

COMMENT

PALESTINE'S STATEHOOD AND ABILITY TO LITIGATE IN THE INTERNATIONAL COURT OF JUSTICE

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I. INTRODUCTION

“L’injustice à la fin produit l’indépendance.”¹

1. VOLTAIRE, TANCRÈDE act IV, sc. 6. Translated, this means: Injustice in the end produces independence. *Injustice in the End Produces Independence*, GOOGLE TRANSLATE, <http://translate.google.com/#auto/en/L'injustice%20à%20la%20fin%20produit%20l'indépendance>.

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On November 29, 1947, the United Nations (UN) General Assembly adopted resolution 181.² The resolution recommended that the United Kingdom partition the Palestine Mandate into Jewish and Arab states.³ Since adopting the resolution, acts of war and terror have ravaged the region.⁴ The violence has yet to produce a permanent solution to the Israeli-Palestinian conflict, or stability to the region generally.⁵ Long-term diplomatic solutions have proven equally ineffective.⁶ The failure of a diplomatic solution to the problem lends credence to a potential judicial solution to the Palestinian question.

Article 33(1) of the UN Charter indicates the importance of settling disputes peacefully, and using international adjudication as a mechanism to achieve peaceful solutions.⁷ Article 92 of the UN Charter created the International Court of Justice (ICJ) as the preeminent international tribunal to handle disputes between the States of the world.⁸ However, the ICJ's ability to issue binding decisions is limited to disputes between States.⁹ Therefore, statehood is necessary

2. G.A. Res. 181, U.N. GAOR, 2d Sess., Supp. No. 11, U.N. Doc. A/RES/181 (Nov. 29, 1947).

3. *Id.*

4. See generally *A History of Conflict*, BBC News, http://news.bbc.co.uk/2/shared/spl/hi/middle_east/03/v3_ip_timeline/html/ (last visited Sept. 29, 2013) (describing how, since 1890, there have been at least twenty-five specific instances of conflict between the "Israelis" and "Palestinians.").

5. See Greg Myre, *Is the Middle East Conflict Getting Even Tougher to Solve?*, PARALLELS (Aug. 14, 2013 7:25 AM), <http://www.npr.org/blogs/parallels/2013/08/13/211711863/is-the-middle-east-conflict-getting-even-tougher-to-solve>.

6. *See id.*

7. UN Charter art. 33, para. 1. ("The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all seek a solution by negotiation, mediation, . . . arbitration, . . . [or] judicial settlement . . .").

8. *Id.* art. 92.

9. Statute of the International Court of Justice art. 34, para. 1, June 26, 1945, 15 U.N.T.S. 331 [hereinafter ICJ Statute]. While the ICJ does have the authority to issue advisory opinions, advisory decisions are not legally binding. *Id.* art. 65, para. 1; see UN Charter art. 96. 2 Oellers-Frahm, *Article 96*, in *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 1975, 1987 (Bruno Simma et al. eds., 3d ed. 2002) [hereinafter UN CHARTER COMMENTARY ART. 96].

for effective ICJ jurisprudence and peaceful solutions to international disputes.

The international community has grappled with the issue of Palestinian statehood for decades.¹⁰ Due to Palestine's admission to the United Nations Educational, Scientific and Cultural Organization (UNESCO) as a member state, and the UN General Assembly recognizing Palestine as a "[n]on-member State Observer," the argument for Palestinian Statehood has never been stronger.¹¹ But if Palestine could be considered a State under international law, could it possibly bring a dispute to the ICJ?

This Comment attempts to clarify the issues surrounding Palestine's ability to access the ICJ, and concludes that Palestine is a State for three reasons. First, Palestine arguably satisfies the Montevideo Criteria for statehood.¹² Second, the international community of States has collectively recognized Palestinian statehood.¹³ Finally, Palestine is entitled to invoke the doctrine of self-determination to facilitate statehood.¹⁴ Therefore, Palestine is a State that should be able to bring contentious cases before the ICJ. But, even if Palestine cannot bring contentious cases to the ICJ, the ICJ's advisory jurisprudence can still be of some use to Palestine.

Section II of this Article discusses whether Palestine can be considered a State under international law. Without statehood, Palestine cannot be a party in a contentious case and can only enjoy the limited relief of the ICJ's advisory power.¹⁵

Next, assuming Palestine is a State, section III of this Article analyzes whether Palestine can bring a contentious case to the ICJ.

10. Myre, *supra* note 5.

11. *See infra* Part II.

12. The Montevideo Criteria are the traditional criteria needed under customary international law, for an entity to be considered a state. *See infra* Part II.A.

13. Collective Recognition allows for a looser application of the aforementioned Montevideo criteria. *See infra* Part II.B.

14. Only certain entities are enabled to invoke the doctrine of self-determination to achieve statehood. *See infra* Part II.C.3.

15. ICJ contentious cases are distinguishable from ICJ advisory opinions because only contentious cases are legally binding on the parties. *Compare* UN Charter art. 94 (requiring parties to comply with contentious case judgments in good faith), *with* UN CHARTER COMMENTARY ART. 96, *supra* note 9 (stating that advisory opinions are not legally binding).

Under the umbrella of contentious case adjudication there are three avenues Palestine can take to bring a case before the ICJ. First, Palestine could become a "Member State" to the UN.¹⁶ Second, Palestine could become a party to the ICJ Statute.¹⁷ Third, Palestine could petition the United Nations Security Council (SC) to allow it to bring a single dispute before the ICJ.¹⁸ Each option is under the auspices of the SC. While each of these options would give the ICJ jurisdiction over Palestine, the ICJ would also need to have jurisdiction over the State opposing Palestine in the dispute.¹⁹

Section IV examines Palestine's options for utilizing the ICJ's advisory jurisprudence, and the efficacy of such an opinion. Finally, section V reemphasizes that Palestine's ability to litigate in the ICJ, as well as the enforceability of an ICJ judgment or advisory opinion, lies in the hands of the SC. The threshold issue, however, is whether Palestine is a state, as that determination influences the subsequent analysis.

II. THE CASE FOR PALESTINIAN STATEHOOD

Under Article 34(1) of the Statute of the ICJ, only States can be parties before the ICJ.²⁰ Although many scholars, including judges who have served on the ICJ, believe that the requirement is not compatible with the current international system, statehood remains a prerequisite for parties to contentious cases wishing to appear before the ICJ.²¹ Therefore, the threshold issue is whether Palestine is a State under international law.²²

16. See UN Charter art. 93.

17. ICJ Statute, *supra* note 9, art. 35, para. 1.

18. S.C Res. 9, U.N. S/RES/9 (Oct. 15, 1946).

19. ICJ Statute, *supra* note 9, art. 36.

20. *Id.* art. 34(1).

21. Pierre-Marie Dupuy, *Article 34*, in *THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE* 585, 604-05 (Andreas Zimmermann et. al. eds., 2d ed. 2012).

22. While there is no formally agreed upon definition of what a State is this paper will argue that Palestine is a State under customary international law. Customary international law is widespread and consistent state practice that is taken out of a legal obligation, or *opinion juris*. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW*, at 6, 8 (7th ed. 2008) (noting how state practice that is not taken out of a sense of a legal obligation does not qualify as a customary international law norm); see ICJ Statute, *supra* note 9, art. 38, para. 1(b).

A. Palestine Satisfies the Criteria for Statehood under International Law

Article 1 of the Montevideo Convention (Montevideo Criteria) sets forth the best-known formula for statehood.²³ The Montevideo Criteria are premised on the principle of effective control over a territorial entity,²⁴ and provide the most succinct standard when evaluating whether an entity is a State.²⁵ If Palestine is to be considered a State under international law, it must satisfy to some degree the Montevideo Criteria.

In addition to the Montevideo Criteria, the notion of statehood recognition and the right to self-determination play a role in establishing Palestine as a State.²⁶ Thus, Palestine could overcome any deficiencies regarding the Montevideo Criteria through the international community's collective recognition of Palestine as a State, and its right to Self-Determination.²⁷

23. JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 45 (2d ed. 2006); *see* Convention on Rights and Duties of States art. 1, Dec. 26, 1933, 164 L.N.T.S. 19 [hereinafter Montevideo Convention] (“The state as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states.”); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (1987) (noting in Comment (a) that The Montevideo Convention is seen as customary international law with respect to statehood).

24. CRAWFORD, *supra* note 23, at 46.

25. Thomas Grant, *Defining Statehood: The Montevideo Convention and its Discontents*, 37 COLUM. J. TRANSNAT'L L. 403, 414 (1999). However, scholars debate whether the Montevideo Criteria contain a sufficient definition of statehood. Scholars note that other factors besides those reflected in the Montevideo Convention are equally if not more important than the four factors in article 1. *Id.* at 437. Such factors include the ability of an entity to observe human rights standards, and maintain a market economy. Conclusions of the Presidency (EC) SN 180/1/93 REV 1 of June 21-22 1993 (noting that to become a Member State of the European Union, an entity must satisfy the Copenhagen Criteria, which requires, among other things, an entity to observe human rights standards and maintain a market economy); *see also* The Treaty of Maastricht: Treaty on European Union (EU), Feb. 7, 1992 O.J. (C 191) 1, 31 I.L.M. 253 (establishing the current institutional setup of the European Union).

26. JAMES CRAWFORD, *BROWNIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 141 (8th ed. 2012) [hereinafter PRINCIPLES].

27. MALCOLM N. SHAW, *INTERNATIONAL LAW* 206 (6th ed. 2008).

1. *The Montevideo Criteria applied to Palestine*

To satisfy the Montevideo Criteria, Palestine must possess a permanent population, a defined territory, a government, and the capacity to enter into relations with other States.²⁸ A permanent population can be defined as an aggregate of individuals who, together, form a community.²⁹ Arguably, Palestine has a permanent population, if the Palestinian populations in the Gaza Strip and the West Bank are taken into consideration.³⁰ Additionally, Palestine must have a government that controls a defined territory.³¹ A State's creation depends "upon the exercise of full governmental powers with respect to some area of territory."³² While creation of a State depends on the government exercising power over some area of territory, there is no rule prescribing how much territory must actually be controlled.³³ Arguably, because the UN called for the partition of

28. See *supra* note 23.

29. LASSA OPPENHEIM, OPPENHEIM'S INTERNATIONAL LAW 121 (Robert Jennings & Arthur Watts eds., 9th ed. 1992).

30. See *Knox v. Palestine Liberation Organization*, 306 F. Supp. 2d 424, 434 (S.D.N.Y. March 1, 2004) (stating the defendant's contention that it "is an indisputable fact that there has been a permanent population in Palestine for over two millennia."); see also John Quigley, *The Israel-PLO Interim Agreements: Are They Treaties?*, 30 CORNELL INT'L L.J. 717, 724 (1997) (stating that Palestine appears to satisfy the criterion of controlling a territory's population).

31. While the criteria "defined territory" and "government" are separate elements of the Montevideo Convention, scholars have indicated that the two elements really form the "effective control principle." See CRAWFORD, *supra* note 23; SHAW, *supra* note 27. Thus, they will be discussed together here.

32. CRAWFORD, *supra* note 23, at 46; see *Island of Palmas (U.S. v. Neth.)*, 1 R.I.A.A. 829, 839 (Perm. Ct. Arb. 1928); BROWNLIE, *supra* note 22, at 71.

