



BRIEFING No. 27

SADAKA صدقة  
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## Palestinian state recognised by UN

On 29 November 2012, Palestine won an historic victory at the UN when the General Assembly voted by an overwhelming majority – 138 in favour to 9 against, with 41 abstentions – to recognise Palestine as a state, in the teeth of bitter opposition from Israel and the US.

The defeat for Israel and the US was even worse than it appears at first glance because only 3 significant states (Canada, Czech Republic and Panama) sided with them in rejecting the proposition. The other 4 votes against came from the Marshall Islands, Micronesia (Federated States of), Nauru, and Palau, all tiny south Pacific island states that are dependent on the US.

More significant still, Israel has lost more ground in Europe, which a few years ago Israel could rely on for support. Only one EU state (Czech Republic) backed Israel, 14 (Austria, Belgium, Cyprus, Denmark, Finland, France, Greece, Ireland, Italy, Luxembourg, Malta, Portugal, Spain, and Sweden) voted to recognise Palestine as a state, and the other 12 abstained.

(The UN press release GA/11317 [\[1\]](#) gives details of the proceedings and of the voting, which is reproduced below).

A Reuters report by Crispian Balmer summarised the outcome as follows:

“The margin of Israel's defeat in a UN vote that granted de-facto statehood to Palestine has disappointed Israeli political leaders, whose attempts on Friday to play down the result could not disguise its significance. ...

“But the fact only three major countries sided with Israel at the world forum on Thursday - the United States, Canada and the Czech Republic - underscored how isolated it has become on the international stage regarding peacemaking with the Palestinians.

“Even old friends like Germany refused to stand alongside us. There were external factors, but it is hard not to see this as a total failure for our diplomacy which will obviously have consequences’, said a senior official who declined to be named.” [\[2\]](#)

### Full membership applied for

The events at the UN on 29 November 2012 were the culmination of a process that began at the UN on 23 September 2011. On that date, President Mahmoud Abbas made a formal application for full UN membership for a Palestinian state on the 1967 borders, with Jerusalem as its capital, that is, in the West Bank, including East Jerusalem, and the Gaza Strip – the Palestinian territories which have been under Israeli military occupation since June 1967.

Had that application been successful, Palestine would have become the 194<sup>th</sup> UN member state, recognised at the UN like any other, despite the fact that it is wholly occupied by another UN member state. However, to be successful, the application required

- a positive recommendation by the Security Council to the General Assembly, and
- a two-thirds majority in the General Assembly (that is, two-thirds of the members present and voting, excluding abstentions).

The application was always going to fall at the first hurdle and never reach the General Assembly, because the US announced long in advance that it would veto a positive recommendation in the Security Council. In the event, no vote was taken in the Security Council and the US didn't have to cast its veto.

### **Non-member state fallback**

Palestinians always had a fallback position, which was to seek observer rights at the UN as a "non-member state", a status which has in the past been a stepping stone to full membership, for example, for West Germany (1952-1973), South Korea (1949-1991) and Switzerland (1946-2002). This step does not require the approval of the Security Council and therefore could not be blocked by the US. It merely requires a simple majority in the General Assembly.

This was achieved on 29 November 2012 when the General Assembly passed resolution A/RES/67/19 [\[3\]](#) by 138 votes to 9. Paragraph 1 and 2 of the resolution states that the General Assembly:

“1. Reaffirms the right of the Palestinian people to self-determination and to independence in their State of Palestine on the Palestinian territory occupied since 1967;

“2. Decides to accord to Palestine non-member observer State status in the United Nations ...”

The resolution notes that 132 UN member states have “accorded recognition to the State of Palestine”. A further 30 or so states, including Ireland, while not going as far as recognition, have established some form of diplomatic relations with it. It wasn't surprising, therefore, that 138 states voted for the only form of recognition at the UN that was available, namely, as a "non-member state". It was surprising, however, that so few states voted against.

Iran voted for the resolution despite the fact that it backs a two-state solution, specifically, “an independent, sovereign, democratic, contiguous and viable State of Palestine living side by side in peace and security with Israel on the basis of the pre-1967 borders”.

### **Support for full membership?**

In Paragraph 3, the resolution also expressed the hope “that the Security Council will consider favourably the application submitted on 23 September 2011 by the State of Palestine for admission to full membership in the United Nations”.

