
FRIENDS OF ISRAEL INITIATIVE

Upgrading the Palestinian Observer Mission at the UN General Assembly to a Non-Member State: The Negative Consequences

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After having failed to obtain full UN membership for a Palestinian state at the UN Security Council in 2011, Palestinian Authority President Mahmoud Abbas (Abu Mazen) announced during his UN address on September 27, 2012 that he would seek to have the UN General Assembly adopt a resolution defining the Palestine Observer Mission as a non-member state. This is likely to occur during the second half of November 2012. By seeking to enhance the international status of the Palestinian Authority in the UN General Assembly, rather than in the UN Security Council, Abbas understood that he would not face the threat of a US veto, though he still would not acquire the formal status of a member state of the United Nations.

The Palestinians have sought to enhance their international status using the UN General Assembly for many years. Originally, the Palestine Liberation Organization (PLO) was accepted by the UN as an observer back in 1974. The UN had other non-state observers like the Arab League, the Islamic Conference, and the Organization of African States. There have been observers like the Holy See (the Vatican) that were non-member states.¹ The UN also used this kind of representation for movements that were not strictly states under international law but might evolve in this direction like the Southwest African Peoples' Organization (SWAPO) which was granted observer status in 1976.

By 1988, the UN General Assembly decided that the PLO Observer Mission should henceforth be called "Palestine," but it carefully stipulated that this change in nomenclature would be executed without prejudice to the "status and functions" of the PLO within the UN system. In short, despite its new designation, the PLO Observer mission did not represent a state. Presently, Abbas hopes to get the UN General Assembly to adopt a resolution which will establish that the Palestinian Authority, created as a result of the Oslo Agreements between Israel and the PLO, can be regarded as a state.

Why would this new designation of the Palestinian Authority as a state be so controversial? First, it would be regarded by Israel as a material breach of the Oslo II Interim Agreement from September 28, 1995 that stated: “Neither side shall initiative or take any step that will change the status of the West Bank and the Gaza Strip pending the outcome of permanent status negotiations.” Israel and the PLO committed themselves to resolving their differences at the negotiating table. By turning to the UN, Abbas would be operating unilaterally instead of seeking to resolve the Israeli-Palestinian conflict bilaterally.

Second, the language of the resolution is likely to contain phraseology that pre-judges the outcome of negotiations on critical issues like borders, which, according to the Oslo Agreements, are supposed to be decided at the peace table. The future status of Jerusalem was also designated by Oslo to be a subject of negotiations, as well. Yet in his UN address this September 27 2012, Abbas spoke about “the realization of the independence of the State of Palestine, with East Jerusalem as is capital, *over the entire territory occupied by Israel since 1967...*(emphasis added).”²

It appeared that Abbas was circumventing negotiations and using the UN to establish a *fait accompli* on borders. This is fact has become a common motif in Palestinian UN initiatives. A year ago, when he sought UN membership through the Security Council, he made clear that the application for admission of Palestine would be “on the basis of 4 June 1967 borders, with *Al-Quds Al-Sharif* (Arabic for Jerusalem) as its capital.”

Third, since January 2009, the Palestinian Authority has sought to involve the International Criminal Court (ICC) in the Israeli-Palestinian Conflict. As a rule, the PA has been politicizing international institutions with false charges against Israel that have been ultimately disproven as in the cases of Operation Defensive Shield in 2002 and Operation Cast Lead in 2009. In fact, Abbas admitted in a *New York Times* op-ed on May 16, 2011, that he was seeking the admission of a Palestinian state to the UN because it “would pave the way for the internationalization of the conflict as a legal matter, not only a political one.”³

The Rome Statute, upon which the work of the ICC is based, establishes that its jurisdiction applies to signatories to the statute, as well as to states, which are not signatories, that seek its involvement on an *ad hoc* basis. The PA has been trying to get the ICC Prosecutor to designate it as a state in order to facilitate this process, but the previous prosecutor was reluctant to

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take this step. Defining the Palestinians as a non-member state of the UN could have a profound impact on the decision of the current ICC prosecutor and open-up the floodgates of a wave of politicized charges against the officers of the Israel Defense Forces.

What Happened with the Last Request for Palestinian Admission to the UN?

As already noted, Mahmoud Abbas sought in September 2011 to get “Palestine” admitted to the UN as member state. That procedure required the approval of the UN Security Council. Reportedly, the UN Security Council was divided with Russia, China, Brazil, India, Lebanon and South Africa supported the Palestinian request. The US opposed the Palestinian initiative, while Britain, France and Colombia indicated that they would abstain if there was a vote.⁴ The Palestinians did not have the required nine votes needed, according to the UN Charter, to get the Security Council to adopt a resolution admitting the Palestinian state to the UN. In the meantime, the Palestinian application was dealt with on September 27 and September 28, at which time the application was referred to the Committee on the Admission of New Members. Its report was issued on November 11, 2011.⁵

It is instructive to review what were the results of this process last year and what were the issues raised by the report. For example, while the Palestinians’ aspiration for statehood was generally supported, questions were raised over whether Palestine exercised effective control over the territory it claimed. There were criteria for statehood that were established under 1933 Montevideo Convention: the state needed a defined territory, a permanent population, and a government as well as a capacity to enter into relations with other states.

