

Opinion

THE CREATION OF THE NON-MEMBER OBSERVER STATE OF PALESTINE: A LEGAL ANALYSIS OF UN GENERAL ASSEMBLY RESOLUTION 67/19

*Shadi Sakran**

Keywords: Palestinian Statehood; Resolution 67/19; Collective recognition;
International law.

Introduction

The pursuit of the Palestinians' aspiration for an independent, sovereign and recognized 'state' has always been met with multiple complications, both legally and politically. After almost seven decades of struggle, the issue of fulfilling the classical conditions of statehood is still contentious.¹ On 29 November 2012, the UN General Assembly (GA) adopted Resolution 67/19 titled 'Palestine as a non-member Observer state.'²

This opinion article will provide an outlook to the Palestinians' complicated status within the UN in three subsequent parts. The first part briefly describes the development of Palestine's status in the UN through GA resolutions and practice, before the adoption of Resolution 67/19. The second part analyses the adoption of this Resolution, concentrating on the legal question of whether or not the Resolution can construct Palestine as a state. The final part provides an overview to changes which occurred following the adoption of Resolution 67/19.

I. The Evolution of Palestine's status within the UN until Resolution 67/19

* *Doctoral student, Kobe University, Graduate School of International Cooperation Studies. L.L.M, Tel-Aviv University (2015); L.L.B and B.A in Asian Studies, University of Haifa (2012). The author would like to thank Professor Mika Hayashi for her supervision, insights and comments. Email: sakran.shadi@gmail.com.*

¹ For classical observations regarding Palestinian statehood and fulfilling the traditional elements of statehood, see: F. Boyle, 'The Creation of the State of Palestine' *European Journal of International Law* 1990-1, pp. 301-306. On contrast, see: J. Crawford, 'The Creation of the State of Palestine: Too Much Too Soon?' *European Journal of International Law* 1990-1, p. 307

² UN General Assembly, *Status of Palestine in the United Nations*, Resolution 67/19, UN Doc. A/RES/67/19, 29 November 2012.

The evolution of Palestine's status within the UN regime is elusively complicated. The complications first started in 1947, when the GA recommended dividing Historical Palestine, which was under the Mandate Administration of the British, into two separate states, a Jewish State (55% of the land) and an Arab State (45% of the land), with Jerusalem as a *corpus separatum*.³ The Zionist party accepted the Partition Plan, while the Palestinians and other Arab countries rejected it, eventually leading to warfare.⁴ By the time British soldiers finished withdrawing from the area in 1948 the State of Israel was created, but 'Palestine', or what was left of it (today known as the territories of the West Bank, East Jerusalem and The Gaza Strip) remains unsettled until this day.⁵

However, within the UN, rights and privileges were granted occasionally to the Palestinians; on 22 November 1974, the GA permitted the Palestinian Liberation Organization (PLO) to participate as an Observer in the sessions of the UN and its organs.⁶ Starting from 1988, the term 'Palestine' replaced the term PLO in all UN documents. A month later, the GA passed a substantive resolution acknowledging the right of the Palestinian people to exercise their own sovereignty over the Palestinian occupied territories of the 1967 borders.⁷ On 7 July 1998, Palestine was granted additional rights as an Observer, including participation in the general debate of the GA, the right to raise points in issues related to Palestine and The Middle East, and the right to make interventions.⁸ Unfortunately none of the mentioned resolutions invoked a reasonable solution for the Palestinian statehood question.⁹

On 23 September 2011, Mahmoud Abbas, Chairman of the Executive Committee of the PLO and president of the State of Palestine, officially submitted an application for full UN membership to Secretary-General Ban Ki-Moon on behalf of the Palestinian people.

³ UN General Assembly, *Future Government of Palestine*, Resolution 181(II), UN Doc. A/RES/181(II), 29 November 1947 (Partition Plan). Additional explanation about the Mandate System in the Historical Palestine and the right of the Palestinian people for self-determination, see: J. Quigley, 'Palestine's Declaration of Independence: Self-Determination and the Right of the Palestinians to Statehood', *Boston University International Law Journal* 1989-7, p. 1.

⁴ On 1948 war and establishment of the state of Israel see: J. Quigley, *The Case for Palestine: An International Law Perspective*, Durham: Duke University Press 2005, pp. 67-86.

⁵ For the argument about the 'birth certificate' of Israel in the international community, see: J. Weiler, 'The Birth of Israel and Palestine – The Ifs of History, Then and Now', *Blog of European Journal of International Law*, 26 September 2011, at: <http://www.ejiltalk.org/the-birth-of-israel-and-palestine-the-ifs-of-history-then-and-now-2/#more-3841> (all internet references accessed on February 2017); Ibid, Quigley 2005, pp. 87-93.

⁶ UN General Assembly, *Observer status for the Palestinian Liberation Organization*, Resolution 3237(XXIX), UN Doc. A/RES/3237(XXIX), 22 November 1974.

⁷ UN General Assembly, *Question of Palestine, Resolution*, 43/177, UN Doc. A/RES/43/177, 15 December 1988.

