

The Mouse that Roared?

Palestine v. United States at the ICJ

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The “State of Palestine” is suing the United States in the International Court of Justice at The Hague (ICJ), claiming that moving the U.S. Embassy to Jerusalem is a violation of the international law relating to diplomatic relations.¹ The gist of the Palestinian claim is that embassies can only be located in the sovereign territory of a state, and Jerusalem is not in the sovereign territory of Israel. Palestine contends that the ICJ indeed has jurisdiction since both the U.S. and Palestine are parties to a multilateral treaty granting the ICJ jurisdiction in cases involving diplomatic missions. A number of issues emanating from these contentions require decisions by the ICJ. These are discussed below.

Does Palestine Have Standing Before the Court – Is it a State?

According to the ICJ Statute, “Only States may be parties in cases before the Court.”² Even before considering the question of jurisdiction, the Court will therefore have to decide whether Palestine is, in fact, a state and thus entitled to appear before the Court.³ Presumably the Palestinian claim that Palestine is a state will be based on the claim that over 130 states have recognized Palestine; that it is a party to many international treaties; and that it has been recognized as an “Observer State” by the UN General Assembly (UNGA).⁴ They will no doubt quote the Prosecutor of the International Criminal Court (ICC), “The Office [of the ICC Prosecutor] considers that, since Palestine was granted observer State status in the UN by the UNGA, it must be considered a “State” for the purposes of accession to the Rome Statute.”⁵

However, the U.S. is already on record as stating that it does not see Palestine as a state.⁶ Shabtai Rosenne, a professor of international law and an Israeli diplomat, comments: “The Court may be called upon to decide the question [whether the applicant is a State] even without a challenge by another State.”⁷ The Court will also have to take into consideration the accepted formula for defining a state as having a permanent population, defined territory, effective government and the ability to enter into relations with other states.⁸ The Court will have to examine whether

Palestine fulfils these criteria and whether the fact is relevant that in the Oslo agreements the Palestine Liberation Organization (PLO) undertook not to declare statehood.⁹ As to the question of the recognition of the State of Palestine by the UNGA, it is relevant that nine states voted against the Resolution and 41 states abstained. It is also relevant that the UNGA has no authority to

1. Application Instituting Proceedings in the International Court of Justice, *State of Palestine v. United States of America* (Sept. 28, 2018), available at <https://www.icj-cij.org/files/case-related/176/176-20180928-APP-01-00-EN.pdf>.
2. Statute of the International Court of Justice, art. 34(1), June 26, 1945, 33 U.N.T.S. 993.
3. *Legality of Use of Force, Serbia and Montenegro v. Belgium*, Judgment, Preliminary Objections, 2004 ICJ Rep. 279, paras. 34, 36 (Dec. 15, 2004).
4. UN General Assembly Res. A/RES/67/19, Status of Palestine in the United Nations (Dec. 4, 2012).
5. The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine, THE INTERNATIONAL CRIMINAL COURT, Jan. 16, 2015, available at <https://www.icc-cpi.int/Pages/item.aspx?name=pr1083>.
6. John Bolton on Palestine: “Of Course It’s Not a State,” C-SPAN, Oct. 4, 2018, available at <https://www.c-span.org/video/?c4753603/john-bolton-palestine-of-state>.
7. Malcolm Shaw, *ROSENNE’S LAW AND PRACTICE OF THE INTERNATIONAL COURT 1920-2005*, ch. 2, 296 (5th ed., 2016).
8. Montevideo Convention on the Rights and Duties of States, Dec. 26, 1933, 165 LNTS.
9. Declaration of Principles on Interim Self-Government Arrangements, Israel and Palestine Liberation Organization, 32 I.L.M. 1525, Sept. 13, 1993; Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, ISRAELI MINISTRY OF FOREIGN AFFAIRS, Sept. 28, 1995, available at <http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/the%20israeli-palestinian%20interim%20agreement.aspx>.

recognize states as such; furthermore, it explicitly only granted to Palestine “the status of a non-member State”¹⁰ and did not recognize it as an observer state. The language used was in this context different from that used when dealing with the Vatican.¹¹ Furthermore, after the vote, a number of states that voted in favor of the Resolution explained that the Resolution did not mean recognizing Palestine as a state. The French delegate, for example declared “The international recognition that the Assembly has today given the proposed Palestinian State can become fact only through an agreement based on negotiations between the two parties.”¹² The Swiss delegate specified “This decision does not involve a bilateral recognition of a Palestinian State, which will depend on future peace negotiations.”¹³

