

Litigating “Palestine” Before International Courts and Tribunals: The Prospects of Success and Perils of Failure

By VICTOR KATTAN*

I. Introduction

One of the purposes of the United Nations (UN) is to bring about by peaceful means, and in accordance with international law, the settlement of international disputes.¹ One such international dispute, which predates the founding of the UN, is the conflict between Israelis and Palestinians.² In May 2011, Mahmoud Abbas, the chairman of the Palestine Liberation Organization (PLO) and President of the Palestinian National Authority (PNA) also known as the PA, announced that “this September, at the United Nations General Assembly, we will request international recognition of the State of Palestine on the 1967 border and that our state be admitted as a full member of the United Nations.”³ Abbas added, “Palestine’s admission to the United Nations would pave the way for the internationalization of the conflict as a legal matter, not only a political one. It would also pave the way for us to pursue claims against Israel at the United Nations, human rights treaty bodies and the International Court of Justice.”⁴ The claim that Palestine’s admission to the UN will improve its chances of pursuing legal claims against Israel before international courts is the subject of this article.

When the UN was founded in 1945, its Charter provided for an

* School of Oriental and African Studies, University of London. This article was submitted for publication on August 1, 2011.

1. See U.N. Charter, art. 1(1).

2. See VICTOR KATTAN, *FROM COEXISTENCE TO CONQUEST: INTERNATIONAL LAW AND THE ORIGINS OF THE ARAB-ISRAELI CONFLICT 1891-1949* (2009).

3. Mahmoud Abbas, *The Long Overdue Palestine State*, N.Y. TIMES, May 16, 2011, <http://www.nytimes.com/2011/05/17/opinion/17abbas.html>.

4. *Id.*

International Court of Justice (ICJ) to resolve legal disputes submitted to it by states and to give advisory opinions on legal questions referred to it by authorized United Nations organs and specialized agencies.⁵ Since July 2002, it has also become possible for states to have recourse to the International Criminal Court (ICC) to complement national legal systems in matters of individual criminal responsibility.⁶ These are the two main international courts that the Palestinians could use if their quest for UN membership is successful. Additionally, if Palestine's UN bid is successful, Palestine could also avail itself of the conciliation and arbitration services provided by the Permanent Court of Arbitration (PCA). In addition to gaining access to the ICJ, the ICC, and the PCA,⁷ a key explanation as to why President Abbas laid particular emphasis on attaining membership of the UN is that Palestine's admission would provide compelling evidence from the international community that Palestine is a state.

In recent years there has been no shortage of calls to refer various aspects of the Israel-Palestine conflict to international courts and tribunals. As one example, in his 2007 report on the human rights situation in the occupied Palestinian territories (oPts), Professor John Dugard, then UN Special Rapporteur, suggested asking the ICJ for an advisory opinion on the legal consequences of a regime of prolonged occupation with features of colonialism and apartheid.⁸ In response to that call, two years later, the Human Sciences Research Council of South Africa published a 302-page study compiled by a dozen international lawyers on apartheid and

5. See U.N. Charter, ch. XIV.

6. Recourse to the International Criminal Court (ICC) may take place when a situation has been referred to the court by a state party, when a crime is referred to the court by the Security Council, or if the Prosecutor initiates his own investigation. See Rome Statute of the International Criminal Court, art 13, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter ICC Statute], available at <http://untreaty.un.org/cod/icc/statute/romefra.htm>.

7. It is important to note, however, that the use of the ICJ's advisory function is not contingent on Palestine being a UN member, which is why the ICJ was able to give an advisory opinion on the legal consequences of the construction of a wall in the occupied Palestinian territory in June 2004. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J. No. 131, 136 (July 9), available at http://www.icj-cij.org/icjwww/-idocket/imwp/imwp_advisory_opinion/imwp_advisory_opinion_20040709.htm [hereinafter *Wall opinion*].

8. Rep. of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, *Implementation of General Assembly Resolution 60/251 of March 15 entitled "Human Rights Council,"* ¶¶ 58-62, U.N. doc. A/HRC/4/17, 3, 22-24 (Jan. 29, 2007) (by John Dugard).

colonialism.⁹ In that report, the authors proposed that states use the following question when requesting for the UN General Assembly to refer the situation in the oPts to the ICJ:

Do the policies and practices of Israel within the Occupied Palestinian Territories violate the norms prohibiting apartheid and colonialism; and, if so, what are the legal consequences arising from Israel's policies and practices, considering the rules and principles of international law, including the International Convention on the Elimination of all forms of Racial Discrimination, the International Convention on the Suppression and Punishment of the Crime of Apartheid, the Declaration on the Granting of Independence to Colonial Countries and Peoples, UN General Assembly Resolution 1514 (1960), the Fourth Geneva Convention of 1949, and other relevant Security Council and General Assembly resolutions?¹⁰

Under Professor Richard Falk, the current UN Rapporteur, the calls to refer various infringements of Palestinian human rights by Israel to the ICJ for an advisory opinion have continued. In his latest report to the Human Rights Council, Professor Falk suggested the ICJ should assess allegations that the occupation of the West Bank and East Jerusalem possesses elements of “colonialism,” “apartheid,” and “ethnic cleansing” inconsistent with international humanitarian law and self-determination.¹¹ In this connection, reference should also be made to the Report of the United Nations Fact-Finding Mission on the Gaza Conflict (“Goldstone Report”), which was published in September 2009.¹² This report referenced a declaration filed in the name of the Government of Palestine at the Office of the Prosecutor of the ICC on January 21, 2009, after Israel was accused of

9. *Occupation, Colonialism, Apartheid? A re-assessment of Israel's practices in the occupied Palestinian territories under international law*, HUMAN SCIENCES RESEARCH COUNCIL OF SOUTH AFRICA 294 (May 2009). The study was led by Dr. Virginia Tilley. The international lawyers involved included Shane Darcy, John Dugard, Max du Plessis, Fatmeh El-Ajou, Hassan Jabareen, Victor Kattan, Michael Kearney, Gilbert Marcus, Stephanie Khoury, Godfrey Musila, John Reynolds, Rina Rosenberg, Iain Scobbie, Michael Sfar, Stephanie Khoury, and Peter Stemmet.