33. CRAWFORD, *supra* note 23, at 46; see also Thomas M. Franck & Paul Hoffman, *The Right to Self-Determination in Very Small Places*, 8 N.Y.U. J. INT'L L. & POL. 331, 383-84 (1976) (noting that "infinitesimal smallness has never been seen as a reason to deny self-determination to a population."). Furthermore, the ICJ and the United Nations Convention on the Law of the Sea (UNCLOS) both note that international law does not require a State's boundaries to be fully defined. See United Nations Convention on the Law of the Sea art. 49, Dec. 10, 1982, 1833 U.N.T.S. 397 (noting that archipelagic States do not need contiguous territory to be considered a state, and possess the same rights as States that have contiguous territory); *North Sea Continental Shelf (F. R. G. v. Neth.)*, 1969 I.C.J. 3, ¶ 45 (Feb. 20) (holding that entities do not require fully defined frontiers to satisfy the *defined territory* aspect of statehood).

British-mandated Palestine, Palestine has a defined territory comprised of the West Bank, Gaza Strip, and East Jerusalem.³⁴

Additionally, the requirement of an effective government may be the central element regarding a claim to statehood.³⁵ International law defines government as “the extent of governmental power exercised, or capable of being exercised, with respect to some territory and population.”³⁶ Under the Interim Agreement,³⁷ the Palestinian Liberation Organization (PLO) administers the Gaza Strip, and the West Bank’s major towns, thus satisfying the effective government requirement for Palestine.³⁸

34. *Knox*, 306 F. Supp. 2d at 434 (arguing this exact point by the defendants, who admit that Palestine’s borders have occasionally changed and there is some dispute as to their exact contours).

35. See BROWNLIE, *supra* note 22, at 71; CRAWFORD, *supra* note 23, at 55.

36. CRAWFORD, *supra* note 23, at 56.

37. See Quigley, *supra* note 30, at 724. The Israeli-Palestinian Interim Agreement initiated a peace process, and declared the Palestinian Liberation Organization (PLO) the representative of the Palestinian people. See The Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip, Isr.-PLO, Sept. 28, 1995, 36 I.L.M. 551 available at <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/THE+ISRAELI-PALESTINIAN+INTERIM+AGREEMENT.htm>.

38. Quigley, *supra* note 30, at 724. The government control requirement is relaxed in international practice where a putative State is seen as having a right to statehood and where no entity is competing for statehood in the same territory. *Id.* The government criterion concerning Palestine draws much dispute, because as of August 2012, the Palestine National Authority controls the West Bank, while the Hamas government controls the Gaza Strip. See JIM ZANOTTI, CONG. RESEARCH SERV., RL34074, THE PALESTINIANS: BACKGROUND AND U.S. RELATIONS 1 (2012). Thus, two entities purport to control Palestine, which tends to negate the effective control principle. However, entities have gained or retained statehood and UN membership in the absence of an effective government. See G.A. Res. 67/502, U.N. Doc. A/67/502 (Oct. 24, 2012) (permitting the Central African Republic, the Comoros, Guinea-Bissau, Sao Tome and Principe and Somalia to vote without governments, for instances where entities retained statehood); Eric Ting-Lun Huang, *Taiwan’s Status in a Changing World: United Nations Representation and Membership for Taiwan*, 9 ANN. SURV. INT’L & COMP. L. 55, 71 (2003) (discussing how the United Nations admitted Congo as a “member state” when, at the time, Congo had no effective government) see also G.A. Res. 1480, U.N. Doc. A/RES/1480 (Sept. 20, 1960) (admitting the Congo to the UN at a time that it did not have an effective government).

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Finally, a State must have the capacity to enter into relations with other States to qualify as a State under international law.³⁹ A State's capacity to enter into relations is independent of its recognition by other States.⁴⁰ Additionally, a State's capacity or ability to engage other States depends on the power of the internal government over its people and land.⁴¹

The *State* of Palestine is a member of several international organizations, including UNESCO and the Arab League, and is also a "Non-Member Observer State" to the UN.⁴² Palestine, as a member of these organizations, demonstrates that it has the ability to enter into relations with other States.⁴³

An argument negating Palestine's capacity to enter into relations, however, is that other parties purport to sign treaties on Palestine's behalf.⁴⁴ But, nonetheless, based on Palestine's membership in

39. Montevideo Convention, *supra* note 23, art. 1(d). Only the capacity to enter into relations is relevant; actually doing so is not required. CRAWFORD, *supra* note 23, at 61.

40. Montevideo Convention, *supra* note 23, art. 3; CRAWFORD, *supra* note 23, at 61.

41. CRAWFORD, *supra* note 23, at 62.

42. Press Release, General Assembly Grants Palestine Non-Member Observer State Status at UN, U.N. Press Release GA/11317 (Nov. 29, 2012); *General Conference Admits Palestine as UNESCO Member*, UNESCOPRESS (Oct. 31, 2011) [hereinafter *Palestine Admitted to UNESCO*], http://www.unesco.org/new/en/media-services/single-view/news/general_conference_admits_palestine_as_unesco_member_state/. In the League of Arab States, the State of Palestine seceded the seat of the PLO following the 1988 Palestinian Declaration of Independence. *See Member States*, THE LEAGUE OF ARAB STATES, http://www.lasportal.org/wps/portal/las_en/inner!/ut/p/c5/vZLLjoJAFES_xQ8wDQ0oLNEG5B1oRGRDAAEBpRWNPL5-MJnFbHQ2xlVlSt1TiwlhmNTEj7KI7yVp4hMIQLiikOC4PusyFI8lgVihUm1Th5Cymcnfv_b55T_pHQgoNsLVcFHHenSrEY8WSntv3HYmkgbP28IbWhm4cgYs3XWrLuT1sYgVv71yI7nqhSra88wg3WwGcNZM_8J3xGefp0-9OJECexAu-Q5maZUB_POSlID1YfA-2DjtyyZ_iKL-R7Lpz7K0kBYnEgyLXW32Q89ImaHx F10TKU2r6xEgNyhWpt6p5C2356kQAzmTdkai8BDfGoY_aI3V5LWJnmnbJLsdpSt6krcgdNgl0UWILF8s8O6ZpeBEXud1xA-UPM2ZrHj5mYRpSO8xBpCdC6I-iInTGuE7CFOgLUh5wxcztH6fL0r5hCnM1-AH9YDmg!/dl3/d3/L2dBISeVz0FBIS9nQSEh/?pcid=69747e00425e3086ba20fbc0e4251219 (last visited Oct. 21, 2013).

43. *See* Montevideo Convention, *supra* note 23, art. 1(d).

44. The PLO is the party to numerous international agreements, presumably on behalf of the State of Palestine, including the Free Trade Agreement with the

international organizations, there is evidence demonstrating that Palestine has the capacity to enter into relations with other States, exemplifying its independence.

2. *Independence*

Inextricably linked to the capacity to enter into relations with other States and the notion of a government that effectively controls a populated territory is the criterion of independence. Although independence is not expressly provided for in the Montevideo Criteria, it encompasses the elements of the Montevideo Criteria.⁴⁵ The two main elements of independence are: (1) the existence of a separate entity within reasonably coherent frontiers, and (2) the freedom from subjection to the authority of other States.⁴⁶

The PLO and Hamas each control a substantial and coherent territory, as well as the populace of Palestine.⁴⁷ Additionally, political actors within Palestine, and not other States, enter into international agreements and organizations on Palestine's behalf.⁴⁸ While it would be naive to declare that Palestine indisputably satisfies the Montevideo Criteria and qualifies as an independent State, it is at least plausible that Palestine qualifies as a State under international law. In

European Union. *See* Euro-Mediterranean Interim Association Agreement on Trade and Cooperation Between the European Community, of the One Part, and the Palestine Liberation Organization (PLO) for the Benefit of the Palestinian Authority of the West Bank and the Gaza Strip, of the Other Part, Eur. Union-PLO, Feb. 24, 1997, 1997 O.J. (L 187) 3 [hereinafter Euro-Mediterranean Interim Association Agreement], available at http://trade.ec.europa.eu/doclib/docs/2004/june/tradoc_117751.pdf. In contrast, the Palestine National Authority is the party to the Union for the Mediterranean, on behalf of Palestine. *See* Barcelona Declaration Adopted at the Euro-Mediterranean Conference, Nov. 27-28, 1995 [hereinafter Barcelona Declaration], available at http://www.eeas.europa.eu/euromed/docs/bd_en.pdf.

45. *See* Island of Palmas (U.S. v. Neth.), 1 R.I.A.A. 829, 838 (Perm. Ct. Arb. 1928) (“Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State.”).

46. Customs Regime Between Germany and Austria, Advisory Opinion, 1931 P.C.I.J. (ser. A/B) No. 41, at 57-58 (Sept. 5); CRAWFORD, *supra* note 23, at 66.

47. Zanoliti, *supra* note 38, at 4; Francis A. Boyle, *The Creation of the State of Palestine*, 1 EUR. J. INT'L LAW 301, 302 (1990).

48. Euro-Mediterranean Interim Association Agreement, *supra* note 44; Barcelona Declaration, *supra* note 44.

addition, the concept of State recognition may strengthen Palestine's status as a State under international law.

B. The Effects of Collective Recognition by the International Community

Recognition of statehood by other States is related to, but distinct from, an entity achieving statehood.⁴⁹ In earlier times, "statehood recognition was considered . . . to be an essential element of statehood . . ." ⁵⁰ The more international recognition a State receives, the less strictly the Montevideo Criteria are applied.⁵¹ Collective recognition could assist an entity that is otherwise missing some of the Montevideo Criteria, and alternatively, collective non-recognition could inhibit recognition based on the Criteria.⁵² Accordingly, even if Palestine does not completely satisfy the Montevideo Criteria, it should be entitled to a looser application of the Criteria because of the international community's overwhelming recognition of Palestine as a State.⁵³

49. John Cerone, *The UN and the Status of Palestine—Disentangling the Legal Issues*, 15 AM. SOC'Y INT'L L. INSIGHTS 26 (Sept. 13, 2011), available at <http://www.asil.org/insights/volume/15/issue/26/un-and-status-palestine-%E2%80%93-disentangling-legal-issues> [hereinafter *Disentangling Legal Issues*].

50. *Id.* There are two theoretical frameworks concerning statehood recognition: (1) the constitutive theory, and (2) the declaratory theory. BROWNLIE, *supra* note 22, at 86; CRAWFORD, *supra* note 23, at 19, 22. The constitutive theory holds that a State only becomes a State via recognition by other States. *Id.* at 19. The declaratory theory holds that the recognition of a new State is a political act independent of the new state's existence. CRAWFORD, *supra* note 23, at 22. Under the declaratory theory recognition merely declares that an entity satisfies the objective Montevideo Criteria. *Disentangling Legal Issues*, *supra* note 49.

51. *Disentangling Legal Issues*, *supra* note 49.

52. *Id.*

53. Palestine's membership to UNESCO, and the GA resolution labeling Palestine a "Non-Member State" demonstrates the international community's collective recognition of Palestine as a State. Individual States have also unilaterally recognized Palestine as a State outside of UN dealings. *See, e.g.*, Israel News, *Argentina, Uruguay Recognize Palestinian State*, YNETNEWS (Dec. 6, 2010 22:06 PM), <http://www.ynetnews.com/articles/0,7340,L-3995297,00.html>.