Jurisdiction

On the issue of the Court's jurisdiction, the Palestinian argument is that the “State of Palestine” acceded to the 1961 Vienna Convention on Diplomatic Relations¹⁴ (Vienna Convention) and to the Optional Protocol Concerning Compulsory Settlement of Disputes, 1961¹⁵ (Optional Protocol). Parties to that Optional Protocol agreed that disputes “arising out of the interpretation or application of the [Vienna] Convention lie within the compulsory jurisdiction of the ICJ.” The U.S. is party to both the Vienna Convention and to the Optional Protocol.¹⁶

Although only state members of the UN are parties to the ICJ Statute, nevertheless the jurisdiction of the Court is open to any state that “shall previously have deposited with the Registrar of the Court a declaration by which it accepts the jurisdiction of the Court.”¹⁷ Palestine deposited such a declaration regarding the Optional Protocol.¹⁸

An anomaly of the UN system is that a state that is not a member of the UN and wishes to become a party to the Statute of the Court needs to obtain authorization by the UN General Assembly and the UN Security Council.¹⁹ However, if the state wishes to just accept the jurisdiction of the Court in general, or for a particular case, it can do so by a unilateral declaration without any external authorization.²⁰ The Palestinian National Authority chose the latter procedure, namely a unilateral declaration.²¹

Presumably the U.S. could argue that since it does not recognize Palestine as a state, and it does not recognize Palestine as a party to the Optional Protocol, then there are no treaty relations between the U.S. and Palestine that could, in turn, bestow jurisdiction on the ICJ.

The Court furthermore will have to consider two weighty constraints on its having jurisdiction. First, the Court will have to decide whether the issue raised is really

the “interpretation or application of the [Vienna] Convention,”²² or whether the issue is, in fact, the question of sovereignty over Jerusalem. The issue of the status of Jerusalem is clearly not covered by the Optional Protocol, and in no way has the U.S. agreed to adjudicate it at the Court. The only dispute between the U.S. and Palestine is the status of Jerusalem, and the Court has no jurisdiction to decide this issue.

10. UN General Assembly Res. A/RES/67/19, *supra* note 4, “Decides to accord to Palestine non-member observer State status” (emphasis added).
11. See UN General Assembly Res. A/58/314, Participation of the Holy See in the work of the United Nations (July 16, 2004): “...Capacity as an Observer State.”
12. UN General Assembly 67th sess., A/67/PV.44 (Nov. 29, 2012), available at <https://unispal.un.org/DPA/DPR/unispal.nsf/0/C05528251EA6B4BD85257AE5005271B0>.
13. *Ibid.*
14. Vienna Convention on Diplomatic Relations, 500 U.N.T.S. 95 (April 18, 1961).
15. Optional Protocol to the Vienna Convention Concerning Compulsory Settlement of Disputes, 500 U.N.T.S. 241 (April 18, 1961).
16. Subsequent to the submission of the Palestinian claim, the U.S. withdrew from the Optional Protocol.
17. UN Security Council Res. S/RES/9, para 1, The International Court of Justice (Oct. 15, 1946), available at <https://www.icj-cij.org/en/other-texts/resolution-9>; Art. 35(2), Statute of the International Court of Justice, *supra* note 2.
18. Annex 5 Application Instituting Proceedings in the International Court of Justice State of Palestine v. United States of America (Sept. 28, 2018), available at <https://www.icj-cij.org/files/case-related/176/176-20180928-APP-01-00-EN.pdf>.
19. UN Charter, United Nations, available at <https://www.un.org/en/sections/un-charter/un-charter-full-text/>.
20. The International Court of Justice Rules of Court, art. 41, April 14, 1978, available at <https://www.icj-cij.org/en/rules>; UN Security Council Resolution S/RES/9, The International Court of Justice (Oct. 15, 1949); Statute of the International Court of Justice, art. 35(2), *supra* note 2.
21. Dapo Akande, ICC Prosecutor Decides that He Can't Decide on the Statehood of Palestine. Is He Right? EJIL: TALK, April 5, 2012, available at <https://www.ejiltalk.org/icc-prosecutor-decides-that-he-cant-decide-on-the-statehood-of-palestine-is-he-right/>.
22. Optional Protocol to the Vienna Convention Concerning Compulsory Settlement of Disputes, art. I, *supra* note 15.