⁸ UN General Assembly, *Participation of Palestine in the work of the United Nations*, UN Doc A/52/1002, 4 August 1998; General Assembly, *Participation of Palestine in the work of the United Nations*, UN Doc. A/52/1002/Corr.1, 26 October 1998.

⁹ Some may argue that external intervention not necessary leads to effective solution to the dispute. For example, see the excellent book of: R. Barnidge, *Self-Determination, Statehood, and the Law of Negotiation: The Case of Palestine*. Oxford: Hart Publishing 2016, ch. 5.

Abbas stated that: 'Palestine is a peace-loving nation and that it accepts the obligations contained in the Charter of the United Nations and solemnly undertakes to fulfil them'.¹⁰

Instead of granting Palestine full UN membership in 2012, the GA adopted Resolution 67/19 titled 'Status of Palestine in the United Nations', which granted Palestine the status of 'non-member Observer State'.¹¹ The question remained whether, following the adoption of this resolution the status of 'non-member Observer State' can legally construe the status of 'state.'

II. Can GA Resolution 67/19 Constitute a 'State' of Palestine?

The antecedent UN resolutions deviated from proposing an amendment effectively suggesting Palestine's statehood. However, the issue of Palestine's statehood had been challenged in the debate ultimately resulting in Resolution 67/19. This Resolution was adopted in the 44th GA meeting, with a record of 138 votes in favour, nine against, and 41 abstentions.¹² Even with the enormous support for Resolution 67/19, the method of the 'State of Palestine' was politically controversial.¹³ Construing statehood through Resolution 67/19 is not tenable for multiple reasons, which will be discussed briefly in three fundamental arguments.¹⁴

First, the current status of Palestine as 'non-member Observer State' within the UN is lawfully problematic because the Observer status is not regulated in the UN Charter.¹⁵ Article 4 of the UN Charter defines relevant terms for fulfilling full membership only and makes no clear assent regarding the Observer status.¹⁶ The Observer status exists within the UN as a practical course.¹⁷ This title has been given to sixteen entities in the history of

¹⁰ UN General Assembly, *Application of Palestine for Admission to Membership in the United Nations*, UN Doc. A/66/371, 23 September 2011; UN Security Council, *Application of Palestine for Admission to Membership in the United Nations*, UN Doc. S/2011/592, 23 September 2011.

¹¹ UN Doc A/RES/67/19, op para 2 (emphasis added).

¹² 'General Assembly Votes Overwhelmingly to Accord Palestine 'Non-Member Observer State' Status in the United Nations', UN Doc. GA/11317, 29 November 2012, at: <http://www.un.org/press/en/2012/ga11317.doc.htm>.

¹³ UN Doc. A/67/PV.44. Analysis regarding the impact of the quantity of the votes regarding resolution 67/19, see: D. Joyner, 'The UNGA Recognizes the State of Palestine', *Arms Control Law*, 3 December 2012, at: <https://armscontrolaw.com/2012/12/03/the-unga-recognizes-the-state-of-palestine/>.

¹⁴ See the argument of the implicit statehood by J. Vidmar, 'Palestine and the Conceptual Problem of Implicit Statehood' *Chinese Journal of International Law*, 2013-12, p. 21.

¹⁵ *Idem*, p. 24. Vidmar stated:

'[...] In terms of treaty law, it is important to stress that an observer State does not enter into treaty relations with parties to the UN Charter. And as the phrasing 'non-member State' itself suggests, the entity does not become a member of an organization which otherwise prescribes statehood as a prerequisite for membership. Consequently, the status of a 'non-member State' does not bring implicit confirmation of the legal status of a State.'

¹⁶ Explanation about admission to the United Nations Charter and full admission criteria, see: T. Grant, *Admission to the United Nations*, Boston: Martinus Nijhoff Publishers 2009, ch. 1.

¹⁷ For information about the Observer course in the UN, see: P. Eden, 'Palestinian statehood: trapped between rhetoric and realpolitik', *International and Comparative Law Quarterly* 2013-62, pp. 225-226. The Observer status, within the framework of the General Assembly and the Secretary-General, exists in five different forms: '(a) Permanent Observer Missions of Non-Member

the UN.¹⁸ A possible controversial reason behind attaining the Observer status is to avoid settling the pending request of the entity's membership in the UN.¹⁹

Second, the term 'state' has been granted to Palestine through the GA resolution. In general, GA resolutions are 'recommendatory as a rule' and have no binding effect on the external relations between the UN members.²⁰ In other words, outside UN walls UN states members are not obligated to develop any sort of relations or to recognize Palestine as a state. However, according to Ronen, 'in practice they may have legal effect and operative consequences' within the organization sphere.²¹ In addition, the International Court of Justice, in its advisory opinion titled 'Competence of the General Assembly for the Admission of a State to the United Nations'²² recognized the binding effect of GA resolutions decisions in general internal matters, such as the admission of new member states, voting for the budgets and so forth.²³