1. *UNESCO Admitted Palestine as a Member State*

On October 31, 2011, UNESCO admitted Palestine as a Member State.⁵⁴ Notably, Article II of UNESCO's constitution distinguishes non-UN States responsible for their international relations from territories that are not.⁵⁵ Pursuant to UNESCO's Constitution, 107 of the 121 present *voting* Member States voted in favor of Palestine being admitted as a Member State.⁵⁶ Overall, fifty-eight percent of UNESCO's 185 member states supported Palestine's membership bid.⁵⁷

Under UNESCO's rules of procedure, members vote to adopt conventions and recommendations submitted by UNESCO's General Conference.⁵⁸ Thus, Palestine, as a Member State, has authority equal

54. *Palestine Admitted to UNESCO*, *supra* note 42. Palestine officially joined UNESCO as a Member State on November 23, 2011. LUISA BLANCHFIELD & MARJORIE ANN BROWNE, CONG. RESEARCH SERV., R42999, The United Nations Educational, Scientific, and Cultural Organization (UNESCO) 6 (2013), *available at* <http://www.fas.org/spp/crs/row/R42999.pdf>. UNESCO is a specialized UN agency that focuses on building peace among cultures "by promoting collaboration among . . . nation states through education . . . [and] science . . ." United Nations Educational Scientific and Cultural Organization [UNESCO], *Constitution of UNESCO*, art. I, para. 1 (Nov. 16, 1945) [hereinafter UNESCO Constitution]. The purposes of UNESCO are important because it sets the scope for an ICJ advisory opinion. *See infra* Part IV.A.1. Membership in UNESCO is not dependent on membership to the UN, but a Member State of the UN is entitled to membership in UNESCO. UNESCO Constitution, *supra*, art. II, para. 1; *see id.* para. 2.

55. UNESCO Constitution, *supra* note 54, art. II, paras. 2-3. Thus, UNESCO expressly differentiates States from entities that do not control their international relations. This distinction is important when comparing Palestine to entities that are not States.

56. *See Palestine Admitted to UNESCO*, *supra* note 54 (fifty-two present Member States abstained from the vote); *see also* UNESCO Constitution, *supra* note 54, art. II paras. 2-3 (requiring a two-thirds majority vote for admission to UNESCO admission requirements).

57. John Cerone, *Legal Implications of the UN General Assembly Vote to Accord Palestine the Status of Observer State*, 16 AM.SOC'Y INT'L L. INSIGHTS 37 (Dec. 7, 2012) *available at* <http://www.asil.org/insights/volume/16/issue/37/legal-implications-un-general-assembly-vote-accord-palestine-status> [hereinafter *Legal Implications*].

58. UNESCO Constitution, *supra* note 54, art. IV, para. 4. UNESCO's General Conference consists of the representatives of the Member States. *Id.* art. IV, para. 1.

to that of "Confirmed States" in the organization, such as the United States, whose statehood is undisputed.⁵⁹ Consequently, Palestine has equal ability to vote for or against actions taken by UNESCO, which confirms Palestine's ability to act like a State. To bolster the position that membership in UNESCO confirms Palestinian statehood, it is useful to briefly compare the results of the recent UN general Assembly (GA) vote.

2. *The United Nations General Assembly Recognizes Palestine as a Non-Member State*

On November 29, 2012, the GA voted to accord Palestine the status of "Non-Member Observer State."⁶⁰ Prior to receiving this status, the UN recognized Palestine as an "Entity."⁶¹ Although Palestine's new designation as a "Non-Member Observer State" does not include new procedural rights within the UN,⁶² the international community's collective recognition of Palestine as a State is significant. The GA affirmatively chose to recognize Palestine as "Non-Member Observer State," versus a type of *Non-State* observer such as an "Entity."⁶³ The GA's discretion to place Palestine in the "Non-Member State" category further demonstrates that some in the

59. *Member States of the United Nations*, UNITED NATIONS, <http://www.un.org/en/members/#p> (last visited Oct. 22, 2013).

60. Status of Palestine in the United Nations, G.A. Res. 67/19, ¶ 2, U.N. Doc. A/RES/67/19 (Nov. 29, 2012). The UN "Blue Book" of the UN Protocol and Liaison Service sets forth several observer categories that maintain permanent observer missions at UN Headquarters. Protocol and Liaison Service, *Permanent Missions to the United Nations*, at vi-vii, U.N. Doc. ST/PLS/SER A/302 (Dec. 2012) [hereinafter UN Blue Book]. These observer designations include: "Non-member States;" "Inter-governmental organizations;" "Other entities;" and "Specialized agencies and related organizations." *Id.*

61. In the most recent UN Blue Book, the category of "entity" is not listed. See UN Blue Book, *supra* note 60. Only the categories noted in the above footnote are mentioned in the latest version of UN Blue Book. *Id.*

62. *Legal Implications*, *supra* note 58.

63. G.A. Res. 67/19, *supra* note 60, ¶ 2. The UN affirmatively chooses to recognize different types of observers, and there exist several observer categories in the UN. See UN Blue Book, *supra* note 60 (noting the various UN observer statuses); *infra* note 61.

international community accept Palestine as a State, rather than some other type of international actor.⁶⁴

Arguably, the best arbiter of statehood is the collective recognition of a State's existence by a majority of other States. Collective recognition, as opposed to unilateral recognition, dissipates the concern that statehood recognition is a political act.⁶⁵ The sheer number of States that recognize Palestine as a State ensures that its statehood is not determined by a single State or a small group of States.⁶⁶ This is precisely the outcome of the GA vote that named Palestine a "Non-Member Observer State" to the UN.⁶⁷

Article 18(2) of the UN Charter requires that "important questions" shall be made by a two-thirds majority of the GA.⁶⁸ One of these "important questions" is the admission of new Members to the UN.⁶⁹ If Palestine could pass the first obstacle to UN membership (the SC recommendation to the GA that a State should be considered for membership), Palestine would currently have the two-thirds majority required for admission to the UN.⁷⁰

64. Accordingly, by giving Palestine "Non-Member State" status, UN Member States either applied the Montevideo Criteria to Palestine, or disregarded the criteria as necessary for statehood, making the Criteria little more than a theoretical achievement.

65. See BROWNLIE, *supra* note 22, at 94.

66. This is precisely the stance that critics of the constitutive theory take concerning statehood recognition. See SIR HERSCH LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW* 38 (1947).

67. See *Legal Implications*, *supra* note 57 ("[T]he mere fact that the resolution was adopted constitutes a determination by the UN's most representative political organ that Palestine is a *state*." (emphasis added)). More States recognized Palestine as a State in the GA vote than in the vote admitting it to UNESCO as a Member State. Compare *Palestine Admitted to UNESCO*, *supra* note 55 (calculating that 107 of 173 members of the UNESCO General Conference, or 61.8%, voted to admit Palestine as a UNESCO Member), with *Legal Implications*, *supra* note 57 (calculating that 138 of 193 of the UN Member States, or 71.5%, voted to make Palestine a "Non-Member Observer State").

68. See UN Charter art. 18, para. 2.

69. *Id.*

70. These UN procedural standpoints are distinct from the importance of the international community's recognition of Palestine as a State. *Disentangling Legal Issues*, *supra* note 49.

3. *Palestine Has a Right to Self-Determination*

If Palestine is entitled to self-determination, its claim to statehood might be strengthened. The United Nations is founded on developing “friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples”⁷¹ The main components of self-determination are *internal* and *external* self-determination.⁷² The Internal component of self-determination refers to a *people*,⁷³ *territorial integrity*,⁷⁴ and the ability to participate in government.⁷⁵ The External component of self-determination refers to a territory and people who were, or are governed, by a third State, either in the colonial context or under military occupation.⁷⁶ If Palestine is entitled to the right of self-determination, Palestine may be able to *legally* secede from Israel.⁷⁷ In addition, Palestine can be considered a former colonial territory, thus invoking the external prong of self-determination.

The right to external self-determination is present in the West Bank because the Palestine National Authority works with the Israeli Defense Forces (IDF) in administering the Palestinian people in the West Bank.⁷⁸ The situation in the West Bank is an example of a “militarily occupied territory,” satisfying both the internal and external prongs of self-determination. The external prong is satisfied because the Palestinian people are under IDF military occupation.

In addition, if Palestine is considered a colonial territory, Palestine has a right to “external” self-determination based on the right to self-

71. UN Charter art. 1, para. 2; 1 Stefan Oeter, *Self-Determination*, in *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 315, 315 (Bruno Simma et. al. eds., 3d ed. 2012).

72. Oeter, *supra* note 71, at 327-29.

73. A people is defined as a “group of persons bound together by common objective characteristics, like language, culture, religion, [and] race, . . . as long as such a group also has a common (subjective) understanding of belonging together and being distinct from all the other surrounding groups.” *Id.* at 325.

74. “Territorial Integrity” refers to a people submitting to a common authority. Oeter, *supra* note 71, at 327-28.

75. Reference re Secession of Quebec, [1998] 2 S.C.R. 217, para. 126 (Can.).

76. *Id.* para. 138.

77. *See id.* paras. 122, 132-35.

78. Zanotti, *supra* note 38, at 19.

determination being accorded to all peoples, and the grant of independence to colonial peoples by the GA.⁷⁹ The Gaza Strip may still be considered as subject to colonial control, because Israeli military forces routinely run operations and maintain permanent posts throughout the West Bank's borders.⁸⁰ This presence may satisfy the external prong of self-determination.

Many scholars agree that "self-determination" is a preemptory, or *jus cogens*, norm of international law.⁸¹ Under international law, no deviation is permitted from *jus cogens* norms.⁸² The ICJ noted, "the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character . . ."⁸³ An obligation of *erga omnes* character is an obligation owed by all States to every other State.⁸⁴ Appropriately, self-determination as a "purpose or principle of the UN Charter, constitutes a legally binding norm for all member states of the United Nations."⁸⁵ Accordingly, Palestine should be able to invoke the right to external self-determination, and, given the State practice in the UN, should be entitled to make its own decision about statehood.⁸⁶

79. Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV), ¶ 2 U.N. Doc. A/RES/1514 (Dec. 14, 1990) ("All peoples have the right to self-determination.").

80. Zanotti, *supra* note 38, at 19.

81. H.G. Espiell, *Self-Determination and Jus Cogens*, in UN LAW/FUNDAMENTAL RIGHTS 167, 167 (Antonio Cassese ed. 1979); Oeter, *supra* note 71, at 316.

82. Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]; see BROWNLIE, *supra* note 22, at 510 (noting that *jus cogen* norms are "inalienable" or "inherent").

83. See Concerning East Timor (Port. v. Austl.) 1995 I.C.J. 90 ¶ 29 (June 30); PRINCIPLES, *supra* note 26, at 578.

84. PRINCIPLES, *supra* note 26.

85. Oeter, *supra* note 71, at 316.

86. See Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res 1514 (XV), U.N. Doc. A/RES/1514(XV) (Dec. 14, 1960) ("All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."); *The United Nations and Decolonization: Trust Territories That Have Achieved Self-Determination*, UNITED NATIONS, <http://www.un.org/en/decolonization/selfdet.shtml> (last visited Sept. 30, 2013) (listing several Trust Territories, which are former colonies, that have achieved statehood through self-determination).

Denying Palestine the right to invoke self-determination may, therefore, constitute a violation of a *jus cogens* norm.

III. PALESTINE'S STANDING TO BRING A CONTENTIOUS CASE BEFORE THE ICJ

If the international community recognizes Palestine as a State under international law, it could become, and then bring a case as, a UN Member State.⁸⁷ While UN membership is a possible avenue for Palestine to become a member to the ICJ Statute, the chances of Palestine receiving UN membership at this time are slim.⁸⁸ Thus, this route to ICJ litigation will not be discussed as thoroughly as the other avenues through which Palestine can litigate in the ICJ.

As a non-UN Member State, Palestine has three avenues to get a case before the ICJ. First, Palestine could join the ICJ Statute without becoming a UN Member State.⁸⁹ Second, Palestine could bring a proceeding before the ICJ pursuant to Article 35(2) of the ICJ Statute.⁹⁰ Third, a treaty may have a provision that gives the ICJ

87. UN Charter art. 93(1) (stating that “[a]ll members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice.”); *Id.* art. 4(1); ICJ Statute, *supra* note 9, art. 34(1).

