

# **The *de jure* State of Palestine under Belligerent Occupation: Application for Admission to the United Nations**

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This succinct work paper examines admission of new member States to the United Nations between international law and international politics. This paper further explores the privileges of United Nations membership and the consequences of non-UN membership. The major question to be raised is whether and to what extent and under which conditions can the non-admission of the *de jure* State of Palestine to the UN affect its *de jure* statehood and/or status under international law.

## **I. Admission of New Member States between International Law and International Politics**

The conditions for admission of new members to the United Nations (UN) can be traced in Article 4 of the UN Charter. The first paragraph of Article 4 stipulates that '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.'<sup>1</sup> Hence, any State that is peace-loving, accepts the UN Charter obligations, is able and willing to carry out the Charter obligations is qualified for membership to the UN according to the UN Charter. At any event, the assessment of whether an applicant fulfils the criteria mentioned in Article 4 of the UN Charter is subjective and not objective to a greater extent and became a political mean rather than legal. Rule 134 in the General Assembly Rules of Procedure provides that 'Any State which desires to become a Member of the United Nations shall submit an application to the Secretary-General. Such application shall contain a declaration, made in a formal instrument, that the State in question accepts the obligations contained in the Charter.'<sup>2</sup> The second paragraph of article 4 of the UN Charter provides that '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.'<sup>3</sup>

If and when the Security Council recommends an applicant State for membership, the General Assembly is the organ that effects the recommendation by a two-thirds majority of the members. If and when the Security Council recommends an applicant State for membership but the General Assembly fails to decide by a two-thirds majority upon the admission of the recommended applicant State, then the State could not be admitted to the UN. Rule 136 in the General Assembly Rules of Procedure provides that 'If the Security Council recommends the applicant State for membership, the General Assembly shall consider whether the applicant is a peace-loving State and is able and willing to carry out the obligations contained in the Charter and shall decide, by a two-thirds majority of the members present and voting, upon its application for membership.'<sup>4</sup> Hence, admission of new members to the UN is a shared competence between the Security Council and the General Assembly.

It is the General Assembly that effects the decision of membership by a two-thirds majority based upon the recommendation of the Security Council. If and when the Security Council fails to recommend an applicant State for membership, then the General Assembly does not have the power to admit this applicant State. The International Court of Justice (ICJ) provided in the *Competence of the General Assembly for the Admission of a State to the United Nations* advisory opinion that '... the admission of a State to membership in the United Nations, pursuant to paragraph 2 of Article 4 of the Charter, cannot be effected by a decision of the General Assembly when the Security Council has made no recommendation for admission...'<sup>5</sup> Rule 137 in the General Assembly Rules of Procedure provides that

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<sup>1</sup> Charter of the United Nations, June 26, 1945

<sup>2</sup> See General Assembly Rules of Procedure governing the admission of new Members

<sup>3</sup> Charter of the United Nations, June 26, 1945

<sup>4</sup> See General Assembly Rules of Procedure governing the admission of new Members

<sup>5</sup> Competence of Assembly regarding admission to the United Nations, Advisory Opinion : I.C. J . Reports 1950, p. 4.

If the Security Council does not recommend the applicant State for membership or postpones the consideration of the application, the General Assembly may, after full consideration of the special report of the Security Council, send the application back to the Council, together with a full record of the discussion in the Assembly, for further consideration and recommendation or report.<sup>6</sup>

The failure of recommending the admission of an applicant State may be as a result of an opposition of at least one permanent member State in the Security Council i.e., a negative vote of at least one permanent member State and/or the non-approval of the requisite majority in the Security Council i.e., the 9 required votes in favour. Articles 23 and 27 of the UN Charter were amended in 1963 and entered into force in 1965.<sup>7</sup> Amended article 23 increased the members of the Security Council from 11 to 15.<sup>8</sup> In reference to amended Article 27, the decisions of the Security Council on procedural matters 'shall be made by an affirmative vote of nine members (formerly seven), and on all other matters by an affirmative vote of nine members (formerly seven), including the concurring votes of the five permanent members.'<sup>9</sup>

Throughout the history of the UN, many applicant States have been unsuccessful in their first applications for admission to UN membership. States have been denied and/or delayed membership for many years from the right to UN membership either because of the non-support of the requisite majority States in the Security Council and/or a negative vote of at least one permanent Member State in the Security Council upon a draft resolution to recommend an applicant. For example, Portugal applied for UN membership in 1946 and on the 18<sup>th</sup> of August 1947 nine members of the Security Council supported a draft resolution recommending the admission of Portugal to the UN but was opposed by one permanent member State and hence Portugal was not admitted at that time.<sup>10</sup> It was not until December 1955 when Portugal was admitted to the United Nations. Ireland, Italy and Finland are also perfect epitomes of European States that secured the support of the requisite majority in the Security Council for their admission to the UN but were opposed by a permanent member State. However, they were admitted to UN membership at a later stage i.e., in 1955. As regards Austria's membership to the UN, the draft resolution recommending its membership to the UN on the 21<sup>st</sup> of August 1947 was supported by eight member States but it was opposed by one permanent member State in the Security Council.<sup>11</sup> However, Austria was eventually admitted to the UN in 1955.