10. *Id.* at 294.

11. Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967, *Human Rights Situation in Palestine and Other Occupied Arab Territories*, ¶ 32(b) at 17, U.N. Comm'n on Human Rights, U.N. Doc. A/HRC/16/72, (Jan. 10, 2011) (by Richard Falk), available at <http://unispal.un.org/UNISPAL.NSF/0/A72012A31C1116EC8525782C00547DD4>.

12. Rep. of the U.N. Fact-Finding Mission on the Gaza Conflict, *Human Rights in Palestine and Other Occupied Arab Territories*, U.N. doc. A/HRC/12.48, (Sept. 15, 2009) [hereinafter *Goldstone Report*].

committing war crimes and crimes against humanity during Israel's three week assault on Gaza, known as "Operation Cast Lead."¹³ The Goldstone report acknowledged it was for the ICC Prosecutor to determine for the purposes of its Statute whether Palestine qualified as a state.¹⁴ To that end, the report recommended in the absence of good faith investigations – which were independent and in conformity with international standards – the Security Council should refer the situation in Gaza to the ICC Prosecutor. The report called on the Prosecutor to make the required legal determination as to whether Palestine is a state "as expeditiously as possible."¹⁵

This Article, after considering the legal avenues available to Palestinians and assuming that Palestine has standing to appear before international courts and tribunals, considers the wisdom of the calls to refer the situation in Palestine to the ICJ and the ICC, and the likelihood of Palestinian success therein. The success of some of these endeavors depends on an answer to the question of whether Palestine is a state. An affirmative answer to the question would allow the ICC prosecutor to consider the declaration under Article 12(3) of the Rome Statute of the International Criminal Court (ICC Statute).¹⁶ The question of whether Palestine is a state, and if so, at what exact moment it became a state, is however, beyond the purview of this Article, which is more narrowly concerned with the matter of litigation.¹⁷ It is not by chance that most of the reports on Palestine produced by the UN Special Rapporteurs have called on the UN General Assembly to refer various questions to the ICJ in the form of advisory opinions. Their preference for advisory opinions can be explained on the basis that only states can become parties to contentious cases before the ICJ, whereas no such condition is attached to advisory opinions, which are given to the UN organ or specialized agencies that request them.

13. See Victor Kattan *Operation Cast Lead: Use of Force Discourse and Jus ad Bellum Controversies*, XV THE PALESTINE Y.B. INT'L L. 95-117 (2009).

14. *Goldstone Report*, *supra* note 12, at 590 ¶ 1632.

15. *Id.* at 548 ¶ 1767.

16. Indeed, the Prosecutor may feel that his Office is not the most appropriate authority to determine whether Palestine is a state, which might explain why we have not heard much on the matter from his Office for the past two years.

17. On the matter of statehood, see generally JOHN QUIGLEY, THE STATEHOOD OF PALESTINE: INTERNATIONAL LAW IN THE MIDDLE EAST CONFLICT (2010); see also Victor Kattan *Book Review: The Statehood of Palestine: International Law in the Middle East Conflict* 105 AM. J. INT'L L. 407 (2011).

II. The Various Forms of International Litigation

There are various options available to the Palestinians to have recourse to international litigation, although most of these options require that Palestine be considered a state. The possibilities include: bringing a contentious case against Israel before the ICJ, engaging Israel in arbitration before the PCA, seeking an advisory opinion from the ICJ, or bringing a case before the ICC. We know from the publication of the confidential *Palestine Papers* that the PLO's Negotiation Support Unit (NSU) – which is located within the Negotiation Affairs Department in Ramallah – has in recent years been considering various international litigation options.¹⁸ *The Palestine Papers* came into the hands of *Al Jazeera* and *The Guardian* newspaper in January 2011 and included papers assembled over a decade by the NSU.¹⁹ The light some of these papers shed on the practicalities of the Palestinian strategy in seeking recourse to international courts – referenced below – bears mentioning.

It is worth taking a closer look at the potentiality of bringing a contentious case against Israel, and whether arbitration may one day prove to be an option as well before further addressing the ICC, and the matter of seeking advisory opinions. We know from the *Palestine Papers* that in 2009 the NSU produced two memos considering various international litigation options. The first was entitled, “Procedures for bringing proceedings before the ICJ and UN diplomacy,” [the UN Diplomacy memo] and the other, “Legal approaches to be advanced at the ICC in order to protect Palestinian strategy and realize Palestinian rights and interests”²⁰ [the ICC memo]. Regarding proceedings before the ICJ, the UN Diplomacy memo noted that only member states of the UN, and other states that have become parties to the Statute of the ICJ or have accepted its jurisdiction under certain conditions, may be parties to contentious

18. See Seumas Milne and Ian Black, *Secret papers reveal slow death of Middle East peace process*, THE GUARDIAN, Jan. 23, 2011, <http://www.guardian.co.uk/world/2011/jan/23/palestine-papers-expose-peace-concession>.