The second constraint on jurisdiction refers to what is known as “Interests of a Third Party.” Rosenne writes that the Court will not have jurisdiction if it is required “to pass on the legal position of a third state which is not a party to the proceedings.”²³ In the *Monetary Gold Case*, the Court ruled that where “the vital issue to be settled concerns the international responsibility of a third State, the Court cannot, without the consent of that third State, give a decision binding upon any State.”²⁴ The Court made a similar ruling in the *East Timor* case. There, the Court decided that it could not exercise jurisdiction because “it would have to rule, as prerequisite, on the lawfulness of Indonesia’s conduct in the absence of that State’s consent.”²⁵ The criterion is whether the legal interests of the third party form the “very subject-matter”²⁶ of the decision. There can be little doubt that the status of Jerusalem is the very subject matter of the issue.

In the *Wall* case,²⁷ and in the recent *Chagos* case,²⁸ the Court rejected a similar claim but made the point that the lack of consent to the Court’s contentious jurisdiction by interested states has no bearing on the Court’s jurisdiction to give an advisory opinion. However, the present proceedings are contentious, so it would appear that the *Monetary Gold* and the *East Timor* cases should serve as precedents for denying jurisdiction.

One commentator is of the opinion that the “*Monetary Gold*” precedent does not apply, since “Indeed, Palestine framed its claims in such a way as the Court could answer them without determining the extent of Israel’s territory.”²⁹ Israel has not and clearly will not agree that the ICJ adjudicate the status of Jerusalem.

The Substance of the Claim

The substance of the Palestinian claim is based on the argument that embassies should be located in the territory of the “receiving State”³⁰ and Jerusalem is, according to this argument, not within the territory of Israel, the “receiving State.”

On the first issue, the Court will have to take into consideration the fact that the article of the Vienna Convention to which the Palestinian claim refers does not stipulate that an embassy must be in the territory of the receiving state. The Vienna Convention, in fact, explicitly allows a state to have an embassy in one state accredited to a number of other states.³¹

The Palestinian position, that Jerusalem is not within the territory of Israel, is based on the 1947 UNGA Resolution 181³² (the “Partition Plan”), that called for the whole of Jerusalem to be a *corpus separatum* not part of either the proposed Jewish or Arab states. The Palestinian

claim adds that the reference to Jerusalem in UNGA Resolution 181 was reiterated by the UNGA in 1949.³³

This argument would not seem to be tenable. The Partition Plan was a non-binding recommendation by the UNGA made over 70 years ago and rejected at the time by all the Arab member states of the UN and by the representatives of the Palestinians.³⁴ Although the Jewish population of Palestine expressed its willingness to accept the plan at the time, if the Arabs were to accept it, the Israel offer was rejected and the plan was never implemented.³⁵ In other words, the 1947 Partition plan

23. Shaw, *supra* note 7, at 560.

24. *Monetary Gold Removed from Rome in 1943* (Italy v. France, United Kingdom and United States), Judgment, ICJ. Rep. pp. 19, 32, 33 (June 15, 1954).

25. *East Timor* (Portugal v. Australia), Judgment, ICJ. Rep. p. 90, paras. 32-35 (June 30, 1995).

26. *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), ICJ, para. 88 (Nov. 26, 1984).

27. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] ICJ Rep. 136, para. 47 (July 9, 2004).

28. *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, [2019] ICJ Rep., para. 86 (July 9, 2004), available at <https://www.icj-cij.org/files/case-related/169/169-20190225-01-00-EN.pdf>.

29. Alina Miron, *Palestine’s Application to the ICJ, neither Groundless nor Hopeless. A Reply to Marko Milanovic*, EJIL: TALK, 2018, available at <https://www.ejiltalk.org/palestines-application-the-icj-neither-groundless-nor-hopeless-a-reply-to-marko-milanovic/>.

30. 1961 Vienna Convention on Diplomatic Relations, art. 21 (2), *supra* note 14.

31. 1961 Vienna Convention on Diplomatic Relations, art. 5 (1), *supra* note 14.

32. UN General Assembly Res. A/RES/181 (II) *Future Government of Palestine* (Nov. 29, 1947).

33. UN General Assembly Res. A/RES/303 (IV), *Palestine: Question of an international regime for the Jerusalem area and the protection of the Holy Places* (Dec. 9, 1949).