On the 15 November 1976, a draft resolution on Vietnam membership to the UN was supported by 14 member States in the Security Council but was opposed by one permanent member State (the United States of America) and hence the Security Council could not recommend Vietnam to UN membership. Earlier and before the unification, the draft resolutions to recommend admission of the Democratic Republic of Viet Nam (North) and Republic of South Viet Nam were vetoed by the United States of America in 1975. Vietnam was eventually admitted to the United Nations on September 1977. The People's Democratic Republic of Korea (North Korea) supported by the then Union of Soviet Socialist Republics

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<sup>6</sup> See General Assembly Rules of Procedure governing the admission of new Members

<sup>7</sup> United Nations Publications *Basic Facts About the United Nations*, United Nations, New York, 1980 p.3.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> See for example G.A Resolution 113(II) D 17 November 1947

<sup>11</sup> See for example G.A Resolution 113(II) H 17 November 1947

(USSR) was denied admission in 1949 while the Republic of Korea (South Korea) application to UN admission was vetoed by the USSR. The People's Democratic Republic of Korea and the Republic of Korea were only admitted to UN membership in 1991 i.e., after the end of the cold war.

The aforementioned are but few examples on how some permanent members of the Security Council opposed the admission of certain States to UN membership for a reason they had in their mind. The criteria for admission of new members to the UN is codified in the UN Charter and must not by any mean include political intentions when deciding on admitting new member States. As a result of the systematic policy of denying certain States from membership in the UN, the General Assembly sought an advisory opinion from the ICJ in 1947. The General Assembly requested the ICJ in resolution 113 (II) of 17 November 1947 for an advisory opinion on the following question:

Is a Member of the United Nations which is called upon, in virtue of Article 4 of the Charter, to pronounce itself by its vote, either in the Security Council or in the General Assembly, on the admission of a State to membership in the United Nations, juridically entitled to make its consent to the admission dependent on conditions not expressly provided by paragraph I of the said Article? In particular, can such a Member, while it recognizes the conditions set forth in that provision to be fulfilled by the State concerned, subject its affirmative vote to the additional condition that other States be admitted to membership in the United Nations together with that State?<sup>12</sup>

In the *conditions of admission of a State to membership in the United Nations (Article 4 of the Charter)* advisory opinion, the ICJ pointed out the five requisite conditions for membership in the United Nations explicitly mentioned in Article 4 of the Charter 'an applicant must (1) be a State; (2) be peace-loving; (3) accept the obligations of the Charter; (4) be able to carry out these obligations; and (5) be willing to do so.'<sup>13</sup> The ICJ further provided in the *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)* advisory opinion that

The natural meaning of the words used leads to the conclusion that these conditions constitute an exhaustive enumeration and are not merely stated by way of guidance or example. The provision would lose its significance and weight, if other conditions, unconnected with those laid down, could be demanded. The conditions stated in paragraph I of Article 4 must therefore be regarded not merely as the necessary conditions, but also as the conditions which suffice.<sup>14</sup>

The admission of States to UN membership is decided by political organs of the UN and unfortunately enough not by the principal judicial organ of the United Nations. However, the political organs have legal obligations to ensure that the criteria of membership are observed. The ICJ pointed out in the *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)* that the member States in the Security Council or the General Assembly are '... not juridically entitled to make its consent to the admission

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<sup>12</sup> A/RES/113(II) B

<sup>13</sup> Admission of a State to the United Nations (Charter, Art. 4), Advisory Opinion: I. C. J. Reports 1948, p. 57.

<sup>14</sup> Ibid.

dependent on conditions not expressly provided by paragraph 1 of the said Article.<sup>15</sup> It further stated that ‘The political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgment.’<sup>16</sup> Hence, States have legal obligations to examine solely whether the rules which are codified in article 4 of the UN Charter are fulfilled when voting on whether to admit an applicant State or not. If some States for example decide to vote not to admit an applicant State based upon political factors and not the rules set in the UN Charter then it may be said that such States are violating the UN Charter and abusing their power. Member States in the Security Council and/or the General Assembly must act in good faith in general and when deciding on this specific matter in particular.

Like recommending membership to the General Assembly, the Security Council can recommend the expulsion of a member State that violated the principles of the Charter as Article 6 declares in the UN Charter. Article 6 of the UN Charter law provides that ‘A Member of the United Nations which has persistently violated the Principles contained in the present Charter may be expelled from the Organization by the General Assembly upon the recommendation of the Security Council.’<sup>17</sup> Once again, like recommending applicant States, expulsion of current members from the UN has to be done solely based on the legal rules codified in the UN charter. Here again, it is a shared competence of the Security Council and the General Assembly to admit States in the UN and/or expel them from the UN.