19. See Memorandum from Al Jazeera's Transparency Unit on procedures for bringing proceedings before the ICJ and UN Diplomacy (Oct. 15, 2009), available at <http://transparency.aljazeera.net/files/4883.pdf> [hereinafter UN Diplomacy memo] and Memorandum from the negotiations support unit to Palestinian leadership on legal approaches to be advanced at the ICC in order to protect overall Palestinian strategy and realize Palestinian rights and interests (Mar. 25, 2009), available at <http://thepalestinepapers.com/files/4494.pdf> [hereinafter ICC memo].

20. *Id.*

cases. Because “Palestine holds only permanent observer status at the UN,” the memo observed, “it is unlikely that the PLO and the PNA are able to be a party to a contentious case.” While this is true so long as there is no change in the international legal status of Palestine, there is the option, albeit remote, of requesting that a third state bring a claim against Israel on Palestine’s behalf where there has been a breach of a peremptory norm of general international law.

A. *Contentious Cases*

Under Articles 42 and 48 of the International Law Commission’s Articles on The Responsibility of States for Internationally Wrongful Acts (the Articles on Responsibility), it is possible for an “injured state” to invoke the responsibility of another state. This can be done under Article 42 if the obligation breached is owed to the state individually. Alternatively, responsibility can also be invoked if the breach is of such a character as to radically change the position of all the other states to which the obligation is owed with respect to the further performance of the obligation.²¹ In the case of Article 48, any state other than the injured state is entitled to invoke the responsibility of another state if the obligation breached is owed to the international community as a whole, i.e. an obligation *erga omnes*.²² An example of an obligation *erga omnes* is a breach of the right to self-determination.²³ Any state entitled to invoke the responsibility of another state can claim cessation of the internationally wrongful act, and seek assurances and guarantees of non-repetition and reparation. It may therefore be possible for a third state to invoke Israel’s responsibility for prohibiting the Palestinian people from exercising their right to self-determination (or for breaching another peremptory norm of international law if applicable), although it would be necessary to establish a jurisdictional link.

21. According to a study published in 2007, Article 42 of Articles of Responsibility had received no judicial mention since the adoption of the Articles in 2001. See Simon Olleson, *The Impact of the ILC’s Articles on Responsibility of States for Internationally Wrongful Acts*, BRITISH INSTITUTE OF INTERNATIONAL AND COMPARATIVE LAW 249 (2007), available at http://www.biiicl.org/files/3107_impactofthearticlesonstate_responsibilitypreliminarydraftfinal.pdf.

22. There has been some judicial mention of Article 48, but nothing enlightening. See *id.* at 263-66.

23. JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES* 278 (2002).

So long as the international community does not consider Palestine a state, the prospect of bringing a contentious case against Israel is bleak. Even assuming first, that Palestine is a state and second, that it is possible to bring a case against Israel on the basis, for example, of the infringement of a multilateral human rights treaty to which both Israel and Palestine are parties, and third, that neither state has submitted a reservation to that treaty, any decision in a contentious case would have no binding force except between the parties and in respect to that particular case.²⁴ In the event of a decision favorable to Palestine, it would not be surprising if Israel were to refuse to abide by the decision. In such a situation, it would be necessary to apply to the UN Security Council for enforcement of the decision.²⁵ As that body has consistently avoided criticizing Israel's infringements of international law in the last four decades, it is unlikely that an ICJ decision, assuming that it is favorable to Palestine, would be enforced against Israel.²⁶

B. Arbitration

Nonetheless, the ICJ is not the only international dispute resolution mechanism that may prove of use to the Palestinians. It would also be possible to resort to arbitration if Israel were agreeable, and if the arbitration were related to an issue on which there is a treaty obligation between Israel and another state. In this connection, Israel's peace treaty with Egypt and its peace treaty with Jordan provide that any dispute that cannot be settled between the parties by negotiation is to be resolved by conciliation or submitted to arbitration.²⁷ The PCA, which is based in the Peace Palace in The Hague, is a body that administers arbitrations, and is often used by states. Akin to cases brought before the ICJ, the results of any

24. Article 59 of the ICC statute provides "the decision of the Court has no binding force except between the parties and in respect of that particular case."

25. U.N. Charter, art. 94(2).

26. This was exemplified most recently in the United States veto of the draft settlement resolution in February 2011. See draft S.C. Res. 2011/24, (Feb. 18, 2011) (vetoed by the United States).

27. See Israel-Egypt Peace Treaty, Isr.-Egypt, art. 7(2), Mar. 26, 1979, 1252 U.N.T.S., and Israel-Jordan Peace Treaty, Isr.-Jordan, art. 29(2), Oct. 26, 1994, 2042 U.N.T.S. 59.

arbitration would only be binding upon the parties to the dispute.²⁸ Egypt resolved a dispute with Israel at the PCA in the 1988 Taba arbitration.²⁹ Jordan could use the services of the PCA to raise those sections of its peace treaty with Israel on refugees and on Jerusalem if it turns out that Israel is not fully abiding by its obligations. However, Israel would have to agree to arbitration as a means to resolve any dispute that arises from these treaty provisions. The PLO and Israel could have engaged in arbitration on the basis of Article XV of the Declaration of Principles (1993) and Article XXI of the Cairo Agreement (1995) in the event of a dispute arising with respect to these agreements, and in the event that conciliation failed.³⁰ However, Israel and the PLO have not exercised this right.

