



**Al-Haq's Questions and Answers:
Palestine's UN Initiatives and the Representation
of the Palestinian People's Rights**

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2011



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Cover photo: United Nation Building in New York.

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I. Summary

As an organisation dedicated to the protection and promotion of human rights in the Occupied Palestinian Territory (OPT), Al-Haq analysed the legal and political implications of the upcoming Palestinian UN initiatives on the protection of the rights of the Palestinian people under international law. By adhering to a strict application of international law and contemporary legal practice, Al-Haq's legal briefs on the UN initiatives seek to bring some clarity to the questions and concerns raised in the public debate and highlight, where appropriate, potential threats to the full exercise of all the Palestinian people's rights.

Al-Haq's initial legal brief 'Al-Haq's Questions and Answers on the Palestinian Initiatives at the United Nations' examined Palestine's statehood, the options available to the State of Palestine at the UN and the potential benefits and risks of the UN initiatives. It concluded that the initiatives do not bear any legal implications for Palestine's statehood status.

The existence of a State is not a legal, but a purely factual and political matter, and Palestine has been treated as a State over the years by the majority of States and international organisations. Therefore, by seeking UN admission, Palestinians do not claim a right to statehood, but rather the rights flowing from an existing statehood status. The upgrade of the Palestinian representation in the UN system is an important adjustment that would provide Palestine with further political leverage and legal avenues. It would strengthen Palestine's international legal personality and enhance its influence over the international community's willingness to put an end to Israel's occupation of the OPT and continuous violations of international law. Nevertheless, the September initiatives do not as such consist in an exercise of any right, they are merely a means to forward existing rights claims.

Recent public debate on Palestine's UN initiatives has raised concerns about potential changes in the mechanism of representation of the Palestinian people at the international level, and their possible effects on future rights claims, including the rights of return, to reparations and self-determination. The overarching concern has been that the UN initiatives could jeopardise the effective and collective representation of all the Palestinian people – the Diaspora, refugees, Palestinians citizens of Israel and the Palestinians in the OPT – both inside and outside of the UN system.

Al-Haq's legal analysis of the current structures of the Palestine Liberation Organisation (PLO) and the State of Palestine, respectively, concludes that these two entities have considerably different representational roles and capacities, flowing from their different international legal personalities. The State has the benefit of accessing more effective legal mechanisms, including the international criminal justice system, and engaging with other States - including Israel, on an equal footing to claim its sovereign rights. However, the State of Palestine might face limitations vis-à-vis other States in bringing individual claims through different international mechanisms on behalf of those who are not its nationals or dependents, namely, Palestinian refugees whose homes are in Israel and Palestinians citizens of Israel. On the other hand, the PLO's representational capacities allow it to represent claims on behalf of all the Palestinian people, the majority of which are refugees, despite its limited leverage compared to that of the State.

As such, it is of prime importance to safeguard the unique internationally recognised representational role and capacities of the PLO in parallel to those of the State of Palestine. With the upgrade in the Palestinian representation at the UN, the UN initiatives should ensure the full integration of the people's interests represented by the PLO into the participation of the State of Palestine through its

seat at the UN. The PLO should also continue to function outside of the UN system in parallel to the State, maintaining its current role and capacities because it is not subject to the limitations placed by international law and practice on relations between States.

Al-Haq acknowledges the importance of upgrading the Palestinian representation in the UN, provided that these steps are taken in a cautious and responsible manner; by undertaking firm measures to ensure the utmost protection of the rights of all the Palestinian people, therefore preserving the role and functions of the PLO. It is equally the responsibility of the international community towards the Palestinian people, in particular the Palestinian refugees, to ensure that their representation is maintained and facilitated both inside and outside the UN system. Importantly, the future undertaking of internal reforms of the Palestinian representative bodies must guarantee the legal protection of all the Palestinian people, and ensure their political participation in accordance with their civil and political human rights. Al-Haq reiterates its firm belief that strict adherence to international law is the essential framework for the protection of the rights of the Palestinian people, and the only basis for a just and sustainable resolution of the conflict.