As regards the *de jure* State of Palestine application to UN membership that was submitted to the UN Secretary-General on the 23<sup>rd</sup> of September 2011, it will be unsurprising that the Security Council will decide not to recommend the *de jure* State of Palestine to UN membership due to the opposition of at least one permanent member State (the United States of America) and/or the non-approval of the requisite majority in the Security Council or even by adjourning the *de jure* State of Palestine application. The third paragraph of Rule 60 on Provisional Rules of Procedure of the Security Council provides that ‘If the Security Council does not recommend the applicant State for membership or postpones the consideration of the application, it shall submit a special report to the General Assembly with a complete record of the discussion.’<sup>18</sup> That said, the conduct of opposing the admission of the *de jure* State of Palestine in the UN will be based upon political factors and not legal ones. At any rate, it is the right of the *de jure* State of Palestine to present proofs (legal memo) that it fulfils the criteria as set in the first paragraph of article 4 of the UN Charter and where needed to make the General Assembly request an advisory opinion on the status of the State Palestine under international law and whether it fulfils the criteria of Article 4, paragraph I of the UN Charter. G.A resolution 506 (VI) of 1952 stipulates that ‘... according to the principles of international justice, it is not possible to deny to States Candidates for membership in the United Nations the right to present proofs on facts such as those recited in the first paragraph of the

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<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> Charter of the United Nations, June 26, 1945

<sup>18</sup> Provisional Rules of Procedure of the Security Council (adopted by the Security Council at its 1st meeting and amended at its 31st, 41st, 42nd, 44th and 48th meetings, on 9 April, 16 and 17 May, 6 and 24 June 1946; 138th and 222nd meetings, on 4 June and 9 December 1947; 468th meeting, on 28 February 1950; 1463rd meeting, on 24 January 1969; 1761st meeting, on 17 January 1974; and 2410th meeting, on 21 December 1982. Previous versions of the provisional rules of procedure were issued under the symbols S/96 and Rev. 1-6)

preamble.’<sup>19</sup> The proofs on facts as mentioned in G.A resolution 506 (VI) are ‘...the maintenance of friendly relations with other States, the fulfilment of international obligations and the record of a state's willingness and present disposition to submit international claims or controversies to pacific means of settlement established by international law.’<sup>20</sup>

Amidst the so many incidents of blocking certain States from UN membership as a result of the non-recommendation of the Security Council, the General Assembly could not admit them to the UN but was urging the Security Council to reconsider the applications of the non-recommended States. For example, General Assembly resolution 113 (II) G of 1947 ‘Requests the Security Council to reconsider the application of Finland, in the light of this determination of the Assembly.’<sup>21</sup> The General Assembly further requested an advisory opinion from the ICJ on the *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)* as has been observed and called the Security Council to comply with the criteria set in the first paragraph of Article 4 of the UN Charter. General Assembly resolution 197 (III) of 1948 ‘Recommends that each member of the Security Council and of the General Assembly, in exercising its vote on the admission of new Members, should act in accordance with the foregoing opinion of the International Court of Justice.’<sup>22</sup> The General Assembly further established a Special Committee in 1952 to make a detailed study of the question of the admission of States to membership in the United Nations.<sup>23</sup> In addition, the General Assembly established a Committee of Good Offices in 1953 so as ‘...to consult with members of the Security Council with the object of exploring the possibilities of reaching an understanding which would facilitate the admission of new Members in accordance with Article 4 of the Charter.’<sup>24</sup> The General Assembly has also sought another advisory opinion on the *Competence of the General Assembly for the Admission of a State to the United Nations*.

## **II. The Privileges of UN Membership and the Consequences of Non-UN Membership**

To put it simply, membership in the UN means that States belong to the United Nations Organisation. A UN member State is a party to the Statute of the International Court of Justice on an *ipso facto* basis. The first paragraph of Article 93 of the UN Charter states that ‘All Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice.’<sup>25</sup> Nevertheless, a non-member State of the UN may become a party to the ICJ Statute. The second paragraph of Article 93 of the UN charter provides that ‘A state which is not a Member of the United Nations may become a party to the Statute of the International Court of Justice on conditions to be determined in each case by the General Assembly upon the recommendation of the Security Council.’<sup>26</sup> At any rate, any non-UN member State which is a party to a contentious case will only have to contribute for the expenses of the ICJ. ‘3. When a state which is not a Member of the United Nations is a party

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<sup>19</sup> A/RES/506(VI) A, Admission of new Members, including the right of candidate States to present proof of the conditions required under Article 4 of the Charter

<sup>20</sup> Ibid.

