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# Statehood and Recognition: the Case of Palestine



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## **LIST OF ABBREVIATIONS**

DOP = Declaration of Principles

EU = European Union

GA = General Assembly

ICC = International Criminal Court

ICJ = International Court of Justice

IMF = International Monetary Fund

OPT = Occupied Palestinian Territories

PA = Palestinian Authority

PLO = Palestine Liberation Organization

PNC = Palestinian National Council

SC = Security Council

UN = United Nations

UNGA = United Nations General Assembly

UNSC = United Nations Security Council

WB = World Bank

## INTRODUCTION

This work focuses on one of the most debated issues in international politics: the status of Palestine within the international community. I chose this topic because I think that too many times the issue of Palestine is analysed only within the context of the conflict with Israel, and there is a lack of analysis about the real status of Palestine in terms of being or not a state of the international community. Moreover, during the last years the strategy developed by Palestinian authorities shifted from negotiations with Israel in order to solve the conflict as the best path towards recognition, into a unilateral approach aimed at gaining recognition through bilateral and multilateral efforts. This raises new doubts and questions about the capacity of Palestine to be treated as a state within the international system.

The main question I tried to answer in this work is “Is Palestine a state?”. It seems to be an easy one, but of course it is not. In order to do that I had to deal with other significant issues such as “Does Palestine fulfil the Montevideo criteria?”, “Did Palestine gain a level of recognition (bilateral and multilateral) satisfactory to be a state according to the constitutive theory?”, or “Do the difficulties for Palestine to obtain full membership in the United Nations (hereinafter, UN) affect its international status?”. In order to be exhaustive and precise in this analysis I made use of some of the most important books dealing with the theories of statehood and recognition, aiming at a full understanding of the theoretical framework of this topic. Moreover, I examined many academic reviews expressing different points of view about Palestinian statehood, and it enabled me to compare ideas and have a whole view of the problem. Finally, I consulted many official documents of the UN, such as resolutions and reports, and of the Israeli and Palestinian governments.

Regarding the general structure of this work, it is divided in three chapters plus the final conclusions. The first one is basically an explanation of the theoretical framework existing around the notions of statehood and recognition. After a brief analysis of the concept of state and its constitutive elements according to the Montevideo Convention on the Rights and Duties of States (hereinafter, Montevideo Convention), I identified strengths and weaknesses of the two main theories in this field: declaratory and constitutive.

Then, in the second chapter, I applied the ideas settled in the first to the Palestinian case. Following a brief overview of the Palestinian claims since 1948 to the present, I tried to figure out if Palestine fulfils the four Montevideo criteria of statehood and then if it is or not a state according to the declaratory theory. I especially focused on the Palestinian capacity to enter into relations with other states, stressing how the strategy for political and diplomatic recognition changed from Arafat to Abbas and how it is affected by the impasse in negotiations with Israel.

Finally, in the third chapter, I moved from the bilateral dimension of the Palestinian strategy for recognition to the multilateral one. I centred mainly in the way the relationship between Palestine and the UN evolved through the years, examining with special attention the legal and political implications of the historical decision by the General Assembly (hereinafter, GA) to upgrade the status of Palestine to non-member observer state in 2012. In the last part I focused on the Palestinian approach to international justice, especially the International Court of Justice and the International Criminal Court (hereinafter, ICJ and ICC). Palestine membership in the ICC in 2015 was a huge success for enhancing its status in the international arena and could yield important consequences in shaping the conflict with Israel.

In the last section, I collected all the ideas treated in the body of this work trying to answer to the questions that I raised. The results are quite interesting because they show to the readers a clearer image of Palestinian efforts in terms of statehood and recognition and if they satisfied the legal and practical requirements to define Palestine as a state.

# 1. INTERNATIONAL LAW, STATEHOOD AND RECOGNITION

## 1.1 THE MONTEVIDEO CRITERIA OF STATEHOOD

In the 21<sup>st</sup> century the concept of “state” remains a critical component of international law and international relations. Given its central role, there should be a clear and codified definition of state existing in international law. However, it is not the case, and even if since 1945 several attempts have been made to agree on such a definition, none of these efforts succeeded. Thus, the Montevideo Convention<sup>1</sup> can still be considered, as Crawford argues, “*the best-known formulation of the basic criteria for statehood*”<sup>2</sup>. The Article 1 enunciates that “*The state as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with other states*”<sup>3</sup>.

Starting from the territorial aspect of statehood, it is obvious that states are territorial entities. Firstly, this element requires the exercise of governmental power over some territory, without specifying a minimum area for the purpose of fulfilling this condition. For example, Tuvalu, a state of only 26sq km, obtained independence in 1978 and became a full member of the UN in 2000. Furthermore, the territory of the state in international law does not require continuity of the territory<sup>4</sup>. About the second element, a permanent population, it is probably the least controversial of the four traditional statehood benchmarks. It is necessary for statehood, and it is connected with the territorial dimension, because “*if states are territorial entities, they are also aggregates of individuals*”<sup>5</sup>. Moreover, like in the case of territory, no minimum population is required. The third requirement is the presence of a government capable of exercising independent and effective authority over the population and the territory. Fundamentally, it must be shown that the territory has a government who is independent, control the affairs of the

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<sup>1</sup> The Montevideo Convention on the Rights and Duties of States was signed at Montevideo, Uruguay, on 26 December 1933, during the Seventh International Conference of American States. Even if the Convention was signed only by 19 states, it has been almost universally accepted as the main reference in order to identify the constitutive elements of states. Convention on the Rights and Duties of States (Uruguay, Seventh International Conference of American States, 26 December 1933), Article 1. <https://www.ilsa.org/jessup/jessup15/Montevideo%20Convention.pdf> (Last accessed 15 December 2017).

<sup>2</sup> James Crawford, *The Creation of States in International law*, 2<sup>nd</sup> ed. (Oxford: Oxford University Press, 2006), 4.

<sup>3</sup> Convention on the Rights and Duties of States, Article 1.

<sup>4</sup> Rewand Hajjaj, “International Recognition Evolving Statehood Criterion: Comparative Analysis of Palestine and Kosovo” (Central European University, Department of Legal Studies, 2012), 6.

<sup>5</sup> Crawford, *The Creation of States in International law*, 46.

state and ensures social and legal order. Nonetheless, if a state ceases temporarily to have an effective government (think about scenarios of civil war) this does not mean that the state disappeared<sup>6</sup>. The fourth and last requirement for statehood according to the Montevideo Convention, the capacity to enter into relations with other states, refers to the legal capacity of an entity to participate in public international relations, including the legal competence to carry out its obligations<sup>7</sup>. There is a debate between those who argue that it is a defining element of statehood, and who sees it as a consequence and not a prerequisite of being a state. Currently, the second option seems to be the preferred one. The idea is that if an entity meets the first three criteria (a territory, a population, and a government) it can be considered a state and therefore has the ability to enter into relations with other states, and not the other way around. As Crawford argued, “*capacity to enter into relations with other states is not a criterion, but rather a consequence of statehood, and one which is not constant but depends on the status and situation of particular states*”<sup>8</sup>.

Therefore, the Montevideo Convention and the prevailing law at the time, viewed states as a kind of *sui generis* legal entity operating and existing under its own authority and power. However, it seems that it falls short in many senses, because it did not include political criteria and considerations which are relevant in states’ discourses. It is really complex to codify a new definition of state, a concept whose meaning depends heavily on the context, which has changed since the framing of the Convention. The search for a definition gets bogged down almost immediately in a long-running debate that deeply divides the international legal scene: is recognition an essential requirement for statehood or rather a confirmation of a pre-existing factual situation?<sup>9</sup>

## 1.2 THEORIES OF STATEHOOD: STRENGTHS AND WEAKNESSES

The current body of international rules governing the process of state recognition finds itself in an existential crisis. Even though the applicability of a basic set of legal rules on the recognition of states remains the starting point of much legal scholarship, the practice

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<sup>6</sup> Martin Dixon, *Textbook on International Law* (Oxford: Oxford University Press, 2010), 121.

<sup>7</sup> Jianming Shen, “Sovereignty, Statehood, Self-Determination, and the issue of Taiwan”, *American University International Law Review* 15, no.5 (2000): 1106.

<sup>8</sup> Crawford, *The Creation of States in International Law*, 116.

<sup>9</sup> Cedric Ryngaert & Sven Sobrie, “Recognition of States: International Law or Realpolitik? The Practice of Recognition in the Wake of Kosovo, South Ossetia, and Abkhazia”, *Leiden Journal of International Law* 24 (May 2011): 469.

of the last years seems to draw a different reality in which political convenience rather than legal norms plays the leading role. This is reflected in the debate existing between supporters of the declaratory and the constitutive theory, whose views about recognition is completely opposite.

### *1.2.1 The Declaratory Theory*

This doctrine owes to the traditional positivist thought on the supremacy of the state and the concomitant weakness or non-existence of any central guidance in the international community. According to the declaratory school, an entity in order to become an existent state has simply to fulfil the legal statehood criteria as required under international law, in particular those defined in the Montevideo Convention: defined territory, permanent population, government and the capacity to enter into relations with other states. The recognition is just the mere acknowledgment of its existence<sup>10</sup>. Article 3 provides that “*The political existence of the state is independent of recognition by other states*”<sup>11</sup>, while Article 6 affirms that “*The recognition of a state merely signifies that the state which recognizes it accepts the personality of the other with all the rights and duties determined by international law*”<sup>12</sup>. Thus, recognition is seen as a political act, not a necessary element for statehood. It is almost irrelevant because the status of statehood is based on facts and not on individual state discretion, and if statehood is a fact, then recognition should be automatic<sup>13</sup>. In current doctrine and jurisprudence, the declaratory is the dominant theory. One of the most important reasons of its success lies in the fact that it establishes a primacy of objective legal norms over political arbitrariness deriving from states’ decisions about statehood. It deprives states of the right to determine the legal status of an entity according to their own political convenience<sup>14</sup>.

However, there are criticisms of this theory. The first one lies in the practical consequences of being a state according to the Montevideo criteria, which are little without recognition. This impede to act as a state in the whole sense of the term. In fact, states do not acquire international rights on the international plane until they are recognized by other states. The fact that recognition empowers states with these rights

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<sup>10</sup> Ibidem, 470.

<sup>11</sup> Convention on the Rights and Duties of States, Article 3.

<sup>12</sup> Ibidem, Article 6.

<sup>13</sup> William T. Worster, “Law, Politics, and the Conception of the State in State recognition theory“, *Boston University International Law Journal* 27, no. 1 (August 2009): 119.

<sup>14</sup> Brandon R. Roth, *Governmental Illegitimacy in International Law* (Oxford: Clarendon Press, 1999), 128.



changes the expectations of the others encouraging them to make peaceful choices<sup>15</sup>. Another problem arising out the declaratory theory is the absence in international law of mechanisms for authoritatively determining whether an entity fulfils the factual criteria for statehood. Moreover, this doctrine does not look at the way the entity has acquired necessary requirements, and this is a severe deficiency assumed that states can come into being through grave violations of international law. State practice responds to such events by not granting recognition to these entities, but this kind of sanction is meaningless within the framework of the declaratory theory<sup>16</sup>. Finally, another major point of disapproval concerns the argument that if a state exists in fact, it must exist in law. As Raič argues, “*the theory assumes that the mere factual situation, which is the direct result of the fulfilment of the criteria for statehood would lead ipso facto to international personality, which is incorrect*”<sup>17</sup>. International personality cannot be the consequence of a factual situation, rather it is the result of an international legal rule. Thus, a state is not an international person because it satisfies Montevideo criteria, but because international law confers international personality to such factual situation.

