

## **LEGAL IMPLICATIONS OF PALESTINE'S ENHANCED STATUS IN THE UN GENERAL ASSEMBLY**

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### **1. Introduction**

It has been almost two years since the United Nations General Assembly (UNGA) adopted resolution 67/19, upgrading the status of Palestine in the United Nations (UN). The adoption of this resolution has, naturally, given rise to satisfaction on the Palestinian side. Palestinians saw this decision as a confirmation of their struggle for statehood and a collective recognition of the Palestinian state by the members of the international community. They emphasized the fact that the enhanced status of Palestine will enable future Israeli-Palestinian negotiations to be held on equal terms, i.e. between two sovereign states. Conversely, Israel and the United States have argued that the initiative is a unilateral step, aimed at torpedoing bilateral peace negotiations.

Regardless of the political importance of this resolution for the future of the Middle East Peace Process, it is crucial to consider its legal consequences from a contemporary perspective. It is all the more important because of Palestinian attempts undertaken in recent months to join the United Nations' bodies and international agreements. The Palestinian issue

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has, for many years, been the subject of deliberations of various UN bodies, including the UNGA, the Security Council (UNSC) and the International Court of Justice (ICJ). It encompasses contemporary problems related to wider questions of membership of the UN, the binding force of its organs' decisions and the legal heritage of the Organization. A proper analysis of the implications thereof is particularly difficult given the high level of partisanship presented in legal discourse concerning the Palestinian issue. As James Crawford points out, "it seems to be difficult for international lawyers to write in an impartial and balanced way about the Palestine issue"<sup>1</sup>.

Several scholars have attempted to analyze the issue in question. Some authors<sup>2</sup> tried to envisage the consequences of Palestine's full membership of the UN. Others have concentrated on Palestine's possible accession to international treaties, full admission to the UN<sup>3</sup> and ICC jurisdiction<sup>4</sup>, while still others have sought to analyze the problem of whether a vote in the UNGA constitutes the implicit recognition of Palestinian statehood and whether Palestine fulfills the statehood criteria.<sup>5</sup> The issue was also the subject of a lively debate following the UNGA vote in 1988<sup>6</sup> and after Palestine's admission to UNESCO in 2011.<sup>7</sup>

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<sup>1</sup> J. Crawford, *The Creation of the State of Palestine: Too Much Too Soon?*, 'European Journal of International Law' 1990, vol. 1, at p. 307.

<sup>2</sup> M. Wählisch, *Beyond a Seat in the United Nations: Palestine's U.N. Membership and International Law*, 'Harvard International Law Journal' 2012, vol. 53, at pp. 226-267.

<sup>3</sup> G. Poissonnier, *La Palestine, État non-membre observateur de l'Organisation des Nations Unies*, 'Journal du Droit International' 2013, vol. 140, at pp. 427-454.

<sup>4</sup> J. Cerone, *Legal Implications of the UN General Assembly Vote to Accord Palestine the Status of Observer State*, American Society of International Law Insight, 7.12.2012, <http://www.asil.org/insights/volume/16/issue/37/legal-implications-un-general-assembly-vote-accord-palestine-status>; A. Schwarz, *Die Anerkennung Palästinas als Beobachterstaat: Die Frage der Staatlichkeit und der Zugang zur internationalen Gerichtsbarkeit*, BOFAXE Nr 419D, 7.12.2012, <http://www.ruhr-uni-bochum.de/ifhv/documents/bofaxe/bofaxe2012/419d.pdf>.

<sup>5</sup> J. Vidmar, *Palestine and the Conceptual Problem of Implicit Statehood*, 'Chinese Journal of International Law' 2013, pp. 19-41.

<sup>6</sup> See i.a.: F. A. Boyle. *The Creation of the State of Palestine*, 'European Journal of International Law' 1990, vol. 1, pp. 301-306; J. Crawford, *The Creation of the State of Palestine: Too Much Too Soon?*, 'European Journal of International Law' 1990, vol. 1, pp. 307-313; Boyle, *Create the State of Palestine!*, 'Scandinavian Journal of Development Alternatives' 1998, vol. 7, no. 2-3, at pp. 25-58.

<sup>7</sup> S. Missling, *Der Status Palästinas in internationalen Organisationen*, 'Vereinte Nationen' 2012, vol. 60, no 4, at pp. 147-153.

There are, however, several issues that are neglected in the discussion, such as the consequences of the UNGA's decision for the UN itself, or the legal effects of the resolution resulting from the provisions of the UN Charter and other UN documents. The purpose of this article is to help fill these gaps. It does not purport to offer an entirely comprehensive analysis of all effects of resolution 67/19 but, rather, offers a special focus on the effects on the UN ground, including the UNGA, the UN Secretariat and specialized agencies. This article will not consider whether Palestine meets the international law criteria necessary for it to be recognized as a state. Instead, it focuses on the legal implications of Palestine's new status within the UN and analyses the ways in which Palestinians may benefit from the newly-acquired position.

A study of Palestine's legal status within the UN is difficult since, prior to resolution 67/19, Palestinians already possessed several rights granted in the past to non-member states.<sup>8</sup> Palestine obtained such rights either by means of individual UNGA resolutions or via UN practice. It is worth mentioning that, in the case of the UN, we deal very often with a situation when the rules of the organization are the result of custom rather than explicit legal provisions. Consequently, a full analysis of the topic requires a brief summary of the events that led to the earlier status quo.

## 2. Historical background

Palestine has remained an area of particular interest to the UN since 1947 when the UNGA adopted resolution 181 (II), recommending adoption of the Partition Plan for Palestine. In May 1949 Israel was admitted to full membership of the UN. Palestinians intensified their efforts to upgrade their international position in the mid-seventies. In 1974 UNGA resolution 3237 (XXIX) granted observer status<sup>9</sup> in the UNGA to the Palestine

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<sup>8</sup> S. Missling, *op. cit.*, p. 149.