C. *Advisory Opinions*

The obstacles to engaging Israel in a contentious case or resolving a dispute by recourse to arbitration might explain why the UN Diplomacy memo concentrated mainly on the procedure for referring advisory opinions to the ICJ. This would also explain why most of the calls from the Special Rapporteurs were for advisory opinions. The UN Diplomacy memo explains “the United Nations General Assembly and Security Council may request advisory opinions on ‘any legal question.’” Other United Nations organs and specialized agencies which have been authorized to seek advisory opinions can only do so with respect to “legal questions arising within the scope of their activities.”³¹ An example relevant in the present context is the question formulated by the UN General Assembly regarding the advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Wall

28. Convention for the Pacific Settlement of International Disputes art. 84, Oct 18, 1907, 1 Bevens 577; and Convention for the Pacific Settlement of International Disputes art. 56, July 29, 1899, 1 Bevens 230.

29. See Egypt-Israel Arbitration Tribunal: Award in Boundary Dispute Concerning the Taba Area, 27 I.L.M 1421-38 (1988).

30. See art. 15 of the Declaration of Principles on Interim Self-Government Arrangements, Sept. 13, 1993, Isr.-PLO, 32 I.L.M. 1525, 1533 (1993) and art. 21 of the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, Sept. 28, 1995, 36 I.L.M. 551, 566 (1997). See also, GEOFFREY R. WATSON, THE OSLO ACCORDS: INTERNATIONAL LAW AND THE ISRAELI-PALESTINIAN PEACE AGREEMENTS 120 (2000) (observing that Israel and the PA did not use the dispute resolution mechanism in the Oslo Accords).

31. See *supra* note 19 and accompanying text.

opinion).³² Another example is the question formulated by the UN General Assembly regarding the *Applicability of the Obligation to Arbitrate Under Section 21 of the United Nations Headquarters Agreement*, which concerned a dispute between the United States and the UN, when the United States attempted to close Palestine's Permanent Observer Mission to the UN in 1988.³³

The UN Diplomacy memo describes the procedure for seeking advisory opinions from the General Assembly in these words: "For decisions by the General Assembly, a simple majority vote is usually required, but for decisions on 'important questions,' a two-thirds majority is required, excluding abstentions."³⁴ The document notes that, "The definition of 'important questions' in Art. 18(2) of the UN Charter is not entirely clear, but it is possible that questions regarding the Israel-Palestinian conflict would meet the threshold of 'important questions' and therefore require a two-thirds majority of participating voters." Nonetheless, whilst UN practice is not clear on what it considers to be "important questions" requiring a two-thirds majority vote of members present in the Assembly and voting, it does stipulate that questions relating to the maintenance of international peace and security would be considered an important question.³⁵ According to one commentary to the UN Charter most decisions taken under Article 18 do not indicate whether the members were aware that the voting procedure for "important questions" applied. One of the commentaries to the Charter noted that considerations as to whether a question is an important one requiring a two-thirds majority vote is often of a political rather than legal nature.³⁶

Past questions referred to the ICJ for advisory opinions do not shed much light on whether a simple majority or a two-thirds majority vote is required for seeking an advisory opinion. For instance, the UN General Assembly resolution concerning the question that was referred to the ICJ in the *Nuclear Weapons* advisory opinion was passed by a simple majority, with seventy-eight states voting in favor

32. *Wall opinion*, *supra* note 7, at 164, ¶ 66 (July 9, 2004).

33. *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, Advisory Opinion, I.C.J. Rep. 12 (Apr. 26, 1988).

34. UN Diplomacy memo, *supra* note 19, at 3.

35. U.N. Charter, art. 18(2).

36. BRUNO SIMMA THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 357 (Simma ed. 2002).

of the resolution to forty-three votes against.³⁷ In contrast, the UN General Assembly resolution concerning the question on whether the unilateral declaration of independence of Kosovo was in accordance with international law was passed by a two-thirds majority with seventy-seven states voting in favor of the resolution to only six votes against.³⁸ Similarly, the UN General Assembly resolution concerning the *Wall opinion* was passed by ninety states voting in favor to eight against.³⁹ These resolutions do not indicate whether the two-thirds majority was required for these resolutions to pass or whether it was because states strongly supported recourse to the ICJ in these instances, which might explain why they attained a two-thirds majority so easily.

Due to the large support in Africa, Asia, and Latin America for the Palestinian people's struggle for self-determination under international law, it should be relatively simple for the PLO to secure a two-thirds majority vote to render a question before the ICJ in the form of an advisory opinion. In practical terms a two-thirds majority means that the Palestinians would need to secure 127 votes in the General Assembly. Of the 193 states who at the time of writing this Article are UN members, most are from the Middle East, Africa, and Asia.⁴⁰ Even if the United States, the Marshall Islands, Micronesia, Palau, Canada, Australia, New Zealand, the twenty-seven members of the EU, and the dozen islands in the Pacific Ocean that usually vote with Australia, vote against the request, this would still leave over 127 states favorably inclined to support a Palestinian request for an advisory opinion. Provided that the representatives of all these states are present for the vote, the Palestinians should face little difficulty in lobbying two-thirds of the General Assembly to support their cause in order to pass a resolution containing a request for an advisory opinion from the ICJ.

37. G.A. Res. 49/75 (Jan. 9, 1995). Voting records can be accessed on the United Nations Bibliographic Information System (UNBIS) by inserting the document symbol of the UN resolution in the search engine. Abstentions are not counted as votes in the assessment of a simple or two-thirds majority vote.