### 1.2.2 The Constitutive Theory

The constitutive view holds that an entity’s very legal existence as part of the international system is constituted by the recognition of the other entities making up the system. This places considerable significance on the satisfaction of the criteria for statehood set up in Montevideo, but it requires something more, precisely the recognition of the new states by existing ones<sup>18</sup>. The constitutive view is typically associated with the positivist conception that law among nations arises as the product of sovereign consent. The principle lies in the assumption that legal relations between two entities who are not subject to a superior legal order can arise only as the result of mutual recognition of international personality. Given the fact that international law lacks mechanisms to determine whether an entity fulfils the factual criteria for statehood, the proponents of the constitutive theory highlight the importance attached to recognition by existing states. In their opinion, the international law provides existing states the freedom to determine in

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<sup>15</sup> Worster, “Law, Politics and the Conception of the State in State Recognition Theory”, 119.

<sup>16</sup> Ryngaert & Sobrie, “Recognition of States: International Law or Realpolitik? The Practice of Recognition in the Wake of Kosovo, South Ossetia, and Abkhazia”, 470.

<sup>17</sup> David Raič, *Statehood and the Law of the Self-Determination* (The Hague: Kluwer Law International, 2002), 38.

<sup>18</sup> Amy, R. Eckert, “Constructing States: The Role of the International Community”, *Journal of Public and International Affairs* 13 (Spring 2002): 24.

each case whether an entity meets or not the necessary criteria for statehood, through recognition. It is a condition *sine qua non*, necessary to close the gap between the general rules of international law and the specific facts on which these rules should be applied. This theory is also supported by the notion that obligations that states must fulfil in the international community come from individual state consent, and as Crawford argues “*while the existence of a new state will bring such legal obligation to the existing state, the existence of this new state should be by the consent of the existing state*”<sup>19</sup>.

However, like for the declaratory theory, the constitutive is object of diverse criticisms too. At a very concrete level, questions arise as to how many recognizing states are needed before an entity turns into a state and whether the decision to recognize should be the result of an evaluation of the facts or should be based on norms or geopolitical considerations. This is a serious drawback, because most of the times a new entity has been recognized only by a part of the international community, and this makes difficult to determine if a new state emerged or not according to the constitutive theory<sup>20</sup>. The constitutive theory does not define precise criteria and thresholds to say what the number of recognizing states is enough. It has been criticized also from a theoretical point of view. According to Worster, it is not attractive in that “*it permits states to ignore the facts, i.e. the existence of a state, acting as such and acknowledged as such by national and perhaps neighbours*”<sup>21</sup>. The theory argues that an unrecognized state will not have rights and duties towards the world order, and this means that it can invade any state and it can be invaded by any state. However, there is no evidence to suggest that states regard unrecognized states as if they would not exist. On the contrary, regardless of international recognition, a supposed state might exercise its authority over its nationals without regard to the position of other states, even if they do not believe it fulfils the criteria for statehood. This way results in the assignment of recognition to the purely political process based on a high level of discretion, rather than legal and right-based process. These assumptions raise questions over the credibility of this theory.

The wide gap between the constitutive theory, in which recognition is fully normative, and its declarative counterpart, in which recognition has no normative value, seems

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<sup>19</sup> Crawford, *The Creation of States in International Law*, 13.

<sup>20</sup> The constitutive theory is precise only when it comes to unilateral recognition, which, in the words of Cassese, “cannot be constitutive”. Antonio Cassese, *International Law* (Oxford: Oxford University Press, 2004), 49.

<sup>21</sup> Worster, “Law, Politics, and the Conception of the State in State recognition Theory”, 120.

unbridgeable. However, with the aim to resolve this theoretical debate, some authors proposed a third system in which statehood is seen in terms of effectiveness, and recognition would be a tool to raise this effectiveness. According to this view, recognition is both constitutive and declaratory. Constitutive because it creates relations between the recognizing and the recognized state, and declaratory since it does not grant statehood on the entity<sup>22</sup>. However, instead of trying to solve the theoretical debate, it seems more helpful to question its practical relevance, looking at the concrete advantages deriving from recognition and how the international community deals with this issue.

### 1.3 EFFECTS OF RECOGNITION AND STATE PRACTICE

According to present-day practice, recognition has only a declaratory character. The state comes into existence as soon as it fulfils the elements of statehood identified in the Montevideo Convention<sup>23</sup>. The legal existence of a state is not dependent on whether it has been recognized as such by other states and recognition is much more a question of policy than of law. However, even if it is not generally considered as a requirement for statehood, international recognition plays a crucial role in determining the actual rights of the state at the international level. In fact, only once the new state has been recognized it becomes a subject of international law with all the rights and obligations that it encompasses<sup>24</sup>. In other words, recognition determines whether or not statehood can be exercised in any practical sense within the international community.

States which have not obtained a diffuse recognition are generally called *de facto* states<sup>25</sup>. In the words of Scott Pegg, “*a de facto state exists where there is an organized political leadership which [...] receives popular support; and has achieved sufficient capacity to provide governmental services to a given population in a defined territorial area*”<sup>26</sup>.

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<sup>22</sup> Ryngaert & Sobrie, “Recognition of States: International Law or Realpolitik? The Practice of Recognition in the wake of Kosovo, South Ossetia, and Abkhazia”, 470-71.

<sup>23</sup> In more recent international practice, several additional criteria have been identified as prerequisites for statehood. The recognition policy of many states and the positions taken by contemporary jurists indicate that the traditional criteria for statehood are being extended to include additional elements. They require, for instance, that an entity seeking recognition demonstrate that it has not been established as the result of illegality, that it is willing and able to abide by international law, that it constitutes a viable entity, and that its claim to statehood is compatible with the right to self-determination.

<sup>24</sup> Christian Hillgruber, “The Admission of New States to the International Community”, *European Journal of International Law* 9 (February 1998): 492.

<sup>25</sup> Different terms are used to define these kind of states. For instance contested states or states with limited recognition.

<sup>26</sup> Scott Pegg, “De Facto States in the International System”, *Institute of International Relations of the University of British Columbia*, no. 21 (February 1998): 2.

However, it is unable to achieve widespread international recognition and remain illegitimate in the eyes of international society. The problem with *de facto* states is that the lack of recognition hinders them from benefitting of all the advantages related with the achievement of a *de iure* status. These can be summarized in four points:

- only recognized states may be part of international treaties with other states;
- only recognized states can be full members of intergovernmental organizations like the UN, the IMF or the WB;
- only recognized states have the power to bring claims against other states before the ICJ;
- finally, recognized states are the unique recipients of Foreign Direct Investments from the IMF or the WB<sup>27</sup>.

Take the case of Somaliland, which is considered one of the most prominent examples of *de facto* state. It has been independent since the end of Siad Barrer's regime and the outbreak of the civil war in 1991, organizing independently local and national elections and writing a constitution. Moreover, it has a functioning police force and a governmental body with authority over people. Virtually Somaliland meets all the legal criteria for statehood, but it is not recognized by any other state. Therefore, its internal sovereignty without recognition means little for its external affairs, impeding it to become a full member of international society. Somaliland is not an isolated case and reflects a diffuse practice among states which seem to favour the maintenance of the status quo rather than supporting the inclusion of new states in the international community<sup>28</sup>. In the eternal debate between self-determination and territorial integrity, the latter seems to predominate. Outside the context of the decolonization in the 60's and the disintegration of Soviet Union and Yugoslavia in the 90's, states have been careful in recognizing secessionist entities<sup>29</sup>. Political and strategic considerations, especially the fear of a

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<sup>27</sup> Bridget L. Coggins, "Secession, Recognition and the International Politics of Statehood" (Ohio State University, Department of Philosophy, 2006), 46-47.

<sup>28</sup> According to Deon Geldenhuys, in 2009 there were ten cases of *de facto* or contested states, which after a declaration of independence have not obtained widespread recognition by other states. These are: South Ossetia & Abkhazia, Kosovo, Northern Cyprus, Western Sahara, South Ossetia, Nagorno-Karabakh, Transnistria, Somaliland, Kosovo and Palestine. Deon Geldenhuys, *Contested States in World Politics* (London: Palgrave Macmillan, 2009).

<sup>29</sup> Recognition is, to some extent, linked to the way in which the new state comes into existence. In the case of decolonization movements and the disintegration of the USSR, there were the consent of the central authorities of the former states. When the secession is uncontested, recognition is likely. The case of Yugoslavia was also an exception, because of its historical development and the recognized violation of

domino effect which could put in danger the territorial integrity of many states of the world, are still decisive in shaping the recognition's discourse.

## **2. THE CASE OF PALESTINIAN STATEHOOD**

### **2.1 BRIEF HISTORY OF PALESTINIANS CLAIMS**

There are some events which played a crucial role in determining the actual status of Palestine and its claims for statehood and recognition. The territory of Palestine from which both Israel and Palestine originated, was part of the Ottoman Empire. With the end of the World War I, which implied its disintegration, its territory was placed under the League of Nations Mandate system, with Great Britain exerting as the Mandatory power. The Article 22 of the Covenant of the League of Nations, referring to the so-called "Class A Mandates", such as Palestine, provided them with the provisional recognition of "*their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone*"<sup>30</sup>. The intention was to set up one or more independent nations from the British Mandate. After the World War II, due to its incapacity to cope with revolts from both sides, the spread of violence, and a massive Jewish migration from Europe, Great Britain decided to bring the question of Palestine before the United Nations General Assembly (hereinafter, UNGA). On 29 November 1947, it adopted Resolution 181, approving the Partition Plan, which included the creation of an Arab and a Jewish state not later than October 1948, the division of Palestine into eight parts (three conferred to the Arab state and three to the Jewish one) and an international administration regime for Jerusalem.

On 14 May 1948, the same day as the British Mandate expired, Israel was unilaterally established as an independent state, and immediately recognized by the US and the Soviet

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human rights against ethnic minorities. Except these cases, only Bangladesh's attempt of secession from Pakistan was successful and now Bangladesh is a recognized state member of the UN. Currently, the practise has not changed significantly, and any new states created without consent have been fully recognized by the other states. In order to have a deeper vision of secessionism in theory and practice look at: Aleksandar Pavkovic & Peter Radan, *Creating New States: Theory and Practice of Secession* (London & New York: Routledge, 2008); Percy. B. Lehning, *Theories of Secession* (London & New York: Routledge, 1998).

<sup>30</sup>The Covenant of the League of Nations (Paris: Paris Peace Conference, 28 June 1919). <http://www.refworld.org/docid/3dd8b9854.html> (Last Accessed 27 December 2017).

Union. In the Israeli Declaration of Independence there is a reference to the UNGA Resolution 181, as recognizing the right of the Jewish people to establish a state. Therefore, it could be argued that also the Palestinian state could lie on the same resolution as a source of legitimacy of a unilateral declaration of independence<sup>31</sup>. Following the declaration, hostilities broke out between Arab and Jewish communities, and neighbouring Arab states entered the territory in assistance of the Palestinians. The 1948 Arab-Israeli war ended with Israel in control of much of the territory conferred to the Arab state by the Partition Plan, including West Jerusalem, and Egypt and Jordan respectively managing the remaining portions of Gaza and the West Bank. A victorious Israel had not only retained its status as a new state but had also increased its territory by almost 50%<sup>32</sup>. Because of the war, a major humanitarian crisis had been created, with almost 750,000 Palestinians displaced from their own land<sup>33</sup>. This is important because the right of return of the Palestinian refugees is one of the unresolved issues of the conflict. Later in 1949, the Armistice Agreement was signed between Israel, Egypt, Lebanon, Jordan and Syria, which set up the so called “Green Lines”<sup>34</sup>. Boundaries also became one of the critical unresolved issues when discussing the territorial configuration of the Palestinian state.

