



***THE PALESTINIAN AUTHORITY'S APPLICATION FOR UNITED NATIONS MEMBERSHIP  
AND ITS IMPLICATIONS FOR THE INTERNATIONAL CRIMINAL COURT***

The Palestinian bid for state recognition at the 66th session of the General Assembly could raise a number of issues relevant to the International Criminal Court (ICC). This development has been covered in many articles, often times with inaccuracies that require the analysis and description of facts in this paper.

On September 23, 2011 the Palestinian Authority (PA) submitted an application to the United Nations Security Council for admission to the UN as a member state.<sup>1</sup> The Security Council is expected to delay addressing the issue for several weeks which would permit Israel and Palestine more time for direct negotiations, with the hope of obviating the need for a vote on whether to admit Palestine as a member state. However, in the event of such a vote, the United States has stated that it would veto any such resolution, making it impossible for Palestine to become a UN member state. As an alternative, the PA may seek to elevate its status from “observer” to “observer state” through a resolution adopted by the UN General Assembly.<sup>2</sup> Such a resolution could be interpreted as recognition internationally of Palestine as a state.

International recognition as a state means that the state of Palestine in the future may seek to join multilateral treaties, including the Rome Statute of the ICC. Statehood is required for the ratification of international treaties. However, in order for a country to become a party to the ICC, it must first create a ratification instrument to be presented to the UN Secretary-General, who is responsible for managing acceptance of ratifications of the Rome Statute. He must judge whether the depositing country is recognized internationally as a state. It would be difficult for the Secretary-General to reject Palestine’s ratification of the Rome Statute or other multilateral treaties after an action by the General Assembly recognizing Palestine as a state.

Previously, the PA submitted a declaration to the ICC accepting the jurisdiction of the over the Gaza/Israel situation in 2009. However, only a state may make such a declaration according to the Rome Statute. The ICC Office of the Prosecutor has not sought authorization to open a formal investigation, though the Prosecutor stated that he needed to first determine whether Palestine is a state for the purposes of ICC jurisdiction. A General Assembly resolution recognizing Palestinian as a state may influence the analysis of the ICC Prosecutor as to whether he may act. Any decision to investigate on the basis of the 2009 declaration would require the consent of the Pre-Trial Chamber. Such an investigation would be of the situation as a whole and thus include alleged crimes of individuals of any party to the conflict.

Applying for State Membership in the United Nations

On July 14, 2011, Palestinian Authority President Mahmoud Abbas told the Arab League nations meeting in Doha that effort should be focused on creating a Palestinian state.<sup>3</sup> For 37 years, the Palestine Liberation Organization (PLO) has represented the people of Palestine at the UN. It has participated not as a member state but rather in the capacity of observer. The PA has now succeeded the PLO in that capacity. On September 23, 2011, President Abbas applied to elevate its status to that of a member state in the United Nations, despite threats from the U.S. and Israeli governments to deter this plan.<sup>4</sup>

<sup>1</sup> Jay Solomon, *Palestinians submit U.N. Statehood Bid*, September 23, 2011, <http://online.wsj.com/article/SB10001424053111903791504576588760450245004.html>.

<sup>2</sup> Evelyn Leopold, *Palestine at the U.N.: What will fail, What will Pass, and What it means*, September 19, 2011, [http://www.huffingtonpost.com/evelyn-leopold/palestine-at-the-un-what-\\_b\\_970483.html](http://www.huffingtonpost.com/evelyn-leopold/palestine-at-the-un-what-_b_970483.html).

<sup>3</sup> Security Council Report, *Israel/Palestine*, July 25, 2011 No. 1, [www.securitycouncilreport.org](http://www.securitycouncilreport.org), page 1.

<sup>4</sup> Joby Warrick and Joel Greenberg, *Diplomatic efforts unable to derail Palestinians' U.N. gambit*, *The Washington Post*, Friday, September 9, 2011.

