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ORIGINAL ARTICLE

INTERNATIONAL LEGAL THEORY

On membership of the United Nations and the State of Palestine: A critical account

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Abstract

Against the context of pending judicial proceedings between the State of Palestine and the United States of America (US) at the International Court of Justice (ICJ), this article critically examines the United Nations (UN) commitment to the international rule of law through an examination of its consideration of Palestine's 2011 application for membership in the organization. The universality of membership of the UN is a foundation upon which the organization rests. The international law governing UN admission has accordingly been marked by a liberal, flexible and permissive interpretation of the test for membership contained in the UN Charter. In contrast, an assessment of the UN's consideration of Palestine's application for membership demonstrates that it was subjected to an unduly narrow, strict and resultantly flawed application of the membership criteria. An examination of the contemporaneous debates of the Council demonstrates that the main driver of this was the US, which used its legal authority as a permanent member of the Council to block Palestine's membership. The principle argument used against membership was the US's view that Palestine does not qualify as a state under international law. Notwithstanding, the State of Palestine has been recognized by 139 member states of the UN and has acceded to a number of treaties that furnish it with access to the ICJ. While a number of articles have been written about Palestine's statehood, little has been written on the UN's consideration of Palestine's 2011 application for membership. *Palestine* v. *USA* provides a renewed opportunity to do so.

Keywords: membership; Palestine; rule by law; statehood; United Nations

1. Introduction

In 2018, Palestine instituted proceedings against the US before the ICJ. The case was brought under the 1961 Vienna Convention on Diplomatic Relations (VCDR) and its Optional Protocol, to which both the US and Palestine are parties. Palestine alleges US violatation of the VCDR through its December 2017 recognition of Israeli sovereignty over Jerusalem and relocation of the US embassy to Jerusalem in May 2018.[1] Among the issues in the case is the matter of Palestine's statehood. As the ICJ's contentious jurisdiction is limited to consenting states, the Court will not exercise jurisdiction if it determines that Palestine is not a state. In November 2018, the Court ordered the parties to submit pleadings on jurisdiction and admissibility.[2]

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[1]International Court of Justice, 'The State of Palestine Institutes Proceedings Against the United States of America', 28 September 2018, Press Release No. 2018/47, available at www.icj-cij.org/public/files/case-related/176/176-20180928-PRE-01-00-EN.pdf (accessed 28 June 2021).

[2]Relocation of the United States Embassy to Jerusalem *(Palestine v. United States of America)*, Order, 2018 ICJ General List No. 176, 15 November 2018 (hereinafter '*Palestine v. USA*').

The US has argued against jurisdiction on the basis that Palestine is not a state.[3] As at the time of writing, the Court has yet to rule on the matter. When it does, and if recent procedings before the International Criminal Court (ICC) are any indication,[4] the issue of Palestine's statehood may be interpreted by the ICJ through the narrow prism of whether Palestine qualifies as a state for the purposes of its Statute and the VCDR. On the other hand, given the ICJ's broad remit as the principle judicial organ of the UN, it may feel required to rule on Palestine's statehood under general international law. In either case, of import for the ICJ will be how other organs of the UN have dealt with the matter of membership of the organization, a pre-requisite of which is statehood.

This article critically examines Palestine's application for membership of the UN in September–November 2011. Although some scholars have written about the statehood of Palestine,[5] its UN membership bid has garnered little attention. This article therefore undertakes an international law assessment of the report of the Security Council's Committee on the Admission of New Members ('Committee'), which concluded that it could not unanimously recommend Palestine's membership in the UN after examining whether Palestine satisfied the criteria for membership under Article 4(1) of the UN Charter.[6]

When measured against the prevailing international law and practice governing UN membership, this article demonstrates that Palestine's failure to gain admission in 2011 resulted from US pressure to adopt an unduly narrow and erroneous application of Article 4(1). Thereafter, Palestine turned to the UN General Assembly ('General Assembly' or 'Assembly'), which upgraded its status to non-member observer state in 2012. While the legal consequences of this upgrade have been considerable, including allowing Palestine the right to accede to the VCDR and its Optional Protocol, its juxtaposition against the refusal of the Committee to recommend membership as a result of US pressure is demonstrative of a condition I have elsewhere called international legal subalternity (ILS).[7] According to the ILS condition, the promise of justice through international law and institutions is repeatedly proffered to global subaltern classes – here represented by Palestine – under a cloak of political legitimacy furnished by the international community, but its realization is interminably withheld. This withholding is performed through the application of what might be called an international rule *by* law – as distinct from the rule *of* law – characterized by the cynical use, abuse or selective application of international legal norms under a claim of democratic rights-based liberalism, but with the effect of perpetuating inequity between hegemonic and subaltern actors on the system. The central claim advanced in this article

[3]In 2020, similar arguments were unsuccessfully advanced by a number of states parties of the Rome Statute of the International Criminal Court appearing before the Pre-Trial Chamber (PTC) on the issue of the scope of the Court's territorial jurisdiction in the situation in Palestine. See *infra* note 4; A. Imseis, 'State of Exception: Critical Reflections on the *Amici Curiae* Observations and Other Communications of States Parties to the Rome Statute in the Palestine Situtation', (2020) 18 *Journal of International Criminal Justice* 905.

[4]On 22 January 2020, the Prosecutor of the ICC requested a ruling from the Court on the scope of the territorial jurisdiction of the ICC in Palestine. On 5 February 2021, the PTC ruled that the ICC's territorial jurisdiction in the situation in Palestine, a State Party to the Rome Statute, extends to the Palestinian territories occupied by Israel since 1967. The PTC underscored that it was not competent to determine matters of statehood binding upon the international community as a whole, but rather focused only on the scope of its jurisdiction in the territory of a State Party under the Rome Statute. See *Decision on the 'Prosecution requrest pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine'*, ICC-01/18, Pre-Trial Chamber 1, 5 February 2021, available at www.icc-cpi.int/CourtRecords/CR2021_01165.PDF (accessed 29 July 2021).

[5]See J. Moussa, 'Atrocities, Accountability and the Politics of Palestinian Statehood', (2016) XIX *Pal. YB Int'l. L.* 42; J. Crawford, 'Israel (1948–1949) and Palestine (1998–1999): Two Studies in the Creation of States', in G. Goodwin-Gill and S. Talmon (eds.), *The Reality of International Law: Essays in Honour of Ian Brownlie* (2012); J. Quigley, *The Statehood of Palestine: International Law in the Middle East Conflict* (2010); V. Kattan, 'Palestinian Statehood', in H. Sayed and T. Skouteris, *Oxford Handbook of International Law in the Arab World* (forthcoming).

[6]United Nations Charter, Art. 4(1), ('UN Charter').

[7]For further exposition of the international rule by law, and the condition of international legal subalternity it has spawned see A. Imseis, *The United Nations and the Question of Palestine: Rule by Law and the Structure of International Legal Subalternity* (forthcoming).

is that while the UN has allowed for a gradual and qualified recognition of some Palestinian legal subjectivity and rights over time, it has failed to provide Palestine with the legal and political foundation upon which those rights have a greater chance of being realized, namely full membership of the organization. Insofar as Palestine's statehood will be litigated before the ICJ, *Palestine* v. *USA* at once represents a manifestation of the ILS condition as much as an opportunity to challenge it.

This article has three parts. Section 2 sets out the international rule of law as embodied in the law and practice governing admission to UN membership. With few exceptions, this law and practice is marked by a liberal, flexible and permissive interpretation of Article 4(1) of the Charter, ostensibly predicated on the principle of the universality of the organization. Section 3 contrasts this to Palestine's failed membership bid in 2011. Owing to the unduly narrow and erroneous interpretation of Article 4(1) taken by some members of the Committee under US pressure, it shows that Palestine has been unfairly kept from availing itself of the full protection of its rights under international law within the organization. Section 4 then examines the implications of Palestine's turn to the Assembly and its upgrade to non-member observer state status in 2012.

2. The international rule of law as represented through the prinicple of the universality of the membership of the United Nations

2.1 Universality of membership as the general principle

The post-1945 emergence of the UN as the standard-bearer of the international rule of law is one of the organization's defining features. A central aspect of this is the organization's universality of membership. Given the general purposes of the UN, not least the safeguarding of international peace and security, it is axiomatic that it remains 'an open organization with a universal vocation'.[8] While a handful of states have chosen to remain outside the UN (e.g., Holy See, Switzerland until 2002), that is the exception to the rule of universal membership. Today, the organization boasts a membership of 193 states.

UN membership is governed by Chapter II of the Charter. Under Article 3, 'original' members of the UN were those states that participated in the San Francisco conference, or associated with the allied powers, and who signed and ratified the Charter in June 1945.[9] Under Article 4, acquisition of membership subsequent to the Organization's founding is governed as follows:

> (1) 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;
> (2) the admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council.[10]

Articles 3 and 4 are similar, insofar as they envision that only *states* may be members of the UN.[11] They differ insofar as the latter imposes substantive and procedural conditions that, with the exception of the condition of statehood, do not exist under the former. Appreciating the interdependence of these conditions – the substantive and procedural – is vital for a full understanding of

[8]K. Ginther, 'Membership: Article 4', in B. Simma et al. (eds.), *The Charter of the United Nations: A Commentary*, vol. II (2002), at 178.

[9]Poland did not sign until October 1945. U. Fastenrath, 'Membership: Article 3', in Ibid., at 173–4.

[10]UN Charter, Arts. 3, 4.

[11]Because of the lack of political independence of some original members (e.g., Belorussia, India, Philippines, and Ukraine), Higgins argues that inclusion of these states in the organization was *sui generis*. She cites various reasons for the inclusion of these members. Yet this does not square with the ordinary meaning of the term 'state' as used in Art. 3. This is particularly so because (as Higgins herself notes) the Charter's drafters consciously chose to use the term 'state' over 'nation', when the latter had been proposed by the Philippine delegation. R. Higgins, *The Development of International Law Through the Political Organs of the United Nations* (1963), 15–16.

Article 4 as the legal gateway to UN membership and the maintenance of the organization's universal function.

Substantively, the Article 4(1) conditions have been determined by the ICJ as subjecting UN admission to a five-part test. The applicant must: (i) be a state; (ii) be peace-loving; (iii) accept the obligations of the Charter; (iv) be able to carry out those obligations; and (v) be willing to do so.[12] Procedurally, the responsibility for determining whether an applicant meets these five criteria is jointly exercised by the UN Security Council ('Security Council' or 'Council') and the General Assembly under Article 4(2). However, because a decision of the Assembly necessarily requires a recommendation of the Council, admission of new members resides, in the first instance, with the Council whose permanent members may utilize their veto power.[13] The political implications are self-evident. With the great powers commanding permanent seats on the Council, the international law governing admission of new members to the UN is open to the exercise of hegemonic interest. For those applicants who find themselves negatively subjected to this interest, the resulting disenfranchisement exposes the limits of the international rule of law.

