

AMNESTY INTERNATIONAL

Q&A

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The Palestinian bid for UN membership and statehood recognition

As a human rights organization, Amnesty International takes no position on the question of Palestinian statehood, which is a political issue outside our mission. However, the Palestinian request for full UN membership has initiated a process which will have important implications for human rights concerns in the Occupied Palestinian Territories (OPT) regardless of its eventual outcome at the UN. This document outlines the key human rights implications of the Palestinian bid for UN membership and international recognition of a Palestinian state.

BACKGROUND ON THE PALESTINIAN STATEHOOD BID

The leadership of the Palestinian Authority (PA) and the Palestine Liberation Organization (PLO) have embarked on a major diplomatic effort to secure wider recognition of a Palestinian state and an upgraded status at the UN. According to the PA and the PLO, the initiative is about recognition rather than declaring independence, as the Palestine National Council already issued a Declaration of Independence in November 1988. Currently, Palestine has the status of an observer entity at the UN General Assembly, where it is represented by the PLO via the Permanent Observer Mission of Palestine. Meanwhile, more than 120 states have recognized Palestine as a state, many maintain diplomatic relations with it, and the PA and PLO leadership have been actively working for additional states to recognize Palestine for the past year.

Palestinian President Mahmoud Abbas submitted an application for full UN membership to UN Secretary-General Ban Ki-moon on 23 September 2011.¹ The Secretary-General has presented the application to the UN Security Council, and it is currently being considered by the Council Committee on Admission of New Members, which includes all 15 Council members. In order for the application to be considered by the General Assembly, where a vote on the admission of Palestine as a new member state would need to be approved by a two-thirds majority, at least nine of the 15 Council members need to recommend admission, with none of the five permanent veto-holding members opposing it. The US administration opposes any upgrade in Palestine's status at the UN and has stated that it will exercise its veto power at the Security Council if the matter comes to a vote. However, it is not clear that the Palestinian application has the support of nine Council members, and the issue could remain within the Committee, which generally operates by consensus and has no effective time limit on its considerations.² As Israel and the USA continue to lobby Security Council members not to support the application, while the Quartet and EU representatives push for the resumption of Israeli-Palestinian negotiations, a speedy decision is unlikely.

Previously, Palestinian representatives also announced their intention to bring a resolution to the General Assembly which would reportedly reaffirm previous UN resolutions, invite UN member states which have not already recognized Palestine bilaterally to do so, and support Palestine's application for UN membership and its admission to international organizations. However, the

most recent announcements of President Mahmoud Abbas and other senior Palestinian officials indicate that the PA and PLO leadership have decided to wait for the Security Council to consider the request for full membership before approaching the General Assembly.

If and when the General Assembly does consider a resolution on the issue, one possibility would be for it to recommend upgrading Palestine to a non-member observer state, the same status currently held by the Holy See and previously by states such as Switzerland, Austria, Finland, Italy, and Japan. This would not require approval by the Security Council, only a simple majority at the General Assembly, but the rights and privileges of this status are not defined, so the practical implications of Palestine becoming a non-member observer state are unclear. In fact, since the PLO obtained observer status in 1974, the General Assembly has progressively increased Palestine's rights of participation to the point where its privileges are already almost identical to those of a non-member observer state.³

The PA/PLO bid for recognition of Palestinian statehood is an initiative of the Fatah movement, and consultations with other Palestinian political factions have been limited. The initiative has been endorsed by several of the secular Palestinian political parties represented in the PLO, but not by the Hamas party or the Hamas de facto administration in the Gaza Strip. No formal public consultations, referendum, or vote have been held on the issue within the Occupied Palestinian Territories (OPT), among Palestinian citizens of Israel, or among Palestinians living in the Diaspora.

QUESTIONS AND ANSWERS

What is Amnesty International's position on the PA/PLO bid for recognition of Palestinian statehood and UN membership?

Amnesty International does not take a position on the resolution of the Israeli-Palestinian conflict, the question of whether Palestine is a state or what its borders should be, or on the current PA/PLO bid for recognition of Palestinian statehood and UN membership. As a human rights organization, our concern is that any resolution, initiative or agreement fully respects the human rights of Palestinians and Israelis, including access to justice, truth, and reparations.