While the first and second argument dealt specifically with Resolution 67/19, the third argument will raise a dependent point regarding the act of recognition and the circumstances of the adoption. The third argument entails that despite possessing 138 votes in favours out of 193 member states, which is estimated to be 71% of the UN states parties, these do not necessarily recognize Palestine as a feature of sovereign state.²⁴ The case of the Japanese government's position, which was published in 30 November 2012, after the adaption of Resolution 67/19, may well serve as a proper example.²⁵ The Japanese government explained why it voted in favour of Resolution 67/19, but indicates precisely that 'future' State of Palestine will be established together with Israel:

[Japan has long understood the Palestinians' aspiration for building an independent State and has supported the right of the Palestinian people to self-determination. Japan thus endorses a Two-State solution under which Israel and a future independent Palestinian State would co-exist side by side in peace and security. In light of this, Japan voted in favour of this resolution regarding the status of Palestine at the United Nations.]²⁶

States,(b) Observer Status for National Liberations Movements,(c) Observer Status for Regional Organizations and Groups of States, (d) Observer Status for Specialized Agencies, and (e) Observer Status for Non-governmental Organizations (NGO)'.

¹⁸ See Vidmar 2013, supra note 14, p. 24.

¹⁹ See, the article written before the adoption of Resolution 67/19: M. Wahlich, 'Beyond a Seat in the United Nations: Palestine's U.N. Membership and International Law', *Harvard International Law Journal* 2012-53, p. 254.

²⁰ M. Oberg, 'The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ' *European Journal of International Law* 2006-16, p. 883.

²¹ Y. Ronen, 'Recognition of a Palestinian State: Still Too Much Too Soon?', in F. Beatens & C. Chinkin, *Sovereignty, Statehood and State Responsibility: Essays in Honour of James Crawford*, New York: Cambridge University Press 2015, pp. 229-231.

²² Competence of the General Assembly for the Admission of a State to the United Nations, ICJ Reports 1950, 4, p. 8 (emphasis added).

²³ Oberg 2006, supra note 20, p. 883,

²⁴ See Ronen 2015, supra note 21, pp.239-241.

²⁵ 'Adoption of the UN General Assembly resolution regarding the status of Palestine in UN, and Japan's Position', *Ministry of Foreign Affairs of Japan*, 30 November 2012, at: http://www.mofa.go.jp/region/middle_e/palestine/kokuren121130.html.

²⁶ Idem, paragraph II(1).

On the basis of the first two arguments presented above, it is hard to tell if Resolution 67/19, which switched the status of Palestine from Observer to non-member Observer state, indeed legally construed the State of Palestine. And as put forth in the third argument, it is hard to see how Resolution 67/19, even with 138 supporter states, can lead to a collective recognition of Palestinian statehood.

III. The Additional Legal Prerogatives of Resolution 67/19

Despite the ambiguous effect of Resolution 67/19 and whether or not it legally construed the State of Palestine by granting Palestine non-member Observer state status, Palestine continues to take part in GA sessions and participate in international conferences, without voting or submitting its own candidates for any kind of elections or appointments.²⁷ In addition, Palestine is not yet a State Party to the International Court of Justice.²⁸

After the adoption of the Resolution, the UN Office of the Legal Affairs codified several additional changes concerning the way that Palestine should be treated.²⁹ First, upon Mahmoud Abbas's request, the UN accepted to refer to Palestine as 'State of Palestine' or 'non-member Observer State of Palestine' in 'all official documents, meetings, or United Nations meetings'.³⁰ Second, Palestine possesses 'the right to place items on the provisional agenda of the Security Council and the General Assembly'.³¹ Third, Palestine was permitted to join multilateral treaties 'that are open to 'any State' or 'all States' ('all states' formula a treaties) deposited with the Secretary-General'.³²

Conclusion

In my perspective, Resolution 67/19 did not legally constitute the State of Palestine; additionally, it did not offer an explicit solution for the non-ending Palestine statehood question, which has been highly controversial for decades. It must be noted, however, that Resolution 67/19 is influential; it granted Palestine with additional rights within the UN and achieving these rights can be regarded as powerful and additional evidence for statehood or in other words, an entrance ticket to statehood.³³

²⁷ UN General Assembly, *Status of Palestine in the United Nations*, UN Doc A/67/738, 8 March 2013, op para 5.

²⁸ 1945, Statute of the International Court of Justice, 3 Bevens 1179, Art 34(1). According to Article 34(1) 'Only states may be parties in cases before the Court'.

²⁹ See UN Doc A/67/738.

³⁰ *Idem*, op paras 2-3.

³¹ *Issues related to General Assembly resolution 67/19 on the status of Palestine in the United Nations*, UN Doc Interoffice Memorandum, 11 December 2012, op paras 9-12. Available at: <http://palestineun.org/wp-content/uploads/2013/08/012-UN-Memo-regarding-67-19.pdf>.

³² *Ibid*, paras 13-16.

³³ See the insight by J. Cerone, 'Legal Implications of the UN General Assembly Vote to Accord Palestine the Status of Observer State', 16 *American Society of International Law*, 7 December 2012, at: <https://www.asil.org/sites/default/files/insight121208.pdf>. The insight claims that Resolution 67/19 'increase' Palestine's ability 'to act more like a state'.