88. 1 Konrad Ginther, *Article 4*, in *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 178 (Bruno Simma et al. eds., 2ed. 2002) (stating that to be a Member State to the UN, “five conditions must be fulfilled. . . : the applicant must be a (a) State and (b) peace-loving; it must (c) accept the obligations contained in the Charter and (d) be able to carry out those obligations; and finally (e) it must be willing to do so”); see UN Charter art. 4, para. 2 (“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.”). Arguably, the violence based out of Palestine will preclude them from being deemed “peace loving.” See Zanotti, *supra* note 38, at 11-13. Further, UN Charter Article 4(2) requires applicants to receive a recommendation by the Security Council, followed by a General Assembly vote, to gain membership. UN Charter art. 4(2). Palestine likely will be vetoed in any SC recommendation for statehood by the United States, which has a pro-Israel bias. Zanotti, *supra* note 38, at 4; *US Confirms It Will Veto Palestinian Statehood Bid*, *THE JERUSALEM POST*, Sept. 8, 2011, <http://www.jpost.com/DiplomacyAndPolitics/Article.aspx?id=237199>. The specific procedures and likelihood of Palestine receiving UN membership is beyond the scope of this paper.

89. UN Charter art 93, para. 2 (allowing a state that is not a UN member to become a party to the ICJ statute under certain conditions).

90. See ICJ Statute, *supra* note 9, art. 35, para. 2.

jurisdiction to settle disputes between State Parties to the treaty.⁹¹ Regardless of the option it chooses, Palestine must also establish the requisite mutual consent for ICJ jurisdiction for any contentious case.

A. Bringing a Contentious Case as a Non-UN Member State

1. Palestine's ability to join the ICJ Statute

A non-member UN State may become a party to the ICJ Statute, on conditions to be determined in each case by the GA, upon the recommendation of the SC.⁹² Five non-UN Members have joined the ICJ Statute since 1946.⁹³ The conditions in each case were identical: (1) acceptance of the provisions of the ICJ Statute; (2) acceptance of all the obligations of a UN member under Article 94 of the UN Charter; and (3) undertaking to contribute to the expenses of the ICJ as the GA sees fit.⁹⁴ Currently, every State that is party to the ICJ Statute is also a UN Member.⁹⁵ Each of the five non-UN Members that joined after 1946 eventually became Members of the UN.⁹⁶ The fact that all States that are members to the ICJ Statute are also all presently UN members should not lead one to consider UN Charter Article 93(2) as meaningless.⁹⁷ Joining the ICJ Statute would still serve a purpose to Palestine, even if UN membership is unattainable.⁹⁸

91. While this avenue can provide access to the ICJ, the dispute must come within the specific subject of the treaty. *See* ICJ Statute, *supra* note 9, art. 36, para. 1.

92. UN Charter art. 93, para 2. This is reflected in Article 35(1) of the ICJ Statute. ICJ Statute, *supra* note 9, art. 34, para. 1 (“The Court shall be open to the states parties to the present statute.”).

93. Karin Oellers-Frahm, *Article 93, in* THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 179, 183 (Andreas Zimmermann et al. eds., 2d ed. 2012) [hereinafter ICJ COMMENTARY ART. 93 UN CHARTER] (those countries, none of which were UN members at the time, are Japan on April 2, 1954, Liechtenstein on March 29, 1950, San Marino on February 18, 1954, Nauru on January 29, 1988, and Switzerland on December 11, 1946).

94. *Id.*; *see* UN Charter art. 93, para. 2; ICJ Statute, *supra* note 9, art. 35, para. 3.

95. ICJ COMMENTARY ART. 93; UN CHARTER, *supra* note 100, at 185.

96. *See id.*

97. *Id.*

98. *See id.*

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If Palestine were denied UN membership, joining the ICJ Statute would still allow Palestine to litigate in the ICJ.⁹⁹

a. How UN Charter Article 93 and ICJ Statute Article 35 would allow Palestine to bring a case before the ICJ

Under UN Charter Article 93 and ICJ Statute Article 35(1), Palestine could join the Statute of the ICJ without being a member to the UN.¹⁰⁰ A potential obstacle might be Palestine's inability to pay for the expenses of an ICJ proceeding. Further, access to the ICJ via this option is contingent on Palestine being a State.¹⁰¹ The pertinent phrase of UN Charter Article 93(2) is, "upon recommendation of the Security Council."¹⁰²

Palestine will struggle with two difficult hurdles if it tried to join the ICJ Statute: (1) its status as a non-State,¹⁰³ and (2) its ability to

99. See *id.*; ICJ Statute, *supra* note 9, art. 35. Ideally, Palestine would like to join the UN to enjoy other UN privileges besides the possibility of litigating in the ICJ, such as membership in the GA. See UN Charter 4 art. 9, para. 1 (entitling UN Member States are entitled to participation in the GA); see also Siegfried Magiera, *Article 9*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 445, 447 (Bruno Simma, et al. eds., 3ed. 2012) (noting that any new member may participate in the GA upon admission). However, this paper is focused on the right to litigate in the ICJ, and thus the other privileges rooted in UN membership will not be discussed further.

100. UN Charter Article 93 and ICJ Statute Article 35(1) work together allowing States that are not parties to the UN to become a State party to the ICJ Statute. Andreas Zimmerman, *Article 35*, in THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 606, 620-21 (Andreas Zimmermann et al. eds., 2ed. 2012) [hereinafter ICJ COMMENTARY ART. 35]; see UN Charter art. 93, para. 2; ICJ Statute, *supra* note 9, art. 35.

101. See ICJ Statute, *supra* note 9, art. 34, para. 1.

102. UN Charter art. 93, para. 2. In the past, the main debate in the SC was whether the applicant to the Statute was a State, not whether the applicant could fulfill the conditions of complying with ICJ judgments. 2 SHABTAI ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT 1920-2005, 599 (2006) [hereinafter LAW AND PRACTICE]. For example, Liechtenstein's application to join the ICJ Statute, "although ultimately approved, was principally opposed on the ground that Liechtenstein did not conduct its own foreign relations." *Id.* The Soviet Union (USSR) "opposed Japan's application [to the ICJ] because at the time [the USSR] did not maintain diplomatic relations with [Japan]." *Id.*

103. See *supra* Part II.

comply in good faith with ICJ judgments.¹⁰⁴ Questions would arise as to whether Palestine could, or would, comply with an ICJ judgment in good-faith, due to its inability to exert complete authority over the Palestinian territory.¹⁰⁵ Failure to comply in good faith with an ICJ judgment, however, would be self-defeating for Palestine because Palestine would lose international accountability, which is the exact goal that it is striving for. An additional concern is whether Palestine could pay for the proceedings.¹⁰⁶ There is little merit to this concern, however, given that Palestine's current GDP exceeds that of several UN Member States who can litigate in the ICJ.¹⁰⁷

b. The SC's Authority to Reject Palestine's Application to the ICJ Statute

Under UN Charter Article 27(2), “[d]ecisions of the Security Council on procedural matters shall be made by an affirmative vote of

104. UN Charter art. 94, para. 2.

105. UN Charter Article 94 requires States to comply in good faith with ICJ judgments. UN Charter art. 94, para. 2. An issue may arise with Palestine's compliance if they received an unfavorable judgment because of the difficulty of enforcing ICJ judgments. *See* UN Charter art. 94; *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31) (providing an example of the US not enforcing the ICJ's decision). The lack of government control would also affect Palestine's statehood status. *See* Montevideo Convention, *supra* note 23, art. 1(c); BROWNLIE, *supra* note 22, at 71.

106. In 2011 the “West Bank's” GDP was \$8.02 billion (USD). *The World Factbook: Middle East: West Bank: Economy*, The Central Intelligence Agency (CIA), available at <https://www.cia.gov/library/publications/the-world-factbook/geos/we.html> (last visited Oct. 22, 2013). The Gaza strip's GDP is calculated as part of the West Bank's. *See The World Factbook: Middle East: Gaza Strip: Economy*, CIA, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/gz.html> (last visited Oct. 22, 2013) (“see entry for West Bank.”).

107. The CIA Factbook lists the West Bank's GDP as 156 out of 229 entities in the world, ahead of UN member states such as Liechtenstein and Monaco. *The World Factbook: Country Comparison: GDP: Purchasing Power Parity*, CIA, available at <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2001rank.html?countryName=West%20Bank&countryCode=we®ionCode=mde&rank=155#we> (last visited Oct. 23, 2013).

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nine members.”¹⁰⁸ The issue of whether admission to the ICJ Statute is a *procedural matter* is a complex question.¹⁰⁹ If admission is a procedural matter, then an affirmative vote by nine member majority of the SC would allow Palestine to become a member of the ICJ Statute.¹¹⁰ However, if admission is not a *procedural matter*, then all permanent members of the SC must give concurring affirmative votes.¹¹¹

This distinction is crucial because the United States is a Permanent Member of the SC, and its vote is required if admission to the ICJ Statute is a *non-procedural matter*.¹¹² But if admission is a *procedural matter*, then a concurring United States vote is not required.¹¹³ A major problem for Palestine arises when the United States views Palestine's admission to the ICJ Statute as a *non-procedural matter*, while a majority of the SC viewed admission as a *procedural matter*.¹¹⁴ The issue becomes even more complex where,

108. UN Charter art. 27, para. 2. The UN SC has fifteen members. United Nations Security Council, *Current Members*, UNITED NATIONS, <http://www.un.org/en/sc/members/> (last visited Nov. 3, 2013).

109. Although there is no uniformly accepted definition of procedural matter, UN Charter Article 18(2) provides some clarity. 1 Stefan Brunner & Bruno Simma, *Article 27, THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 485 (Bruno Simma et al. eds., 2ed. 2002). It provides that important questions for the GA include: issues of international peace and security, admission of new members, and suspension of rights and privileges of members. UN Charter art. 18, para. 2. This list is not exhaustive, however. Andreas Zimmermann, *Article 27, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 871, 890 (Bruno Simma et al. eds., 3d ed. 2012) [hereinafter ICJ COMMENTARY ART. 27 UN CHARTER]. If important questions for the GA amount to more than “procedural matters,” for the SC, then an affirmative nine votes, without any vetoes by the permanent members of the SC, would suffice for Palestine to join the ICJ Statute. 1 Rüdiger Wolfrum, *Article 18, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 621, 625 (Bruno Simma et al. eds., 3d ed. 2012).

110. See 1 Andreas Zimmermann, *Article 27, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 871, 890 (Bruno Simma et al. eds., 3d ed. 2012) [hereinafter ICJ COMMENTARY ART. 27 UN CHARTER].

111. UN Charter art. 27, para. 2; ICJ COMMENTARY ART. 27 UN CHARTER, *supra* note 110.

112. See UN Charter art. 27, para. 2; *Current Members*, *supra* note 108.

113. See UN Charter art. 27, para. 2.

114. See 1 Bruno Simma et al., *Article 27, in The Charter of the United Nations: A Commentary* 491 (Bruno Simma et al. eds., 2d ed. 2002) (noting that a

against the will of a permanent member, a simple majority of the SC regards a matter as procedural. This would make Palestine's bid to join the ICJ Statute unlikely, as the United States would essentially wield veto power over Palestine's efforts.¹¹⁵

Furthermore, when the GA and SC allow an entity to join the ICJ under Article 93(2) of the UN Charter, they implicitly accept an entity as a State for the purposes of ICJ Statute Article 35(1).¹¹⁶ Therefore, if these principal organs of the UN¹¹⁷ decide that an entity is a State, that decision is binding on the ICJ, who could not dismiss a case for lack of jurisdiction.¹¹⁸ Thus, pursuant to UN Charter Article 93, and upon a recommendation by the SC, Palestine could access the ICJ by becoming a Member of the ICJ Statute without becoming a Member State to the UN.¹¹⁹ Such an action would likely solidify Palestine's standing as a State.

conflict such as this could be settled by an impartial third-party, and could be referred to the ICJ for an Advisory Opinion.).