* * * * *

II. Al-Haq's Questions & Answers:

Palestine's Initiatives at the United Nations

This paper seeks to answer some of the common questions that have arisen recently in the context of the upcoming initiatives of Palestinian representatives at the United Nations (UN). The questions concerns four main issues: (i) Palestine's September initiatives; (ii) Palestine's statehood status in international law; (iii) the procedure for admission as a Member State of the UN; and (iv) the potential implications of these initiatives. In providing answers to these questions, Al-Haq has adhered to a strict application of international law and contemporary legal practice, including the relevant rules of international humanitarian law.

I. Palestine's September Initiatives

1. What are the Palestinian leadership's plans for September?

The Palestinian representatives had initially expressed the intention to issue a (unilateral) declaration of independence in September 2011 along the 1967 borders. This would have amended the Declaration of Independence issued by the Palestine Liberation Organisation (PLO) in 1988,¹ which remains the most recent basis for Palestine's statehood. The 1988 declaration is based on the UN General Assembly Resolution 181, also known as the UN Partition Plan of 1947, which is considered the most authoritative instrument for Palestine's international legitimacy.²

The plan to issue a declaration was changed to a series of initiatives that consist of applications for membership in international organisations, including but not limited to the UN, and the ratification of different international conventions and treaties, including the Geneva Conventions and different human rights instruments. In parallel, Palestine is looking to obtain further recognitions of its statehood from individual States.³

2. What can be expected from the September UN initiatives?

The September initiatives are an important way to enhance Palestine's prospects for acceding to international treaties, especially human rights instruments such as the two International Covenants on Civil and Political Rights (ICCPR) and on Economic Social and Cultural Rights (ICESCR). Palestine could also prospectively become a member of some international organisations, both within and outside the system of the UN.

Practically, the most Palestine could achieve through the UN admission procedure, in light of the likely US veto at the Security Council, is a General Assembly resolution recommending the recognition of Palestine's statehood, and/or granting it the status of 'observer State' at the UN, as discussed below.

¹ The Declaration of Independence was made by the Palestine National Council (PNC) of the Palestine Liberation Organization (PLO) on 15 November 1988, during its 19th session in Algiers <<http://unispal.un.org/UNISPAL.NSF/0/6EB54A389E2DA6C6852560DE0070E392>> accessed 16 July 2011.

² See for instance, J. Crawford, *The Creation of States in International Law* (2nd ed.) (Oxford University Press, Oxford, 2006).

³ Information obtained from consultations with Palestinian Authority's Ministry of Foreign Affairs, legal advisers, 28 June 2011 (minutes of the meetings are on-file with Al-Haq).

II. Palestine's Statehood Status in International Law

I. Is Palestine a State under international law? What is the international community's position with regards to Palestine's statehood?

Palestine has been treated as a State by the majority of States and international organisations over the years.⁴ In its capacity as observer at the UN, Palestine has been accorded rights reserved for States by the Security Council and the General Assembly, amongst other UN bodies.⁵ For instance, the UN Secretariat has also indirectly acknowledged Palestine's statehood by accepting its instruments of adherence on road, maritime, and rail transport concluded under the auspices of the Economic and Social Commission for Western Asia, of which Palestine is a member country.⁶ Palestine has also been conducting international relations, economic and diplomatic, with individual and groups of States for many years.

However, as a whole, the existence of a State is not a legal, but a purely factual and political matter. The difficulties with the questions concerning Palestine's statehood result from the fact that statehood is an indeterminate status under international law. It cannot be ascertained by using an objective test with a clear set of legal criteria; neither the Montevideo Convention, nor the varying theories on recognition are helpful in determining statehood status. Moreover, questions concerning the exact parameters of a State, including its borders, are unrelated to the question of whether it is or is not a State, and their impeding resolution is not a bar to statehood.⁷

Statehood can be understood mainly in terms of State practice vis-à-vis the entity concerned, including its admission as a member of international organisations or accession as a party to international treaties and conventions. Each country decides for itself whether to recognise the entity as a State, either explicitly or implicitly by entering into relations therewith. This does not, however, have an effect on the determination of the entity's status in international law.