Yet in the Palestinian case, Hamas was the *de facto* authority over the Gaza Strip, which was part of the territory that the Palestinian Authority claimed. The Palestinian Authority could not claim that it was the government of the Palestinians in a large part of the territory that it claimed--Hamas was in control of 40 per cent of the Palestinian population. Hamas control over Gaza raised another issue in the view of the Security Council report. States applying for UN membership are supposed to be “peace-loving” countries. Yet Hamas refused to renounce terrorism and violence. It retained its stated aim to destroy the State of Israel. Hamas, it should be added, is defined as

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an international terrorist organization by both the US and the European Union. If the Palestinian request for UN admission included the territory of the Gaza Strip and its regime, then it would be difficult to characterize “Palestine” as a peace-loving state.

These sorts of considerations produced a split in the UN Security Council last year, so that some of its members had “serious questions about the application.” As a result these same members felt that the Palestinian application “did not meet the requirements for membership” in the UN. Beyond the analysis of the UN Security Council last year with respect to the admission of Palestine to the UN, there are other considerations which must be taken into account in the debate over whether the UN General Assembly should determine that it is qualified to be regarded as a non-member state observer in the General Assembly.

The Palestinian Request for Non-Member State Status – A Material Breach of the Oslo Accords

As already noted, the 1995 Israeli-Palestinian Interim Agreement, also known as Oslo 2, clearly established that neither side was to take steps that “change the status of the West Bank and the Gaza Strip” before the conclusion of the negotiations between them over the permanent status of these territories. By seeking UN approval for changing the legal status of these territories as a state, the Palestinians are violating a core commitment to which they agreed when they signed the Oslo Agreements. Moreover, the Palestinians undertook in the Oslo Accords that some of the most important issues of permanent status, like borders and the future of Jerusalem, would be resolved in negotiations. Trying to determine their status through UN resolutions violates that commitment.

This Palestinian initiative also puts a number of countries in an awkward position. The US, Russia, the European Union, Norway, Egypt and Jordan actually signed Oslo II as witnesses. How for example can the EU then support a Palestinian initiative at the UN which violates this core commitment in an international agreement, when the EU itself is a signatory to the agreement in question? Can EU countries go ahead and recognize a Palestinian state when they then become active participants in changing the status of the territories whose fate is supposed to be determined only by negotiations?

Historically, the EU has been reticent at times for a number of reasons about approving resolutions to upgrade the Palestine observer mission at the UN. In December 1997, rather than support the upgrade resolution, the EU under the Luxembourg presidency, proposed an amendment by which the General Assembly would review the question of whether the changes proposed for the Palestine observer mission were necessary. The amendment requested that the Secretary-General report on this issue to the General Assembly, as well. The EU amendment was adopted on December 7, 1997, against the wishes of the Arab bloc.⁶ This episode illustrated the power of the EU, when acting as a bloc, in the context of the UN General Assembly.

Prejudging the Outcome of Negotiations

When Israel and the PLO signed on September 13, 1993 the first of the Oslo Agreements, known as the Declaration of Principles (DOP), they undertook commitments with regard to future permanent status negotiations. According to Article V of the DOP, both parties agreed:

Permanent status negotiations will commence as soon as possible...*It is understood that these negotiations shall cover remaining issues, including: Jerusalem, refugees, settlements, security arrangements, borders, relations and cooperation with other neighbors, and other issues of common interest.* (emphasis added)

In other words two very specific issues that the parties agreed would be negotiated—borders and Jerusalem-- are likely to be affected by a UN General Assembly resolution establishing that the Palestine Observer Mission is a non-member state, especially if the draft resolution specifically states that the boundaries of the Palestinian state are the 1967 lines, with East Jerusalem being its capital. The Palestinians have given no indication that they plan to withdraw this territorial element from their UN initiative.

It should be added that at the outset of the Israeli-Palestinian peace process, the PLO Chairman Yasser Arafat also made a separate undertaking in an exchange of letters with Prime Minister Yitzhak Rabin. In his letter dated September 9, 1993, Arafat wrote: “The PLO commits itself to the Middle East peace process, and to a peaceful resolution of the conflict between the two sides and declares that all outstanding issues relating to permanent status will be resolved through negotiations.”

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The letter illustrates one of central problems with the Palestinian initiative at the UN: rather than resolve his differences with Israel through negotiations, Abbas wants to the UN to determine key components of permanent status by means of UN resolutions. By doing so he places the international community in a dilemma: for while there is widespread support for a resolution to the Israeli-Palestinian conflict, there is a clear preference for a negotiated resolution to the conflict. Backing the Palestinian effort to upgrade their status at the UN to a non-member state, contradicts the commitment of the international community to a negotiated solution, especially when the very issues designated for permanent status talks are compromised by this action.