That is a message from the General Assembly to the Security Council to recommend full membership and indicates that the General Assembly would vote for full membership, if it were to receive such a recommendation.

Most likely, Ireland would have voted for full membership for Palestine had that opportunity presented itself. Speaking at the UN General Assembly on 26 September 2011, Foreign Minister, Eamon Gilmore, said:

“The day will come, not too far off, when the General Assembly will be asked to vote on a proposal to admit Palestine as a member of this Organisation or perhaps, as an interim step towards the achievement of that goal, to accord Palestine non-member observer state status. Provided that the resolution is drafted in terms that are reasonable and balanced, I expect Ireland to give its full support.” [\[4\]](#)

On 29 November, Ireland voted with 137 others for the “interim step”.

### What does upgrade mean?

What will observer rights at the UN as a “non-member state” mean in practice for Palestinians?

At the UN itself, there will be very little change. As far back as 1974, the UN General Assembly recognised the Palestine Liberation Organisation (PLO) as “the representative of the Palestinian people” and granted it observer rights at the UN. Prior to the present upgrade, Palestine had a permanent mission at the UN with observer rights, but as a liberation movement, not as a state.

Becoming a “non-member state” recognised by the UN means that Palestinians will continue to have observer status but now as a state, with a territory – the West Bank, including East Jerusalem, and the Gaza Strip – recognised by the UN.

This is a firm statement from the nations of the world that there should be a Palestinian state in all of the territories occupied by Israel since 1967 – and that Israel should withdraw to allow one to be established.

### Palestine may join UN-related bodies

Being a “non-member state” will allow Palestine to apply for full membership of other UN-related bodies (about 20 in all), for example, the World Health Organization (WHO), the Food and Agriculture Organization (FAO) or the International Atomic Energy Agency (IAEA). The US cannot veto any of these applications, so it is odds on that any application would succeed.

Already, in November 2011, Palestine was admitted to full membership of UNESCO, even though at that time it wasn’t recognised as a state by the UN (see Sadaka Briefing *Palestine wins UNESCO membership* [\[5\]](#)).

This event would have been of little significance, if it wasn’t for the fact that there is legislation on the US statute book, enacted at the behest of Israeli lobby in the US, which compels the US to halt its funding of UN-related bodies if Palestine is admitted to full membership. The legislation allows the US President no discretion in this matter.

As a result, the US has been forced to withdraw its funding to UNESCO and it may lose its voting rights in UNESCO in a year’s time (see Reuters report *UNESCO chief says U.S. funding cuts “crippling” organization* dated 11 October 2012 [\[6\]](#)).

If Palestine is admitted to other UN-related bodies, then, without a change in this legislation, the US will have to withdraw funding from these bodies as well, and perhaps lose voting rights as a result.

### The International Criminal Court (ICC)

Now that Palestine has been recognised as a state by the UN, is it possible that individuals could be prosecuted by the ICC for crimes carried out in Palestinian territory, that is, in the West Bank, including East Jerusalem, and Gaza?

The ICC can prosecute individuals for genocide, war crimes or crimes against humanity, as defined in the Rome Statute of the Court [\[7\]](#). The ICC acquires jurisdiction in respect of these crimes by states granting it jurisdiction under Article 12 of the Statute. A state can grant jurisdiction to the Court

- (a) by becoming a Party to the Statute (Article 12(1)) or
- (b) by making an ad hoc declaration accepting the Court's jurisdiction (Article 12(3)).

The ICC can try individuals for genocide, war crimes or crimes against humanity, committed in the territories of states that have granted the Court jurisdiction.

In January 2009, prompted by Israeli actions against Gaza during Operation Cast Lead, the Palestinian Authority made an ad hoc declaration to the Court under Article 12(3) in the following terms:

“In conformity with Article 12, paragraph 3 of the Statute of the International Criminal Court, the Government of Palestine hereby recognizes the jurisdiction of the Court for the purposes of identifying, prosecuting and judging the authors and accomplices of acts committed in the territory of Palestine since 1 July 2002” [\[8\]](#).

It took the ICC Prosecutor over three years (until April 2012) to decide that the Court couldn't accept the jurisdiction offered. This decision hung on whether or not Palestine was a “state” within the meaning of Article 12(3), which says that a “State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question”.