“The existence of a State is a purely factual and political matter... Questions concerning the exact parameters of a State, including its borders, are not a bar to statehood.”

General Assembly resolution 181 of 1947 has already provided for the creation of two States, one Arab, one Jewish, at the end of the British mandate in Palestine.⁸ This, amongst other pertinent past and contemporary facts, should be seen as supportive evidence of the international community's perception and practice in relation to Palestine's statehood. It is equally important, in this regard, to understand the obligations owed by the international community to the Palestinian people with regards to ensuring the exercise of their independence.

⁴ The European Union for example deals with Palestine on the basis that it is a State, having concluded the 1997 Euro-Mediterranean Interim Association Agreement with Palestine and acknowledging Palestine's statehood at the European Court of Justice in 2010, where it used the word "state" in reference to Palestine. *Brita GmgH v Hauptzollamt Hamburg-Hafen*, European Court of Justice, Case C-386/08 (25 February 2010) para. 58. See further J. Quigley, *The Statehood of Palestine: International Law in the Middle East Conflict* (Cambridge University Press, New York, 2010) 180-181.

⁵ *Ibid.*

⁶ See the official website of the UN Economic and Social Commission for Western Asia <<http://www.escwa.un.org/members/map.asp>>.

⁷ See generally, I. Brownlie, *Principles of Public International Law* (7th ed.) (Oxford University Press, New York, 2008) 69-95.

⁸ See for a further discussion of the Partition Plan and international law see N. Elaraby, 'Some Legal Implications of the 1947 Partition Resolution and the 1949 Armistice Agreements', 33 *Law and Contemporary Problems* 1 (1968) 97-109.

Palestine's statehood has recently been discussed at length in the context of the submission of the Palestinian declaration under Article 12(3) of the Statute of the International Criminal Court (ICC), as a State that is not a party to the Statute, transferring jurisdiction to the Court over international crimes committed in Palestine. The issuance of the declaration produced a debate over Palestine's statehood amongst scholars, States' legal services and different groups, which examined whether Palestine is, for the purpose of the Statute or otherwise, a State under international law.⁹ Adopting a functional approach to the objectives of its work, the ICC should accept Palestine's declaration on the grounds that Palestine is indeed a State for the purpose of the Rome Statute.¹⁰

2. Does the fact that Palestine is under occupation affect its statehood status?

Statehood is not affected by belligerent occupation, neither does occupation negate or offset statehood in legal terms. Statehood is not dependent on occupation, which only has the effect of limiting the ability of a State to exercise its sovereignty and independence. During occupation, the sovereignty over the territory remains at all times with the local population. The sovereignty and independence of the Palestinian people, as well as their cardinal right to self-determination, have been affirmed by numerous UN resolutions as well as by official statements made on behalf of individual States.

3. What effects can recognition have on the status of an entity under international law?

The prominent position in international law is that the number of recognitions an entity has obtained does not have legal bearing on the determination of statehood. Recognition is a declaratory act and implies only the acknowledgement of the legal fact that an entity is a State.¹¹ A refusal to recognise Palestine is a political act, which does not have any legal bearing on its statehood status. Similarly, a declaration of independence is only an invitation for States that is meant to trigger recognition.¹²

Most States, including Israel, have recognised Palestine and the sovereignty of the Palestinian people, either explicitly or implicitly through relations therewith. So far, about 117 States have explicitly recognised Palestine, and the Palestinian representatives predict they will have obtained over 130 recognitions by September 2011. Although recognition does not constitute statehood as such, it substantiates Palestine's statehood providing it with further means to gain more rights and obligations in the international legal order.¹³

“Statehood is not affected by belligerent occupation, which only has the effect of limiting the ability of a State to exercise its sovereignty and independence.”