Another past event to be considered took place in 1964, when a conference backed by the Arab League held in Jerusalem brought to the creation of the Palestine Liberation Organization (hereinafter, PLO), to act as the government of the Palestinians<sup>35</sup>. It rapidly gained the support of most of the Arab League governments, which offered to the PLO a seat in the organization. On the other side, the relations between Israel and its Arab neighbours were characterized by a growing tension due to raising security concerns. This situation of stalemate came to an end in 1967, when Israel launched a series of pre-emptive attacks against Egyptian airfields, followed by troops’ mobilization. This would

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<sup>31</sup> Errol Mendes, “Statehood and Palestine for the purpose of Article 12 (3) of the ICC Statute”, *University of Ottawa*, (2010): 4.

<sup>32</sup> To the historians of Israel, the conflict became the War of independence, while for the Palestinians, due to the catastrophic result of the war, it was symbolized by the term “*Nakba*”. It is often considered as the beginning of the contemporary history of Palestine, made of violent suppression, catastrophic changes and fight not to disappear.

<sup>33</sup> United Nations, *The Question of Palestine and the United Nations*, (New York: Department of Public Information of the United Nations, 2008), 10.

<sup>34</sup> The Green Line is the demarcation line set out in the 1949 Armistice Agreements. It serves as the de facto borders of the state of Israel from 1949 until the Six-Day War in 1967.

<sup>35</sup> John Quigley, *The Statehood of Palestine: International Law in the Middle East Conflict* (New York: Cambridge University Press, 2010), 133.

later be known as the War of 1967, or the Six-Day War, which will exert a significant effect in awakening Palestinian nationalism, as Israel gained the authority of the West Bank from Jordan and the Gaza Strip from Egypt in a short but intense war in which Israel took advantage of its clear military superiority. Finally, Israel defeated Syria controlling the Golan Heights, and also Jerusalem was occupied, including all the holy sites<sup>36</sup>. All the events that took place during 1948 and 1967 wars significantly shaped the framework of peace talks because it was during those conflicts that some of the core issues emerged. Palestinian refugees, control of Jerusalem and mutual recognition of statehood still today dominate discussions and remained largely unresolved in the peace negotiations<sup>37</sup>.

In 1974 the PLO was granted observer status in the UN, as the representative of the Palestinian Arabs. The GA, in a resolution adopted on 22 November 1974, invited the PLO to participate in its sessions in the capacity of observer. This was an important step for Palestinians, because it showed that UN backed a longstanding peaceful solution to the conflict. Moreover, the GA reaffirmed the inalienable rights of the Palestinian people, such as the right of self-determination, sovereignty and national independence. The following years were characterized by political turbulence and failed attempts of negotiations. After the 1973 Yon Kippur war, in which Israel defeated Egypt and Syria, tension lessened between Israel and Arab countries. In 1977 Sadat, the Egyptian Prime Minister, travelled to Jerusalem to meet with Israeli government, and his visit brought to the 1978 Camp David Accords. Sadat, Begin and Carter negotiated two different issues: the first one led to the bilateral peace treaty between Israel and Egypt<sup>38</sup>, while the second focused on Palestine led to autonomy talks which ended in 1980<sup>39</sup>. Despite these efforts, tension between Palestinians and Israel rose during the 80's, due to Israel's territorial occupation and discrimination of the Palestinians. In December 1987, twenty years after the beginning of the occupation, the Gaza Strip and the West Bank erupted in a spontaneous popular uprising that was known as the *intifada* (which in Arab means "shaking off"). Palestinians used mainly rocks, tires and molotov cocktails. However,

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<sup>36</sup> Suzanne Kelly Panganiban, "Palestinian Statehood: A Study of Statehood through the Lens of the Montevideo Convention" (Virginia Polytechnic Institute and State University, Master of Arts in Political Science, 2015), 42-43.

<sup>37</sup> Ibidem, 44-45.

<sup>38</sup> Israel completed its withdrawal from the Sinai Peninsula in 1982.

<sup>39</sup> Negotiations failed because Palestinians did not accept Israel limited authority in the Gaza Strip and the West Bank, while Israel refused to accept the PLO as the Palestinian negotiator. Look at: Jeremy Pressman "A brief history of the Arab-Israeli conflict" *University of Connecticut* (May 2005): 9. [http://web.uconn.edu/polisci/people/faculty/doc/history\\_pressman.pdf](http://web.uconn.edu/polisci/people/faculty/doc/history_pressman.pdf) (Last accessed 5 January 2018).

Israeli army's response was disproportionate and in the next six years, over 1,000 Palestinians were killed, and much more were wounded<sup>40</sup>.

The negotiation process resumed in October 1991, with the convening of the Peace Conference on the Middle-East held in Madrid. It established bilateral talks between Israel and its Arab neighbours (Lebanon, Jordan and Syria), while the Palestinians were included in a delegation together with Jordan. Multilateral Working Groups on different issues were also established, but the negotiations proved difficult especially when it came to final borders, Jerusalem, Palestine's future status, Israeli settlements and Palestinian refugees. Parallely to the labour of the working groups, in the summer of 1993 in Oslo, secret Israeli-Palestinian talks led to a major breakthrough. Israel and the PLO signed the Declaration of Principles (hereinafter, DOP). The PLO officially recognized the right of Israel to exist, committed to fight against terrorism, and accepted United Nations Security Council (hereinafter, UNSC) Resolution 242<sup>41</sup>. Israel finally recognized the PLO as its legitimate negotiating partner. The DOP called for Israeli withdrawal from a not specified territory in the West Bank and the Gaza Strip, and for the creation of the Palestinian Authority (hereinafter, PA), a five-year interim self-government body in the areas which Israel committed to return to Palestinian control in Gaza and the West Bank. These arrangements were supposed to last for 5 years, during which the most difficult matters, such as Jerusalem, Palestinian refugees, Jewish settlements and definite borders should have been settled in final status negotiations. The two sides negotiated other agreements with the aim to implement the Oslo Accords, including the Gaza-Jericho agreement in May 1994<sup>42</sup>, and the Oslo II agreement in September 1995. The latter was particularly important because it divided the West Bank (except for East Jerusalem and parts of Hebron) into Areas A, B and C. In Area A, the PLO was responsible for civil affairs and maintaining order; in the Area B only for civil affairs, while security and order were in the hands of Israel; in the Area C Israel remained in full control<sup>43</sup>. However, the Oslo peace process came to an end because both sides did not respect the agreements they

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<sup>40</sup> United Nations, *The question of Palestine and the United Nations*, 27.

<sup>41</sup> UNSC Resolution 242 was adopted for unanimity on 22 November 1967, in the aftermath of the Six-Day War. It stated the inadmissibility of the acquisition of territory by war and fixed the principles of a lasting peace in the Middle-East region: withdrawal of Israeli armed forces from territories under occupation because of the 1967 war; and respect for the sovereignty, territorial integrity and political independence of every state in the area.

<sup>42</sup> The Treaty provided for Palestinian limited self-rule in the West Bank and Gaza Strip within five years, Israel promised to withdraw partly from Jericho region in the West Bank and from Gaza.

<sup>43</sup> Pressman, "A brief history of the Arab-Israeli conflict", 11.



signed. Israel intensified its settlement expansion, while on the Palestinian side the PA was not able to block terrorist attacks against Israel by radical Islamists groups, such as Hamas, which believed in the armed struggle as the best way to resist.

The last attempt to find an agreement towards a two-state solution was sponsored by President Clinton in 2000, in Camp David. He presented a proposal suggesting the parameters for a final compromise, but fundamental divisions remained about all the most important issues on the table, especially the future of Jerusalem and the Palestinian refugees. In the following years both parties confirmed that they had never been so close to an agreement as in December 2000. Immediately after the failure of Camp David II, the second Palestinian *intifada* began, and it was still bloodier than the first. Israeli military forces responded attacking populations in Ramallah, Gaza and elsewhere using missiles and heavy weapons<sup>44</sup>. In 2003, in an effort to revive peace talks, both parties accepted the “Road Map to Peace”<sup>45</sup>, launched by the Quartet, formed by UN, US, Russia and the European Union (hereinafter, EU). Unfortunately, tensions renewed following Hamas electoral victory in the Palestinian parliamentary elections held in 2006. Israel launched a series of strong military operations in Gaza against Hamas, provoking a wide rejection by the international community for the disproportionate weight of the attacks<sup>46</sup>. By February 2009, a ceasefire agreement was established with international mediation, though sporadic episodes of violence did not disappear.

Last years have been characterised by a stalemate in terms of negotiation progresses. Both Israel and Palestine are struggling with internal problems which favour the status quo. Israel is taking advantage of the current situation to extend Jewish settlement and to keep discriminating Palestinians in the Occupied Palestinian Territories (hereinafter, OPT). Moreover, the election of Trump played in favour of Netanyahu’s government, clearly backed by the new US administration much more than how Obama did<sup>47</sup>. A clear proof

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<sup>44</sup> Joel Beinin & Lisa Hajjar, “Palestine, Israel, and the Arab-Israeli conflict: a primer”, *Middle East Research and Information Project*, 12 February 2014. [https://web.stanford.edu/group/sper/images/Palestine-Israel\\_Primer\\_MERIP.pdf](https://web.stanford.edu/group/sper/images/Palestine-Israel_Primer_MERIP.pdf). (Last accessed 13 January 2018).

<sup>45</sup> The Road Map consisted of three phases leading to the establishment of a “democratic Palestinian state” and to a “final and comprehensive settlement of the Israeli-Palestinian conflict by 2005”: 1) end of terrorism and violence and transforming the PA; 2) creation of a Palestinian state with provisional borders by the end of 2003; 3) launch of final negotiations toward a permanent resolution of the conflict by 2005.

<sup>46</sup> The bloodiest operation organized by the Israeli Defence Forces (IDF) was the so-called Operation Cast Lead, in 2008. One year after, 1440 Palestinians were killed, over half of them civilians.

<sup>47</sup> Obama, with a surprising move just before the end of its mandate, decided not to use the US veto in the UNSC, allowing for the first resolution regarding Israel and Palestine to pass after nearly eight years. This

of it is the decision by the current US President to declare Jerusalem as Israel's capital and to move the embassy there. It was a dangerous decision which could break out decades of diplomatic consensus over the status of the holy city and could provoke an escalation of violence<sup>48</sup>.

## 2.2 PALESTINIAN FULFILMENT OF THE MONTEVIDEO CRITERIA

All the events analysed above shaped the status of Palestine within the international system and affected, positively and negatively, its capacity to fulfil the Montevideo criteria for statehood. An interesting debate exists among scholars about this issue, and divisions rose between those supporting its bid for statehood and those who think Palestine does not accomplish with some of the Montevideo criteria. The first condition to be satisfied, before to examine the fulfilment of these criteria, is the existence of a motivation to be a state, because without this determination to be recognized as a state the fulfilment of the Montevideo criteria turns into a mere symbolic fact<sup>49</sup>. In the case of Palestine, this determination exists. The 1988 Declaration of Independence made by the PLO stated that "*The Palestinian National Council [...] proclaims the establishment of the state of Palestine on our Palestinian territory with its capital Jerusalem*"<sup>50</sup>.

The first criterion to take into consideration is the existence of a defined territory and there is little discussion about its completion by Palestine. Though the most of them are contested with Israel, Palestine has established its borders, and an overwhelming majority of the international community, included the UN and the EU, recognizes the "Green Lines" as the legitimate partition between Palestinian and Israeli territory, with the former including West Bank, the Gaza Strip and East Jerusalem. Since the Oslo Accords to the present, the international community has agreed that regarding the border issue Palestine and Israel should use the pre-1967 borders as a starting point for further discussions<sup>51</sup>.

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decision was criticized by Netanyahu and Trump, but it was backed by the majority of the international community. The resolution condemned Israeli settlement activity as illegal and demanding that Israel immediately and completely cease all settlement activities in the 'occupied' Palestinian territory, including east Jerusalem.