<sup>9</sup> Observer status is not mentioned in the UN Charter. It is based mainly on the practice of the Organization. The observers have access to many of the UN meetings and documentation but they are not allowed to vote. Observer status can be granted to non-member states (Holy See, Palestine), intergovernmental organizations (e.g. African Union, Council of Europe, International Organization of la Francophonie) and other entities do not have the status of an intergovernmental organization (e.g. International

Liberation Organization (PLO)<sup>10</sup> as an entity. Resolution 43/77<sup>11</sup> from 1988 changed the designation from “PLO” to “Palestine” whilst not granting any additional substantive rights to Palestinians.

Ten years later, UNGA resolution 52/250 enhanced Palestine’s privileges within the UN. It conferred upon Palestine, in its capacity as observer, several key rights and privileges, including the right to participate in general debates of the UNGA, the right of inscription on the list of speakers in the UNGA, the right of reply and the right to raise points, as well as the right to co-sponsor draft resolutions and decisions on Palestinian and Middle East issues. Resolutions 54/77 and 52/250 did not officially confirm that Palestine was a state. Instead their preamble paragraphs merely mentioned the fact that the Palestine National Council had proclaimed the State of Palestine on 15.11.1988. The status of Palestine in the UN from 1998 to 2012 was very unique, i.e. Palestine possessed almost the same rights and privileges as non-member states,<sup>12</sup> whilst not having been formally granted such status.

On 23.9.2011 the President of the State of Palestine, Mahmoud Abbas, submitted to the UN Secretary General (UNSG) an application for admission of Palestine as a *full member* of the UN.<sup>13</sup> The application was submitted “based on the Palestinian people’s natural, legal and historic rights” and respective UN resolutions.<sup>14</sup> The paper was transmitted by the UNSG to the UNSC and on 11.11.2011 a report of the UNSC Committee on the Admission of New Members (CANMS) was issued. CANMS stated that it was unable to make a unanimous recommendation to the UNSC regarding the Palestinian application, given the existence of divergent views among its members<sup>15</sup>.

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Committee of the Red Cross, International Olympic Committee, Sovereign Military Order of Malta).

<sup>10</sup> Palestine Liberation Organization was created in 1964. The Executive Committee of the PLO performs the governmental functions of Palestine.

<sup>11</sup> Resolution was adopted after the Proclamation of State by the Palestine National Council. It was at that time that many UN member states from the Soviet bloc (incl. Poland, the Czech Republic, Hungary) formally recognized Palestine as a state.

<sup>12</sup> I.e. Holy See and Switzerland until 2002.

<sup>13</sup> Application of the State of Palestine for Admission to Membership in the United Nations. UN General Assembly Documents, No. A/66/371-S/2011/592.

<sup>14</sup> *Ibidem*.

<sup>15</sup> Report of the Committee on the Admission of New Members Concerning the Application of Palestine for Membership in the United Nations, UN Documents, S/2011/705.

One year later, the Palestinian government again attempted to enhance its status within the UN. The UNGA adopted resolution 67/19 on 29.11.2012<sup>16</sup>, granting Palestine a non-member state observer status in the UN. The resolution was adopted by a vote of 138 countries in favour to 9 against (i.a. USA, Canada and the Czech Republic) with 41 abstentions (incl. France, United Kingdom and Poland). Such upgraded status was granted “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 practice”.<sup>17</sup> Furthermore, the resolution reaffirmed the principle of universality of membership of the UN.<sup>18</sup>

On 1.4.2014, following a decision of the PLO Executive Committee, President Mahmoud Abbas signed *letters of accession* to 15 multilateral treaties and conventions, including the four Geneva Conventions of 12.8.1949, the Vienna Convention on Diplomatic Relations, the Vienna Convention on the Law of the Treaties and the International Covenant on Civil and Political Rights. Palestine's representatives stated that they took this decision because Israel had neglected to announce a fourth round of prisoner release.<sup>19</sup> Palestine's applications were accepted by the UNSG and the governments of Switzerland and the Netherlands, as depositaries of the treaties. On 27.4.2014 the Palestinian National Council adopted a plan that enabled further attempts to join other UN bodies and international treaties.

### **3. New status and the direct legal consequences thereof within the UN**

It is important to consider the legal consequences of UNGA resolutions in general in order to fully examine the effects of resolution 67/19.

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<sup>16</sup> The date was planned deliberately by the Palestinian authorities, since it was the International Day of Solidarity with the Palestinian People and the 65<sup>th</sup> anniversary of the adoption of the UNGA resolution 181 (II) on the Government of Palestine.

<sup>17</sup> OP2 of the Resolution 67/19 (in the UN terminology preambular paragraphs are indicated as “PP” and operative paragraphs as “OP”).

<sup>18</sup> PP26 of the resolution 67/19.

<sup>19</sup> Q&A: *Palestine's Accession to International Treaties* by Palestine Liberation Organization, Negotiation Affairs Department, dated 2.04.2014, available at: <http://nad-plo.org/userfiles/file/fact%20sheets/Q&A%20Accession.pdf>.

