
Recognition of the State of Palestine

Still too much too soon?

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1 Introduction

In 1990 James Crawford wrote ‘The Creation of the State of Palestine: Too Much Too Soon?’, rejecting the claim that in Resolution 43/177 the UN General Assembly (UNGA) recognised the existence of a State of Palestine.¹ Surprisingly, perhaps, in 2012 a similar question arose, whether UNGA Resolution 67/19, in the operative part of which the General Assembly decided ‘to accord to Palestine non-member observer State status in the United Nations’,² recognised the existence of the State of Palestine. And no less than in 1990, ‘[i]t seems difficult for international lawyers to write in an impartial and balanced way about the Palestine issue.’³ Scholars who support the Palestinian cause at times converge the ‘ought’ with the ‘is’, citing the resolution as confirmation of their position that a State of Palestine already exists, without delving into the resolution’s content;⁴ while those less convinced that such a State already

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¹ James Crawford, ‘The Creation of the State of Palestine: Too Much Too Soon?’, *European Journal of International Law*, 1 (1990), 307.

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

³ Crawford, ‘The Creation of the State of Palestine’, 307. A telling admission of this is John Quigley’s statement that his position, that a state of Palestine has been in existence at least since 1924 is disputed ‘among scholars, even scholars who generally are taking positions supportive of the Palestinian cause’. Russell Tribunal on Palestine, John Quigley, October 2012, available at www.russelltribunalonpalestine.com/en/sessions/future-sessions/new-york-session-video-presentations/john-quigley.

⁴ Jean Salmon, ‘La Qualité d’état de la Palestine’, *Revue belge de droit international*, 2012/1 (2013), 13; Richard Falk, ‘Forward’ in Mutaz Qafishe (ed.), *Palestine Membership in the*

existed prior to the resolution, are correspondingly more reserved about the legal consequences of the resolution.⁵ The differences of view concern practically every element involved, including an assessment of the effectiveness criteria, of the effect of recognition and of whether Resolution 67/19 constituted an act of recognition. Partisanship is not unavoidable; it is nonetheless useful to articulate one's point of departure in order to establish a common ground with the reader. Those who contest it, while unlikely to convert, might nonetheless find interest in the intellectual journey proffered in the following lines.

This chapter adopts the view that the declaratory approach is preferable to the constitutive one. While the comparison between the two, and the drawbacks of the latter, have been discussed primarily with regard to situations where recognition has been denied (at least in part) despite effective functioning, this chapter concerns the converse situation, where recognition is extended in the absence of effectiveness. Acknowledgement of statehood in this situation, too, is problematic, since it accords rights and obligations to an entity which is not fully able to act upon them. With respect to Palestine, this chapter shares in the view that irrespective of the desirability of the establishment of a Palestinian State, such a State probably did not exist prior to the adoption of UNGA Resolution 67/19 because it lacked sufficient independence and consequently effectiveness, and that treating a Palestinian entity as a State for the purposes of international law, be it represented by the PA or the PLO, required engaging in legal fiction, which is undesirable as a matter of legal policy, and not necessarily conducive to rendering statehood a political reality. Nonetheless, whatever the drawbacks of the constitutive approach on the doctrinal, prescriptive level, practice suggests that a critical amount of recognitions combined with some objective features of effectiveness may render statehood close to objective. In other words, that collective

United Nations (Cambridge Scholars, 2013), xviii; John Dugard, 'Palestine and the International Criminal Court: Institutional Failure or Bias?', *Journal of International Criminal Justice*, 11 (2013), 563–70.

⁵ Joseph H. H. Weiler, 'Differentiated Statehood? "PreStates"? Palestine @ the UN', *European Journal of International Law*, 24 (2013), 1; John Cerone, 'Legal Implications of the UN General Assembly Vote to Accord Palestine the Status of Observer State', *ASIL Insight*, 16 (2012); Dapo Akande, 'Palestine as a UN Observer State: Does this Make Palestine a State?', *EJIL: Talk!*, 3 December 2012; Jure Vidmar, 'Palestine and the Conceptual Problem of Implicit Statehood', *Chinese Journal of International Law*, 12 (2013), 21; Martin Wählich, 'Beyond a Seat in the United Nations: Palestine's UN Membership and International Law', *Harvard International Law Journal*, 53 (2012), 236 (writing in anticipation of the resolution).

recognition is actually constitutive may be the more accurate description of a political reality.⁶

The history of Palestinian participation in the work of the UN leading to UNGA Resolution 67/19 has been canvassed elsewhere, including the request for admission of Palestine as a member to the UN, which is formally still pending before the Security Council, and Palestine's admission as member of UNESCO.⁷ This chapter focuses on UNGA Resolution 67/19 itself. First, it examines whether the General Assembly can generate an objective statehood through collective recognition. It then examines whether UNGA Resolution 67/19 actually recognises the existence of – or creates – a State of Palestine. If the answer is negative, this does not mean that the Resolution has no consequences; those are considered in the final section. The article does not purport to settle the question of whether the entity under Palestinian Authority governance presently fulfils the effectiveness criteria, since the situation on the ground has not changed as a result of the adoption of the resolution.