In order to become a member state of the UN, a government must submit a formal application, including an instrument declaring its acceptance of the obligations under the UN Charter.<sup>5</sup> This application is submitted to the Secretary-General, who is required to place it before the Security Council<sup>6</sup> and to send a copy of the application to the General Assembly. The application is sent to the 15-member Committee on Admission of New Members which conducts its work by consensus and thus can a single country can block. The Security Council must then vote on a resolution either recommending the application to the General Assembly for a vote or denying the recommendation.<sup>7</sup> Gaining member state status at the United Nations requires both a Security Council recommendation and a two-thirds majority vote by the General Assembly. The United States, a permanent member of the Security Council, has already stated its intent to veto any resolution creating a Palestinian state.<sup>8</sup> However, the Security Council may delay addressing the bid, reportedly in order to allow for more direct negotiations to occur.<sup>9</sup>

### Applying for Observer State Status in the General Assembly

The issue of permanent sovereignty for the Palestinian people in the occupied Palestinian territory has long been on the agenda of the General Assembly and is again on the Provisional Agenda for the General Assembly's 66th Session this year. The guaranteed veto by the United States of a Security Council recommendation means that the PA may pursue elevating its status from that of a nonvoting observer "entity" to that of a nonvoting "observer state" in this familiar forum, through a General Assembly resolution. This recognition would require a two-thirds majority vote of U.N. member states and cannot be vetoed.<sup>10</sup> It is unclear whether the PA would succeed in the General Assembly; at least 100 countries, a majority of the 193 UN members, already recognize Palestine as a state.<sup>11</sup>

In casting their votes, countries in the General Assembly would consider whether Palestine should be recognized as a state under international law. The Montevideo Convention of 1933 recognizes four criteria for the existence of a state: (1) a permanent population; (2) a defined territory; (3) a government; and (4) the capacity to enter into relations with other states.<sup>12</sup> Many states may conclude that the PA currently meets these criteria because it has defined territory with a population in the Gaza strip and the West Bank, a government led by President Abbas, and that it is already entered into diplomatic relations with over 100 countries.

At the same time, there are those who may be persuaded either to vote against recognition or to abstain. A few weeks ago, the United States began a worldwide diplomatic campaign to persuade Palestinian President Abbas to abandon the bid for state recognition and to persuade other countries from supporting the proposal in the General Assembly. The U.S. reportedly approached over 100 governments hoping to forestall any actions by the PA, but it is unclear whether these efforts will succeed in preventing the General Assembly from acting on a resolution recognizing Palestine as a state.

### Ratification of the ICC Rome Statute Treaty

Status as a nonvoting observer state may permit Palestine to join a vast number of international treaties, including the ICC's Rome Statute. Article 126(3) of the Rome Statute states that the treaty be open to accession by all "States," and

<sup>5</sup> Security Council Report, Israel/Palestine, July 25, 2011 No. 1, [www.securitycouncilreport.org](http://www.securitycouncilreport.org), page 1.

<sup>6</sup> Rule 59, Provisional Rules of Procedure of the Security Council, United Nations 1983, <http://www.un.org/Docs/sc/scrules.htm>.

<sup>7</sup> Rule 135, Rules of Procedure of the General Assembly, <http://www.un.org/en/ga/about/ropga/index.shtml>.

<sup>8</sup> Joby Warrick and Joel Greenberg, *Diplomatic efforts unable to derail Palestinians' U.N. gambit*, The Washington Post, Friday, September 9, 2011.

<sup>9</sup> Chris McGreal, *Palestinian Statehood: plan emerges to avoid UN Showdown*, Friday September 20, 2011, <http://www.guardian.co.uk/world/2011/sep/21/palestinian-statehood-plan-un-showdown>.

<sup>10</sup> United Nations Charter, Article 18(2), June, 26, 1945, <http://www.un.org/en/documents/charter/chapter4.shtml>.

<sup>11</sup> President Abbas stated that Palestine already has embassies and missions in over one hundred countries. Mahmoud Abbas, *The Long Overdue Palestinian State*, May 16, 2011, <https://www.nytimes.com/2011/05/17/opinion/17abbas.html>.

<sup>12</sup> Montevideo Convention on the Rights and Duties of States, Article 1, December 26, 1933.



that instruments of ratification shall be deposited with the Secretary-General of the UN. Therefore, in order to join the ICC, the PA must take internal steps to ratify the Rome Statute and deposit its instrument of ratification with the Secretary-General. He will be the one to determine whether or not a state is indeed a “State” for purposes of ratification (this determination is not within the responsibilities of the Assembly of States Parties as set out in Article 112 of the Statute<sup>13</sup>). If the Secretary-General accepts the instrument, this will automatically make Palestine an ICC State Party according to the procedures in the Rome Statute.

