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After recognition at the United Nations,
Palestine at the International Criminal Court?

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ABSTRACT

This dissertation tries to assess the consequences that the successful Palestinian bid for statehood at the United Nations Education and Science Organization (UNESCO) and in the United Nations General Assembly will have on the dynamics of the conflict between Israelis and Palestinians. The focus of the analysis is on the role played by the United Nations in past episodes and on the consequences of the bid in a broader strategic framework, drawing considerations on a political and legal level.

The dissertation first reviews United Nations resolutions, debates and reprimands from an historical point of view. In the second part, the bid at the United Nations is analyzed in detail. The third part deals with one of the most delicate issues related to the aftermath of the recognition: the possible jurisdiction of the International Criminal Court. The fourth part provides a legal analysis comparing the Palestinian case with other episodes of contested statehood. The final part analyses several opinions on the different paths the peace process and the conflict could take.

The conclusion argues that the bid for statehood should be viewed within a broader strategy to promote the right of self-determination and civil rights for Palestinians. As such, it has slowed down for as a result of the pressure of the United States and the European Union. The decision to freeze momentarily the initiative, which was criticized because it is not obtaining much from negotiations with Israel, leaves open both the question of statehood and the chances of finding a negotiated solution.

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INTRODUCTION

The attempt by the Palestinian leadership to seek recognition as a state at the United Nations in 2011 was not successful: the request was blocked in the Security Council by the opposition of the United States and other countries. The bid was instead successful at the UN organization which promotes education, culture and science (UNESCO) and at the General Assembly of the United Nations.

This dissertation tries to assess the consequences that this move could have on the dynamics of the conflict. Since recognitions by UNESCO and the UN General Assembly would not change directly the reality on the ground, which features over four decades of Israeli occupation in Gaza and the West Bank, the analysis will focus on the role played by the United Nations in past episodes and the consequences of a bid on a legal and economic level, in a broader strategic framework.

The dissertation first reviews United Nations resolutions, debates and reprimands from an historical point of view. The goal of this section is to better understand how the international organization influenced the conflict.

In the second part, the bid is analyzed in the larger context of the Palestinian campaign for statehood, which took place in different branches of the UN system. A complex web of possible consequences, potentially both positive and negative, will emerge after recognition.

The third part deals with one of the most delicate issues related to the aftermath of the recognition: the possible role that the International Criminal Court could play. After reviewing the declaration of recognition of jurisdiction by the Palestinian leadership, the response from the ICC and the opinions from different legal scholars, it would be reasonable to say that the Palestinian leaders could try again to ask the Court to investigate on possible crimes, but the consequences of such a move are still not clear.

The fourth part further explores the legal ramifications of the recognition by the

General Assembly, drawing comparisons paralleling the Palestinian case with other episodes of contested statehood. At the center of the analysis lies the right to self-determination, which has been debated extensively at the United Nations. Actually, the General Assembly spearheaded the decolonization process also on a legal level. After analyzing this aspect, this part studies more recent cases (Kosovo, South Ossetia, and Somaliland), comparing and contrasting them with Palestine.

The fifth section deals with the way forward for relations between Israelis and Palestinians, contrasting a number of diverging opinions. The majority of those who believe in a two-state solution support the bid, even though the move is criticized by Palestinian prime minister Salam Fayyad, who said that a state should be built, not declared. Similar critiques arise from those describing a “one-state reality”, which do not think that a symbolic UN recognition would change the reality on the ground.

The conclusion argues that the bid for statehood should be viewed within a broader strategy to promote the right of self-determination and civil rights for Palestinians. As such, it has slowed down for the pressure of the United States and the European Union. The decision to freeze momentarily the initiative, which was criticized because it is not obtaining much from negotiations with Israel, leaves open both the question of statehood and the chances to find a negotiated solution.

PART I

THE UN AND THE CONFLICT: AN HISTORICAL REVIEW (1947-2011)

1. The Partition Plan at the United Nations

Professor Abdul Raham Hajj Ibrahim of Birzeit University said: “It all started at the United Nations, so there we return”¹. It could be argued that Israel had actually been created on November 29th 1947 by the international community through a vote of the United Nations General Assembly, which approved resolution 181 containing the so-called “partition plan”.

The plan was also the cause of waves of inter-communal violence between Jews and Palestinians that later, after the declaration of independence by the Jewish state in May 1948, became a full-fledged war between Israel and the Arab countries. The declaration was issued immediately after the British authorities left, relinquishing the League of Nations’ mandate. The partition plan was accepted by the Zionist movement, in spite of dissenting internal voices, whereas the Palestinian leadership rejected it.

When a Palestinian delegation was finally accepted at the United Nations, Arafat spoke of the partition plan with a figure of speech taken from the biblical history of King Solomon: “The General Assembly partitioned what it had no right to divide, an indivisible homeland – he said speaking in the Assembly itself – when we rejected that decision, our position corresponded to that of the natural mother who refused to permit King Solomon to cut her son in two when the unnatural mother claimed the child for herself and agreed to his dismemberment.”²

In spite of this passionate opinion by his predecessor, current Palestinian Authority president Mahmud Abbas recently surprised his interlocutor “confessing that the Arabs’

¹ Interview with professor Abdul Rahmah Al-Hajj Ibrahim, Birzeit University, June 19th 2012.

² Yasser Arafat, speech to the United Nations General Assembly, 1974. Un archives: A/PV.2282 and Corr.1

refusal to accept the partition decision was a mistake that he is trying to rectify”.³

The Palestinian non-acceptance of the partition plan is a crucial event which has been interpreted in many different ways by historians. As Walid Khalidi underlines, it “was seen, in conventional Israeli historiographical narrative, as the ultimate proof of the Palestinians’ responsibility for both the 1948 war and the creation of the refugee problem.”⁴

In any case, the vote in the General Assembly immediately became an important date for both Israeli and Palestinian histories. And, as professor Hajj Ibrahim noted, another vote in the General Assembly, on the statehood of Palestine, would somehow put Israel and Palestine on the same level, as envisioned in the partition plan.⁵

2. The Six Day War and Resolution 242

Reacting to the Six Day War of 1967, the United Nations Security Council approved resolution 242 that, in its key passage, called for the “withdrawal of Israel armed forces from territories occupied in the recent conflict”⁶. Historians have debated this passage extensively because it does not call for a complete withdrawal from all the occupied territories, at least not in its English version. The French version of the resolution, instead, does request a withdrawal from “*the* territories occupied in the recent conflict”.

Different accounts of the discussions on resolution 242 show how this ambiguity was purposely crafted by the United States delegation to the United Nations, while the United Kingdom delegation had a neutral position⁷. In this way, the United States helped Israel effectively from the diplomatic platform of the United Nations. As it will become clear

3 Akika Eldar, “Abbas should change his locks before next wave of Palestinian prisoners freed” in *Haaretz*, December 6, 2011

4 Walid Khalidi, “Revisiting the UNGA partition resolution”, in Ilan Pappé (ed.) *The Israel/Palestine Question. A Reader*. Routledge, London 2007, pg. 97

5 An interesting parallelism to illustrate this idea can be found in Robert Fisher, “Following in Another’s Footsteps; the Acquisition of International Legal Standing by the Palestine Liberation Organization” in *Palestine and International Law: Essay on Politics and Economics*

6 Yehuda Lukacs (ed.) *The Israeli-Palestinian Conflict: a documentary record 1967-1990*. Cambridge University Press 1992. pg.1 The resolution was passed on June 14th, 1967,

7 Muhammed El Farrah. “Notes on the Six Days War” in *Birzeit University Class Reader for “The Palestinian Question” 2012*, pg. 53

throughout the historical review, this happened again with the settlements and, ultimately, with the request of recognition of a Palestinian state in the Security Council.

From a Palestinian perspective, resolution 242 was a failure. Worse, it was the repetition of episodes of loss and dispossession of 1948. The Jordanian ambassador to the UN, Mohammed El-Farrah, recounted that “while attending the Security Council debate on the 1967 war” he “could see Deir Yassin, the tragedy of 1948, being repeated”⁸.

3. PLO “the sole representative of the Palestinian people

During the 1970s the Arab League decided to crown Yasser Arafat and the Palestinian Liberation Organization (PLO) as the “sole representative of the Palestinian people”. Thanks to this decision, and to resolution 3237 (XXIX) approved by the United Nations General Assembly in 1974, the PLO was able to gain an “observer seat” at the United Nations, similar to the one granted to the Red Cross or to non-governmental organizations.

That was not a seat for a member state, but it allows the PLO to assert its position during crises. It was renamed the seat of the “Palestinian National Authority” after the Oslo Accords.

Israeli historian Gershom Gorenberg recounts that after the decision to grant this seat, during a meeting at the United Nations “Israel felt terribly vulnerable, especially with a PLO representative present”.⁹ The Palestinian voice, from then on, was no longer conveyed through the Jordanian delegation or the representatives of the Arab League. Even from a visual point of view, the change was important: at the UN Israeli and Palestinian representatives could literally sit, for the first time, at the same table in the Security Council chamber.

⁸ Muhammed El Farrah. “Notes on the Six Days War” in *Birzeit University Class Reader for “The Palestinian Question”* 2012, pg. 53

⁹ Gershom Gorenberg, *The Accidental Empire. Israel and the Birth of the Settlements, 1967-1977*. Times Books Henry Holt and Company New York 2006. pg. 344. The meeting he is referring to took place on March 23rd 1975, where Israel was condemned for its settlements activities.

The most important consequence of this decision, though, was probably the famous speech by Yasser Arafat, in which the United Nations are both condemned and praised, depending on the decisions taken. Yet, Arafat's speech shows that the UN was still viewed as a place to bring things to justice.

The Palestinian leader underlined that that recognition granted to the PLO "indicates anew that the United Nations of today is not the United Nations of the past, just as today's world is not yesterday's world", where the Zionist leadership "managed to get itself accepted as a Member of the United Nations" and "further succeeded in getting the Palestine question deleted from the agenda of the United Nations and in deceiving world public opinion by presenting our cause as a problem of refugees in need either of charity from do-gooders, or settlement in a land not theirs".¹⁰

4. The status of Jerusalem

In 1980 the Israeli parliament proclaimed the annexation of East Jerusalem, occupied in the 1967 war, to the Jewish state. The entire city was declared capital of Israel. The Security Council declared void such annexation with resolution 476 of 30 June 1980, and few days later, on 20 August 1980, it approved resolution 478, calling on members of the United Nations not to recognize the decisions of the Israeli parliament and to shut down their diplomatic representations. The two resolutions passed with 14 votes in favor and the abstention of the United States led by president Jimmy Carter.

Tel Aviv is currently hosting the embassies of many countries, including Italy. Locating an embassy in one city is an indirect sign to show recognition of the capital of a country. While holding their embassies in Tel Aviv, many countries decided to open other diplomatic offices in Jerusalem to deal with Palestinian affairs and, indirectly, to underline

¹⁰ Yasser Arafat, *Speech to the United Nations General Assembly*, New York 1973. Available from the United Nations archives: A/PV.2282 and Corr.1

the contested status of the city.

This is the case of Italy, who has not only an embassy in Tel Aviv, but also a consulate general in Jerusalem, which deals with issues in the West Bank and the Gaza Strip. The consulate has its offices in two different buildings: one in Katamon, the other in Sheikh Jarrah, which is one of the most important Arab neighborhoods of Jerusalem. As it will be seen, the Italian president of the republic, Giorgio Napolitano, promised an upgrade of the diplomatic representation of Italy to Palestine, but this has not happened yet.

5. The Oslo Accords

The Oslo Accords, approved at the beginning of the 1990s, are extremely important in the history of the conflict between Israelis and Palestinians. On that occasion, Palestinian and Israeli leaders were really close to a solution consisting in two states, living side by side. The agreements generated an interim process that unfortunately never reached the final stage.

Even though the process envisaged by the accords derailed, the regime on which Yasser Arafat and Yitzhak Rabin agreed generated numerous consequences, both legal and practical, which affect heavily the situation on the ground today and, not less importantly, the discourse at the United Nations and elsewhere.

There are several opinions on the Oslo Accords, on the real reasons driving the different actors that signed them and on the factors which ultimately made them failed. It would be too long to explore them here. For the purposes of this analysis, it will be underlined the role that the Accords played in *potential statehood of Palestine*. The plan envisaged a step by step process towards a change of status from “occupied territories” to an “independent state”.

The agreements created the Palestinian National Authority, which should not be confused with the Palestinian Liberation Organization, which continued to exist and it was

not replaced by the PNA. Of course Arafat was the chief of the entity created by the accords, but he kept the OLP operative, and he continued to guide it. The Authority (which was not a government and not immediately representative of a new state) was supposed to enlarge the territories it administered (this is the reason behind the names “zone A”, “zone B”, etc.). The phased process was conceived to give time for a withdrawal of Israeli Defense Forces from the Palestinian territories and for giving mutual assurances of trust to the parties.

The first article of the Declaration of Principles signed by the two leaders stated that

The aim of the Israeli-Palestinian negotiations within the current Middle East peace process is, among other things, to establish a Palestinian Interim Self-Government Authority (...) for the Palestinian people in the West Bank and the Gaza Strip, for a transitional period not exceeding five years, leading to a permanent settlement. (...)

As we know, the final goal was never reached. Nevertheless, the Palestinian National Authority kept being a self-ruling entity of territories that, ultimately, were (re)occupied by Israel. Twenty years after the Oslo Accords, with the PNA still fully operational, the Jewish state keeps control of the borders of the West Bank, of the great majority of the roads connecting villages, of the numerous Israeli settlements within the territories. Even if it officially withdrew from the Gaza Strip, Israel controls its borders, its air space and many military interventions took place inside its territories.

Another agreement, signed by Yasser Arafat and then prime minister of Israel Benjamin Netanyahu, should be recalled in this context. It is the Wye River Memorandum, which was supposed to implement the “interim agreement” put forward by the “Oslo II” process. Interestingly, the Israeli cabinet approved the agreement adding eleven conditions, one of which said that in case of a “unilateral declaration by the Palestinian Authority on the establishment of a Palestinian state, prior to the achievement of a final status agreement, would constitute a substantive and fundamental violation of the Interim Agreement”. Israel

“in the event of such a violation, would consider itself entitled to take all necessary steps, including the application of Israeli rule, law and administration to settlement areas and security in Judea, Samaria and Gaza, as it sees fit”¹¹. In any case, the Wye River Memorandum, as the Oslo Process, could not be considered at the moment legally binding: they both derailed many years ago.

6. The Wall and the referral to the International Court of Justice

The separation wall erected almost ten years ago by Israel faced opposition both internationally and domestically. On an international level, there was an attempt in October 2003 to condemn it in the Security Council, but these attempts encountered strong opposition from the United States, which vetoed any proposal.

The issue then moved to the General Assembly, which on December 2003 referred it to the International Court of Justice (ICJ) in The Hague, where disputes between states are discussed. The ICJ ruled against the wall, stating that “the construction by Israel of a wall in the Occupied Palestinian Territory and its associated regime are contrary to international law”, and in particular contrary to several international legal conventions:

The wall and its associated regime are contrary to the relevant provisions of the *Hague Regulations of 1907* and of the *Fourth Geneva Convention*; that they impede the liberty of movement of the inhabitants of the territory as guaranteed by the *International Covenant on Civil and Political Rights*; and that they also impede the exercise by the persons concerned of the right to work, to health, to education and to an adequate standard of living as proclaimed in the *International Covenant on Economic, Social and Cultural Rights* and in the *Convention on the Rights of the Child*. Lastly, the Court finds that this construction and its associated regime, coupled with the establishment of settlements, are tending to alter the demographic composition of the Occupied Palestinian Territory and thereby contravene *the Fourth Geneva Convention*¹².

In addition, the court encouraged “the United Nations, and especially the General

¹¹ Quoted in James Crawford, *The Creation of States in International Law*, Clarendon Press, Oxford 2006, pg. 446

¹² International Court of Justice Press Office, Press Release 2004/28, July 9th 2004. *Emphasis added*.

Assembly and the Security Council (to) consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated regime”.

The issue of the separation wall was also discussed by a highest tribunal of the Jewish State, the Israeli Supreme Court, which intervened after the complaints of activists who opposed the wall. The Israeli court decided that the barrier was necessary for security concerns, whereas the ICJ stated to be “not convinced that the specific course Israel has chosen for the wall was necessary to attain its security objectives”¹³.

Even if it took a softer stance, the Israeli Supreme Court did ask the Israeli government to change some sections of the wall in two different legal opinions¹⁴. Those parts of the separation barrier were therefore changed.

The differing outcome of the two legal opinions questions the effectiveness of international fora such as the International Court of Justice. Ultimately, the petitioners at the national Supreme Court obtained some result, though far less extensive in scope than the requests of the ICJ.

It should be noted, though, that states usually follow the indications of the International Court of Justice, whose statute was prepared jointly with the Charter of the United Nations. Nevertheless Israel, at the UN as in front of the court in the Hague, could assume a peculiar position, ultimately because it is backed by the United States.

7. Operation Cast Lead, the Mavi Marmara Crisis and the UN Reports

During Operation Cast Lead in Gaza and throughout the Mavi Marmara crisis, the

¹³ The ICJ further “observes that the route of the wall as fixed by the Israeli Government includes within the Closed Area (between the wall and the Green Line) some 80 percent of the settlers living in the Occupied Palestinian Territory” and it “recall(s) that the Security Council described Israel’s policy of establishing settlements in that territory as a flagrant violation of the Fourth Geneva Convention, the Court finds that those settlements have been established in breach of international law”.

¹⁴ Israeli High Court of Justice - HCJ 2056/04 - Beit Sourik Village Council v. The Government of Israel, Israeli High Court of Justice - HCJ 9757/04 Mara'abe v. The Prime Minister

impression in many media outlets was that Israel was able to carry out brutal military activities in total impunity. Operation Cast Lead lasted for less than a month, from December 27th 2008 to January 18th 2009. According to some observers, the military activities lasted as long as president-elect Obama was not in power because in the last days of the tenure of George W. Bush the Israeli government certainly had more leeway.

The Security Council meetings did not produce any relevant result, whereas the United Nations Human Rights Council, based in Geneva, requested a fact-finding mission, led by judge Richard Goldstone, a South African judge of Jewish origins. This report condemned the Israeli military operation.