<sup>48</sup> Michael Wilner, "Trump announces US moving embassy to Jerusalem", *The Jerusalem Post*, 6 December 2017. <http://www.jpost.com/Middle-East/WATCH-LIVE-Trump-delivers-much-anticipated-announcement-about-Jerusalem-517201> (Last accessed 13 January 2018).

<sup>49</sup> For instance, the case of Taiwan is really revealing. Taiwan is an entity whose fulfilment of the Montevideo criteria is quite accepted. However, currently it is not claiming statehood and recognition to be a fully independent state.

<sup>50</sup> Palestinian Declaration of Independence (Alger: Palestine Liberation Organization, 15 November 1988). <http://www.mideastweb.org/plc1988.htm>. (Last accessed 26 January 2018).

<sup>51</sup> Susan Panganiban, "Palestinian Statehood: A Study of Statehood through the Lens of the Montevideo

Moreover, the territorial integrity of Palestine has also been recognized by the Security Council (hereinafter, SC) through Resolution 242, which called for the withdrawal of Israeli forces from territories occupied during the Six-Day War, and by the ICJ in its Advisory Opinion on the Legal Consequences of the Construction of a Wall in the OPT<sup>52</sup>. Critics raise some arguments arguing that Palestinian territory is fragmented, imprecisely delimited and disputed with Israel. Regarding the first point, it is an objective evidence that the territory of Palestine is fragmented. However, as outlined by Crawford, the territory of a state in international law does not require continuity<sup>53</sup>. Secondly, a state has not the obligation to have declared borders. The case of Israel is indicative that not having fixed and determined borders is not seen as an obstacle to be considered a state<sup>54</sup>. Moreover, it is quite clear reading at the Palestinian Declaration of Independence that the PLO had in mind what should be the territory of the Palestinian state, consisting of the Gaza Strip and West Bank, with East Jerusalem being its capital. The same we can conclude about borders disputes with Israel. There are other states with this kind of territorial disputes without this affecting its existence as states<sup>55</sup>. Therefore, even if Israel continues to maintain forces at the borders and to build settlements impeding to Palestinians an effective control over territories, Palestine has a defined territory within the meaning of the Montevideo Convention.

In relation to the second criterion, it is important to separate the concepts of nation and permanent population. It is undeniable that Palestinians are a nation. They have resided within its territory since time immemorial and shared a common culture, identity and traditional practices. These are exemplified through a common language that is spoken, similar habits and traditions, all indicators of a shared identity. Moreover, the existence of a Palestinian people has never been questioned at the international level. The mandate recognized the existence of a population of Palestinians, and it was influenced by the purpose to secure the population's right to self-determination<sup>56</sup>. Even after the

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Convention", 63.

<sup>52</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion (The Hague, International Court of Justice, 9 July 2004). <http://www.icj-cij.org/docket/files/131/1671.pdf>. (Last accessed 27 January 2018).

<sup>53</sup> Crawford, *The creation of States in International Law*, 47.

<sup>54</sup> Francis A. Boyle, "The Creation of the State of Palestine", *European Journal of International Law* 1, no. 1 (January 1990): 301.

<sup>55</sup> For instance, India and Pakistan dispute for the Kashmir region, the East China Sea claimed by China and Japan, or the Western Sahara in Northwest Africa, where Morocco pushed the indigenous population of Sahrawis out of the area.

<sup>56</sup> Boyle, "The Creation of the State of Palestine", 302.

establishment of the state of Israel, the international community recognized repeatedly the existence of a Palestinian community. The UN and the rest of the world always use the words “Palestinians” or “Palestinian refugees” when they refer to population of Gaza and the West Bank, and to the Palestinian refugees worldwide. Thus, the international community, acknowledged the existence of a community of individuals of shared origins. Initially Israel claimed that the Palestinians were not a people for the purpose of the population requirement of statehood, because of a supposed lack of continuity of Palestinian national identity through the decades. Israel backed the idea that Palestinians are simply Arabs and therefore not forming a separate people from that of surrounding Arab states. Anyway, if we look at some government documents, Israel refers to Palestinians implicitly admitting that they are a nation<sup>57</sup>. However, what is important here is not if Palestinians are a people, but if Palestinian authorities has control over a permanent population, independently on the fact that it is made only by Palestinians or not. In this case these two concepts coincide, because basically population in the OPT is made mostly by Palestinians. Today, according to the Central Bureau of Statistics, Palestine has a total population of five million people approximately, with more than three million living in the West Bank and almost two million residing in the Gaza Strip<sup>58</sup>. However, seventy years of conflict also produced a huge refugee crisis and currently there are more than five million of Palestinians living far from their land, mostly concentrated in Jordan, Lebanon and Syria<sup>59</sup>. As a conclusion, we can affirm that the Palestinian authorities exert a control over a permanent population in the OPT.

The third criterion identified in Montevideo is the presence of an effective government, whose fulfilment by Palestinian authorities represents a more complex issue. Before evaluating the grade of accomplishment of this condition in the case of Palestine, it seems useful to sum up the governmental structure and the different actors involved in the governance of the OPT. Established in 1964, the PLO emerged with the aim to represent the Palestinian people. In its early years, it was seen as an extension of Arab regimes, especially the Egypt of Nasser, without possessing complete autonomy over its decision-

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<sup>57</sup> Joshua Berzak, “The Palestinian Bid for Statehood: Its Repercussions for Business and Law”, *Journal of International Business Law* 12, no. 1 (2013): 14.

<sup>58</sup> Palestinian Central Bureau of Statistics, “Population Indicators 2017”. <http://pcbs.gov.ps/site/langen/881/default.aspx#Population>. (Last Accessed 4 February 2018).

<sup>59</sup> According to the UNRWA in 2017 there were 5,340,443 registered Palestinian refugees. The countries which received most of them are Jordan (2,175,491), Lebanon (463,664) and Syria (543,014).

making<sup>60</sup>. However, after the defeat in the 1967 Six-Day War the PLO gained more international reputation. A decade after its creation, it was recognized as the Palestinians' sole legitimate representative by the Arab League and the UNGA through Resolution 67/19, which upgraded Palestine to non-member observer status. In 1988 the Palestinian National Council (hereinafter, PNC), the legislative body of the PLO, adopted the Palestinian Declaration of Independence. It was proclaimed by Yasser Arafat, Chairman of the PLO, which assumed also the title of first President of Palestine. Arafat and the PLO acted as the diplomatic face of the Palestinians, such as in the negotiations of the Oslo Accords with Israel in 1993. They brought to the establishment of the PA, which was created as a five-year interim body with the aim to oversee Palestinian affairs in the OPT. It exceeded its initial five-year mandate and a complex web of political representation emerged. However, it is the PLO, and not the PA, who handles negotiations with Israel and operates embassies and diplomatic missions around the world<sup>61</sup>. The PLO includes several political parties, though it has been dominated by Fatah, which gradually abandoned its previous stance against the existence of Israel and in favour of a military solution to the conflict. Since the 90's, Hamas challenged the primacy of Fatah and carried out a series of suicide attacks against Israel in order to undermine the peace process. It was not until March 2005, after the election of Mahmoud Abbas as President of the PA, following Arafat's death, that Hamas and Fatah reached an agreement in Cairo in which the former committed to end terrorism against Israel<sup>62</sup>. In the legislative elections held in 2006 Hamas surprisingly won, achieving the majority of the seats in the Palestinian Legislative Council. Fatah and other factions refused to participate in the new government because of differences in the political program. After the intensification of the clashes between the two factions at the beginning of 2007, an agreement was signed in Mecca which brought to the formation of a government of national unity. Unfortunately, it was dismantled by another explosion of violence through which Hamas seized control of the Gaza Strip, while Fatah consolidated its control over the West Bank, paving the way for two separate Palestinian governments. Even if some attempts of

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<sup>60</sup> Salem Barahmeh, "The Palestinians, the PLO, and Political Representation: the Search for Palestinian Self-Determination", *International Centre for the Study of Radicalisation and Political Violence* (June 2014): 7.

<sup>61</sup> Yaghi Mohammad, "Hamas Challenge to the PLO: Opportunities and Prospects", *The Washington Institute*, 9 February 2009. <http://www.washingtoninstitute.org/policy-analysis/view/hamas-challenge-to-the-plo-opportunities-and-prospects> (Last accessed 23 February 2018).

<sup>62</sup> Ibidem.

reconciliation have been made, they were not implemented, and now there exists a complex internal situation which in a certain sense could undermine the future of Palestine. Anyway, despite the political conflicts emerged inside the PA, we can say that under Abbas it has established governmental functions close to those of a state government and that great progresses have been made in terms of democratic processes<sup>63</sup>. However, it is still debatable whether the Palestinian government exercises sufficient authority over its territories. It has full control only over parts of them, while in others, specifically the West Bank, it is only partial as Israel possesses almost the 60%. Further critical arguments claim that important areas of governmental authority such as external and border security were never transferred to the PA, while remained in Israeli hands. However, the limitation on its responsibilities does not necessarily defeat the requirement of effective government, because international law does not oblige an entity to have all these competences and powers in order to satisfy the government criterion<sup>64</sup>. We can sustain that the competencies transferred to the PA with the Interim Agreement are the evidence that Palestine has a government because the PA is responsible for almost all the most important governmental services, such as a judiciary and a police force, legislative and executive authority including education, tourism, culture, social welfare, taxation and so on<sup>65</sup>.

About the last criterion, the accepted idea is that an entity which is not able to enter into relations with other states cannot be defined as a state. Those who back the idea that Palestine does not fulfil this criterion refer to the DOP, according to which the PA will not have powers and responsibilities in the sphere of foreign relations. It excludes from Palestinian competences the decision on the establishment of diplomatic missions abroad or international diplomatic missions in the West Bank and Gaza Strip. However, in the practice, the PLO was accepted to conclude international agreements with states or international organization “*for the benefit of the PA*”<sup>66</sup>. We can affirm that the PA possesses the capacity to enter into relations with other states and international

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<sup>63</sup> Michael Emerson, “The Political and Legal Logic for Palestinian Statehood”, *Centre for European Policy Studies* (October 2011): 2.

<sup>64</sup> There are several small states, such as Liechtenstein, Monaco and San Marino, which are regarded as States but do not exercise effective competences and powers in the external security area.

<sup>65</sup> William T. Worster, “The exercise of jurisdiction by the ICC over Palestine”, *American University International Law Review* 26, no. 5 (February 2012): 1167.

<sup>66</sup> Hajjaj, “International Recognition Evolving Statehood Criterion: Comparative Analysis of Palestine and Kosovo”, 33.

organizations, although this is often exercised through the PLO. Moreover, there is no strict distinction between the PLO and PA. When interacting with the Palestinian government, states and international organizations sometimes refer to PA and others to PLO. Concretely, both maintain a functioning network of diplomatic relations, apart from participating in various international organizations with different status (from observer to associate or affiliate). Palestine currently obtained bilateral recognition from 137 states and recently some European governments have begun to formally recognize it<sup>67</sup>. It also established embassies, missions and general delegations in many countries, as an indication of its ability to enter into relations with other states.

Overall, Palestine meets the basic requirements for statehood as enunciated in the Montevideo criteria. Even if in some respects it could be argued that some of them are only partially fulfilled, because of the lack of complete control of its borders and territory and internal political problems, there are enough evidences which back the Palestinian statehood within the meaning of the Montevideo criteria. However, as we argued in the first chapter, recognition is nowadays crucial to be entitled of all the rights and obligations deriving from being a state in the full sense of the term. Palestinian authorities are aware of this, and they made significant efforts with the aim to obtain full recognition by the international community, in bilateral and multilateral terms.