38. G.A. Res. 63/3 (Oct. 8, 2008).

39. G.A. Res. ES-10/14 (Dec. 8, 2003).

40. South Sudan became a member state of the UN on July, 14, 2011. See G.A. Res. 65/308 (Aug. 25, 2011).

III. The Prospects of Success and the Perils of Failure

The current composition of the UN General Assembly contrasts starkly with its original composition when it was established in 1945.⁴¹ Then, the Assembly was dominated by the colonial powers.⁴² In 1947, a resolution sponsored by Egypt and Syria concerning the legality of the UN Partition Plan was prevented from being referred to the ICJ by a single negative vote cast in an Assembly dominated by Cold War politics.⁴³ Whether or not the failure to refer the matter of partition to the ICJ in 1947 had any discernable impact on later PLO policy, the reticence that the Palestinian leadership has displayed towards referring certain aspects of its dispute with Israel to international legal bodies is striking. This reticence became particularly galling during decolonization when the composition of the UN General Assembly was dramatically transformed with the addition of many new states from Africa and Asia who had a shared history with the Palestinian people in their struggle against colonialism.⁴⁴ Perhaps this reticence can be attributed to a faulty understanding of the international legal system, bad legal advice, a preference for armed struggle and revolution, cultural ambivalence towards international

41. The original members of the UN included Argentina, Australia, Belgium, Bolivia, Brazil, Byelorussian Soviet Socialist Republic, Canada, Chile, China, Colombia, Costa Rica, Cuba, Czechoslovakia, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, France, Greece, Guatemala, Haiti, Honduras, India, Iran, Iraq, Lebanon, Liberia, Luxembourg, Mexico, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, Philippine Republic, Poland, Saudi Arabia, Syria, Turkey, Ukrainian Soviet Socialist Republic, Union of South Africa, Union of Soviet Socialist Republics, United Kingdom, United States, Uruguay, Venezuela, Yugoslavia.

42. In November 1947, the UN was comprised of fifty-five member states, and therefore a proposal could be blocked by nineteen adverse votes if every delegation cast a vote. For an analysis of the UN vote on partition and the Plan's legal aspects see KATTAN FROM COEXISTENCE TO CONQUEST, *supra* note 2, at 146-68.

43. See Y.B. U.N. 241 (1947-48).

44. Between 1945 and 1964 when the PLO was founded, the following states had attained UN membership: Afghanistan, Iceland, Siam, Sweden, Pakistan, Burma, Yemen, Israel, Indonesia, Albania, Austria, Bulgaria, Cambodia, Ceylon, Finland, Hungary, Ireland, Italy, Jordan, Laos, Libya, Nepal, Portugal, Romania, Spain, Japan, Morocco, Sudan, Tunisia, Ghana, Federation of Malaya, Guinea, Cameroun, Central African Republic, Chad, Congo (Brazzaville), Congo (Leopoldville), Cyprus, Dahomey, Gabon, Ivory Coast, Malagasy Republic, Mali, Niger, Nigeria, Senegal, Somalia, Togo, Upper Volta, Mauritania, Mongolia, Sierra Leone, Tanganyika, Algeria, Burundi, Jamaica, Rwanda, Trinidad and Tobago, Uganda, Kenya, Kuwait, Zanzibar, Malawi, Malta, Zambia.

litigation, or a combination of all of these factors.⁴⁵ Whatever the case may be, the PLO's ambivalence towards international litigation can be contrasted with the strategies adopted by the national liberation movements in Southern Africa who routinely resorted to international courts in their struggle against apartheid.⁴⁶

On two occasions, the Palestine question found its way to The Hague. The issue first arose indirectly during a legal dispute between the UN Headquarters and the United States in 1988; it again emerged directly in the case of the wall in 2004. In both cases, the Palestinians emerged victorious. Of course it cannot be assumed that the Palestinians would be as successful in any future cases brought before the ICJ. Success largely depends on the circumstances surrounding the request for the opinion and on the question asked. And indeed *asking the right question* is absolutely crucial to success at the ICJ. This is why caution ought to be exercised in formulating a question to ask the UN General Assembly to refer to the ICJ in the form of an advisory opinion. In this connection some of the calls referred to earlier by the two UN Special Rapporteurs to ask for an advisory opinion on "apartheid" or "ethnic cleansing," might not be the wisest strategy, although at least in the case of apartheid there are three international treaties that proscribe its practice, and which define and penalize it as a crime.⁴⁷

Colonialism, unlike apartheid, has proved difficult to define both in the social sciences and in international law.⁴⁸ For instance, could

45. Interestingly, there was an attempt to create an Arab Court of Justice by the Arab League in 1950 and there was also an attempt to create an Islamic International Court of Justice by the Organization of the Islamic Conference. This may suggest that the Arab and Islamic world do not believe that the International Court of Justice is capable of fully appreciating and addressing inter-Arab disputes. See MICHELLE L. BURGIS, *BOUNDARIES OF DISCOURSE IN THE INTERNATIONAL COURT OF JUSTICE: MAPPING ARGUMENTS IN ARAB TERRITORIAL DISPUTES* 91-93 (2009).

46. See Michla Pomerance, *The ICJ and South-West Africa (Namibia): A Retrospective Legal/Political Assessment*, 12 LEIDEN J. INT'L L. 426 (1999).

47. See International Convention on the Elimination of All Forms of Racial Discrimination, art. 3, G.A. Res. 2106 (Dec. 21, 1965); Convention on the Suppression and Punishment of the Crime of Apartheid, *opened for signature* Nov. 30, 1973, 1015 U.N.T.S. 243 (entered into force July 18, 1976); see also, ICC Statute, *supra* note 6, art 7(1) (stipulating the crime of apartheid is a crime against humanity).