115. See THE JERUSALEM POST, *supra* note 88.

116. ICJ COMMENTARY ART. 35, *supra* note 100, at 617; see UN Charter art. 93, para. 2; ICJ Statute, *supra* note 9, art 35, para. 1 ("The Court shall be open to all states parties to the present statute."); LAW AND PRACTICE, *supra* note 102, at 616-17. If Palestine joined the ICJ Statute, the SC and the GA implicitly would consider Palestine as a State, and Palestine's bid for UN membership would thus be strengthened. See ICJ Statute, *supra* note 9, art. 34, para. 1 (explaining that only States may come before the ICJ).

117. The GA and the SC are the most powerful organs in the UN. See UN Charter art. 7, para. 1; Andreas Paulus & Matthias Lippold, *Article 7*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 387, 391 (Bruno Simma, et al. eds., 3d ed. 2012).

118. ICJ COMMENTARY ART. 35, *supra* note 100, at 617; see LAW AND PRACTICE, *supra* note 102, at 616-17; see, e.g., Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro.), 1996 I.C.J. 595, 605 (July 11) (dismissing a case for lack of jurisdiction). Furthermore, the ICJ could not rule that Palestine is not a State because only states can appear before the ICJ. ICJ Statute, *supra* note 9, art 34, para. 1. This is a different scenario than allowing the ICJ to determine whether Palestine is a State under ICJ Statute Article 35(2). See *id.* art 35, para. 2.

119. This assumes that the GA voting patterns would be consistent with the UNESCO and Non-Member Observer State voting results. See G.A. Res. 67/19, *supra* note 60; *General Conference Admits Palestine as UNESCO Member*, UNESCOMPRESS (Oct. 31, 2011), http://www.unesco.org/new/en/media-services/single-view/news/general_conference_admits_palestine_as_unesco_member_state/.

2. *The Implications of ICJ Statute Article 35(2) on Palestine*

If Palestine is unable to join the UN or the ICJ Statute outright, it could still bring a contentious case before the ICJ under ICJ Statute Article 35(2),¹²⁰ which allows the SC to lay down special treaty provisions that prescribe conditions under which the ICJ shall be open to other states.¹²¹ Under S.C. Res. 9 (1946), the ICJ is open to non-member States of the UN or the ICJ Statute, which have previously deposited a declaration with the Registrar of the Court, and accepted jurisdiction of the ICJ, and obligations according to UN Charter Art. 94.¹²² If Palestine were to bring a case under ICJ Statute Art. 35(2), the issue of statehood may be less problematic than if Palestine were to try to join the ICJ Statute under UN Charter Art. 93.¹²³

a. *The Unique Jurisdictional Problems Under Art. 35 (2)*

ICJ Statute Article 35(2) presents the easiest path for Palestine to get before the ICJ. However, the jurisdictional conditions built into

120. See ICJ Statute, *supra* note 9, art. 35, para. 2. The ICJ is open to States that are neither a party to the ICJ Statute, nor UN members. Hermann Mosler & Karin Oellers-Frahm, *Article 93*, in *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 1171, 1173 (Bruno Simma et al. eds., 2d ed. 2002) [hereinafter UN COMMENTARY ART. 93 2ED].

121. ICJ Statute, *supra* note 9, art. 35, para. 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 . . .”) (emphasis added). Acting under the powers granted via ICJ Statute Article 35(2), the SC outlined conditions to access the ICJ by adopting S.C. Res. 9. ICJ COMMENTARY ART. 35, *supra* note 100, at 621; see S.C. Res. 9, *supra* note 18.

122. S.C. Res. 9, *supra* note 18, ¶ 1.

123. In contrast to UN Charter Article 93, the GA and SC have never made a prior determination on statehood when an entity brings a case under ICJ Statute Article 35(2). See *LAW & PRACTICE*, *supra* note 102, at 616-17 (distinguishing an ICJ Statute Art. 35(2) determination of statehood from a State joining the ICJ Statute outright where the GA and SC already determined that it is a State). Here, the ICJ could decide whether Palestine is a State under ICJ Statute article 35. Thus, even if the SC believed that Palestine did not qualify as a State in the international system, the ICJ would have the discretion to decide whether or not Palestine qualified as a State, pursuant to paragraph 5 of S.C. Res. 9 and Article 41 of the ICJ Rules of Court. ICJ COMMENTARY ART. 35, *supra* note 100, at 617; see S.C. Res. 9, *supra* note 18; Rules of Court 978, I.C.J. Acts & Docs. No. 6 art. 41; *LAW & PRACTICE*, *supra* note 102, at 616-17.

ICJ Article 35(2) vis-a-vis S.C. Res. 9 (1946), may nevertheless present insurmountable hurdles for Palestine to clear. Under ICJ Statute Article 36(2), parties to the ICJ Statute may recognize the court's jurisdiction in relation to another party as compulsory.¹²⁴ S.C. Res. 9 (1946) allows States pursuing ICJ access to make a similar declaration, with a caveat.¹²⁵ It provides that such acceptance may not, without explicit consent, be relied upon vis-à-vis UN member States, which have made a compulsory jurisdiction declaration under ICJ Statute 36(2).¹²⁶ Therefore, unlike States parties to the ICJ, who make declarations accepting compulsory jurisdiction under ICJ Statute Article 36(2), if Palestine brought a case under ICJ Article 35(2), those States accepting compulsory jurisdiction of the ICJ could decline to accept Palestine's declaration.¹²⁷

Because Palestine is not a party to the ICJ Statute, it may not know in advance, whether the ICJ would have jurisdiction over a dispute between it and another State brought under Article 35(2) in conjunction with S.C. Res. 9 (1946).¹²⁸ An opposing State that Palestine brings a claim against in this manner could reject ICJ jurisdiction, leaving Palestine with no recourse in the ICJ.

*b. Whether a Treaty Can Provide an Avenue to the ICJ via
Art. 35(2)*

Article 35(2) subjects the SC's power to determine conditions to admit third party states "to the special provisions contained in treaties in force"¹²⁹ The principle underlying ICJ Article 35(2) is that

124. ICJ Statute, *supra* note 9, art. 36, para. 2.

125. S.C. Res. 9, *supra* note 18, ¶ 2.

126. *Id.*

127. See ICJ COMMENTARY ART. 35, *supra* note 100, at 623-24. Israel terminated its compulsory jurisdiction declaration in 1985. See Declaration Recognizing as Compulsory Jurisdiction of the International Court of Justice, in Conformity with Article 36, Paragraph 2, of the Statute of the International Court of Justice, Oct. 3, 1956, 252 U.N.T.S. 301 (recognizing compulsory jurisdiction of the ICJ over Israel); Amendment to the Declaration Recognizing as Compulsory the Jurisdiction of the International Court of Justice Under Article 36, Paragraph 2, of the Statute of the Court, Feb. 28, 1984, 1349 U.N.T.S. 326 (terminating Israel's acceptance of the compulsory jurisdiction of the International Court of Justice).

128. ICJ COMMENTARY ART. 35, *supra* note 100, at 624.

129. ICJ Statute, *supra* note 9, art. 35, para. 2.

pre-existing jurisdictional bases, via a treaty provision, should not be overridden by a SC resolution.¹³⁰ The ICJ has held that ICJ Article 35(2) does not cover Article IX of the 1948 Genocide Convention, which provides compulsory jurisdiction of the ICJ because ICJ Article 35(2) relates only to treaties concluded prior to the Statute of the ICJ.¹³¹ Accordingly, only treaties entered into force before October 24, 1945 “may be considered as ‘treaties in force’ within the meaning of Art. 35(2).”¹³²

For purposes of Article 35(2), only treaties entered into force before the creation of the ICJ Statute enable a State that is neither a UN Member, nor a party to the ICJ Statute, access to the ICJ without making a declaration accepting compulsory jurisdiction pursuant to S.C. Res. 9 (1946).¹³³ Consequently, Palestine cannot circumvent the discretion of the SC, found in S.C. Res. 9 (1946), by exclusively relying on treaty provisions that provide for ICJ jurisdiction over a dispute.¹³⁴

B. Jurisdictional Obstacles in the ICJ

Once in front of the ICJ, procedural barriers, like jurisdiction, may act to prevent the merits of Palestine's case from being heard.¹³⁵ Finding a party that will consent to ICJ jurisdiction is Palestine's largest obstacle in adjudicating in the ICJ. Under all the scenarios discussed, the ICJ has jurisdiction over the other party to hear the merits of the case.¹³⁶ ICJ Article 36 gives the ICJ authority to

130. ICJ COMMENTARY ART. 35, *supra* note 100, at 625.

131. *Legality of Use of Force*, (Serb. & Montenegro v. Belg. and Nine Other States), 2004 I.C.J. 279, ¶¶ 113-14 (Dec. 15); *see* Convention on the Prevention and Punishment of the Crime of Genocide, art. IX, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

132. ICJ COMMENTARY ART. 35, *supra* note 100, at 628.

133. *Id.* at 628, 630.

134. Palestine was a party to several treaties before 1945, however, under Palestine Mandate article 12: “Britain was responsible for Palestine's foreign relations and treaty making authority.” The Palestine Mandate art. 12, July 24, 1922, 22 L.N.T.S. 354; JOHN QUIGLEY, *THE STATEHOOD OF PALESTINE: INTERNATIONAL LAW IN THE MIDDLE EAST CONFLICT* 53 (2010).

135. *See* ICJ Statute, *supra* note 9, art. 36.

136. *See id.* arts. 35-36.

adjudicate disputes between states,¹³⁷ which reinforces the importance of statehood because the ICJ may not legitimately adjudicate disputes with or among any non-state subjects of international law.¹³⁸

Additionally, Article 36 of the ICJ Statute encourages *mutual consent*,¹³⁹ which means that States cannot be compelled to accept ICJ jurisdiction.¹⁴⁰ Further, the UN Charter expressly states that parties to any dispute have the right to choose the form of settlement.¹⁴¹ Thus, Palestine must obtain the consent of the opposing State before proceedings are initiated in the ICJ.¹⁴²

ICJ Article 36 provides three methods for the ICJ to gain jurisdiction over states. First, via what is known as *Ad Hoc* jurisdiction,¹⁴³ the ICJ can enter into a *special agreement* with another State.¹⁴⁴ Second, the ICJ can be a party to a compromissory clause contained in a treaty.¹⁴⁵ Third, under ICJ Article 36(2), a State can submit to the compulsory jurisdiction of the ICJ via a unilateral declaration.¹⁴⁶ These latter two methods of ICJ gaining jurisdiction are referred to as the ICJ's compulsory jurisdiction.¹⁴⁷ Each option

137. See ICJ Statute, *supra* note 9, art. 36, paras. 1-2; Christian Tomuschat, *Article 36*, in THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 633, 641 (Andreas Zimmerman et al. eds., 2d ed. 2012) [hereinafter ICJ COMMENTARY ART. 36].

138. ICJ COMMENTARY ART. 36, *supra* note 137, at 641.

139. *Id.* at 647. The principle of mutual consent derives from UN Charter Art. 33(1). UN Charter art. 33, para. 1; ICJ COMMENTARY ART. 36, *supra* note 1137, at 647.

140. ICJ COMMENTARY ART. 36, *supra* note 137, at 647. If ICJ jurisdiction could be forced on States, the record of judgments actually complied with would be atrocious. *Id.* at 648.