### 2.3 STRATEGY FOR DIPLOMATIC AND POLITICAL RECOGNITION

Palestinian strategy for international recognition is not static. Since the Declaration of Independence, the PLO and the PA made important steps towards a greater recognition of the Palestinian state. Currently, Palestine enjoys bilateral recognition from 137 states, whose majority extended recognition immediately after the declaration. Other states recognized Palestine later following intense bilateral and multilateral diplomatic efforts by Palestinian authorities<sup>68</sup>.

The declaration was not a unilateral and isolated action made by Arafat and the PLO<sup>69</sup>. It was part of a bigger strategy with the goal to seek international recognition through

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<sup>67</sup> State of Palestine, "Palestinian Government", Mission of Palestine in Denmark. <http://palestine.dk/palestine/government/> (Last Accessed 28 February 2018).

<sup>68</sup> State of Palestine, "Diplomatic Relations", Permanent Observer Mission of the State of Palestine to the United Nations. <http://palestineun.org/about-palestine/diplomatic-relations/> (Last Accessed 28 February 2018).

<sup>69</sup> Arafat was one of the most controversial personalities of the 21<sup>st</sup> century. He founded Fatah in 1959; in 1969 he was nominated Chairman of the PLO; in 1988 after the declaration of independence he became

bilateral diplomatic efforts. This strategy aimed at creating an effective governmental structure of the state of Palestine and obtaining widespread support. Another goal was to convince Israeli public opinion that the PLO was committed towards a peaceful coexistence<sup>70</sup>. Even if at the end of 1989 Palestine was already recognized by around 100 states, its efforts were only partially successful. Among the recognizing states there were Arab, African, Latin American and Eastern European states, and also some of the most significant world powers such as Russia, China, India and Indonesia, two of which permanent members of the SC<sup>71</sup>. However, no Western European countries fully recognized Palestine in the aftermath of the declaration, and it was also the result of a deliberate strategy by US and Israel in that direction.

This strategy was gradually abandoned in favour of a different vision based on the idea that the resolution of the conflict with Israel was the best way to obtain greater recognition by the whole international community. The process of negotiations which started with the Madrid Conference and brought to the Oslo Accords, served the PLO to ensure that neither Jordan nor an independent delegation were the representatives of the Palestinian people. In this struggle for representation the PLO was quite successful given the fact that on the one side it recognized Israel's right to exist, while on the other Israel recognized the PLO as the sole entity representing Palestinians<sup>72</sup>. Due to this engagement in negotiations with the mediation of the US and the support of the Arab states, Palestinian authorities officially abandoned the unilateral path and linked its political future to the solution of the conflict with Israel. The Oslo II Agreement clearly stated that no unilateral steps or initiatives that will change the status of the West Bank and the Gaza Strip had to be taken neither by Israel nor by Palestine. This unequivocally meant that the status of Palestine relied on the peace process with Israel. Unfortunately, all the efforts made by

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President of the PLO; during the following years he was engaged in negotiations with Israel to end the conflict, which failed. After his death in Paris in October 2004, in circumstances which remains unclear, it became evident the importance that Arafat had for all the Palestinians in the struggle for national self-determination. He was able to maintain the unity, even with some setbacks, of the Palestinians. His successor, Mahmoud Abbas, has not the same credibility at the eyes of the Palestinians, and since he took power, internal conflicts spread through the Palestinian side. In order to have a clearer image of Yasser Arafat read: Barry Rubin & Judith Colp Rubin, *Yasir Arafat: a Political Biography* (Oxford: Oxford University Press, 2003).

<sup>70</sup> Jerome M. Segal, "Creating the Palestinian State: Revisited", *Palestine-Israel Journal of Politics, Economics and Culture* 20, no. 2 (2015). <http://www.pij.org/details.php?id=1613> (Last accessed 2 March 2018).

<sup>71</sup> Worster, "The Exercise of Jurisdiction by the ICC over Palestine", 1169.

<sup>72</sup> Segal, "Creating the Palestinian State: Revisited".



the international community towards a peaceful and definitive solution to the conflict failed, included the desperate attempt made by President Clinton just before the end of his mandate at Camp David.

Arafat's death and the election of Mahmoud Abbas<sup>73</sup> as head of the PLO and President of the PA, provoked a change in Palestinian strategy for recognition. He opted for the internationalization of the struggle for statehood. Moreover, he continued an international campaign to gain broader recognition, with a particular focus on the EU, whose members' recognition could mean a strong push in favour of Palestinian cause. Abbas' foreign policy looked especially at gaining Palestinian membership in diverse international organizations, together with a campaign against Israel, including at the ICC and the ICJ. He considers that sooner or later the entire international community will recognize the state of Palestine, and that continued violation of human rights by Israel through its discriminatory policy of occupation will be the most powerful weapon in the hand of the Palestinians. Abbas also wants to internationalize future peace talks with Israel, replacing bilateral negotiations with American mediation with a model similar to the one which brought to the Iran nuclear deal, characterized by the participation of the five permanent members of the SC and the EU<sup>74</sup>.

In addition, Abbas and the PA carried out a plan aimed at establishing diplomatic relations with the highest number of states and maintaining a network of embassies, missions and general delegations throughout the world, following a path already started by Arafat. He was successful in establishing diplomatic relations with many states which recognized Palestine after the Declaration of Independence. In Africa and the Middle East embassies were established in Algeria, Ghana, Jordan, Saudi Arabia, Somalia, Sudan, Senegal, Nigeria, Mali, Libya, Iran, Iraq etc. In Asia, Palestinian embassies were set up in China, India, Indonesia, Pakistan and Vietnam<sup>75</sup>. In Europe, the majority of Eastern European countries recognized Palestine in 1988 (Romania, Ukraine, Belarus, Albania, Slovakia

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<sup>73</sup> Mahmoud Abbas participated in negotiations of the Madrid Conference and the Oslo Accords, and he was part of the Palestinian delegation in Camp David. In 2003, after intense international pressure, Abbas became Prime Minister as an effort to overthrow Arafat, who was considered by USA as an obstacle to the peace process. Following Arafat's death in November 2004, Abbas was named head of the PLO, and in 2005 he won elections to become President of the PA.

<sup>74</sup> Michael Herzog, "Abbas: in search of a new strategy", *Britain Israel Communications and Research Centre* (February 2018). <http://www.worldaffairsjournal.org/article/abbas-search-new-strategy> (Last accessed 5 March 2018).

<sup>75</sup> Panganiban, "Palestinian Statehood: A Study of Statehood through the Lens of the Montevideo Convention", 75-76.

and Poland among them, and later the Russian Federation), and the reason is quite clear. The Soviet Union was close to its disintegration and the nations forming part of it clearly supported the principle of self-determination because they would benefit later by it. The problem was that neither powerful European countries nor American ones had officially opened diplomatic relations with Palestine, because they did not identify it as a state.

For this reason, Abbas' strategy focused on these countries, apart from international organizations, to upgrade the status of Palestine. In the case of Latin America, this strategy was pretty successful given the fact that Palestinian embassies were opened in Venezuela in 2009, Ecuador and Bolivia in 2010, and Chile, Brazil, Dominica, Honduras, Paraguay, Peru and Uruguay in 2011<sup>76</sup>. Less progresses were made with European countries. The majority of them still did not officially recognized Palestine, limiting their strategy to the opening of missions or special delegations in their territories. Apart from Russia and countries which made part of the Soviet Union, embassies were opened only Montenegro in 2006, Iceland in 2011 and Sweden in 2014. Missions and special delegations were established in France, Italy, Spain, Germany, UK, Belgium, Denmark, Finland, Greece and the Netherlands. However, this only meant the recognition of the PLO as subject of international law, but not as a state.

It can be said that both Arafat and Abbas understood the importance of a diplomatic approach as the first step towards a full recognition of Palestinian statehood. Even during long periods, such as the current one, in which negotiations seem to be at a deadlock, Palestine has never stopped working in this direction. At the present time, the priority of the PLO is to upgrade its status in the most influencing international organizations, and many efforts have been directed to obtain full membership in the UN, which is almost universally considered as the definitive step to gain full international recognition of Palestinian's statehood. Recently, the Trump's election and his stance strongly in favour of Israel, as proved by his recognition of Jerusalem as its capital and his intention to move US' Embassy from Tel Aviv to the holy city, provoked a strong condemnation by the international community, more and more lined up with Palestine. After Trump's declaration the UNGA approved a resolution against his statement, with 128 votes in

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<sup>76</sup> In order to have a whole vision of Palestinian diplomatic relations around the world have a look at: Palestine Embassies and Consulates, "List of Diplomatic Missions in Palestine & Palestinian Diplomatic Missions abroad", Embassy Worldwide. <https://www.embassy-worldwide.com/country/palestine/> (Last accessed 15 March 2018).

favour and only 9 against it. It is not clear what will be the next developments, but it seems evident that the UN will play a central role.

### **3. PALESTINE AND THE INTERNATIONAL COMMUNITY**

Until now we focused on Palestinian efforts to obtain bilateral recognition and enhance its status in the international arena. However, this is not the only dimension of the Palestinian plan for recognition. In fact, many energies have been devoted to the obtainment of membership in international organizations, such as the UN, UNESCO and the ICC, and to the ratification of many treaties and international conventions. This is not totally new because during its first years of existence the PLO made numerous efforts to become part of regional organizations especially within the Arab region. In 1969 it was admitted to the Organisation of Islamic Cooperation, in 1976 it became part of the Arab League, and one year later it obtained membership in the UN Economic and Social Commission for Western Asia. These efforts increased under Abbas' presidency, who due to the long-stalled peace process, began to look for alternatives direct negotiations with Israel. Membership in international organizations, especially the UN, became crucial because even if it does not determine that an entity is a state, it presupposes that it acquires all the rights and obligations that membership in the UN implies under international law. Palestinian authorities worked in that direction, as it seems clear that negotiations with Israel are currently in a phase of impasse, and it will take time and maybe a political change in Israel (and US) for peace process to be reinitiated.

#### **3.1 THE HISTORY OF PALESTINE AND THE UN**

The first concrete step towards Palestine's full membership in the UN was made in 1974, when the PLO was granted the status of non-member observer entity. Nevertheless, this was only the conclusion of a broader process of mutual approach between the UN and the PLO. On December 1973, the GA adopted an important resolution, urging that national liberation movements be invited to participate as observers in the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict<sup>77</sup>. Later, on October 1974, it adopted Resolution 32/10, which recognized

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<sup>77</sup> State of Palestine, "Status of Palestine", Permanent Observer Mission of the State of Palestine to the United Nations. <http://palestineun.org/status-of-palestine-at-the-united-nations/> (Last accessed 7 March 2018).

the PLO as the sole representative of the Palestinian people and invited it to participate in the plenary meetings of the GA on the question of Palestine. On 13 November Yasser Arafat, as a President of the PLO, addressed the GA in a landmark appearance in which he delivered his famous speech: “*Today I have come, bearing an olive branch and a freedom-fighter’s gun. Do not let the olive branch fall from my hand*”. Just a few days later, Resolution 32/73 was passed, granting to the PLO the status of non-member observer. This status was later extended to include all the UN bodies<sup>78</sup>. The decision was certainly welcomed by the PLO and the Palestinian people, because it was seen as a reaffirmation of the support of the GA for the creation of the Palestinian state and its commitment to contribute to a peaceful solution of the conflict.