2.2 History of membership in the UN

In the UN's first decade, Cold War rivalry occasioned a deadlock on admission of new members resulting from narrow, at times overtly political, interpretations of the Article 4(1) criteria.[14] Accordingly, no consensus was reached on the normative content of the criteria during this period. Between 1945 and 1955, only nine of 31 applicants were admitted to membership.[15] Only after the 1955 admission of 16 members *en bloc* did a consensus of practice emerge. Since then, Article 4(1) has been interpreted in a very liberal, flexible, and permissive manner, giving it a normative content consistent with the principle of the universality of the UN's membership.[16] This liberal, flexible, and permissive approach is characterized by a clear rejection of formality and ridigity and aimed at ensuring as broad a representation as possible of humanity, expressed through membership of states within the UN. It is the openness and permissiveness of this normative content of Article 4(1) that underpins the international rule of law governing UN membership.

Even at the height of the Cold War deadlock, the organization was unanimous on the importance of the universality of membership and the need for a liberal approach. In 1946, the Secretary-General noted that the 'founding Members of the United Nations and all of the great powers which form part of our Organization have agreed, on numerous occasions, that the United Nations must be as universal as possible'.[17] For its part, the US made clear that 'the Organization should move toward universality of membership' and urged the Council to 'take broad and farsighted action to extend the membership of the United Nations now as far as is consistent with the provisions of Article 4 of the Charter'.[18] The principle of universal membership was subsequently endorsed in resolutions of the General Assembly,[19] and continues to be reflected in the deliberations of both the Assembly and the Security Council.[20]

[12]*Conditions of Admission of a State to Membership in the United Nations (Article 4 of the UN Charter)*, Advisory Opinion of 28 May 1948, [1948] ICJ Rep. 57, at 62 ('*Conditions of Admission*').

[13]This was affirmed by the ICJ in *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion of 3 March 1950, [1950] ICJ Rep. 4, at 10.

[14]Ginther, *supra* note 8, at 179.

[15]Ibid.

[16]See, e.g., Higgins, *supra* note 11, at 14; J. Crawford, *The Creation of States Under International Law* (2006), 179, 182; Quigley, *supra* note 5, at 236.

[17]UNSCOR, 1st Yr., 54th Mtg., UN Doc. S/PV.54 (1946), at 44.

[18]Ibid., at 41–2.

[19]See, e.g., UN General Assembly, Res. 187B, UN Doc. A/RES/197B (1948); UN General Assembly, Res. 506A(VI), UN Doc. A/RES/506A (VI) (1952); UN General Assembly, Res. 718(VIII), UN Doc. A/RES/718(VIII) (1953).

[20]UN, Repertory of Practice of United Nations Organs, UN Charter, Art. 4, Vol. 1 and Supplements 1–10 (1945–2009) ('Repertory of Practice').

For greater clarity, in 1948 the General Assembly asked the ICJ for an Advisory Opinion on, *inter alia*, whether a member of the UN, when called upon to consider an application for admission under Article 4 of the Charter, is 'juridically entitled to make its consent to the admission dependent on conditions not expressly provided by paragraph 1 of the said Article'.[21] In answering negatively, a majority of the Court opined that the 'natural meaning' of the text of Article 4(1) makes clear that the five conditions for membership thereunder are 'exhaustive', and that the 'provision would lose its significance and weight, if other conditions, unconnected with those laid down, could be demanded'.[22] The Court accordingly held that 'considerations extraneous to the conditions laid down in' Article 4(1) could not be employed to 'prevent the admission of a State which complies with them'.[23] In the Court's view this includes 'new condition[s] ... concerning States other than the applicant State'.[24] It also includes 'political considerations', so long as such considerations cannot reasonably and in good faith be connected with the exhaustive conditions of admission under Article 4.[25]

In a concurring separate opinion, Judge Alvarez opined that 'all States fulfilling the conditions required by Article 4 of the Charter have a *right* to membership', and that the 'exercise of this right cannot be blocked by the imposition of other conditions not expressly provided for by the Charter', including 'grounds of a political nature'. In his view, for member states to do otherwise would be 'an abuse of right which the Court must condemn'.[26]

The ICJ's opinion affirming the exhaustive nature of the Article 4(1) criteria remains valid today. Whether Judge Alvarez was correct in his characterization of membership as a positive right where an applicant meets those criteria is arguable, given that Article 4(1) does not expressly speak of a 'right' to membership as such. Nevertheless, Article 4(1) does provide that membership 'is open' to applicant states that meet the criteria, implying such a right. As such, Alvarez's reading is more than plausible. Indeed, in his leading study of Article 4 Grant indicates that it is now a 'presumption that any State seeking admission will be granted admission'.[27]

The *Conditions of Admission* advisory opinion was critical in limiting the influence of political factors and the imposition of other extraneous conditions in UN admissions practice. This helped set the stage for the adoption of a permissive approach to the Article 4(1) criteria. Writing in 1963, Higgins noted that UN practice on Article 4(1) had, as early as that time, demonstrated a 'flexibility' in approach to the criteria that had become widely evident.[28] During decolonization, the admission of new states 'took place as a rule without even mentioning the [Article 4(1)] criteria'.[29] Since 1963, of the 87 successful membership applications, all but five were approved without objection.[30] This is not to suggest that all admissions decisions have been unproblematic or automatic.[31] But it is reasonable to say that the liberal, flexible, and permissive interpretation of the Article 4(1) criteria in the vast majority of cases has reduced that Charter provision to what Ginther calls 'a mere procedural formality'.[32] Grant concurs, noting that 'in time, the substantive criteria for admission came scarcely to be implemented at all'.[33] This has ultimately led to an 'unconditional universality' of membership within the organization as the defining feature of

[21] *Conditions of Admission*, *supra* note 12, at 58.
[22] Ibid., at 62.
[23] Ibid., at 63.
[24] Ibid., at 65.
[25] Ibid., at 62–3.
[26] *Conditions of Admission*, *supra* note 12, at 71.
[27] T. Grant, *Admission to the United Nations: Charter Article 4 and the Rise of Universal Organization* (2009), 244.
[28] Higgins, *supra* note 11, at 14.
[29] Ginther, *supra* note 8, at 180.
[30] Crawford, *supra* note 16, at 180, puts the figure at 85 successful applicants between 1963 and 2005. Montenegro and South Sudan have since been admitted to membership without objection.
[31] Ibid. at 180.
[32] Ginther, *supra* note 8, at 180.
[33] Grant, *supra* note 27, at 52.

the international rule of law on UN membership.[34] The following brief survey of state practice bears this out.

2.3 UN practice concerning the membership criteria

2.3.1 Statehood

Statehood is the first criterion for UN membership. International law proffers two theories on the existence of statehood.[35] Under the constitutive theory a state exists only if it is recognized by other states, thus rendering it a product of political facts. In contrast, under the declarative theory an entity must possess the following four qualifications, codified in the 1933 Montevideo Convention on the Rights and Duties of States: '(a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states'.[36] Although some have suggested additional factors under this theory, such as independence, sovereignty, and effectiveness,[37] the four Montevideo requirements are the standard followed in UN admissions practice. When any additional factors have been taken into account, they have only factored *as part* of the relevant Montevideo qualifications and treatment has not been uniform. In addition, there is a slight hybridity of the two theories in UN practice, insofar as recognition figures prominently in determining the fourth of the Montevideo qualifications. As noted by Crawford, statehood is therefore a mixed question of law and fact.[38] All of this underscores the liberal, flexible, and permissive reading that the four qualifications are given in UN practice.

Thus, with respect to a permanent population, practice indicates that a state's population need not be homogenous. For example, Indonesia, Nigeria, and Yugoslavia are UN member states[39] whose populations consist of a multiplicity of ethnic, religious, and linguistic groups. Nor does a state's population need to be *in situ* for a prescribed period. Here, the member states of Australia, Canada, New Zealand, South Africa, and the United States stand out, with their mix of indigenous peoples and descendants of later arrivals. Finally, there is no lower or upper limit a state's population must reach. UN membership includes microstates such as Tuvalu, Nauru, and Palau, whose populations number in the few thousands.[40] It is clear, therefore, that the population requirement has been applied permissively in UN admissions practice.

The defined territory criterion has been similarly construed. UN admissions practice applies no minimum size a territory must be.[41] Thus, microstates such as Liechtenstein, Monaco, and San Marino did not face objections to membership despite their diminutive areas of 160, 2, and 61 km^2, respectively.[42] Likewise, great allowance has been made for the extent to which a territory must be demarcated by definite borders. As noted in *North Sea Continental Shelf*, '[t]here is ... no rule that the land frontiers of a State must be fully delimited and defined, and often in various

[34]Ginther, *supra* note 8, at 180.

[35]Crawford, *supra* note 16, at 19–28.

[36]Convention on the Rights and Duties of States, Montevideo, 165 LNTS 19 (1933), Art. 1 at 25 ('Montevideo Convention'). Although UN practice consistently refers to the Montevideo criteria when assessing an entity's statehood, some scholars have questioned the validity of the criteria themselves. See, e.g., Crawford, *supra* note 5, at 113.

[37]Crawford, *supra* note 16, at 46, 62–89; Higgins, *supra* note 11, at 25.

[38]Crawford, *supra* note 5, at 95.

[39]UN General Assembly, Res. 491(V), UN Doc. A/RES/491(V) (28 September 1950); UN General Assembly, Res. 1492(XV), UN Doc. A/RES/1492(XV) (1960); Yugoslavia was an original member.

[40]Crawford, *supra* note 16, at 52; UN General Assembly, Res. 55/1, UN Doc. A/RES/55/1 (2000); UN General Assembly, Res. 54/2, UN Doc. A/RES/54/2 (1999); UN General Assembly, Res. 49/63, UN Doc. A/RES/49/63 (1994).

[41]Grant, *supra* note 27, at 240.

[42]UN General Assembly, Res. 45/1, UN Doc. A/RES/45/1 (1990); UN General Assembly, Res. 47/231, UN Doc. A/RES/47/231 (1993); UN General Assembly, Res. 46/231, UN Doc. A/RES/46/231 (1992); but see also Grant, ibid., at 240–4, who discusses the concern, in principle, of some member states as to the ability of microstates, in general, to assume their obligations as full members.

places and for long periods they are not'.[43] The best example is Israel, which gained UN membership despite not having settled borders with its neighbours.[44] Similarly, the defined territory qualification has sometimes been questioned on the basis of competing territorial claims of other states. Nevertheless, the existence of unsettled Iraqi claims to Kuwait and Moroccan claims to Mauritania did not frustrate either in gaining UN membership.[45] It is equally clear, therefore, that the defined territory requirement has enjoyed a liberal interpretation by the UN.