<sup>21</sup> General Assembly resolution 113(II) G, 17 November 1947

<sup>22</sup> G.A Res 197 (III) 8 December 1948

<sup>23</sup> G.A Res 620 (VII) 21 December 1952

<sup>24</sup> G.A Res 718(VIII), 23 October 1953

<sup>25</sup> Charter of the United Nations; June 26, 1945

<sup>26</sup> Ibid.

to a case, the Court shall fix the amount which that party is to contribute towards the expenses of the Court. This provision shall not apply if such state is bearing a share of the expenses of the Court.<sup>27</sup> Any non-UN member State which desires to accede to the Statute of the International Court of Justice could do so through fulfilling the conditions determined by the General Assembly based upon the recommendation of the Security Council. Switzerland Liechtenstein, Japan and San Marino have complied with the conditions determined by the General Assembly and as a corollary became parties to the Statute of the ICJ<sup>28</sup> prior to becoming UN Member States. Similarly Nauru became a State party to the ICJ Statute when it fulfilled the conditions determined by the General Assembly based upon the recommendation of the Security Council.<sup>29</sup> Nauru joined the United Nations only in 1999.

Moreover, a State that is neither a member in the UN nor a party to the ICJ Statute can still access the ICJ. The second paragraph of article 35 of the ICJ Statute provides that '2. The conditions under which the Court shall be open to other states shall, subject to the special provisions contained in treaties in force, be laid down by the Security Council, but in no case shall such conditions place the parties in a position of inequality before the Court.'<sup>30</sup> Security Council Resolution 9 of 15 October 1946 resolves that

1.The International Court of Justice shall be open to a State which is not a party to the Statute of the International Court Justice, upon the following condition, namely, that such State shall previously have deposited with the Registrar of the Court a declaration by which it accepts the jurisdiction of the Court, in accordance with the Charter of the United Nations and with the terms and subject to the conditions of the Statute and Rules of the Court, and undertakes to comply in good faith with the decision or decisions of the Court and to accept all the obligations of a Member of the United Nations under Article 94 of the Charter;<sup>31</sup>

Hence, the *de jure* State of Palestine can lodge a general declaration stating that it accepts the jurisdiction of the ICJ and be deposited with the Registrar of the ICJ. In any event, being a party to the ICJ Statute would be of little value in regards to the Palestinian–Israeli situation although it does not harm it at all. Even if becoming a State party to the ICJ Statute, the *de jure* State of Palestine cannot in contentious proceedings bring before the ICJ an application against the State of Israel simply because it requires the consent of the other party (Israel). Israel will evidently not agree to bring the Palestinian-Israeli situation to the jurisdiction of the ICJ. Furthermore, Israel did not make a declaration recognizing the jurisdiction of the ICJ as compulsory. The second paragraph of article 36 of the ICJ Statute provides that 'The states parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes...'<sup>32</sup> As regards advisory opinions, the ICJ can give advisory opinions on legal questions even if it concerns non-UN member States as was with the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* advisory opinion in 2004. The first paragraph of Article 96 of the UN

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<sup>27</sup> Ibid.

<sup>28</sup> See G. G A resolution 91 (I), G A resolution 363 (iv), G A resolution 805 (VIII)., G A resolution 806 (VIII).

<sup>29</sup> See S.C Resolution 600, 19 Oct 1987 and G.A /RES/42/21, 18 November 1987

<sup>30</sup> Statute of the International Court of Justice, June 26, 1945

<sup>31</sup> Security Council Resolution 9, 15 October 194

<sup>32</sup> Statute of the International Court of Justice, June 26, 1945

Charter provides that ‘The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.’<sup>33</sup>

If and/or when the *de jure* State of Palestine joins the UN, it will have a right to vote in General Assembly drafted resolutions in equality with any other member State. The first paragraph of Article 18 of the UN Charter provides that ‘Each member of the General Assembly shall have one vote.’<sup>34</sup> In addition, Palestine may also become a temporary member in other principal organs of the United Nations, *inter alia*, The Economic and Social Council and the Security Council if and/or when admitted to the UN. It is worth to bear in mind that the appurtenance of UN Membership is not without financial obligations. The first two paragraphs of Article 17 of the UN Charter provide that ‘1. The General Assembly shall consider and approve the budget of the Organization. 2. The expenses of the Organization shall be borne by the Members as apportioned by the General Assembly.’<sup>35</sup>

Blocking Palestine’s admission to the United Nations will not alter the status of the *de jure* State of Palestine under international law. As observed Austria, Italy, Finland and Portugal are but few countries that were blocked from UN membership for many years and this conduct did not underestimate their statehood under international law. Moreover, Switzerland was admitted to the UN only in 2002 when it so desired. Very few countries decided not to be members in the United Nations, *inter alia*, the Holy See and Cook Islands and this did not diminish by any mean their statehood under international law. The United Nations does not recognise States, the United Nations admit States to membership based upon the recommendation of the Security Council and effected by the General Assembly as has been observed. States as subjects of international law were established before the United Nations and even way before the League of Nations. States created the United Nations through the ratification of the UN Charter but the United Nations did not and does not create States but indeed admit them.