Once again, a judiciary body related to the UN rejected the official Israeli stance, namely that “political and administrative institutions in Gaza are part of the Hamas terrorist infrastructure”.¹⁵ The mission furthermore encouraged the Government of Israel, which had not cooperated with the mission, to launch its own investigation and to accept the assessment of an independent committee of experts in human rights and humanitarian law.

While the majority of the countries kept good relations with the Jewish state, the document did isolate Israel. When Goldstone stated in the *Washington Post* that he would have written a different report, more balanced towards Israel since new information emerged, Israeli prime minister Benjamin Netanyahu used this opportunity to reframe the Israeli operation. Once again, it seems that the United Nations could be a useful “propaganda tool”, going in favor or against the Israeli or the Palestinian leaderships.

A similar pattern can be seen during another crisis, the Mavi Marmara incident. The goal of the convoy of ships travelling towards Gaza was to provide humanitarian goods to

¹⁵Executive Summary of the report by the UN fact-finding mission appointed by the Human Rights Council (A/HRC/12/48) Geneva, September 15th 2009)

the population. Members of the Israeli Defense Forces stopped it and killed nine people during clashes on board. A few hours after that, the Security Council requested another investigation, led by Sir Geoffrey Palmer, former president of New Zealand and by former president of Colombia Alvaro Uribe.

Unlike the Goldstone report, the document came to conclusions that were partially welcomed by Israel. The commission working on the document included, besides Palmer and Uribe, representatives from Israel and Turkey, the two countries involved in the crisis. When the document was published in summer 2011, these two representatives issued opposing statements.

On the one hand Joseph Ciechanover Ithzar, an official from the Israeli foreign ministry, underlined that “Israel has reservations about a few aspects of the report (...) but appreciates that the report concurs with Israel's view that 'the naval blockade was legal', that it 'was imposed as a legitimate security measure in order to prevent weapons from entering Gaza by sea’”. On the other hand, Suleyman Ozdem Sanberk of Turkey states that “common sense and conscience dictate that the blockade is unlawful”¹⁶.

From the two reports emerges a very complex picture of the conflict where, in spite of the accusation of the Israeli government against the UN, the Jewish state is not necessarily portrayed as a cruel aggressor. The two documents could be very useful tool of debate, but unfortunately are used politically only to condemn or absolve one of the two parts.

8. Settlements, the United Nations and the Obama Administration

In 2011, the Palestinian Authority decided to seek international condemnation of the settlements, stressing that they violated international law. More than 120 countries sponsored a draft resolution to condemn them. When the Security Council was called on

¹⁶ Geoffrey Palmer, Alvaro Uribe et al. *Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident*, published by the United Nations on September 2010

the issue, in February 2011, all the members but the United States voted against the settlements.

The Obama administration, which had promised to persuade Israel to stop the settlements' activities, vetoed the resolution and was obviously embarrassed to have to block the document so as not to anger Israel and its lobby. This vote showed that the foreign policy of the United States, even under president Obama, favors Israel over Palestine.

Nevertheless, after the veto, “United States Ambassador Susan Rice sought to play down US differences with the rest of the UN membership, saying the administration's veto should 'not be misunderstood to mean we support settlement activity', which on the contrary 'has undermined Israel's security and corroded hopes for peace and stability in the region’”. But, Rice concluded, “the adoption of the resolution would risk hardening the positions of both sides’”. Israeli Prime Minister Benjamin Netanyahu expressed his government's appreciation for the American vote, saying that the "decision by the US makes it clear that the only path to such a peace will come through direct negotiations and not through the decisions of international bodies"¹⁷.

Interestingly, the White House had tried to convince the Palestinian Authority to avert the initiative at the United Nations. The US president offered a less stringent document – technically called a “presidential statement”, which unlike a resolution is not legally binding – against the settlements. He also offered to promote a visit by the Security Council to the Middle East, something that had not happened since 1979. But the Palestinian Authority refused. Israel and the United States found themselves more isolated in defending the settlements.

The Obama administration thus retreated from something it had been promoting. The

¹⁷ Colum Lynch, “US vetoes Security Council resolution denouncing Israeli settlements” in *The Washington Post*, February 18th 2011

freeze of the settlements was a priority for the Democratic president, but paradoxically he was the leader who blocked the condemnation at the UN, in order not to anger America's ally, Israel. This embarrassment could be read as a victory for the Palestinians, who were able to show how ineffective the White House is when dealing with the Israeli/Palestinian conflict.

In the past, a Republican president had to face an identical situation. In a meeting in March 1975 Gerald Ford decided to "openly declare Israeli behavior an obstacle to American goals", yet afterwards, at the United Nations, the United States "vetoed as 'unbalanced' a resolution condemning the settlements, and the Ford administration, soon smooth(ened) its rhetoric on Israel for the US election campaign".¹⁸

And yet there is a consensus on the illegality of settlements at the United Nations. Secretary General Ban Ki-moon stated repeatedly that they are illegal. There are other resolutions of the Security Council defining them as violating international law, such as resolution 465 of 1980 and called on Israel to "dismantle the existing settlements" in the occupied territories.¹⁹ That time the resolution was not vetoed by the United States, whose president was Jimmy Carter.

9. Conclusions from the historical review

Condemning and isolating are key words in the historical review of the episodes analyzed above. While the international mechanisms of the United Nations give Israel an advantaged position to avoid substantial reactions that are more than reprimands, the pattern in recent history tends towards the isolation of the Jewish state (and, on the resolution on the settlements, also its ally, the United States).

18 Gershom Gorenberg, *The Accidental Empire. Israel and the Birth of the Settlements, 1967-1977*. Times Books Henry Holt and Company New York 2006, pg. 344

19 United Nations Security Council, Resolution 465 (1980). Available on <http://unispal.un.org/UNISPAL.NSF/0/5AA254A1C8F8B1CB852560E50075D7D5>

As will emerge from the review of the campaign for statehood in 2011 and 2012, Israel and the US tried to avoid this isolation, sometimes successfully, persuading other members of the Security Council to oppose the bid.

While the United Nations is a forum allowing all member state to put forward their views on an equal footing, states with more powerful diplomatic and political apparatuses, as shown by the English text of resolution 242 and by the US veto on settlements due to the Israeli lobby, in the end carry more weight.

PART II – THE CAMPAIGN, THE VOTE AND ITS REPERCUSSIONS

A. MEMBER AT UNESCO, STALEMATE IN THE SECURITY COUNCIL

On 23 September 2011 Mahmud Abbas, chair of the Palestinian National Authority and leader of the Organization for Liberation of Palestine, handed Ban Ki-moon a request applying for membership at the United Nations. In the previous months, lobbying activities and negotiations took place in different capitals, carried on with opposing motivations by Israeli and Palestinian diplomats. Both of them were concerned, obviously for different reasons, about the consequences of such recognition.

One of the most important results of the lobbying activities took place in the United States Congress. The majority of representatives, who were mostly Republican, approved a temporarily freeze of “50 million dollars in economic support funds for the Palestinian security forces and 148 million dollars in other assistance”²⁰. After intense pressure from the White House, they were successively unlocked.

1. Speeches at the United Nations

Also on 23 September 2011 the United Nations also hosted the speeches of Mahmud Abbas and Benjamin Netanyahu, which were pronounced less than an hour one from the other. Both of them underlined the contradictory role of the United Nations in the conflict.

At the very beginning of his speech²¹, Abbas stated that “the Palestine Question is intricately linked with the United Nations” and that “we (the Palestinian people) aspire for and seek a greater and more effective role for the United Nations in working to achieve a just and comprehensive peace in our region that ensures the inalienable, legitimate national rights of the Palestinian people”. The obstacle towards that goal “is that the Israeli

20 Ythzak Benhorin. “US unfreezes \$200M in security aid to PA” in *The Jerusalem Post*, November 7th 2011

21 Mahmud Abbas, *Speech before the United Nations General Assembly*, September 23rd, 2011, available from the United Nations archives, A/66/PV.19, pg. 25

government refuses to commit to terms of reference for the negotiations that are based on international law and United Nations resolutions”.

Abbas seemed to spell out the strategic vision behind bringing the request to the United Nations, explaining that such a move was “a confirmation of our reliance on the political and diplomatic option and a confirmation that we do not undertake unilateral steps”. He added that the membership requested was “not aimed at isolating Israel or delegitimizing it; rather we want to gain legitimacy for the cause of the people of Palestine”.

A few minutes later, Netanyahu said that at the United Nations Israel “is singled out for condemnation more often than all the nations of the world combined” and that “twenty-one out of the 27 General Assembly resolutions condemn Israel -- the one true democracy in the Middle East”. His critique takes on even harder tones, when he defining the United Nations as “the theatre of the absurd”.

Interestingly, Netanyahu used to be ambassador of Israel to the UN. When he was appointed, in 1984, he visited the great rabbi of Lubavich who told him: “You will be serving in a house of many lies” but “even in the darkest place, the light of a single candle can be seen far and wide”.

Alongside the condemnations, the Israeli prime minister noted in positive terms the UN decisions that were useful for Israel, that is noted by the Israeli premier in positive terms: “Israel needs greater strategic depth – he said – and that is exactly why Security Council Resolution 242 (analyzed in the historical review in Part I) did not require Israel to leave all the territories it captured in the Six-Day War”.²²

As it was the case for Arafat in his 1974 speech, both for Abbas and Netanyahu, the United Nations is a platform that offered both benefits and drawbacks for the Palestinians

²² All the quotes are from Benjamin Netanyahu, *Speech before the United Nations General Assembly, September 23rd*, available from the United Nations archives, A/66/PV.19, pg. 36

and Israelis. It is both praised and denounced, and this shows again that ultimately it is viewed as a forum for justice, where the international community is best represented.

2. The impasse in the Security Council

On November 2011 the Security Council, after several meetings of its Committee on the Admission of New Members, decided not to transmit the request submitted by Mahmud Abbas to the Council because it “was unable to make a unanimous recommendation”²³. Not only were the United States ready to veto the proposal, but other countries would have voted against it.

According to news reports²⁴, only eight countries inside the council would have voted to recognize Palestine and, since a resolution could not pass with fewer than nine votes, the United States could have even abstained, avoiding another embarrassing veto.

This was a victory for American diplomats. They were able to manoeuvre the procedures of the Council to avoid further isolation and contain more embarrassment (after all, president Obama, speaking at the General Assembly in 2010, had declared his hope to see an independent Palestinian state, member of the United Nations, within one year).

Nevertheless, frustration was growing among diplomats of other countries, since the situation on the ground was not improving and the settlements activities were continuing. For these reasons, on 20 December 2011, the European Union and a group of emerging powers including India, Brazil, and South Africa, issued two statements condemning the lack of progress in the peace process. These complaints were discussed in a private Security Council meeting, during all the members but the representative from Washington “came out in a strong, united denunciation of the US (without naming it directly) for blocking all criticism (and) for threatening to veto any resolution supporting Palestinian

²³ Report of the Committee on the Admission of New Members concerning the application of Palestine for admission to membership in the United Nations. 11 November 2011. S/2011/705

²⁴ Colum Lynch. “Inside the Security Council deliberations on Palestine” on the *Foreign Affairs* website. November 9, 2011

statehood.”²⁵

UK Ambassador Mark Lyall Grant read the statement on behalf of the European Union, which linked “the viability of the Palestinian state that (EU diplomats) want to see and the two-state solution that is essential for Israel's long-term security and that is threatened by the systematic and deliberate expansion of settlements”²⁶.

3. The opinions of Palestinians and Israelis

According to a survey published September 2011, in the run up of the Abbas' request, the overwhelming majority of Palestinians (83%) supported going to the Security Council to obtain recognition of Palestine as a state. A vast majority realized that the decision could signify the end to funds and assistance by the United States and from Israel (64 and 78% respectively). On a domestic level, the survey stated that Abbas gained in popularity because of the bid (59% of Palestinians supported them). Other possible candidates to lead the Authority, like Marwan Barghouti, currently jailed by Israel, and Ismail Haniyem, leader of Hamas in the Gaza Strip, would obtain 54% and 38% respectively²⁷. The Palestinian Authorities does not organize elections since the traumatic experience 2006.

A parallel poll stated that 69% of Israelis thought Israel should accept the decision if indeed the UN recognizes a Palestinian state, and either start negotiations with the Palestinians about its implementations (34%) or not allow any change on the ground by the Palestinians (35%).²⁸

In Ramallah, during the run up to the request, gatherings in favor of the bid were attended by many Palestinians. It was noted, though, that some of these demonstrations

25 “Update on Conflict and Diplomacy” in *Journal of Palestine Studies*, Vol. 41 No. 3 Spring 2012, University of California Press, pg. 204

26 The statement was published in “Documents and Source Material” in *Journal of Palestine Studies*, Vol. 41 No. 3 Spring 2012 pg. 219, University of California Press

27 Palestinian Center for Policy and Survey. *Poll No. 41*. September 19th 2011

28 Harry S. Truman Research Institute for the Advancement of Peace at the Hebrew University of Jerusalem, Palestinian Center for Policy and Survey Research. *Joint Israeli-Palestinian Press Release*. Ramallah, September 21st 2011

could have been staged.²⁹ In the Gaza Strip, on the other hand, Hamas prohibited any television programs airing Abbas' speech. This shows divisions still unresolved among the Palestinian leadership. Solving these divisions is crucial to face the challenges arising after a successful vote recognizing Palestine as a state. Yet, as professor Hajj Ibrahim noted, "both sides are happy with the divisions" and therefore "they are not hurrying up" to achieve a solution.³⁰

An article published six months after the speech of Abbas stated that "on the streets of Ramallah, the glow that surrounded the bid has faded" and "there is a growing sentiment that economic development efforts intended to lay the groundwork for independence have backfired"³¹. Signs stating that "Palestine is the 194th country of the United Nations" were still visible in the streets of Ramallah several months after the bid, but the huge blue wooden chair of almost 9 meters that has been erected in Manara Square, in the center of the city, collapsed during a sudden storm in winter 2011. For a reporter of the BBC, given the impasse in the Security Council, "the analogy with the Palestinian UN bid was not hard to make"³².

4. Recognition at UNESCO, the battle for Bethlehem

On 31st October 2011, the organization for education, science and culture of the United Nations (UNESCO) recognized Palestine as a state. What happened at UNESCO was, to a certain extent, a "rehearsal" of the subsequent recognition in the United Nations General Assembly. Unlike the Security Council, almost all the countries of the international community, not just the fifteen members of the Council, were able to discuss and vote.

Even if recognition at UNESCO was symbolic more than substantial, and the

29 Graham Usher, "Letter from the United Nations" in *Journal of Palestine Studies*, Winter 2012. Vol. 41 No.2

30 Interview with professor Abdul Rahman Hajj Ibrahim, Birzeit University, June 19th 2012

31 Karin Brulliard, "Palestinian Authority faces economic woes, public anger as statehood efforts lag" in *The Washington Post*, March 26th 2012

32 Jon Donnison, *Faded hopes of Palestinian place at UN*, BBC News, September 14th, 2012.

consequences on a substantial level barely significant, the United States and Israel decided to cut their funding for the organization based in Paris.

In the United Nations, the Congress blocked 60 million dollars for UNESCO, because a national law does not allow funding international entities that recognize the Organization of Liberation of Palestine as a state³³. Sixty million dollars due in November 2011 were frozen. They constituted almost all the contributions due yearly by Washington, which was to earmark, about 80 million dollars. Since these funds are around 22% of the UNESCO budget, experts foresaw as a consequence of the cut “immediate slashes in program activities, layoffs in personnel beginning in January 2012 and other credible threats, including (to) UNESCO’s pension system”³⁴.

Israel, for its part, temporarily blocked the reimbursement of the value added tax (VAT) to the Palestinian Authority. After international pressure, it decided to “unfreeze around 100 million dollars due in November and a similar amount withheld in October”³⁵.

In summer 2012 the Nativity Church of Bethlehem and the pilgrimage route leading to it was recognized as part of the UNESCO Heritage in Danger. The Nativity Church, used in 2002 as a refuge by Palestinian militants, is lacking the funds needed for the reparation of the roof. The focus, though, was on the declaration of a site within a territory defined as Palestine, considered an independent state.

From a Palestinian point of view it was a way to reassert its independence. Developments at UNESCO could be seen as pieces of a broader campaign for the recognition of statehood. On 21 November 2011 the Palestinian minister for Tourism and

33 Public Law 101/246, approved by a Democratic-controlled Congress in 1990, forbids to fund “the United Nations or any specialized agency thereof which accords the Palestinian Liberation Organization the same standing as member states”. More generally, Public Law 103-236 Title IV, passed in 1994, stops any funding to “any affiliated organization of the United Nations which grants full membership as a state to any organization or group that does not have the internationally recognized attributes of statehood”.

34 Esther Coopersmith and Richard Arndt of Americans for UNESCO, quoted in Jim Meyers, “US Defunds UNESCO over Palestinian Vote”, October 31st 2011 available on <http://www.newsmax.com/Newsfront/US-defunds-UNESCO-Palestinian/2011/10/31/id/416343>

35 Harriet Sherwood, “Israel unfreezes Palestinian Authority tax millions”, *The Guardian*, November 30th 2011.

Antiquities, Hamdan Taha, stated that another priority of the government would have been to seek world heritage status for the old cities of Hebron and Jericho.³⁶

Israel and UNESCO always had difficult relations. In 1974 the organization stripped the Jewish state of its membership after allegations of damage done by Israeli archaeological excavations on the Temple Mount in Jerusalem. In 1977 UNESCO granted again the membership to Israel because of the threat by the United States threat to withhold its funding from the organization. In another occasion, the Israeli government suspended itself because UNESCO's executive board declared the tombs of the patriarchs and Rachel's tomb as "integral part of the occupied Palestinian Territories".

5. Rejection at the International Criminal Court

The Palestinian campaign for statehood touched the judiciary branch of the United Nations system well before the speech for the recognition by president Abbas in late 2011. More than two years before, on January 2009, the Palestinian minister of justice Ali Khashan signed a "declaration recognizing the jurisdiction of the International Criminal Court (ICC)" for "the purpose of identifying, prosecuting and judging the authors and accomplices of acts committed on the territory of Palestine"³⁷.

The purpose of the letter was to open a path for international trials against Israeli soldiers who could have committed war crimes in the occupied Palestinian territories. However, three years later, ICC prosecutor Luis Moreno Ocampo did not open this path. He stressed that the request came from an entity whose statehood and jurisdiction is disputed.

