

Palestinian UN “observer state” status: what it really means

On 29 November 2012, the UN General Assembly voted, by an overwhelming majority of 138 — 9 votes, to upgrade Palestine’s status from an ‘observer entity’ at the UN to a ‘non-member observer state’. In this briefing paper, we explore the significance of this new status and some of its implications.

Background

Palestine’s status at the UN has evolved over a period of decades (see overleaf Figure 1: Palestinian representation at the UN 1964-2011).

Figure 2



In 2011, Palestine’s official status at the UN was ‘permanent observer entity’. Having been granted rights in addition to those of other observers, its rights of participation fell somewhere between those of member states and of observer entities (see Figure 2: Status barometer).

That year, Palestine submitted an application for UN membership, which was forwarded to the Security Council (see overleaf Figure 3: Process for UN membership). The Council deferred its vote. Later in 2011, the Board of the UN Educational, Scientific and Cultural Organisation (UNESCO) approved Palestine’s application for membership of this UN specialised agency – something normally reserved for states. The move led to the withdrawal of US funding for UNESCO.

2012 bid

In 2012, Palestine launched another bid to upgrade its UN status, this time to ‘non-member observer state’. Unlike UN membership – which requires a positive recommendation by the Security Council (see Figure 3) – this status can be approved by a simple majority vote in the General Assembly.

Figure 1

PALESTINIAN REPRESENTATION AT THE UN

- 1964:** UN formally notified of the Palestine Liberation Organisation (PLO).
- 1965:** The Special Political Committee of the UN General Assembly (GA) allows PLO to attend meetings.
- 1974:** The GA recognises the PLO as the representative of the Palestinian people and grants the organisation "observer entity" status.
- 1975:** The Security Council approves a request for the PLO to attend proceedings as a non-voting participant.
- 1982:** The UN Office of Legal Affairs acknowledges that most states formally recognise the PLO.
- 1986:** The Asian Group of countries at the UN accepts the PLO as a member.
- 1988:** The GA decides the PLO and the South West Africa People's Organisation are entitled to have communications issued as official documentation. To date, no other observer enjoys that right. "Palestine" replaces "PLO" in UN documents.
- 1988:** The GA calls on the US to cease its attempts to close down Permanent Observer Mission of the PLO to the UN.
- 1998:** The GA confers additional rights on Palestine, including the ability to participate in its general debate and co-sponsor resolutions. Palestine gains six places for delegates at the GA (four more than other observers).
- 1998:** Yasser Arafat speaks during the GA's general debate – the first non-member state representative to do so. Palestine co-sponsors 21 GA resolutions.
- 2009:** Palestine applies for membership of the UN Educational, Scientific and Cultural Organisation (UNESCO), normally reserved for states.
- 2011:** In April the UN Special Co-ordinator for the Middle East reports the Palestinian Authority has succeeded in laying the institutional foundations for realising a state. In September, Palestine submits a membership application, which is forwarded to the Security Council. The Council defers its vote and sends the application to a committee.

Figure 3

PROCESS FOR UN MEMBERSHIP

1. An application is submitted to the Secretary-General
2. The Secretary-General sends the application to the Security Council
3. The Security Council recommends the application to the General Assembly. This requires at least nine out of 15 votes in favour, with no veto by any of the five permanent members.
4. A two-thirds majority in the General Assembly approves the application.

While resolutions passed by the General Assembly are not legally binding on member states, the fact that the body includes all 193 member states means its decisions can be interpreted as reflecting the weight of world opinion. The significance of the overwhelming majority in favour of upgrading Palestine's status at the UN cannot, therefore, be dismissed.

'Non-member observer state' status

In terms of participation rights at the UN, the new status will not result in any meaningful change to those already accorded to Palestine.

The UN Charter does not include provisions for permanent observers, so the status is based purely on practice, dating from Switzerland's 1946 application to be an observer (it became a member state in 2002).

In practice, permanent observers (which can include intergovernmental organisations) are invited to participate in the sessions and work of the General Assembly and can maintain permanent offices at the UN Headquarters in New York. Palestine already did both these things.

The significance of the new status lies more in the designation 'state'. To date, 'non-member state' status, which is open to states that are members of one or more of the UN's specialised agencies (such as UNESCO), has only been accorded to established states.

One key consideration ahead of the General Assembly vote was to what extent the upgraded status could be interpreted as statehood for Palestine, and what this in turn might mean for Palestine's membership of other bodies.

Has Palestine attained statehood?

Much of the commentary has focussed on the implications of Palestine's upgraded UN status. In fact, statehood is distinct from UN status and is governed by a range of legal and non-legal criteria.