A State does not necessarily and/or precisely need to be a member of the United Nations to accede or ratify international conventions under public international law, *inter alia*, international humanitarian law, international human rights law and international criminal law. For example, the Convention on the Rights of the Child, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of Persons with Disabilities and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families are open for accession to all States regardless of whether they are members of the United Nations or not. That said, article 26 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment stipulates that ‘This Convention is open to accession by all States. Accession shall be effected by the deposit of an instrument of accession with the Secretary General of the United Nations.’<sup>36</sup> Hence, the *de jure* State of Palestine must without any delay deposit an instrument of accession to all these conventions with the Secretary-General of the UN and

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<sup>33</sup> Ibid.

<sup>34</sup> Charter of the United Nations, June 26, 1945

<sup>35</sup> Charter of the United Nations, June 26, 1945

<sup>36</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984 entry into force 26 June 1987, in accordance with article 27 (1)



preferably accompanied by a legal memorandum on the existence of a *de jure* State of Palestine under international law albeit under occupation. Article (18) in the Third Draft Constitution for a Palestinian State provides that ‘The state of Palestine shall abide by the Universal Declaration of Human Rights and shall seek to join other international covenants and charters that safeguard human rights.’<sup>37</sup>

On the other hand, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination and the International Covenant on Civil and Political Rights requires any State wishing to deposit an instrument of accession to be either a ‘...State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a Party to the present Covenant.’<sup>38</sup> Hence, the *de jure* State of Palestine albeit not a member in the United Nations can accede to such conventions too based upon the invitation of the General Assembly and/or through its membership in any UN specialized agency.<sup>39</sup> As regards the International Convention for the Protection of All Persons from Enforced Disappearance, it is only open to accession by all member States of the UN. The third paragraph of article 38 in the International Convention for the Protection of All Persons from Enforced Disappearance provides that 3 ‘This Convention is open to accession by all Member States of the United Nations. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General.’<sup>40</sup> Shifting from international human rights law to the law of the sea, the United Nations Convention on the Law of the Sea is open for accession by all States. The first paragraph of article 305 of the United Nations Convention on the Law of the Sea provides that ‘This Convention shall be open for signature by: (a) all States’<sup>41</sup> Article 307 of the United Nations Convention on the Law of the Sea provides that ‘This Convention shall remain open for accession by States and the other entities referred to in article 305...The instruments of accession shall be deposited with the Secretary-General of the United Nations.’<sup>42</sup>

As regards international humanitarian law treaties, there is no condition which requires States to be members of the UN so as to ratify or accede to the laws and customs of war conventions. Obviously enough, the early codification of the laws and customs of war conventions was way before the existence of the UN. Even after the establishment of the UN,

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<sup>37</sup> Constitution of the State of Palestine, Revised third draft 4 May 2003. Quoted in Brown, Nathan J., *The Third Draft Constitution for a Palestinian State: Translation and Commentary*, Palestinian Centre for Policy and Survey Research, 2003, p. 14

<sup>38</sup> See Article 17 in the International Convention on the Elimination of All Forms of Racial Discrimination Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX)

of 21 December 1965 entry into force 4 January 1969 and see article 26 in the International Covenant on Economic, Social and Cultural Rights Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 3 January 1976

<sup>39</sup> On the 31st of October 2011 the General Conference of UNESCO voted to admit Palestine as a Member State in the UNESCO.

<sup>40</sup> See article 38 in the International Convention for the Protection of All Persons from Enforced Disappearance, Entry into force 23 December 2010

<sup>41</sup> United Nations Convention on the Law of the Sea of 10 December 1982

<sup>42</sup> Ibid.

ratification or accession of international humanitarian law conventions was not limited to UN member States. Article 156 of The Fourth Geneva Convention provides that ‘Accessions shall be notified in writing to the Swiss Federal Council, and shall take effect six months after the date on which they are received.’<sup>43</sup> Article 94 of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 1977 provides that ‘This Protocol shall be open for accession by any Party to the Conventions which has not signed it. The instruments of accession shall be deposited with the depositary.’<sup>44</sup> The Swiss Federal Council is the depositary of Additional Protocol I and the Four Geneva Conventions.