The prosecutor told Al Arabyia that "Palestine has jurisdiction over Palestinians but not

36 "Update on Conflict and Diplomacy" in *Journal of Palestine Studies*, Vol. 41 No. 3 Spring 2012 pg. 204
37 A copy of the letter can be found on the website of the International Criminal Court, at <http://www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279777/20090122PalestinianDeclaration2.pdf>

over Israelis and most crimes denounced were committed by Israeli people (...) if you want me to investigate accusations on Israeli citizens but you don't have criminal jurisdiction on it, well, I cannot: the normal way to do it is going to the General Assembly, being recognized as an observer state”³⁸. Through a rejection, the ICC prosecutor “paved the way” for the path towards international trials, stating that it is an achievable goal after the recognition of an “observer state” status from General Assembly. An in-depth analysis of the possible jurisdiction of the International Criminal Court will be developed in Part III.

B. THE SECOND CAMPAIGN: THE GENERAL ASSEMBLY

1. Resolution 19: Palestine is a state

At the beginning of September 2012 president Abbas announced that “the Palestinian Authority has decided to seek United Nations recognition as a non-member state”³⁹, which could have been granted by the General Assembly, bypassing the Security Council.

On 29 November 2012 the General Assembly approved resolution 19 with 130 votes in favor, 9 against and 41 abstentions. The resolution⁴⁰ accorded the status of non-member observer state to Palestine, the same status of the Holy See.

The date of 29 November was chosen for its symbolic power: on that very day, in 1947, the General Assembly approved resolution 181, also known as the Partition Plan. It envisaged the creation of a Palestinian and a Jewish state. Only the latter became an entity recognized by the international community, almost unanimously⁴¹, as a state.

The then president of the General Assembly, Vuk Jeremic, spoke before the voting procedure, underlining that that debate “would achieve what was envisaged in 1947, a two-

³⁸ The interview was published by *Al Arabiya* on April 3rd, 2012. It can be seen at <http://english.alarabiya.net/articles/2012/04/03/205154.html>

³⁹ Avi Issacharoff, Jack Khoury. *Abbas: Palestinians will seek UN recognition, despite U.S. pressure*. September 8th, 2012

⁴⁰ General Assembly Resolution 19 (LXVII), *Status of Palestine at the United Nations*. 29 November 2012

⁴¹ Some Arab countries, notably Lebanon, do not recognize Israel.

state solution”⁴². The secretary general Ban Ki-moon, also speaking before the vote, stressed that the “two-state solution seems ever more distant” and that Israeli and Palestinian “leaders must show a sense of historic responsibility and vision”⁴³. The striking contrast between the goal of a two-state solution, supported by the great majority of the international community, and a reality where Israel is controlling all the area, will be analyzed in Part V.

The core of the resolution is in the second operative paragraph, which states that

(the General Assembly) decides to accord to Palestine non-member observer State status in the United Nations, without prejudice to the acquired rights, privileges and role of the Palestine Liberation Organization in the United Nations as the representative of the Palestinian people, in accordance with the relevant resolutions and practice⁴⁴.

The other paragraphs of the resolution reiterated bullet points used by many leaders engaged in solving the Israeli-Palestinian conflict, such as “the need for a way to be found through negotiations to resolve the status of Jerusalem as the capital of two States”.

Presenting the resolution to the delegates present at the headquarters of the United Nations, Palestinian president Mahmoud Abbas asked the delegates in the General Assembly to “issue a birth certificate of the reality of the State of Palestine”. He added that the aim was not to delegitimize Israel, “a country created many years ago”, but rather to save the peace process⁴⁵.

2. The immediate reactions

Prime minister of Israeli Benjamin Netanyahu, speaking after the approval of resolution 19, said that

the decision at the United Nations will change nothing on the ground. It will not advance the

⁴² Ewen MacAskill. "UN appears set to upgrade Palestine status in face of US-Israeli opposition" in *The Guardian*. 29 November 2012

⁴³ "UN chief: Peace process is on life support". *Ynetnews*. 29 November 2012.

⁴⁴ United Nations General Assembly, *Resolution n.19 (67th Session)*, approved on 29 November 2012.

⁴⁵ "General Assembly recognizes Palestine as observer state". *Ynetnews*. 30 November 2012.

establishment of a Palestinian state. It will delay it further. No matter how many hands are raised against us, there is no power on earth that will cause me to compromise on Israel's security.⁴⁶

The State Department reacted through her spokesperson, Victoria Nuland:

We've been clear, we've been consistent with the Palestinians that we oppose observer state status in the General Assembly and this resolution. And the Deputy Secretary also reiterated that no one should be under any illusion that this resolution is going to produce the results that the Palestinians claim to seek, namely to have their own state living in peace next to Israel⁴⁷.

In the Palestinian territories, a spokesman for Hamas based in Gaza, Salah al-Bardaweel, had mixed reactions towards the initiative of Fatah:

There are controversial issues in the points that Abbas raised, and Hamas has the right to preserve its position over them. We do not recognize Israel, nor the partition of Palestine, and Israel has no right in Palestine. Getting our membership in the U.N. bodies is our natural right, but without giving up any inch of Palestine's soil.⁴⁸

Following the approval of the resolution, secretary general Ban Ki-moon underlined that "there can be no substitute for negotiations. I call on those concerned to act responsibly".

According to the official account of the United Nations, the Italian delegate speaking in the General Assembly said that the country

was strongly committed to peace as a fundamental interest of the European Union and the region. Italy's position was grounded in the commitment that peace must be based on the idea of two States living on agreed borders and in peace and security.

(I) strongly supported the European Union's call to parties to ensure meaningful negotiations and to refrain from actions that undermined the credibility of the peace process.

(The Italian) delegation had supported the resolution (but holding) the firm conviction that Palestine's new status should not be applied retroactively. Furthermore, it in no way should prejudice the necessity for a

⁴⁶ Ewen MacAskill, "UN appears set to upgrade Palestine status in face of US-Israeli opposition". *The Guardian*. November 2012

⁴⁷ US State Department, spokesperson Victoria Nuland, Daily Press Briefing. Washington, DC November 28, 2012

⁴⁸ Bronner, Ethan; Hauser, Christine. "U.N. Assembly, in Blow to U.S., Elevates Status of Palestine (original title: U.N. Will Vote on Status for Palestinians, Defying U.S.)". *The New York Times*, 15 November 2012

negotiated settlement.⁴⁹

The request that “new status should not be applied retroactively” is certainly the most interesting one. Why did Italy stress this point? The reason lies probably in the legal implications that affects the International Criminal Court, which will be analyzed in Part III.

3. A geopolitical analysis of the vote

The nine votes against resolution 19 were casted by the United States, Canada, Czech Republic, the Federated States of Micronesia, Israel, Marshall Islands, Nauru, Palau and Panama. The European Union tried to reach a common position, but it did not succeed. Prague was the only European capital to vote against recognition as a state. The UK, Germany, Poland, all the Balkan peninsula including Hungary and Slovakia (with the exception of Serbia and Greece voting in favor) abstained. Ukraine was not present for the vote. Small countries such as Andorra, Monaco and San Marino also abstained.

German Foreign Minister Guido Westerwelle explained his abstention stressing that “in our view there are doubts over whether the desired move by the Palestinians today is supportive for the peace process. We fear it could lead rather to a hardening of views⁵⁰”.

4. A comparison with bilateral recognition

Even though many countries voted for the resolution giving Palestine an observer State, not all of them recognized Palestine at a diplomatic level. This is an important detail: states that recognized its statehood should act consequently and have diplomatic relations with Palestine. Why so many countries do not recognized Palestinian representatives at the

⁴⁹ The quotes of secretary general and the Italian representative comes from: “General Assembly Votes Overwhelmingly to Accord Palestine ‘Non-Member Observer State’ Status in the United Nations” published by the UN department for public information. "General Assembly Votes Overwhelmingly to Accord Palestine ‘Non-Member Observer State’ Status in United Nations". published by the UN department for public information

⁵⁰ "Palestine poised for symbolic but historic victory at UN" in *Zee News*. 30 November 2012

same level of other foreign diplomats? The possible explain could be that the vote is only a way to show sympathy towards the Palestinian position, reiterating though that only a negotiated solution could bring about real diplomatic recognition.

A careful analysis of a map showing these diplomatic recognitions⁵¹ is indeed interesting. All Western Europe, in fact, do not recognize Palestine as a state. With the only exception of Malta, Iceland and Norway, such recognition was adopted almost exclusively by the Eastern area of Europe: Albania, Belarus, Bosnia and Herzegovina, Bulgaria, puzzlingly also Czech Republics⁵² which voted against resolution 19, Slovakia, Hungary, Montenegro, Poland, Romania, Russia, Serbia, Ukraine, Georgia. Also Cyprus and Turkey recognize Palestine.

5. Under a new government, Italy changed its position

In May 2011, more than one year before the vote the United Nations, Italian prime minister Silvio Berlusconi, speaking at an event celebrating Israel's independence, Berlusconi said that "Italy has always stood by Israel, even within the framework of the EU, when it opposed decisions that were unbalanced and unjust towards Israel"⁵³. Afterwards, in June, he stressed: "We do not believe that a unilateral solution can help peace, neither on the Palestinian side nor on the Israeli side. I believe peace can only be reached with a common initiative through negotiations".⁵⁴

A group of Italian parliamentarians prepared a letter addressed to the UN where they stated that "a premature, unilateral declaration of Palestinian statehood would not only undermine rather than resolve the Israeli-Palestinian peace process, but would constitute a

⁵¹ One is available here

http://upload.wikimedia.org/wikipedia/commons/thumb/0/08/Palestine_recognition_only.svg/1376px-Palestine_recognition_only.svg.png

⁵² Czech republic, on the website of the foreign ministry, recognizes an "Embassy of the State of Palestine"
http://www.mzv.cz/jnp/en/diplomatic_missions/foreign_missions_to_the_czech_republic/palestine_embassy_of_the_state_of.html

⁵³ *The Jerusalem Post*, Berlusconi: Italy won't recognize Palestinian state. 12 May 2011

⁵⁴ Ma'an News Agency. "Israel hails Italy's opposition to Palestinian state bid". 13 June 2011

standing affront to the integrity of the United Nations, international agreements, and international law”⁵⁵.

Some months later, after the collapse of Berlusconi’s government, the new cabinet, led by Mario Monti, decided to vote in favor of the recognition. In reality, this change of policy could be attributed, at least in part, to the presidency of the republic of Italy. Giorgio Napolitano visited Ramallah in May 2011, announcing an upgrade of the status of diplomatic relations with Palestine. Such a move, he added, was “decided by the Italian government” after a meeting with Palestinian president Mahmoud Abbas, who said “this is another gift that Italy is doing to us”⁵⁶.

According to Sabri Ateyeh, diplomatic representative of the Palestinian National Authority to Italy, “this is a gesture that helps peace in the Middle East region, I am glad of the announce of president Napolitano, which reflect the support of the Italian people for the peace process and for the Palestinian people”.

The idea was probably to upgrade the diplomatic mission of Italy concerned with the Palestinian issues (currently a Consulate General in East Jerusalem) to a special diplomatic delegation (the only existing one is in Taipei, Taiwan). But, as of December 2013, the official map on the website of the Italian ministry of foreign affairs showed only the “first class consulate in Jerusalem”⁵⁷, still not upgraded.

According to news reports, before the vote at the United Nations of November 2012, prime minister Monti called his Israeli homologue, Benjamin Netanyahu, stressing that “this decision does not imply moving away from the strong and traditional friendship with Israel, guaranteeing the firm Italian engagement to avoid any strumentalization that could come towards Israel, who has a right to guarantee its safety in front of (*vis-à-vis*) the

⁵⁵ Elad Benari. “Italian MPs Write Letter Against Unilateral PA Move”. *Arutz Sheva*. 10 August 2011

⁵⁶ The quotes of the president are translated from Il Messaggero, *Napolitano: palestinesi avranno ambasciatore a Roma. Abu Mazen: grazie Italia*. 16 May 2011.

⁵⁷ Italian Foreign Ministry, Map of Diplomatic Representations http://www.esteri.it/MAE/IT/Politica_Estera/

International Criminal Court⁵⁸.

6. The report by Ban Ki-moon

On 8 March 2013, around three months after the adoption of the resolution recognizing the State of Palestine, the UN secretary general Ban Ki-moon published, as requested, a report on the developments and the implications of the recognition within the international organization.

In the final observations, the secretary general explained that the adoption of resolution 19 “symbolized the growing international impatience with the long-standing occupation and clearly endorsed Palestinian aspirations to live in freedom and dignity in an independent State of their own, side by side with Israel”, and the secretary general underlined that “this can only be achieved through negotiations to solve all final status issues”⁵⁹.

C. REPERCUSSIONS AFTER THE VOTE

In spite of the emotions around the General Assembly vote recognizing the statehood of Palestine, the repercussions in the Gaza and the West Bank were not violent. This is probably due, among other things, to the leadership of Ramallah, which did not exploit all the political, diplomatic and legal consequences that recognition could have entailed.

As a matter of fact, Abbas has not taken practical steps to seek membership in other international entities, which would be relatively easier after the positive vote at the General Assembly, as we will see. Palestinian security forces continue to coordinate with Israeli troops in tracking Islamic militants in the West Bank. Nothing really changed on a practical

⁵⁸ Corriere della Sera, *Palestina “stato osservatore”, sì dell’Onu. L’Italia appoggia la risoluzione deluso Israele*. 29 November 2012

⁵⁹ UN Secretary General, *Report on the Status of Palestine in the United Nations*. 8 march 2013.

level for thousands of Palestinians living in the territories occupied territories.

The Israeli repercussions were not as extreme as they could have been. There were no upright military retaliations and violent confrontations with Palestinian militants do not seem to be related to the initiative of the General Assembly. Funds that the Jewish state collects on behalf of the Palestinian authority were frozen only for a brief period of time. Nevertheless, retaliation did take place with the construction of settlements in the E1 area, not far from Jerusalem. This initiative, which will be analyzed in detail, is another hurdle on the way towards a two-state solution.

1. Financial threats by Israel

The most painful effect feared by Palestinians after the successful bid at the General Assembly was the possibility of an economic retaliation by Israel and by the United States. In the past, as it was seen in the UNESCO case, both countries threatened or implemented curtailment of funds towards the Palestinians, but ultimately they resumed the transfers.

The Palestinian Authority has faced the lack of reimbursement of the value added tax (VAT) from Israel as well as funds for aid and development earmarked by the United States, but it was ultimately able to receive them, maybe after some weeks of delay.

Some American politicians threatened to stop funding the UN headquarters, with no result. The bill that stopped funding UNESCO forbids giving money to UN agencies that recognize Palestine as a “member state”, while the General Assembly, as it was seen, granted it a “non-member observer state” status. Washington did not stop transferring money to the United Nations, possibly for the slight difference between “member” and “non-member observer state” or simply for political opportunity.

Few weeks after the UN recognition, Israel withheld around \$115 million transfer of

tax rebates that it collected on behalf of the Palestinian Authority. This move deepened further the financial situation of the Palestinian government. After some days, the funds were released in line with the obligations that Israel accepted as part of the 1994 Paris Protocol to the Oslo Accords. The secretary general of the UN underlined that this document, which demands Israel to collect the Value Added Tax (VAT) of goods before their entrance in Palestine and to transfer the funds to its counterpart, “remains in force”⁶⁰.

The secretary general, in his 2013 report review in section B.6, stressed also that “the Palestinian fiscal situation represents a core challenge” because “the full, timely and predictable transfer of Palestinian tax and customs revenues by Israel (...) is essential in order for the Government of the State of Palestine to be able to meet its financial obligations”.

2. UN Protocol and Passports

At the UN, the official name used for the entity represented by the diplomats from Ramallah is now “State of Palestine”. The Protocol and Liaison Service of the organization, which every year prepares the “Blue Book” listing the “Permanent Missions to the United Nations”, currently includes Palestine under category II, as a “Non-member State having received a standing invitation to participate as observer in the sessions and the work of the General Assembly and maintaining permanent observer mission at Headquarters”.

Less than 15 days after recognition, on 12 December 2012, Palestine informed the secretariat of the organization that the designation “State of Palestine” should be used in all documents during the meetings of the organization. Following similar requests, “Mr. Abbas is now addressed as the president of the state of Palestine, Mr. Fayyad as the prime

⁶⁰ Associated Press, *State Of Palestine: Palestinians Change Name, Won't Rush To Issue New Passports* of 7 January 2013 and UN Secretary General, *Report on the Status of Palestine in the United Nations* of 8 march 2013.

minister of the State of Palestine and Mr. Malki as the minister for foreign affairs of the State of Palestine”⁶¹.

Ironically, while the official name has become State of Palestine, changes in the West Bank do not happen so quickly: a news article”⁶² stressed that Palestinian president Abbas “is not rushing to change passports and ID cards Palestinians need to pass through Israeli crossings.

Israel controls the borders of the West Bank: technically, it could decide not to accept certain documents issued from the Palestinian authority. Palestinian spokeswoman Nour Odeh, explained the need for caution in these terms: “At the end of the day, the Palestinian Authority won’t cause trouble for its people”.

3. The E1 settlement area

The most important change on the ground related to the UN recognition is the Israeli decision to build more settlements on the “East 1” administrative area, which spans East of Jerusalem and West of the Ma’aleh Adumim settlement in the West Bank: once finished, it will provide continuity between Jerusalem and the Israeli settlement, which is already carved out of the West Bank by the Separation Wall built in 2003. Critics contend that it would make almost impossible for East Jerusalem to be part of a Palestinian state.

The Israeli leadership has been debating for years on the destiny of the area: it is difficult to say whether it would have decided to proceed with the settlements anyway. Already in 1994, during the “Age of Oslo”, Yitzhak Rabin enlarged the administrative frontiers of Ma’aleh Adumim to include the E1 area, but he did not approve building plans on the extended area. Many another political leaders preferred not to give green light to the

⁶¹ UN Secretary General, *Report on the Status of Palestine in the United Nations*. 8 march 2013

⁶² Associated Press, *State Of Palestine: Palestinians Change Name, Won't Rush To Issue New Passports*. 7 January 2013

projects, knowing how controversial it would be. The *Jerusalem Post* explained that “building in E-1 (...) is something various Israeli government have long wanted to do, but which US opposition has prevented”⁶³.