Will the bid for recognition of Palestinian statehood affect the legal standards applicable in the OPT, or Israel's obligations as the occupying power?

International humanitarian law, in particular the Fourth Geneva Convention and the Hague Regulations, apply to any situation of belligerent occupation, regardless of whether or not the territory in question is recognized as a state. The key question is whether a foreign power exercises "effective control" and governance over the local population. Neither recognition of Palestine by any number of states, nor any resolution by the UN Security Council or General Assembly, will change the effective control which Israel maintains over the Palestinian population in the West Bank, including East Jerusalem, and the Gaza Strip, which together comprise the OPT.

In the West Bank, Israel maintains full civil and military control over the air space, border crossings, and 60 per cent of the land area (designated "Area C" under the Oslo Accords). Israeli military courts have ruled that the entire territory, including the limited areas designated as "Area A" under the Oslo Accords, remain under occupation. In Gaza, Israel maintains direct control over the air space, territorial waters, all but one of Gaza's land crossings, and the "buffer zone" inside the Gaza Strip. Israel controls the passage of people and goods into and out of both parts of the OPT, which are considered as one territory under the Oslo Accords and international humanitarian law. Furthermore, Israel controls the Palestinian population registry and has refused to update it or process any requests for family unification since 2000, which means that tens of thousands of Palestinians in the West Bank and Gaza Strip are considered illegal residents by the Israeli authorities and live in constant fear of deportation.

For all of these reasons, Israel remains the occupying power in both the West Bank, including East Jerusalem, and the Gaza Strip. Its obligations as an occupying power, including its responsibility for the welfare of the Palestinian population and the protection of civilians, are unchanged by any recognition of Palestine or upgrade in its status at the UN. Israel's actions in the OPT will also continue to be subject to its obligations under the international human rights treaties it has ratified, as has been repeatedly affirmed by the treaty-monitoring bodies, as well as customary rules of international human rights law. Treaties ratified by Israel include the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women, and the Convention on the Rights of the Child.

As explained below, the statehood bid could also affect the legal standards applicable to the PA.

Will the PA/PLO statehood bid allow for Palestinian ratification of international human rights conventions and treaties, including the Rome Statute of the International Criminal Court (ICC)?

State status requirements to become a party to human rights conventions and treaties vary from treaty to treaty. Some treaties allow all states to become a party, as for instance the Rome Statute of the ICC. Others require full UN membership, an invitation from the UN General Assembly or being a party to the Statute of the International Court of Justice. The ICCPR, ICESCR, and the International Convention on the Elimination of All Forms of Racial Discrimination do not require full UN membership as a condition for ratification, as they are also open to any state invited to become a party by the General Assembly. This means that a General Assembly resolution, even if it does not upgrade Palestine's status to that of non-member observer state, could allow it to sign and ratify these treaties. This would formalize the PA's human rights obligations and subject it to monitoring and regular review by the relevant treaty bodies. As the government of a state, the PA would also be bound by customary international human rights law even if it did not ratify human rights treaties.

The Rome Statute is open to accession by all states, and UN membership is not a requirement. One state that is not a General Assembly member, the Cook Islands, is a party to the Rome Statute without any state objecting to this. Legal opinions vary on whether further recognition of Palestinian statehood, a potential General Assembly resolution, or obtaining non-member observer state status at the UN would allow it to ratify the Rome Statute, but any of these would bolster Palestinian claims to be a state and thus eligible to become a party to the ICC.

The statehood bid is essentially a political undertaking, and the current political manoeuvres could also have adverse effects on Palestine's ability to access the ICC. Media reports have suggested that EU member states have proposed upgrading Palestine's status to non-member observer state on condition that the Palestinians forgo recourse to the ICC, while EU High Representative Catherine Ashton has reportedly proposed creating a new status at the General Assembly which would not allow the PA to ratify the Rome Statute. Amnesty International opposes any such attempts to prevent the Palestinians from accessing the ICC.⁴ Such attempts contravene the fundamental principle that justice should be accessible to all, regardless of nationality or political affiliation; undermine the integrity of the ICC; and seem designed to offer impunity for crimes under international law, in particular those committed during the 2008-2009 conflict in Gaza and southern Israel, by preventing both Palestinian and Israeli victims from accessing justice through the ICC.