The term “resolution” is not mentioned directly in the UN Charter. Instead, the Charter uses such terms as “recommendations” (Art. 10), “decisions” (Art. 4 (2)) and “approvals” (Art. 17(1)) when referring to the actions of the UNGA. In principle, UNGA resolutions that are recommendations are non-binding<sup>20</sup>. Their binding force is restricted *ratione materiae* to organizational matters concerning internal issues of the UN as an organization, e.g. amendments to the Charter, admission, suspension and expulsion of members and budgetary issues.<sup>21</sup> It is clear, then, that the binding scope of UNGA “decisions” covers the entire UN system. Consequently, resolution 67/19 affected *all UN organs*, including the Secretariat, the UNGA and specialized agencies of the UN system<sup>22</sup> in the sense that they are required to fully respect Palestine’s upgraded status. Obviously, one cannot ignore the political importance of the resolution, since the UNGA is the only UN organ mentioned in the Charter in which all member states are represented.<sup>23</sup>

Upon adoption of resolution 67/19, many doubts arose regarding the status of Palestine in the UN. At first sight, it seemed that the rights and privileges of Palestine in the UN had not changed significantly in consequence of the veto. As highlighted in the previous paragraphs, prior to the UNGA decision, Palestine had already enjoyed rights and privileges of participation in the UNGA comparable to those of an observer state<sup>24</sup>, acquired upon the adoption of resolution 52/250. Questions raised by the international community and the Palestinians themselves after the UNGA

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<sup>20</sup> Recommendatory and non-binding character of UNGA resolutions was confirmed by the ICJ. See *South West Africa (Ethiopia v. South Africa, Liberia v. South Africa)*, Second Phase, ICJ Judgment of 18.7.1966, *ICJ Reports*, at para 98.

<sup>21</sup> “The authority of the GA to make legally binding decisions only covers the area relating to internal organization, that is, to ‘housekeeping matters’”. See A. Verdross, B. Simma, *Universelles Völkerrecht: Theorie und Praxis*, Berlin 1984, p. 94.

<sup>22</sup> It was clearly admitted by the UNSG in his report that upgraded status of Palestine in the UN does not apply to organizations and bodies outside of the UN system.

<sup>23</sup> Further at: M.D. Öberg, *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, vol. 16, no 5, at p. 883 and S. Schwebel, *The Effect of Resolutions of the U.N. General Assembly on Customary International Law*, ‘American Society of International Law’ 1979, vol. 73, at pp. 301-309.

<sup>24</sup> Annex to the resolution 58/314 stipulates that the Holy See has i.a. the right to participate in the general debate of the UNGA, the right of inscription on the list of speakers under agenda items at any plenary meeting of the UNGA, after the last Member State inscribed on the list, the right of reply as well as the right to co-sponsor draft resolutions and decisions that make reference to the Holy See.

vote concerned not only matters of protocol (i.e. where the Palestinian seat would be situated in the UNGA Hall and the scope of privileges of the Palestinian Permanent Mission to the UN), but also the legal consequences of the UNGA resolution, which mentioned that a certain entity was a state.

The UN Charter does not make explicit reference to a non-member state status, although it provides for certain privileges for states that are not members of the UN. From its very inception, the UN has struggled with the issue of relations with states remaining outside its structures. At some moment the idea of associate membership<sup>25</sup> was proposed, endowing recipient states with several rights in UN bodies without having the right to vote in the UNGA or to hold office at the UN headquarters<sup>26</sup>. The concept of a special non-member state observer status was created by the practice of the Organization<sup>27</sup> and several countries enjoyed this status prior to being granted full membership in the UN.<sup>28</sup> The possibility for a state to acquire observer status has been confirmed officially by the UNGA in a decision of 9.12.1994, when it was decided that granting observer status “should in the future be confined to States and to those intergovernmental organizations whose activities cover matters of interest to the Assembly”<sup>29</sup>.

Observer status is, as Mower puts it: “a means whereby a government which is not a Member of the United Nations can have its representatives

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<sup>25</sup> One should not mistake it with current associate membership status that several UN specialized agencies (e.g. FAO, WHO, UNESCO, IMO) provide for those “territories or groups of territories which are not responsible for the conduct of their international relations”. Associate membership does not usually give a right to vote for the associated member.

<sup>26</sup> Repertory of Practice of the United Nations Organs, Supplement No 5 (1970-1978), vol. 1, p. 72.

<sup>27</sup> A. Glenn Mower, *Observer countries: Quasi Members of the United Nations*, ‘International Organizations’ 1966, vol. 20, no 2, p. 270. See also: C.L. McNeely, *Constructing the Nation-State – International Organization and Prescriptive Action*, Greenwood Publishing Group, 1995, p. 44.

<sup>28</sup> Switzerland was a non-member state from 1948 to 2002 until becoming a full member state on 10.9.2002 when the UNGA in New York accepted Switzerland as a UN member state after a referendum was concluded in that country. Several other countries were granted this status in the past, incl. Austria, Bangladesh and Finland. See also P. Seger, *Die Stellung der Schweiz als beobachter bei den Vereinten Nationen in New York*, ‘Schweizerische Zeitschrift für internationales und europäisches Recht’ 1995, vol. 5, no 4, at pp. 479-514.

<sup>29</sup> UNGA Decision 49/426, *Question of criteria for the granting of observer status in the General Assembly*, Resolutions and Decisions adopted by the General Assembly during its forty-ninth session, A/INF/49/725, January 1995, p. 128.

on the scene where international affairs are being discussed and where decisions are being made and have them there accepted members of a community of diplomats, free to mingle and do everything a representative of a Member can do except speak and vote in official sessions".<sup>30</sup> Currently only Palestine and the Holy See are treated as non-member states in the UNGA. A cursory historical analysis indicates that countries have enjoyed, or still continue to enjoy, this right for different reasons, including (i) they chose this status deliberately, given their political approach (the Holy See<sup>31</sup>, Switzerland prior to 2002<sup>32</sup>), (ii) they did not have a fully independent government but wanted to highlight their relations with the UN (Austria in 1952, Bangladesh in 1973) or (iii) their application for full membership in the UN was blocked for political motives (Palestine).<sup>33</sup> Despite the different reasons underlying the granting of such status we may argue that, in general, non-member state status may be treated as a sort of antechamber<sup>34</sup> to full membership in the UN.<sup>35</sup> Its importance has been strengthened over the years by the mere fact that non-member state status was possessed by such influential countries as West Germany, Spain, Italy and Switzerland<sup>36</sup>.