In practice, the government requirement has been bound up with notions of independence and effective control over territory and public administration.[46] Accordingly, government cannot be said to exist if it is not effective and/or independent. This requirement has also been construed broadly. Thus, neither an ongoing civil war, nor a *coup d'etat* dividing central government between two warring factions, nor even the continued presence of colonial Belgian forces, were dispositive for the Congo's UN admission in September 1960.[47] Likewise, neither the continued presence of colonial Belgian forces, nor a UN commission's finding negating their capacity for effective government, impeded Rwanda's and Burundi's UN admission in 1962.[48] Similarily, Guinea-Bissau's 1974 UN admission was not frustrated by its colonial power, Portugal, remaining in control of the country after independence.[49] Other emblematic cases concern original members. Thus, neither Belorussia nor Ukraine were independent when the UN was formed, but were rather constituent territories of the Soviet Union, which enjoyed 'broad legislative power' over these states.[50] Likewise, both the Philippines and India were still dependent territories of the US and Great Britain, respectively, when they helped found the UN in 1945.[51] Thus, practice indicates that the degree and extent to which the criterion of government must be independent and effective has been given a very wide and flexible interpretation by the UN.

The requirement of foreign relations capacity has also been construed flexibly and permissivly in UN admissions practice. Staying with Belorussia and Ukraine, the Soviet Union maintained authority over their foreign trade and external defence, and neither were authorized by Moscow to conclude international treaties.[52] Likewise, Monaco was admitted to UN membership in 1993, despite ceding all authority over its defence to France, agreeing to govern itself in 'complete conformity with the political, military, naval and economic interests of France', and agreeing not to conduct its international relations without prior consultation with France.[53] Similarily, Micronesia and the Marshall Islands both gained UN admission in 1991, despite ceding 'full authority and responsibility for security and defense matters' to the US, as well as agreeing to

[43] *North Sea Continental Shelf*, Judgment, [1969] ICJ Rep. 3, at 32 ('*North Sea Continental Shelf*').

[44] UN General Assembly, Res. 273(III), UN Doc. A/RES/273(III) (1949); Higgins, *supra* note 11, at 17–18; see also text accompanying *infra* notes 128–134.

[45] Higgins, ibid., at 18–19. UN General Assembly, Res. 1872(S-IV), UN Doc. A/RES/1872(S-IV) (1963); UN General Assembly, Res. 1631(XVI), UN Doc. A/RES/1631(XVI) (1961).

[46] Higgins, ibid., at 21.

[47] UN General Assembly, Res. 1480(XV), UN Doc. A/RES/1480(XV) (1960); Crawford, *supra* note 16, at 56. The conflict made it impossible for the Assembly to identify which warring faction should be allocated a seat at the UN. See UNGAOR, 15th Sess., 864th Plen. Mtg., UN Doc. A/PV.864 (1960), at 6. On Belgium's continued presence and the deployment of UN forces, see UN Security Council, Res. 143 (1960), UN Doc. S/RES/143 (1960); see also UN Security Council, Res. 145 (1960), UN Doc. S/RES/145 (1960); UN Security Council, Res. 146 (1960), UN Doc. S/RES/146 (1960).

[48] See UN General Assembly, Res. 1746(XVI), UN Doc. A/RES/1746(XVI) (1962); UN General Assembly, Res. 1748(XVII), UN Doc. A/RES/1748(XVII) (1962); UN General Assembly, Res. 1749(XVII), UN Doc. A/RES/1749(XVII) (1962). Higgins, *supra* note 11, at 23.

[49] UN General Assembly, Admission of the Republic of Guinea-Bissau to membership in the United Nations, UN Doc. A/RES/3205(XXIX), 17 September 1974; Quigley, *supra* note 5, at 239.

[50] Quigley, ibid., at 236–7.

[51] Ibid., at 239.

[52] Ibid., at 236–7.

[53] UN General Assembly, Res. 47/231, UN Doc. A/RES/47/231 (1993); Treaty Establishing the Relations of France with the Principality of Monaco, 981 UNTS 359 (1918), Arts. 1 and 2, at 364. Quigley, *supra* note 5, at 239–40.

co-ordinate foreign policy with Washington.[54] It is apparent from these and other cases[55] that the foreign relations capacity requirement has also been furnished with a very permissive interpretation by the UN.

2.3.2 Peace-loving

Being 'peace-loving' is the second criterion for UN membership. It derives from the desire of the Charter's framers to disqualify the Axis powers from immediate membership in 1945.[56] The framers also agreed that an applicant's peace-loving credentials could not be judged by reference to its domestic political institutions.[57] During decolonization, when the vast majority of UN member states were admitted, the requirement of being peace-loving was relaxed to the point of being 'of no practical importance at all'.[58] When the criterion has figured into admission determinations, it has sometimes been assessed through whether the applicant has shown sufficient respect for UN Charter principles, including non-intervention and pacific dispute resolution.[59] Even then, the threshold has remained low. The best evidence of this is the admission of states to UN membership despite being in situations of active and/or formal war. Thus, Israel was admitted in May 1949 while still formally at war with Egypt, Jordan, Lebanon, and Syria, having only concluded armistice agreements with the former three.[60] Likewise, the Congo was admitted while embroiled in a civil war in which UN peacekeepers were deployed.[61] Finally, Bosnia and Herzegovina was admitted in 1992 while in the middle of a multi-party war that lasted for three more years.[62] It is evident, therefore, that the peace-loving criteria has been interpreted very permissively by the UN in its admissions decisions.

2.3.3 Acceptance, ability and willingness to carry out the Charter obligations

Acceptance of the obligations contained in the Charter is the third criterion for UN membership. This has historically been satisfied through the submission of an instrument affixed to the membership application in which the applicant solemnly accepts the obligations of the Charter, usually 'without any reservation'.[63] As a *pro forma* act, this requirement has not given rise to difficulties in practice.

Ability and willingness to carry out Charter obligations are the fourth and fifth criteria for UN membership. These have also been given a broad and liberal application in practice. Ability was originally intended to bar from membership states that lacked sufficient material and human resources to meet their Charter obligations. Yet, the admission of states with little to no military

[54]UN General Assembly, Res. 46/2, UN Doc. A/RES/46/2 (1991); UN General Assembly, Res. 46/3, UN Doc. A/RES/46/3 (1991); Compact of Free Association, United States-Federated States of Micronesia-Marshall Islands, U.S. Congress, 99 Stat. 1770, 1822, at §311(a); Quigley, *supra* note 5, at 240–2.

[55]See, generally, Grant, *supra* note 27.

[56]Ginther, *supra* note 8, at 182.

[57]Ibid.

[58]Ibid.

[59]Ibid.

[60]In the debates on Israel's application for admission in May 1949, these factors did not preclude a finding that Israel was peace-loving for the purposes of Art. 4(1). See UNGAOR, 3rd Sess., 207th Plen. Mtg., UN Doc. A/PV.207 (1949), at 306–36; see also text accompanying *infra* note 175. See generally, 'Egypt-Israel, General Armistice Agreement, Rhodes', UN Doc. S/1264/Corr.1 (1949); 'Lebanon-Israel, General Armistice Agreement, Ras Naqura', UN Doc. S/1296 (1949); 'Hashemite Jordan Kingdom – Israel, General Armistice Agreement, Rhodes', UN Doc. S/1302/Rev.1 (1949); 'Israel-Syria, General Armistice Agreement, Hill 232', UN Doc. S/1353 (1949).

[61]See text accompanying *supra* note 47.

[62]UN General Assembly, Res. 46/237, UN Doc. A/RES/46/237 (1992).

[63]UN Provisional Rules of Procedure of the Security Council, UN Doc. S/96/Rev. 7 (1983), ('SC Provisional Rules of Procedure'); UN Rules of Procedure of the General Assembly, UN Doc. A/520/Rev 15. (1984), Rule 134; Repertory of Practice, *supra* note 20.

or financial capacity (e.g., Austria, Japan, the microstates, etc.) has rendered this criterion 'practically irrelevant'.[64] As to the willingness criterion, despite an early resolution of the General Assembly suggesting that it be assessed against factors capable of objective verification, this was never formally endorsed by member states in practice.[65] It is noteworthy that according to the *Repertory of Practice of the United Nations Organs* – which as at time of writing is available for the years 1945–2009 – 'although there have been statements of position [by member states] in respect of specific interpretations of' the terms 'peace-loving state' and 'able and willing' to carry out the obligations of the Charter, 'there has never been any attempt, in proposals submitted to the Council or the Assembly, to define their meaning in any general sense'.[66] This too is indicative of a desire of the UN to maintain as open and permissive an application of these criteria as possible.

2.4 General observations

The current law on admission to membership of the UN is relatively clear. As the ICJ affirmed in 1948, the Article 4(1) criteria of the Charter are exhaustive. No condition extraneous to them may factor into an admissions assessment. This includes conditions of a political nature, so long as such conditions cannot reasonably and in good faith be connected to the criteria themselves. Once those criteria are met, a presumption, and arguably a positive right, exists for UN membership. With the exception of the UN's first decade, the organization's admissions practice has consistently applied the Article 4(1) criteria in a liberal, flexible, and permissive manner. In many cases, and in line with the principle of the universality of UN membership, substantive application of the criteria has been dispensed with altogether.

From the standpoint of the maintenance and development of the international rule of law, the principle of the universality of UN membership is vital.[67] While not all member states are equally endowed with material resources and capabilities, they juridically enjoy the same standing. Because sovereign equality of states remains a pillar of the Charter-based international legal order, access to that order is best secured through UN membership. Were Palestine a full UN member, questions about its statehood as a means to argue against jurisdiction of the ICJ in *Palestine* v. *USA* would not arise. Given the Security Council's role as the effective gatekeeper of UN membership, it is therefore not hard to see how and why admission to the UN remains a site where great power interest can give rise to the replacement of the international rule of law with an international rule by law.

As noted by Chesterman, Johnstone and Malone, cases of admission to the UN 'are interesting from a policy point of view because they illustrate how restrictions on participation can be used as a kind of sanction, registering disapproval of a regime or its policies'.[68] For those on the receiving end of such sanction or disapproval, it is the contingency of their own international legal status that such decisions affirm that this article is concerned with. While substantive parameters have been set by judicial opinion and state practice on the interpretation of the Article 4(1) criteria, the procedural power vested in the UN's principal political organs to apply those criteria under Article 4(2) in good faith holds within it a most significant and, in the end, controlling authority. It is to the application of that authority in the consideration of Palestine's application for UN membership that we now turn.