48. In this connection, I was one of a dozen international lawyers who participated in the South African study on apartheid and colonialism that I mentioned in the Introduction. The study was funded by the South African Government through the aegis of the Human Sciences Research Council. See *supra* note 9 (for a list of the international lawyers who participated in the study). The

the current “peace process” or the notion of “earned sovereignty” as replicated in the UN Road Map (2003) not be defined as “colonialism” or “neo-colonialism”? If so, I would expect that no Western state would vote for a question that directly raises the matter of colonialism in a question formulated for an ICJ advisory opinion. Neither would the PA support such a move, especially since the legal structure of its authority can be likened to a colonial entity in many ways. Similarly, most of the Western educated members of the Court might have difficulty with determining whether the ICJ would have jurisdiction to entertain such a request. This is because it is necessary for the question formulated for an advisory opinion to be a “legal question” within the meaning of Article 96 of the Charter and Article 65 of the ICJ’s Statute. Asking a question that makes reference to colonialism in the context of a UN resolution that was adopted amidst much Cold War controversy might be considered overtly political.⁴⁹ Whilst the ICJ has repeatedly affirmed “that a question [which] has political aspects does not suffice to deprive it of its character as a legal question,” a question that directly raises colonialism in a post-colonial age might be a step too far.⁵⁰ This is especially as the ICJ can exercise its discretion to refuse to respond to a request for an advisory opinion, although it is rare for the Court to do so acting only in exceptional circumstances where there are compelling reasons.⁵¹

study was chaired by Professor John Dugard, who both as an academic and as an advocate gained much experience challenging many of the policies of apartheid in South Africa over several decades. For a personal reflection of his experiences, see John Dugard’s testimony to the Russell Tribunal on Palestine in Cape Town (Nov. 5-7, 2011), <http://www.russelltribunalonpalestine.com/en/> (forthcoming) (on file with author). The study was the first serious and systematic attempt to apply the concept of apartheid under international law to Israeli policy in the oPts. See Max du Plessis, *Seeking an Advisory Opinion on Israel’s Apartheid and Colonial Practices in the Occupied Palestinian Territories* 34 S. AFRICAN Y.B. INT’L L. 169 (2009). Whilst I agree with most of the study’s specific conclusions and with the apartheid analogy to the West Bank and Gaza I would, upon reflection, think twice before asking the question that we specifically composed for the General Assembly to seek an advisory opinion from the ICJ. See *Occupation, Colonialism, Apartheid? A re-assessment of Israel’s practices*, *supra* note 9, at 294. My concern is primarily about the reference to “colonialism” rather than to apartheid.

49. See, e.g., Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514, 15 U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1961).

50. See Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Rep. ¶ 27 and cases cited therein (July 22, 2010) [hereinafter *Kosovo Advisory Opinion*].

51. See *id.* ¶¶ 30-31 and cases cited.

Instead of focusing on the issue of colonialism, it would be more practical to address apartheid, which is specifically prohibited by both customary international law and treaty law. In this regard, it would be more prudent to raise the question of apartheid *indirectly* by asking a question that would require the interpretation of treaties regarding human rights and racial discrimination in a situation where there is a denial of self-determination. This would be particularly apt in a situation of prolonged occupation. In this way, even if the majority of judges at the ICJ avoid addressing the apartheid question directly, it would not prevent a few from raising it in a separate or dissenting opinion. Such a situation might arise if Israel, for instance, refuses to relinquish its control over the occupied territories after the sixty-sixth session of the UN General Assembly when Palestine has said it will seek membership of the UN. It must be remembered that the ICJ is still a conservative institution known for its positivist approach to international law through which it employs “constrained, neutral language” in its decisions and advisory opinions.⁵² The ICJ also has a tendency to shy away from controversy.⁵³ Moreover, the question of apartheid was never directly raised before the ICJ in the Southwest Africa cases although it naturally formed the background to the four advisory opinions and two attempts at contentious litigation.⁵⁴ It is one thing to ask the General Assembly to formulate a resolution comparing Israel’s occupation to apartheid, it is quite another to ask the ICJ to do this. Furthermore, the General Assembly has not even likened Israel’s occupation of Palestine to apartheid unlike in the case of Southwest Africa where it frequently condemned apartheid.

In this regard, a question that would be taken more seriously by the ICJ in the current political climate would be one that focuses on the matter of Palestinian statehood. Assuming that Palestine’s quest for UN membership is successful during the sixty-sixth session of the UN General Assembly, the most appropriate question to ask the ICJ would be to enquire as to when Palestine became a state. This is because UN membership does not determine statehood. Rather

52. See Burgis, *supra* note 45, at 266.

53. For instance, in the recent *Kosovo Advisory Opinion*, the ICJ dodged the question it was asked on whether Kosovo’s declaration of independence was in accordance with international law by reformulating the question and concluding that it did not breach any rule of international law.

54. Pomerance, *supra* note 46, at 428.

admission to the UN is based on an assumption that the entity seeking membership is already a state.⁵⁵ At the time of writing this article, it is not clear whether Palestine will seek full UN membership or observer-state membership. The former status is subject to a recommendation from the Security Council, whereas the latter can be attained within the UN General Assembly where Palestine has more support.⁵⁶ If a request for an advisory opinion is formulated with a view to ascertaining the exact moment Palestine attained statehood, then reference could be made to the number of states that have recognized Palestine and the date of recognition, to the definition of statehood in the Montevideo Convention on the Rights and Duties of States (1930), and any relevant General Assembly and Security Council resolutions.⁵⁷ Ascertaining the date that Palestine became a state is important because this would have ramifications for the matter of ICC jurisdiction, which is briefly examined below.

