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The Palestinian UN Upgrade: Setting Things Straight

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- The UN upgrade resolution has neither created a Palestinian state, nor did it grant any kind of statehood to the Palestinians. General Assembly resolutions, including the Palestinian upgrade resolution, can neither determine nor dictate international law or practice.
- The areas of Gaza and the West Bank (Judea and Samaria) have never been determined in any legal document or agreement to be sovereign Palestinian areas. Both Israel and the Palestinians entertain claims over the areas in dispute
- After the Palestinian upgrade resolution, neither the status of Israel in the territories, nor that of the Palestinians, has changed in any way. The new claim voiced by the Palestinian leadership that Israel became, overnight, an occupant of Palestinian sovereign territory is without any basis.
- None of the agreements signed between Israel and the Palestinians contain any limitation on building in the areas under their respective jurisdiction. The attempt by the Palestinian leadership to isolate the settlements issue and to turn it into a precondition for further negotiation undermines any chance of a return to viable negotiations.
- The International Criminal Court (ICC) is not obliged to follow the recommendations of the UN General Assembly. The ICC has attempted, up to the present, to avoid having its independent juridical character politicized or otherwise compromised.

- Futile attempts to initiate criminal charges against Israel and its leaders do not portend any willingness on the Palestinians' part to create the ambience of mutual trust and confidence necessary for a resumption of sincere and genuine negotiations.

Now that the dust has settled on the Palestinian UN upgrade bid; now that Palestinian President Mahmoud Abbas (Abu Mazen) has received his applause and cudos from the UN Plenary, from the Europeans, and from many Israelis as the hero and savior of the Palestinian people; now that the UN General Assembly has returned to its regular and wasteful agenda of repetitive, pointless, and inane resolutions; now that some Israeli legal and non-legal commentators are already forecasting that Israeli leaders, officials, officers, and settlers are about to be put on trial before the International Criminal Court for war crimes and crimes against humanity; now that Palestinian lawyers are busy preparing their criminal charges against Israel – now it is perhaps the time to place things in their correct proportion and to face the legal and political truths, without misleading exaggeration, imaginative embellishment, wishful thinking, and false predictions.

No Palestinian State Has Been Created

The UN upgrade resolution¹ has neither created a Palestinian state, nor did it grant any kind of statehood to the Palestinians. The UN does not have the legal and political power to establish states. It merely upgraded the observer status of the PLO's UN representation to that of a non-member-state-observer for internal purposes within the UN and its constituent organs and agencies.

General Assembly resolutions, including the Palestinian upgrade resolution, can neither determine nor dictate international law or practice. They cannot obligate any state or organization to act or to accept what they recommend. They are nothing more than non-obligatory recommendations expressing the political view of the states that voted for them. Thus, this resolution constitutes one more General Assembly recommendatory resolution on Middle East issues, added to the hundreds of such resolutions that have already been adopted by the General Assembly and that abound in the annals of the UN.

In the same way that previous politically-motivated and one-sided resolutions on the Middle East generally, or regarding Jerusalem, settlements, borders or refugees in particular, have neither practically affected nor influenced the actual situation on the ground, and have not affected in one iota the actual negotiating process, so the present resolution, referring to the Assembly's vision of a Palestinian state within "the pre-1967 borders," will have absolutely no affect or influence on the situation on the ground

between Israel and the Palestinians, which can only be influenced as a result of direct negotiations and agreement between them.

The Palestinians Are Not in a Position to Declare Statehood

The internationally accepted requirements for statehood include, among other things, a unified territorial unit and responsible governance of its people, and capability of fulfilling international commitments and responsibilities.² Furthermore, the UN Charter requires that a state seeking membership in the UN be “a peace-loving state” that accepts and is willing and capable of carrying out the obligations of the UN Charter.³

Clearly, the Palestinians have far to go until they can honestly admit to realizing these very basic qualities and requirements for statehood. With Hamas/Iran-ruled Gaza and the Fatah-ruled West Bank still at ideological and military loggerheads with each other, while thousands of rockets are periodically, intentionally, and indiscriminately fired from Gaza into Israel’s towns and villages in stark and willful violation of the norms of international humanitarian law, and thousands more are still stockpiled for future use by the terror organizations openly and proudly operating in Gaza, no logical observer could reasonably endorse Palestinian readiness for statehood, let alone UN membership.