The Permanent Observer of Palestine to the United Nations Office at Geneva in its letter of 21 June 1989 informed the Swiss Federal Council that the Executive Council of the Palestine Liberation organization (PLO) decided to adhere to the Four Geneva Conventions of 1949 and its two protocols of 1977 on 4 May 1989.<sup>45</sup> The Swiss Federal Council riposte in 13 Sept 1989 was rather neutral. It stated that it was not in a position to decide whether the letter sent by the Permanent Observer of Palestine to the United Nations Office at Geneva constituted an instrument of accession, ‘due to the uncertainty within the international community as to the existence or non-existence of a State of Palestine [sic]’<sup>46</sup> The PLO had also previously attempted to accede to the Four Geneva Conventions and indeed expressed its formal position and decision to accede to the Four Geneva Conventions and even Additional Protocol I. In 1969, the PLO informed the Swiss Federal Political Department of its decision to adhere to the Four Geneva Conventions.<sup>47</sup> In 1974 the PLO reiterated its declaration to adhere to the Geneva Conventions.<sup>48</sup> On June 7, 1982, the PLO made a unilateral declaration to the Swiss Federal Council that it would adhere to Additional Protocol I.<sup>49</sup> The remarkable issue about the PLO 1989 decision of accession to the Four Geneva Conventions of 1949 and its two Additional Protocols is that it was communicated to the State parties of the Geneva Conventions by the Swiss Federal Council and the 1989 PLO decision was reiterated after the proclamation of the State of Palestine in 15 November 1988.

Palestine’s attempt to accede to the Four Geneva Conventions albeit a *de jure* State under occupation is not without a precedent under international law. The Provisional Government of the Algerian Republic acceded to the 1949 Geneva Conventions on the 20th of June

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<sup>43</sup> Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.

<sup>44</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977

<sup>45</sup> States party to the Geneva Conventions and their Additional Protocols, available at URL: <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P>

<sup>46</sup> Ibid.

<sup>47</sup> Gay J. McDougal ‘Palestinian Prisoners Captured in the Israeli Invasion of Lebanon: Are They Prisoners of War?’ The Seventh United Nations Seminar on the Question of Palestine Theme: "The inalienable rights of the Palestinian people" 9 - 13 August 1982 Dakar, Republic of Senegal

<sup>48</sup> Rosas, The Legal Status of Prisoners of War, supra note 50, 208. (Helsinki, 1976). Quoted in Gay J. McDougal ‘Palestinian Prisoners Captured in the Israeli Invasion of Lebanon: Are They Prisoners of War?’ The Seventh United Nations Seminar on the Question of Palestine Theme: "The inalienable rights of the Palestinian people" 9 - 13 August 1982 Dakar, Republic of Senegal

<sup>49</sup> Gay J. McDougal, op.cit.

1960<sup>50</sup> even though it was not until July 1962 when Algeria established its independent State after it was set free from French occupation. Palestine accession to the Four Geneva Convention and its Additional Protocols must be reiterated again in front of the Swiss Federal Council. That said, it must be evidenced by the legal argument of the existence of a *de jure* State of Palestine under international law albeit under a belligerent occupation and the emergence of a customary international law that the Occupied Palestinian Territory (OPT) of 1967 is a *de jure* of the State of Palestine, supported by State practise of recognizing the State of Palestine, and that Israel has the status of an occupying colonizing power in the OPT. Once again, the *de jure* State of Palestine instrument of accession must be reiterated accompanied by a legal memo on the absolute certainty of the existence of a *de jure* State of Palestine under international law albeit under occupation.

The Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction of 18 September 1997 does not also require a State to be a member in the UN to accede to it. Article 16 provides that ‘2. It shall be open for accession by any State which has not signed the Convention.’<sup>51</sup> Article 21 provides that ‘The Secretary-General of the United Nations is hereby designated as the Depositary of this Convention.’<sup>52</sup> The Chemical Weapons Convention is also but another example of a convention that any State can accede to without being a member in the UN. Article XX of The Chemical Weapons Convention provides that ‘Any State which does not sign this Convention before its entry into force may accede to it at any time thereafter.’<sup>53</sup> Article XXIII of The Chemical Weapons Convention notes that ‘The Secretary General of the United Nations is hereby designated as the Depositary of this Convention...’<sup>54</sup> Moreover, there is no prerequisite in the Convention on Certain Conventional Weapons (CCW) that a State has to be a member in the UN to sign and/or ratify or accede to the CCW. Article 4 in the Convention on Certain Conventional Weapons provides that ‘1. This Convention is subject to ratification, acceptance or approval by the Signatories. Any State which has not signed this Convention may accede to it.2. The instruments of ratification, acceptance, approval or accession shall be deposited with the Depositary.’<sup>55</sup> Article 10 of the Convention on Certain Conventional Weapons provides that ‘1. The Secretary-General of the United Nations shall be the Depositary of this Convention and of its annexed Protocols.’<sup>56</sup> Cook Islands and the Holy See are perfect examples of States parties to international conventions, *inter alia*, the Four Geneva Conventions of 1949 while being non-UN member States. The *de jure* State of Palestine must also accede to the Convention for the Protection of Cultural Property in the Event of Armed Conflict. Article 32 of the Convention for the Protection of Cultural Property in the Event of Armed Conflict provides that

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<sup>50</sup> See States party to the Geneva Conventions and their Additional Protocols, available at URL: <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P>

<sup>51</sup> Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Oslo, 18 September 1997

<sup>52</sup> Ibid.