A. Legal Issues Arising from Palestine's Quest to Achieve Statehood

Whilst it is impossible to predict the future, a number of complex legal issues arising from the quest to achieve membership in the UN of a Palestinian state are foreseeable. Problems may arise, for instance, with regards to the matter of UN membership. If Palestine seeks full UN membership, and if its request is either vetoed in the Security Council or fails to pass due to a lack of support, then Palestine may seek to “upgrade” its status in the UN General Assembly.⁵⁸ If Palestine decides to pursue the latter option then it may be subject to a legal challenge. This is because the ICJ, in an early opinion, ruled that the admission of a state to membership of the UN, pursuant to Article 4(2) of the Charter, could not be effected by a decision of the General Assembly when the Security Council has made no recommendation for admission, by reason of the candidate

55. See U.N. Charter, art. 4(1) (“Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.”).

56. See *id.* art. 4(2) (“The admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council.”).

57. See Montevideo Convention on Rights and Duties of States, Dec. 26, 1933, 49 Stat. 3097, T.S. 881.

58. Article 27(2) of the U.N. Charter provides “decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members.”

failing to obtain the requisite majority or due to a negative vote of a permanent member upon a resolution so to recommend.⁵⁹ Moreover, even if Palestine does succeed in upgrading its status in the Assembly, what legal rights and duties would such a state have under the UN Charter? If Palestine's status continues to be questioned, it may also be challenged when it seeks to accede, sign, and ratify bilateral and multi-lateral treaties, because these are only things that states can do. It may even be the case that some UN organs, and perhaps even the ICC, will seek the ICJ's advice with a view to making an assessment as to whether Palestine is competent to join their organization or accede to specific treaties.

These are issues that the ICJ would be capable of answering, and which would genuinely assist the UN with ascertaining whether Palestine can become a member if the Security Council, for instance, refuses to recommend its membership to the Assembly, due to United States opposition.⁶⁰ In the event that the US does not block Palestine's membership, and Palestine becomes a member of the UN, an answer to the question of statehood may still be pertinent if Israel refuses to relinquish control over the oPts. Indeed there may be further grounds to challenge Israeli policy if it continues to populate the settlements with its own citizens, either by expanding existing settlements or constructing new ones, contrary to international law.⁶¹ This is because one of the outcomes of an ICJ opinion to the effect that Palestine is a state is that Israel would be required to withdraw from the territory, and cease its support for settlement activity, because of its infringement of Palestine's sovereignty. Alternatively, in anticipation of the opinion, Israel may act preemptively with a grand gesture by terminating its occupation. It is, however, doubtful whether Israel would actually withdraw beyond the wall, since it would probably maintain full control of East Jerusalem, and it may even carry out threats to annex the settlement blocs that are contiguous to that city.⁶²

59. See Competence of Assembly Regarding Admission to the United Nations, Advisory Opinion, I.C.J. Rep. 1950, 4, ¶ 10 (Mar. 3, 1950).

60. See Natasha Mozgovaya, *U.S. House Opposes Unilateral Declaration of Palestinian State*, HAARETZ (Dec. 8, 2010), <http://www.haaretz.com/news/diplomacy-defense/u-s-house-opposes-unilateral-declaration-of-palestinian-state-1.330922>.

61. On the illegality of Israeli settlement activity, see *Wall opinion*, *supra* note 7, at 136, 183-84 ¶ 120.

62. Ori Lewis, *Israel could annex more of West Bank – Minister*, REUTERS (Nov. 16, 2009), available at <http://www.reuters.com/article/2009/11/16/us-palestinians->

IV. A Comment on the ICC

It will be recalled that the ICC memo previously mentioned in Part II, which was leaked to *Al Jazeera* and *The Guardian* newspaper from the NSU files in Ramallah, addressed the possible legal approaches that could be advanced by the PA at the ICC to protect Palestinian rights. As the memo noted, the declaration lodged in the Prosecutor's Office in the name of the Government of Palestine on January 21, 2009, in the aftermath of Operation Cast Lead, was predicated on the assumption "that Palestine is already a state."⁶³ The memo added, "This is a potentially significant departure from the position that the leadership has assumed since the early 1990s that a Palestinian state will only emerge upon termination of the Israeli occupation, and may have significant strategic implications for permanent status negotiations." Confusion over the approach of the Palestinian leadership's position on statehood is evident from the submissions that were sent to the Office of the Prosecutor of the ICC on whether the declaration lodged by the PA met statutory requirements.⁶⁴ Those scholars and organizations that supported the Israeli position in arguing that Palestine was not a state, relied on comments by PA officials implying that they were in the process of seeking statehood, whereas those who argued that Palestine was already a state, said these statements were taken out of context.⁶⁵

This confusion is also reflected in the ICC memo. After expressing concern over the PA's departure from its official position that a Palestinian state would only emerge after the end of the occupation, the memo set out the possible legal arguments that the Palestinian leadership could invoke to support the declaration lodged at the Prosecutor's Office "in order to avert a misinterpretation of the

israel-annexationidUSTRE5AF1HF20091116?feedType=RSS&feedName=everything&virtualBrandChannel=11563 ("Israel warned the Palestinians on Monday that declaring a state without concluding a peace agreement would lead to Israeli counter-measures that could include annexation of more of the occupied West Bank.").