The UN Term “Occupied Palestinian Territories” Has No Basis in Law and Fact

The areas of Gaza and the West Bank (Judea and Samaria) have never been determined in any legal document or agreement to be sovereign Palestinian areas. UN Security Council Resolutions 242 (1967)⁴ and 338 (1973)⁵ called for a negotiated settlement of the conflict between the states concerned, and pursuant to that, Israel and the PLO agreed to settle all the relevant issues regarding the fate of the areas in question by negotiation between them.⁶

Both Israel and the Palestinians entertain claims over the areas in dispute, the Palestinians basing their claims on long-time residence and the right to self-determination, and Israel basing itself on long-standing historic and indigenous claims,⁷ including the chain of documents originating in the 1917 Balfour Declaration,⁸ through the League of Nations British Mandate,⁹ and the UN Charter. However, notwithstanding these claims, both sides have committed themselves in the 1993-5 Oslo Accords to negotiate between them the permanent status of the areas.¹⁰

Thus, any references in all of the many UN resolutions to “occupied Palestinian territories” are nothing more than an irresponsible prejudgment of an issue that has been agreed between the Palestinians and Israel to be settled in negotiations between them. It is indicative of nothing more than wishful thinking on the part of those states

voting in favor of it. Such resolutions have not and cannot determine the sovereignty of the areas in question or the state or authority to which such areas belong.¹¹

Thus, the legal status of the territories that has prevailed up to now, as agreed upon between Israel and the PLO in the Oslo Accords, continues to prevail after the Palestinian upgrade resolution. Neither the status of Israel in the territories, nor that of the Palestinians, has therefore changed in any way. The new claim voiced by the Palestinian leadership that Israel became, overnight, an occupant of Palestinian sovereign territory is without any basis.

The Settlements Issue Is a Negotiating Issue, Not a Precondition

From the start of the peace-process negotiations, it was agreed between the parties, and accepted by the international community in witnessing and endorsing the Oslo Accords, that the issue of settlements would be one of several issues to be negotiated in the permanent status negotiations.¹² None of the agreements signed between the parties contain any limitation on building by the parties in the areas under their respective jurisdiction.¹³

The attempt by the Palestinian leadership to isolate the settlements issue and to turn it into a precondition for further negotiation, as well as threats to initiate action regarding settlements in the International Criminal Court, undermine and prejudice any chance of a return to viable negotiations.

The sooner the Palestinians demonstrate a capability and willingness to return to the negotiating table, the sooner the issue of settlements will be amicably solved and removed from the bilateral and international agenda.

The Palestinian “Threat” to Initiate Charges in the International Criminal Court Is Legally and Politically Doubtful

A central aspect of the Palestinian campaign for acknowledgment of statehood in the UN has been the premise that UN recognition would enable them to initiate charges against Israeli leaders, officers, and officials in the International Criminal Court (ICC) in The Hague. This premise has received considerable prominence in the international media, and even more so in Israel. Even some Israeli jurists have added their voice to this curious premise and have even gone so far as to list the potential war crimes for which Israelis could be charged.¹⁴

However, this premise is highly questionable for several reasons. The ICC is neither a UN Organ nor a Specialized Agency, and is not obliged, as are the specialized agencies and other bodies within the UN system, to follow the recommendations of the UN General

Assembly. It is an “independent, permanent judicial institution” as determined in its relationship agreement with the UN.¹⁵

The 1998 ICC Statute provides that the court’s jurisdiction may be activated only by states, and that a state party to the ICC Statute may initiate charges.¹⁶ In fact, in January 2009, the Palestinian Authority turned to the ICC in a formal letter declaring its readiness to accept the ICC’s jurisdiction on the “territory of Palestine.” However, in his decision of April 2012,¹⁷ the ICC Prosecutor announced that his office did not have the competence to determine whether the term “state” could be applied to the Palestinian Authority. He added that “competence for determining the term ‘State’ within the meaning of article 12 [of the ICC Statute] rests, in the first instance, with the United Nations Secretary General who, in case of doubt, will defer to the guidance of the General Assembly. The Assembly of States Parties of the Rome Statute could also in due course decide to address the matter in accordance with article 112(2)(g) of the Statute.”

It is questionable if the Secretary-General will take up this “hot potato” handed him by the ICC Prosecutor. He is not obligated to do so.