141. UN Charter art. 33, para. 1.

142. However, the ICJ may have jurisdiction without a State's consent if that State has made a compulsory jurisdiction declaration under ICJ Statute 36(2). ICJ Statute, *supra* note, 9, art. 36, para. 2.

143. *Ad hoc* jurisdiction is essentially arbitration, where both parties consent to jurisdiction. MARK WESTON JANIS, INTERNATIONAL LAW 134 (6th ed. 2012).

144. *Id.* art. 36, para. 1.

145. See ICJ Statute, *supra* note 9, art. 36, para. 1; ICJ COMMENTARY ART. 36, *supra* note 137, at 665; see also Maritime Delimitation and Territorial Questions (Qatar v. Bahrain), 1995 I.C.J. 6, ¶ 31 (Feb. 15) (allowing Bahrain and Qatar to litigate in the ICJ because of a compromissory clause in a treaty).

146. ICJ Statute, *supra* note 9, art. 36, para. 2; see JANIS, *supra* note 138.

147. *Id.* para. 2; PRINCIPLES, *supra* note 26, at 726.

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involves an element of State consent, which can come at different stages of a dispute.¹⁴⁸ Palestine would need to satisfy one of these three prongs in order for the ICJ to hear the merits of its case.

1. *Ad hoc jurisdiction of ICJ Statute Article 36(1) in relation to Palestine*

ICJ Article 36(1) provides, “the jurisdiction of the Court comprises all cases which the parties refer to it.”¹⁴⁹ If the Parties choose this option, they enter into a special agreement, referred to as a *compromis*.¹⁵⁰ The *compromis* defines the issues the ICJ is to resolve, and gives the ICJ jurisdiction over the dispute,¹⁵¹ allowing the ICJ to “operate much like a public international arbitration tribunal.”¹⁵² When using this option, the States consent to ICJ jurisdiction *after* the dispute arises.¹⁵³ While many of the Court’s effective decisions have occurred in *compromis* cases, they rarely involve highly charged or politically important subject matter.¹⁵⁴

If Palestine gains access to the ICJ through statehood,¹⁵⁵ it could stipulate with another State to ICJ jurisdiction. But, given the politically charged nature of the disputes Palestine could potentially bring,¹⁵⁶ it is unlikely that a State, specifically Israel, would consent to ICJ jurisdiction through a special agreement.

148. See MARK WESTON JANIS & JOHN E. NOYES, INTERNATIONAL LAW: CASES AND COMMENTARY 325 (4th ed. 2011).

149. ICJ Statute, *supra* note 9, art. 36, para. 1. Thus, the parties to a “dispute can jointly come to the conclusion that it would be wisest solution to seek judicial settlement through the [ICJ]” via the language “all cases which the parties refer to it.” *Id.* (emphasis added); ICJ COMMENTARY ART. 36, *supra* note 137, at 660.

150. ICJ COMMENTARY ART. 36, *supra* note 137, at 660.

151. *Id.*; JANIS, *supra* note 162, at 134.

152. JANIS, *supra* note 143, at 134.

153. See *id.*

154. JANIS, *supra* note 143, at 135.

155. See UN Charter art. 93; ICJ Statute, *supra* note 9, art. 35, para. 2; *supra*, Part II.

156. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 163 (July 9) (listing a series of violations of international law for which Israel is responsible, and which Palestine would want to litigate in a contentious case setting).

2. *The Impact of Compulsory jurisdiction of ICJ Statue Article 36*

The ICJ could have compulsory jurisdiction over disputes between States. Compulsory jurisdiction derives from language in ICJ Statute Articles 36(1), and 36(2).¹⁵⁷ ICJ compulsory jurisdiction subjects parties to jurisdiction without their consent.¹⁵⁸

a. *Treaties and compulsory jurisdiction of ICJ Statute Article 36(1)*

First, ICJ Article 36(1) gives the ICJ compulsory jurisdiction via the text of the statute, “treaties or conventions in force.”¹⁵⁹ In particular, these treaties must have provisions that provide for the ICJ to settle any disputes that relate to the treaty.¹⁶⁰ Therefore, Palestine could access the ICJ if it became a State and a party to one of these treaties, and had a dispute with a State also party to that treaty, and that dispute concerned the substantive terms of the treaty.¹⁶¹

Approximately 300 bilateral or multilateral treaties contain such provisions.¹⁶² For example, if Palestine was to join the Genocide Convention, Article 9 of the Genocide Convention provides that “[d]isputes between the Contracting Parties relating to the interpretation, application or fulfillment of the present Convention . . . shall be submitted to the [ICJ] at the request of any of the parties to

157. *Legal Implications*, *supra* note 58, n.7; *see* ICJ Statute, *supra* note 6, art. 36, paras. 1-2.

158. JANIS, *supra* note 162, at 137-38.

159. *Legal Implications*, *supra* note 57, n.7; *see* ICJ Statute, *supra* note 9, art. 36, para. 1; ICJ COMMENTARY ART. 36, *supra* note 137, at 656-57.

160. ICJ Statute, *supra* note 9, art. 36, para. 1; *see* U.N. G.A. Rep. of the Int’l Court of Justice, Aug. 1, 2009-July 31, 2010, ¶ 8, U.N. Doc. A/65/4; GAOR, 65th Sess., Supp. No. 4 (2010) [hereinafter 2009-2010 ICJ Report].

161. *See* ICJ COMMENTARY ART. 36, *supra* note 137, at 670; *see also* Oil Platforms, Preliminary Objection, (Iran v. U.S.) 1996 I.C.J. 803 ¶¶ 34-43 (Dec. 12) (providing an example of the ICJ interpreting the substantive treaty provisions of the 1955 Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran).

162. 2009-2010 ICJ Report, *supra* note 160, ¶ 55; JANIS, *supra* note 162, at 140.

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the dispute.”¹⁶³ Palestine could become a party to the Genocide Convention if it received an invitation from the GA.¹⁶⁴

The dispute, however, must involve the application of that treaty's terms.¹⁶⁵ Even if Palestine joined the Genocide Convention and was either a UN Member, a party to the ICJ Statute, or fulfilled the conditions of S.C. Res. 9 (1946), any dispute that Palestine brings via Article 9 would have to be about something specifically contained in the Genocide Convention.¹⁶⁶ The ICJ has made it clear that disputes appearing before the court via a compromissory clause in a treaty must be about the specific application of that treaty and nothing else, unless it is stipulated to.¹⁶⁷ Palestine would need to allege that an act of Genocide occurred in its territory, or another State party's territory, for Palestine to successfully bring a claim under the Genocide Convention.¹⁶⁸

163. Genocide Convention, *supra* note 131, art. 9. This is possible, as Switzerland became a State party to the Genocide Convention nearly six years before becoming a member of the UN. Accession to Convention on the Prevention of the Crime of Genocide, Sept. 6, 2000, 2121 U.N.T.S. 282, *available at* <http://treaties.un.org/doc/Publication/UNTS/Volume%202121/v2121.pdf> (providing that Switzerland's accession to the Genocide Convention was effective on December 6, 2000); Press Release, United Nations, United Nations Member States, U.N. Press Release ORG/1469 (July 3, 2006), *available at* <http://www.un.org/News/Press/docs/2006/org1469.doc.htm> (listing Switzerland's date of joining the UN as Sept. 10, 2002) (noting that Switzerland acceded to the Genocide Convention on 7 Sept. 2000).

164. Genocide Convention, *supra* note 131, art. XI. If Palestine shows an interest in joining the Genocide Convention, and member states of the GA continue their pro-Palestine voting pattern, Palestine could plausibly become a party to the Genocide Convention as a “non-member State.” *Legal Implications, supra* note 57, n.7.

165. ICJ COMMENTARY ART. 36, *supra* note 137, at 670 (“The compromissory clauses contained in bilateral or multilateral treaties must always be seen in connection with the substantive portions of the treaty concerned . . .”).

166. ICJ Statute, *supra* note 9, art 36, para. 1.; *see* ICJ COMMENTARY ART. 36, *supra* note 137, at 670 .

167. *See* Legality of Use of Force (Yugoslavia v. Belg.), 1999 I.C.J. 124, ¶¶ 40-41 (June 2); ICJ COMMENTARY ART. 36, *supra* note 137, at 669-70.

168. *See* Legality of Use of Force, 1999 I.C.J. at ¶¶ 40-41. The ICJ held that under the Genocide Convention, Genocide is the killing of a group, and the mere threat or use of force against a State is not genocide under the convention. *Id.* at ¶¶ 39-40. ICJ COMMENTARY ART. 36, *supra* note 137, at 669. As a result, the court found that there was no jurisdiction to litigate this case under Art. 9 of the Genocide

The Genocide Convention is one of many treaties that Palestine could join, which contains compromissory clauses. Regardless of which treaty Palestine joins, the procedure Palestine would have to go through for the ICJ to have jurisdiction via a compromissory clause is the same. Additionally, many States attach reservations to compromissory clauses to limit the ability of a State to compel the State making the treaty reservation to appear before the ICJ.¹⁶⁹ This procedure does not allow the compromissory clause to apply to the State that attaches a reservation, and consequentially eliminates compulsory jurisdiction.¹⁷⁰

Moreover, the Vienna Convention on the Law of Treaties allows specialized agencies of the UN, such as UNESCO, to become parties to treaties.¹⁷¹ Thus, if UNESCO becomes a party to a treaty with an ICJ compromissory clause, and brings a claim, the ICJ could have jurisdiction over that claim.¹⁷² Theoretically, as a Member State to UNESCO, Palestine could bring a dispute to the ICJ that arises out of the treaty's terms. But the dispute would have to involve the terms of the treaty and UNESCO would have to be a party to the treaty.¹⁷³

convention, as there was no genocide by Yugoslavia under the treaty, and thus the matters at issue were not specifically provided for by the Genocide Convention. Legality of Use of Force case 1999 I.C.J. at ¶¶ 40-41.

169. *Legal Implications supra* note 57, n.7; *see, e.g.*, VCLT, *supra* note 82, art. 19. For a list of States that have made treaty reservations to Article 36(2) of the ICJ Statute, *see Declarations Recognizing as Compulsory the Jurisdiction of the International Court of Justice Under Article 36, Paragraph 2, of the Statute of the Court*, UN TREATY COLLECTION http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY& mtdsg_no=I-4&chapter=1&lang=en (last visited Oct. 25, 2013).

170. *See, e.g.*, VCLT, *supra* note 82, arts. 19-23.

171. VCLT, *supra* note 82, art. 81; U.N. LEGAL COUNSEL, FINAL CLAUSES OF MULTILATERAL TREATIES HANDBOOK, at 15, U.N. Sales No. E.04.V.3 (2008) [hereinafter UN Treaties Handbook] (describing the Vienna Formula, which allows international agencies and organizations to join treaties, in addition to states).

172. *See* UN Treaties Handbook, *supra* note 171; *see, e.g.*, United Nations Framework Convention on Climate Change, art. 20. May 9, 1992, 1771 U.N.T.S. 107; *see also* Agreement For Facilitating the International Circulation of Visual and Auditory Materials of an Educational, Scientific and Cultural Character art. XV, July 15, 1949, 197 U.N.T.S. 3 (providing that the treaty is open for signature to specialized agencies such as UNESCO); *id.* art. IX (containing the treaty's compromissory clause).