34. UN GAOR, 2nd Sess., 1947, at 12-19 (Ad Hoc Committee on the Palestine Question).

35. Victor Kattan writes: “It could be argued that Israel consented to the jurisdiction of the ICJ when it accepted the 1947 UN Partition plan.” See Victor Kattan, *It’s time to take Palestine v. USA Seriously*, OPINIO JURIS, Oct. 16, 2018, available at <http://opiniojuris.org/2018/10/16/its-time-to-take-palestine-v-united-states-of-america-seriously/>.

remained a recommendation and was never implemented. Non-binding resolutions do not become binding by being repeated. This view is reflected in Prosper Weil's statement that "Neither is there any warrant for considering that by dint of repetition, non-normative resolutions can be transmuted into positive law through a sort of incantatory effect."³⁶

Nowadays the official Palestinian position is that East Jerusalem should be the capital of Palestine,³⁷ hence even today they do not accept the Partition Plan with its proposed *corpus separatum* status for Jerusalem. The Arab League 2002 Peace Initiative,³⁸ which reflects the unanimous position of all Arab League states, including the "State of Palestine," refers to a number of UN resolutions but makes no reference to the Partition Plan.

Is the Dispute Political Rather than Legal?

The function of the ICJ is to decide legal disputes between states and not political disputes. The Court has recognized and has ruled, however, that "Legal disputes between sovereign States by their very nature are likely to occur in political contexts."³⁹ The Court always has, however, discretion to refrain from deciding a case even if it finds that it has jurisdiction. Rosenne writes that "circumstances can require it to refrain from deciding a case."⁴⁰

The Location of the U.S. Embassy – East and West Jerusalem

A little observed feature of the U.S. decision to move the embassy to Jerusalem was that the embassy is today located in West Jerusalem and not in East Jerusalem. Furthermore, President Trump's statement carefully noted that:

We are not taking a position on any final status issues, including the specific boundaries of the Israeli sovereignty in Jerusalem, or the resolution of contested borders. Those questions are up to the parties involved.

The United States would support a two-state solution if agreed to by both sides. In the meantime, I call on all parties to maintain the status quo at Jerusalem's holy sites, including the Temple Mount, also known as Haram al-Sharif.⁴¹

Although Israeli law makes no distinction between East

and West Jerusalem and regards the city as undivided, the international community (including Arab states) disputes Israel's status in East Jerusalem but not in West Jerusalem. International law regards West Jerusalem as undisputed Israeli territory. It is undisputed because it satisfies the test of the ultimate criteria to establish to whom a disputed territory belongs. The test is namely whether there exists "the continuous and peaceful display of territorial sovereignty"⁴² and acquiescence by other potential claimants. With regard to West Jerusalem, except for some fringe elements of the Palestinian community,⁴³ the entire world community, including Arab states and the Palestinians, accept or acquiesce to Israeli sovereignty over West Jerusalem. This is demonstrated by the fact that all heads of state, including the presidents of the U.S., Russia, and China have made state visits to (West) Jerusalem. All ambassadors, including the ambassadors of Egypt and Jordan, present their credentials to the President of Israel at his official residence in (West) Jerusalem. Treaties to which Israel is party are signed in (West) Jerusalem. Since all these actions imply recognition of Israeli sovereignty in (West) Jerusalem, presumably they would all have to be considered as violating international law, if the Palestinian arguments were to be accepted by the Court. The 2002 Arab League Peace Initiative, which represents the consensus of all the Arab

36. Prosper Weil, Towards Relative Normativity in International Law, 77(3), AM. J. INT'L L., pp. 413, 417 (1983).

37. Beirut Declaration on Saudi Peace Initiative, ISRAEL MINISTRY OF FOREIGN AFFAIRS, March 28, 2002, available at <http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/beirut%20declaration%20on%20saudi%20peace%20initiative%20-%202028-.aspx>.

38. *Ibid.*

39. Case Concerning United States Diplomat and Consular Staff in Tehran (United States of America v. Iran) Judgment, ICJ Reports, para.37 (May 24, 1980).

40. Shaw, *supra* note 7, at 560.

41. White House Press Release, Statement by President Trump on Jerusalem, Dec. 6, 2017, available at <https://www.whitehouse.gov/briefings-statements/statement-president-trump-jerusalem>.