In considering the issue of whether the Palestinians could be considered a state for the purposes of approaching the ICC, the fact nevertheless remains that even after the UN General Assembly’s latest upgrade resolution, the Palestinians are no more a state than they were before adoption of the resolution. Thus, it remains highly unlikely that the Court, the Assembly of States Parties or the UN Secretary-General, if functioning properly and legally and without political manipulation, would be able to accept Palestinian complaints against Israeli officials.

As an independent juridical institution, in keeping with the purposes for which it was established, and with a view to protecting its absolute objectivity, the ICC has attempted, up to the present, to avoid having its independent juridical character politicized or otherwise compromised. The attempts by the Palestinians to politicize the ICC and turn it into a whipping-body against Israel and its leadership would doubtless cause considerable damage to the court and prejudice its continued credibility and viability.

Conclusion

Any solution to the Middle East issues, including the achievement of Palestinian statehood, cannot be imposed by UN General Assembly resolutions, whatever majority they may command and however many times they may be repeated.

As has been universally acknowledged by the Security Council and by the parties themselves in the various peace treaties and other agreements signed between them,

only genuine and *bona fide* negotiations will produce the sought-after solution and permanent settlement, including opening the route to Palestinian statehood.

Creating false hopes among the Palestinian population, while perhaps catering to the self-serving interests and purposes of its leadership generally, and Mahmoud Abbas in particular, will only result in frustration and disappointment, once it becomes evident to all that nothing has changed, or is likely to change, until the Palestinian leadership is capable of representing all Palestinians in negotiation with Israel.

Similarly, futile attempts to initiate criminal charges against Israel and its leaders do not portend any willingness on the Palestinians' part to create the ambience of mutual trust and confidence necessary for a resumption of sincere and genuine negotiations.

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Notes

1. A/Res/67/19, 26 November 2012, <http://unispal.un.org/unispal.nsf/0080ef30efce525585256c38006eacae/181c72112f4d0e0685257ac500515c6c?OpenDocument>
2. Article 1, 1933 Montevideo Convention, <http://www.cfr.org/sovereignty/montevideo-convention-rights-duties-states/p15897>
3. Article 4, UN Charter, <http://www.un.org/en/documents/charter/chapter2.shtml>
4. <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/240/94/IMG/NR024094.pdf?OpenElement>
5. <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/UN+Security+Council+Resolution+338.htm>
6. See exchange of letters between PLO Chairman Yasser Arafat and Israeli Prime Minister Yitzhak Rabin, 9 Sept. 1993, in which Arafat promised "The PLO commits itself to the Middle East peace process, and to a peaceful resolution of the conflict between the two sides and declares that all outstanding issues relating to permanent status will be resolved through negotiations." <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Israel-PLO+Recognition+-+Exchange+of+Letters+betwe.htm>
7. See also the United Nations Declaration on the Rights of Indigenous Peoples, http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf
8. <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/The+Balfour+Declaration.htm>
9. <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/The+Mandate+for+Palestine.htm>
10. <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/THE+ISRAELI-PALESTINIAN+INTERIM+AGREEMENT.htm>
11. See the chapter by this author on "Israel's Rights Regarding Territories and the Settlements in the Eyes of the International Community," in *Israel's Rights as a Nation State in International Diplomacy* (Jerusalem Center for Public Affairs, 2011), <http://jcpa.org/book/israels-rights/>
12. See Article 5 of the 1993 Israel-PLO Declaration of Principles (commonly known as "Oslo 1"), <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Declaration+of+Principles.htm> and the PLO-Israel 1995 Interim Agreement,

<http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/THE+ISRAELI-PALESTINIAN+INTERIM+AGREEMENT.htm>

13. To the contrary – Article 27 (Planning and Zoning) of Annex III (Civil Affairs) to the 1995 Palestinian-Israeli Interim Agreement specifically enables each respective party to conduct the requisite planning, zoning and construction activities in its respective areas,

<http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/THE+ISRAELI-PALESTINIAN+INTERIM+AGREEMENT+-+Annex+III.htm#app-27>

14. Eyal Gross, “Following UN Recognition of Palestine, Israel Could Be Forced to Defend Itself at The Hague,” *Ha'aretz*, 2 Dec. 2012.

15. http://www.icc-cpi.int/nr/rdonlyres/916fc6a2-7846-4177-a5ea-5aa9b6d1e96c/0/iccasp3res1_english.pdf

16. See Articles 12-14 of the Statute of the ICC <http://untreaty.un.org/cod/icc/statute/romefra.htm>

17. <http://www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf>

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