[64]Ginther, *supra* note 8, at 183.

[65]UN General Assembly, Res. 506A(VI), UN Doc. A/RES/506A(VI) (1952); Grant, *supra* note 27, at 59–60.

[66]Repertory of Practice, *supra* note 20.

[67]Grant, *supra* note 27, at 79.

[68]S. Chesterman, I. Johnstone and D. Malone, *Law and Practice of the United Nations: Documents and Commentary* (2016), 196.

3. Membership of Palestine in the United Nations and the international rule by law

3.1 The 2011 application

Palestine's application for UN membership was submitted on 23 September 2011.[69] Unsurprisingly, it was rooted in prevailing international law, not only as reflected in the long-established UN position on the question of Palestine but also as regards the law governing UN membership. The application accordingly based itself, *inter alia*, on General Assembly Partition Resolution 181(II) of 29 November 1947 and the Declaration of Independence of the State of Palestine of 15 November 1988. Reference was made to 'the successful culmination' of Palestine's 'State-building program', endorsed by the Quartet of the Middle East Peace Process (UN, US, Russia, European Union), and to the Palestinian people's right to self-determination, as affirmed by the Security Council,[70] General Assembly,[71] and ICJ.[72] The application recalled that 'the vast majority of the international community' has accorded 'bilateral recognition to the State of Palestine on the basis of the 4 June 1967 borders, with East Jerusalem as its capital' (i.e., the occupied Palestinian territory (OPT)), and indicated that it was consistent with Palestinian refugee rights under international law. Finally, the application reaffirmed Palestine's commitment to negotiations with Israel on all final status issues – Jerusalem, refugees, settlements, borders, security and water – aimed at a just, lasting, and comprehensive resolution of the Israeli-Palestinian conflict, as endorsed by the Security Council and General Assembly.[73]

Following consideration of the application, the Committee – whose membership is identical to the Security Council – issued its report indicating that it 'was unable to make a unanimous recommendation' on Palestine's admission.[74] Since then, no action has been taken on Palestine's application for membership, further consideration of which effectively remains adjourned *sine die*. In effect, Palestine's application for admission was rejected. Notwithstanding the international rule of law basis of Palestine's application, a critical assessment of its appraisal by the UN reveals why its effective failure can be better understood as resulting from the exercise of the international rule by law.

In assessing the report of the Committee, two general and related points are salient. First, contrary to the liberal, flexible, and permissive application of the Article 4(1) criteria that characterizes UN admissions practice, the report reveals that some members of the Committee preferred an unduly narrow and strict approach. This made the usual method of *pro forma* consensus recommendations for membership impossible to reach, thereby frustrating Palestine's admission.[75] Second, because the report of the Committee was anonymous as to the particular views of given Council members, it is difficult to determine from that document alone the

[69]Application of Palestine for Admission to Membership in the United Nations, UN Doc. A/66/371-S/2011/592 (2011) ('Application for Membership').

[70]See, e.g., UN Security Council, Res. 2334 (2016), UN Doc. S/RES/2334 (2016) and UN Security Council, Res. 1515 (2003), UN Doc. S/RES/1515 (2003) where, insofar as the Council endorses a two-state solution as per S/RES/242(1967), it is implied that the Palestinian people has a right to self-determination in an independent State of Palestine and that the OPT is the self-determination unit within which such right is to be exercised.

[71]See, e.g., UN General Assembly, Res. 2672(XXV)(C), UN Doc. A/RES/2672(XXV)(C) (1970); UN General Assembly, Res. 3236(XXIX), UN Doc. A/RES/3236(XXIX) (1974); UN General Assembly, Res. 70/141, UN Doc. A/RES/70/141 (2015).

[72]*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, [2004] ICJ Rep., para. 118 ('*Wall*').

[73]Application for Membership, *supra* note 69.

[74]UN Security Council, Report of the Committee on the Admission of New Members Concerning the Application of Palestine for Admission to Membership in the United Nations, UN Doc. S/2011/705 (2011), ('Report of the Committee').

[75]Some suggest consensus is required, e.g., Moussa, *supra* note 5, at 60. But practice suggests otherwise. When the Committee recommended the Republic of Nauru's admission of membership, China indicated it was unable to associate itself with that recommendation. See Report of the Committee on the Admission of New Members Concerning the Application of the Republic of Nauru for Admission to Membership in the United Nations, S/1999/716, 25 June 1999. See also Chesterman et al., *supra* note 68, at 205.

positions of individual members. For that, we must examine other contemporaneous UN records, in particular the verbatim record of the Security Council debate of 24 October 2011. Based on that record, it was the spectre of a certain US veto that made it impossible for Palestine's application to succeed.[76] Those Council members that indicated they might join the US, or were otherwise unclear as to their intentions, were Bosnia and Herzegovina,[77] Colombia,[78] Gabon,[79] Germany,[80] France,[81] Nigeria,[82] Portugal,[83] and the United Kingdom.[84] This lack of clarity introduced challenges for Palestine, not least because three of these states (Bosnia and Herzegovina, Gabon, and Nigeria) already enjoy full diplomatic relations with Palestine but were generally non-committal on the issue of its UN membership owing to US pressure being brought to bear on them and other members of the Council.[85] However, assuming positive votes from those three states, when combined with those Council members that did indicate they would vote positively – Brazil,[86] China,[87] India,[88] Lebanon,[89] the Russian Federation,[90] and South Africa[91] – it was clear that Palestine might achieve a nine to 15 majority in favour, but would never be able to overcome a US veto.

The pivotal US role is therefore important when considering Palestine's application for UN membership. The exercise of the Council's powers to recommend membership of an applicant under Article 4(2) is the site where the rule by law was maintained in this case. In the assessment of the Committee's report below, special consideration will therefore be given not only to comparing the Committee's approach with UN admissions practice in general, but also with the ostensible long-standing support of the US government for the principle of the universality of UN membership,[92] and the manifestations of that support in the admission of one other member state with a special relevance to the case at hand, namely Israel in 1949.[93] The research shows that the double standard evident in the strict approach to the Article 4(1) criteria taken by the Council on Palestine's application, when compared with the liberal, flexible, and permissive approach normally adopted in UN admissions practice, is demonstrative of the international rule by law.

3.2 Conditions extraneous to the Article 4(1) criteria

Some members of the Committee sought to impose conditions extraneous to the Article 4(1) criteria in their evaluation of Palestine's application. Thus, a view was twice expressed in the Committee's report that it should take the 'broader political context' into account in its assessment.[94] It was also noted that 'a two-State solution via a negotiated settlement remained

[76]UNSCOR, 66th Sess., 6636th Mtg., UN Doc. S/PV.6636 (2011), at 12, Statement of Ms. Rice (USA).
[77]Ibid., at 24, Statement of Mr. Barbalić (Bosnia and Herzegovina).
[78]Ibid., at 28, Statement of Mr. Osorio (Colombia).
[79]Ibid., at 22, Statement of Mr. Messone (Gabon).
[80]Ibid., at 15, Statement of Mr. Berger (Germany).
[81]Ibid., at 21, Statement of Mr. Arnaud (France).
[82]Ibid., at 28–9, Statement of Mrs. Ogwu (Nigeria).
[83]Ibid., at 27, Statement of Mr. Moraes (Portugal).
[84]Ibid., at 18–20, Statement of Mr. Lyall Grant (United Kingdom).
[85]Bosnia and Herzegovina (1992); Gabon (1988); and Nigeria (1988). See also correspondence with Deputy Permanent Observer of the State of Palestine, United Nations, New York, 25 May 2018 (on file with author).
[86]UN Doc. S/PV.6636 (2011), *supra* note 76, at 16, Statement of Ms. Viotti (Brazil).
[87]Ibid., at 16, Statement of Mr. Li Baodong (China).
[88]Ibid., at 13, Statement of Mr. Ahamed (India).
[89]Ibid., at 25, Statement of Mr. Salam (Lebanon).
[90]Ibid., at 18, Statement of Mr. Churkin (Russian Federation).
[91]Ibid., at 23, Statement of Mr. Gumbi (South Africa).
[92]See text accompanying *supra* notes 17–18.
[93]After a failed December 1948 application, Israel was admitted in May 1949. See UN General Assembly, Res. 273(III), UN Doc. A/RES/273(III) (1949).
[94]Report of the Committee, *supra* note 74, paras. 4, 6.

the only option for a long-term sustainable peace and that final status issues had to be resolved through negotiations'.[95] Similarly, it was stated that 'the Committee's work should not harm the prospects of the resumption of peace talks', and 'that the Palestinian application would not bring the parities closer to peace'.[96] This reflects the views of the US, whose representative stated in the October 2011 Council debate that:

> we believe that Palestinian efforts to seek Member State status at the United Nations will not advance the peace process, but rather will complicate, delay and perhaps derail prospects for a negotiated settlement. Therefore, we have consistently opposed such unilateral initiatives.[97]

Joining the US in that debate, specifically in referencing negotiations as the only means to Palestinian statehood (and, perforce, UN membership), were Colombia,[98] Germany,[99] and Portugal.[100]

To begin with, the notion 'broader political context' is so imprecise as to admit of no relevance to the Article 4(1) analysis. Furthermore, while a willingness to engage in peaceful resolution of disputes is relevant to the Article 4(1) 'peace-loving' criterion (below), UN admissions practice does not condition membership on successfully *concluding* negotiated peace with belligerent states. Likewise, the existence of statehood depends upon the fulfillment of the four Montevideo requirements, not the conclusion of peace agreements. Both the 'broader political context' and 'successful negotiations' conditions thus run afoul of the exhaustive character of the Article 4(1) criteria as affirmed by the ICJ.[101] Neither can they be regarded reasonably and in good faith as permissive political considerations of relevance to any of those criteria in light of UN admissions practice.[102] In effect, these requirements constitute, in the words of the ICJ, 'new' and 'extraneous' conditions, improperly invoked to 'prevent the admission of a State'.[103]

Some members of the Committee rejected this approach. The *Conditions of Admission* advisory opinion was cited as affirming the exhaustive character of the Article 4(1) criteria.[104] At any rate, it was stated, 'Palestine's application was neither detrimental to the political process nor an alternative to negotiations.'[105] Were it otherwise, it was argued, 'Palestinian statehood would be made dependent on the approval of Israel, which would grant the occupying Power a right of veto over the right of self-determination of the Palestinian people.'[106] Of note, none of the final status issues to be negotiated between Israel and Palestine include the Palestinian right to statehood.[107] Indeed, Palestine informed the Council that it did not see any contradiction between negotiations with Israel over the final status issues and Palestine's application for membership. Rather, the two were 'mutually reinforcing'.[108]

[95]Ibid., para. 6.
[96]Ibid., para. 7.
[97]UN Doc. S/PV.6636 (2011), *supra* note 76.
[98]Ibid., at 28, Statement of Mr. Osorio (Colombia).
[99]Ibid., at 15, Statement of Mr. Berger (Germany).
[100]Ibid., at 27, Statement of Mr. Moraes (Portugal).
[101]*Conditions of Admission*, supra note 12, at 62.
[102]Ibid., at 62–3.
[103]Ibid., at 63, 65.
[104]Report of the Committee, *supra* note 74, para. 5.
[105]Ibid., para 7.
[106]Ibid.; this was the position taken by Lebanon, whose ambassador articulated it publicly in the Security Council debate of 24 October 2011; see UN Doc. S/PV.6636 (2011), *supra* note 76, at 25, Statement of Mr. Salam (Lebanon).
[107]These are: Jerusalem, refugees, settlements, security, and borders. See 1993 Declaration of Principles on Interim Self-Government Arrangements (Israel–Palestine Liberation Organization), 32 ILM 1525 (1993) ('DOP'). The issue of water was added later; see UN Doc. S/PV.6636 (2011), *supra* note 76, at 8, Statement of Mr. Mansour (Palestine).
[108]Ibid., at 6.