On 30 November 2012, the day after the General Assembly voted on the resolution recognizing the State of Palestine, the Netanyahu inner cabinet announced the approval of the building of 3,000 housing units, which could be part of a center which could include potentially up to 15,000 houses, a police station and an industrial zone.

D. US INITIATIVES AND EU DOUBTS

1. Obama’s visit in Palestine

Barack Obama visited Israel and Palestine in early 2013. It was his first time in the region as president of the United States, while in 2008 he went there as a presidential candidate. The decision to see the Israeli and Palestinian leaderships in their respective capitals was a signal that the White House wants to see progress in the negotiations.

During the joint press conference of Obama and president Abbas, the Palestinian leader underlined that he was ready to collaborate for achieving the two-state solution. At the same time, he urged the United States “intensify its efforts to remove the obstacles ahead to achieve a just peace, which the peoples of the region have long awaited”.

Obama, speaking after him, explained that he

returned to the West bank (after his visit as a presidential candidate) because the United States is deeply committed to *the creation of an independent and sovereign state of Palestine*. The Palestinian people deserve an end to occupation and the daily indignities that come with it. Palestinians deserve to move and travel freely and to feel secure in their communities.

⁶³ The Jerusalem Post, *Israel okays building of 3,000 units in J’lem, W. Bank*. 30 November 2012

Obama stressed multiple times the need for statehood, saying for example that: “One thing I’m very certain of, Palestinians have the talent, drive and the courage to succeed in their own state”. Crucially, though, Obama reiterated that the United States and Palestine, together

seek and independent, viable and contiguous state along the Jewish state of Israel, two nations enjoying self-determination, security and peace. And I’ve said many times *the only way to achieve that goal is through direct negotiations*. There is no short cut to a sustainable solution.

In more emotional terms, adopting the rhetorical style of the campaign to become the first black president of the United States, he made what it seems a comparison between the situation experienced by the Palestinians and the black citizens of America during the civil rights movement:

Those of us in the United States understand that change takes time, but it is also possible because there was a time when my daughters could not expect to have the same opportunities in their own country as somebody else’s daughters. What’s true in the United States can be true here as well.

We can make those changes, but we’re going to have to be determined. We’re going to have to have courage. We’re going to have to be willing to break out of the old habits, the old arguments to reach for that new place, that new world.

After condemning Hamas, the political party which is controlling the Gaza Strip, the US president underlined that Washington is funding several projects of the Palestine Authority through USAID. The goal of such projects is to “help strengthen governance, rule of law, economic development, education and health”, which the United States considers “investments in a future Palestinian state, investments in peace”.

Behind closed doors, the two delegations discussed substantial issues. According to an account published on the leading Israeli newspaper *Haaretz*⁶⁴, the Palestinian leadership

⁶⁴ Haaretz, *Palestinian President Mahmoud Abbas to suspend unilateral moves at UN to give U.S. mediation*

promised that it will freeze the initiative at International Criminal Court, which will be the focus of Part III. The core issue, once again, was the Israeli settlement project E1: if it had proceeded, the Palestinian leadership would have continued the campaign and probably applied officially to the International Criminal Court. The exchange between E1 settlements freeze and the initiative at the ICC will be analyzed in detail in Part IV.

2. Can Kerry help in making the state?

If in 2014 there will be any change on the diplomatic front, the merit will probably be of the secretary of state of the United States John Kerry, who appears to be deeply committed in finding a negotiated solution. It seems clear that the former presidential candidate, himself a son of a diplomat, feels a personal engagement towards the issue. Kerry himself explained once that when he went to Israel and the Palestinian territories for the first time, in 1986, he “traveled everywhere” and, when he went to the Wailing Wall, he left a message on which he “is still working on”⁶⁵.

Behind Kerry’s proactivity there is, of course, the willingness of the White House to bring the two parties to discuss: it seems obvious that president Obama would like to foster a solution between Israel and Palestine within his second mandate. A useful insight on the reasons driving the two American leaders is included in a long article published on *The Atlantic*:

After Obama’s reelection, the president and Kerry agreed that the U.S. should try to revive Middle East negotiations *before the Palestinians again pushed for statehood, at the United Nations General Assembly in September 2013.*⁶⁶

According to the article, the US initiative is related to the “diplomatic offensive” put

a chance. 4 April 2013

⁶⁵ John Kerry, *Remarks at the American Jewish Joint Distribution Committee’s 100th Anniversary Celebration*. December 9th, 2013. US Department of State

⁶⁶ David Rohde, “How John Kerry Could End Up Outdoing Hillary Clinton” in *The Atlantic*. November 21, 2013. Emphasis added.

forward by the Palestinian leadership at the United Nations. The bid for statehood, described in detail in section B and C, and its possible ramification at the ICC, which will be reviewed in next Part, have become embedded in the triangular negotiations between Israel, the United States and Palestine.

In 2013 Kerry visited the two countries eight times, realizing a shuttle diplomacy that consisted usually in meeting prime minister Netanyahu, president Abbas and possibly again the Israeli counterpart. Kerry also accompanied president Obama during the visit discussed above. He arrived before the president and remained in the region after his departure. That time, he talked for more than two hours with Palestinian president Abbas in Amman and then he met Israeli Prime Minister Netanyahu and three of his aides in Israel.

He returned to the region one week later, holding meetings both in Jerusalem and Ramallah. He called these talks “constructive” and hinted at an economic strategy for reviving negotiations, but there were no breakthroughs. Another round of negotiations, as recounted by the *Guardian*⁶⁷, took place

in late June, (when Kerry) held three meetings with Netanyahu and Abbas in three days, including one meeting with the Israeli prime minister that lasted six hours, until 3 a.m. On June 29, he canceled a trip to the United Arab Emirates so he could keep talking with Netanyahu and Abbas, raising expectations of a breakthrough. On June 30, he held another press conference at the Tel Aviv airport.

“We have made real progress on this trip, and I believe that with a little more work, the start of final-status negotiations could be within reach” Kerry said. “We started out with very wide gaps, and we have narrowed those considerably.”

These wide gaps could have narrowed during the next visit of the secretary of state in July, when some results were achieved: 104 Palestinian prisoners were released by Israel, and the move was positively received by the leadership of Ramallah. Nevertheless, there

⁶⁷ Sherwood, Harriet. “John Kerry in fresh push to kickstart Israel-Palestine talks” in *The Guardian*. 4 December 2013

was no real agreement on the settlements of the E1 area but, according to the report by *The Atlantic*, this was not one of the public pre-condition.

The real breakthrough of the summer 2013 could in fact be the related announcement of a negotiating initiative, which should take place within a framework of 9 months. The deadline would therefore be in April/May 2014. During the press conference to present it, the secretary of state underlined that during these 9 months negotiations had to be secret, conducted quietly and secretly. He would be the only “spokesperson” for all parties⁶⁸.

In November, three months after the start of the “Kerry initiative”, prime minister Benjamin Netanyahu did not sound too hopeful about real chances of substantial results:

I want peace with the Palestinians; Israel wants peace with the Palestinians. We agreed three months ago on certain terms. We stand by those terms. We abide scrupulously by the terms of the agreement and the understanding on which we launched the negotiations.

I'm concerned about their progress because I see the Palestinians continuing with incitement, continuing to create artificial crises, continuing to avoid, run away from the historic decisions that are needed to make a genuine peace. I hope that your visit will help steer them back to a place where we could achieve the historical peace that we seek and that our people deserve.

During the subsequent meeting with president Abbas, Kerry said that his Palestinian counterpart had "committed that the Palestinians will not go to the United Nations during the period of time of these talks in exchange for the prisoners that are being released by Israel"⁶⁹.

These words are crucial for understanding the dynamics caused by the Palestinian initiative at the United Nations and at the International Criminal Court. In fact, this move

⁶⁸ John Kerry, *Remarks After a Meeting With Israeli Prime Minister Benjamin Netanyahu Before Their Meeting*. 6 November 2013. US Department of State

⁶⁹ John Kerry, *Remarks After a Meeting With President Mahmoud Abbas*. 6 November 2013, US Department of State. The successive quotes are from the same document.

has become a tool which Palestinians threaten to use during negotiations. Through this threat, they are able to obtain conditions, such as the liberation of 104 prisoners mentioned above.

Later that day, meeting president Shimon Peres, Kerry said that an agreement "require(s) both leaders to make big, historic, difficult decisions", which are necessary steps since "there is no alternative: there will be chaos, violence, turmoil, confrontation, in the absence of peace" because "you cannot live with perpetual war, particularly in the Middle East".

On December 5th, 2013, Kerry had yet another meeting with president Abbas. He admitted that his counterpart, together with many Palestinians, "ha(d) perceived difficulties in the process". He underlined that during talks emerged "questions of sovereignty, questions of respect and dignity which are obviously significant to the Palestinians".

The following day, having learnt of the death of Nelson Mandela, Kerry reminded a sentence of the former South Africa president: "It always seems impossible until it is done"⁷⁰, saying that "it is appropriate for us to think that in the context" of the Israeli-Palestinian conflict.

Apparently, the United States already has plans to deal with the issue if talks do not end as the White House hopes. An article on the diplomatic efforts of John Kerry published by the *New York Times* reported that

Kerry denied reports in Israel's news media that the United States was working on its own plan for a Palestinian state, based on the borders before the 1967 war, to present in January if there is no breakthrough in the talks by then. "There is no other plan at this point in time," Mr. Kerry said, choosing his words carefully in a clearly fluid situation.

⁷⁰ John Kerry, *Press Availability at Ben Gurion International Airport*. 6 December 2013. US State Department <http://www.state.gov/secretary/remarks/2013/12/218422.htm>

For diplomacy watchers, the speculation about an American plan, while premature, indicates that the talks have progressed beyond their first phase, in which teams of negotiators chew over the issues, to a second phase, in which Mr. Kerry can be more directly involved in trying to find areas of agreement between Mr. Netanyahu and Mr. Abbas⁷¹.

3. European doubts

According to news reports, the European Union considered cutting funding to the Palestinian Authority if there will be no breakthrough in the talks promoted by Secretary of State Kerry. Bruxelles could withhold the 300 million euros it gives to the Palestinian Authority each year, which are considered “a fig leaf for the Israeli occupation of the West Bank”, EU officials said to the *Guardian*⁷².

The European Union had already considered this move earlier in 2013 but it preferred “to delay the decision when peace talks began, awaiting diplomatic resolution”. Fourteen countries of the Union are also considering a boycott of products coming from the Israeli settlements.

President Abbas himself, speaking at the United Nations General Assembly in 2013, referred to “the position of the European Union with regard to settlement products (which) is a positive model of what is possible to be done in order to ensure an environment supportive of the negotiations and the peace process”.

E. SKIRMISHES, BUT NOT FULL BATTLE, IN INTERNATIONAL FORA

1. US and Israel lose their voting rights

In summer 2013, after two years not paying their dues, Israel and the US were stripped

⁷¹ Landler, Mark and Jodi Rudoren. “In Mideast, Kerry Tries to Nudge Peace Talks Along” in *The New York Times*, 6 November 2013

⁷² Harriet Sherwood. “John Kerry in fresh push to kickstart Israel-Palestine talks” in *The Guardian*. 4 December 2013

of their voting rights at UNESCO. According to an account provided by Reuters, the two countries missed the deadline “to provide an official justification for non-payment and a plan to pay back missed dues”, an UNESCO official said.

In this explanation there was no official reference to Palestine. References were not made either in the remarks to the press by the United States ambassador to UNESCO, David Killion. On the contrary, following the diplomatic etiquette, the ambassador defined the cultural organization as a “critical partner in creating a better future” and he explained that Washington intended to continue an “engagement with UNESCO in every possible way”.

The withdrawal of US funding, which totaled about 240 million dollars or about 22 percent of the budget of UNESCO, has plunged the organization into a funding crisis and forced it to cut programs.

In a comment published by the *Huffington Post*⁷³, director Irina Bokova underlined the important role of the organization. It is worth noting that, like the ambassador, she did not make any reference to the reason behind the non-payment.

2. The General Assembly in 2013

Both Netanyahu and Abbas spoke at the United General Assembly in late 2013. The speech of Benjamin Netanyahu on October 1st 2013 at the UN dealt at length with Iran, and warned the international community about what he considered risks of negotiation about the nuclear program of Teheran. Only few paragraphs were dedicated to the Palestinian issues:

For peace to be achieved - Netanyahu said - the Palestinians must finally recognize the Jewish state, and Israel's security needs must be met.

I am prepared to make an historic compromise for genuine and enduring peace, but I will never

⁷³ Irina Bokova. “UNESCO Matters” in *The Huffington Post* website. 12 November 2013

compromise on the security of my people and of my country, the one and only Jewish state.

The Palestinian president, on his part, reaffirmed the refusal

to enter into a vortex of a new interim agreement that becomes eternalized, or to enter into transitional arrangements that will become a fixed rule rather than an urgent exception. Our objective is to achieve a permanent and comprehensive agreement and a peace treaty between the States of Palestine and Israel that resolves all outstanding issues and answers all questions, which allows us to officially declare an end of conflict and claims.

3. The First Palestinian Vote at the UN (for a judge)

Even though a non-member state, the Palestinian delegate to the United Nations, Ryad Mansour, was able to cast his first vote on 19 November 2013. The non-member states cannot participate in the actual voting procedures of resolutions, but they can when the Assembly decides the names of the judges of international tribunals.

The report by the secretary general prepared after the General Assembly resolution of November 2012 explained clearly that “non-member States maintaining permanent observer missions at United Nations have the right to submit nominations for and to vote in the elections for the permanent and ad litem judges of the Residual Mechanism”.

In what was defined a “routine vote” ambassador Mansour voted for judge Koffi Kumelio Afande of Togo for the International Tribunal of Former Yugoslavia. After being applauded by other members of the Assembly, the Palestinian delegate said: "This is a very, very special moment in the history of the struggle of the Palestinian people at the United Nations".

He conceded that it was just "symbolic (...), but it is an important one because it reflects that the international community, particularly the General Assembly, is hungry and waiting for the state of Palestine to become a full member of the United Nations." His Israeli colleague, vice ambassador David Roet criticized him for the “hijack” of the

attention of the meeting towards the first vote rather than on the actual matter⁷⁴. Asked whether the United States or Israel had objected to Monday's vote in the UN assembly, Mansour answered: "They can't. This is a very crystal clear case."⁷⁵

4. Other possible actions at the United Nations

The report by the secretary general, reviewing the possible actions that the Palestinian could undertake at the UN, explained that “pursuant to Article 35, paragraph 2, of the Charter of the United Nations, the State of Palestine may also place items on the provisional agenda of the Security Council and the General Assembly”. This is an important right for procedural matters.

The report states also that the State of Palestine can participate to conferences “open to members of specialized agencies”.

F. CONCLUSIONS

This part reviewed how the Palestinian campaign for statehood in 2011-12 had opposing outcomes at UNESCO, which recognized the delegation of Ramallah as a full member of the organization, representative of a state, and at the UN Security Council, where the firm opposition of the United States, which acted through the technical procedures, blocked any action. The outcome of this campaign at the International Criminal Court was somehow in between the previous results: the Office of the Prosecutor left an “open door”, stating that he could not assess whether Palestine is a state.

The campaign for admission within the United Nations system was more successful at the General Assembly in late 2012: despite the opposition of Israel, the United States and few other countries, about two thirds of the Assembly voted for a resolution which

⁷⁴ Jerusalem Post, Palestinians cast first ever vote in UN General Assembly

⁷⁵ DW, Palestine cast first vote at UN General Assembly.

recognized Palestine as a state, even though it was not admitted as a member of the UN, but only as an observer (previously, as we saw in Part I, such position had been granted to the Organization for Liberation of Palestine).

Such recognition, approved through in a multilateral environment such as the General Assembly, does not coincide with actual, traditional bilateral diplomatic recognition. As a matter of fact, several states that voted the resolution in the Assembly do not have the consequent bilateral relation with Palestine which could be expected, leaving many questions open. What is the real meaning of recognition? What is the relationship between statehood and recognition? The following Parts of this work will try to answer these questions.

Part III, in particular, will deal with the possible implications at the International Criminal Court, which could now act differently, given the recognition granted by the General Assembly. The ICC could play a major role in future developments for Israel and Palestine. Minor developments, not as dramatic as expected, took place in the aftermath of the vote of the General Assembly, the most important of which is the Israeli decision to proceed with settlements construction in the E1 area, which could ultimately signify the end of the viability of a two-state solution.

These two developments, at the ICC and in the settlements activities, became a matter for negotiations in the talks promoted by Secretary of State John Kerry, who offered the two parts a nine month initiative which could bring about a proposal similar to the one prepared by president Bill Clinton at the end of his second mandate. As we will see in the last Part, this initiative could be the last chance for the solution that has been envisaged for so long, prefiguring two states living side by side.

PART III – DOES THE INTERNATIONAL CRIMINAL COURT HAVE JURISDICTION ON PALESTINE?

Recently, some legal scholars and human rights activists stated that Palestine, now recognized as an “observer State” by the General Assembly of the United Nations, could request the International Criminal Court (ICC) to investigate whether war crimes and crimes against humanity were committed in the Palestinian territories. This third part will review on which basis such statements are made to assess which consequences an investigation of the ICC could have on the broader Israeli-Palestinian issue.

A. RELEVANT DOCUMENTS AND FACTS

1. The request from the Palestinian Authority

On 21 January 2009, during the Israeli military intervention in the Gaza Strip named “Operation Cast Lead”, the minister of justice of the Palestinian National Authority, Ali Khashan, was in The Hague to submit a letter addressed to the International Criminal Court⁷⁶.

Khashan, who hand-signed both in Latin letters and in Arabic script “for the Government of Palestine”, formally accepted the jurisdiction of the Court in the first paragraph:

In conformity with Article 12, paragraph 3, of the Statute of the International Criminal Court, the Government of Palestine hereby recognizes the jurisdiction of the Court for the purpose of identifying, prosecuting and judging the authors and accomplices of acts committed on the territory of Palestine since 1 July 2002.