173. To see a list a UNESCO related treaties and conventions visit: *Conventions Legal Instruments*, UNESCO, <http://portal.unesco.org/en/ev.php->

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Only then could Palestine, via UNESCO, bring a claim against other States that are party to the treaty.¹⁷⁴

b. The Effect of ICJ Statute Article 36(2) Compulsory Jurisdiction Declaration on Palestine

The ICJ also has compulsory jurisdiction over States through the ICJ Statute, Article 36(2), which is an optional, compulsory jurisdiction provision.¹⁷⁵ If two States make 36(2) declarations, then if either State wants to bring an action against the other in the ICJ, the responding State is compelled to accept ICJ jurisdiction. This is contrasted to ICJ Article 36(1) where consent from each State party is required.¹⁷⁶ The notion of ICJ compulsory jurisdiction is analogous to the American court system where parties are generally compelled to come before the court regardless if the party consents to an action or not.¹⁷⁷ Thus, if Palestine became a Member to the UN or the ICJ Statute, it could issue a compulsory jurisdiction declaration.¹⁷⁸ But all parties to a dispute must accept the ICJ's compulsory jurisdiction in order to bring a case under Article 36(2).¹⁷⁹ The effect of Article 36(2) is similar to that of a compromissory clause.¹⁸⁰ The difference

URL_ID=12025&URL_DO=DO_TOPIC&URL_SECTION=-471.html (last visited Oct. 25, 2013).

174. This theory is contingent on Palestine being a State because only States can appear before the ICJ, and UNESCO, which is not a State, cannot bring a claim before the ICJ. ICJ Statute, *supra* note 9, art. 34, para. 1; see JANIS, *supra* note 143, at 139.

175. ICJ Statute, *supra* note 9, art. 36, para. 2 (“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 other States accepting the same obligation, the jurisdiction of the Court . . .”) (emphasis added).

176. See ICJ Statute, *supra* note 9, art. 36, para. 1.

177. WILLIAM W. SCHWARZER, ET AL., PRACTICE GUIDE: FEDERAL CIVIL PROCEDURE BEFORE TRIAL ¶ 3:11 (Nat. ed 2013) (“‘Personal jurisdiction’ refers to the court’s power to render a judgment that either commands defendant’s personal obedience or imposes obligations on the defendant that will be enforced by other courts.”) (citing *Burnham v. Superior Ct.*, 495 U.S. 604, 609-10 (1990)).

178. See UN Charter art. 93, paras. 1, 2; ICJ Statute, *supra* note 9, art. 36, para. 2.

179. JANIS, *supra* note 143, at 139.

180. PRINCIPLES, *supra* note 26, at 726-27; see VCLT, *supra* note 82, art. 66 (providing a compromissory clause that allows parties to submit disputes to the ICJ);

is the subject matter of the compulsory jurisdiction contained in Article 36(2). Under Article 36(2) the ICJ has compulsory jurisdiction over:

[A]ll legal disputes concerning: a) the interpretation of a treaty; b) any question of international law; c) the existence of any fact which, if established, would constitute a breach of an international obligation; [and] d) the nature or extent of the reparation to be made for the breach of the international obligation.¹⁸¹

The scope of Article 36(2) compulsory jurisdiction can thus be seen as much broader compared with a compromissory clause contained in a single treaty. This could benefit Palestine because it allows any subject matter relating to any dispute of international law to be adjudicated in the ICJ, rather than only the subject matter of a single treaty. Currently, the compulsory effect of ICJ Article 36(2) is ineffective because of the numerous reservations the majority of States attach to 36(2) declarations.¹⁸² Thus, compulsory jurisdiction of the ICJ over a case involving Palestine is highly unlikely, unless the case fits nicely into another State's 36(2) specifically tailored declaration and accompanying reservation. The number of reservations to ICJ Article 36(2) demonstrates States' reluctance to be exposed to liability in the ICJ.

Genocide Convention, *supra* note 131, art. IX (providing a compromissory clause that allows parties to submit a dispute to the ICJ regarding the interpretation or application of the Genocide Convention).

181. ICJ Statute, *supra* note 9, art. 36, para. 2.

182. To date, there are sixty-seven States that have made ICJ Article 36(2) declarations, but most declarations carry with them a reservation. ICJ COMMENTARY ART. 36, *supra* note 137, at 676-77. These reservations usually limit the applicability of Article 36(2) to non-domestic disputes, and certain territorial disputes. JANIS, *supra* note 143, at 139.; *see* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.) 1986 I.C.J. 392, ¶¶ 1, 45-46, 172-75, 179 (June 27) (providing an example of the United States withdrawing their compulsory jurisdiction under ICJ Statute article 36(2)); ICJ COMMENTARY ART. 36, *supra* note 137, at 679 (describing the Nicaragua case in further detail); *see also* *Declarations Recognizing as Compulsory the Jurisdiction of the International Court of Justice under Article 36, Paragraph 2, of the Statute of the Court*, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=I-4&chapter=1&lang=en (providing an example of every State that has made a reservation to ICJ Statute article 36(2) declarations) (last visited Nov. 9, 2013).

c. *The Nexus Between S.C. Res. 9 (1946) and ICJ Statute Article 36(2)*

As discussed in section III.A.2, Palestine can access the ICJ by complying with ICJ Statute, Article 35(2), and S.C. Res. 9 (1946).¹⁸³ Given that Palestine is neither a current member of the UN, nor a party to the ICJ Statute, this is Palestine's best option to gain access to the ICJ.

One of the benefits of an Article 36(2) declaration is that it does not require another State that has also made an Article 36(2) declaration to consent to the ICJ's jurisdiction.¹⁸⁴ S.C. Res. 9 (1946) allows States that are pursuing access to the ICJ via S.C. Res. 9 (1946) such as Palestine to make the equivalent of an Article 36(2) declaration.¹⁸⁵ Such a declaration, however, is not effective against a State that has made an Article 36(2) declaration and is *also* a party to the ICJ Statute.¹⁸⁶ By making a declaration, a State has already consented to compulsory jurisdiction and is required to appear before the ICJ. However, if Palestine, made such a declaration under S.C. Res. 9 (1946), it would not reap the same benefit as an ICJ Statute Member State that makes a declaration under Article 36(2) because it is not a party to the ICJ Statute, and thus the Member State is not compelled to accept jurisdiction.¹⁸⁷ Therefore, according to S.C. Res.

183. See *supra* part Part III.A.2.

184. See ICJ Statute, *supra* note 9, art. 36, para. 2.

185. S.C. Res. 9, *supra* note 18, para. 2 ("A State . . . may, in accordance with Article 36, paragraph 2, of the Statute, recognize as compulsory, *ipso facto* and without special agreement, the jurisdiction of the Court . . .").

186. A State can make a general declaration in accordance with ICJ Article 36(2), "however, . . . such acceptance may not, without explicit agreement, be relied upon vis-à-vis States parties to the [ICJ] Statute which have made the declaration in conformity with Article 36, paragraph 2, who are parties to the ICJ Statute." *Id.*

187. *Charter of the United Nations and Statute of the International Court of Justice*, UNITED NATIONS TREATY COLLECTION, <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&msgid=I-3&chapter=1&lang=en> (last visited Nov. 6, 2013) (noting the discrepancy between compulsory jurisdiction under S.C. Res. 9, and traditional compulsory jurisdiction under article 36(2) of the ICJ statute). Interestingly, if Palestine made such a declaration, other States would not need Palestine's consent in order for the ICJ to have jurisdiction. See S.C. Res. 9, *supra* note 18, ¶ 2. The language in S.C. Res. 9 creates a one-way street of acceptance, favoring those States who are already UN members, and or parties to the ICJ Statute. *Id.*

9 (1946), any State that has made an ICJ Article 36(2) declaration must consent to appear before a proceeding involving Palestine, even though that State has already made an Article 36(2) declaration.¹⁸⁸

IV. THE LEGAL IMPLICATIONS INVOLVING AN ICJ ADVISORY OPINION

Palestine's ability to bring a contentious case before the ICJ seems bleak. But the ICJ may still offer Palestine some recourse because of its ability to issue advisory opinions.¹⁸⁹ UN Charter Article 96(a) allows the ICJ to "give an advisory opinion on any legal question" if the GA or SC requests one.¹⁹⁰

A. The Procedural Aspects of an Advisory Opinion

The procedural aspects regarding Palestine's chances of receiving an advisory opinion from the ICJ are important. The ICJ has held that the GA can request an advisory opinion concerning international peace and security when the SC has failed to address the matter.¹⁹¹ Given Palestine's status as a Non-Member State observer, and the broader international issues concerning Palestine, the GA can be a competent organ to ask for an advisory opinion.

1. The competence of UNESCO requesting an advisory opinion

The ICJ can decline to issue an advisory opinion if the scope of the requested advisory opinion does not relate to the activities of the requesting UN specialized agency.¹⁹² Thus UNESCO (a specialized

188. See S.C. Res. 9, *supra* note 18, ¶ 2.

189. See UN Charter art. 96, para. 1; ICJ Statute, *supra* note 9, art. 65, para. 1.

190. UN Charter art. 96, para. 1. ICJ Statute, Article 65(1) allows the ICJ to "give an advisory opinion on any legal question at the request of whatever body may be authorized or in accordance with the Charter of the United Nations to make such a request." ICJ Statute, *supra* note 9, art. 65, para 1.

191. Jochen Frowein & Karin Oellers-Frahm, *Article 65, in THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY* 1605, 1613 (Andreas Zimmermann et al. eds., 2d ed. 2012) [hereinafter ICJ COMMENTARY ART. 65] (citing Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, paras. 18-23 (July 9)).

192. UN Charter art. 96, para. 2 ("[O]rgans of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal question arising

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UN agency) can request an advisory opinion concerning Palestine, if the issue arises within the scope of UNESCO's activities. One can glean the scope of UNESCO's activities from its Constitution:

The purpose of the Organization is to contribute to peace and security by promoting collaboration among the nations through *education, science and culture* in order to further *universal respect for justice, for the rule of law and for the human rights and fundamental freedoms which are affirmed for the peoples of the world, without distinction of race, sex, language or religion, by the Charter of the United Nations.*¹⁹³

Strictly construed, UNESCO's activities involve education, science, and culture,¹⁹⁴ which are the means that UNESCO will use to accomplish its goals. Presumably this would fall under the guise of "activities" in Article 96 of the UN Charter, empowering the ICJ to issue an advisory opinion.¹⁹⁵

Broadly construed, UNESCO's activities also involve the "universal respect for justice, for the rule of law and for . . . human rights and fundamental freedoms . . ."¹⁹⁶ Under the narrow approach, it seems that Palestine is using their UNESCO membership to advance claims of sovereignty over important historical and cultural sites, such as the Church of the Nativity in Bethlehem.¹⁹⁷ Because the

within the scope of their activities.") (emphasis added). For example, the World Health Organization (WHO) "repeatedly requested the ICJ to issue an advisory opinion concerning the use of nuclear weapons," but the ICJ declined because the request fell beyond the scope of WHO's activities. ICJ COMMENTARY ART. 65, *supra* note 191, at 1617 (citing Legality of the Use of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 I.C.J. 226 ¶¶ 14, 22 (July 8)). The ICJ reasoned that the use of nuclear weapons fell outside the scope of the WHO activities, and therefore the ICJ did not have the authority to issue an advisory opinion. Use of Nuclear Weapons 1996 I.C.J. ¶ 22; *see* UN Charter art. 96, ¶ 2; ICJ Statute *supra* note 9, art. 65, ¶ 1.

193. UNESCO Constitution, *supra* note 54, art. 1, para. 1 (emphasis added).

194. *Id.*

195. *See* UN Charter art. 96, para. 2.

196. UNESCO Constitution, *supra* note 54, art. 1, para. 1.

197. Zanotti, *supra* note 38, at 10; *see Church of the Nativity and the Pilgrimage Route in Bethlehem, Palestine, Inscribed on UNESCO World Heritage List Along with Sites from Israel, Palau, Indonesia, and Morocco*, UNESCO (June 29, 2012), [hereinafter *UNESCO Names Heritage Site*] <http://whc.unesco.org/en/news/896>.