How would the statehood bid affect efforts to pursue accountability for crimes under international law committed during the 2008-2009 conflict in Gaza and southern Israel, and what is Amnesty International calling for in this regard?

Amnesty International documented evidence that war crimes were committed by both Israeli forces and Palestinian armed groups during the 2008-2009 conflict in Gaza and southern Israel,⁵ and the UN Fact-Finding Mission on the Gaza Conflict concurred with this assessment in its September 2009 report.⁶ After monitoring the domestic investigations of both parties, Amnesty International concluded that both the Israeli government and the Hamas de facto administration have failed to conduct credible, independent investigations in conformity with international law, and failed to prosecute perpetrators of crimes under international law as required by the General Assembly.⁷

Crimes under international law may be investigated, and if sufficient admissible evidence exists, prosecuted, by any state exercising universal jurisdiction, even when there is no link between the state and the incident in question. Whether the suspect is a national of a state or not is irrelevant. Amnesty International calls upon all states to exercise universal jurisdiction over crimes under international law, including those documented in the 2008-2009 Gaza conflict. States should investigate and, if sufficient admissible evidence is found, prosecute crimes under international law committed during the conflict before their national courts, regardless of the nationality of the victims or suspects.

Amnesty International has also called on the ICC Prosecutor to request a determination from the Pre-Trial Chamber on the validity of a January 2009 declaration made by the Palestinian Authority under Article 12(3) of the Rome Statute, accepting the ICC's jurisdiction over crimes "committed on the territory of Palestine since 1 July 2002."⁸ This declaration would potentially cover all crimes committed in Gaza and southern Israel documented in the UN Fact-Finding Mission report. The ICC Prosecutor has received various submissions on whether the PA declaration meets statutory requirements and is conducting a preliminary examination into crimes committed during the Gaza conflict. However, he has yet to request a determination from the Pre-Trial Chamber on the PA declaration, or to seek authorization for a full investigation. The PA/PLO bid for recognition of Palestinian statehood could influence the Prosecutor's decision on requesting a ruling, but much depends on the outcome of the bid at the UN. If the PA declaration from 2009 were determined to be valid, or if the PA made a new declaration after receiving non-member observer state status at the UN, the ICC might be able to prosecute crimes committed during the 2008-2009 Gaza conflict. In the event that the PA declaration was not accepted by the Pre-Trial Chamber, ICC jurisdiction would only be triggered by a Security Council referral, or if Palestine were to become a state party to the Rome Statute, or if the accused were a national of a state party or of a state that had already accepted the jurisdiction of the Court.

Amnesty International continues to call on the UN General Assembly to reconsider the UN Fact-Finding Mission report at its 66th session, as recommended by the Human Rights Council in March 2011. The General Assembly should refer the report to the Security Council with the recommendation that it refer the Gaza situation to the Prosecutor of the ICC, pursuant to Article 13(b) of the Rome Statute.⁹

How would the statehood bid affect efforts to pursue accountability for human rights violations, abuses, and crimes under international law by the PA and the Hamas de facto administration in Gaza?

Palestinian accession to international human rights treaties such as the ICCPR, ICESCR, and the International Convention on the Elimination of All Forms of Racial Discrimination would strengthen efforts to pursue accountability for the serious ongoing human rights violations by the PA. These include arbitrary arrests, torture and other ill-treatment of detainees, non-enforcement of judicial decisions (including for the release of detainees), and arbitrary restrictions on freedom of expression and association. As a signatory to international human rights treaties, the PA would be subject to regular monitoring by UN treaty bodies, and would be obliged to take necessary steps to prevent human rights violations by government bodies and its security forces.