⁹ Summary of submissions on whether the declaration lodged by the Palestinian National Authority meets statutory requirements, ICC website <<http://www.icc-cpi.int/menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/palestine/summary%20of%20submissions%20on%20whether%20the%20declaration%20lodged%20by%20the%20palestinian%20national%20authority%20meets>> accessed 17 July 2011. See also, UCLA School of Law, Human Rights and International Criminal Law Online Forum, 'Gaza Jurisdiction Question: Does the Prosecutor of the ICC have the Authority to Open an Investigation into Alleged Crimes committed in the 2008-2009 Gaza Conflict?' <<http://uclalawforum.com/gaza>> accessed 17 July 2011.

¹⁰ M. Kearney, 'Palestine and the International Criminal Court: Asking the Right Question', UCLA Human Rights & International Criminal Law Online Forum, J. Quigley, 'The Palestine Declaration to the International Criminal Court: The Statehood Issue', *Rutgers Law Record* (2009). Memo by J. Quigley submitted to the ICC on 20 May 2010 <<http://www.icc-cpi.int/NR/rdonlyres/D3C77FA6-9DEE-45B1-ACC0-B41706BB41E5/281978/Quigleyadditionalsubmission1.pdf>> accessed 16 July 2011.

¹¹ J. Crawford (n 2) 17-28 and J. Quigley (n 4) 219-252.

¹² Al-Haq consultation with Dr. J. d'Aspremont, Associate Professor of International Law and Senior Research Fellow of the Amsterdam Center for International Law at the University of Amsterdam, on statehood and Palestine's status in international law, 18 May 2011 (notes on-file with Al-Haq).

¹³ V. Kattan, 'A State of Palestine: The Case for UN Recognition and Membership', Al-Shabaka, Policy Brief, May 2011 <<http://al-shabaka.org/policy-brief/politics/state-palestine-case-un-recognition-and-membership>> accessed 16 July 2011.

4. Is the question of Palestine's statehood relevant to the September initiatives?

Although on face value Palestine's UN options have given rise to certain questions concerning Palestine's statehood status, the "September options" do not, in purpose or in effect, draw on or pretend to bring about any determinations with regard to this question. In other words, the question of whether Palestine is or is not a State under international law is neither invoked nor answered through these processes.

As such, neither UN membership nor further recognition of Palestine as a State can legally determine whether it is a State – each State and international organisation will have the last say on whether they choose to treat Palestine as a State. This depends wholly on political will and the legitimacy that each one of them chooses to attribute to Palestine, and not on an objective determination on the basis of international legal standards.

The issue at stake in the context of the "September initiatives" is not statehood as such, but a strategy to strengthen Palestine's position in the international legal order to be unequivocally recognised rights and obligations under public international law and enhance its ability to exercise such rights by bringing international claims.¹⁴

"Neither UN membership nor further recognition of Palestine as a State can legally determine whether it is a State – each State and international organisation will have the last say on whether they choose to treat Palestine as a State."

III. UN Admission Procedure

I. What is the procedure for admission as a Member State of the UN?

The procedure for being accepted as a member of the UN is initiated when a State submits an application to the Secretary-General stating its adherence to the UN Charter. Thereafter, the 15-member Security Council must make a recommendation that requires nine yes votes and no veto by a permanent member, and only then can the General Assembly vote on membership. The General Assembly vote must be approved by a two-thirds majority.

The Security Council is composed of five permanent members who have a veto power: China, France, Russian Federation, the United Kingdom and the United States, and ten non-permanent members (with year of term's end): Bosnia and Herzegovina (2011), Germany (2012), Portugal (2012), Brazil (2011), India (2012), South Africa (2012), Colombia (2012), Lebanon (2011), Gabon (2011), and Nigeria (2011).¹⁵

US President Obama has expressed the intention of the US to veto a Security Council recommendation on Palestine's admission as a Member State of the UN. In the likelihood of a veto at the Security Council, it is uncertain whether there is an alternative route for Palestine to achieve UN membership by bypassing the Security Council (see discussion below).