Through the 70’s and the first half of the 80’s no significant steps ahead were made in the resolution of the conflict. Tension was high, Israel continued with its restrictive policies in the OPT and episodes of terrorism were still common. In December 1987, the Gaza Strip and the West Bank spontaneously reacted to 20 years of occupation through massive demonstrations and strikes demanding the end of the occupation. The SC, the GA and the Secretary General repeatedly affirmed their concern for the disproportionate measures took by the occupying forces to repress the *intifada*. UNSC Resolution 605 strongly condemned the practices of the Israeli armed forces and their violations of human rights in the OPT, making also reference to the Fourth Geneva Conference regarding the protection of civilians in times of war. Later in 1988, with a strategic and diplomatic move, the PNC declared unilaterally the independent state of Palestine in a meeting in Alger. As I already mentioned, the declarations provoked a wave of recognition by a high number of states. The GA acknowledged the proclamation of the state of Palestine and decided that the designation “Palestine” had to be used instead of “PLO” in the UN system<sup>79</sup>. During the 90’s the UN sponsored the peace process started with the Madrid Conference. In 1992 it was invited to participate in the negotiations as “extra regional participant” in the different working groups created to deal with various issues (regional security, water, environment, refugees, economic development etc.). The GA expressed full support for the DOP signed by Israel and the PLO, in which they mutually recognized each other, and stressed its will to be more active in the resolution of the Palestinian-

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<sup>78</sup> United Nations, *The Question of Palestine and the United Nations*, 24.

<sup>79</sup> State of Palestine, “Status of Palestine”.

Israeli conflict<sup>80</sup>. However, the following years saw very little progress if compared with the expectation created by the signing of the Oslo Accords. Some attempts were made in order to advance in the implementation of the DOP<sup>81</sup>, but all the agreements ended with no or only limited implementation. The outbreak of the second *intifada* in 2000 meant a deep blow to the peace process. The GA showed its concern for the deterioration of the situation in the OPT and repeatedly called for the immediate cessation of violence and the need to find a two-state solution.

In 2003, the Quartet (USA, EU, Russia and the UN) prepared a roadmap, which was also endorsed by the SC, calling for the “*creation of an independent Palestinian state with provisional borders and attributes of sovereignty*”, and the “*promotion of international recognition of a Palestinian state, including possible UN membership*”<sup>82</sup>. The Road Map was a three-phase plan, to be implemented gradually through incremental steps and based on UNSC Resolutions 242 (1967), 338 (1973) and 1397 (2002) and on the principles laid by the Madrid Conference<sup>83</sup>. However, the efforts by the Quartet have been continuously affected by differences between the parties, which agree (at least theoretically) about the two-state solution but have different strategies about how to reach it. Furthermore, the impasse in the relations between Israel and the Palestinian authorities, aggravated by the victory of Hamas in the democratic elections held in 2006, represented an additional obstacle for the solution of the conflict and the consequent recognition of Palestine. Abbas chose a unilateral diplomatic strategy to obtain recognition from the highest number of states in order to influence also its future membership in the UN. With a move coherent with his strategy, on September 2011 he submitted a formal request to the Secretary General Ban Ki Moon, asking the UN to admit the Palestine as a full member<sup>84</sup>. The bid,

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<sup>80</sup> United Nations, *The question of Palestine and the United Nations*, 30-31.

<sup>81</sup> Various agreements were signed between the 90's and the beginning of 2000's. For instance, in 1995 the parties signed the Interim Agreement, which provided for the transfer of powers and responsibilities to the Palestinian Interim Self-Governing Authority. Later, in 1997, PLO and Israel signed the Hebron Protocol, concerning the redistribution of Israeli forces in the zone. In 1998, after days of talks promoted by the USA, the Wye River Memorandum was concluded, as an attempt to resume permanent status negotiations. It provided for the withdrawal of Israeli armed forces from the 13% of the West Bank, while the PLO committed to take measures to counter terrorism. The last and probably most productive effort was made by US President Bill Clinton in Camp David in the summer of 2000. In this case both Edu Barak (the new Israeli Prime Minister) and Arafat declared that they were really close to a final solution to the conflict, but at the end nothing was done and the outbreak of the second *intifada* closed the doors to permanent negotiations to be resumed.

<sup>82</sup> United Nations, “A Performance-Based RoadMap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict”, April 2003.

<sup>83</sup> United Nations, *The Question of Palestine and the United Nations*, 48.

<sup>84</sup> BBC News, “Palestinians’ Upgraded UN status”, 30 November 2012. <http://www.bbc.com/news/world->

as expected, stalled two months later after the SC was unable to make a recommendation, especially due to US intention to use its veto power<sup>85</sup>. Abbas then submitted a downgraded request to the GA for admission to the UN as a non-member observer state. In a historic session on 29 November 2012, the GA voted by a huge majority Resolution 67/19 to recognize Palestine as non-member state with observer status in the organization<sup>86</sup>. In terms of Palestine's rights of participation in the GA, the resolution changes little. In fact, prior to its designation as an observer non-member state, Palestine already had rights of participation in the sessions and the work of the GA comparable to those of the observer states. The importance of the vote is more symbolic because it can be read as a *de facto* recognition of the sovereignty of the state of Palestine, and because it had a broader impact on the question of Palestinian statehood in international law<sup>87</sup>.

### 3.2 FULL MEMBERSHIP IN THE UN AND OTHER INTERNATIONAL ORGANIZATIONS: LEGAL AND POLITICAL CONSIDERATIONS

The upgrade of Palestine's status in the UN to observer non-member state through GA Resolution 67/19 raised a debate about those who consider that with that move the UN has officially recognized the state of Palestine, and those who back the idea that it was only symbolic and did not mean the collective recognition of the Palestinian statehood by the international community. The first aspect to highlight is that statehood and membership in UN and other international organizations are two distinct issues. There are cases of states which are recognized as such but are not members of the UN, and on the other side there are members of the UN which at the time of their admission did not fulfil the Montevideo criteria of statehood<sup>88</sup>. However, it is also true that the admission as a full member of the UN (and other international organizations) is universally seen as

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middle-east-13701636 (Last accessed 10/03/2018).

<sup>85</sup> The procedure for the admission in the UN begins with the submission of an application to the Secretary General by the state. Then, the SC has to consider the application and approve a recommendation for admission which must receive the affirmative votes of 9 of the 15 members of the Council (provided that none of its 5 permanent members have voted against the application). Only in case the SC recommends admission, the recommendation is presented to the GA for consideration, and it must be backed by the two-thirds of the GA for admission of a new state.

<sup>86</sup> 138 countries voted in favour of the resolution, 41 abstained and only 9 voted against: Canada, Czech Republic, Israel, U.S., Panama, The Marshall Islands, Palau, Nauru and Micronesia.

<sup>87</sup> John Cerone, "Legal Implications of the UNGA Vote to Accord Palestine the Status of Observer State", *American Society of International Law* 16, no. 37 (December 2012): 1.

<sup>88</sup> For instance, Switzerland entered UN only in 2002 but it was considered a state much before. On the other side, Ukraine y Belarus, which are among the founding members, were not states in 1945, and the same for India which obtained independence only in 1947. The fact is that it was required only to admitted members to be states which respect all the conditions enounced in the Charter, while it was not a requisite for founding members.

the legitimation and confirmation of statehood and the official collective recognition that an entity is a state within the international community. When it comes to UN membership, political considerations often became more important and somehow determine the real status of an entity in the international order.

This is clearly the case of Palestine and its bid for full membership in the UN. The organization has recognized the existence of the state of Palestine much before the decision to upgrade its status to observer non-member state. A fundamental clause of the Resolution 67/19 expressed the hope that the SC will consider favourably the application submitted by the state of Palestine to full membership. This assumption implicitly accepts the statehood of Palestine as a fact previous to the resolution<sup>89</sup>. Moreover, Palestine fulfils the obligations for UN membership. Article 4 (1) of the Charter states that “*membership in the UN is open to all other peace-loving states which accept the obligations contained in the present Charter and [...] are able and willing to carry out these obligations*”<sup>90</sup>. Palestine explicitly declared its commitment to the UN Charter in its Declaration of Independence. It undoubtedly transmitted its commitment and willingness to respect the purposes and principles of the Charter and the Universal Declaration of Human Rights. Palestine also expressly rejected the use of any form of violence or intimidation against any other state and accepted all the obligations contained in the four 1949 Geneva Conventions and the 1907 Hague Resolutions, the basis of international humanitarian law and the law of war<sup>91</sup>. In this sense Resolution 67/19 represented a step ahead, because it granted Palestine the competence to ratify UN conventions and other international treaties. This competence was used in 2014 when Palestine ratified fourteen treaties and became a state party to the Geneva Conventions regulating the conduct of armed conflict<sup>92</sup>. It also important to remember that in October 2011 Palestine had been accepted as a full member by UNESCO, becoming the 195<sup>th</sup> full member of the Educational,

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<sup>89</sup> John Quigley, “Palestine Statehood and International Law”, *Global Policy Essay* (January 2013): 2.

<sup>90</sup> Charter of the United Nations (San Francisco: United Nations, 1945), Article 4.

<https://treaties.un.org/doc/Publication/CTC/uncharter.pdf> (Last accessed 13 March 2018).

<sup>91</sup> Saeb Erikat, “Palestine Liberation Organization Legal Brief in Support of Recognition of the State of Palestine”, in *Palestine Membership in the UN: Legal and Practical Implications*, ed. Mutaz Qafisheh, (Cambridge: Cambridge Scholar Publishing, 2013), 25.

<sup>92</sup> Palestine ratified the Convention on the Elimination of All Forms of Discrimination Against Women; International Covenant on Economic, Social and Cultural Rights; International Covenant on Civil and Political Rights; Convention on the Rights of Persons with Disabilities; International Convention on the Elimination of All Forms of Racial Discrimination; UN Convention Against Torture; UN Convention Against Corruption; UN Genocide Convention; Convention on the Suppression and Punishment of the Crime of Apartheid; Convention on the Rights of the Child.

Scientific and Cultural organization<sup>93</sup>. All these progresses showed on one side the motivation of Palestine to be granted full membership in the UN, and on the other that political conflict of interests within the organization are the only real cause impeding Palestine to obtain UN full membership.

Rule 134 in the GA Rules of Procedure provides that “*Any state which desires to become a Member of the UN shall submit an application to the Secretary General. Such application shall contain a declaration [...] that the state in question accepts the obligations contained in the Charter*”<sup>94</sup>. From this point of view there is no doubt that Palestine has the will to obtain full membership, as proved by the submission of an official application in 2011, and its continuous commitment to the principles and the obligations of the UN Charter. However, the decisive competence is in the hands of the SC, which, upon the request of the Secretary General, must make a recommendation about the admission. When the SC recommends an applicant state for membership, the GA is the organ that effects the recommendation by a two-thirds majority of the members<sup>95</sup>. In case it does not, because at least one of the permanent members uses its veto power, then the GA may send the application back to the SC. Therefore, what emerges from this procedure is that the SC is empowered with the last decision, as happened in 2011 when Abbas’ bid for full recognition was blocked by the veto of the US in the SC.

In the case of Palestine, the political conflict of interests with US is a critical factor within this puzzle. In addition to Israel, the US has been a leading opponent of the Palestinian statehood bid in the UN. Israel is a fundamental American ally in the Middle-East, and their relations are really strong economically, military and diplomatically. Because of this alliance, US always supported Israel’s claims and it often criticized the UN (especially in the last years) because of its supposed support towards the Palestinian cause. Through the years it used veto power more than forty times to block resolutions of the SC regarding the right of self-determination of Palestinians, the illegality of Jewish settlements, the situation in the OPT, the Palestinian refugees, or the status of Jerusalem, just to make

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<sup>93</sup> Steven Erlanger, “UNESCO accepts Palestinians as full members”, *The New York Times*, 31 October 2011. <http://www.nytimes.com/2011/11/01/world/middleeast/unesco-approves-full-membership-for-palestinians.html> (Last accessed 15 March 2018).

<sup>94</sup> United Nations General Assembly, “Rules of Procedure governing the admission of new Members”, United Nations. [http://www.un.org/ga/ropga\\_adms.shtml](http://www.un.org/ga/ropga_adms.shtml) (Last accessed 19 March 2018).