In making his decision, the Secretary-General will consult his legal advisers who will refer to the definition of a “state” set out in the Montevideo Convention referenced above. A General Assembly resolution recognizing the Palestine as an observer state would also be persuasive. Security Council members, including the U.S., may be consulted.

When the Secretary-General accept a state’s instrument of ratification, the Rome Statute enters into force for that state on the first day of the month after the 60th day following the deposit of the State’s instrument of ratification.<sup>14</sup> Thus, a newly recognized state of Palestine – if it decided to join the ICC – would have to wait at least two months from the date of depositing its instrument of ratification before becoming a full-fledged ICC State Party, a status which would include the capacity to refer a situation, including the alleged one with Israel, to the ICC.

The PA’s interest in such a referral is demonstrated by its previous purported declaration to the Prosecutor consenting to the ICC’s jurisdiction. On January 22, 2009 the Minister of Justice of Palestine wrote an ad hoc letter to the Office of the Prosecutor stating that the Palestinian government would accept ICC jurisdiction for crimes committed on Palestinian soil after July 1, 2002. Under Article 12(3) of the Rome Statute, recognized states that are not a party to it or otherwise subject to the Court’s jurisdiction, may lodge a declaration with the Court stating that they accept its jurisdiction. Such a declaration would require the Prosecutor and his office to determine (1) whether the declaration was properly executed, and if so, (2) whether the crimes alleged fall within the Court’s jurisdiction. However, at the time of the declaration, Palestine was not universally recognized as a state. As a result, the Prosecutor only considered the declaration and never officially took action on it, recognizing that such action would require a decision on Palestinian statehood.

Following a General Assembly resolution recognizing Palestine as a state, there are two general scenarios that may follow with respect to possible action by the Prosecutor of the ICC. First, the Prosecutor could use the General Assembly recognition as evidence of Palestine’s statehood for the purposes of the 2009 declaration. However, depending on the terms of resolution, including whether it identifies the time of statehood, the PA may not have had the capacity to make a declaration as a state in 2009. Article 12(3) of the Rome Statute only permits non-States Parties to lodge such declarations. The newly-recognized Palestine may choose to lodge the declaration again before becoming a State Party. In either case, it is unclear how far back in time it would be able to accept the jurisdiction of the Court. For example, it may have been a state for the purposes of the declaration in 2009 but it may not have been on July 1, 2002, the start of its purported acceptance of jurisdiction.

The second scenario could be a decision of the Prosecutor to proceed with an investigation if the newly-recognized Palestine were to become an ICC State Party. In such a situation, a referral to the Court by a State Party would confer jurisdiction to the ICC over alleged crimes that occurred after the Rome Statute entered into force for Palestine. Any jurisdiction over alleged crimes before that date would have to be based on the previous declaration or a new one, assuming that Palestine was previously a state for purposes of an ICC declaration, thus permitting the Court to investigate alleged crimes prior to the entry into force of the treaty for Palestine following ratification.

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<sup>13</sup> The President of the ICC Assembly of States Parties has said a General Assembly resolution conferring observer state status to Palestine will allow the new state to ratify the Rome Statute, making it a regular state party.

<sup>14</sup> Rome Statute of the International Criminal Court, Article 126 (2), <http://untreaty.un.org/cod/icc/statute/romefra.htm>.



## Political Implications

The ICC must consider all actions by any party in a conflict situation referred to it in making its decision whom to prosecute and for which crimes.<sup>15</sup> Yet Israel is still likely to view any action on the Gaza/Israel situation by the ICC as a threat and this could have a negative impact on a negotiated peace agreement. If so, the Court, despite its being a judicial institution, could be blamed for any further impasse. In addition, any developments at the Court related to Israel may elicit a negative response from the U.S. and could impact U.S. relations with the ICC.

*Researched and drafted by Lauren Maccarone  
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<sup>15</sup> Rome Statute of the International Criminal Court, Article 54(1)(a) and (b), <http://untreaty.un.org/cod/icc/statute/romefra.htm>.