¹⁴I. Brownlie (n 7) 69-95.

¹⁵For further information on the UN Security Council see its official webpage <<http://www.un.org/Docs/sc/index.html>>.

2. Will the UN admission procedure come to an end if the UN Security Council is deadlocked by a veto?

The procedure for UN membership, under Article 4(2) of the UN Charter, requires a nine yes vote at the Security Council before the General Assembly can conduct a vote on the admission of a State as a member of the organisation. Therefore, a deadlock at the Security Council is expected to bring the 'classical' UN admission procedure to an eventual deadlock. Still, some attempts can be made by the General Assembly to act despite a negative recommendation by the Security Council, including exchanges between the two bodies, which can take place on the reasons for a negative recommendation by the Security Council.

In response, it has been suggested that the General Assembly's 'Uniting for Peace' powers under its Resolution 377 could be used to bypass a deadlock at the Security Council and bring the admission matter before the General Assembly.¹⁶ Since it is highly improbable that the non-admission of Palestine to the UN can be defined as a 'threat to international peace and security', it is unlikely that these powers can be invoked. The International Court of Justice (ICJ) Advisory Opinion in the Admission case in 1950 examined the competence of the General Assembly in the context of the UN admission procedure, concluding that the Security Council's recommendation is indeed a condition precedent to the General Assembly vote on the matter, and therefore also to the admission of a State as a member of the organisation.¹⁷

As another option to overcome a veto at the Security Council, some discussions have proposed the possibility of arguing that the admission of a State as a member of the UN is a procedural, as opposed to a substantive, matter and that therefore the permanent five members of the Security Council should not be able to use their veto powers to prevent the achievement of a nine yes vote.

Notably, this is not a question that was directly examined in the ICJ 1950 Opinion and could therefore be brought before the Court by the General Assembly for further examination. Equally, the minority opinion in the 1950 Opinion added that the Court should have distinguished between two scenarios: the first being where the application failed to receive majority support in the Security Council, and the second being where the application received the majority approval, but was opposed by a permanent member. In this latter case, it would not have been permissible, according to the minority opinion of the Court, for a permanent member of the Security Council to obstruct the acceptance of a membership request that received majority approval by the Security Council, and then proceeded to obtain two-thirds majority support from the voting members of the General Assembly.¹⁸ The grounds for this option continue to be debated and its prospects remain uncertain.

3. What is the 'observer State' status option? What significance, legal or political, does it have?

In light of the political pressures at the UN, the most that can realistically be expected to come out of Palestine's application for UN membership is a resolution from the General Assembly with the majority of States recommending the recognition of Palestine's statehood and granting it 'observer State' status.¹⁹

¹⁶ Al-Haq consultation with Dr. J. d'Aspremont (n 12).

¹⁷ *Competence of the General Assembly for the Admission of a State to the United Nations* (Advisory Opinion) ICJ Rep 1950 (3 March 1950) <<http://www.icj-cij.org/homepage/index.php>>.

¹⁸ For further discussion of these options see C. Mansour, 'Palestinian Options at the United Nations', Institute for Palestine Studies <<http://palestine-studies.org/column/details.aspx?t=2&id=34>> accessed 19 July 2011.

¹⁹ Like in the case of Switzerland, before it became a UN member State in 2002, and the present case of the Holy See.

Such status is based purely on practice, and there are no provisions for it in the UN Charter. As gathered from the Swiss, Austrian, Finnish, Italian and Japanese precedents, the only requirement is that the non-Member State of the UN be a member of one or more specialised UN agencies.²⁰ A simple majority vote in the General Assembly then seems to suffice to grant the State observer status.

The upgrade to UN 'observer State' status for Palestine, from non-State observer²¹, is nevertheless an important adjustment that would provide Palestine with further political leverage, and confirm its rights as a State within the UN system. Although to a lesser extent than admission to the UN as a full Member State, the 'observer State' status would further Palestine's position vis-à-vis others States, including Israel, enhancing its influence to claim its rights from others.

