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Opinion

'Lawfare' in the Conflict between Israel and Palestine?

*Kenneth Manusama**

Introduction

On November 29th, 2012, the United Nations General Assembly voted to grant Palestine non-member observer State status. The core question is whether this newly found status for the Palestinians will be beneficial or disadvantageous to both the Palestinians and the peace process. Non-member observer State status at the UN signifies recognition of Palestinian statehood, and as such introduces a host of legal issues into one of the most entrenched and protracted conflicts in the world. Was it the birth of a new state that inaugurates the beginning of the end to the Israeli-Palestinian conflict, or did the acceptance of Palestine as a non-member observer State merely introduce a new phase and battlefield? The term 'lawfare' comes to mind. The notion of 'lawfare' can be either defined as "the use of the law as a weapon of war", "the abuse of Western laws and judicial systems to achieve strategic military or political ends", or "the negative manipulation of international and national human rights laws to accomplish purposes other than, or contrary to, those for which they were originally enacted".[1] It has, therefore, a definite negative connotation. But it is the use of the law in the relationship between Israel and Palestine, which may be the most important consequence of Palestinian statehood.

This short opinion article explores the legal effects of Palestine's newfound status and the potential legal battles in the future. Will the introduction of international legal processes into the dispute entrench the parties in their positions and exacerbate the conflict now that they stand on equal legal footing? Or does international law provide a previously unexplored avenue towards peace? Despite the fact that Palestine has now implicitly been recognised as a sovereign state, much can be questioned about the Palestinian claim and status. Therefore, the question of whether Palestine is truly a sovereign state will be discussed first.

I. Is Palestine a State?

The birth of a new state in international law and international relations is often a curious mix of objective legal criteria, unclear rights, political recognition and the realities of international life. The legal principle of the right to self-determination for peoples lies at the heart of any claim to statehood. Hard-liners and extremists have argued that the Palestinians do not constitute a 'people' in the legal sense and, therefore, do not enjoy a right to self-determination. Based on historic fact and conjecture, this position, while valid as testimony to the murky decolonisation process in the region after World War II, is generally unhelpful in relation to the reality of the situation. The UN has recognised the right of the Palestinian people to self-determination and the Palestinian Liberation Organization (PLO) being the sole

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* *Dr. Kenneth Manusama is Assistant Professor of International Law at the Transnational Legal Studies Department at the Faculty of Law of the Vrije Universiteit Amsterdam. In addition, he is also the co-founder of the Vitoria Institute for International Law and Policy.*

[1] See e.g. http://www.thelawfareproject.org/what-is-lawfare.html; http://www.lawfareblog.com/about/. See also generally the comprehensive special issue of the *Case Western Reserve Journal of International Law*, Volume 43, No. 1-2, Spring-Fall.

representative of the entire Palestinian people, even though half of the Palestinian people live in the diaspora. The PLO already proclaimed an independent State in 1988 on the basis of the borders prior to the war of 1967. Moreover, that state has already been recognised by more than 100 countries (out of the almost 200 countries in the world), and it is claimed that the remaining issue in the peace process is or should be the determination of the border between Israel and Palestine. UN membership would be the ultimate recognition of Palestine and would put its status as an independent State beyond doubt. Many states withhold their recognition because they fear that such recognition would be an obstacle to the peace process between Israel and Palestine. Opponents of Palestinian statehood argue that issues regarding effective governance and territory must first be solved at the negotiating table and cannot be forced upon parties through statehood.

As any international law textbook will outline, an entity proclaiming independence and claiming statehood must meet, at a minimum, certain objective criteria such as the presence of defined territory, a population, effective government and the capacity to enter into relations with other states. One could argue that the Palestinian entity fails to meet the first and third of these criteria. A hundred percent agreement on borders between States is not required and does not constitute a barrier to statehood. However, the fundamental nature and extent of the disagreement between Palestinians and Israelis on the border issue – i.e. Jerusalem – puts the fulfilment of the 'territory' requirement in some doubt.

More problematic is the existence of an effective government – or lack thereof – over proclaimed territory due to both internal and external factors. Over the years, control over the Palestinian territories by the ruling faction, organisation, or even internationally recognised authority has never been complete or absolute. Most recently, the deep split between the Islamist group Hamas, which controls the Gaza Strip, and the more moderate Palestinian Authority, which largely dominates the Palestinian population in the West Bank and controls some of its territory, dramatically illustrates this point, as the latter has no effective control over the former. Or does the proclaimed state of Palestine include the West Bank only? Moreover, Israel has *de facto* and *de jure* control over the airspace and territorial waters of the Palestinian Territories, as well as the border crossings. This has not changed since the Palestinian change of status and neither has the status of the Palestinian Territories as Occupied Territories under international humanitarian law.

Admittedly, these questions regarding the fulfilment of the objective criteria for statehood stand in stark contrast to the powerful role played by the act of recognition of the new State by other States. Little attention is commonly drawn to the fact mentioned earlier that Palestine had already declared independence in 1988 and has been recognised as such by over 100 states. Although a multitude of recognitions is not a constitutive requirement for statehood, it is a reflection of the political view of any claim to statehood and of great importance to the ability of a new state to act as such on the international stage. A comparison can be made with, for instance, Taiwan, which is not a recognised state or a UN member for (geo-)political purposes although it displays all the objective characteristics of a fully independent State. Conversely, a Palestinian state, although arguably not displaying all objective characteristics, could nevertheless be recognised as a State also for political purposes and therefore be recognised, or, as has transpired, be granted the status of non-member observer State at the United Nations.