2 Can a General Assembly resolution on recognition create objective statehood?

The drafters of the Charter did not intend for the General Assembly resolutions to have, in themselves,⁸ binding authority other than in its relations with other organs of the UN.⁹ However, while General Assembly resolutions do not directly create obligations for States, in practice they may have legal effect and operative consequences.¹⁰ It is in this category that a General Assembly resolution on recognition may fall, in that it

⁶ Dan Joyner, 'The UNGA Recognizes the State of Palestine', *Arms Control Law* (3 December 2012), available at <http://armscontrollaw.com/2012/12/03/the-unga-recognizes-the-state-of-palestine/>. Kevin Jon Heller, 'Palestinian Statehood and Retroactive Jurisdiction', *Opinio Juris* (2 December 2012), available at <http://opiniojuris.org/2012/12/01/palestinian-statehood-and-retroactive-jurisdiction/>.

⁷ An excellent account is that by Paul Eden, 'Palestinian Statehood: Trapped between Rhetoric and Realpolitik', *International and Comparative Law Quarterly*, 62 (2013), 225.

⁸ As opposed to their constituting *opinio juris*, representing State practice or codifying customary international law.

⁹ M. J. Peterson, 'General Assembly' in Thomas G. Weiss and Sam Daws (eds.), *The Oxford Handbook on the United Nations* (Oxford University Press, 2007), 103.

¹⁰ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Resolution 276 (1970)*, Advisory Opinion, 21 June 1971, ICJ Reports (1971), 16, para. 105. On the changing role of resolutions of international organisations see Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press, 1994), 22–8.

purports to establish a new state of legal relations, or at least declare a fact that carries legal consequences.

A General Assembly resolution on admission is generally perceived as confirming 'objective' statehood of the new member, triggering the applicability not only of the UN Charter but also of customary international law between the new member and all other States, regardless of the stance they had taken towards the admission and of their bilateral relations with that State. While the jurisprudential basis for this law is neither agreed upon nor beyond controversy, it is reflected in practice.¹¹

A separate question is whether a UN General Assembly resolution recognising the statehood of an entity but stopping short of admitting the latter as a member of the Organisation can also create an objective status. Dugard suggests that the answer is positive, since admission is, ultimately, a matter of procedure¹² that is unrelated to the merits of the case, and therefore non-admission does not necessarily indicate failure to fulfil the criteria for statehood. As an example he cites the 1948 General Assembly resolution declaring that 'there has been established a lawful government (the Government of the Republic of Korea) having effective control and jurisdiction over that part of Korea . . . in which the great majority of the people of all Korea reside',¹³ which was regarded as recognition of the fulfilment of the criteria of statehood with respect to Korea for all purposes.¹⁴ However, it is submitted that the various possible

¹¹ John Dugard, *Recognition and the United Nations* (Cambridge: Grotius Publications, 1987), 43. Dugard's thesis was based mainly on decolonisation practice; however, its practice review remains exhaustive since there has been no subsequent practice of admission to the UN of entities while their statehood was controversial (although controversies over status persist, e.g. whether the Federal Republic of Yugoslavia was the successor of the Social Federal Republic of Yugoslavia or not).

¹² *Ibid.*, 50.

¹³ UN General Assembly, UNGA Resolution 195(III), UN Doc. A/RES/195(III), 12 December 1948, operative para. 2.

¹⁴ Herbert W. Briggs, 'Community Interest in the Emergence of New States: The Problem of Recognition', *Proceedings of the American Society of International Law at Its Annual Meeting (1921-1969)*, 44 (1950), 171, 175. Dugard, *Recognition and the United Nations*, 59-60. This resolution differs from numerous resolutions declaring that certain aspiring members are peace-loving States (e.g. UN General Assembly Resolution 296 (IV), 22 November 1949, concerning Austria, Ceylon, Finland, Ireland, Italy, Jordan, Portugal and Nepal; UN General Assembly Resolution 620(VII), UN Doc. A/RES/620(VII), 21 December 1952, concerning Japan (Part B), Vietnam (Part C), Cambodia (Part D), Laos (Part E), Libya (Part F), Jordan (Part G); UN General Assembly Resolution 1017(X), UN Doc. A/RES/1017, 28 February 1957, concerning Korea (Part A) and Viet-Nam (Part B)) in that it establishes not eligibility for membership but statehood. It differs from other resolutions which have been adopted in the face of Security Council vetoes, in that it

jurisprudential grounds for regarding a resolution on admission to the UN as evidence of, or confirming, objective statehood, do not apply in the same manner to a resolution on recognition that does not encompass UN membership.

For example, if admission resolutions are universally binding because under UN Charter Article 4(1) States have delegated their competence to recognise new States to the organisation, as advocated by Kelsen,¹⁵ then resolutions outside Article 4(1) do not necessarily have the same universal effect. States may have subjected themselves to majority vote in order to facilitate effective functioning of the organisation, which would be hampered if member status was non-uniformly applicable; but they cannot be deemed to have made the same concession to majority vote with respect to all other matters. Similarly, if the universally binding character of the resolution derives from co-membership in the organisation, as proposed by Briggs,¹⁶ then a resolution that does not lead to co-membership does not have the same binding effect.

A different strand of views is that admission to the UN provides compelling¹⁷ or *prima facie*¹⁸ evidence of a determination by States individually, or by the international community as a whole,¹⁹ that an entity fulfils the criteria for statehood. These views differ from the previous ones in that they perceive UN admission resolutions as establishing only a *factual presumption* of objective statehood, rather than normative status. In other words, while recognition according to the previous views is constitutive, the present strand perceives recognition as declaratory. Whether the presumption of objective statehood is equally compelling when the resolution concerns recognition short of admission to the UN can be debated. Since a vote on recognition does not trigger the applicability of the UN Charter, it is reasonable to argue that the weight of a vote in favour of recognition as indicating an assessment on the fulfilment

anticipated admission to the UN, rather than aimed to balance the failure of the attempt at admission.