Certain doubts were raised by some scholars as regards the legal effects of admitting an entity to membership in the UN as a "*collective*" recognition of the entity by the member states voting in favour of such recognition or even by all member states of the UN.<sup>37</sup> It is nowadays widely accepted in international law academic writings<sup>38</sup> that support of a member

<sup>30</sup> A. Glenn Mower, *op. cit.*, at p. 267.

<sup>31</sup> The Holy See has deliberately resigned from applying for a full member status at the UN, leaving itself a specific spiritual and moral role in the Organization. E.X. Obiezu, *The Holy See in the United Nations: An Assessment and Critique*, 'New Theology Review' 2013, vol. 26, no 1, at p. 29.

<sup>32</sup> Michael M. Gunter, *Switzerland and the United Nations*, 'International Organization' 1976, vol. 30, no 1, at pp. 130-131.

<sup>33</sup> J. Vidmar, *op. cit.*, pp. 25-26. Compare: J. Crawford, *op. cit.*

<sup>34</sup> Compare with the list of UN non-self-governing territories that includes i.a. the Western Sahara and several other entities such as French Polynesia, Gibraltar and New Caledonia that have through formulated their statehood aspirations.

<sup>35</sup> G. Poissonnier, *op. cit.*, p. 439.

<sup>36</sup> A. Glenn Mower, *op. cit.*, p. 272.

<sup>37</sup> S. Rosenne, *Recognition of States by the United Nations*, 'British Yearbook of International Law' 1949, at pp. 437-447; J. Dugard, *Recognition and the United Nations*, 'Hersch Lauterpacht Memorial Lectures' III, Cambridge 1987, pp. 78-80.

<sup>38</sup> At T. D. Grant, *Admission to the United Nations: Charter Article 4 and the Rise of Universal Organization*, Martinus Nijhoff Publishers 2009, pp. 255-256; E. Osieke,



state for admission to the UN does not imply the automatic recognition of statehood. Recognition of a state is widely understood as a unilateral and discretionary act. This argument is also strengthened by the UN Charter *travaux préparatoires*.<sup>39</sup> *A maiore ad minus*, one cannot treat a resolution granting non-member state status as implying recognition as a state. It is worth mentioning that some member states<sup>40</sup> voting in favour of the resolution 67/19 clearly expressed in their statements before the UNGA that their vote does not imply the recognition of Palestine as a state.<sup>41</sup> Taking this into account, it is clear that the UNGA vote cannot be regarded as constituting recognition of Palestine as a state.

It is also obvious that, having been granted non-member state status, Palestine cannot vote in the UNGA or other UN bodies and, even more importantly, its representatives cannot be elected to any UN bodies. There is, however, one exception<sup>42</sup> in this respect. After adoption of resolution 67/19, Palestine benefits from the rights and privileges granted to non-member states of the UN in the Statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). According to Art. 13 *bis* of the Updated Statute of the ICTY<sup>43</sup> (and Art. 12 *bis* of the Statute of the ICTR respectively) UN members and “the non-member States maintaining permanent observer missions at United Nations Headquarters” have the *right to nominate candidates for judges and vote in the elections for the judges of the Tribunal*. On 18.11.2013, Palestine voted for the first time in the UNGA during elections of ICTY judges.

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*Constitutional Law and Practice in the International Labour Organization*, Springer 1985, pp. 26-28; D. Raic, *Statehood and the Law of Self-Determination*, ‘Developments in International Law’ 2002, vol. 43, at pp. 39-47.

<sup>39</sup> Proposal submitted by Norway during the preparatory works on the UN Charter at the San Francisco Conference granting the UNGA a right to collective recognition of new members was not adopted.

<sup>40</sup> E.g. Finland, New Zealand. Moreover, several countries that do not formally recognize Palestine as a state have supported the resolution, e.g. France, Italy and Japan.

<sup>41</sup> Several countries (incl. France and several other Western European countries) voting in favor of the resolution 67/19 have not formally recognized Palestine as a state. More on this topic: G. Poissonnier, *op. cit.*, at p. 444.

<sup>42</sup> Exceptional character of this right was explicitly mentioned in the UNSG’s report of 8.03.2013, A/67/738.

<sup>43</sup> UNSC resolution 827 (1993), 25.05.1993 with subsequent amendments.

As regards *protocol issues*, the UN Secretariat<sup>44</sup>, clarified certain doubts regarding Palestine's position within the UN, in a memorandum dated 21.12.2012<sup>45</sup>. It stated that "Palestine can be referred to as a State of Palestine in all official documents of the United Nations and on nameplates to be used in the United Nations meeting". Consequently, several protocol changes were made by the UN Protocol. An official *UN Blue Book*<sup>46</sup> entry was changed from "Permanent Observer Mission of Palestine" to "Permanent Observer Mission of the State of Palestine". Palestine and the Holy See are currently mentioned in the UN Protocol as "non-member States having received a standing invitation to participate as observers in the sessions and the work of the UNGA and maintaining permanent observer missions at Headquarters".<sup>47</sup>

As previously mentioned, resolution 67/19 gave rise to significant consequences from the perspective of the *UN budget*. According to Regulation

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<sup>44</sup> The Office, headed by the Under-Secretary-General for Legal Affairs, is the central legal service of the United Nations. It is divided into organizational units, such as the Office of the Legal Counsel, the General Legal Division and Division for Ocean Affairs and the Law of the Sea. The OLA was established by the General Assembly in its resolution 13 (1) of 13.02.1946. The legislative basis for the activities of OLA is provided in a number of resolutions of the General Assembly, the medium-term plans of the United Nations Secretariat and the Secretary-General's bulletins on the organization of OLA. Its core functions are regulated by the Secretary General's Bulletin "Organization of the Office of Legal Affairs" from 01.08.2008 (ST/SGB/2008/13). Section 6.2. of this document stipulates that the Office of the Legal Counsel of the OLA deals i.a. with preparing "legal opinions, studies and advice on the interpretation of the UN Charter and on the interpretation and drafting of rules of international public law", incl. UN resolutions. On the role of one of the OLA's divisions see more: S. Tarassenko, I. Tani, *The Functions and Role of the United Nations Secretariat in Ocean Affairs and the Law of the Sea*, 'International Journal of Marine and Coastal Law' 2012, vol. 27, at p. 698.