Article 1 of the Montevideo Convention on the Rights and Duties of States, 1933 is the starting point for determining statehood. According to this convention, the following criteria must be fulfilled in order to constitute a state:

- (i) a permanent population;
- (ii) a defined territory;
- (iii) government; and
- (iv) capacity to enter into relations with other states.

It is debatable whether Palestine presently satisfies any of the above criteria. An additional relevant (though not binding) criterion for statehood is that of recognition by other states. Here, it is relevant to note that Palestine has already received international recognition from several nations, which indicates their acceptance of the entity as a state (see Figure 1). However, several influential states have still not done so.

Can Palestine now become a member of other international bodies?

The upgraded UN status does not automatically confer membership of any UN bodies on Palestine, or any additional rights for it to seek such membership. Palestine's UNESCO membership was agreed prior to the 2012 General Assembly vote and as such, it would still need to go through the individual application processes for each body.

Of all the bodies it could apply to, the prospect of Palestine becoming party to the International Criminal Court (ICC), or bringing cases to it, is perhaps the most controversial implication that has been discussed.

The ICC is not a UN body. To be bound by its jurisdiction, states must ratify or accede to the Rome Statute – the treaty establishing the Court. Article 125 of the Statute provides for accession by all 'States' (emphasis supplied). The Statute itself is silent on the definition of 'state'. However, the Office of the Prosecutor at the ICC mentioned in an [April 2012 statement](#) that "in instances where it is controversial or unclear whether an applicant constitutes a 'State', it is the practice of the (UN) Secretary-General to follow or seek the General Assembly's directives on the matter." While there is a clear majority of states in the General Assembly that recognise Palestine as a 'state', some influential states (e.g. the US and the UK, both permanent members of the UN Security Council) do not do so, and would likely object to such an interpretation.

There is an alternative view, which holds that Palestine may already be state for the purposes of the Rome Statute in accordance with the 'Vienna formula' described in Summary of Practice of the Secretary-General as Depository of Multilateral Treaties ([see paragraphs 79-83](#)). This formula holds that if a state is a member of any of the UN specialised agencies, then it may sign a treaty which remains open for accession by all states. In such situations, the Secretary-General is not required to consult the General Assembly on issues of statehood. Proponents of this view argue that Palestine's membership of UNESCO has already rendered it eligible. By this token, Palestine was a state for the purposes of the Rome Statute before it was accorded a new upgraded UN status.

Does Palestine need to become a party to the Rome Statute to invoke the ICC's jurisdiction?

If Palestine can be considered a state for the purposes of the Rome Statute, it is not required to first become a party to the Rome Statute in order to invoke the jurisdiction of the ICC. Article 12(3) of the Rome Statute permits a state which is not a party to the Statute to accept the jurisdiction of the ICC with respect to the crime in question, by lodging a declaration with the ICC Registrar. Palestine lodged such a [declaration in January 2009](#). The ICC Prosecutor rejected this declaration in April 2012 as Palestine was not considered a state under the Rome Statute.

However, in September 2012, the [ICC Prosecutor remarked](#) that “if Palestine is able to pass over that hurdle, of course, under the General Assembly, then we will revisit what the ICC can do”. The hurdle refers to obtaining statehood and presently the ICC is studying the legal implications of the UN vote. It is therefore possible that Palestine may be able to successfully invoke ICC jurisdiction. The statements by the ICC Prosecutor, coupled with the fact that the previous declaration accepting the ICC jurisdiction was rejected on the grounds of not satisfying the criteria of statehood *per se* and not legal statehood in particular, lend support to this argument.

Can Palestine prosecute Israel, which is not a party to the Rome Statute, before the ICC?

A related issue is whether Palestine would be permitted to initiate investigations against Israel, given that Israel has not signed the Rome Statute. Article 12(2) of the Rome Statute permits the ICC to exercise jurisdiction over a state “on the territory of which the conduct in question occurred” (emphasis supplied). This is possible so long as the state is either a party to the Rome Statute or has accepted the jurisdiction of the ICC by filing a declaration under Article 12(3) of the Rome Statute. At present, Palestine is not a signatory to the Rome Statute and its declaration for accepting ICC jurisdiction was rejected earlier in 2012. However, in the event that the ICC recognises Palestinian statehood and Palestine then either signs the Rome Convention or files a declaration; it would be possible for Palestine to submit a claim.

In reality though, successful prosecution of Israel would incur several problems. Article 87(5) of the Rome Statute states that the ICC *may* invite any state not party to the Rome Statute to provide assistance to the ICC. But if the state in question is not cooperative, the ICC is limited in terms of the action it can take. The ICC lacks the power to compel non-members to extend cooperation and also does not have a police force to enforce warrants. All it can do is inform the Assembly of States Parties to the Rome Statute, which includes representatives, alternates and advisers of each of the parties to the Rome Statute. There would therefore likely be difficulties in pursuing prosecutions against Israeli officials.