¹⁵ Dugard, *Recognition and the United Nations*, 46. See also Weiler, 'Differentiated Statehood?', 4–5, doubting that States which have accepted the voting rules of other international organisations have also accepted that this entailed replacing their discretion in according recognition of statehood by that of the organisation.

¹⁶ Briggs, 'Community Interest in the Emergence of New States', 178.

¹⁷ James Crawford, *The Creation of States in International Law*, 2nd edn (Oxford University Press, 2006), 545.

¹⁸ James Crawford, *Brownlie's Principles of Public International Law*, 8th edn (Oxford University Press, 2012), 150.

¹⁹ Wright, cited by Dugard, *Recognition and the United Nations*, 49.

of the effectiveness criteria is not the same as that of a vote in favour of admission.

Finally, the weight of practice in developing the law differs with regard to recognition through admission and to direct resolutions on recognition. The conclusiveness of recognition through admission is largely a matter of practice,²⁰ based on numerous instances where admission to the UN preceded bilateral recognition, including some in which entities were admitted despite strong controversy as to their compliance with the effectiveness requisites.²¹ In contrast, collective recognition short of admission occurred in the single resolution regarding the Republic of Korea. Practice can therefore hardly be said to have led to the crystallisation of new law on collective recognition that is unaccompanied by admission to the UN.²²

In conclusion, no immediate extrapolation can be made from the law regarding collective recognition through admission to the UN, to collective recognition that is not linked to admission. There is (at least as yet) no rule that majority recognition outside the framework of admission to the UN is binding on third States.²³ To the extent that Resolution 67/19 constitutes recognition of statehood, it might of course add to the development of such law. This leads, naturally, to the question of whether the resolution purports to recognise or establish a Palestinian State.

3 Does General Assembly Resolution 67/19 constitute collective recognition of a State of Palestine?

While admission to the UN is generally perceived as implying recognition of statehood since only States may become members of the organisation,²⁴ the grant of observer status (to a State or any other actor) is not regulated

²⁰ Dugard, *Recognition and the United Nations*, 43; Crawford, *The Creation of States in International Law*, 150.

²¹ E.g. Israel, Guinea-Bissau, Angola; Dugard, *Recognition and the United Nations*, 60–3, 73–5.

²² Briggs argued the opposite. However, the practice he cited concerned Israel, which had been admitted to the UN, as well as the resolutions on Korea, Jordan, Nepal and Ceylon, following the failure of their admission bids on political grounds. Briggs, 'Community Interest in the Emergence of New States', 174–5.

²³ Crawford, *The Creation of States in International Law*, 438.

²⁴ For a contrary view see Vidmar, 'Palestine and the Conceptual Problem of Implicit Statehood', paras. 72–3, who maintains that statehood cannot be held hostage to procedure and determined by reverse effect.

by the Charter, and since it does not entail any pre-set organisational substantive rights or obligations, it cannot be regarded as an implicit confirmation of legal status.²⁵ However, this does not preclude the possibility that the content of the resolution constitutes recognition of statehood, whether express or implicit – irrespective of the organisational status that it confers.

That Resolution 67/19 does not expressly recognise the existence of a State is obvious. This is no bar since recognition may be implicit; but it must be unequivocal.²⁶ It is therefore necessary to ascertain whether the references in the resolution to the ‘State of Palestine’ are an acknowledgement of existing statehood (in which case the resolution may generate legal consequences if it is regarded as universally binding) or merely an exhortation for future development. There are no established rules on interpretation of General Assembly resolutions. Nor is there much practice or scholarship on the matter. The lack of interest in interpreting General Assembly resolutions is not surprising since they are not, in themselves, binding sources under international law. Guidance on interpretation of international instruments other than treaties is generally sparse, and, with the exception of the ILC’s Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations,²⁷ is almost entirely limited to interpretation of Security Council resolutions adopted under Chapter VII.

It has repeatedly been proposed that the point of departure for interpretation of international instruments other than treaties should be by analogy from the Vienna Convention on the Law of Treaties (VCLT),²⁸ namely an exercise to give effect to the drafters’ intention as expressed by the use of the words in light of surrounding circumstances,²⁹ taking into account the particular character of the instrument in question.³⁰ For

²⁵ *Ibid.*, 5, 23–4, para. 16. The UN Charter does however mention non-member States, Arts. 2(6), 11(2), 32, 35(2), 50.

²⁶ Yaël Ronen, ‘Entities that Can Be States but Do Not Claim to Be’ in Duncan French (ed.), *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law* (Cambridge University Press, 2013), 47–8.

²⁷ International Law Commission, Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, UN Doc. A/61/10 (2006).

²⁸ Vienna Convention on the Law of Treaties (Vienna, adopted 22 May 1969, entered into force 27 January 1980), 1155 UNTS 331.

²⁹ *Ibid.*, Art. 31(1).

³⁰ *Fisheries Jurisdiction (Spain v. Canada)*, Merits, Judgment, 4 December 1998, ICJ Reports (1998), 453, para. 46. Regarding interpretation of declarations under ICJ Statute Art. 36(2), endorsed by ILC, Guiding Principles Applicable to Unilateral Declarations

example, the *a priori* non-binding nature of General Assembly resolutions might require that endowing them with a binding quality be subject to the rigorous demand relating to a unilateral declaration, which ‘entails obligations for the formulating State only if it is stated in clear and specific terms.’³¹ In addition, interpretation of General Assembly resolutions might resemble that of Security Council resolutions, given the essentially political character of both types of resolutions. Nonetheless, there are pertinent differences: the interpretation of Security Council resolutions, for example, involves limited reliance on preambular language for interpreting operative parts, since preambles tend to be used as dumping grounds for proposals that are not acceptable in the operative paragraphs.³² In contrast, with respect to General Assembly resolutions which are *prima facie* non-binding, the absence of normative gap between preambular and operative paragraphs invites a greater interpretative role for preambular paragraphs.