The minister was quoting Article 12, paragraph 3, of the Statute of the ICC, also known

⁷⁶ The “Declaration recognizing the Jurisdiction of the International Criminal Court” is available on the website of the court: <http://www.icc-cpi.int/nr/rdonlyres/74eee201-0fed-4481-95d4-c8071087102c/279777/20090122palestiniandeclaration2.pdf>

as the “Rome Statute”:

(a State which is not a Party of the Statute itself) may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

These last few lines were copied verbatim in the second paragraph of the Palestinian letter to the court, which reads that “the Government of Palestine will cooperate with the Court without delay or exception, in conformity with Chapter IX of the Statute”.

The last two paragraphs stated that the declaration of jurisdiction by the Palestinian National Authority was “made for an indeterminate duration” and that “material supplementary to and supporting this declaration will be provided shortly in a separate communication”.

The following day Silvana Arbia, registrar of the International Criminal Court, sent a receipt for the request of the Palestinian minister⁷⁷, certifying that his official letter was formally lodged. Two weeks later, on 6 February 2009, the office of the ICC prosecutor, Luis Moreno-Ocampo, issued a statement explaining that it will “carefully examine all relevant issues related to the jurisdiction of the Court”⁷⁸.

2. The first reaction from the ICC

In August 2010, around 19 months after minister Khashan recognized, on behalf of the Palestinian Authority, the jurisdiction of the ICC, the Court itself presented its usual report to the General Assembly of the United Nations in New York. The legal experts of The Hague wrote that they were continuing “to examine, first, whether the declaration

⁷⁷ Letter from the ICC to the Palestinian National Authority, reference 2009/404/SA/LASS. Available here: <http://www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279778/20090123404SALASS2.pdf>

⁷⁸ Office of the Prosecutor, International Criminal Court, *Visit of the Minister of Justice of the Palestinian National Authority, Mr. Ali Khashan, to the ICC* (22 January 2009) available on <http://www.icc-cpi.int/NR/rdonlyres/979C2995-9D3A-4E0D-8192-105395DC6F9A/280603/ICCOTP20090122Palestinerev1.pdf>

accepting the exercise of jurisdiction by the Court meets statutory requirements, and second, whether crimes within the Court's jurisdiction have been committed"⁷⁹.

The Office of the Prosecutor was also "consider(ing) whether there are national proceedings in relation to alleged crimes". It also had received "15 legal submissions from experts, academics and NGOs on the issue of jurisdiction", which was clearly becoming of interest for the experts of international law.

Furthermore, the ICC declared that, in addition to the letter signed by the Palestinian minister of justice of January 2009, it had received in October 2009 "a preliminary report comprising legal arguments in support of the declaration". Another, more detailed, report was to be received after few months.

In addition, the Office of the Prosecutor "also exchanged communications with the Embassy of Israel in the Netherlands, from which it *inter alia* received the Israeli Defense Forces report on Operation Cast Lead".

Moreover the prosecutor, Luis Moreno-Ocampo, met "with various stakeholders, including representatives from the Palestinian National Authority, the secretariat of the League of Arab States (...) to discuss, *inter alia*, the jurisdiction of the International Criminal Court.

3. The answer: "I cannot assess whether it is a state or not"

On April 12 2012, the Office of the Prosecutor of the ICC (thereafter called "OTP") released a statement entitled "Situation in Palestine"⁸⁰ indicating that

the first stage in any preliminary examination is to determine whether the preconditions to the exercise of jurisdiction under article 12 of the Rome Statute are met. Only when such criteria are established will the Office proceed to analyze information on alleged crimes as well as other conditions for the exercise of

⁷⁹ The report is available among the UN documents. It is A/65/313. Relevant paragraphs are from 81 to 85.

⁸⁰ International Criminal Court, Office of the Prosecutor. *Situation on Palestine*. 3 April 2012.

jurisdiction as set out in article 13 and 53(1).

After examining the request, the prosecutor and his team tried to assess whether Palestine could be considered a State. They reached the conclusion that

the competence for determining the term “State” within the meaning of article 12 rests, in the first instance, with the United Nations Secretary General who, in case of doubt, will defer to the guidance of General Assembly. The Assembly of States Parties of the Rome Statute could also in due course decide to address the matter in accordance with article 112(2) of the Statute.

This statement is first referring to the practice of the UN Secretary General as treaty depositary: as a matter of fact, agreements between States, once signed, are transmitted formally to the Office of Legal Affairs (OLA) of the United Nations headquarters in New York⁸¹. The Secretary General acts as the “custodian” of these treaties. Therefore, according to the prosecutor, he could indicate whether Palestine qualifies as a State.

Crucially, the prosecutor underlined that “in case of doubt”, the secretary general “will defer to the guidance of General Assembly”. In the legal reasoning of the prosecutor, further on, there is a clear reference to the request by the Palestinian Authority to be recognized as a State, presented in 2011 both to the Security Council and the General Assembly of the United Nations.

Such recognition, which was not granted by the Security Council but only by the General Assembly, as a “non-member” State, could “inform the current legal status of Palestine for the interpretation and application of article 12”, the Prosecutor stated. In other words, the General Assembly recognition could help find a clear legal indication of the Palestinian statehood and, consequently, of its eligibility to recognize the jurisdiction of the International Criminal Court.

Another option indicated by the prosecutor is some kind of action from the Assembly of

⁸¹ Following art. 102 of the United Nations Charter and Vienna Convention 1969

the State Parties which, according to article 112(2) of the Statute, could show the path to follow, accepting or declining the Palestinian request. Article 112(7) states that

Each State Party shall have one vote. Every effort shall be made to reach decisions by consensus in the Assembly and in the Bureau. If consensus cannot be reached, except as otherwise provided in the Statute:

- (a) Decisions on matters of procedure shall be taken by a two-third majority of those present and voting provided that an absolute majority of States Parties constitutes the quorum for majority for voting;
- (b) Decisions on matters of procedure shall be taken by a simple majority of States Parties present and voting.

Given the working procedures of the Assembly of the State Parties, Palestine could be accepted as a member. Yet, it is not sure that that is really the way to accept it as a state. After all, Luis Moreno-Ocampo decided not open any investigation because he could not assess, during the three years during which he has been considering the issue, whether Palestine was a State or not.

That was one of the final actions the Argentinian prosecutor undertook on the issue. After a few months, he left his post at The Hague: his mandate was over and it was not renewable. The document prepared by her predecessor seems leave open four possible paths which we could summarize as follow:

1. The secretary general of the United Nations, as the legal depositary of a treaty, indicates that Palestine could be considered like other States and, as such, it could become a party to the Rome Statute.

It seems highly unlikely that the secretary general of the United Nations could take such a step without a proper framework that allows him to do it, but the Office of the Prosecutor underlined that the secretary general can seek guidance from the General Assembly.

2. The General Assembly itself recognizes Palestine as a state. As known, this is exactly

what happened.

3. The Assembly of State Parties of the Rome Statute could review the articles that define the rules to start an investigation. According to legal scholar Cerone of Boston University, “the pressure on the OTP to move forward will further increase if the situation in Palestine is referred to the OTP by a State Party to the ICC Statute”, provided that its motion has a two-third majority, as requested by article 112.

4. The Security Council of the United Nations could request the International Criminal Court, following article 13(b) of its Statute, to open an investigation on the situation in Palestine.

This hypothesis is really unlikely given that, in the Council, the United States would block any initiative going in this direction. Nevertheless Moreno-Ocampo, in the last paragraph of his letter, reminded that he “could in the future consider allegations of crimes committed in Palestine (...) should the Security Council, in accordance with article 13(b), make a referral providing jurisdiction.”

4. The new prosecutor: “In Palestine, we had a problem”

On 15 June 2012, Mrs. Fatou Bensouda became the new prosecutor of the International Criminal Court. She has been the deputy prosecutor under Moreno-Ocampo’s tenure since September 8th 2004. A native of Gambia, where she has been appointed minister of justice at the age of 37, Bensouda was the first female and the first African prosecutor of the ICC.

Two months after her appointment, on September 2012, she was a special guest at the Council on Foreign Relations in New York. She was asked about the Palestinian request by Jeffrey Laurenti from the Century Foundation, who said that the delegates from Ramallah would have soon “knock(ed) on your door to sign the Rome Statute”.

“The main issue we were looking at was about the state - whether the Palestinian

Authority has a state status or not”, Mrs. Bensouda answered. She also reminded the audience that Cote d’Ivoire lodged a recognition of jurisdiction and “because Cote d’Ivoire has no question of whether it is a state or not, we have been able to start investigating in Cote d’Ivoire”. She added that “in Palestine, we had a problem, and I think we tried to deal with it for over two years”.

She concluded stating that what the office of the prosecutor has done “is to leave the door open and to say that if this -- if Palestine is able to pass over that hurdle (meaning the recognition), of course, under the General Assembly, then we will revisit what the ICC can do. But at the moment I do not think it is for the judges of the ICC to decide the status of Palestine, neither is it for the Office of the Prosecutor to make that determination.”

B. THE DEBATE AMONG SCHOLARS

As we saw, Palestine was recognized as a State (and a member) by UNESCO, the organization of the United Nations that promotes education, science and culture. At the United Nations themselves, the request by the Palestinian leadership, put forward on the 23rd of September 2011, was not accepted by the Security Council, which was divided. In November 2012, the General Assembly recognized Palestine as a State (not as member State, but an observer State, as it is the Holy See).

The development just illustrated clearly paved the way for a reconsideration of the request made by the Palestinian minister of justice to the International Criminal Court. There are many ideas and many questions around this issue.

We will analyze first the debate among legal scholars, who dealt with the issue trying to adopt a detached attitude, avoiding political considerations and following a reasoning which interpret the events and ask questions at a theoretical level. Then, in the next section, the analysis will be broadened, putting the ICC issue in the larger political and diplomatic

context.

1. When did Palestine become a state?

After the recognitions obtained in international institutions such as UNESCO and the UN General Assembly, different legal scholars seem to agree on the fact the statehood of Palestine, if not yet a matter of fact, is at least emerging. The International Criminal Court, therefore, could answer positively to the question left open by prosecutor Luis Moreno-Ocampo.

Nevertheless, another question arises and it deals with the moment when Palestine started, at a legal and international level, to be a state. Linda M. Keller, an American professor of Law, lists different options on this issue:

Assuming that the resolution qualifies Palestine as a state, it is not clear how the Palestinian declaration should be treated. If Palestine was not a state until November 29, 2012, could it have properly submitted a declaration accepting jurisdiction in 2009? Could that declaration properly extend the court's jurisdiction all the way back to July 2002 (when the ICC began its work), well before the resolution? Could a new declaration cure the problem or is it impossible for a state to consent to jurisdiction prior to its statehood? Perhaps any Palestinian declaration would be effective only with regard to crimes allegedly committed after the (General Assembly) resolution satisfying the OTP's statehood concern⁸².

Professor John Cerone, member of the American Society of International Law (ASIL), wrote an in-depth analysis in which he concluded that, since “the General Assembly has now determined that Palestine is a state (...) it would now seem more difficult for the Office of the Prosecutor to maintain the position that it may not proceed with an examination of international crimes alleged to have been committed in Gaza and the West Bank”.

Nevertheless, he then listed similar thorny question:

Even if Palestine is now a state, was it a state at the time that it lodged its declaration of consent? Is it

⁸² Linda M Keller. *The International Criminal Court and Palestine: Part I*

necessary that Palestine have been a state at that time, or is it sufficient that it is now a state? Could Palestine now submit a new declaration of consent with respect to past conduct? While Article 12(3) contemplates declaring consent in relation to prior conduct, is it necessary that Palestine have been a state at the time of the alleged conduct?

Ultimately, the answer to all these questions can only come from the court of The Hague where, as known, the prosecutor changed. Cerone underlines that

the ICC has a new Prosecutor and she may reject the approach of her predecessor. The OTP might rely less on the practice of the Secretary General as treaty depositary and political determinations by the General Assembly, and instead frame the issue purely in terms of general international law, assessing the General Assembly vote through the lens of recognition rather than giving it determinative weight.

In other words, the professor believes that even a recognition from the UN General Assembly could not suffice to the new prosecutor. In this light, it seems particularly delicate assigning a role of “gate-keeper” to the Secretary General:

Underlying the issue of whether it is appropriate for the OTP to analogize to the practice of the Secretary General as treaty depositary is the more theoretical question of whether the OTP is more of a political organ or a judicial organ. The role of prosecutors in this respect varies significantly among states.

Linda Keller seems to agree on the issue, suggesting that, rather than the General Assembly, the prosecutor could prefer having an indication from the Assembly of the States Parties which accept the jurisdiction of the International Criminal Court.

Bensouda could conclude the prior determination (by her predecessor Luis Moreno-Ocampo) improperly deferred to the secretary general of the UN. She could decide that the determination belongs to the Assembly of States Parties (of the Rome Statute), which could derail or delay further action.

All these considerations show several possible paths that could or could not bring about the inclusion of Palestine within the jurisdiction of the ICC. In addition, as noted above, another issue would arise: the date when Palestine started being a state. On this, professor Keller notes that

perhaps Bensouda will set an earlier date for effective statehood. Many states recognized Palestine as a state years ago. Further, on October 31, 2011, UNESCO admitted Palestine as a member state, which would

likely suffice in terms of treaty ratification, the apparent test previously used by the Office of the Prosecutor. Thus, there is much uncertainty related to the declaration itself.

Her colleague Cerone underlines that, in spite of all these uncertainties and ambiguities, the double move - the letter to the International Criminal Court and the recognition by the General Assembly - opens up a certain leeway:

As a practical matter, these legal ambiguities afford the ICC a degree of latitude in deciding whether to move forward. However, they also allow room for political choices. The challenge for the ICC will be to demonstrate that its decision is not a political choice, but that it is the result of legal analysis. Whatever decision it makes, it will likely be decried as a political choice by the opposing camps (either as yet another example of anti-Israel bias in international organizations or as caving into political pressure exerted by the United States). It will thus be all the more important for the ICC to provide a thorough, well-reasoned legal analysis in support of its course of action.

At any rate, Cerone believes that the Palestinian leadership has started a process that seems irreversible: talking of a “snowball effect”:

Ultimately, whether or not the General Assembly vote was sufficient to affirm the statehood of Palestine in general or to satisfy statutory requirements in the context of the ICC, it will likely have a snowball effect. The resolution increases the ability of Palestine to act like a state. The more it does so, the more clearly Palestine will satisfy the criteria for statehood. The train to statehood has clearly left the station.

In the next pages, the most recent declarations from the ICC prosecutor will be analyzed to understand if she answered to the questions posed by these scholars. Before doing that, though, it could interest to examine the opinion of another expert of international law, who opposed publicly the Palestinian campaign for recognition.

2. Goodwill-Gill: is the bid really useful?

One of the most important opinions in the debate around the bid for statehood at the UN, which has had deep echo in Palestine and in the international circles that follow the issue, was given by a famous lawyer, Guy S. Goodwin-Gill, based in London. Since he has been helping the Palestinians on the issue of the wall debated at the International Court of

Justice (ICJ), recalled in the historical review, his voice is listened to carefully in these circles. But this time he was opposed to the initiative of the Palestinian leadership.

The main concern of Goodwin-Gill was the issue of representation: declaring a state, he argued, meant to go beyond the Palestinian Liberation Organization (PLO). The “new” State of Palestine, which was formally recognized by the United Nations in late 2012, would forget the diasporas present in many countries: Jordan, Lebanon, Israel, Europe and the United States.

It should be reminded that the Palestinian Liberation Organization has been recognized in many UN resolutions, since 1975, as the “sole and legitimate” representative of the Palestinian people. The Oslo Accords envisaged the creation of a new entity, the Palestinian National Authority (PNA), which would have become the government of Palestine at the end of the peace process.

In the course of action envisaged by the accords, this entity would have taken power and responsibility over the occupied territories while the Israeli army would have withdrawn, provided that some conditions had been met by the Palestinians. This clearly did not happen. The peace process was derailed.

The PNA did not replace completely the Palestinian Liberation Organization. Goodwill-Gill believes that the 2012 recognition, on the contrary, “will terminate the legal status held by the PLO in the UN since 1975 that it is the sole legitimate representative of the Palestinian people”. He believes that “crucially, there will no longer be an institution that can represent the inalienable rights of the entire Palestinian people in the UN and related international institutions”⁸³.

Guy-Goodwil wrote that the diaspora “constitute(s) more than half of the people of Palestine, and if they are 'disenfranchised' and lose their representation in the UN, it will

⁸³ Guy S. Goodwin-Gill, *Opinion on the Palestinian Liberation Organization, the future State of Palestine, and the question of popular representation*. A report on his opinion in: ⁸³MAAN News Agency, *UN statehood bid 'threatens Palestinian rights'*, 24/08/2011

not only prejudice their entitlement to equal representation ... but also their ability to vocalize their views, to participate in matters of national governance, including the formation and political identity of the State, and to exercise the right of return,"

4. And the crime of aggression?

Some Palestinians, especially the elders, still keep the keys of the houses they were forced to leave during the Israeli occupations, in 1948 and 1967 or later. They could argue that, among the crimes that might have been perpetrated there are not only war crimes and crimes against humanity, but also an act of aggression which ought to be sanctioned.

It is highly unlikely that this kind of accusation would be reflected formally in proceedings at The Hague, even though the “crime of aggression” was debated extensively when the Statute of the International Criminal Court was drafted.

In the original version of the Rome statute the act of aggression was contemplated in article 5(d), which states that this crime is punished but only when a *provision will be approved to specify in what this crime actually consists*.

This provision was approved at the Conference of the State Parties in Kampala in late 2010. According to the new text, the ICC “may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties”. It “may exercise jurisdiction only with respect to crimes of aggression (...) subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute”.

An important clause underlines that “in respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party’s nationals or on its territory”.

It is therefore clear that a court procedure about an act of aggression is not to be

expected before 2017. What could be considered an aggression happened more than half a century ago, and now many Palestinians are experiencing the consequences of that.

The issue of aggression was already under the spotlight when the ICC received many requests on 2003 war in Iraq, whose legality was questioned. “I do not have the mandate to address the arguments of the use of force or the crime of aggression”, the prosecutor Luis Moreno-Ocampo explained in a letter in 2006⁸⁴.

C. PALESTINE AND THE ICC IN THE POLITICAL AND DIPLOMATIC CONTEXT

1. Bensouda: the ball is in Palestine’s courtyard

In March 2013 Prosecutor Bensouda spoke again to a public of experts of diplomacy and international relations, referring to the Palestinian case. There are not too many reports on what she has said at the Académie Diplomatique Internationale in Paris, during a lecture followed by a question and answer session.