“Recognition and UN membership are two different matters. By seeking UN admission, Palestinians do not claim a right to statehood, but rather the rights flowing from an existing statehood status.”

4. What could be the value of UN membership (or 'observer State' status) for Palestine?

Despite the important symbolic political value of UN membership and recommendation for recognition by the General Assembly, they do not bear any legal implications as such. Recognition and UN membership are two different matters, one does not imply the other – neither is UN membership a requirement for statehood, nor does the General Assembly have the powers to constitute a State.

By seeking UN admission, Palestinians do not claim a right to statehood, but rather the rights flowing from an existing statehood status. Neither are Palestinians claiming a right to sovereignty or independence; they are claiming the means to actually exercise them.

IV. Implications of Palestine's September Initiatives

1. What are the legal implications of the September initiatives?

Certain indirect legal effects could flow from the eventual admission of Palestine to some international organisations and treaties, as well as the overall increase in political legitimacy and legal personality. A number of gains can be asserted from the upcoming strategy, both pertaining to access to accountability mechanisms for Israel's violations of international law, which have so far benefitted from a climate of impunity where justice has been held hostage by the politics of the 'negotiations table' and the misnamed 'peace process.'

The benefits of enhancing Palestine's international legal personality can be classified in a two-fold manner: (1) further possibilities to adjudicate claims of violations of international humanitarian and human rights law; and (2) the possibility to gain further influence over the international community's willingness to put an end to Israel's violations.

²⁰ For further information on UN permanent observers and non-Member States at the UN <<http://www.un.org/en/members/aboutpermobservers.shtml>> accessed 17 July 2011.

²¹ In its resolution 3237 (XXIX) of 22 November 1974, the General Assembly granted observer status to the Palestine Liberation Organization. In its resolution 43/177 of 15 December 1988, it decided that the designation "Palestine" should be used in place of the designation "Palestine Liberation Organization" in the United Nations system. See, respectively, UNGA Res 3237 (XXIX) (22 November 1974) Un Doc A/RES/3237 (XXIX) and UNGA Res 43/177 (15 December 1988) Un Doc A/RES/43/177.

Firstly, the accession to international organisations and treaties will provide access to new international fora and justice avenues, including the UN human rights treaty bodies and special procedures, for Israel's violations of international law, which are widely acknowledged and have been condemned countless times by different UN bodies. Importantly, this will also facilitate access to the ICC, where a favorable impact of even a GA resolution (recommending the recognition of Palestine) could assist both the prospective acceptance of Palestine's declaration under Article 12(3) of the Statute of the ICC, and its potential ratification of the Statute of the ICC.

Another option that will become available is requesting an advisory opinion from the ICJ on the illegal character of Israel's occupation, due to its persistent violations of international law, including the law of occupation and the prohibitions of apartheid and colonialism.

Palestinians would also gain further political leverage to pressure the international community to comply with its responsibility (under the UN Charter, the international law of State responsibility and Common Article 1 to the Geneva Conventions) to bring Israel's violations of international law to an end, including by strengthening the possibility to get the UN to define the Israel-Palestine conflict as a 'threat to international peace and security' in order to allow for the use of UN collective measures against Israel.²²

Concurrently, the Palestinian governmental institutions in the Occupied Palestinian Territory (OPT) could also be affected by Palestine's accession to international humanitarian and human rights law treaties by being subject to a comprehensive audit for their protection of the rights of the people under their jurisdiction.

2. What are the political implications of the September initiatives?

The political implications that may flow from these initiatives are manifold, and have often been conflated with the legal ones. The indirect legal implications, discussed above, also respectively bear different political implications on Palestine's position in the international legal system, bringing it onto a footing of 'equal formality' with other States. By accruing such legitimacy in the international legal order, Palestine would be better situated to claim its rights from the international community, in particular the means to exercise the right to self-determination.