Nevertheless, the imposition of factors extraneous to the Article 4(1) conditions by the US and others helped frustrate Palestine's admission. Interestingly, when Israel applied for membership, the US also cited extraneous factors, but only to argue the case *for* admission. Thus, on 2 December 1948, Philip Jessup, then US Ambassador-at-Large, informed the Security Council that 'something more' than the Article 4(1) criteria was 'being dealt with' in Israel's case; the Council was:

> dealing here with the desire of a people who laboriously constructed a community, an authority and, finally a Government operating in an independent State, to see the State which they have thus arduously built take its place among the Members of the United Nations.[109]

Notably, Jessup overlooked the fact that the community being 'laboriously constructed' was, in real time, being forged through the mass expulsion of Palestine's indigenous population and the expansion of the putative new state's borders beyond those delimited by the General Assembly only months earlier.[110]

3.3 Statehood

UN practice on the first of the Article 4(1) criteria – that the applicant be a 'state' – has been very liberal.[111] It is unsurprising, therefore, to find that the US view regarding Israel's membership application was equally liberal. In the December 1948 Council debate on Israel's membership Jessup opined that the term 'State' as used in Article 4(1) 'may not be wholly identical with the term "State" as it is used and defined in classic textbooks of international law'.[112] Although in that case the US would nevertheless apply a close approximation of the Montevideo definition, its disposition was clearly to do so less vigorously than required.[113]

In the Committee's report concerning Palestine, there was no disagreement on the first of the four Montevideo requirements for statehood, namely a permanent population.[114] The OPT has a population of 4.5 million people,[115] thereby satisfying this requirement. Perhaps because of the indigeneity of this population and its historical tenure going back millenia, there was no need for the Committee to employ the usual wide appreciation given to this criterion in practice. The same cannot be said of the flexibility with which the US argued for Israel's admission in 1948/49.

At that time, in recounting 'the traditional definition of a State in international law' before the Council, Jessup curiously asserted that the existence of 'a people' was the relevant qualification.[116] But as an expression of prevailing treaty and customary law in 1948, Montevideo referred to 'a permanent population', not a 'people'.[117] This was possibly done because the Jewish Agency's case

[109]UNSCOR, 3rd Yr., 383rd Mtg., UN Doc. S/PV.383 (1948), at 13–14. Jessup was given wide latitude by Washington to frame his government's arguments on Israel's admission. See P. Jessup, *The Birth of Nations* (1974), 294.

[110]This was a matter that would have been well known to Jessup, as the issue was actively being discussed in the Assembly which, only nine days after he delivered his remarks to the Security Council, passed its own resolution affirming, *inter alia*, the right of the refugees to return to their homes. See UN General Assembly, Res. 194(III), UN Doc. A/RES/194(III) (1948); see also the statement of the representative of Syria, at UNSCOR, 3rd Yr., 384th Mtg., UN Doc. S/PV.384 (1948), at 25; and text accompanying *infra* notes 176, 184–186.

[111]See text accompanying *supra* notes 35–55.

[112]See UN Doc. S/PV.383 (1948), *supra* note 109, at 10.

[113]M. Wählisch, 'Beyond a Seat in the United Nations: Palestine's UN Membership and International Law', (2012) 53 *Harvard Int'l. L. J. Online* 226, at 241.

[114]Report of the Committee, *supra* note 74, para. 10.

[115]Palestinian Central Bureau of Statistics, *Estimated Population of the Palestinian Territory Mid-year by Governorate 1997-2016*, available at www.pcbs.gov.ps/Portals/_Rainbow/Documents/gover_e.htm (accessed 30 June 2021).

[116]See UN Doc. S/PV.383 (1948), *supra* note 109, at 10.

[117]Montevideo Convention, *supra* note 36, Art. 1.

for the existence of the State of Israel was based, in part, on its claim to be the state of the Jewish *people* as a whole, rather than of the whole of Palestine's population whose majority was Arab. This may explain Jessup's other curious assertion – uttered when the expulsion of the Palestinian Arabs hit its peak – that '[n]obody questions the fact that the State of Israel has a people. It is an extremely homogenous people, a people full of loyalty and enthusiastic devotion to the State of Israel'.[118] Oddly, in his discussion of the requirements of statehood in his own 1949 international law treatise Jessup himself referred to 'a population' rather than a 'people', in deference to the Montevideo standard.[119] Be that as it may, these American interventions before the Council contributed to a very liberal understanding of this branch of Montevideo, highlighting the malleability of the Article 4(1) requirements, and emphasizing the incongruity of the American position on Palestine in 2011 and before the ICJ today.

The Committee's assessment of Palestine's fulfilment of the second requirement of a defined territory was a matter of disagreement. Those in favour of admission correctly 'stressed that the lack of precisely settled borders was not an obstacle to statehood'.[120] Nevertheless, some members of the Council disputed Palestine's satisfaction of this qualification by questioning its *control* over its territory. In support of this contention, both the de facto control of the Gaza Strip by Hamas and the Israeli occupation of the OPT were raised.[121] While these factors might have some connection to the third Montevideo qualification of government (below), they have no relevance to the ground of a defined territory. This line of argument confuses two branches of the test for statehood.

The borders of what is today the OPT were originally set by UN-mediated armistice negotiations in 1949[122] and, since the PLO's 1988 recognition of Israel, have been accepted as delimiting the territorial unit within which the Palestinian people are entitled to exercise its right to self-determination.[123] Although these borders would ideally be finalized through some form of peace agreement, the fact that they are unsettled does not render them insufficiently clear under the Montevideo test. That there has been a quarrel between Palestine's two main political parties (Fatah and Hamas) manifesting in a partially separate administration of the Gaza Strip from the West Bank has no logical impact on the existence of the OPT as a defined territory, as such. Nor does Israel's military occupation of the OPT detract from the sufficiently defined nature of Palestine's territorial sphere. Israel is legally debarred from asserting sovereignty over the OPT given its status as an occupying power.[124] Likewise, the only other state that has ever laid claim (and only then to a portion) of the OPT, namely Jordan, has since 1988 relinquished such claim in favour of the Palestinian people.[125] Nor does the fact that the territory of Palestine is physically discontiguous (i.e., between the West Bank, including East Jerusalem, and the Gaza Strip) frustrate this branch of Montevideo.[126] There are many UN member states that share that characteristic,[127] most prominently the US.

[118]See UN Doc. S/PV.383 (1948), *supra* note 109, at 11; Jessup's position did not go unchallenged. In response to the US position that Israel had a permanent population, the Syrian representative pressed him: '[W]here are the people? Half the people of the territory which they [i.e., the Zionists] occupy have been expelled and dispersed throughout the country. They are now homeless, starving and dying. These are the people of the territory which they are occupying ... How can he [i.e., Jessup] say that [t]his people [i.e., those of Israel] are peace-loving and are complying with the requirements of Article 4 of the Charter?'; see UN Doc. S/PV.383 (1948), ibid., at 19.

[119]P. Jessup, *A Modern Law of Nations: An Introduction* (1949), 46.

[120]Report of the Committee, *supra* note 74, para. 10. See text accompanying *supra* notes 43–45.

[121]Report of the Committee, ibid., para. 11.

[122]See UN Doc. S/1264/Corr.1 (1949), *supra* note 60. See UN Doc. S/1302/Rev.1 (1949), *supra* note 60.

[123]UN General Assembly, Res. 43/177, UN Doc. A/RES/43/177 (1988).

[124]This view was also affirmed by some members of the Committee; Report of the Committee, *supra* note 74, para. 11.

[125]King Hussein Amman, 'Address to the Nation', 31 July 1988, available at www.un.org/unispal/document/auto-insert-202739/ (accessed 14 August 2021).

[126]Quigley, *supra* note 5, at 210.

[127]E.g., Anglola, Azerbaijan, Brunei Darusasalam, East Timor, Oman, United Arab Emirates, and the US.

To appreciate the incongruity applied in Palestine's case, it is useful to examine the Security Council's treatment of the defined territory criterion in Israel's membership application, paying note of the US position at the time. The application was submitted during the 1948 war, when the territory originally allotted to the putative Jewish State in Assembly Resolution 181 (II) was being considerably expanded through military and paramilitary operations. Syria objected that Israel 'has no boundaries' and therefore could not satisfy the defined territory branch of Montevideo.[128] In response, Jessup reminded the Council that '[o]ne does not find in the general classic treatment of this subject any insistence that the territory of a State must be exactly fixed by definite frontiers'.[129] He noted that 'many States have begun their existence with their frontiers unsettled', citing the US as an example.[130] He concluded that 'the concept of territory does not necessarily include precise delimitation of the boundaries of that territory'.[131] This position influenced other members of the Council,[132] paving the way for Israel's admission. According to Higgins, 'Israel's admission is the best example of the statehood criterion of "defined territory"' because it reveals that 'this criterion has never been interpreted very strictly'.[133] In her view, 'given its customary liberal interpretation' in UN admissions practice, it was 'properly applied' in Israel's case.[134] Considering the permissive state of the law, it is hard to argue that Palestine's territory would not objectively meet this threshold. Yet that was the effect of the position taken by some members of the Committee.