According to an account by John V. Whitebeck, an international lawyer who has advised the Palestinian negotiating team during talks with Israel, Bensouda “said, unsurprisingly, that any new application would have to be considered” and “*there was even a hint of puzzlement that the ICC had not heard from Palestine subsequent to the UN vote*”⁸⁵.

Whitebeck believes that, in spite of the uncertainties explained above, the prosecutor would go ahead in including Palestine under the ICC jurisdiction if the Palestinian leadership presented a new request, given that statehood was recognized at UNESCO and the UN General Assembly. The lawyer even saw a certain “puzzlement” by the prosecutor,

⁸⁴ Luis Moreno-Ocampo, *Letter Concerning Iraq*. February 2006

⁸⁵ John V. Whitebeck, “Palestine and the ICC - Opinion” in *Al Jazeera English*, 16 april 2013. Emphasis added.

⁸⁵

who maybe was expecting such a move by the authorities of Ramallah.

The prosecutor was also asked about the issue of retroactivity in the case of inclusion of Palestine within the ICC jurisdiction and “she did not think any retroactivity could extend back to the birth of the court in 2002 - at most if prior to Palestine’s formal accession to the Rome Statute, to November, 29, 2012, when the UN General Assembly determined the issue of Palestine’s state status”.

2. The ICC as a deterrent

Whitebeck is saying (and he is also hoping) that, given the recognition from the General Assembly, the Palestinian leadership should now become a State party of the ICC. Probably it is not doing it because, as emerged during the meeting between Mahmud Abbas and Barack Obama in Ramallah in early 2013, the United States are pushing against such move, which would surely endanger relations with Israel and, more broadly, the situation in the region.

Nevertheless this international lawyer suggests to go ahead because, believing that the ICC would start considering violations from the date of a new accession which Palestinians have to present, the jurisdiction will be a deterrent not to commit new crimes. It would help avoid future violations rather than punishing those committed in the past. And, Whitebeck argues, “if the ICC would have jurisdiction only over FUTURE war crimes (...) who (other than Israel) could argue against Palestinian membership with a straight face?”

The International Criminal Court would then be similar to a nuclear weapon during the Cold War: a means of deterrence. The lawyer outlines this parallelism: “It should be borne in mind - he writes - that possession of ICC membership does not necessarily entail seeking prosecutions any more than possession of nuclear weapons necessarily entails using them. In both cases the primary motivation and virtue of club membership is deterrence”.

The lawyer asks why Palestinians decided not to go ahead in the campaign for inclusion in the jurisdiction of the International Criminal Court. We will now try to flesh out the possible answer to this important question, but we will review another “call for action” towards The Hague, prepared by two non-governmental organizations helped by an expert from the University of Sussex, Michael Kearney.

3. The initiative of Al Haq to make the ICC act

On October 2013 it was reported that Palestinian NGOs Al-Haq and the Palestinian Centre for Human Rights (PCHR) met ICC Prosecutor Bensouda to present a legal paper which “provides legal justification for the Prosecutor to move forward with the declaration submitted by the Palestinian leadership in 2009, accepting the jurisdiction of the Court under Article 12 (3) of the Rome Statute”.

According to this paper, “the Prosecutor can ratify the 2009 declaration *without any renewed action needed from the Palestinian leadership*”.⁸⁶ In other words, the ICC should not wait for another request from the Palestinian Leadership, which at the moment is not showing interest in doing so.

Shawan Jabarin, general director of Al-Haq, commented: “With this paper we are submitting our position that the rights of Palestinian victims are not subject to compromise”, referring to the compromise supposedly sealed between president Mahmud Abbas and Barack Obama not to go on with the initiative at the ICC.

Jabarin added that such a compromise would leave out the expectations of many in Palestine. “Any negotiated agreement that sidelines the pursuit of justice through the ICC is an agreement that lacks the representative support of Palestinian civil society - he explained - this is especially important in light of the fact that violations of international

⁸⁶ Alternative Information Center (AIC) *Call on ICC to advance Palestinian ratification*

⁸⁶<http://www.alternativenews.org/english/index.php/politics/politico/7138-call-on-icc-to-advance-palestinian-ratification>

law continue unabated despite ongoing negotiations.

CONCLUSIONS

1. Another move from Palestine is probably required

As we will see in the Part IV, there are two theories for recognizing a state in international law: the constitutive theory and the declaratory theory. For the former, the declarations of recognition are a constitutive component for existence of a state. If the majority of the international community does not recognize an entity, that entity cannot be considered a state. It is an old theory, not used by many scholars. This theory would not accord statehood to entities such as Taiwan or Kosovo, two cases that will be reviewed later on.

The declaratory theory considers recognition as a political act, while international law should base its assessment on the independence and the efficacy of the entity. Following the reasoning of this theory, recognition is similar to a political act, even though it could have two different forms: *de jure* or *de facto*. If this theory is applied to the Palestinian case, it could be said that many states do not recognize Palestine *de jure* even if they do it *de facto*, through the vote at the United Nations. In this sense, what happened on 29 November 2012 should be read on a political rather than a legal level.

The ICC prosecutor could act following the political indication emerged with the General Assembly vote, opening an investigation. Her predecessor was clear in underlining the role of the Assembly for applying ICC jurisdiction on Palestine. Yet, based on what Bensouda said so far, she seems unlikely to go ahead without a new request from the Palestinian leadership. But the authorities of Ramallah, in preparing their campaign for recognition, have assured partners, among them Italy, that they will not request an investigation of the Criminal Court.

2. Even with another move, the outcome is not clear

Another request from the Palestinian leadership could ultimately bring the ICC to act on Palestine, even though such an outcome is not certain. Provided that the minister of justice of Ramallah went again to The Hague reiterating the recognition of jurisdiction, prosecutor Bensouda could simply declare that Palestine is a state, based on the General Assembly resolution 19, and that consequently the ICC has jurisdiction on it.

Alternatively, the prosecutor could ask an opinion from the Assembly of the State Parties of the International Criminal Court: another vote would take place, which could or could not give green light to Palestine as a new member of the Assembly.

In any case, these two options would bypass the Security Council which, following the Rome Statute, could even block an investigation of the International Criminal Court on Palestine. An unprecedented clash between two entities of the United Nations would take place, with dramatic consequences for the image of the international organization.

Incidentally, questions could arise on possible jurisdiction and on the statehood status of the Gaza Strip, technically part of Palestine but *de facto* governed by Hamas, an organization that has not always recognized Fatah as the legitimate representative of the Palestinian people.

3. Consequences for the Palestinians

An extension of ICC jurisdiction on Palestine would obviously have consequences for Palestinians, since they could be investigated for all crimes listed in the Rome Statute. There would certainly be cases where Palestinians could be prosecuted, like bombings against civilians. In different United Nations reports, such as the one prepared by judge Goldstone (reviewed in Part I), international experts underlined that such crimes were committed by both parties involved, Israeli and Palestinian.

Ultimately, such a scenario could help improve the situation and diminish the number of

violations: it would show that the institution of The Hague is independent and it punishes crimes committed by any party. Furthermore the jurisdiction of ICC, as the one any other court, would have a deterrent effect, as it was underlined. Investigations on both directions should help make the crimes diminishing because of possible indictments.

Nevertheless, given the pattern of violence and massacres in Israel by Palestinian terrorists and in the Palestinian territories by Israeli soldiers, it would be delusional thinking that the end of violence could be brought only by deterrence of the International Criminal Court.

PART IV – CONTESTED STATEHOOD: A COMPARATIVE ANALYSIS

INTRODUCTION

Many interesting parallelisms could be drawn between the case of Palestine and other recent episodes of contested statehood, which was ultimately attained in some occasions or remained incomplete in others. A comparative analysis would shed light on a very important distinction that has to be made, between actual statehood and recognition of this status on a bilateral or a multilateral level.

After a brief explanation of these two concepts and the role they have in different theories to define a state, this fourth part will analyze several episodes of contested statehood from the last sixty years: Namibia, Western Sahara, Kosovo, Taiwan, Somaliland, Abkhazia, South Ossetia, Transnistria, Nagorno-Karabakh, the Republic of Northern Cyprus and the most recent recognitions of statehood by the UN.

The review of each case is not necessarily complete. The focus is rather on key decisions that could help drawing comparisons with the Palestinian case. The approach is legal rather than political and it attempts to find common patterns that could explain how to define statehood and how it could be attained.

Answering these questions could solve or at least simplify the puzzle described in the previous part: whether the International Criminal Court could consider Palestine as a state and have jurisdiction on it. As it will become clear, it is not easy to solve the puzzle.

A. THE DOCTRINE ON STATEHOOD

To better understand the interplay between statehood and recognition in international law, the two major theories dealing with statehood will be briefly outlined⁸⁷. The

⁸⁷ A good guide for the two theories is Thomas D. Grant, *The recognition of states: law and practice in debate and evolution*. Westport Connecticut. 1999

declarative theory defines a state as owning international personality independently from the recognition by other states. Hence, following the so-called Montevideo rules⁸⁸, based on the principle of effectiveness among territorial units⁸⁹, a state is an entity that meets the following criteria:

1. a defined territory
2. a permanent population
3. a government and
4. capacity to enter into relations with other states.

According to the declarative theory, recognition is a mere political act, which could assume two forms, *de jure* or *de facto*. In any case, it is something that is usually coming after actual statehood.

By contrast, the constitutive theory defines a state as owning international personality only if it is recognized as such by other states that are already members of the international community. This theory, adopted in the past by scholars such as Dionisio Anzilotti, is not adopted anymore.

Nevertheless, recognition keeps playing an important role: as it will become clear in the course of the analysis, there are cases in which, even if statehood is not really contested, the non-recognition is causing problems on a legal level.

The constitutive theory, focusing on recognition, links statehood to the behavior of other states. It is therefore possible to find a specific moment in which an entity becomes a state. The declarative theory, on the other hand, leaves many questions open such as who is entitled to assess the conditions for statehood and when these conditions come into existence. These questions resonated towards the end of Part III, because they are crucial

⁸⁸ The reference is to the *Montevideo Convention on the Rights and Duties of States* of 1933. The Convention was ratified by the United States and certain States in Latin America: it is still in force and, despite its regional character and low participation, is referred extensively in jurisprudence and international law textbooks.

⁸⁹ James Crawford, *The Creation of States in International Law*, 124

for giving green light to jurisdiction of the International Criminal Court.

Recently, James Crawford tried to classify systematically the different cases of recognition of states, searching for the parameters necessary to define them in order to go beyond the dichotomy between the constitutive and declaratory theory. His work, *The Creation of States in International Law*, is a reference of utmost importance.

B. CASE STUDIES

1. Namibia

South West Africa, currently known as Namibia, used to be a colony of Germany. After the German defeat in World War I, it was decided under the 1919 Treaty of Versailles that the territory would have been a League of Nations mandate territory and that the Union of South Africa would have been responsible for its administration. This latter state, where the rights of the local population were heavily restricted, became independent from the United Kingdom in 1931.

After World War II, the United Nations took the place of the League of Nations and South West Africa should have become a UN Trust Territory, an entity with features similar to the ones of a League of Nations mandates.

According to article 73 of the UN Charter, in Trust Territories “peoples have not yet attained a full measure of self-government”. Therefore these peoples would have been governed by states that are members of the United Nations and that “accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present charter, the well-being of the inhabitants of these territories”.

The Union of South Africa kept administering it as its fifth province (the other four were Cape Colony, Natal Colony, Transvaal Colony, Orange River Colony), in spite of the call to hand the territory to the trusteeship system of the United Nations. The International

Court of Justice was asked to give an opinion on the issue. In the first advisory opinion of 1950⁹⁰, the judges conceded that South Africa was not obliged to convert the League of Nations mandate in a UN Trust Territory but, as a League of Nations mandate, it was to the General Assembly to assume a supervisory role towards South Africa, which should have followed the Charter of the United Nations.

In this case, as in the Palestinian one, the UN General Assembly became a key player. In its first opinion, the Court underlined that the Assembly could receive petitions from persons living in South-West Africa. It could also request South Africa, considered as a mandatory nation, to prepare reports on specific issues.

In 1960, opposition to South Africa in this “fifth province” formed the South West Africa People’s Organization (SWAPO) and started a military and guerrilla conflict aiming at independence. In 1966 the General Assembly passed resolution 2145 which terminated the mandate. According to the text, South Africa could not rule the country anymore, but it continued to do so. In response, SWAPO started military operations against the occupation.

In the meantime, the United Nations Security Council asked the International Court of Justice to issue another opinion, on the *Legal consequences for States of the continued presence of South Africa in Namibia (South West Africa)*⁹¹. The Court ruled that the continued administration of Namibia by South Africa was not lawful.

On that occasion, the Court did not give an opinion on the statehood of Namibia (it was not asked to do so). It could be argued that at that point of time this entity was not a state. Actually, before that decision it was never a state in the current sense of the term, since it was first a colony, up until World War I, then a mandate territory under the supervision of the League of Nations.

⁹⁰ International Court of Justice, *International Status of South West Africa*. Advisory Opinion. 11 Juillet 1950.

⁹¹ International Court of Justice, *Legal consequences for States of the continued presence in South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970)*. 21 June 1971. Prgf.

As it happened in other League of Nations' Mandates or United Nations' Trust Territories, statehood came about during the administration by another state, under the auspices by the international organization, which protected the right of self-determination enshrined in the charter of the international organization.

In 1973 the General Assembly recognized the South West Africa People's Organization as the "authentic representative of the Namibian people"⁹² and in 1976 it conferred on it the status of UN observer⁹³. Previously Namibia was removed from the list of Non-Self-Governing Territories⁹⁴.

As it was underlined during the historical review, the Organization for Liberation of Palestine (OLP) had a similar treatment as the one of SWAPO: in 1974, the General Assembly offered it an observer status with resolution 3237⁹⁵.

In 1978, UN Security Council adopted resolution 435 which included a decolonization plan for Namibia, even though South Africa started retreating only a decade later. On 22 December 1988 it signed the so-called New York Accords, ending the hostilities with the rebels. On 21 March 1990, the SWAPO won the national elections and formed a government. Some days later, Namibia was admitted as a member state of the United Nations⁹⁶.

Throughout the struggle towards statehood and independence, Namibia represented a symbol for the process of decolonization. The organization fighting for its independence was supported by the General Assembly, which indicated how to enact the right of self-determination protected by the United Nations Charter. In doing so, the Assembly went beyond the textual indications of the Charter and transformed a programmatic principle in

⁹² General Assembly Resolution 3111 (XVIII), *Question of Namibia*. 12 December 1973. Prgf. 2

⁹³ General Assembly Resolution 152 (XXXI), *Observer status for the South West Africa People's Organization*. 20 December 1976. Prgf. 1.

⁹⁴ General Assembly Resolution 152 (XXXI). *Observer status for the South West Africa People's Organization*. 20 December 1976

⁹⁵ General Assembly resolution 3237 (XXIX). *Observer status for the Palestine Liberation Organization*. 22 November 1974. Prgf.1

⁹⁶ Don Shannon, "Namibia Joins the U.N. as 160th Member State" in *The Los Angeles Time*, 24 April 1990

a juridical obligation. Nevertheless, jurisprudence does not seem to conceive self-determination in terms of international customary law⁹⁷.

2. Western Sahara

The region of Western Sahara, claimed by Morocco, constitutes a long-standing issue at the United Nations. Formerly a colony of Spain, which returned it to Morocco in 1969, the territory is also claimed by the Polisario Front movement, which proclaimed the Sahrawi Arab Democratic Republic. As for Palestine and Namibia, the General Assembly recognized the right of the Western Sahara people to self-determination and the Polisario Front as its representative.

It is difficult to say that the conditions of the “Montevideo rule” are met by the republic: the Polisario Front does not have total control of the territory, and its self-governing authorities are weak and constantly challenged by the Moroccan military. The United Nations has been promoting negotiations lasting for decades but it did not gain substantial results.

Over the course of the years, this entity has been recognized by 84 UN member states even though 38 of them decided to freeze or even withdraw such recognition for political or diplomatic concerns. The countries that granted recognition were mainly coming from the Non-Aligned Movement (NAM), such as Algeria, Mexico, Iran, Venezuela, Vietnam, Nigeria, and South Africa. Barely any Western country recognized the Sahrawi Arab Democratic Republic as a state. At the end of 2013, 35 States had formal diplomatic relations with the Republic, which in some areas is controlled by the rebels but in areas remains under the military control of Morocco.

The situation is similar to Namibia before independence: a group of rebels is claiming

⁹⁷ Quote translated from Enzo Cannizzaro, *Diritto Internazionale*.

statehood which is denied by another country partially controlling the area, and which did not have clear and strong links with the territory. This historical tie was at the center of the debate during the decolonization process: who was the legitimate representative of Western Sahara before and during the Spanish colonial rule? There were actually three pretenders: the Polisario Front, Morocco and also Mauritania, which at the time of the Spanish colonization was not an independent state.

In December 1974 the International Court of Justice was requested by the General Assembly⁹⁸ to answer, submitting two different questions. The second one was to be answered in case of affirmative response for the first one.

Was Western Sahara (Rio de Oro and Sakiet El Hamra) at the time of colonization by Spain a territory belonging to no one (*terra nullius*)?

What were the legal ties between this territory and the Kingdom of Morocco and the Mauritanian entity?

The answer to the first question, decided by a vote of 13 to 3, was that at the time of colonization, defined on 28 November 1884, the territory was not *terra nullius*. But to whom was the area linked? The answer to this second question was divided in two parts. On one hand, the judges decided that there were legal ties of allegiance between the territory and the Kingdom of Morocco. On the other hand, the court stated that also the Mauritanian entity, the forefather of current Mauritania, had legal ties to the territory.

The Court underlined that it did not mean that these ties implied sovereignty or rightful ownership over the territory. Nor these ties applied to “self-determination through the free and genuine expression of the will of the people of the Territory”⁹⁹. The judges did not give green light to one claim over the other and they seem to hint that the guiding principle to solve the issue could be the right of self-determination.