<sup>53</sup> Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (Chemical Weapons Convention) , Paris 13 January 1993

<sup>54</sup> Ibid.

<sup>55</sup> The Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects as amended on 21 December 2001

<sup>56</sup> Ibid.

From the date of its entry into force, the present Convention shall be open for accession by all States mentioned in Article 30 which have not signed it, as well as any other State invited to accede by the Executive Board of the United Nations Educational, Scientific and Cultural Organization. Accession shall be effected by the deposit of an instrument of accession with the Director-General of the United Nations Educational, Scientific and Cultural Organization.<sup>57</sup>

The Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954 and the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict of March 1999 should also be acceded by the *de jure* State of Palestine. As regards international criminal law, the Rome Statute of the International Criminal Court (ICC) is open for accession by any State regardless of whether it is a UN member or not. Article 125 of the Rome Statute of the ICC provides that ‘3. This Statute shall be open to accession by all States. Instruments of accession shall be deposited with the Secretary-General of the United Nations.’<sup>58</sup> On the 21st of January 2009 the Government of Palestine made a declaration recognizing the jurisdiction of the International Criminal Court in conformity with Article 12, paragraph 3 of the Rome Statute of the International Criminal Court but until the time of writing this paper there was no decision on accepting and activating the lodged declaration. However, the *de jure* State of Palestine must attempt to accede to the Rome Statute of the ICC under Article 125 by depositing its instrument of accession with the Secretary-General of the UN.

The *de jure* State of Palestine must also accede to the International Convention on the Suppression and Punishment of the Crime of Apartheid. Article XIII of the International Convention on the Suppression and Punishment of the Crime of Apartheid provides that ‘The present Convention is open for signature by all States. Any State which does not sign the Convention before its entry into force may accede to it.’<sup>59</sup> Article XIV provides that ‘2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.’<sup>60</sup> The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity can also be acceded by Palestine albeit non UN-membership.<sup>61</sup> As regards the Palestinian refugee question, whether the *de jure* state of Palestine joins the UN or not, the rights of the Palestinian refugees under international law is by no mean prejudiced. The Palestinian refugees are entitled to full reparation in accordance with customary international law i.e., restitution, compensation and satisfaction.

The *de jure* State of Palestine can also approach UN specialized agencies for membership without being a member State in the UN. Palestine applied for the World Health Organisation

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<sup>57</sup> Convention for the Protection of Cultural Property in the Event of Armed Conflict Done at the Hague, 14 May 1954 Entered in force: 7 August 1956

<sup>58</sup> The Rome Statute of the International Criminal Court of 1998 entered into force July 1, 2002

<sup>59</sup> International Convention on the Suppression and Punishment of the Crime of Apartheid, G.A. res. 3068 (XXVIII), 28 U.N. GAOR Supp. (No. 30) at 75, U.N. Doc. A/9030 (1974), 1015 U.N.T.S. 243, *entered into force* July 18, 1976.

<sup>60</sup> *Ibid*

<sup>61</sup> See Article 5 and 7 in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, G.A. res. 2391 (XXIII), annex, 23 U.N. GAOR Supp. (No. 18) at 40, U.N. Doc. A/7218 (1968), *entered into force* Nov. 11, 1970.

(WHO) membership in 1989 but its application was postponed as a way of compromise by 83 votes for, 47 against and 20 abstentions in the World Health Assembly. This compromise vote was as a result of the United States of America cheap exercise of political and economic pressures on the WHO member States and the WHO *per se*. Article 3 in the WHO constitution states that ‘Membership in the Organization shall be open to all States.’<sup>62</sup> While Article 6 of the WHO constitution provides that

Subject to the conditions of any agreement between the United Nations and the Organization, approved pursuant to Chapter XVI, States which do not become Members in accordance with Articles 4 and 5 may apply to become Members and shall be admitted as Members when their application has been approved by a simple majority vote of the Health Assembly.<sup>63</sup>

On the 5<sup>th</sup> of October 2011, the Executive Board of the United Nations Educational, Scientific and Cultural Organization (UNESCO) voted on a recommendation to admit Palestine to the Organization. Article II Paragraph II in the Constitution of the United Nations Educational, Scientific and Cultural Organization provides that ‘...states not members of the United Nations Organization may be admitted to membership of the Organization, upon recommendation of the Executive Board, by a two-thirds majority vote of the General Conference.’<sup>64</sup> The UNESCO’s General Conference voted on the 31<sup>st</sup> of October 2011 to admit Palestine as a Member State in the UNESCO.<sup>65</sup>