<sup>45</sup> 'UN Interoffice Memorandum: Issues related to General Assembly resolution 67/19 on the status of Palestine in the United Nations' dated 21.12.2012 from Patricia O'Brien, Under-Secretary for Legal Affairs to the member states, not published.

<sup>46</sup> The Blue Book is an official publication of the UN Protocol and Liaison Service listing the permanent missions to the UN listing their address, dates of national holidays as well as names and diplomatic ranks of all members of the diplomatic personnel (Article XVIII of the Manual of Protocol of the United Nations, ST/SG/4/Rev.7, May 2005, available online: [http://www.un.int/protocol/manual\\_toc.html](http://www.un.int/protocol/manual_toc.html)).

<sup>47</sup> Prior to that change, Palestine was listed solely under the name of "Entity having received a standing invitation to participate as observer in the sessions and the work of the General Assembly".

3.8. of the Financial Regulations and Rules of the United Nations<sup>48</sup>, states which are not members of the UN have a duty to contribute to the UN budget if they are either parties to the Statute of the International Court of Justice or UN treaty bodies, or if they participate in organs or conferences financed from the UN appropriations. Contributions of non-member states to the UN budget are relatively small, but they represent a symbolic confirmation of their special relation with the UN. The exact rates of such contributions are calculated in a special manner, i.e. a flat rate of 50% is used for all non-member states and a rate assessment is calculated based on income data<sup>49</sup>. On 27.12.2013, the UNGA adopted a decision<sup>50</sup> by consensus on the scale of assessments of Palestine for the years 2012-2014, thus allowing the State of Palestine to contribute towards the UN expenses.

Apart from protocol and budgetary issues, several other implications arose for non-member states resulting from the provisions of the UN Charter. The UN, at its very origin in 1945, was an organization with only 51 original members and that number did not expand significantly until the 1960s. A desire to maintain balance between members and non-member states constituted the reason for placing several provisions in the UN Charter regarding the relationship between UN members and non-member states.<sup>51</sup> The Charter gives non-members certain privileges and duties resulting from the global impact of the UN. Most of them should be treated as provisions providing for rights of third states (as stipulated in Art. 36 of the Vienna Convention on the Law of Treaties). Their significance is limited at present and most of these provisions are rarely resorted to in practice. They present, however, an important window of opportunity for non-member states, taking into account both the fact that they were widely used in the past and that the UN Charter is probably not going to be revised in the near future.

Art. 32 of the UN Charter gives any state which is not a member of the UN a *right of participation in UNSC's discussion* if this state is a party to a dispute being considered by the Council. An analogical provision is included in the Provisional Rules of Procedure of the UNSC (PRP) which stipulate, in Rule 39, that the UNSC shall have the right to invite "members

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<sup>48</sup> Document ST/SGB/2003/7, 9.5.2003.

<sup>49</sup> Currently 0,001% in case of the Holy See and 0,005% in case of Palestine.

<sup>50</sup> UNGA Decision 68/548 of 27.12.2013, A/C.5/68/L.10.

<sup>51</sup> There have been a few amendments through 70 years of the Charter's existence, all of them technical in nature.

of Secretariat or other persons [...] to supply it with information or to give assistance in examining matters within its competence”<sup>52</sup>. The main difference between these provisions is that, in the case of Art. 32, the UNSC is obliged to extend an invitation to a non-member state whereas the PRP merely gives a right to the third party, be it a non-member state or a person. Art. 32 is not applied at present. The Holy See, as a Permanent Observer, is invited to participate in the UNSC meetings on the basis of Rule 39<sup>53</sup> or by using a clause “in accordance with the understanding reached in prior consultations”<sup>54</sup> whereas Palestine is regularly invited to participate in open debates of the UNSC “in accordance with the rules of procedure and previous practice in this regard”<sup>55</sup>, without any mention being made of either Art. 32 or Rule 39. Art. 32 has, however, been relied upon on numerous occasions in the past and may be a useful track for non-member states.<sup>56</sup>

According to Article 35 (2) of the UN Charter, a non-member state may *bring to the attention of the UNSC or of the UNGA any dispute* to which it is a party if it accepts in advance the obligations of pacific settlement provided in the Charter<sup>57</sup>. This provision presents non-member states with a unique opportunity of using the UN’s role in pacific settlement of disputes without being a UN member. The only condition is acceptance the obligations of the Charter in this respect. The political importance of Article 35(2) is diminished, however, since entities that are not treated as states generally rely upon the assistance of a friendly UN state to present a dispute to the wider membership<sup>58</sup>.

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<sup>52</sup> Provisional Rules of Procedure of the Security Council S/96/Rev. 7.

<sup>53</sup> Rule 39 is being used also in case of invitations to representatives of the Secretariat, subsidiary organs of the Security Council, United Nations organs, United Nations specialized agencies and funds and programmes, regional and other intergovernmental organizations, or other invitees including representatives of non-governmental organizations (NGOs), were invited under rule 39.

<sup>54</sup> S/PV.4709 (Resumption 1 and Corr. 1), p. 2. The same clause was used with respect to Switzerland before 2002, see: S/PV. 4128 and S/PV.4264.

<sup>55</sup> E.g. Security Council’s open debate on the situation in the Middle East, including the Palestinian question, S/PV.7096.

<sup>56</sup> SV Manesh, *Taiwan Imbroglia: A Brazen Violation of U.N. Charter and Its Basic Principles*, ‘Taiwan International Studies Quarterly’, vol. 4, no 1, at p. 227.