In Gaza, the Hamas de facto administration regularly commits similar serious abuses to those of the PA in the West Bank. In addition, since gaining control over Gaza in June 2007, the Hamas authorities have been responsible for executing people after unfair trials in military and civilian courts, failing to prevent Palestinian armed groups from launching indiscriminate rockets into southern Israel, which constitutes a war crime, and failing to ensure the humane treatment of captive Israeli soldier Gilad Shalit. The impact of the PA/PLO statehood bid on efforts to pursue accountability for these abuses by the Hamas authorities is less straightforward, since Hamas would remain a non-state actor even if the PA were to accede to international treaties. The Hamas authorities would continue to have obligations under customary international humanitarian law. The PA bears some responsibility for the actions of armed groups and non-state actors from within its territory, subject to the extent of its control and the means of action at its disposal. If Palestine were to become a party to the ICC or if ICC jurisdiction were triggered by any of the mechanisms discussed above, accountability for crimes under international law committed by the Hamas de facto administration and Palestinian armed groups would be greatly boosted, as the ICC can investigate and prosecute crimes under international law committed by non-state actors.

Amnesty International will lobby for the PA to sign and ratify all relevant human rights treaties if Palestine gains non-member observer state status at the UN or any other form of international recognition as a state.

What are the implications of the statehood bid for the status of Israeli settlements in the OPT?

The PA/PLO bid for statehood recognition does not affect Israel's status as the occupying power in the West Bank and Gaza Strip, and it does not affect the status of Israeli settlements in the OPT. The establishment and retention of civilian settlements in occupied territory violates international humanitarian law, specifically Article 49 of the Fourth Geneva Convention, which prohibits an occupying power from transferring its own civilian population into the territory it occupies, and Article 55 of the Hague Regulations, which forbids an occupying power from changing the character and nature of state property, except for security needs or for the benefit of the local population. The "transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies" is considered a war crime under Article 8(2) of the Rome Statute of the ICC, "when committed as part of a plan or policy or as part of a large-scale commission of such crimes." Israel's settlement policy is also inherently discriminatory and results in continuing violations of the rights to adequate housing, water and livelihoods for Palestinians in the occupied West Bank. The Israeli authorities continue to construct new housing and plan entire new neighbourhoods in illegal settlements in East Jerusalem and elsewhere in the West Bank. Amnesty International continues to call on Israel to immediately halt the expansion of settlements in the West Bank, including East Jerusalem, as a first step towards completely removing unlawful Israeli settlements from the OPT.¹⁰

Will the statehood bid have implications on the international representation of Palestinian refugees, or Palestinians' right to return?

The issue of who represents the Palestinian people and their rights internationally is a matter for Palestinians to decide, and these questions have been much debated by Palestinian academics and civil society organizations in recent weeks. The PLO currently has multiple representational functions, as it represents Palestine diplomatically, including at the UN, and it also represents the rights of all Palestinians, wherever they reside, including the right of Palestinian refugees to return to their homes in Israel and receive compensation for lost property. Critics of the PA/PLO statehood bid have claimed that upgraded representation of Palestine at the UN would affect the representation of Palestinians living outside the recognized state and the PLO's capacity to represent Palestinian refugees, with some even claiming that it could bring about the unintended dissolution of the PLO. However, others argue that if Palestine received non-member state status or even full membership at the UN, the PLO could continue to represent the state in its external

relations, including at the UN, and that there is no reason the PLO could not continue to act in its other capacities as the internationally recognized representative of the Palestinian people and their rights, including the right to return.

The rights of Palestinian refugees relating to their everyday life, whether they are civil and political rights or economic, social and cultural rights, must be respected by the states under whose jurisdiction they live. These rights are guaranteed by international law and are not affected by the recognition (or lack thereof) of a Palestinian state. Likewise, the right to return is a right guaranteed to every Palestinian refugee individually and cannot be compromised by any change in the status of Palestine at the UN or the recognition (or lack thereof) of a Palestinian state. It applies not only to those who were directly expelled and their immediate families, but also to those of their descendants who have maintained close and enduring connections.¹¹

What implications does the statehood bid have for the status of Palestinian prisoners held by Israel?