42. Island of Palmas Case, United States v. Netherlands, PCA, 2 RIAA 826 p. 845 (April 4, 1928).

43. Hanan Ashrawi's statement in a recent CNN interview that "the legal status of West Jerusalem remains *corpus separatum*" (reference omitted) would seem to be an aberration.

states and the PLO, demands from Israel “the acceptance of the establishment of a Sovereign Independent Palestinian State on the Palestinian territories occupied since June 4, 1967 in the West Bank and Gaza strip, with East Jerusalem as its capital,”⁴⁴ thus clearly not making any claim to West Jerusalem. The 1994 Israel-Jordan Peace Treaty includes the following phrase, inserted at Jordanian request:

Article 3 (2) The boundary.... is the permanent secure and recognised international boundary between Israel and Jordan, without prejudice to the status of any territories that came under Israel military government control in 1967.⁴⁵

The advisory opinion of the International Court of Justice in the *Wall* case expressed that “all these territories (including East Jerusalem) remain occupied territories,”⁴⁶ thus implying recognition of Israel sovereignty over West Jerusalem.

The Palestinian claim brought to the ICJ refers to a number of UN General Assembly and Security Council Resolutions dealing with Israel’s status in Jerusalem and denying the validity of Israeli unilateral steps.⁴⁷ A commentator who supports the Palestinian position, writes that “As such, it creates an objective territorial situation, opposable *erga omnes*.”⁴⁸ However all the Resolutions quoted are post 1967 and refer to Israeli actions taken as regards East Jerusalem. Since 1949, there has not been a single UN Security Council or General Assembly Resolution denying Israel sovereignty in West Jerusalem. Consequently, it would be difficult to sustain a position that moving an embassy to West Jerusalem is a violation of international law.

Conclusion – What if the Palestinians Lose the Case?

The former legal advisor to the U.S. Department of State writes that “the United States will have very strong arguments to defend in the case filed by Palestine and is very likely to win.”⁴⁹ Another legal commentator writes:

So, this case – whatever its merits – will just not go anywhere. The only question is how quickly the Court shoots it down, and what exactly it says in doing so....The case is, in other words, an exercise in constructing and furthering a particular narrative. And seen in that light the case will probably achieve its purpose (for whatever that’s exactly worth) even if it gets thrown out by the Court (which it will be).⁵⁰

One commentator adds, however, that even if the Court does not accept the substance of the Palestinian claim, “an authoritative opinion from the ICJ on Palestine’s statehood” could be helpful to the Palestinian cause on other issues. “As the principal judicial organ of the United Nations, the ICJ is a good place to challenge the policy of a global hegemon.”⁵¹

If, however, the Court senses that the real motive behind submitting the claim to the Court was simply to obtain recognition of Palestine as a state, the Court may well see this as an abuse of the legal process. The Court might rule that requesting an advisory opinion would be the correct way to get an opinion on this legal issue and not artificially enclosing it in what may well be considered a spurious contentious claim. .

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44. Beirut Declaration on Saudi Peace Initiative, *supra* note 37 (emphasis added).
45. Israel-Jordan Peace Treaty, art. 3 (2), Oct. 26, 1994, available at <https://mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/israel-jordan%20peace%20treaty.aspx> (emphasis added).
46. International Court of Justice, Advisory Opinion, [2004] ICJ Rep. 136, *supra* note 27, para. 85 (emphasis added).
47. UN General Assembly Resolutions A/RES/2253 (ES-V), Measures Taken by Israel to Change the Status of the City of Jerusalem (July 4, 1967); A/RES/2628 (XXV), The Situation in the Middle East (Nov. 4, 1970); A/RES/2799 (XXVI) The Situation in the Middle East (Dec. 13, 1971); A/RES/2949 (XXVII), The Situation in the Middle East (Dec. 8, 1972); and UN Security Council Resolutions S/RES/267 (July 3, 1969); S/RES/298 (Sept. 25, 1971); S/RES/476 (June 30, 1980); S/RES/2334 (Dec. 23, 2016).
48. Alina Miron, *supra* note 29.
49. John Bellinger, Thoughts on the ICJ’s Decision in Iran v United States and the Trump Administration’s Treaty Withdrawals, *LAWFARE*, Oct. 5, 2018, available at <https://www.lawfareblog.com/thoughts-icjs-decision-iran-v-united-states-and-trump-administrations-treaty-withdrawals>.
50. Palestine sues the United States in the ICJ re Jerusalem Embassy, *EJIL TALK*, Sept. 30, 2018, available at <https://www.ejiltalk.org/palestine-sues-the-united-states-in-the-icj-re-jerusalem-embassy>.
51. Victor Kattan, Opinion / Palestine Declares (Legal) War on the United States of America, *HAARETZ*, Oct. 8, 2018, available at <https://www.haaretz.com/middle-east-news/.premium-palestine-declares-legal-war-on-the-united-states-of-america-1.6527711>.