<sup>57</sup> Rule 13h of the Rules of Procedure of the UNGA stipulates that the provisional agenda of a regular session of the UNGA includes i.a. items proposed under Art. 35 para 2 of the UN Charter by states not members of the UN.

<sup>58</sup> It happened in the past in case of Turkey acting on behalf of the Turkish Republic of Northern Cyprus or Albania on behalf of Kosovo.

The condition precedent of having accepted the obligations of pacific settlements provided for in the Charter is also a condition for exercising the privilege granted to non-member states in Article 11(2) of the Charter, which allows non-member states the right to *bring a question relating to the maintenance of international peace and security before the UNGA* (Art. 11(2)). This provision has not yet been utilized by non-member states. Further rights granted to non-member states in the UN Charter include the right of non-members affected by SC measures to consult the Council (Art. 50) and the right to become a party to the Statute of the ICJ (Art. 93 (2) – explained in further paragraphs). Although the abovementioned provisions remain purely formal and have not been used in recent years, they may be activated at any time. It is clear that they present a possibility for Palestine to reply upon them, since they apply to non-member states.

Art. 2(6) of the UN Charter has a different character, since it provides for a *quasi-duty of a non-member state*. It stipulates that the UN shall ensure that states which are not members of the UN act in accordance with its principles “so far as may be necessary for the maintenance of international peace and security”. The provision has been used several times in UN practice<sup>59</sup>. On several occasions, non-member states have failed to apply relevant paragraphs of UN resolutions regarding the maintenance of international peace and security, especially with regard to sanction regimes. One good example was when Switzerland and West German (at that time, both non-member states) continued a *courant normal* in the face of sanctions imposed by the UNSC on Southern Rhodesia<sup>60</sup>. However, the growing universality and political changes have recently caused this provision to lose importance. It is especially visible in the wording of individual UN resolutions<sup>61</sup>. Many UNSC resolutions in the past contained

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<sup>59</sup> The provision of Art. 2(6) was applied for the first time by the Polish delegation in 1946 that requested the UNSC to place on its agenda the situation arising from the existence and activities of the Franco regime in Spain, stating that “the situation in Spain makes the application of this provision imperative” (*Repertoire of the Practice of the Security Council 1946-1961, Chapter VIII, Consideration of questions under the Council's responsibility for the maintenance of international peace and security*, p. 306).

<sup>60</sup> Swiss approach towards UN sanctions has later significantly changed and the issue lost its importance because of both countries' accession to the UN. At: V. Gowlland-Debbas in V. Gowlland-Debbas, D.L. Tehindrazanarivelo, *National Implementation of United Nations Sanctions: A Comparative Study*, Martinus Nijhoff Publishers, 2004, p. 71.

<sup>61</sup> Mahiou in: J-P. Cot, A. Pellet, M. Forteau, *La Charte des Nations Unies – Commentaire article par article*, 3<sup>e</sup> édition, p. 477.

a specific reference to the cooperation of non-member states of the UN in the application of sanctions under Chapter VII of the UN Charter<sup>62</sup>. For the last ten years, it is now established practice that the Security Council's decisions tend to refer to "all States" or simply to "States" when it calls for the state community as a whole to take specific actions<sup>63</sup>. This practice led many scholars to argue that the significance of Art. 2(6) is currently limited to a purely theoretical level<sup>64</sup>. It is obvious that Article 2(6) cannot impose direct obligations on third states (*pacta tertiis* rule). The Charter does not contain any sanctions applicable to non-member States and it is widely accepted in academic writings<sup>65</sup> that it does not create an obligation for UN non-members, "unless the Charter obligation is reflective of an obligation under customary international law"<sup>66</sup>.

#### 4. Further possible enhancements

The UNGA vote indirectly affected Palestine's ability to become a party to international treaties, since usually only states can ratify such measures. The absence of clarity regarding Palestine's status in international law has, in the past, constituted an argument in favour of the negative conclusions of depositaries regarding Palestine's ability to become a party to *multilateral treaties*<sup>67</sup>. Many treaties provide final clauses regulating which states are

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<sup>62</sup> E.g. resolution 918 (1994) on situation in Rwanda – paragraph 15; resolution 883 (1993) on sanction against Libya – paragraph 12; resolution 1054 (1996) – paragraph 5, resolution 661 (1990) – paragraph 6.

<sup>63</sup> E.g. resolution 1970 (2011) on Libya – paragraph 11.

<sup>64</sup> B. Simma (ed.), H. Mosler, A. Paulus, *The Charter of the United Nations: A Commentary*, Second Edition, vol. I, p. 146. See also: A. Mahiou in: J-P. Cot, A. Pellet, M. Forteau, *La Charte des Nations Unies – Commentaire article par article*, 3<sup>e</sup> édition, p. 482.

<sup>65</sup> Cf. B. Simma (ed.), H. Mosler, A. Paulus, *op. cit.*, p. 148.

<sup>66</sup> S. Talmon, *A Universal System of Collective Security Based on the Charter of the United Nations: A Commentary on Article 2(6) UN Charter*, 'Bonn Research Papers on Public International Law' 2011, no 1, at p. 6.