Four years later, in 1979, the General Assembly approved a resolution which declared the Polisario Front as the legitimate representative of Western Sahara, linking the

⁹⁸ General Assembly Resolution 3292 (XXIX). *Question of Spanish Sahara*. 13 December 1974. Prgf. 1

⁹⁹ International Court of Justice, *Advisory Opinion on Western Sahara*. 16 October 1975. Prgf.162, 163

organization to the territory through the right of self-determination¹⁰⁰. The United Nations system tried to find a negotiated solution and several rounds of talks were held in Manhasset, not too far by its headquarters in New York, but no breakthrough was found. Differently from the SWAPO and similarly to the OLP, the Polisario Front remains an entity linked to a territory which seems entitled to become a state.

3. Kosovo and the latest recognitions by the UN

East Timor, Montenegro, South Sudan and Kosovo are the most recent cases of statehood which the United Nations system has dealt with. With the exception of Kosovo, these entities were recognized as states by the General Assembly upon the recommendation of the Security Council. These UN recognitions, relatively “unpainful”, will be analyzed later. Kosovo is a much more complicated issue, which had important ramifications from a legal point of view. Unlike Palestine, this entity did not apply for recognition at the United Nations, but several countries recognize it on a bilateral level.

In the late 1990s, Serbia coordinated activities of ethnic cleansing which targeted the Muslim population of Kosovo. A military intervention was organized to stop Belgrade. At the end of the conflict, Kosovo was administrated by the United Nations. This international protectorate, a sort of mandate managed directly by the international organization, could be interpreted as a preparatory phase to actual statehood.

On 17 February 2008, Kosovo declared its independence even if Serbia continues to consider it one of its provinces, which hosts important sites for the history of the Serbian nation. After five years, 106 countries have recognized Kosovo as an independent state. Within the European Union, 23 out of the 28 countries favor this position. Interestingly, the five countries of the Union that do not recognize Kosovo have problems with minorities: Spain with the Basque minorities, Slovakia and Romania with their citizens of Hungarian

¹⁰⁰ General Assembly resolution 37 (XXXIV), *Question on Western Sahara*. 21 November 1979. Prgf. 7

origins, Greece for the question of Macedonia, Cyprus for the Turkish community present in the North, which declared its own independence (see section 9). In spite of the opposition of these five members, the European Union has started a stabilization and association process with Kosovo. For these kinds of agreements, full sovereignty is not required.

As in the Palestinian case, the UN Security Council did not act on the issue of Kosovo. If the veto of the United States is blocking the Council for Palestine, deliberations on Kosovo are frozen by the opposition of Russia, an ally of Serbia, and China. And, again as in the Palestinian case, the General Assembly acted in the *vacuum* created by the Security Council inactivity. Following article 96 of the Charter¹⁰¹, the Assembly requested the International Court of Justice to render an advisory opinion on the following question:

Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?¹⁰²

The answer to the question, included in paragraph 84 of the advisory opinion of the Court, delivered on 22 July 2010, is that “general international law contains no applicable prohibition of declarations of independence”. The judges were divided on the issue: 10 voted in favor, while 4 were against.

As in other cases, there was not a clear final word on the status of Kosovo. The ICJ did not deal with statehood. After all, it was not requested to do so by the General Assembly. Paragraph 56 of the opinion underlined that the Court was

not required to take a position on whether international law conferred a positive entitlement on Kosovo unilaterally to declare its independence or, *a fortiori*, on whether international law generally confers an entitlement on entities situated within a State unilaterally to break away from it.

Indeed, it is entirely possible for a particular act - such as a unilateral declaration of independence - not to be in violation of international law without necessarily constituting the exercise of a right conferred by it. The

¹⁰¹ The first paragraph of Article 96 states that: “The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question”.

¹⁰² General Assembly, Resolution 3 (63th session), 8 October 2008. Prgf. 1.

Court has been asked for an opinion on the first point, not the second.

If recognition of Kosovo is problematic, as we saw, for European countries which include disgruntled minorities, its declaration of independence is positively seen where secession would be a blessing for similar minorities elsewhere: Nagorno-Karabakh in Armenia, South Ossetia and Abkhazia in Georgia and even among the Serbian minority in the Federation of Bosnia and Herzegovina. All of them hailed positively the opinion given by the International Court of Justice.

Kosovo is one of the newest examples of contested statehood. It differs from Palestine because it was not a colony and because it did not seek membership at the United Nations or its agencies. If it did so, it would most likely follow a pattern similar to the Palestinian one: the Council could not find a solution mainly for the opposition of China and the Assembly could “fill the *vacuum*” with a decision that would be symbolic but not binding: statehood would remain contested.

7. East Timor

East Timor, formerly a colony of Portugal, gained statehood in 2002, after years of civil war and, subsequently, of international administration supervised by the United Nations. Portugal decided to stop colonial rule on the territory, part of the Indonesian archipelago, in 1964. Subsequently, Indonesia declared the area as its 27th province. A group of Timorese insurgents did not accept this decision. Military confrontations followed suit and the UN Security Council condemned the decision of Indonesia, reiterating that East Timor was a non-self-governing territories. Independence was declared more than ten years later, in 1975, but the conflict did not end. International military operations to stop the violence, headed by Australia, took place in the last years of the 19th century. After a UN-brokered agreement, the international organization administered East Timor, as it did in Kosovo. On 27 September 2002 the entity gained independence and statehood and it was officially

recognized as a member of the United Nations.

East Timor is an interesting case because it presents features common both to Namibia and Western Sahara, as it used to be a colony, and to Kosovo, as it was administered by the United Nations in a sort of preparatory phase towards independence and statehood. It is difficult to find a common pattern for these different paths, but it seems clear that the role of the UN in protecting the right of self-determination or in administering a contested territory is a recurrent feature.

8. Recent cases of UN recognition

In this section other recent cases of UN recognition, less complex than Kosovo and East Timor, will be reviewed. On 3 June 2006, two years before the declaration of Pristina, another former region of Serbia, Montenegro, announced its own independence. The declaration was pronounced officially by the Montenegrin Parliament and it was followed by a referendum in which a majority of voters favored independence. Serbia did not object to the declaration.

The most recent state to gain UN membership, South Sudan, was born in yet another secessionist episode. In the summer of 2011 the authorities of Juba declared their independence from Sudan after long negotiations with Khartoum, supervised by the international community. South Sudan was accepted as a member of the United Nations by the General Assembly, upon the unanimous recommendation of the Security Council. In this case, the issues of statehood and recognition did not pose particular problems within the international organization.

4. Taiwan

Taiwan represents a particularly interesting case for a compared analysis of contested

statehood because it does seem to fulfill all the conditions of the “Montevideo rule” reviewed above: the Taiwanese government effectively rules on a number of people living on a defined territory and it has external relations with other countries. What it is missing, though, is recognition, both at the United Nations (where it is absent) and on a bilateral level (where it relatively scarce).

The entity that is ruling *de facto* what was known as the island of Formosa, ruled by the Republic of China (ROC), is not recognized as a state by many countries. Crucially, continental China, ruled by the People’s Republic of China (PRC) asserts to be the “sole legal representation of China”. Obviously, the ROC has the same claim. The reason of these opposing views has deep roots which developed during the Chinese civil war, in the aftermath of World War II.

Ironically, the Republic of China was one of the founding members of the United Nations and it was a permanent member of the Security Council with power to veto resolutions. It maintained this position until 1971, when it was expelled with resolution 2758 of the General Assembly¹⁰³ to be replaced in all UN entities and agencies by the People’s Republic of China. The resolution reads as follows:

The General Assembly,

Recalling the Principles of the Charter of the United Nations,

Considering that the restoration of the lawful rights of the People's Republic of China is essential both for the protection of the Charter of the United Nations and for the cause that the United Nations must serve under the Charter,

Recognizing that the representatives of the Government of the People's Republic of China are the only lawful representatives of China to the United Nations and that the People's Republic of China is one of the five permanent members of the Security Council,

Decides to restore all its rights to the People's Republic of China and to recognize the representatives of

¹⁰³ General Assembly, *Resolution 2758 (25th session)*. 25 October 1971. The issue of Chinese representation at the UN has been controversial for years. Another resolution approved by the Assembly in 1961, n. 1668, decided that any matter regarding such issue should have approved with a vote of two thirds.

its government as the only legitimate representatives of China to the United Nations, and to expel forthwith the representatives of Chiang Kai-shek from the place which they unlawfully occupy at the United Nations and in all the organizations related to it.

The famous “One China Policy” entails that Beijing will participate in international organizations only if the Republic of China is not recognized as a member, since both capitals claim to be the “real” China. It is difficult to find Western countries that would like to discuss openly on the status of Taiwan, even though they might support it. The United States, for example, does help the ROC on a military level.

The *Anti-Secession Law*, ratified on 14 March 2005 by the People’s Republic of China, considers the possible use of “non-peaceful means” in the event of a declaration of Taiwan independence: it is a substantial threat against the ROC, because violent measures could be taken in case of a move similar to the one undertaken by other secessionist entities, such as Kosovo or South Sudan.

At any rate, Taiwan is recognized formally by around 20 members of the United Nations, while it maintains informal but often strong relations with more than 50 states, through the Taiwanese “economic and cultural offices”. It is not by chance that the Italian diplomatic delegation on the island of Formosa is named similarly: “Economic and cultural office of Italy”.

In conclusion, Taiwan is probably the clearest example showing that recognition is a matter less legal than political. In this case, the relation between statehood and recognition seems to be particularly weak. The effectiveness required for statehood, formalized in the conditions of Montevideo, is not really contested, but the problem lays ultimately in the claim that Taiwan makes: to be a state comprising also continental China.

The non-recognition of Taiwan at the United Nations is related to the strong position of the People’s Republic of China, which imposed it on many other countries and, ultimately, on the United Nations system. Similarly, as it was seen, Russia has so far imposed non-

recognition of Kosovo within the UN system.

5. Somaliland

Somaliland is a break-away region claimed by Somalia, which is considered by many as a non-functioning or failed state. Somaliland declared its independence on 17 May 1991 and it is currently trying to seek international recognition. So far it was not able to obtain it, even though some delegations, notably from the EU institutions, visited the territory and declared their interest in maintaining some kind of relations.

In addition to the European Union, there were sporadic political contacts with the United Kingdom, Rwanda, Norway, Ethiopia and Kenya. The United States and the European Union debated whether shifting its support from the actual state of Somalia, considered extremely fragile, to Somaliland, which guarantees a certain safety for carrying on business of different kinds. According to news reports, some officials from the Defense Department would support the latter because that would be useful to stabilize the Horn of Africa but

in contrast, "the State Department wants to fix the broken part first -- that's been a failed policy," the official said.

The official U.S. government position is that the United States should withhold recognition from Somaliland because the African Union has yet to recognize it. "We do not want to get ahead of the continental organization on an issue of such importance", said Assistant Secretary of State Jendayi E. Frazer in an e-mailed response to questions.

The issue is diplomatically sensitive because recognizing Somaliland could set a precedent for other secession movements seeking to change colonial-era borders, opening a Pandora's Box in the region¹⁰⁴.

The Court of Auditors of the European Communities, on the other hand, warned the European Commission to be "committing itself to revenue-generating projects under the

¹⁰⁴ Ann Scott Tyson, "U.S. Debating Shift of Support in Somali Conflict" in *The Somaliland Times*. 3 December 2007

present conditions as Somaliland, where the port is located, has not been internationally recognized as an autonomous state”¹⁰⁵. The reference is to the port of Berbera, which became the “chief entry point for international aid to Ethiopia, as well as local aid”¹⁰⁶.

The internal debates in Europe and the United States show how recognition could be used for political purposes. An important feature is the link to a broader entity which is considered by many as lacking the conditions necessary for statehood, which are related to an effective political control of a territory inhabited by a population. The effectiveness of this political control is questioned: the continuing civil war and the episodes of piracy rather show a situation dramatically close to anarchy.

Yet, if statehood of Somalia is often questioned, the members of the United Nations, and the organization itself, recognized it as a state. Further, the international community often seems to push the weak Somali authorities to spend more efforts to become a state. It is indeed a very peculiar situation, which shed light on the complexities of statehood and recognition, two concepts which should not be confused.

Once again, this difficult situation is due to a colonial past: Somaliland occupies what was British Somalia until 1960. Once it obtained the independence from London, on 26 June 1960, it merged to former Italian Somalia, which had become a Trust Territory assigned to Italy in 1950. The new entity gained independence few days later, as the Republic of Somalia, which is recognized as a state by the United Nations.

As Lewis pointed out

The different colonial traditions combined with tribal differences and the Act of Union of 1960 proved difficult to implement. The English common law and the Indian Penal Code were in force in Somaliland; the Italian Code continued in the south. Economic differences also existed and were exacerbated by a lack of infrastructure connecting the regions¹⁰⁷.

Somalia and Somaliland indicate the complex interplay between statehood (which

¹⁰⁵ Court of Auditors of the European Communities, *Special Report* on 4/2000, OJ C 113/1

¹⁰⁶ Security Council. Report on relief programs in Somaliland. 21 February 2002. S/2002/189

¹⁰⁷ Lewis, IM. *The Modern History of Somaliland: From Nation to State*, pgg. 161-78, quoted by Crawford

seems to be less fragile in the former British colony, able to offer a more stable environment that ultimately helps economic relations) and recognition (which is not granted for political opportunity and diplomatic caution).

6. Abkhazia, Ossetia, Transnistria and Nagorno-Karabakh

Abkhazia and South Ossetia are two territories which declared their independence from Georgia and were backed by Russia, which gave immediate recognition. There are a few other States which recognize the two breakaway regions. Abkhazia, for example, is recognized by five UN members: in addition to Russia, there are Nicaragua, Venezuela and the island states of Nauru and Tuvalu.

Transnistria, formally named the Pridnestrovian Moldavian Republic, on which Moldova claims sovereignty, declared its independence in 1990 with backing from Russia. It is currently recognized by three UN non-members, the same of before: Abkhazia, Nagorno-Karabakh and South Ossetia.

Nagorno-Karabakh Republic, claimed by Azerbaijan, declared its independence in 1992. It is recognized, interestingly, only by three “states” that are non-members of the UN: Abkhazia, South Ossetia and Transnistria.

7. Turkish Republic of Northern Cyprus

Invading Cyprus, Turkey helped the institution of a secessionist republic in the North of the island, which declared its independence in 1983. The Security Council reacted with resolution 541, approved on 18 November 1983. The document asked to states not to recognize the new state.

The international community followed the request of the Security Council, as it did when the Council asked not to recognize Jerusalem as the capital of Israel. The only, quite

obvious exception is Turkey, which keeps recognizing Northern Cyprus as a state.

Nevertheless, the entity is actually governing an area of the island. It could be argued that Northern Cyprus is actually a state then, yet the process that allows the birth of this entity was the military occupation of an independent and sovereign country, Cyprus. The United Nations tried to solve the issue deploying peacekeeping soldiers in the island. The mission is still operational, while negotiations to end the crisis did not bring any significant result.

The issue of recognition of Northern Cyprus had important ramifications in the European Union: its existence was one of the causes of the harsh opposition of Greece to the admission of Turkey in the Union. Interestingly, the Organization of Islamic Cooperation and the Economic Cooperation Organization have granted Northern Cyprus observer status under the name "Turkish Cypriot State". United Nations Security Council Resolution 541 defines the declaration of independence of Northern Cyprus as legally invalid.

Once again, recognition seems to be a political action, nevertheless forbidden by the Security Council, whose action, more than at "contesting the existence of the requirements of effectiveness of a government, (was aimed against) the legality of the process of formation of the new entity"¹⁰⁸.

C. SOME CONSIDERATIONS

1. Self-determination and the colonial past

As emerged during the analysis of the Namibian and Western Saharan cases, the right of self-determination played a very important role in paving the way for statehood during the second half of the twentieth century, when the decolonization process was recognized and often supported by a large majority of the international community.

Legal scholars underline how during this process a pattern emerged and with the ICJ

¹⁰⁸ Enzo Cannizzaro, *Diritto Internazionale*. Torino 2012

advisory opinions on Namibia in 1971¹⁰⁹ and Western Sahara in 1975¹¹⁰, which recognized as self-determination in a colonial context as international customary law. The court reiterated this principle in the sentence on East Timor of 1995¹¹¹, where it defined self-determination “as one of the essential principles of contemporary international law”.

Crawford believes that in many cases a pre-recognition entity, or “self-determination unit”, is firstly identified by the United Nations system. The charter of the organization considers these areas populated by people that sooner or later will attain independence. For this reason, they are classified subsequently classified as UN Trust Territories which, ultimately, could gain statehood.

The General Assembly, often bypassing the Security Council, followed this pattern for Namibia and Western Sahara, two Trust Territories which were considered “units” ready for self-determination and statehood. The organizations fighting for independence, respectively the SWAPO and the Polisario Front, were recognized as the legitimate representatives of these territories and consequently entitled to the right of self-determination. The process was ultimately successful for Namibia but not for Western Sahara.

2. The Palestinian case and the colonial past

The Palestinian case could be collocated in the same pattern, though its history makes it different from the previous ones in several aspects. As it was seen, this area (and the one comprising the current state of Israel) was recognized as a Mandate by the forefather of the UN, the League of Nations. Consequently, after World War II and the 1947-8 war between the nascent state of Israel and the surrounding Arab States, the West Bank and the Gaza Strip was occupied by Jordan and Egypt respectively. These two areas were then occupied

¹⁰⁹ CIJ, *Recueil*, 1971, page 31

¹¹⁰ CIJ, *Recueil*, 1975, page 31

¹¹¹ CIJ, *Recueil*, 1975, page 29

by Israel in 1967. Since then they were defined as “occupied Palestinian Territories” and the OLP, fighting for their independence, was gradually recognized by the United Nations as the legitimate representative of a “self-determination unit” not exactly comparably as a Trust Territory like Namibia but still a territory under foreign occupation.

The case of Palestine shows at least two additional features that make the road towards statehood more articulated. In the first place, it should be reminded that the Palestinian people were already given the chance to have a state in 1947 when the General Assembly approved a resolution including the “partition plan”, and they rejected it. In the second place, as it was analyzed previously, potential Palestinian statehood was recognized in the Oslo Accords framework. Conforti¹¹² argued nevertheless “the dubious nature of these accords, which resemble the agreements concluded by colonial powers with the representatives of local populations during decolonization, (furthermore) they were not registered at the Secretariat of the United Nations, as it normally happens for the real accords”.

Ultimately, the pattern from colonial rule to statehood could be applied to Palestine, and it was applied most recently by the International Court of Justice in the advisory opinion on the wall. The occupied Palestinian territories could therefore be considered as another example of the evolution of a “self-determination unit” towards an independent state, even though this ultimate goal is not necessarily always achieved, as the Western Sahara case demonstrates.