Palestine’s attempt to join UN specialized agencies must be amplified. The *de jure* State of Palestine must also attempt to join the International Telecommunication Union. This is possible without being a member in the UN. ‘If the State is not a Member of the United Nations: the application for membership needs to have a secured approval by two-thirds of the Member States of the Union;’<sup>66</sup> Palestine must also join the Universal Postal Union (UPU). ‘Any non-member country of the United Nations may become a UPU member provided that its request is approved by at least two-thirds of the member countries of the UPU. The UPU has now 192 member countries.’<sup>67</sup> As regards the World Tourism

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<sup>62</sup> Constitution of the World Health Organization, The Constitution was adopted by the International Health Conference held in New York from 19 June to 22 July 1946, signed on 22 July 1946 by the representatives of 61 States (Off. Rec. Wld Hlth Org., 2, 100), and entered into force on 7 April 1948. Amendments adopted by the Twenty-sixth, Twenty-ninth, Thirty-ninth and Fifty-first World Health Assemblies (resolutions WHA26.37, WHA29.38, WHA39.6 and WHA51.23) came into force on 3 February 1977, 20 January 1984, 11 July 1994 and 15 September 2005 respectively and are incorporated in the present text

<sup>63</sup> Ibid.

<sup>64</sup> Constitution of the United Nations Educational, Scientific and Cultural Organization, The Constitution of UNESCO, signed on 16 November 1945, came into force on 4 November 1946 after ratification by twenty countries: Australia, Brazil, Canada, China, Czechoslovakia, Denmark, Dominican Republic, Egypt, France, Greece, India, Lebanon, Mexico, New Zealand, Norway, Saudi Arabia, South Africa, Turkey, United Kingdom, United States.

<sup>65</sup> The vote was carried by 107 votes in favour of admission and 14 votes against, with 52 abstentions.

<sup>66</sup> State Membership - How to become a Member State available at URL: <http://www.itu.int/members/mbstates2/index.html>

<sup>67</sup> UPU Member countries available at URL: <http://www.upu.int/en/the-upu/member-countries.html>

Organization, the first paragraph of Article 5 of the Statutes of the World Tourism Organization provides that 'Full membership of the Organization shall be open to all sovereign States.'<sup>68</sup> Moreover, the third paragraph of Article 5 of the Statutes of the World Tourism Organization provides that 'Other States may become Full Members of the Organization if their candidatures are approved by the General Assembly by a majority of two-thirds of the Full Members present and voting provided that said majority is a majority of the Full Members of the Organization.'<sup>69</sup> The International Labour Organization is also a UN specialised agency that the *de jure* State of Palestine must join. The Constitution of the ILO provides in article one paragraph four that

The General Conference of the International Labour Organization may also admit Members to the Organization by a vote concurred in by two-thirds of the delegates attending the session, including two-thirds of the Government delegates present and voting. Such admission shall take effect on the communication to the Director-General of the International Labour Office by the government of the new Member of its formal acceptance of the obligations of the Constitution of the Organization.<sup>70</sup>

In sum, the *de jure* State of Palestine must without any delay or hesitation deposit instruments of accession to treaties and other instruments under public international law, *inter alia*, international human rights law, international humanitarian law and international criminal law albeit non-UN membership. The overwhelming majority of public international law conventions does not require from the acceding State to be a member in the United Nations as has been proved. The Depositaries of the aforesaid international conventions must act in good faith by not precluding the *de jure* State of Palestine accession. The accession of the *de jure* State of Palestine to the aforementioned conventions will show the international community that the *de jure* State of Palestine is not affected by non-UN membership and further assure that Palestine as a *de jure* State is willing to assume its obligations under public international law. The *de jure* State of Palestine is definitely looking forward to the early ending of the Israeli colonial occupation of its State i.e., the 1967 borders. The successful attempt of joining the UNESCO is one step forward to joining other UN specialised agencies. Being a non-UN member State does not prejudice the status of the *de jure* State of Palestine under international law.

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<sup>68</sup> See Statutes of the World Tourism Organization (WTO) (withannex). Adopted at Mexico City on 27 September 1970

<sup>69</sup> Ibid.

<sup>70</sup> Constitution of the International Labour Organization. The original text of the Constitution, established in 1919, has been modified by the amendment of 1922 which entered into force on 4 June 1934; the Instrument of Amendment of 1945 which entered into force on 26 September 1946; the Instrument of Amendment of 1946 which entered into force on 20 April 1948; the Instrument of Amendment of 1953 which entered into force on 20 May 1954; the Instrument of Amendment of 1962 which entered into force on 22 May 1963; and the Instrument of Amendment of 1972 which entered into force on 1 November 1974.