The present analysis proceeds on the basis of these guidelines. It begins with an interpretation of the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose, taking into account surrounding circumstances. Where the outcome is inconclusive, the circumstances of adoption and preparatory work may be of particular significance,³³ namely statements in anticipation of and following the vote.

(a) *Textual interpretation*

Some mentions in the operative paragraphs of UNGA Resolution 67/19 can be interpreted as referring to an existing State: Operative paragraph 1 reaffirms ‘the right of the Palestinian people to self-determination

of States Capable of Creating Legal Obligations, Guiding Principle 7, commentary para. (3); *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, ICJ Reports (2010), 403, para. 94; Michael Wood, ‘The Interpretation of Security Council Resolutions’ (United Nations 2008), Audiovisual Library of International Law.

³¹ ILC, Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, Guiding Principle 7.

³² Michael Wood, ‘The Interpretation of Security Council Resolutions’, *Max Planck Yearbook of United Nations Law*, 2 (1998), 86–7.

³³ *Ibid.*; Michael Wood, ‘The Interpretation of Security Council Resolutions’; Bart Smit Duijzentkunst, ‘Interpretation of Legislative Security Council Resolutions’, *Utrecht Law Review*, 4 (2008), 205–8.

and to independence in their State of Palestine'. The use of 'State of Palestine'³⁴ instead of the 'independent State of Palestine' and the use of 'independence' as a goal may imply that an occupied, non-independent State is deemed to already exist.³⁵ The State of Palestine is also mentioned in the call on the Security Council to consider favourably the application for UN membership,³⁶ which is reserved to States, thereby implying the existence of a State capable of being admitted. Operative paragraph 6 urges States and UN-related organisations 'to continue to support and assist the Palestinian people in the early realisation of their right to self-determination, independence and freedom'.³⁷ The absence of mention of 'sovereignty' might imply that such is deemed to already inhere in the Palestinian entity.

Importantly, however, operative paragraph 2, which accords Palestine the new status, does not refer to it as the 'State of Palestine'. In addition, operative paragraph 5 speaks of the 'a permanent two-State solution' as a goal yet to be achieved, and refers to 'the Palestinian and Israeli sides', suggesting that treating them on an equal footing requires that the term 'State' be avoided. Unlike the resolution on Korea, Resolution 67/19 is also vague on the fulfilment of the effectiveness criteria. It welcomes assessments that the Palestinian Authority fulfils the threshold requisites of effective government,³⁸ but stops short of making a clear or independent statement on the matter. In the preamble, the phrase 'State of Palestine' appears as a normative claim (the right of the Palestinian people to their independent State of Palestine),³⁹ or as the goal of a political commitment of the General Assembly ('to the two-state solution of an independent, sovereign, democratic, viable and contiguous State of Palestine living side by side with Israel').⁴⁰ Insofar as the preamble is indicative, it therefore also weakens the claim that Resolution 67/19 holds a State to exist.

The reference to the PLO within the resolution may provide some context for interpretation. Operative paragraph 2 stipulates that the General Assembly accords Palestine non-member observer State status in the United Nations, 'without prejudice to the acquired rights, privileges

³⁴ Preambular para. 2.

³⁵ Similarly see John Quigley, 'Palestinian Statehood: A Rejoinder to Professor Robert Weston Ash', *Rutgers Law Record*, 36 (2010), 257–8.

³⁶ Operative para. 3. ³⁷ Operative paras. 3 and 6. ³⁸ Preambular para. 21.

³⁹ Preambular para. 2. ⁴⁰ Preambular para. 18, operative para. 4.

and role of the Palestine Liberation Organization in the United Nations as the representative of the Palestinian people'. The use, within the same paragraph, of the terms 'Palestine' and 'Palestine Liberation Organisation' (PLO), and the regulation of the relations between Palestine and the PLO, suggest that 'Palestine' now means something other than a designation of the PLO⁴¹ – presumably a State. This also implies that within the UN system there are now two entities representing the Palestinian people: a State, and a national liberation movement. This apparent duplication has been interpreted as preserving the right of the PLO to represent diaspora Palestinians.⁴² However, there is no precedent for a national liberation movement continuing to operate in the UN alongside the government.⁴³ In practice there is only one entity operating in the UN, designated by the UN secretariat as the 'non-member State' of Palestine, effectively identical to the former PLO-designating Palestine.⁴⁴ The 'no prejudice' clause might alternatively be interpreted as providing procedural continuity between Palestine as designating the PLO and Palestine as a State observer, thereby avoiding the need to stipulate the accruing benefits, an exercise which would have been time-consuming and possibly controversial.

It has been suggested that the grant of 'non-member observer state status' (emphasis added) indicates that the resolution is solely concerned with a procedural status. This emerges from comparison of the resolution with past conferrals of observer status in the UN, which did not contain

⁴¹ UN General Assembly, 'Question of Palestine, Resolution A/RES/43/177', 15 December 1988.

