Only the Palestinian people can do that, with likely legitimate help from neighboring and friendly countries. In the absence of law enforcement mechanisms on the international level, only

effective change on the ground will make Israel, the US, and the rest of the world take notice and change their position.

Already, merely seeking UN membership has rattled the US and threatened to loosen its grip over the management of the peace process. For decades, Palestinians and many Arab countries have trusted the US to play the role of the honest broker and lead to a fair and equitable solution of their problem, only to find out that the US was practically a facilitator of an emboldened Israeli territorial expansion through multiplication of illegal settlements and subjecting the Palestinians to the worst kind of inhuman occupation. Putting the settlement of the Palestinian's problem with Israel in the hands of the Quartet the last few years, was in fact an optical illusion to give the impression that through the involvement of the United Nations and the European Union the world community was involved in solving the Palestinian problem, while the US has never ceased to call all the shots within the Quartet and cripple the process. The very strong opposition the US and Israel have expressed against the Palestinians' move towards the United Nations shows their serious concern that the Palestinians might rely on their own efforts in exercising their right to self-determination and national independence and the world community might be supportive. Only time will tell how determined the Palestinians are in exercising their inalienable rights.