<sup>67</sup> On 14.6.1989 Palestine applied for participation in four Geneva conventions of 12.8.1949 and their two additional Protocols of 8.6.1977. The Government of Switzerland, as a depositary of the Conventions, refused to consider the Palestinian declaration "due to the uncertainty within the international community as to the existence or non-existence of a State of Palestine" (Government of Switzerland, Note of Information, Berne, 13.09.1989, reprinted in 'Palestine Yearbook of International Law' 1989, vol. 5, 322).

entitled to sign the text and deposit treaty instruments concerning the treaty.<sup>68</sup>

There is no doubt that Palestine's upgraded status within the UN affects the UNSG as a depositary of multilateral treaties. The Secretary-General serves at present as a depositary for over 550 multilateral treaties<sup>69</sup>, including such milestone documents as the UN Charter, the Vienna Convention on Diplomatic Relations, the Rome Statute of the International Criminal Court and the Vienna Convention on the Law of Treaties. The Secretary-General has to respect the UNGA's decision to grant Palestine non-member state status when performing his functions as the depositary of treaties containing "all States" clauses. Consequently, Palestine can become party to any treaties that are open to "any State" or "all States" deposited with the UNSG<sup>70</sup>. Furthermore, upgraded status may affect Palestine's attendance at conferences organized under the auspices of the UN, since invitations to many of these are sometimes sent using the "Vienna formula" or "all-states formula".<sup>71</sup>

One cannot forget, however, that a vast number of multilateral treaties are deposited with *entities other than* the UNSG. Where entities outside the UN system (i.e. mainly governments of states) serve as treaty depositaries, they will have to make separate decisions according to their own

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<sup>68</sup> Most common ones are known as the Vienna formula and the "all States" formula. The Vienna formula was created in the Cold War era. Some States, which were not members of the UN, were allowed to be members of the UN specialized agencies. The formula refers to the Vienna Convention on the Law of the Treaties that states in Article 81 that it is open for signature and accession by "*all States Members of the United Nations or of any of the specialized agencies or of the International Atomic Energy Agency or Parties to the Statute of the International Court of Justice, and by any other State invited by the General Assembly of the United Nations to become a party to the Convention (...)*". In comparison, the "all states" formula ("*the present Convention shall be open to all States*") is used in treaties that seek universal participation.

<sup>69</sup> *UN Treaty Handbook 2012*, 12.V.1, United Nations, Office of Legal Affairs February, 2013, p.3.

<sup>70</sup> See also R. O'Keefe, C.J. Tams, A. Tzanakopoulos, *The United Nations Convention on Jurisdictional Immunities of States and Their Property. A Commentary*, Oxford Commentaries on International Law 2013, p. XXXX. The authors stated that, in respect to the UN Convention on Jurisdictional Immunities of States and Their Property, that: "on the basis of the past practice Palestine, for example, would be eligible to accede to the Convention". The UN Secretary-General serves as a depositary of numerous multilateral treaties, incl. Chemical Weapons Convention, Comprehensive Nuclear-Test-Ban Treaty and UN Framework Convention on Climate Change (UNFCCC).

<sup>71</sup> E.g. 1973 World Disarmament Conference.

depository practice. “Non-member state” status in the UN will not be *per se* sufficient to conclude that Palestine can be a party to any such treaties.

Palestine’s ability to become a party to multilateral treaties is specifically vital with regard to its potential accession to the statutes of international courts and tribunals. On 22.01.2009 (i.e. prior to the adoption of resolution 67/19), the Palestinian National Authority lodged a declaration recognizing the jurisdiction of the *International Criminal Court (ICC)* under Art. 12 (3)<sup>72</sup> of the Rome Statute.<sup>73</sup> The Office of the Prosecutor of the ICC released a statement on 3.04.2012, indicating that it would not be considering allegations of crimes committed in Palestine, since the Office of the Prosecutor is not a competent body to decide whether Palestine is a state. According to the Prosecutor, the competence for determining the term “State” for the purposes of Art. 12 (3) rested instead upon the UNSG and the UNGA.<sup>74</sup> Furthermore, the Prosecutor argued that the current status granted to Palestine by the UNGA was that of “observer”, not as a “non-member state”.<sup>75</sup> The Office stated in its decision that it could:

in the future consider allegations of crimes committed in Palestine, should competent organs of the United Nations or [...] the Assembly of States Parties resolve the legal issue relevant to an assessment of article 12 or should the Security Council, in accordance with article 13(b), make a referral providing jurisdiction.

It is obvious that resolution 67/19 granting the non-member state status changed this *status quo*. Therefore, at present the Palestinian authorities face two choices, i.e. re-submitting the declaration according to Art. 12 (3) or acceding to the Rome Statute of the ICC, as stipulated in Art. 12 (1) of the Statute. It is unclear whether, in the first case, the ICC would conclude that Palestine qualified as a state under international law before the vote on resolution 67/19. If so, it may allow for retroactive jurisdiction of the potential case that Palestine would bring before the Court.

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<sup>72</sup> Article 12(3) of the ICC Statute allows a “State which is not a Party to this Statute” to accept the exercise of the Court’s jurisdiction over crimes committed by its nationals or within its territory.

<sup>73</sup> A/CONF.183/9 of 17.7.1998 corrected by *process-verbaux* of 10.11.1998, 12.7.1999, 30.11.1999, 08.5.2000, 17.1.2001 and 16.1.2002.

<sup>74</sup> The Assembly of States Parties of the Rome Statute can also decide to address the matter as provided in the Article 112(2)(g) of the Statute.

<sup>75</sup> The Rome Statute was drafted in order to accommodate states that are not members of the UN (e.g. Switzerland, a non-member state and that time).



A similar possibility remains in the case of the ICJ. Art. 93(2) of the UN Charter provides that a state which is not a Member of the UN may become a party to the Statute of the ICJ on conditions determined in each case by the UNGA upon the recommendation of the UNSC. It is clear that this two-level path is similar to that stipulated in Art. 4 of the UN Charter with regard to full UN membership. However, Art. 35 (2) of the ICJ Statute allow the option for a state that is neither a party to the Statute nor a UN member. It provides that the Court is open to states not being parties to the Statute “on conditions laid down by the Security Council”. The UNSC formulated such general conditions in resolution 9 (1946), deciding that a state that is not a party to the Statute can deposit with the Registrar of the ICJ a declaration accepting the jurisdiction of the Court and a statement of compliance with the decisions of the Court and accepting all the obligations of a UN member. These criteria are similar to those stipulated in the Rome Statute.