⁴² Nadia Hijab, 'The Fine Print of Palestinian Statehood', *Aljazeera* (4 December 2012); Al Haq, 'Al-Haq's Questions and Answers: Palestine's UN Initiatives and the Representation of the Palestinian People's Rights' (2011) 23, available at www.alhaq.org/publications/publications-index/item/al-haq-s-questions-and-answers-palestine-s-un-initiatives. On the significance of maintaining PLO representation irrespective of the status within the UN of a State of Palestine, see Sir Guy S. Goodwin-Gill, 'Opinion re the Palestine Liberation Organization, the Future State of Palestine, and the Question of Popular Representation' (10 August 2011), available at <http://s3.documentcloud.org/documents/238962/final-pdf-plo-statehood-opinionr-arb.pdf>.

⁴³ Except in the case of the ANC and South Africa, since the ANC was seeking popular liberation from that very government. Policies of *apartheid* of the Government of South Africa, UN General Assembly Resolution 3151(XXVIII)(B) operative para. 4(d), 14 December 1973. In contrast, the PLO is not recognised as a national liberation movement as against the PA. On the other hand, even in the South African case there was only one entity operating within the formal UN system – the State. In the Palestinian case, neither entity is operating within the formal UN system.

⁴⁴ Available at www.un.org/en/members/nonmembers.shtml, <http://www.un.int/wcm/content/site/palestine/>.

the word 'status'.⁴⁵ This view is supported by statements such as that of Georgia (voting in favour), that 'the resolution confers on Palestine privileges and rights that are equivalent to those of non-member States and only within the General Assembly. Georgia does not consider that the decision endows Palestine with the automatic right to join international institutions and treaties as a State.'⁴⁶ However, a perusal of the explanations of vote reveals that states did not attach particular significance to the 'status' terminology. For example, the Turkish delegate speaks of 'the Palestinian bid to become a non-member observer State' but also of '[g]ranting Palestine the status of a non-member observer State'.⁴⁷

Despite the absence of explicit or even unambiguous recognition in any of the resolution's provisions, the cumulative effect of the repeated references to the right to statehood and to political steps towards consolidation of international status could be tantamount to recognition. Such a contextual interpretation would support the political goal of the resolution, which is beyond dispute an attempt to secure the Palestinian entity the widest measure of recognition as a State despite the obstacle to its admission as a member of the UN. However, that this was the drafters' original motive for pursuing the adoption of the resolution does not mean that it was ultimately achieved. Given the ambiguity of the resolution, it is helpful to turn to States' statements explaining their votes in order to ascertain what they believed the effect of the resolution to be.

(b) The circumstances of adoption: explanations of votes

Fifty-four States took the floor to explain their votes. Only a dozen of those seemed to consider the resolution as recognising or establishing the existence of a Palestinian State for all purposes. For the most part, these states voted in support of the resolution.⁴⁸ Some states referred to the legal obligations and rights associated under international law

⁴⁵ Oded Eran and Robbie Sabel, 'The Status of "Palestine" at the United Nations', *INSS Insight*, 387 (2012), 3, *inter alia* comparing the terminology of the resolution with UN Doc. A/RES/58/314 of 16 July 2004, in which UN General Assembly granted observer status to the Holy See, stating that it 'acknowledges that the Holy See, in its capacity as an *Observer State*, shall be accorded the rights and privileges' (operative para. 1), without 'status'.

⁴⁶ UN Doc. A/67/PV.45, 4. ⁴⁷ UN Doc. A/67/PV.44, 10.

⁴⁸ In addition to the survey below, see the statements in UN Doc. A/67/PV.44 (29 November 2012) 17 (Honduras); UN Doc. A/67/PV.45 (29 November 2012) 1 (Honduras), 13 (Kuwait), 16-17 (UAE), 24 (Morocco) and 3 (Guatemala – abstaining).

with statehood, that accrue to Palestine following the adoption of the resolution, thereby implying that they regarded the Resolution as bringing about a new legal status. Switzerland said that '[t]he elevation of Palestine to the status of a United Nations observer State endows Palestine not only with rights but also with obligations, in particular that of refraining from the threat or use of force as enshrined in the Charter of the United Nations'.⁴⁹ According to Japan, 'following the adoption of that historic Resolution, Palestine will assume greater responsibility as a member of the international community'.⁵⁰ Other statements refer directly to statehood: South Africa found it 'satisfying that the Organization has now cemented in the books of history the fact that Palestine is indeed a State'.⁵¹ Turkey addressed the objections to the resolution as 'misguided efforts aimed at stopping the Palestinians from winning statehood at the United Nations', adding '[w]hen will it be the right time for the Palestinians to achieve their right to statehood, if not today?'⁵² Costa Rica stated that 'our decision is consistent with the recognition that we granted to the State of Palestine in 2008 and with our support for its admission into UNESCO'.⁵³ Canada explained its opposition to the resolution on the ground that it constituted a unilateral measure contrary to the 1995 Interim Agreement between Israel and the PLO⁵⁴ which (implicitly) prohibited the Palestinians from pursuing statehood. This implies that it regarded the Resolution as intended to bring about recognition of statehood.

In contrast, some States clarified that the resolution (and consequently their own in support) votes did not constitute recognition of Palestinian statehood. New Zealand (in favour) was most explicit, that the resolution 'is a political symbol of the commitment of the United Nations to a two-State solution. New Zealand has cast its vote accordingly based on the assumption that our vote is without prejudice to New Zealand's position on its recognition of Palestine'.⁵⁵ Belgium (in favour) also noted 'a significant step towards the creation of a State of Palestine, which we all look forward to . . . For Belgium, the Resolution adopted today by the General Assembly does not yet constitute a recognition of a State in the full sense'.⁵⁶ Finland (in favour) stressed that

⁴⁹ Switzerland's statement is particularly interesting given that it also stated: 'This decision does not involve a bilateral recognition of a Palestinian State, which will depend on future peace negotiations.' UN General Assembly, UN Doc. A/67/PV.44, 29 November 2012, 16.