Security Council referrals

There is one other path by which states that are not party to the Rome Statute can be referred to the Court. The ICC is entitled to conduct investigations should the alleged crime in question be referred by the Security Council. In the past, the Security Council has referred cases involving Libya and Sudan to the ICC. However, given the permanent presence of the US in the Security Council with veto powers, it is highly unlikely that a referral pertaining to Israel would be made.

What kind of charges might the ICC be able to consider in relation to Israel-Palestine?

Who could be open to prosecution?

The first thing to note is that the ICC can only prosecute individuals. It is not a forum for adjudicating on disputes between states. Consequently, any charges can only be brought against Israeli officials or citizens, and not against the state itself.

What types of crimes fall under ICC jurisdiction?

Articles 5-8 of the Rome Statute set out the crimes that fall under the Court’s jurisdiction. These are: genocide, crimes against humanity, war crimes, and the crime of aggression¹. If Palestine were to seek a claim at the ICC,

¹ The first three are defined by the Rome Statute. ‘Crime of aggression’ was not defined and the Court is at present not able to exercise jurisdiction over this last crime. At the Review Conference of the Rome Statute, held in Kampala, Uganda in 2010, states parties adopted consensus amendments to the Statute which define the ‘crime of aggression’ and set out jurisdictional conditions. States parties have yet to decide to activate these amendments, At present, they are not anticipated to enter into force until after 1 January 2017.

it would need to be able to point to specific instances of such crimes (see footnote regarding the 'crime of aggression', and to specific persons responsible.

What time-frame of crimes could be considered?

The time-line for conducting investigations against Israel is a crucial issue. Article 11 of the Rome Statute provides that the ICC has jurisdiction with respect to crimes committed after the Rome Statute enters into force (which it did in 2002). Further, if a state becomes a party to the Rome Statute after the latter enters into force, then the threshold date for exercising jurisdiction will be after the Rome Statute becomes applicable to such state. The only exception to this time-line is if such state has already made a declaration in accordance with Article 12(3). In Palestine's case, since its request for declaration was rejected in 2009, the ICC will be able to investigate only those crimes which occur after Palestine submits a fresh declaration for exercise of ICC jurisdiction (if that declaration is accepted) or after it becomes a party to the Rome Statute.

There is one precedent case involving Côte d'Ivoire where retrospective action was initiated by the ICC. While Côte d'Ivoire signed the Rome Statute in November 1998, it has not as yet ratified it. However, it first accepted the ICC jurisdiction in April 2003 in accordance with Article 12(3) of the Rome Statute. In this instance, the ICC agreed to conduct investigations retrospectively from September 2002, three months after the Rome Statute itself entered into force. Assuming the precedent is followed with relation to Palestine, the earliest date for permissible investigations would likely be July 2002.

What is the role of the International Court of Justice?

The forum which adjudicates on disputes between states is the International Court of Justice (ICJ). However, the ICJ only issues binding opinions on contentious cases between those states which submit to its ruling. It can issue advisory opinions if a referral is made by duly authorised UN organs or specialised agencies. In fact, in 2004 the ICJ issued, at the request of the General Assembly, an advisory opinion on the legal consequences of a wall built by Israel on the 'Occupied Palestinian Territory'. [The ICJ ruled](#) that the construction by Israel was illegal.

With respect to binding opinions, Palestine is not required to first become a party to the Statute of the ICJ in order to obtain a ruling. A reference to Article 35(2) of the Statute of the ICJ and Security Council Resolution 9 (1946) shows that a state which is not a party to the Statute of the ICJ can accept either general or particular ICJ jurisdiction. This is done by depositing a declaration with the ICJ Registrar. This is similar to obtaining ICC jurisdiction without being a signatory to the Rome Statute.

Further, even though ICJ is a UN body, a state can be party to the Statute of the ICJ without obtaining membership of the UN. As per Article 93(2) of the UN Charter, a non-member state of the UN can become a member of the ICJ subject to conditions determined by the General Assembly upon the recommendation of the Security Council.

However, the ICJ is not a criminal court and does not try individuals. Therefore, prosecution of Israel at the ICJ for war crimes is not possible. Further, ICJ is premised on the principle of consent. Israel has not accepted the compulsory jurisdiction of the Court under Article 36(2) of the ICJ Statute and it is improbable that it will consent to jurisdiction with respect to disputes with Palestine. So action against Israel through recourse to the ICJ is highly unlikely too.

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