Strangely, the Prosecutor concluded that it wasn't up to him/her to decide whether or not Palestine was a “state”, within the meaning of Article 12(3), saying that “competence for determining the term “state” within the meaning of article 12 rests, in the first instance, with the United Nations Secretary General who, in case of doubt, will defer to the guidance of General Assembly” [\[9\]](#).

After the General Assembly passed resolution A/RES/67/19 accepting Palestine as a state, the Prosecutor's office announced that it “will consider the legal implications of this resolution” [\[10\]](#). It is possible therefore that the Court will amend its original response and accept jurisdiction in the occupied Palestinian territories without further ado.

Alternatively, Palestine can become a Party to the Statute, which under Article 125 merely requires an instrument of accession to be deposited with the Secretary-General of the United Nations, who will be the arbiter of whether Palestine is a “state” within the meaning of Article 12(1). Given that Palestine has been accepted as a state by the UN, it is almost certain that the answer would be YES.

### Can individuals be prosecuted?

Assuming the ICC acquires jurisdiction over the occupied Palestinian territories, can it prosecute individuals for offences carried out there? Normally, the primary duty for prosecuting these offences lies with the state in which they were committed – and the ICC only acquires jurisdiction to prosecute them if the state fails to do so. In this instance, however, it is impossible for the state to do this, since it is wholly under Israeli military occupation.

Assuming this isn't a problem, for what activities might individuals be prosecuted? One activity springs to mind immediately, namely, settlement building: under Article 8.2(b)(viii) of the Rome Statute

“the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies” [\[7\]](#)

is a war crime.

Since there is no doubt that some 500,000 Israeli civilians have been transferred into territory occupied by Israel, and the process is still going on, there is a prima facie case that Israelis responsible for the settlement building programme, including the present Prime Minister, are guilty of war crimes. It may be that Americans and others who fund settlement building are guilty of aiding and abetting war crimes.

In order to try an indicted individual, the ICC has to get custody of him/her, which would be difficult in this instance, since neither Israel nor the US is a Party to the Rome Statute and is therefore under no obligation to hand over an indicted individual to the Court. However, 121 states (including all 27 EU members) are, so indicted individuals would need to be careful about their travel arrangements.

### UK opposes prosecution for war crimes

If the ICC acquires jurisdiction over Palestinian territories, there is at least a possibility that those responsible for settlement building are brought to trial for what the whole world, apart from Israel and the US, regards as illegal activity.

One would expect that states, like the UK, which accept the jurisdiction of the ICC themselves would be enthusiastic about extending its jurisdiction to the occupied Palestinian territories and seeking to bring to justice individuals responsible for activities that constitute a crime under the Rome Statute.

Yet, prior to the General Assembly vote, the UK Foreign Minister, William Hague, offered to support the resolution, if the Palestinians promised, amongst other things, not to seek ICC jurisdiction over their territory. Here's what he told the House of Commons on 28 November 2012:

“Our country is a strong supporter, across all parties, of international justice and the International Criminal Court. We would ultimately like to see a Palestinian state represented throughout all the organs of the United Nations. However, we judge that if the Palestinians were to build on this resolution by pursuing ICC jurisdiction over the occupied territories at this stage, it could make a return to negotiations impossible.” [\[11\]](#)

It could also bring individuals responsible for war crimes to justice. Happily, the Palestinian leadership did not assent to this request, and the UK abstained in the vote.

Two days later, when in retaliation for the UN action, Israel announced plans for yet more building in settlements, William Hague reacted as follows:

“I am extremely concerned by reports that the Israeli Cabinet plans to approve the building of 3000 new housing units in illegal settlements in the West Bank and East Jerusalem. Israeli settlements are illegal under international law and undermine trust between the parties.” [\[12\]](#)

Dare we suggest that, if settlements are illegal under international law, then, if at all possible, those responsible should be tried in an international court and, if found guilty, punished appropriately? Dare we suggest that, to that end, Palestine should be encouraged to accept the jurisdiction of the ICC?

### Conclusions

It goes without saying that UN recognition of Palestine as a state will not change conditions on the ground for Palestinians. It may even make them worse as Israel responds in its usual vindictive manner against Palestinians, and the international community stands idly by and allows it to happen.

The US and other states who opposed the Palestinian UN initiative have kept repeating the mantra that the only way for Palestinians to get a state is not via the UN but by entering into direct negotiations with Israel.