Church of the Nativity is a cultural site for Palestine, a dispute concerning the site may fall under UNESCO's *activities*, as required by UN Charter Article 96(2).¹⁹⁸ Under the broader approach, presumably, the issue of "self-determination" would fall under the activities of either universal respect for justice, human rights, or fundamental freedoms, in the UNESCO constitution.¹⁹⁹ Thus, the ICJ may determine that Palestine is able to receive an advisory opinion on its statehood because statehood relates to self-determination, and the right to self-determination is an activity of UNESCO.²⁰⁰

2. *The benefit of non-consensual advisory opinions*

Unlike a contentious case, the ICJ does not need to receive the consent of States in order to issue an advisory opinion.²⁰¹ This is crucial regarding Palestine because it is unlikely that a State would consent to ICJ jurisdiction in a contentious case.²⁰² Because an advisory opinion does not have any binding force, no State can prevent the ICJ from issuing one.²⁰³ Consequently, the ICJ's opinion is not given to the States, but rather to the UN organ, which requested it.²⁰⁴ If the request came from the GA, implicitly a majority of Member States gave their consent because States make up the GA.²⁰⁵ Given the recent voting patterns of the GA involving Palestine, it is

198. See UN Charter art. 96, para. 2.

199. UNESCO Constitution, *supra* note 54, art. 1, ¶ 1.

200. However, given the ICJ's narrow holding in the WHO case, the issue in a UNESCO request would likely have to apply to *education, science, or culture*. See Legality of Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 I.C.J. 66, ¶ 22 (July 8) (finding that questions surrounding the use of nuclear weapons were beyond the activities of the WHO).

201. ICJ COMMENTARY ART. 65, *supra* note 191, at 1616-17.

202. See *supra* Part. III.B.

203. ICJ COMMENTARY ART. 65, *supra* note 191, at 1616.

204. *Id.* at 1621. However, in its advisory jurisprudence, the Court noted that a lack of consent might be a factor regarding the judicial weight given to an advisory opinion. *Id.* at 1617.

205. See UN Charter art. 4, para. 1; *id.* art. 9, para. 1; *id.* art. 10; *id.* art. 11, para. 2; *id.* 18, para. 3; see also Status of Eastern Carelia, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 5, at 7 (July 23) (providing an example of how states, here the States comprising the League of Nations, approves of the subject matter in an advisory opinion).

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likely that the GA would vote favorably concerning the issuance of an advisory opinion involving Palestine.²⁰⁶

The word "may" in ICJ Article 65(1) of the ICJ Statute gives the ICJ discretion to decline a request,²⁰⁷ but the ICJ has noted that it should only refuse to give an advisory opinion for compelling reasons.²⁰⁸ To date, however, the ICJ, using its discretionary authority to issue an advisory opinion, has never declined to do so.²⁰⁹ In fact, the ICJ issued an advisory opinion regarding Palestine in *The Wall Opinion* in 2004.²¹⁰

B. The legal effect of an advisory opinion on Palestine

While an advisory opinion is not binding, ICJ opinions may still have some legal effect,²¹¹ due to the GA's practice of turning advisory opinions into GA resolutions.²¹² The resolutions have the effect of

206. However, the subject matter of the question posed by the GA for the ICJ, may affect the voting patterns of the GA member states. Just because GA member states voted in favor of Palestinian statehood does not necessarily mean that the GA would approve of any question sent to the ICJ for an advisory opinion. Thus, the subject matter of the request would probably impact whether the GA would approve of such a request.

207. ICJ Statute, *supra* note 9, art. 65, para. 1; ICJ COMMENTARY ART. 65, *supra* note 191, at 1617.

208. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403, 416, ¶ 30 (July 22); ICJ COMMENTARY ART. 65, *supra* note 191, at 1617. Note this refusal is discretionary, versus a non-discretionary refusal that does not meet the standards of ICJ Article 65(1). ICJ COMMENTARY ART. 65, *supra* note 191, at 1617. When the ICJ refused to issue an advisory opinion regarding the WHO concerns over nuclear weapons, this refusal was not a discretionary refusal; it was based on the scope of the agency's activities. *Id.*; see *Legality of Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, 1996 I.C.J. 66, ¶ 22 (July 8) (refusing to address the concerns of the WHO because issues regarding nuclear weapons were deemed outside the WHO's activities).

209. ICJ COMMENTARY ART. 65, *supra* note 191, at 1617.

210. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, ¶ 163 (July 9) (holding that the wall separating Palestinian from Israeli territory should be dismantled); JANIS, *supra* note 143, at 153-54.

211. See 3 SHABTAI ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT 1920-2005, 1698-1700* (2006) [hereinafter ROSENNE vol. 3].

212. ICJ COMMENTARY ART. 65, *supra* note 191, at 1621.

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creating *soft law*,²¹³ interpreting the UN Charter, or demonstrating that the legal principles referred to in the resolutions are evidence of customary international law.²¹⁴ In fact, the GA adopted portions of the *Wall Opinion* in a resolution.²¹⁵ The *Wall Opinion* may be a poor example of the efficacy of an advisory opinion, as it had a minimal remedial impact on the Middle East's complex politics.²¹⁶ But an advisory opinion stating that the Church of the Nativity in Bethlehem is Palestinian sovereign territory may be influential regarding Palestinian statehood and UN membership.²¹⁷ One can only speculate on the efficacy of another advisory opinion involving Palestine, which will primarily be determined by the substance of the request.²¹⁸

213. Shaw, *supra* note 27, at 117-19 (noting that instruments or documents that contain non-binding provisions are defined as soft law, which is still important within the general framework of international legal development).

214. See BROWNLIE, *supra* note 22, at 15; JANIS, *supra* note 143, at 154.

215. G.A. Res. ES-10/15, U.N. Doc. A/RES/ES-10/15 (Aug. 2, 2004).

216. JANIS, *supra* note 143, at 153-54. However, the opinion held that all states are under an obligation to recognize the illegal situation resulting from the construction of a wall; and all parties to the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War are also under an obligation to ensure compliance of Israel. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 163 (July 9).

217. See UNESCO Names Heritage Site, *supra* note 197.

218. Advisory opinions are useful in developing international law, despite their limited effect. See ICJ COMMENTARY ART. 65, *supra* note 191, at 1628-29. In practice, however, states have treated the authority of the Court's advisory opinions in much the same fashion as they have accepted (or not) the Court's authority to settle contentious cases." JANIS, *supra* note 143, at 154. In the South West Africa Advisory Opinion, States respected the ICJ Advisory Opinion even though it was not binding; states refrained from trading with South Africa due to its illegal occupation of Namibia. ROSENNE vol. 3, *supra* note 211, AT 1700. For the actual ICJ opinion, see Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, Advisory Opinion, 1970 I.C.J. 78 ¶¶ 117-19 (June 21) (describing the obligations on states to refrain from trading with South Africa). Article 59 of the ICJ Statute provides that judgments in contentious cases are only binding on the parties before the ICJ in that particular proceeding. ICJ Statute, *supra* note 9, art. 59. There is no *stare decisis* jurisprudence in the ICJ. See *id.* Thus, advisory opinions have the same legal effect on States that a judgment in a contentious case has, when States are not parties to that particular contentious case. See *id.* Although, as discussed in the next section, an important benefit of advisory opinions

C. Advisory opinion developing international law regarding Palestine

Advisory opinions have had a significant impact on the development of international law.²¹⁹ Article 38(1)(d) of the ICJ Statute allows the ICJ to use judicial decisions to decide disputes, "subject to the provisions of Article 59."²²⁰ Therefore, advisory opinions and judgments in contentious cases both demonstrate the status of international law on a particular issue, and are useful towards the development of that issue in international law.

If UNESCO requested an advisory opinion concerning the sovereignty of Bethlehem, which inextricably would involve the question of statehood, then Palestine's ability to join the UN or the ICJ Statute may be improved. While such an opinion would not be binding, an ICJ pronouncement on Palestine would give guidance to the international community. While the process of *developing* international law may not appear to be an expedient solution to the Palestinian people or supporters regarding Palestinian statehood, an advisory opinion would serve to develop the law concerning Palestinian statehood, and perhaps provide guidance to the GA on the issue.

V. CONCLUSION

Palestine's access to the ICJ greatly hinges on the SC's discretion. All three avenues that Palestine can take to bring a contentious case to the ICJ involve the SC. ICJ Statute Article 35(2) is the most likely path for Palestine to reach the ICJ because it involves only one dispute, and therefore the SC may open the ICJ to Palestine depending on the subject matter of the proceeding. Article 35(2) does not implicate UN membership or allow Palestine to bring any dispute before the ICJ.²²¹ But again, the other State Palestine wishes to bring

is the effect that advisory opinions have on the development of international law. See *infra* Part III.C.

219. ICJ COMMENTARY ART. 65, *supra* note 191, at 1622.

220. ICJ Statute, *supra* note 9, art. 38, para. 1 § d.

221. See U.N. Charter, art 35, para. 2.

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the dispute against must consent to ICJ jurisdiction.²²² Thus, even if the SC approved Palestine's Article 35(2) bid, the opposing State may choose to reject ICJ jurisdiction, and Palestine would then have no judicial recourse.

If Palestine did appear before the ICJ, Palestine would have to be a State, which would strengthen the argument that Palestine should also be a UN Member State.²²³ This likely consequence could, however, discourage the SC from granting an Article 35(2) bid because of the causal chain leading to statehood, and subsequently increased pressure for UN membership, which may result.

Because Palestine's ability to bring a contentious case is limited, the efficacy of advisory opinions involving Palestine becomes the central issue with respect to Palestine's involvement with the ICJ. The ICJ has demonstrated that it is willing to address an advisory request dealing with Palestine.²²⁴ But, what will be the practical outcome of such an opinion? If the international community, and more importantly the SC, is not willing to address violations of international law described by the ICJ, what effect will another advisory opinion actually have?

The United States, by having permanent veto power in the SC, plays an essential role in formal enforcement of ICJ judgments and advisory opinions.²²⁵ If a world leader is not complying with ICJ decisions, or addressing violations of international law, then the UN and the world should reconsider the ICJ's effectiveness. Do the SC and the United States judicial settlements of international disputes remain aspirational goals? Or do they want to empower the ICJ to settle more disputes effectively? If effective dispute resolution is the

222. S.C. Res. 9, *supra* note 18, para. 2; *see* ICJ Statute, *supra* note 9, art. 35, para. 2.

223. If the SC were to grant Palestine access to the ICJ under Article 35(2), such approval could strengthen Palestine's bid for UN membership, because only States may appear before the ICJ. *See* ICJ Statute, *supra* note 9, art. 34.

224. *See* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9).

225. *See* UN Charter art. 27, para. 2. The United States has already jeopardized the efficacy of the ICJ, by its recent non-compliance with the ICJ *Avena* judgment. *See* *Medellin v. Texas*, 552 U.S. 491, 529 (2008) (holding that the United States did not have to enforce an ICJ judgment domestically); *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31).

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goal, then the international community should allow Palestine access to the ICJ, and comply with ICJ judgments and advisory opinions. If effective dispute resolution is not the goal, then it begs the question, are ICJ decisions merely “the mon[e]y of fools[?]”²²⁶

*Charles F. Whitman**

226. THOMAS HOBBS, LEVIATHAN 29 (Richard Tuck, ed. 1651). ICJ decisions can still contribute to the corpus of international law, elaborated sometimes in other forums, including national ones, even if, ICJ decisions are not fully enforced.

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