Another possible track for Palestine to further elevate its status in the UN system could be an attempt to obtain full membership in various *UN-related specialized agencies and bodies*.<sup>76</sup> On 31.10.2011 Palestine was accepted as a full member of the UN Educational, Scientific and Cultural Organization (UNESCO). This decision constituted an important precedent in this respect.<sup>77</sup> Most specialized organizations allow for the membership of countries that are not full members of the UN.<sup>78</sup> The procedures for granting membership in such organizations differ. Some organizations grant membership provided that the applicant state is a member of any of the UN specialized agencies.<sup>79</sup> Other organizations usually require the

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<sup>76</sup> According to Art. 57 of the UN Charter, various specialized agencies, established by intergovernmental agreement and having wide international responsibilities in economic, social, cultural, educational, health, and related fields, can be brought into relationship with the UN.

<sup>77</sup> See also, L. Johnson, *Palestine's admission to UNESCO: Consequences within the United Nations?*, 'Denver Journal of International Law & Policy', 1.9.2011. Since 1977 Palestine is a full member of the UN Economic and Social Commission for Western Asia and a member of several international organizations – e.g. League of Arab States, Organization of Islamic Cooperation and Group 77.

<sup>78</sup> The Holy See is a full member of several organizations of the UN system, incl. World Intellectual Property Organization (WIPO), International Telecommunications Union (ITU) and Universal Postal Union (UPU).

<sup>79</sup> Convention Establishing the World Intellectual Property Organization from 14.07.1967 stipulates that membership is open i.a. “to any state that is a member of the United Nations or of any of the UN specialized agencies or of the International

support of at least two-thirds of their member states.<sup>80</sup> However, Palestine's membership in certain organizations may be difficult due to opposition from the US<sup>81</sup> and Israel.

Nonetheless, the most important challenge for the UN is the future of the Palestinian application from 2011 for *full membership in the UN*. The application has never been formally withdrawn. After CANMS, as an auxiliary body of the UNSC, has concluded its deliberations, it is now for the UNSC to decide on this matter<sup>82</sup>. The question of applications for membership in the UN became politicized during the Cold War era and still remains very sensitive to partisanship.<sup>83</sup> Any action regarding the Palestinian application will require the political will of the UNSC's members. Permanent members have used their veto on several occasions with regard to UNSC decisions on admission. It is obvious that the Palestinian request will not be further examined by the Council until the UNSC reaches an agreement.

## 5. Final remarks

Kaspar Villiger, the President of the Swiss Confederation, stated in his UNGA address on 10.09.2002 (i.e. when Switzerland was granted full membership in the UN after being a non-member state for a long period) that: "[...]we have been working closely with the UN for many years [...] and

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Atomic Energy Agency or that is a party to the Statute of the International Court of Justice". Similar language was used in the Constitution of the UN Industrial Development Organization (UNIDO) from 8.04.1979.

<sup>80</sup> Simple majority in case of WHO, 4/5 majority in case of ICAO.

<sup>81</sup> American law provides that the US shall not make any contribution to any organization of the United Nations which grants full membership to any organization that does not have internationally recognized attributes of statehood (Pub.L. 103-236, Title IV, § 410, Apr. 30, 1994, 108 Stat. 454 (103<sup>rd</sup> Congress, 30.04.1994)).

<sup>82</sup> The pending character of the application was admitted by the UNSG in his report from 4.09.2013, A/68/363-S/2013/524, *Peaceful settlement of the question of Palestine – Report of the Secretary-General*, par. 9.

<sup>83</sup> At B. Simma (ed.), H. Mosler, A. Paulus, *op. cit.*, p. 178. See also: J-P. Cot, A. Pellet, M. Forteau, *La Charte des Nations Unies – Commentaire article par article*, 3<sup>e</sup> édition, p. 527.

out of that has arisen a long-standing partnership. Even as an Observer State we were 'good neighbors' as the UN Charter puts it".<sup>84</sup>

It is obvious, having analyzing the UNGA's vote on resolution 67/19, that non-member state status takes not only the form of a "good neighbor" association with the UN but much more. It provides the non-member with the opportunity to gain political legitimacy in international relations. Furthermore, confirmation of the fact the a given entity is a "state" by the only global organization enjoying an almost-universal status opens up new possibilities in terms of adherence to international treaties, with special consideration to statutes of international courts. Finally, it serves as a kind of waiting room to full UN membership (for those countries that so desire). It can be expected that the enhanced status in the UN will evolve in the future and will be requested by more entities. Non-member status as an antechamber to full membership in the UN may be applied in the future to several entities that aspire to being full UN members (such as Kosovo<sup>85</sup>).

Development of the UN non-member state status is a unique concept in international law. It has shown that the UN is an important organization in which it is worth gaining even quasi-membership status<sup>86</sup>. The UN's universality and political significance in the modern world make it the most important forum for various entities to express and satisfy their political aspirations to statehood. The introduction of formal requirements necessary to obtain non-member status may be worth considering. It could be a step towards increasing the clarity and transparency of the procedure.

The above analysis proves that decisions regarding internal matters of the Organization, such as granting UNGA observer status, may sometimes have a tremendous external legal impact extending beyond the UN system itself. Although UN decisions are largely political in nature, there is a tremendous need for its leadership and rulemaking role among other international institutions, states and legal doctrine.

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<sup>84</sup> <http://www.efd.admin.ch/dokumentation/reden/archiv/02538/index.html?lang=en>.

<sup>85</sup> David I. Efevwerhan, *Kosovo's Chances of UN Membership: A Prognosis*, 'Göttingen Journal of International Law' 2012, vol. 4, no 1, at pp. 93-130.

<sup>86</sup> A. Glenn Mower, *op. cit.*, p. 283.