<sup>95</sup> Basheer Al Zoughbi, “The *de iure* State of Palestine under Belligerent Occupation: Application for Admission to the UN”, *The Applied Research Institute* (November 2011): 2.



some examples<sup>96</sup>. The last time, until now, that the US blocked a resolution was in December 2017, when it rejected a proposal condemning Donald Trump's move to recognise Jerusalem as Israel's capital. Two important facts emerge if we look at the records of voting behaviour: in all of these blocked resolutions US was the only permanent member to veto and in most of them all the other fourteen members of the SC voted in favour (only in some cases few states abstained).

By considering all these factors, the perspectives for Palestine in terms of UN full membership are really dark, at least in the short-term. Given the current political scenario in the US and Israel, the possibilities for Palestine to be admitted as a full member in the UN are little. Anyway, what clearly emerges is that the UN admission procedure should be somehow revised together with the issue of the use of the veto power. In fact, as stated in 1969 by Jordanian Diplomat Hazem Zaki Nuseibeh "*The UN Charter is a master in utopia [...] and its basic principles are unquestionable. But in the most crucial issues, the voices, conscience and votes of the overwhelming majority of mankind remain ineffectual, because power evidently lies somewhere else*"<sup>97</sup>. This quote expresses perfectly the current inability by the UN to find a solution to conflict and makes effective what most of the world think: Palestine is already a state and should be enabled to fully join the UN in order to have all the rights and obligations that this implies. The SC suffers from inherent deficiencies which make it ineffective most of the times. The veto power as it is functioning today is not likely to change soon and the extremely high voting coincidence between US and Israel at the UN is likely to continue in the same line<sup>98</sup>. However, this kind of discourses should not impose over the will of the people and the clear majority of the international community, because it goes undoubtedly against the principles upon which the UN lies.

### 3.3 PALESTINE AND THE INTERNATIONAL JUSTICE

As part of its strategy of internationalization of the Palestinian cause, Abbas also sought for an engagement with international criminal justice. On the one side, the attempts to obtain UN full membership were also aimed at becoming a party to the ICJ, which is one

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<sup>96</sup> Saliba Sarsar, "The Question of Palestine and United States Behaviour at the UN", *International Journal of Politics, Culture and Society* 17, no. 3 (March 2004): 463-64.

<sup>97</sup> Cattan, *Palestine, the Arabs and Israel*, (London: Longman Publishing Group, 1969), xiii.

<sup>98</sup> Sarsar, "The Question of Palestine and United States Behaviour at the UN", 467.

of its organs. On the other, he looked for Palestinian membership in the ICC, which enables access to its jurisdiction.

### 3.3.1 *Palestine and the ICJ*

The ICJ is the principal judicial organ of the UN and it was established by the UN Charter. All the 193 members of the UN are automatically members of the ICJ. Palestine is not full member of the organization, and its extraordinary legal status of non-member observer state raises questions about the possibility for Palestine to become member of the ICJ even if it does not obtain full member status in the UN. However, before the upgrade of its status in 2012, Palestine had already been a matter of concern for the ICJ, which has been confronted with aspects of the Israeli-Palestinian conflict. In December 2003, after the US vetoed a UNSC resolution which declared the construction of the wall as illegal, the GA asked the ICJ to urgently render an advisory opinion on the question of the Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territories<sup>99</sup>. The ICJ complied with the request, but it was unable to reach a consensus and there was a long debate within it in order to take a decision. Finally, the majority of the Court found that the construction of the wall in the OPT, including in and around East Jerusalem, was contrary to international law. Even if advisory opinions have not juridical effects because they are not binding, this pronouncement by the Court against Israel was quite important within the context of the conflict and the international status of Palestine. Among the reasons why the construction of the wall was contrary to international law, the Court cited the infringement of the right of self-determination of the Palestinian people, as laid down in Article 1 of the UN Charter. Moreover, it was asserted that by constructing the wall Israel violated the Fourth Geneva Convention on the Protection of Civilians Persons in Time of War, because it implied the destruction or requisition of property of Palestinians which is contrary to Article 53 of the Convention<sup>100</sup>. According to the Court, Israel was under obligation to terminate its breaches of international law, cease the works of construction and make reparation for the damage caused<sup>101</sup>. Therefore,

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<sup>99</sup> Nidal Al-Farajin & Alexandra Engelsdorfer, "Acceptance of International Criminal Justice and the Path to the International Criminal Court in Palestine", in *After Nuremberg. Exploring Multiple Dimensions of the Acceptance of International Criminal Justice*, eds. Susanne Buckley-Zistel, Friederike Mieth & Marjana Papa (Nuremberg: International Nuremberg Principles Academy, 2017), 4.

<sup>100</sup> The Article 53 states that "Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations."

<sup>101</sup> David Morrison, "ICJ Advisory Opinion: a Summary", *Labour and Trade Union Review* (August 2004).

the ICJ clearly stated that the wall built by Israel was illegal and this represented a strong push for Palestine in the context of its strategy of internationalisation. The overwhelming majority of the nations expressed their support of the findings of the ICJ in a resolution approved by the GA on that issue<sup>102</sup>.

This was the only time the ICJ pronounced on issues related with the Israeli-Palestinian conflict, even if it was through an advisory opinion. In the case of contentious opinions, which are much more important because they are binding, only member states can present a case before the Court. Moreover, only full members of the UN are automatically empowered to bring a case before the ICJ. The chances of Palestine to get full membership are low at this time, because of US' veto in the SC. Therefore, it needs to look for other ways to bring a case before the ICJ against Israel without being granted full membership within the UN.

The first possibility would be for a non-member UN state to become a party to the ICJ Statute. It is technically possible, as five non-UN members states joined it since 1946. Only later they became full members of the UN, but at the time they ratified the ICJ Statute they had not such a status. In each of these five cases the conditions were similar: acceptance of the provisions of the ICJ Statute, acceptance of all the obligations of a UN member under Article 94 of the UN Charter, and undertaking to contribute to the expenses of the ICJ<sup>103</sup>. Palestine already declared its acceptance of the ICJ Statute and UN Charter provisions, even if some doubts have been raised about Palestinian capacity to contribute to the expenses of the ICJ given its fragile organizational structure. However, as in the case of UN membership, there is an obstacle. Article 93 (2) of the UN Charter establishes that *"A state which is not member of the UN may become a party to the Statute of the ICJ on conditions to be determined in each case by the GA upon the recommendation of the SC"*<sup>104</sup>. There is little doubt that the GA would support Palestinian membership in the ICJ, but there is still less about the US recourse of its veto power which would impede to transmit to the GA a favourable recommendation<sup>105</sup>.

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<http://www.david-morrison.org.uk/palestine/wall-illegal-adop-sum.htm> (Last accessed 27 March 2018).

<sup>102</sup> The vote was 150-6 with 10 abstentions. The six countries voting in contrary were US and Israel, for obvious reasons, Australia, Marshall Islands, Palau and the Federate State of Micronesia.

<sup>103</sup> Charles F. Whitman, "Palestine's Statehood and Ability to Litigate in the ICJ", *California Western International Law Journal* 44, no. 1, (2013): 90.

<sup>104</sup> Charter of the United Nations, Article 93.

<sup>105</sup> It is important to highlight that a debate exists about whether the admission to the ICJ Statute is a procedural matter. If it is, then the affirmative vote by nine members of the SC would allow Palestine to

Another option for Palestine would be to bring a contentious case before the ICJ under specific conditions, without being part of the UN or the ICJ. This possibility is contemplated in Article 35 (2) of the ICJ Statute, which leaves the door open to states which are neither members of the UN nor of the ICJ, even if it gives to the SC the competence to determine the conditions under which it could happen. The same is confirmed in UNSC Resolution 9 of 1946, which affirms that the ICJ is open to non-member states in case they have accepted its jurisdiction and the obligations of the UN Charter. However, also this option presents some jurisdictional obstacles. In fact, because Palestine is not a party to the ICJ Statute, it is difficult for it to know in advance whether ICJ would have jurisdiction over a dispute. Moreover, the opposing state could refuse the jurisdiction of the ICJ leaving Palestine with no other recourses. Therefore, even if the ICJ would accept its jurisdiction over a case presented by Palestine, finding a party that would consent to ICJ jurisdiction represents the biggest obstacles. The Article 36 of the ICJ Statute encourages mutual consent, and it means that states cannot be compelled to accept ICJ jurisdiction<sup>106</sup>.

The last option could be that of finding a treaty which has some provisions that gives the ICJ jurisdiction to settle disputes between state parties to that treaty. Approximately 300 bilateral or multilateral treaties contain such provisions, and Palestine signed a lot of them as part of its strategy of internationalization. However, in this case the main obstacle is that it must be proved that the dispute involves the application of one of those treaties' terms. One example could be the Genocide Convention or the Convention against Torture, but Palestine should allege that genocide or torture occurred in its territory. This is a difficult operation because of all the juridical matters involved which make unlikely for states to convince the Court to activate its jurisdiction under a specific treaty.

In conclusion, even if other paths exist for Palestine to present a contentious case before the ICJ against Israel, apart from becoming a full member of the UN, this perspective seems unlikely for two main reasons: the fact that the SC recommendation is needed independently on the options which Palestine could choose, and the necessity of the consent of the cited state. What seems more likely is that, as recently requested by the

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join the ICJ Statute. If it is not, therefore all the permanent members can exert their veto power. Obviously, US is a supporter of the second interpretation, and this is a huge obstacle for Palestinian chances to enter the ICJ.

<sup>106</sup> Whitman, "Palestine's Statehood and the Ability to Litigate in the ICJ", 96-98.

High Commissioner for Human Rights of the UN, the ICJ might issue an advisory opinion on the failure of both Israel and Palestine (especially Hamas) to comply with humanitarian and human rights law. This could have a strong symbolic effect but nothing more if no legal obligations for the parties are created.

### *3.3.2 The Rome Statute and the ICC*

Unlike the ICJ, the ICC is legally and functionally independent from the UN. It is a permanent judicial body established by the Rome Statute in 1998 to prosecute individuals accused of genocide, war crimes, crimes against humanity and aggression<sup>107</sup>. It formally entered into force in July 2002 upon ratification by 60 states<sup>108</sup>. The ICC contributes to fight against impunity and establish the rule of law by ensuring that the most severe crimes do not go unpunished, and by promoting respect for international law. Moreover, it was not created to substitute national tribunals, but to complement them.

The first time Palestine approached the ICC was in 2009. This came on the back of Israel's Operation Cast Lead assault on Gaza in late December 2008, in a broader context in which the idea that war crimes and crimes against humanity were being committed was gaining more and more support. That attack was the most extensive and devastating carried out in the Gaza Strip since the Six-Day War of 1967. Following the end of hostilities, several UN officials and NGO's called for an investigation into war crimes perpetrated by both sides, the Israeli Defence Forces and Hamas, in the course of the attacks. Nevertheless, the focus was mainly on the former, because of the disproportionate number of casualties suffered by Palestinians when compared with Israelis<sup>109</sup>. The PA, which was feeling always more legitimized after the general reactions condemning Israeli attacks, decided to submit a declaration to the Registrar of the ICC accepting its jurisdiction over international crimes committed in Palestine since 1<sup>st</sup> July 2002, the date the Court entered

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<sup>107</sup> In 1998, the negotiating parties in Rome equipped the ICC with jurisdiction over four crimes, included aggression. However, jurisdiction over this crime was made subject to further negotiations, since no consensus was reached on its definition in the Rome Statute. In 2010, the state parties met in Uganda in an effort to finally define this crime. They agreed a definition, though it must be ratified by at least thirty states parties and then approved by a two-thirds majority vote to activate the ICC's jurisdiction. Anyway, 20 years after the Rome Statute, disagreement still exists between states parties which are still debating how to activate the Court's jurisdiction over the crime of aggression.

<sup>108</sup> Currently, more than 120 states ratified the Rome Statute.