The parallelism between the fight for Palestinian independence and other cases of self-determination after a long history of colonial domination is present in the discourse of many representatives at the United Nations, especially the ones coming from countries such as Algeria, Tunisia or Indonesia, which all share Muslim culture and a past as a colony.

¹¹² Translated by Benedetto Conforti, *Diritto Internazionale (settima edizione)*, pg. 14

3. The observer status: pre-statehood?

Given this pattern that could ultimately lead to statehood, how should the most recent recognition at the United Nations be interpreted? Crawford notes that the status of observer, both for organizations and for states, has often constituted a prelude to actual statehood. “The divided States of Germany and Vietnam were early examples of entities granted observer status”, he wrote.

As already highlighted in the previous analysis, Crawford also notes that “more controversially, in 1974 the Palestine Liberation Organization was invited ‘to participate in the sessions and the work of the General Assembly in the capacity of observer; the same status was extended to SWAPO in 1976”¹¹³ and in this latter case it ultimately brought about statehood.

French scholars Pellet and Daillier see “the practice of according observer status to national liberation movements as preparatory to the emergence of State”¹¹⁴ but Crawford underlines that this is “a possible but by no means inevitable outcome”.

Other scholars such as Cannizzaro underline that the observer status given at the United Nations to the Organization for Liberation of Palestine is “an example of progressive recognition of a particular group of insurgents as a person in the international juridical system”.

4. The role of the General Assembly

This review shows how in certain cases of contested or unrecognized statehood, the General Assembly played a key role in paving the way towards statehood. The recognition in 2012, read in this perspective, could certainly indicate a possible imminent statehood:

¹¹³ James Crawford, *The Creation of States in International Law*. 2006. Page 194.

¹¹⁴ Pellet, Daillier and Dinh, *Droit International public (6th edn)*, Page 499.

from a *legal* point of view, the recent decisions at UNESCO and the General Assembly, together with the debate around the possible jurisdiction of the International Criminal Court reviewed in Part III, makes the international personality of Palestine as a state a closer goal.

The road towards statehood, even if not unlikely from a legal point of view, presents nevertheless many hurdles. The United States would recognize an independent state of Palestine only on the condition of a negotiated solution with Israel, which seems unlikely at the moment. The American opposition, which would probably translate in a veto in the Security Council, will create a situation not dissimilar to the one of Kosovo or Taiwan. It would ultimately remain a case of contested statehood.

Another hurdle is posed by Israeli military occupation of Palestinian territories, while the governance of these territories by the Palestinian National Authority is still weak. On this basis, the Montevideo requirements, reviewed above, would be equally contested. Yet, Crawford notes that

Although the criteria for statehood provide a general, applicable standard, the application of that standard to particular situations where there are conflicting and controversial claims is often difficult. It is here in particular that recognition and, equally importantly, other State practice relating to or implying a judgment as to the status of the entity in question are important.

The General Assembly, therefore, could be interpreted once again, as it was in the historical review, as a forum hosting all the voices of the international community. Such a platform can propose a path to follow, with no real power to impose it: the Assembly cannot replace fully the Security Council, which would remain the best place to resolve, legally and politically, the Palestinian issue.

The General Assembly could nevertheless be considered as a source of soft power. It is in this perspective that many international actors, Italy included, pushed for a resolution to promote a global moratorium on death penalty. Such decision, like any other resolution of

the General Assembly, is not binding, but it does show a strong moral stance taken by the majority of the international community and it provides a legal text that can be referred to in decisions of the judiciary system, both in international and national courts.

The analysis conducted so far is limited to legal aspects of statehood. It does not suggest that the resolution of the Israeli-Palestinian issue could be resolved by the recognition of the General Assembly. It rather shows different trajectories towards statehood, and their interaction with the United Nations system.

As experts of international law underline, statehood is a complex issue which may rest, according to some of them, outside the legal framework. It would rather be a matter of fact. And, from that point of view, an analysis of the possible political developments of the Palestinian issues and the negotiations with Israel would be more useful. Such an analysis is provided in Part V.

PART V

THE BID AS A STRATEGY

In this section, the UN bid will be analyzed as a strategy, which was promoted or criticized by different actors. The voices of politicians or intellectuals will be used to gauge the expediency to push forward the bid for statehood at the United Nations. The opinions on the bid will be explained from the most conservative to the most radical. The conservatives wish to preserve the current political status and refuse the bid, while the radicals reject the current political situation but are still against the bid. In between these two positions are located all opinions in favor of the bid, of course with different nuances.

1. Fayyadism: A state built, not declared

One of the most interesting critiques came, almost paradoxically, from the person considered by many as the actual builder of the Palestinian state. Salam Fayyad, appointed prime minister of the Palestinian National Authority by president Mahmoud Abbas, stressed that

"[Statehood] is not something that is going to happen to the Israelis, nor something that is going to happen to the Palestinians.... is something that will grow on both sides as a reality."¹¹⁵

Fayyad also warned that even after a successful bid at the UN "the reality of the occupation will not change." Palestinians, he continued, should not be "looking for (...) a declarative victory," he added.¹¹⁶ The prime minister, an economist trained in the United States who was also a minister of finance, has been working on a series of projects that, under Israeli tutelage if not sponsorship, should build the infrastructures necessary for a state. Thomas Friedman, amongst others, praised his approach:

(Fayyad) is pursuing the exact opposite strategy from Yasir Arafat. Arafat espoused a

115 "Fayyad rejects unilateral declaration of statehood" in *The Jerusalem Post* - August 2nd 2010, available at <http://www.jpost.com/ArtsAndCulture/Entertainment/Article.aspx?ID=183403>

116 The Associated Press, *Palestinian PM: UN recognition of state will just be symbolic victory*, June 28, 2011

blend of violence and politics; his plan was to first gain international recognition for a Palestinian state and then to build its institutions. Fayyad calls for the opposite — for a nonviolent struggle, for building noncorrupt transparent institutions and effective police and paramilitary units, which even the Israeli Army says are doing a good job¹¹⁷

The work of Fayyad is equally praised, or better feared, by Mike Herzog, former chief of staff to Israeli defense minister Ehud Barak, who believes that “Fayyad calculates that political negotiations will not succeed and his plan (to establish a state) will be the only game in town”¹¹⁸.

These apparently opposing strategies – state-building and state-declaring – will be a recurrent theme throughout this last section. It is difficult to deny that Fayyad is actually working in order to physically build the infrastructures necessary to a state. Yet he is doing that under a very particular condition: building a state under the occupation, or at least the tutelage, of Israel, and with the constant threat that funding could be curtailed for any political reason.

In addition, the state-building project of Fayyad cannot stop the building of settlements in the West Bank, which pose serious challenge to the viability of the Palestinian statehood itself. A recognition at the United Nations, on the other hand, could be a useful tool to counter settlements' activities at a political and legal level.

2. Voices from Birzeit: a legitimate way to go back and have justice

As stated at the beginning of the historical review, professor Hajj Ibrahim underlines that since the creation of Israel is linked to General Assembly resolution 181 of 1947, “going back to the United Nations is a legitimate approach”. According to Hajj Ibrahim, “the problem is that there is one power, one big power, the US, that does not want that”¹¹⁹.

117 Thomas Friedman, “Let’s Fight Over a Big Plan”, in *The New York Times*, March 17th 2010

118 Nathan Trall, “Our Man in Palestine”, October 14th 2010. In *The News York Review of Books*

119 Interview with prof. Abdul Rahman Al-Hajj Ibrahim, Birzeit University June 19th 2012

Another teacher at Birzeit University, Saad Nimr, believes that with a “successful bid at the United Nations will set the 1967 borders as the definitive borders of the state, Jerusalem (...) will be the capital (...) settlements will be illegal and they will have to go”.¹²⁰

The hopes of Nimr would not happen automatically after a successful bid in the Security Council or the General Assembly. Rather, they would be additional goals they could be achieved only through a broader campaign built around the vote recognizing the Palestinian state at the United Nations.

3. Alternative approaches towards negotiations

Towards the end of the 1980s, some months after the first intifada, a Jewish American scholar, Jerome M. Segal, outlined a strategy whose core was creating a Palestinian state recognized by the international community. Segal, member of a US delegation who had met representatives of the PLO in Tunis, defined by some in Israel as “the Herzl of the Palestinian state”, explained that his “efforts have been directed towards the creation of a Palestinian state, not primarily as an end in itself, but as a component part of the two state solution”¹²¹. For the author, the declaration of a state would be an astute move in a chess game to start negotiating from a vantage point.

Segal, whose work indirectly contributed to the Palestinian declaration of independence in 1988, had forecasted the opposition of the United States which actually materialized in 2011 when the PA asked the United Nations to consider its request.

“If the United States continues to exercise its veto in the face of overwhelming worldwide support – he wrote – this will be one more vehicle for motivating US efforts to

¹²⁰ Saad Nimr, course “The Palestinian Question”, Palestinian and Arabic Studies Program, University of Birzeit, June 27th 2012.

¹²¹ Jerome M. Segal. *Creating the Palestinian State. A strategy for Peace*. Lawrence Hill Books, Chicago 1989. pg. ix

gain Israeli acceptance of the new state”¹²². In other words, the isolation of Israel and the United States would be useful to obtain specific Palestinian goals.

Another approach which includes a “diplomatic game” suggests that “the question of whether or not to enter negotiations at a certain point is no longer a strategic matter but becomes a tactical and circumstantial one, subject to calculations of benefit and cost”.¹²³

A synthesis of this two approaches seems to have been adopted by president Abbas, who has been promoting the bid for statehood and the possibility of negotiating as tools to unblock a situation which appears frozen.

4. A strategic option, but a Plan B is needed

Another strategic plan, which may include the bid for statehood, was spelled out by the Palestine Strategy Group, which underlines that, given the current situation, Palestinians should be ready for a Plan B: a different strategy towards a different goal, which is recognition of civil and political rights towards a one-state solution.

In August 2011 the group released a report entitled *Towards New Strategies For Palestinian National Liberation*. The authors called the leadership and the people of Palestine to “think strategically”, focusing not only on short term developments (such as local elections or confrontations between factions) but rather on long term goals.

The authors, members of the Middle East program of the independent think tank Oxford Research Group, argue that in order to achieve a Palestinian state one strategic option is to secure “Arab, regional and international support and recognition of Palestinian national goals”¹²⁴. In this framework, seeking recognition at the United Nations was extremely useful.

122 Jerome M. Segal. *Creating the Palestinian State. A strategy for Peace*. Lawrence Hill Books, Chicago 1989, pg. 86

123 Camille Mansour, “Toward a New Palestinian Negotiation Paradigm” in *Journal of Palestine Studies*, Vol. 40, No. 3 (Spring 2011), University of California, pg. 56

124 The Palestine Strategy Group. *Towards New Strategies For Palestinian National Liberation*. Ramallah, August 2011 Pg. 8

But Palestinians should work on a Plan B, to obtain a fair solution within the context of one state. For the Palestinian Strategy Group, the “goal would no longer be self-determination (...) the entire resistance effort would be poured into the demand for civic equality throughout the whole of Palestine” and “it would make the Palestinian struggle more akin to the fight against apartheid in South Africa, with which there are both similarities and dissimilarities”¹²⁵.

Saad Nimr himself, after fighting for years for a two-state solution and promoting that idea at the University of Birzeit, is more doubtful. Around five years ago, he realized that another path is possible, maybe even inescapable. “It is about time that we will turn towards a one state-solution”.¹²⁶

The approach of the PSG indirectly shows that different and apparently contradictory instances coexist in the Palestinian society. According to a poll released by the Jerusalem Media and Communication Centre, the idea of binational state, which gained only 18.3% of consensus among Palestinians in 2001, raised to 34% in April 2010 (while 43.9% supported the two-state solution)¹²⁷. This percentage might grow even more, as Nimr predicted, and constitute an important variable in the developments that will take place in the next years.

5. If the solution is going to be one state, why asking for two?

According to other intellectuals, the window of opportunity to obtain a Palestinian state is already closed. For them it would be more useful to focus directly on fighting for civil rights towards the goal of a one-state solution.

¹²⁵ The Palestine Strategy Group. *Towards New Strategies For Palestinian National Liberation*. Ramallah, August 2011 Pg. 8

¹²⁶ Saad Nimr, course “The Palestinian Question”, University of Birzeit, July 2nd 2012

¹²⁷ Jerusalem Media and Communication Centre. *Poll: One-state solution gains ground*. April 21st, 2010. At <http://www.jmcc.org/news.aspx?id=759>

Few days before the bid, Ali Abunimah, an advocate of a one-state solution¹²⁸ and founder of the website *Electronic Intifada*, criticized the bid stressing that “Palestinians and Israelis are not in a situation of equals negotiating an end to a dispute but are, respectively, colonized and colonizer, much as black and whites were in South Africa” and “this truth must be recognized, and pushing for such recognition would resonate far more with the Palestinian public than empty statehood talk”.¹²⁹

Similar, but from a different perspective, is the critique of Yossi Beilin, one of the architects of the Oslo Accords together with Abbas. Beilin, in a recent article on *Foreign Affairs*, underlines that the accords they signed are betrayed and, in order to fight for change, the only way is a spectacular act such as “giving back the key of Palestine to Israel”¹³⁰.

This move would force it to act in a different way, Beilin argues, because Israel would face the consequences of a one-state reality, which are now softened by the very existence of the Palestinian Authority. Abbas should “remain as the head of the Palestine Liberation Organization, which will give (him) the authority to lead the political negotiations if and when they resume”¹³¹.

Abunimah and Beilin are not alone in talking about a one-state reality. Even Robert Serry, United Nations envoy for the Middle East, warned that the inevitable and probably irreversible outcome of the current situation is a state ruled by just one entity. During a briefing in the Security Council, he said that “if the parties do not grasp the current opportunity (...) we could be moving down the path toward a one-state reality”.¹³²

128 Ali Abunimah. *One country: a bold proposal to end the Israeli-Palestinian impasse*. Metropolitan Books New York 2006

129 Ali Abunimah, “A Formal Funeral for the Two-State Solution. How the PA's Statehood Bid Sidelines Palestinians”. published on the website of *Foreign Affairs*, on September 19, 2011

130 Yossi Beilin. “Dear Abu Mazen: End This Farce”, published on the website of *Foreign Affairs*. April 4th, 2012

131 *ibidem*

132 Ma'an News Agency, *UN envoy warns of 'one-state reality'*, published on 29 May 2012 on <http://www.maannews.net/eng/ViewDetails.aspx?ID=490489>

CONCLUSIONS

At the beginning of 2014, a negotiated solution between Israelis and Palestinians appears extremely difficult in spite of the efforts by US secretary of state John Kerry. Yet, the recent developments over the Iranian nuclear program show that negotiations are possible even after years of stalemate.

In addition, US president Obama did promise an independent Palestinian State and he did so at the UN. The White House and the Department of State are certainly working hard towards a negotiated solution. The more the political tenure of Obama comes closer to an end, the more likely is a scenario similar to the one that originated the Oslo agreements: a US president at his second and final mandate worried less on daily politics than on offering a legacy to posterity.

Obama could pour himself, as Bill Clinton did, in trying to find a solution acceptable for Israel, the “new” State of Palestine and the international community. The most important difference in this parallelism is that the current prime minister of the Jewish state, who could potentially be still in power when Obama leaves office, seems not willing to concede much in the negotiations sponsored by the United States.

On the Palestinian side, the leadership is weak, not holding the effective power which should accompany and characterize statehood: president Mahmoud Abbas and his government rule under heavy restrictions posed by the Israeli occupation. The territory they declared as a state at the United Nations is actually used by citizens of another state to build Jewish villages, with the final goal to enlarge Israel.

In addition, Abbas has significant problems of legitimacy: in Palestine elections have not been called since the traumatic experience of 2006, when Fatah broke its alliance with Hamas, which is now independently ruling the Gaza Strip. That area is indirectly controlled by Israel, which can decide on its borders and its airspace: in other words, it can rule on the entrance of people and goods necessary to the vital needs of the inhabitants.

It is argued that sooner or later this situation will explode, since the reality of occupation cannot be tolerated for so long. This is certainly more probable in the Gaza Strip than in the West Bank. In the former, the humanitarian situation is so dire that it becomes often unbearable. In the latter, normal life can substitute momentarily the hardships of occupation, in a precarious balance that could preserve stability and help the settlements' activities by Israel.

Given this political context, the Palestinian initiative at the UN does not seem to have changed the situation on the ground. The most important consequences of recognition, though, lay probably in the potential legal ramifications analyzed in Part III. The possibility of having the jurisdiction of the International Criminal Court in the area declared as a state is debated, but it seems that Palestinian leadership could push the request lodged in 2009 with significant chances of opening the paths to investigations and trials.

Different European leaders, realizing this likely scenario, stressed that support for resolution 19 was conditioned to a freeze of the Palestinian activities at the ICC. Key, in this respect, is the "manifesto" signed by Javier Solana and Marti Ahtisaari. Their suggestion to the leadership of Ramallah is to not "pursue ICC jurisdiction for a significant period, drawing the sting from this troubling issue"¹³³.

The Palestinian leadership appears to have accepted the request by the European leaders, further reiterated by Kerry, who asked the Palestinians not to proceed with their "recognition offensive". In exchange, Washington is trying to persuade Israel to cede on some issues such as political prisoners and settlements.

Some results were obtained after Kerry's mediation, such as the recent liberation of 104 Palestinian prisoners. Less clear is the result on the E1 settlements, whose construction

¹³³ Marti Ahtisaari and Javier Solana. *Ten Reason for a European 'Yes'* in *The International Herald Tribune*. 16 September 2011

officially started in response to the vote at the General Assembly. It could be said that the Israeli leadership was able to embed successfully the UN initiative within a negotiating framework. The threat of more settlements, coupled with diplomatic pressure from the United States and Europe, seems to have blocked the Palestine move for some time.

Independent NGOs as Al Haq, or international experts such as Whitebeck, criticized the decision to slow the initiative to recognize statehood in international fora. Their critique seems legitimate since the negotiations conducted by Kerry do not seem to bring about significant results. Yet, as in the recent case of Iran and the less recent case of Oslo, quiet and hidden talks could be underway, and ultimately provide a breakthrough.

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