But Israel is not going to withdraw of its own volition from the territories it has occupied militarily since 1967, to allow a Palestinian state can come into being. And it is impossible for Palestinians to make Israel withdraw by direct negotiations or any other means – they are powerless to prevent Israel expanding settlements indefinitely, let alone to bring an end to Israeli military rule. Without outside pressure being applied to Israel to make it end its military occupation, a Palestinian state is unattainable.

Direct negotiations of this kind are equivalent to allowing a thief to negotiate with his victim about the amount of stolen goods, if any, he is going to give back, while he keeps his boot on his victim's throat. Without outside pressure being brought to bear on the Israeli thief, the Palestinian victim is not going to get any of its stolen goods back.

Of course, if the Security Council were doing its job, Israel would be convicted of theft and sanctions imposed on it, until such times as it returned all the stolen goods and paid reparations for all the damage it did to them while they were in its possession. After all, that's what was done to Iraq when it invaded and occupied Kuwait in 1990.

**David Morrison**  
**December 2012**



## References:

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## Vote on Status of Palestine at United Nations

The draft resolution on the Status of Palestine at the United Nations was adopted by a recorded vote of 138 in favour to 9 against, with 41 abstentions, as follows:

**In favour:** Afghanistan, Algeria, Angola, Antigua and Barbuda, Argentina, Armenia, Austria, Azerbaijan, Bahrain, Bangladesh, Belarus, Belgium, Belize, Benin, Bhutan, Bolivia, Botswana, Brazil, Brunei Darussalam, Burkina Faso, Burundi, Cambodia, Cape Verde, Central African Republic, Chad, Chile, China, Comoros, Congo, Costa Rica, Côte d'Ivoire, Cuba, Cyprus, Democratic People's Republic of Korea, Denmark, Djibouti, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Eritrea, Ethiopia, Finland, France, Gabon, Gambia, Georgia, Ghana, Greece, Grenada, Guinea, Guinea-Bissau, Guyana, Honduras, Iceland, India, Indonesia, Iran, Iraq, Ireland, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Kuwait, Kyrgyzstan, Lao People's Democratic Republic, Lebanon, Lesotho, Libya, Liechtenstein, Luxembourg, Malaysia, Maldives, Mali, Malta, Mauritania, Mauritius, Mexico, Morocco, Mozambique, Myanmar, Namibia, Nepal, New Zealand, Nicaragua, Niger, Nigeria, Norway, Oman, Pakistan, Peru, Philippines, Portugal, Qatar, Russian Federation, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Sao Tome and Principe, Saudi Arabia, Senegal, Serbia, Seychelles, Sierra Leone, Solomon Islands, Somalia, South Africa, South Sudan, Spain, Sri Lanka, Sudan, Suriname, Swaziland, Sweden, Switzerland, Syria, Tajikistan, Thailand, Timor-Leste, Trinidad and Tobago, Tunisia, Turkey, Turkmenistan, Tuvalu, Uganda, United Arab Emirates, United Republic of Tanzania, Uruguay, Uzbekistan, Venezuela, Viet Nam, Yemen, Zambia, Zimbabwe.

**Against:** Canada, Czech Republic, Israel, Marshall Islands, Micronesia (Federated States of), Nauru, Palau, Panama, United States.

**Abstain:** Albania, Andorra, Australia, Bahamas, Barbados, Bosnia and Herzegovina, Bulgaria, Cameroon, Colombia, Croatia, Democratic Republic of the Congo, Estonia, Fiji, Germany, Guatemala, Haiti, Hungary, Latvia, Lithuania, Malawi, Monaco, Mongolia, Montenegro, Netherlands, Papua New Guinea, Paraguay, Poland, Republic of Korea, Republic of Moldova, Romania, Rwanda, Samoa, San Marino, Singapore, Slovakia, Slovenia, The former Yugoslav Republic of Macedonia, Togo, Tonga, United Kingdom, Vanuatu.

**Absent:** Equatorial Guinea, Kiribati, Liberia, Madagascar, Ukraine.

*Sadaka supports a peaceful settlement in Palestine/Israel based on the principles of democracy and justice, be that in two states or in one state. We maintain an independent position on internal politics within Palestine, favouring neither Fatah, Hamas nor any other Palestinian political organisation.*