Legal Implications for the International Criminal Court

The upgrading of the Palestine Observer Mission to a non-member state in the UN General Assembly also has legal implications, especially for the International Criminal Court. Back in January 2009, the Palestinian Authority's Minister of Justice, Ali Kashan, sent an official communication to the Office of the Prosecutor of the International Criminal Court recognizing the jurisdiction of the ICC "in the territory of Palestine" retroactively to July 1, 2002. Normally the ICC involves itself in allegations of war crimes in the territory of states that signed the Rome Statute. The PA invoked Article 12, Paragraph 3, of the Rome Statute, which allows non-signatory states to turn to the ICC on an ad-hoc basis. The legal prerequisite for the ICC taking up a case under Article 12.3 is that the request come from a "state," which lead the Office of the Prosecutor to take up the question of whether the Palestinian Authority qualified as a state or not.

The Office of the ICC Prosecutor issued its decision on April 3, 2012. It decided that it was not up to the ICC Prosecutor to decide whether the PA qualified as a state: "Thus, 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."⁷ In other words, if the UN General Assembly decides that Palestine is a non-member state, then such a determination can have implications for the Palestinian plan to involve the ICC in the Israeli-Palestinian conflict.

A clear purpose of the ICC is to protect peoples from war crimes that are not prosecuted domestically by countries whose military or civilian leaders have been alleged to have carried them out. The idea that no individual should

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have impunity is important. But in the Israeli-Palestinian case, there is a history of Palestinian use of international institutions in order to charge the Israeli Defense Forces (IDF) with war crimes that were eventually shown to have not taken place. This occurred in 2002, in the aftermath of Operation Defensive Shield, at which time the IDF sought to uproot the infrastructure of terrorism that had grown in West Bank cities and led to a wave of suicide bombing attacks that left more than a thousand Israeli fatalities. Thus while the Palestinian Authority chief negotiator, Saeb Erekat, charged that Israel had killed 500 civilians in the battle over Jenin during those hostilities, Secretary General Kofi Annan's report showed that a total of 52 had been killed, many of whom were combatants.

This pattern repeated itself in 2009 when Israeli cities came under repeated rocket attacks from the Hamas-controlled Gaza Strip and Israel launched Operation Cast Iron to bring a halt to the rocket launches. The Palestinians then turned to the UN Human Rights Council which established a fact-finding commission that was eventually led by Justice Richard Goldstone of South Africa. While the Goldstone Report charged that the IDF had deliberately killed Palestinian civilians, on the basis of the material it received, Goldstone himself later repudiated this principle conclusion in his own report when he wrote in the *Washington Post* on April 11, 2011 that "civilians were not intentionally targeted as a matter of policy." On the basis of its own experience, Israel is concerned that the IDF will be exposed to dozens of false charges against its officers, as part of a new type of politicized "lawfare" that will be conducted against them, once the ICC becomes a part of the Israeli-Palestinian conflict. This could be a direct result of the upgrade of the Palestine mission at the UN to a non-member state.

Thus, it is in the interest of the international community to dissuade the Palestinians from going through with their plan to upgrade their UN representation to that of a non-member state. This initiative violates a core commitment of the Oslo Agreements and only serves to erode their standing. Since Israel would view the Palestinian action as a material breach of a signed agreement, it would likely feel that it was its right to take strong countermeasures against the Palestinian Authority. What would be the eventual regional consequences of this dynamic is difficult to predict. The EU in particular cannot ignore this aspect of the issue, since it signed the Oslo 2 Interim Agreement as a witness.

Second, the Palestinian move at the UN undermines the principle of direct negotiations between the parties since it is likely to deal with issues that are

supposed to be left to negotiations. Finally, the Palestinian upgrade plan can influence vital Israeli security interests if the ICC, as a result of what the General Assembly does, interjects itself into the Israeli-Palestinian conflict. Should the EU as a whole inform the Palestinian leadership that it will vote against this effort, it may be possible to get it to suspend it with the aim of returning to the negotiating table without preconditions.

Notas

1. Martin Wahlisch, "Beyond a Seat in the United Nations: Palestine's U.N. Membership and International Law," *Harvard International Law Journal*, v. 53 (June 2012):226-267. Switzerland was a non-member state observer until September 2002, when it took up its seat as a full member of the United Nations.
2. Mahmoud Abbas, "Abbas' Remarks to the UN General Assembly," September 2012," Council on Foreign Relations, September 27, 2012.
3. Mahmoud Abbas, "The Long Overdue Palestinian State," *New York Times*, May 16, 2011.
4. "Security Council Divided on Palestinian U.N. Membership Bid: Draft Report," *AlArabiya*, November 8, 2011.
5. "Report of the Committee on the Admission of New Members concerning the application of Palestine for admission to membership in the United Nations," UN Security Council, November 11, 2011.
6. "General Assembly Defers Action on Proposal to Enhance Status of Palestine Observer at United Nations," UN General Assembly Press Release GA/9378, December 9, 1997.
7. "Situation in Palestine," Office of the Prosecutor, International Criminal Court, April 3, 2012.

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