⁵⁰ UN Doc. A/67/PV.45, 3. ⁵¹ *Ibid.*, 15. ⁵² UN Doc. A/67/PV.44, 11.

⁵³ *Ibid.*, 3. ⁵⁴ *Ibid.*, 8. ⁵⁵ *Ibid.*, 20.

⁵⁶ *Ibid.*, 16. See also the statements by Georgia, UN Doc. A/67/PV.45, 4, and Romania, *ibid.*, 6.

‘the Assembly’s vote did not entail a formal recognition of a Palestinian State’.⁵⁷

Other states, such as the US (against), UK and Singapore (abstaining), opined that the resolution could not create a State because the factual criteria had not been fulfilled and nothing has changed on the ground.⁵⁸ These statements indicate that these states regarded the Resolution as a purported act of recognition – but a premature one.

Perhaps the most telling, and in fact setting the terms for the debate, are the statements by Sudan, which introduced the resolution, and by Mahmoud Abbas, speaking on behalf of the Palestine Liberation Organization. The Sudanese careful paraphrasing of the draft resolution⁵⁹ indicates that the sponsors took care not to digress from a delicately crafted text so that nothing could be read into it beyond what was already in the text. Abbas, too, spoke repeatedly of acquiring ‘non-member observer status for Palestine’ and nothing more concrete. After mentioning UNGA Resolution 181(III) of 1947, which recommended the partition of mandatory Palestine into two States, as ‘the birth certificate for Israel’,⁶⁰ Abbas asked the General Assembly ‘to issue a birth certificate of the reality of the State of Palestine’.⁶¹ The comparison to Resolution 181 indicates that Resolution 67/19 is merely a call for the establishment of a State. On the other hand, the reference to ‘the reality of the state’ implies that a State is already in existence.

In general, however, beyond a generally shared focus on the necessity to progress towards peace and a two-State solution to the conflict, most statements were confused and impenetrable. France (in favour), for example, held that ‘[t]he international recognition that the Assembly has today given the proposed Palestinian State can become fact only through an agreement based on negotiations’,⁶² introducing the unprecedented notion of ‘recognition of proposal’, or of recognition of statehood not sufficing for the latter to become ‘fact’ until a political agreement is achieved. Jamaica (in favour) said that its support for the resolution was ‘based on the understanding that the granting of non-member observer State status to Palestine within the United Nations is on the same basis as that given to the Holy See’,⁶³ leaving it unclear whether the ‘same basis’ was statehood or merely procedural benefits. Bulgaria abstained on the ground that

⁵⁷ UN Doc. A/67/PV.44, 20; See also Norway, UN Doc. A/67/PV.44, 21.

⁵⁸ UN Doc. A/67/PV.44, 13 (US), 15 (UK), 14 (Singapore).

⁵⁹ *Ibid.*, 1. ⁶⁰ *Ibid.*, 5. ⁶¹ *Ibid.*

⁶² *Ibid.*, 14. ⁶³ UN Doc. A/67/PV.45, 5.

‘unilateral actions by either side are counterproductive’, implying that the resolution constituted recognition of statehood, but also noted that direct negotiations are ‘the only sustainable way to achieve the establishment of a sovereign . . . Palestinian State’,⁶⁴ suggesting that sovereignty was still lacking (although, as it stated, it had already recognised Palestine bilaterally). Germany (abstaining) noted that ‘a Palestinian State can be achieved only through direct negotiations between Israelis and Palestinians’,⁶⁵ leaving it unclear whether it considered recognition of statehood through the resolution to be objectionable or simply ineffective.

(c) Conclusion

The immediate object and purpose of UNGA Resolution 67/19, clearly articulated, was to accord Palestine non-member observer status. Beyond that – that is, insofar as concerns recognition of statehood or other non-procedural status – the ambiguity of the resolution is intentional. It was drafted in terms which leave matters sufficiently vague as to garner the widest support possible, including from States which, while supporting the Palestinian cause, did not feel that they could subscribe to a Resolution that expressly recognised Palestinian statehood.

Little can be gleaned from the explanations of vote. While a few reflect clear – and conflicting – understandings of the resolution, the majority are drafted in an elusive manner, whether due to failure to comprehend the complexities of the matter or in an attempt to appease all sides without undertaking any commitment.

However, the onus of proof is on whoever claims that a General Assembly resolution carries legal consequences, as well as on whoever asserts that there has been an act of recognition. The ambiguity of UNGA Resolution 67/19 precludes it from being held as an act of collective recognition of a State of Palestine.

4 The consequences of Resolution 67/19

The conclusion that General Assembly Resolution 67/19 does not establish Palestinian statehood does not mean that it is entirely without consequence. First and foremost it has a procedural consequence within the UN. The effect of the vote was well captured by Cuba (in favour), which laconically congratulated ‘the Palestinian people and authorities on their

⁶⁴ UN Doc. A/67/PV.44, 16. ⁶⁵ *Ibid.*, 15.

victory in this Hall today on obtaining the new status of a non-member observer State'.⁶⁶

If the only outcome of the resolution is the upgrade in status, the victory is a hollow one. There are various differences between observer States and other observers, but Palestine (the PLO) already enjoyed most of the preferential benefits of observer States, such as participation in Security Council debates, placement on the list of speakers, and the right to have documents circulated.⁶⁷ A benefit that has now been added is the right of an observer to change its designation upon informing the Secretariat and without requiring prior approval by the General Assembly,⁶⁸ but clearly it was not for this that the Palestinian campaign had been launched. Moreover, the reactions to the adoption of General Assembly Resolution 67/19 indicate that both its proponents and its opponents assume that its impact goes beyond cosmetic changes within UN procedures, even if the Resolution does not put the existence of a State of Palestine beyond dispute.