On the third Montevideo requirement, members of the Committee differed as to whether Palestine possessed an effective and independent government. Those arguing for admission cited reports of the World Bank, the International Monetary Fund and the Ad Hoc Liaison Committee for the Coordination of the International Assistance to Palestinians, all of which 'concluded that Palestine's governmental functions were now sufficient for the functioning of a State'.[135] The Quartet endorsed, largely EU-funded, state-building effort that evolved during the Oslo period built upon governmental institutions and legal structures inherited from the Ottoman, British, and Jordanian periods of control.[136] Despite being under foreign military occupation, Palestine formally boasts a constitutional parliamentary system, with executive, legislative, and judicial branches of government.[137] Its ministries serve across areas A and B of the OPT, covering, *inter alia*, education, finance, foreign affairs, health, interior, justice, labour, planning, and social affairs.[138] Its civil service now numbers in the tens of thousands, and includes security and police services.[139]

Some Committee members nevertheless argued that Palestine failed the effective and independent governmental control test because since the 2007 split between Fatah and Hamas the latter has been 'in control of 40 percent of the population of Palestine' (i.e., Gaza). As such, it was argued that Palestine 'could not be considered to have effective government control over the claimed

[128]See UN Doc. S/PV.383 (1948), *supra* note 109, at 19.

[129]Ibid., at 11.

[130]Ibid.

[131]Ibid.

[132]For example, even though the Zionists were expanding their control over a greater portion of Palestine than had been allotted the Jewish State under the partition resolution, the Soviet Union took the view that Israel's territory had been sufficiently defined through UN General Assembly, Res. 181(II), UN Doc. A/RES/181(II) (1947); ibid., at 22–3.

[133]Higgins, *supra* note 11, at 20.

[134]Ibid.

[135]Report of the Committee, *supra* note 74, para. 13.

[136]See text accompanying *supra* notes 69–72. As noted by Quigley, *supra* note 5, at 214, 'a decree issued May 20, 1994 recites that "the laws, regulations and orders in force before June 5, 1967 in the West Bank and the Gaza Strip shall remain in force until unified"'.

[137]Quigley, ibid., at 215.

[138]Permanent Observer Mission of the State of Palestine to the United Nations, New York, 'Government of the State of Palestine', available at www.palestineun.org/about-palestine/government-of-the-state-of-palestine/ (accessed 30 June 2021).

[139]Quigley, *supra* note 5, at 214.

territory'.[140] In addition, the Israeli occupation was cited as 'a factor in preventing the Palestinian government from exercising full control over its territory'.[141] When measured against the broad and permissive UN admissions practice, these claims are revealed as both unduly narrow and, at times, confused.

A split in government – even by civil war – does not negate the existence of effective government under Montevideo.[142] In Palestine's case, with the exception of a five-day period of armed street clashes in Gaza in 2007, the division between Fatah and Hamas has never descended to anything approximating civil war, remaining largely a matter of internal domestic legitimacy and function. As noted by Quigley, 'the fact that the administrative authority became split created practical difficulties', such as payment of civil service salaries in Gaza, but such difficulties are 'not relevant to the governance criterion for statehood'.[143] While the split raises 'questions about the legitimacy of the governing institutions under domestic Palestine law', legitimacy of government has no bearing on the existence of statehood.[144] To be sure, the PLO (led by the West Bank-based Fatah party) continues to represent Palestine internationally, including at the UN, and Hamas has effectively regarded itself as falling under it for that purpose.[145]

The assertion that the Fatah-Hamas split deprives Palestine of effective and independent government in the OPT suffers from another defect. It confuses the distinct issues of recognition of states with recognition of governments under international law.[146] As noted by Moussa, '[i]t is not uncommon for a State to lack control over a particular part of its territory. This does not mean that its statehood can be denied' on the basis that the governing authorities are not internationally recognized.[147] This confusion arose in the Council debates concerning Israel's admission in 1949. Only in that case, the US made sure the Council did not let it get in the way of admission. Syria attempted to invalidate US recognition of Israel in May 1948 by arguing that that recognition was limited to Israel's provisional government as a de facto authority, rather than Israel as a de jure state.[148] In response, Jessup clarified that the Syrian objection suffered from 'some confusion ... between recognition of the state of Israel and recognition of the provisional government of Israel'.[149] The two were distinct. Jessup affirmed that in entertaining Israel's application for membership, it was the former that the Council was concerned with, and it was to that end that the US's act of recognition of the State of Israel was to be understood.[150]

As to the claim that the occupation of Palestine negates its possession of effective and independent government, it is well to recall the many cases of states that were admitted to, or formed the original membership of, the UN while lacking independent government.[151] What renders Palestine's case even more clear-cut is the fact that the impediment to the full exercise of independence is a prolonged illegal occupation regime that, under international law, cannot override the sovereign right of the people to exercise self-determination in the territory in question. As opposed to temporarily administering the territory in the best interests of this people in accordance with its obligations under international law, the occupying power has systematically sought to permanently frustrate that people's right to self-determination through, *inter alia*, the unlawful

[140]Report of the Committee, *supra* note 74, para. 12.
[141]Ibid., paras. 11–12.
[142]See text accompanying *supra* note 47. See also Higgins, *supra* note 11, at 21–2.
[143]Quigley, *supra* note 5, at 216.
[144]Ibid., at 217.
[145]Ibid.
[146]Moussa, *supra* note 5, at 58.
[147]Ibid.
[148]UN Doc. S/PV.384 (1948), *supra* note 110, at 25.
[149]UNSCOR, 3rd Yr., 385th Mtg., UN Doc. S/PV.384 (1948), at 12.
[150]Ibid.
[151]See text accompanying *supra* notes 48–55.

annexation of the territory and the transfer of its own civilian population into it.[152] It is therefore absurd to frustrate Palestine's admission by suggesting it has not attained a sufficient level of independent and effective governmental control over its territory owing to the illegal acts of the occupying power. As noted by the Lebanese delegate to the Council, to do so would be to furnish the occupying power with the authority to deny the realization of Palestine statehood *ad infinitum*, including the right of its people to self-determination.[153]

Finally, regarding the fourth Montevideo requirement, the Committee differed on whether Palestine possessed foreign relations capacity. Some members questioned the capacity of the Palestinian Authority (PA) to engage in relations with other States, 'since under the Oslo Accords the Palestinian Authority could not engage in foreign relations'.[154] The trouble with this view is that it runs contrary to the liberal, flexible and permissive interpretation given to this branch of Montevideo in UN admissions practice,[155] and is only partially accurate on fact. Unlike some states, Palestine has never ceded its foreign relations capacity to another state. That capacity has always been performed by the PLO on behalf of the Palestinian people, as affirmed by decades of UN practice going back to 1974.[156] Indeed, it was the act of the PLO entering into the Oslo accords with Israel under US auspices that created the PA in the first place.[157] While it is true that Oslo deprived the PA of 'powers and responsibilities in the sphere of foreign relations', it also expressly provided that those powers would be conducted by the PLO on the PA's behalf – a fact not mentioned in the Committee's report.[158] Moreover, since 1988, the designation 'Palestine' has been used in place of 'PLO' at the UN. Palestine has thus demonstrated a capacity to enter into foreign relations through the PLO, which has resulted in a robust diplomatic and treaty practice at the UN and with Israel itself.

The issue of foreign relations capacity returns us to the hybridity of the declaratory and constitutive theories of statehood, the nexus of which is the act of recognition. As noted by Higgins, UN practice 'undeniably reveals that most member states have considered the issue of recognition as relevant' in the Montevideo analysis, as 'it is evidence of the international status of an applicant' for membership.[159] Thus, those members of the Committee that favoured Palestine's application pointed to Palestine's membership in the Non-Aligned Movement, the Organization of Islamic Cooperation, the Economic and Social Commission for Western Asia, the Group of 77, and the United Nations Educational, Scientific and Cultural Organization, as evidence of its foreign relations capacity. Most significantly, they noted that 'over 130 States had recognized Palestine

[152]See, e.g., UN General Assembly, Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967, UN Doc. A/72/43106 (2017).

[153]See text accompanying *supra* note 106. Writing in 1999, prior to the Palestinian state-building effort established by 2011, Crawford took the view that Palestine could not be a state because its occupation by Israel deprives it of independent government. Yet he offered this qualification: '[t]here may come a point where international law (like English equity) is justified in regarding as done that which ought to have been done, if the reason it has not been done is the serious default of one party, and if the consequence of its not being done is serious prejudice to another, innocent, party. The principle that a state cannot rely on its own wrongful conduct to avoid the consequences of its international obligations is capable of novel applications, and circumstances can be imagined where the international community would be entitled to treat a new state as existing on a given territory, notwithstanding the facts'. See Crawford, *supra* note 5, at 24.

[154]Report of the Committee, *supra* note 74, para. 14.

[155]See text accompanying *supra* notes 52–55.

[156]See, e.g., UN General Assembly, Res. 3210I(XXIX), UN Doc. A/RES/3210I(XXIX) (1974); UN Doc. A/RES/3236(XXIX) (1974), *supra* note 71; UN General Assembly, Res. 3237(XXIX), UN Doc. A/RES/3237(XXIX) (1974); UN Doc. A/RES/43/177 (1988), *supra* note 123.

[157]See, e.g., DOP, *supra* note 107.

[158]Interim Agreement on the West Bank and the Gaza Strip Annex II: Protocol concerning Elections (Israel–Palestine Liberation Organization), (1995), Art. IX(5), at 561.

[159]Higgins, *supra* note 11, at 42.

as an independent sovereign State'.[160] As noted by Quigley, this level of recognition has given rise to Palestine's rich treaty and diplomatic/consular relations practice, the latter of which 'perform the tasks that are typical of diplomatic missions, maintaining political contact with host states'.[161] Based on the wide ambit afforded the foreign relations capacity branch of Montevideo in UN admissions practice, it is hard to suggest that Palestine does not meet the required threshold.

The Committee's unduly narrow approach in assessing this requirement in Palestine's application is once again underscored by the different position of the US concerning Israel's application in 1948/49. In urging the Council to take a liberal approach then, Jessup noted that 'we already have, among the Members of the United Nations, some political entities which do not possess full sovereign freedom to form their own international policy'.[162] He noted 'that neither at San Francisco nor subsequently has the United Nations considered that complete freedom to frame and manage one's own foreign policy was an essential requisite of United Nations membership'.[163] In view of the US position then, and its subsequent reflection in wider UN practice, the fact that Palestine's case failed to garner the full support of the Committee on this ground is striking.

3.4 Peace-loving

Some members of the Committee questioned Palestine's satisfaction of the second Article 4(1) criteria, namely its peace-loving character. They cited Hamas's refusal 'to renounce terrorism and violence'.[164] While it is true that Hamas has engaged in low-intensity armed operations against the occupying power, it is also true that the movement has often transgressed the laws of war while doing so.[165] This has not stopped Israel from negotiating agreements with it (e.g., truce, prisoner exchange, etc.).[166] Based on relevant international law and practice, none of these facts are reason enough to disqualify Palestine's character as a peace-loving state.