Further international recognition of Palestinian statehood could enable Palestine to ratify the Geneva Conventions and additional protocols. The Third Geneva Convention regulates the treatment of prisoners of war during armed conflicts and situations of partial or total occupation of the territory of a High Contracting Party. If Palestine ratified the Third Geneva Convention, Israel could be obliged to grant prisoner-of-war status to Palestinian combatants who were part of the regular armed forces, or members of other militias or organized resistance movements provided that they fulfilled certain conditions. These conditions, enumerated in Article 4(2) of the Convention, require combatants to distinguish themselves from civilians by having a fixed, distinctive sign recognizable at a distance and carrying arms openly, and to conduct operations in accordance with the laws and customs of war in order to receive prisoner-of-war status. Prisoner-of-war status would grant various protections which Palestinian prisoners held by Israel for alleged involvement in armed attacks or membership in armed groups do not currently enjoy, although it would not preclude their being tried for attacks against civilians or other serious violations of international humanitarian law. Palestinians from the OPT detained by Israel for allegedly carrying out or planning attacks are currently treated as civilians unlawfully engaged in armed combat, and prosecuted in Israeli military courts or held as administrative detainees, which allows for detention without charge or trial for periods of up to six months, renewable indefinitely.

- ¹ The application was submitted by Mahmoud Abbas in his dual capacity as President of the State of Palestine and Chairman of the Executive Committee of the PLO. "Application of Palestine for admission to membership in the United Nations", 23 September 2011, A/66/371-S/2011/592 (<http://www.un.org/Docs/journal/asp/ws.asp?m=S/2011/592>).
- ² For further information on UN procedures for considering the admission of new members, see: Security Council Report, "Update Report No. 2: Palestine's Application for Admission to the UN", 23 September 2011 (http://www.securitycouncilreport.org/site/c.giKWLeMTIsG/b.7743619/k.DFF2/Update_Report_No_2brPalestines_Application_for_Admission_to_the_UNbr23_September_2011.htm).
- ³ For background information on international law relating to statehood and the status of Palestine, see: John Cerone, "The UN and the Status of Palestine – Disentangling the Legal Issues", *ASIL Insights*, 13 September 2011 (<http://www.asil.org/insights110913.cfm>).
- ⁴ See: "EU must not undermine justice for war crimes in Israel/OPT", Amnesty International press release, 26 September 2011 (<http://www.amnesty.eu/en/press-releases/all-0510/>).
- ⁵ Amnesty International, *Operation 'Cast Lead': 22 Days of Death and Destruction*, July 2009 (<http://www.amnesty.org/en/library/info/MDE15/015/2009/en>).
- ⁶ *Report of the UN Fact-Finding Mission on the Gaza Conflict*, UN document A/HRC/12/48, 25 September 2009 (<http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/FactFindingMission.htm>).
- ⁷ See: *Amnesty International's assessment of Israeli and Palestinian investigations into the Gaza conflict*, 27 September 2010 (<http://www.amnesty.org/en/library/info/MDE15/022/2010/en>); *Amnesty International's updated assessment of Israeli and Palestinian investigations into the Gaza conflict*, 18 March 2011 (<http://www.amnesty.org/en/library/info/MDE15/018/2011/en>).
- ⁸ "ICC should decide on Gaza conflict investigation", 27 September 2010 (<http://www.amnesty.org/en/news-and-updates/icc-urged-decide-gaza-conflict-investigation-2010-09-27>).
- ⁹ See, most recently, "Open letter to UN Secretary-General regarding follow-up to the Report of the UN Fact-Finding Mission on the Gaza Conflict", 16 September 2011 (<http://www.amnesty.org/en/library/info/MDE15/034/2011/en>); "Open letter to Baroness Ashton regarding follow-up to the Report of the UN Fact-Finding Mission on the Gaza Conflict", 16 September 2011 (<http://www.amnesty.org/en/library/info/MDE15/035/2011/en>); "UN urged to reject Israeli calls to retract Goldstone report", 7 April 2011 (<http://www.amnesty.org/en/news-and-updates/un-urged-reject-israeli-calls-retract-goldstone-report-2011-04-07>).
- ¹⁰ For more detail on Amnesty International's position on settlements and international law, see: Amnesty International, *Israel and the Occupied Territories: The issue of settlements must be addressed according to international law* (Index: MDE 15/085/2003), 7 September 2003 (<http://www.amnesty.org/en/library/info/MDE15/085/2003/en>).
- ¹¹ For Amnesty International's policy statement on the Palestinian right to return see: *Israel and the Occupied Territories/ Palestinian Authority: The right to return: The case of the Palestinians* (Index: MDE 15/013/2001), 29 March 2001 (<http://www.amnesty.org/en/library/info/MDE15/013/2001/en>).