Arguably, the minutiae of the resolution's wording and States' linguistic and diplomatic acrobatics are all of limited significance, if – correctly or otherwise – States perceive the resolution as having recognised or established a State of Palestine. In this vein, Akande suggests that if the resolution 'is capable of effecting the legal changes hoped for (by proponents) or feared (by those who oppose the decision), this will provide strong support to the view that collective recognition is capable of creating Statehood'.⁶⁹ *Prima facie*, this proposition turns the matter on its head: consequences should follow from the resolution rather than the resolution being interpreted on the basis of subsequent events. Thus, if the resolution does not (in itself) effect any legal change, it can only give political support for subsequent measures. Accordingly, any decision by States or international organisations such as to recognise Palestine on a bilateral level, to admit it into an organisation reserved to states, or to hold it responsible under customary international law applicable only to states, can rely on UNGA Resolution 67/19 no more than it can rely, for example, on UNGA Resolution 43/177.⁷⁰ Whether the accumulated effect of such legal changes would eventually amount to the emergence of a State

⁶⁶ *Ibid.*, 18. ⁶⁷ General Assembly Resolution 52/520, 13 July 1998.

⁶⁸ S-G letter to Palestine 17 December 2012, available at <http://unterm.un.org/dgaacs/>.

⁶⁹ Akande, 'Palestine as a UN Observer State'.

⁷⁰ This analysis assumes, of course, that Resolution 43/177 also did not, in itself, constitute recognition of Palestine.

if such was not previously recognised is a separate question, which will not be discussed here. However, doctrine does recognise the proposition that subsequent practice in the application of the treaty establishes the agreement of the parties regarding its interpretation.⁷¹ It may well apply also to General Assembly resolutions.

The distinction between the resolution's political and (absence of) legal effect cannot be completed without making reference to a particular type of reliance on General Assembly resolutions, the UN Secretary-General's practice as depositary of multilateral treaties. This is particularly pertinent in the present instance, since the 2012 campaign for UN recognition was carried out very much in the shadow of the debate on the capacity of the Palestinians to consent to ICC jurisdiction,⁷² either by accession to the ICC Statute or by consenting to jurisdiction under Article 12(3).

The Statute of the International Criminal Court (ICC) allows accession by 'all states'.⁷³ Whether the Palestine is a 'state' is a matter to be decided, in the first instance, by the depositary, namely the UN Secretary-General. It is the UN Secretary-General's practice as the depositary of multilateral treaties which refer to accession by 'all states' to follow General Assembly practice in determining whether an entity wishing to deposit an instrument of accession should be regarded as a State.⁷⁴ This is intended to relieve the Secretary-General of having 'to determine, on his own initiative, the highly political and controversial question of whether or not the areas whose status was unclear were States'.⁷⁵ To date, the Secretary-General has relied, in accepting instruments of accession in cases of doubt, on unequivocal indications from the Assembly that it considered particular entities to be States,⁷⁶ as well as on resolutions which noted 'the accession to independence' of various countries.⁷⁷ As demonstrated above, Resolution 67/19 is neither an unequivocal statement that Palestine is a State, nor even an implicit one. As for independence, the resolution

⁷¹ VCLT, Art. 31(3)(b).

⁷² UN Doc. A/67/PV.44, 15 (UK); also Italy: 'Italy decided to vote in favour of resolution 67/19 . . . in the light of the information . . . from President Abbas . . . to refrain from seeking membership in other specialized agencies in the current circumstances, or pursuing the possibility of the jurisdiction of the International Criminal Court . . .' UN Doc. A/67/PV.44, 18–19. See also the statement by Egypt, UN Doc. A/67/PV.45, 8.

⁷³ ICC Statute, Art. 125(3). Note that this is not the 'Vienna formula' which allows also accession of members of the UN specialised agencies.

⁷⁴ UN Secretariat, Office of the Legal Advisor, Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, UN Doc. ST/LEG/7/Rev.1, 1999, para. 81. However, it is UNGA Resolution 67/19 which seems to have prompted the debate on the matter.

⁷⁵ UN Doc. ST/LEG/7/Rev.1, para. 81. ⁷⁶ *Ibid.*, para. 82. ⁷⁷ *Ibid.*, para. 84.

indicates that this is a goal yet to be achieved.⁷⁸ Thus, notwithstanding numerous claims that following the adoption of UNGA Resolution 67/19 Palestine can now accede to the ICC Statute,⁷⁹ it is doubtful whether the Resolution delivers the goods so vehemently sought. Moreover, the resolution may actually block other routes previously adopted by the Secretary-General. For example, in the past the Secretary-General has relied on a decision on statehood by the World Health Assembly. The reliance on a special agencies' resolutions was justified by the Secretary-General where their 'membership was fully representative of the international community'. However, such reliance is appropriate only if '[t]he guidance the Secretary-General might have obtained from the General Assembly, had he requested it, would evidently have been substantially identical' to the decision of the special agency.⁸⁰ In the case of Palestine, there is a resolution admitting Palestine into membership in UNESCO.⁸¹ If the Palestinians had attempted to accede to the ICC Statute prior to the adoption of UNGA Resolution 67/19, the Secretary-General might have been able to rely on the UNESCO resolution. But once UNGA Resolution 67/19 has been adopted, it is clear that the General Assembly's guidance (or lack thereof) is substantially different from that of UNESCO. The Secretary-General's ability to rely on the latter now is at least questionable.⁸²

Taking the matter a step further, it should be noted that admission to international legal institutions such as treaty relations, even when those are reserved only to States, does not necessarily imply a general recognition of statehood. In addition to the doctrinal difficulties in deducing statehood from procedural processes⁸³ based on diverse political agendas,⁸⁴

⁷⁸ Operative paras. 4, 6.