The flexibility applied on this condition has been very wide in practice.[167] Palestine has demonstrated a commitment to pacifically resolve its dispute with Israel. This was unequivocally reiterated in both its application for membership as well as in the October 2011 Council debate.[168] It was additionally demonstrated through Palestine's extensive resort to multilateralism, including diplomatic and legal mechanisms of dispute resolution at the UN, as evident in its active reliance on the ICJ in 2004.[169] Thus, those members of the Committee in favour of Palestine's membership noted that Palestine was peace-loving 'in view of its commitment to the achievement of a just, lasting and comprehensive resolution of the Israeli-Palestinian conflict'.[170] For them,

[160]Report of the Committee, *supra* note 74, para. 14. As at the date of writing this figure has increased to 139 states. Permanent Observer Mission of the State of Palestine to the United Nations, 'Diplomatic Relations', available at www.palestineun.org/about-palestine/diplomatic-relations/ (accessed 30 June 2021).

[161]Quigley, *supra* note 5, at 211–13.

[162]See UN Doc. S/PV.383 (1948), *supra* note 109, at 10.

[163]Ibid.

[164]Report of the Committee, *supra* note 74, para. 16.

[165]UN Human Rights Council, *Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, UN Doc. A/HRC/12/48 (2009).

[166]Indeed, at the time of Palestine's application for membership, Israel had just negotiated an exchange of prisoners with Hamas. See UN Doc. S/PV.6636 (2011), *supra* note 76, at 14, Statement of Mr. Ahamed (India).

[167]See text accompanying *supra* notes 56–62.

[168]Application for Membership, *supra* note 69; see UN Doc. S/PV.6636 (2011), *supra* note 76, at 7, Statement of Mr. Mansour (Palestine).

[169]*Wall*, *supra* note 72.

[170]Report of the Committee, *supra* note 74, para. 15.

> Palestine's fulfillment of this criterion was also evident in its commitment to resuming negotiations on all final status issues on the basis of the internationally endorsed terms of reference, relevant United Nations resolutions, the Madrid principles, the Arab Peace Initiative and the Quartet road map.[171]

The representative of Brazil put it best when she said that '[t]he ultimate demonstration that Palestine is a peace-loving State is precisely the decision to turn to international law and to the United Nations to realize its legitimate right to self-determination'.[172] In her view, '[i]nternational recognition of the Palestinian State and its admission in the United Nations as a full Member can help reduce the asymmetry that at present characterizes relations between the parties'.[173]

Being committed to peace negotiations has been deemed enough to satisfy the peace-loving criterion in UN admissions practice.[174] Thus, when Israel's admission was approved in 1949, the US took the view that the mere promise of peace, as offered by Israel, was enough for it to pass the threshold. In arguing that Israeli admission should be approved by the General Assembly, the US representative proclaimed that '[a] solid foundation for peace and stability in Palestine had been laid by the armistice agreements concluded between Israel and *most* of the Arab States [i.e., Egypt, Jordan and Lebanon]', and that an armistice agreement with Syria was 'still in the process of negotiation'.[175] It bears recalling that at the time of Israel's application, Zionist and then Israeli forces were engaged in the systematic expulsion of the Palestinian population from the country.[176] As discussed below, these matters were well understood by UN member states, yet none of this was enough to taint Israel's 'peace-loving' character.

Given the pivotal role played by the US in frustrating Palestine's application for membership in 2011, the relvance of the above is not insignificant. Far from being a passive observer of the near 30-year Israeli-Palestinian peace process, the US has been its principal sponsor. The US is thus aware of Palestine's commitment to pacifically resolve the conflict based on relevant international law as outlined in UN resolutions and decisions. The fact that a final peace has yet to be concluded should not, as a matter of law and practice, detract from a determination that Palestine is sufficiently peace-loving under Article 4(1).

Both the Indian and South African representatives to the Council rejected conditioning Palestine's membership upon the conclusion of a peace agreement with Israel, the former indicating that to do so would be 'legally untenable'.[177] Nevertheless, because of the unduly narrow position adopted by some members of the Council, including the incongruous one adopted by the US, Palestine's peace-loving character was sufficiently impugned to block membership.

3.5 Acceptance, ability and willingness to carry out the Charter obligations

Notwithstanding the very wide latitude given to the third, fourth, and fifth criteria in practice[178] – acceptance of Charter obligations and ability and willingness to carry them out – some members of the Committee concluded that Palestine did not satisfy these conditions. In particular, it was argued that 'the Charter required more than a verbal commitment' to this effect, and that 'an

[171] Ibid.

[172] See UN Doc. S/PV.6636 (2011), *supra* note 76, at 17, Statement of Ms. Viotti (Brazil).

[173] Ibid.

[174] See text accompanying *supra* notes 59–60.

[175] See UN Doc. A/PV.207 (1949), *supra* note 60, at 313–14, Statement of Mr. Austin (USA). Israel remains at war with Lebanon and Syria.

[176] See generally B. Morris, *The Birth of the Palestinian Refugee Problem Revisited* (2004).

[177] See UN Doc. S/PV.6636 (2011), *supra* note 76, at 14, Statement of Mr. Ahamed (India); and see UN Doc. S/PV.6636 (2011), *supra* note 76, at 23, Statement of Mr. Gumbi (South Africa).

[178] See text accompanying *supra* notes 63–66.

applicant had to show a commitment to the peaceful settlement of disputes and to refrain from the threat or the use of force'.[179] In this respect, 'it was stressed that Hamas had not accepted these obligations'.[180] In its membership application, Palestine offered the standard *pro forma* declaration affirming, *inter alia*, that it accepts the obligations contained in the Charter and solemnly undertakes to fulfil them.[181] It also affirmed its 30-year commitment to peacefully resolve its dispute with Israel through negotiation in line with UN resolutions and international law. That Hamas had engaged in low-intensity armed resistance to Israel's occupation was not disputed. Yet, by comparison, its low-intensity military actions could not approach the armed conflict accompanying the successful applications of other states, including Israel. It was because of these factors that other members of the Committee were satisfied that Palestine fulfilled these criteria.[182] In this regard, they rightly pointed out that when the UN considered Israel's application in 1948/49 it was 'argued that Israel's solemn pledge to carry out its obligations under the Charter was sufficient to meet this criterion'.[183]

To appreciate the extent of the double-standard applied to Palestine it is worth recalling the context in which the UN's acceptance of Israel's solemn pledge was accepted as sufficient by the Organization. Israel's application for membership was submitted in the fall of 1948, after the six-month civil war phase of the conflict and during the first Arab-Israeli war which commenced on 15 May 1948. By the time the application came before the Security Council and General Assembly in December 1948 and May 1949, the vast majority of the roughly 700,000–900,000 Palestinian refugees had been forcibly exiled as a result of the actions of the Haganah and Zionist dissident groups Lehi and Irgun, amounting to roughly 75–90 per cent of the Arab inhabitants of the country.[184] Additionally, the head of the UN Conciliation Commission for Palestine (UNCCP), Count Folke Bernadotte, had been assassinated by Lehi. Finally, Israel expanded its territory to control some 78 per cent of mandatory Palestine, well beyond the terms of the partition resolution, including in violation of the *corpus separatum*.[185] In response, the General Assembly passed Resolution 194(III) on 11 December 1948, calling on Israel to repatriate the refugees 'at the earliest practicable date' and affirming that Jerusalem 'should be placed under effective United Nations control'.[186]

As a result, questions were raised during the May 1949 General Assembly debates on Israel's admission as to whether it accepted its commitments under the Charter and was able and willing to abide by them. Israeli representative, Aubrey Eban, was asked to clarify whether Israel would abide by the terms of Assembly Resolutions 181(II), respecting partition, and 194(III), respecting refugee repatriation and UN control over Jerusalem, and what it was doing to apprehend Bernadotte's assassins.[187] Eban relayed that Israel was only willing to negotiate a hand over of Jerusalem's holy sites to UN oversight with 'integration' of the city 'into the life of the State of Israel'.[188] Likewise, refugee repatriation was rejected in favour of resettlement outside of Israel.[189] Finally, efforts to apprehend Bernadotte's assassins were said to be unsuccessful because

[179]Report of the Committee, *supra* note 74, para. 18.

[180]Ibid.

[181]Application for Membership, *supra* note 69.

[182]Report of the Committee, *supra* note 74, para. 17.

[183]Ibid.

[184]See Morris, *supra* note 176.

[185]S. Hadawi, *Palestinian Rights and Losses: A Comprehensive Survey* (1988), 81.

[186]UN Doc. A/RES/194(III) (1948), *supra* note 110.

[187]Ad Hoc Political Committee, UNGAOR, 3rd Sess., 45th Mtg., (1949); Ad Hoc Political Committee, UNGAOR, 3rd Sess., 46th Mtg., (1949); Ad Hoc Political Committee, UNGAOR, 3rd Sess., 47th Mtg., (1949); Ad Hoc Political Committee, UNGAOR, 3rd Sess., 48th Mtg., (1949); Ad Hoc Political Committee, UNGAOR, 3rd Sess., 49th Mtg., (1949); Ad Hoc Political Committee, UNGAOR, 3rd Sess., 50th Mtg., (1949); Ad Hoc Political Committee, UNGAOR, 3rd Sess., 51st Mtg., (1949).

[188]Ad Hoc Political Committee, UNGAOR, 3rd Sess., 45th Mtg., (1949), at 236.

[189]Ibid., at 239–40.

'the organization of the internal security in the State of Israel had been still in its initial stages' and the 'police force had not yet achieved the necessary degree of internal stability and efficiency which would have enabled it to cope swiftly and effectively' with the matter.[190] Oddly, this admission failed to give rise to questions of not only whether Israel was able to abide by its obligations under the Charter, but also whether it possessed effective governmental control over its claimed territory.

Despite the objections of the Arab states, the Israeli position found support among its Western allies, led by the US. Thus, in the December 1948 Council debate, Jessup recalled that 'in the terms of its application for membership' Israel had 'indicated its acceptance' of the obligations contained in the Charter,[191] and that there was 'no reason' to 'question the solemn assurance of Israel', as per standard practice.[192] He asserted that the 'willingness of Israel to carry out these obligations is made clear in its letter of application for membership', and that the US government was 'satisfied with the ability of the State of Israel' to do so.[193] Following Eban's May 1949 testimony to the Assembly regarding Israel's acceptance of Resolutions 181(II) and 194(III), the US maintained this position, asserting that those issues could not properly factor into assessing Israel's application under Article 4(1).[194] According to the US representative, Warren Austin, the Assembly could not be understood as being 'directly concerned with [the] definitive settlement of the questions of Jerusalem or of the Arab refugees', despite the fact that these issues flowed directly from its own resolutions.[195] 'The point at issue', according to him, was simply 'whether the State of Israel was eligible for membership under Article 4 of the Charter'.[196] On the basis of Israeli promises to engage in peace negotiations, he concluded Israel fully met the criteria.[197] This permissive position was adopted by a number of states from the western and European block in the Assembly.[198]

None of this is to suggest that Israel's application received special treatment on the acceptance, ability and willingness criteria in 1948/49. On the contrary, its treatment was in line with the liberal, flexible and permissive approach that would come to characterize UN admission practice after 1955.[199] For Palestine, however, the result is more than curious. Although the UN record shows that its leadership has been committed to peacefully resolve its dispute with Israel under US auspices for the past 30 years, and certain dissident elements have not committed anywhere near the transgressions against peace as accompanied Israel's admission to membership, this was not enough to pass the threshold.