It is, thus, more political art than legal science that determines whether a new state is in existence and is capable of acting like a state. Nevertheless, one final legal caveat may be inserted. The principle of legality in the establishment of new states dictates that recognition of a new state must be withheld if the new state is brought into existence through violations of international law. That is the case, for example, when a third state uses force in support of

an entity attempting to secede from an existing state in violation of the principle of non-intervention and perhaps the prohibition on the threat or use of force. More relevant is the obligation not to recognise a new entity as a sovereign State when a rebel group violates international law, for instance, through the commission of international crimes. In the Israel-Palestinian context, the question should be asked whether or not the independence of Palestine has come about, in part, through the use of terrorist actions. Such actions violate human rights law if the conflict cannot be considered to be an armed conflict, and violate the laws of war if it is. Yet, even in the face of international crimes being committed, admittedly on both sides, the legal argument does not sway political opinion.

II. The international legal issues at play

The international legal principles involved in the establishment of new states are indeed murky at best, but it is almost ironic that international law is largely ignored in that area, while at the same time it is hailed as the saviour of the peace process. On several occasions before and after the 'birth' of Palestine, the Palestinian Authority speculated on hauling Israeli officials before the ICC for crimes against humanity and war crimes. Indeed, in 2009 Palestine had requested the Office of the Prosecutor to launch an investigation into crimes committed on its territory, as an ad hoc recognition of the ICC's jurisdiction under Article 12(3) Rome Statute. However, the Office of the Prosecutor rebuffed Palestine as it did not meet the preconditions for such a request, because it was unclear whether Palestine was a state. Moreover the Office of the Prosecutor does not have the authority to decide on such a matter.[2] After becoming a non-member state observer to the UN, it is highly likely that Palestine will be able to refer alleged violations of international criminal law committed on its territory. Therefore, it can set aside its futile hope that the United Nations Security Council may exercise its prerogative under the Rome Statute and refer the situation to the ICC. The United States has a history of vetoing draft resolutions on the Israel-Palestinian conflict, as well a difficult, albeit thawing, relationship with the ICC. Any resolution before the Council on ICC referral would be most certainly vetoed as well. Of course, Palestinian statehood also exposes Palestinians to the jurisdiction of the ICC. Particularly in the case of Hamas and the rocket launches from Gaza, Israel could also have grounds for referring Palestinian individuals to the ICC for at least war crimes. Whatever the legal merits of the allegations from both sides, international criminal law is not always conducive to a peace process if it means that the warring parties have more to lose than to gain from pursuing peace. The intractable conflicts in Africa are testimony to the negative incentives that can emanate from international criminal law: better to fight than to be brought to The Hague. Given the history and level of entrenchment of the parties in this conflict, it is unlikely that the threat of an ICC investigation would move either Israel or Palestine towards a compromise.

In addition to the ICC, the International Court of Justice (ICJ) could provide another legal arena for the two states to lock horns. It could be a more tranquil forum, on a more abstract level, as its jurisdiction only covers states and not individuals. The legal questions would therefore be of a very different nature. Yet it is questionable whether either side sees any merit or advantage –legal or political – in pursuing a case before the ICJ. Internationally, there is broad agreement on several legal issues in this conflict. For years, many states have argued - and others have conceded - that for the purposes of the applicability of the laws of war the Israel-Palestinian conflict is of a non-international nature. Israel too, has implicitly recognised Hamas as a party in a (non-)international armed conflict by basing and implementing its naval blockade of Gaza on the 1994 San Remo Manual on International Law

[2] Update on the situation in Palestine, Office of the Prosecutor, available at http://www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf

Applicable to Armed Conflicts at Sea, a recognised codification of customary international law. It has even recognised that the borders between the two states must be drawn on the basis of the 1967 borders, save for Jerusalem. Moreover, the ICJ opined in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* Advisory Opinion that the 1949 Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War is *de jure* applicable, whereas Israel has only applied it *de facto*. In addition, the ICJ summarily dismissed Israel's claim to self-defence under Article 51 of the UN Charter because it only relates to armed attacks from one state against another. However, Israel can now firmly put forward a claim to self-defence against another state (as can Palestine, of course). With regard to the continuation of the building of Jewish settlements in the Occupied Palestinian Territories, international political and legal opinion has been clear as well. The ICJ in the mentioned Advisory Opinion determined most authoritatively that these settlements are illegal under international humanitarian law. That widely held opinion does not change with the birth of the Palestinian state. That event only makes the issue more pressing.

The elevation of Palestine to statehood, albeit more for general political reasons than legal merit, has brought the two sides on equal legal footing. Yet, despite the initial celebrations, it could be argued that such footing has brought little to the peace process. Most legal issues have already been decided, and the new international criminal avenue may only exacerbate the animosity between the parties. Perhaps more importantly, the law is in danger of being used, although with merit, but with clear nefarious motivations and pure political gain in mind on both sides. Political and reputational pressure to extract more concessions from the other side seem to motivate legal action, rather than retribution and justice for both the victims of the conflict and the communities involved, as the relevant laws actually intended. Sounds like lawfare.