⁷⁹ Andreas Zimmerman, 'Palestine and the International Criminal Court Quo Vadis? Reach and Limits of Declarations under Article 12(3)', *Journal of International Criminal Justice*, 11 (2013), 303; Dugard, 'Palestine and the International Criminal Court', 568. Kevin Jon Heller, 'Placard? I Don't See No Stinking Placard!', *Opinio Juris* (24 January 2013), available at <http://opiniojuris.org/2013/01/23/>.

⁸⁰ UN Doc. ST/LEG/7/Rev.1, para. 86.

⁸¹ UNESCO General Conference, Admission of Palestine as a Member of UNESCO, 36C/Resolution 76, 31 October 2011.

⁸² After completion of this text, in August 2014 the prosecutor of the International Criminal Court stated that following the adoption of Resolution 67/19, 'Palestine could now join the Rome Statute.' Fatou Bensouda, 'Fatou Bensouda: The Truth about the ICC and Gaza', *The Guardian*, 29 August 2014, <http://www.theguardian.com/commentsfree/2014/aug/29/icc-gaza-hague-court-investigate-war-crimes-palestine>.

⁸³ Vidmar, 'Palestine and the Conceptual Problem of Implicit Statehood'.

⁸⁴ Weiler, 'Differentiated Statehood?', 5.

international practice evinces a distinction between treaty membership and statehood. For example, when in the 1980s the UN Council for Namibia joined several international treaties on behalf of Namibia, Namibia continued to be regarded as not yet being a State. One might hazard to suggest that even within UNESCO, Palestinian statehood is not beyond debate; this is hinted in the Executive Committee's Resolution in the lead-up to admission which noted that 'the status of Palestine is the subject of ongoing deliberations at the United Nations'; and by the fact that membership was accorded to 'Palestine' rather than to the 'State of Palestine'.⁸⁵

A separate but equally political issue would arise if the ICC Prosecutor decides to revisit the question of accepting a declaration by Palestine under Article 12(3) on the basis of General Assembly Resolution 67/19. This provision engages the ICC Prosecutor's authority to determine whether Palestine is a State or not. It is not clear that the test for jurisdiction is the same as that applied by the Secretary-General with respect to accession to treaties. The ICC Prosecutor's decision of April 2012 suggested that a General Assembly resolution might seal the matter also for the purpose of jurisdiction under ICC Article 12(3). In explaining why he could not regard Palestine as a State, the Prosecutor noted, *inter alia*, that despite wide bilateral recognition, 'the current status granted to Palestine by the United Nations General Assembly is that of "observer", not as a "Non-member State"'.⁸⁶ By implication, the new status is a game-changer. The position of the new ICC Prosecutor, however, may be different. Reportedly, she regards Resolution 67/19 as paving the way for Palestinian accession to the ICC Statute,⁸⁷ but not necessarily for acceptance of its declaration under Article 12(3).⁸⁸ Treaty accession is, ultimately, an institutional procedure. Jurisdiction of the ICC requires a direct determination of statehood as an objective legal status.

⁸⁵ UNESCO Executive Board, UNESCO 187 EX/Decision 40, 2011; Admission of Palestine as a Member of UNESCO.

⁸⁶ ICC, Office of the Prosecutor, 'The Situation in Palestine' (3 April 2012), para. 7, available at www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf.

⁸⁷ John V. Whitbeck, 'Palestine and the ICC', *The Palestine Chronicle*, 6 April 2013.

⁸⁸ This is evident in her statement that the ball is in the Palestinian court. In the context of determining the ICC's jurisdiction, Whitbeck, Palestine and the ICC.

5 Conclusion

The legal significance of Resolution 67/19 might not be as great as would appear at first sight. For those who regarded Palestine as a State prior to the adoption of the resolution, the latter merely removes procedural obstacles.⁸⁹ For those who considered that Palestine lacked certain requisites for statehood, Resolution 67/19 does not necessarily fill the gap. It might give political courage to leading international players, such as the UN Secretary-General. But notwithstanding its political significance, it is submitted that the Resolution should not be viewed as effecting any legal change.

Supporters of the Palestinian cause strove for an all-round recognition of statehood. Realising that they could not achieve that directly, they settled for a formulation which would be acceptable to all. However, the ambiguity which allowed the adoption of the resolution is critical, since being all things to all men (and women), it does not feature the definitive statement that is necessary for statehood to be confirmed. As noted by Crawford, '[f]or a Palestinian State to be properly described as "*nasciturus*", what is needed is statesmanship on all sides, and respect for the rights of the peoples and states of the region. The manipulation of legal categories is unlikely to advance matters.'⁹⁰ More than twenty years down the road, these words have lost none of their poignancy.

⁸⁹ As candidly suggested by John Quigley, even before the adoption of the resolution, above n. 3.

⁹⁰ Crawford, 'The Creation of the State of Palestine', 313.