<sup>109</sup> Some 1,300 Palestinians and some dozens of Israelis died between late 2008 and early 2009. Reports published by Amnesty International, Human Rights Watch, as well as investigations by the Arab League all concluded that Israel likely violated the laws of war. There are accusations that the IDF (Israeli Defence Forces) targeted civilians and non-military objects, including a UN school and headquarters, and used force out of proportion with the military objectives).

into force<sup>110</sup>. Given the fact that neither Palestine nor Israel were state parties to the Rome Statute, the declaration submitted by Palestinian Minister of Justice Ali Khashan was based on Article 12 (3) of the Statute, which allows even non-member states to gain access to *ad hoc* jurisdictions over crimes committed on their territories. In response, the ICC prosecutors opened a primary examination on Palestine which was focused mostly on the issue of Palestinian statehood under international law. While those who opposed to Palestinian declaration relied its arguments on classical notions of how a state is defined under the Montevideo Convention, to conclude that Palestine is not a state and by consequence should be impeded from accessing the Court, the PA's approach was based on the premise that "*short of actual statehood, Palestine is a "state" for the purpose of Article 12 of the Rome Statute because it is sufficiently an international entity to be bound by International Humanitarian Law [...] then Palestine should also be treated as a "state" by the court that is responsible for the enforcement of IHL*"<sup>111</sup>. Palestine did not ask the ICC to recognize the state of Palestine, but only to make sure that the conditions necessary for the exercise of its jurisdiction were fulfilled. The ICC prosecutors concluded that due to its uncertain status with respect to statehood under international law, Palestine's declaration could not be accepted<sup>112</sup>.

In 2012 the PA asked the ICC to review the admissibility of its declaration recognizing the Court's jurisdiction, a demand justified by the fact that at that time Palestine had already been recognized by some 130 states and many international and regional organizations. The Prosecutor once again declined the authority to rule on such admissibility, since he was not empowered to define the term "state" for the purposes of Article 12 (3)<sup>113</sup>. It is curious how the prosecutor completely ignored the fact that as a result of membership in UNESCO obtained in November 2011, Palestine was able to ratify the Statute based on the "Summary of the Practice of the Secretary-General as Depository of Multilateral Treaties" document. According to this document, an entity is

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<sup>110</sup> Michael Kearney and John Reynolds, "Palestine and the Politics of International Criminal Justice", in *The Ashgate Research Companion to International Criminal Law: Critical Perspectives*, eds. William A. Schabas, Yvonne McDermott & Niamh Hayes (London: Routledge, 2013), 420.

<sup>111</sup> Palestinian Negotiations Support Unit, "Legal Approaches to be advanced at the ICC in order to Protect Overall Palestinian Strategy and Realize Palestinian Rights and Interests", 25 March 2009. <http://www.ajtransparency.com/en/document/4494> (Last accessed 24 March 2018).

<sup>112</sup> Al-Farajin and Engelsdorfer, "Acceptance of international Criminal Justice and the Path to the ICC in Palestine", 4.

<sup>113</sup> Emanuele Cimiotto and Micaela Frulli, "What is the legal relationship between the ICC and non-state entities: beyond the case of Palestine", *Questions of International Law*, no. 20 (January 2015): 2.

to be regarded as a state entitled to ratify treaties open to all states, where that entity is a member of the UN or a UN specialised agency. Therefore, the Prosecutor's decision not to consider Palestine a state for the purposes of the Rome Statute clearly missed a fundamental aspect. However, he left open the door to consider future allegations of crimes perpetrated in Palestine, but only when the UN resolved the legal issue regarding its status.

This happened on 29 November 2012, when Palestine was granted "non-member observer state" status through GA Resolution 67/19. It acquired the capacity not only to sign and ratify other international treaties and conventions, but above all to join the Statute of the ICC. On 1 January 2015 Palestine applied for full membership with the ICC according to Article 125 and 126 of the Rome Statute<sup>114</sup>. The day after Palestine transmitted its accession application to the Secretary General and became officially part of the Rome Statute. Later, the Registrar of the ICC accepted the declaration which had been re-submitted by the PA and re-opened a preliminary examination on the situation in Palestine. This meant that "*alleged crimes committed in the occupied Palestinian territory will be investigated and persecuted at the international level by an international court*"<sup>115</sup>. This could pave the way for trials of Israeli and Hamas leaders for war crimes in the West Bank and Gaza. Focusing on a possible persecution of the former, there are several legal and practical obstacles.

Firstly, even if the prosecutor decides to open an investigation, as it happened in this case, achieving a concrete prosecution could be difficult. In order to gather the necessary evidences to bring a case to the ICC, Israel's cooperation is necessary, and it is unlikely that this may happen. Moreover, Israel (which is not member of the ICC) and its western allies, principally the US, will oppose all the actions against the former by pressuring the PA and the Court not to proceed with the case. Then, there are legal obstacles which could impede the ICC to act. As we said above, the ICC can only try crimes when national courts failed to do so. Therefore, in this case it should be demonstrated that Israel is unwilling or unable to "genuinely investigate or prosecute". The ICC often applied low standards to determine whether a state is genuinely unwilling to investigate, and if Israel

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<sup>114</sup> In particular, the Article 125 affirms in the paragraph 1 that "*This status shall be open for signature by all States*", and in the paragraph 3 that "*This Statute shall be open to accession by all States*".

<sup>115</sup> Al-Farajin & Engelsdrofer, "Acceptance of International Criminal Justice and the Path to the ICC in Palestine", 5.

will be able to demonstrate that its investigations are carried out in good faiths then the ICC will have no jurisdiction<sup>116</sup>. Finally, as the most important aspect, the Court must determine if the crimes committed in Palestinian territory from June 2014 onwards can be included within the crimes under its jurisdiction: genocide, crimes against humanity and war crimes. At the present time, many international actors supported the idea that Israel is responsible for war crimes and possible crimes against humanity. The UN, in the words of the head of the Human Rights Council, repeatedly accused Israel of committing serious violations of international humanitarian law and human rights. Also, various human rights groups and NGO's submitted communications to the ICC asserting that Israeli officials have been responsible of those crimes<sup>117</sup>.

Currently, the ICC is still in the phase of preliminary examinations. It is not clear what will be the decision by the Prosecutor, because there are many aspects to consider. What seems clear is that the general context around the Israel-Palestine conflict will have some influence on this issue. The US and Israel will exert an always more intense pressure in order to avoid an investigation and eventual persecution for the crimes mentioned above. The last decision is in the hand of the Prosecutor, and it will represent an important test of the ability of the ICC to accomplish which is original goal: to ensure that crimes against humanity and war crimes do not occur with impunity.

## CONCLUSIONS

In this work I tried to go through the issue of Palestinian statehood and recognition, both in bilateral and multilateral terms, in order to determine if Palestine is or not a state within the international community. Statehood and recognition are noticeably controversial and debated issues, given the fact that the interconnection between legal and political considerations often make difficult to clarify when an entity is a state. The case of Palestine is an example more that in many cases international law is too weak when it

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<sup>116</sup> Salma Karbi-Ayyoub, "Palestinian Membership of the ICC", *Al Jazeera Center for Studies* (July 2015): 4.

<sup>117</sup> It is important to highlight that the declaration of the PA open the way also for the investigation of Hamas for crimes committed against Israeli civilians. Many submissions were filled with supposed evidences of the responsibility of Hamas' officers by the Israeli Government and many NGO's. However, in this paper I focused on the importance for Palestine to access the ICC, therefore I have limited to talk about the possibility to judge Israeli officials only. This does not mean that Hamas could not be responsible such as Israel. It will depend on the results of the investigations and the decision by the Prosecutor.



comes to statehood. Geopolitical reasons often influence the ability of what is a state under international law to act as such, in particular when it is not able to obtain membership in the UN and other international organizations.

As I explained in the first chapter, there are two main theories dealing with the issues of statehood and recognition. The declaratory theory, which is the most followed one, argues that an entity is a state if it fulfils the four criteria defined in the Article 1 of the Montevideo Convention: permanent population; defined territory; government; and capacity to enter into relations with the other states. The criterion of a permanent population presents no problems and is almost unchallenged. Palestinian authorities control a population of 5,000,000 people approximately in the West Bank and in the Gaza Strip. Moreover, in the OPT population and nation coincide, reinforcing the claim that Palestine has a permanent population and fulfils the first Montevideo criteria. The completion of the second criterion, a defined territory, has been challenged by those who consider that the fragmentation, imprecise delimitation and disputes with Israel upon it would make difficult to identify a territory as “defined”. However, I found many reasons to support the accomplishment of this condition by Palestine. Firstly, continuity is not an essential characteristic of the territory of a state. Secondly, the PLO repeatedly declared that the territory of the Palestinian state consists of the Gaza Strip, the West Bank and East Jerusalem as its capital, along the pre-1967 borders. The overwhelming majority of the international community, included the UN and the EU, supports this solution. Thirdly, the fact that do exist borders disputes with Israel does not affect the existence of Palestine as a state, as happens in many other cases. About the government criterion, it is the most problematic one because of the complexity of the Palestinian scenario. However, despite the political conflicts emerged between the PA and Hamas which somehow limited Palestinian capacity to carry out effective governmental functions, Palestinian authorities are responsible for the majority of the most important of them, such as the judiciary, legislative and executive, in areas of education, social welfare, taxation, etc. This is enough to say that Palestine satisfies the government criteria as defined in the Montevideo Convention. As regards the last condition, the capacity to enter into relations with other states, this function is carried out either by the PLO or the PA. Though the PA, according the DOP, has not powers in the sphere of foreign relations, it is the PLO which was accepted to conclude international agreements and open diplomatic relations with other states. Therefore, Palestine accomplishes this criterion, either through the PA or the PLO.

According to this analysis, I found that Palestine is a state according to the declaratory theory because it fulfils all the Montevideo criteria.

Even if it is hugely accepted that recognition by other states does not determine if an entity is a state under international law, those who backed the constitutive theory holds that the very legal existence of a state as part of the international system is constituted by the recognition by the other members of the system. In order to determine if Palestine is a state according to the constitutive theory I analysed how successful has been the Palestinian strategy for recognition, from all points of view. In bilateral terms, Palestinian authorities have been partially effective in their attempt to obtain the recognition of the greatest number of states. Since 1988 Declaration of Independence to the present time, the state of Palestine was officially recognized by 137 states, which represent more than the 70%. It is true that only a little number of European and Western countries did it, but here the problem lies in geopolitical interests related to the conflict with Israel, more than in a unacceptance by these states to recognise the legitimacy of Palestine. In multilateral terms, Palestinian efforts produced even better results. Palestine is member of many important regional organizations, such as the Arab League and the organization of Islamic Cooperation. Many steps ahead were done also in relation to the UN system. On October 2011, Palestine gained full membership in UNESCO, and one year and a few months later its status within the UN was upgraded to non-member observer state. This meant the official recognition by the UN of the existence of the state of Palestine and the confirmation that the only obstacle against Palestinian full UN membership is the presence of the US as permanent member with veto power in the SC. Finally, the Palestinian approach to international courts such as the ICJ and above all the ICC is a further validation of what has been defended in this work. The Palestinian membership of the ICC in 2015 is an historic milestone in Palestinian history because it could bring Israeli before international justice. The conclusion is that, even if we take as a reference the constitutive theory, Palestine is a state because it obtained a huge level of bilateral and multilateral recognition, especially within the UN, and because it was successful in many senses in its attempts to act as a state within the international system.

Having considered all these issues I deducted that Palestine is a state both under the declaratory and constitutive theory. Those who linked Palestinian statehood with the resolution of the Israeli-Palestinian conflict are wrong because these are two separated

issues which cannot be treated as a whole. Palestine is already a state because it is acting as such in the national and international sphere, and there is no reason to deny that.

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