3.6 General observations

An assessment of Palestine's failed 2011 application for membership of the UN reveals incongruities of the most curious sort in the application of the principle of universality of UN membership and, by extension, the international rule of law.

Based on UN practice, Palestine should have had little trouble qualifying for membership. It possesses the requisite elements for statehood under Montevideo and it can demonstrate that it is peace-loving, accepting of its Charter obligations, and able and willing to carry them out.

[190] Ibid., at 243. The head of the Lehi group, Yitzhak Yezernitzsky (later Shamir) was never brought to justice for the Bernadotte assassination. He would eventually become Israel's seventh Prime Minister (1983–1984; 1986–1992).

[191] See UN Doc. S/PV.383 (1948), *supra* note 109, at 12.

[192] Ibid.

[193] Ibid.

[194] UN Doc. A/PV.207 (1949), *supra* note 60.

[195] Ibid.

[196] Ibid.

[197] Ibid.

[198] See, e.g., Statements of: Mr. Ignatieff (Canada), ibid., at 317; Mr. Garcia Bauer (Guatemala), ibid., at 320; Mr. Berendsen (New Zealand), ibid., at 322; Mr. Fabregat (Uruguay), ibid., at 324–5; Dr. Zaydin (Cuba), ibid., at 327–8.

[199] Significantly, in June 1948, one month after Israel's admission to the UN, repatriation of the Palestine refugees was barred by a war-time decision of the Israeli cabinet.

Although it may not have been perfect, based on the liberal, flexible, and permissive standard set by UN admissions practice under Article 4(1), Palestine's candidacy met all of these criteria to a qualitatively equal or greater degree than many other UN member states, including Israel.

The UN record demonstrates that Palestine's membership was frustrated by the imposition of conditions extraneous to the Article 4(1) criteria, along with the unduly narrow application of those criteria by certain members of the Committee. In particular, the role of the US was pivotal. Because the Council has the procedural authority to recommend new members under Article 4(2) of the Charter, and because the US made it clear that it would utilize its veto power to block Palestinian membership, the fate of the effort appears to have been doomed from the start. Some writers have suggested that Palestine's case was therefore wholly political and did not turn on whether the Article 4(1) criteria were actually met.[200] But this view is belied by the fact that the Article 4(1) criteria, or some semblance thereof, formed the basis of the Committee's consideration of Palestine's application.

The implications of this are clear. Palestine's application was not assessed in accordance with the universal legal standard governing UN membership under the international rule of law. Rather its application was denied through a patently incongruous and at times confused interpretation of the relevant legal criteria, thereby allowing it to ironically take place behind a veil of legitimacy furnished by the terms of the Charter itself. The consequence has been to uphold the international rule by law in the UN system.

4. Non-member observer state status for Palestine

Having had its application for UN membership blocked at the Security Council, Palestine's status was upgraded to non-member observer state through General Assembly Resolution 67/19 of 29 November 2012.[201] Based on the UN record, this option was pushed by certain members of the Council, in particular France. It noted that full membership 'cannot be attained at once' owing to 'the lack of trust between the main parties' and the surety of a US veto.[202] France therefore suggested the 'intermediate stage' of non-member observer state status building on prior gains of the PLO in the organization.[203]

The upgrade had the effect of helping mitigate Palestine's contingent position in the international legal order. Whereas Palestine's juridical status as a state was widely debated prior to the upgrade,[204] thereafter much of that debate has become moot. This is because the upgrade enabled Palestine to engage in activity reserved only for states under international law. Thus, the Secretary-General confirmed that Palestine 'may participate fully and on an equal basis with other States in conferences that are open to members of specialized agencies or that are open to all states'.[205] Likewise, in accordance with his practice as depositary of multilateral treaties, the Secretary-General further confirmed Palestine's ability to enter into multilateral treaties open only to states and members of specialized agencies.[206] Accordingly, since the upgrade, Palestine has acceded to over 40 multilateral treaties. This includes the VCDR, its Optional Protocol and the major international human rights, humanitarian law, and criminal law conventions.[207] Likewise, Palestine has

[200]Chesterman et al., *supra* note 68, at 195.

[201]UN General Assembly, Res. 67/19, UN Doc. A/RES/67/19 (2012).

[202]UNGAOR, 66th Sess., 11th Plen. Mtg., UN Doc. A/66/PV.11 (2011), at 23, Statement of Mr. Sarkozy (France).

[203]Ibid. For sources of PLO gains in the UN, *see* resolutions referred to at *supra* note 156.

[204]Quigley, *supra* note 5; Crawford, *supra* note 5.

[205]UN General Assembly, The Status of Palestine in the United Nations, Report of the Secretary General, UN Doc. A/67/738 (2013), at 3, ('The Status of Palestine').

[206]This includes treaties operating under both the 'Vienna' and 'all states' formulas. See Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, UN Doc. ST/LEG/7/Rev.1 (1999), para. 79.

[207]See S. Sakran and M. Hayashi, 'Palestine's Accession to Multilateral Treaties: Effective Circumvention of the Statehood Question and its Consequences', (2017) 25 *J. Int'l. Coop. Stud.* 81.

become a member of a number of international organizations, including INTERPOL and the ICC.[208] As a result of the upgrade, therefore, there is little doubt that the de jure state of Palestine exists, and that among the many benefits it enjoys is the standing to make claims as a state under international law, and to contribute to its progressive development.[209] That Palestine is currently under occupation does not vitiate this legal reality; nor does the fact that some states have yet to recognize it, given universal recognition has never been a condition precedent for the existence of statehood, as evinced by the case of Israel.[210]

At the same time, symptomatic of the contingency of its position in the international order, Palestine's non-member observer state status does not provide it with the full range of rights and duties that accompany UN membership. For instance, Palestine's ability to engage in the General Assembly is largely still substantively and procedurally limited to matters relating to 'Palestinian and Middle East issues'.[211] Most importantly, as noted by the Secretary-General, with one minor exception Palestine 'does not enjoy the right to vote' within the UN, 'including in elections'.[212] Nor may it 'submit its own candidacy for any election or appointment or submit the names of candidates for any election or appointment'.[213] It is this sweeping disenfranchisement that underscores the rule by law operating within the UN to the detriment of lesser actors like Palestine. Despite the gradual provision to Palestine of a series of privileges within the organization, the fact that it remains unable to exercise the franchise as a member state owing to the exercise of great power prerogative demonstrates the central importance of such prerogative in the operation of the system. As such, the upgrade thus illustrates both the promise and the limits of international law for subaltern peoples. For while the existence of the de jure State of Palestine gives rise to a presumption that it satisfies the statehood criterion of the Article 4(1) criteria, getting over the Security Council's current narrow and strict construction of the test for membership in the organization cannot be assured given the hegemonic position of the US. This is despite Grant's view that prevailing law and practice has created a presumption of admission to the UN if requested by a state.[214] Palestine therefore remains caught in a seemingly permanent condition of contingency. No matter the gains made through its stubborn belief in international law and institutions, the operation of those very phenomena may be utilized to perpetually keep Palestine out.

5. Conclusion

The international vocation of the UN and its unique role as the guardian of international peace and security in the post-1945 era rests upon the principle of the universality of its membership. With the exception of its first decade, UN admissions practice has accordingly been marked by a liberal, flexible and permissive interpretation of the admission criteria delienated in Article 4(1) of the Charter. So open has the practice been that the Article 4(1) criteria have been reduced to a mere procedural formality, leading to an unconditional universality of membership within the organization as the defining feature of the international rule of law on UN membership.[215]

In contrast, an assessment of the Committee's consideration of Palestine's 2011 application for UN membership reveals that it was subjected to an unduly narrow, strict and erroneous

[208] Ibid.

[209] Moussa, *supra* note 5, at 95.

[210] Ibid., at 59.

[211] UN General Assembly, Res. 52/250, UN Doc. A/RES/52/250 (1998).

[212] The exception is the International Residual Mechanism for Criminal Tribunals, the Statute of which provides that non-member states maintaining permanent observer missions at UN headquarters have the right to submit nominations for and to vote in the elections of the permanent and *ad litem* judges of the Residual Mechanism, The Status of Palestine, *supra* note 205, at 2.

[213] Ibid.

[214] Grant, *supra* note 27, at 244.

[215] Ginther, *supra* note 8, at 180.

application of the Article 4(1) criteria at odds with long-standing UN admissions practice. The fact that the Committee was able to undertake this substantively anomalous position under cover of a procedural authority expressly granted it by Article 4(2) lends the result of its deliberation problematic. Far from an example of the objective application of the international rule of law governing UN membership, the Committee's refusal to recommend Palestine's application can better be understood as an instance of the international rule by law.

Based on the UN record, the role of the US was vital in this regard. This is demonstrated through a comparison of the inconsistent American approach concerning admission of other states, including Israel, with Palestine's application for admission. It is the juxtaposition of a broad and forgiving interpretation of the Article 4(1) criteria in these other cases, with a strict, narrow and erroneous application of same in Palestine's, that highlights the essence of the problem. In this case, but for the 'abuse' – to quote Judge Alvarez – of the Council's legal authority under Article 4(2) of the Charter, Palestine may have been able to gain some ground in breaking free of its contingent status in the international system.

Aside from the immediate goal of UN membership, it is possible to understand Palestine's application for admission and, upon failing that, for non-member observer state status, as being rooted in its belief in international law and institutions. There is nothing in the Palestinian position, as articulated both in its application for membership and non-member observer state status, that is inconsistent with prevailing international law as affirmed by the UN. Rather than regarding international law and institutions as forms of restraint on state sovereignty, as many states do, Palestine has used these phenomena as the primary means through which its sovereignty may be asserted.[216] *Palestine* v. *USA* will be a site where the tension between these two things will be sure to play itself out. How the Court treats the question of the existence Palestine statehood will either affirm or rebut the extent to which the international rule by law continues to colour the multilateral order, including at the UN.

[216]Moussa, *supra* note 5, at 43.

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