63. See ICC memo, *supra* note 19, at 1.

64. See *Summary of Submissions on Whether the Declaration Lodged by the Palestinian National Authority Meets Statutory Requirements*, WEBSITE OF THE ICC PROSECUTOR (Mar. 5, 2010), <http://www.icc-cpi.int/NR/rdonlyres/D3C77FA6-9DEE-45B1-ACC0-B41706BB41E5/282852/PALESTINEFINAL201010272.pdf>.

65. See, e.g., Michael Kearney, *Palestine and the International Criminal Court: Asking the Right Question*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1633975.

Palestinian position by the Court.” The memo suggested that the leadership adopt the position that “Palestine enjoys functional statehood for the application and implementation of international humanitarian law and prosecution of war crimes.”⁶⁶ It cautioned the leadership that, “irrespective of how the ICC, Israel and other states react to a Palestinian assertion of statehood *today, how* the leadership makes this assertion now could impact on the success of our overall strategy and positions on permanent status issues *in the future.*”⁶⁷ The fact that Mahmoud Abbas, the chairman of the PLO and President of the PA, made it abundantly clear that Palestine will seek UN membership in September, which he announced in *The New York Times*, would seem to put this confusion to rest. The PA clearly believes that Palestine is a state.

According to Article 13 of the ICC Statute, the court may exercise its jurisdiction by one of three ways: First, referral by a state party; second, referral by the Security Council; and third, the Prosecutor may initiate his own investigation. In order for Palestine to refer a situation to the Prosecutor in which one or more crimes within the jurisdiction of the court have been committed, Palestine must be a party to the ICC, and it can only become a party if it is a state. In order for the Prosecutor to initiate his own investigation he needs to be assured that the crimes complained of fall within the jurisdiction of the court.⁶⁸ Again, this comes down to whether Palestine was a state when the crimes complained of were alleged to have been committed.

In this respect, it is unclear at what exact moment Palestine became a state. One opinion is that it has been a state since its Declaration of Independence in 1988, although the PLO lacked control of territory at that particular moment.⁶⁹ Since 1993, the PLO has exercised authority in the West Bank and Gaza through the PA, although it probably still fell short of satisfying the requirements of

66. ICC memo, *supra* note 19, at 2.

67. “This is because,” the document continued, “the leadership’s words and deeds are evidence of how the PLO perceives Palestine’s status under international law and over time may even bind the PLO, and could affect a later consideration by the ICC, another international organization or other state of the status of Palestine.” *Id.* at 3 (emphasis in original).

68. See ICC Statute, *supra* note 6, art. 15(1).

69. See Francis Boyle, *The Creation of the State of Palestine* 1 EUR. J. INT’L L. 301–06 (1990) and James Crawford, *The Creation of the State of Palestine: Too much too soon?* 1 EUR. J. INT’L L., 307–13 (1990).

statehood for most of the 1990s when the negotiations took place.⁷⁰ In any event, the ICC Statute only entered into force on July 1, 2002. The question then would seem to be at what moment did a Palestinian state emerge between 2005, when a Palestinian state was supposed to be established according to the UN Roadmap, and 2011, when Abbas announced that Palestine would seek UN membership? A successful application to become a UN member after September will not resolve this question, since all UN membership tells us is that Palestine is *already* a state. If Palestine becomes a member of the UN, even if only as an observer state through a vote in the UN General Assembly, the Prosecutor will no longer be able to ignore the declaration lodged in the name of the Government of Palestine at his Office on January 21, 2009.⁷¹ That declaration stipulated that, “the Government of Palestine . . . recognizes the jurisdiction of the Court for the purpose of identifying, prosecuting and judging the authors and accomplices of acts committed on the territory of Palestine since July 1, 2002.”⁷²

V. Conclusion

Whether Palestine can pursue Israelis accused of war crimes before the ICC, or bring a case against Israel before the ICJ, or ask a third state to raise issues on its behalf before the PCA, all comes down to whether Palestine is a state. The Prosecutor of the ICC probably believes that his office is not the appropriate authority to decide this question, which would explain the silence of his Office regarding the declaration that was lodged over two years ago. In the event of a problem arising in connection with an assertion of statehood by the Palestinian leadership before the UN in September, which may arise with respect to UN membership or perhaps through an attempt by Palestine to accede to the ICC Statute, then an opportunity might arise for the UN organ or specialized agency in question to consider seeking an advisory opinion from the ICJ.

70. See Omar M Dajani, *Stalled Between Seasons: The International Legal Status of Palestine During the Interim Period*, 26 DENV. J. OF INT’L L. & POL’Y (2007). See also THE ARAB-ISRAELI ACCORDS: LEGAL PERSPECTIVES (Eugene Cotran and Chibli Mallat eds., 1996).

71. See ICC Statute, *supra* note 6, arts. 11(2) and 12(3),

72. See PALESTINIAN NATIONAL AUTHORITY, MINISTRY OF JUSTICE, *Declaration Recognizing the Jurisdiction of the International Criminal Court*, available at <http://www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279777/20090122PalestinianDeclaration2.pdf>.

Should the ICJ decide that Palestine has indeed become a state then one can be fairly certain that the ICC would not ignore an authoritative opinion from the principal judicial organ of the UN. Indeed, the challenge for the ICJ may not be with ascertaining whether or not Palestine is a state, but rather at what exact moment Palestine became a state, since this would affect the issue of ICC jurisdiction. Whilst there is no guarantee that Israel would respond positively to a UN vote or to a favorable advisory opinion that recognized the state of Palestine, its occupation would become untenable, as would its settlement policy.