Resultantly, this is expected to reconfigure the conflict and effectuate a political paradigm shift from a binary and 'zero-sum' situation between Israel and the Palestinians into a multilateral conflict, where actors are not changed but diversified.

“Accession to international organisations and treaties will provide access to international accountability mechanisms and put Palestine on an equal footing with other States.”

²² Similar to the cases of Kuwait and Namibia. See also *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (South West Africa) notwithstanding Security Council Resolution 276 (Advisory Opinion) ICJ Rep 1970 (21 June 1971) (hereafter: *Namibia* Advisory Opinion). See also O. Ben-Naftali, 'Pathological Occupation: Normalizing the Exceptional Case of the Occupied Palestinian Territory (OPT) and Other Legal Pathologies' in O. Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law International Human Rights and Humanitarian Law* (Oxford University Press, Oxford/New York, 2011).

3. What are the potential benefits of the September initiatives?

A prominent backdrop to the discussion of Palestine's statehood is the ongoing, already over four-decade-long, occupation of Palestinian territory by Israel, which amounts to a continuous denial of the right of the Palestinian people to self-determination. The international community possesses a wealth of information on Israel's ongoing grave and systematic violations of international law, including violations of the international law prohibitions of colonialism and apartheid, which establish the inherent illegality of Israel's occupation.²³ Consequently, States are already under an unequivocal obligation not to recognise the situation as legal, not to render aid or assistance as well as to actively cooperate to bring an end to Israel's violations.²⁴

The September initiatives are expected to enhance Palestine's position in the international legal order by allowing it to accumulate further legitimacy and gain a footing of 'equal formality' with other States on the international level. This would permit it to accelerate ongoing international legal processes as well as gain further access to international accountability mechanisms to redress Israel's violations of international law.

“The initiatives do not consist of an exercise of any right. They are meant to further the means to exercise these rights.”

4. Could the September initiatives impact the protection of civilians in the OPT in terms of the application of international humanitarian and human rights law?

The law applicable to the OPT is the law of international armed conflict, which applies by virtue of Israel's occupation of the Palestinian territory, namely the West Bank, including East Jerusalem, and the Gaza Strip. The September initiatives, regardless of their expected results, would not bring about any adjustment in the legal framework applicable to the OPT, since the Palestinian territory will remain under the effective control and administration of the Occupying Power, Israel, which is also ultimately responsible for ensuring the Palestinian population's enjoyment of their fundamental guarantees under the law of occupation.

The rights guaranteed to the Palestinian population in the OPT by the provisions of international humanitarian and human rights law are absolute and cannot be compromised by any change introduced to the territory or government of the occupied territory even by an agreement between the occupying power and occupied population.²⁵ As such, the admission of Palestine to international organisations and its accession to international treaties would not affect the rights guaranteed to protected persons under occupation.

²³ See generally 'Occupation, Apartheid, Colonialism? A re-assessment of Israel's Practices in the Occupied Palestinian Territories under International Law' (Human Sciences Resource Council, Cape Town, 2009) <www.hsarc.ac.za/Document-3227.phtml> accessed 17 July 2011.

²⁴ When a serious breach of a peremptory norm occurs, third party States are seen as being under an obligation towards the international community as a whole (obligations *erga omnes*) to bring the violations to an end; as per the international law on state responsibility, namely Articles 40 and 41 of the International Law Commission's Draft Articles on State Responsibility 2001. See also *Namibia* Advisory Opinion (n 22).

²⁵ Article 47 of the Fourth Geneva Convention ensures the inviolability of the rights of protected persons in time of occupation, stating that "Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory."

5. What are the risks involved in initiating the September options? Can they prejudice the future exercise of Palestinian national rights and/or the determination of questions related to borders and refugees?

Since the path that the Palestinian representatives have chosen is very specific and largely procedural, none of the upcoming initiatives could bring about any legal change to the current rights of the Palestinian people, namely the right to self-determination and the right of return of refugees, which is part and parcel of the exercise of the right to self-determination. These are rights that are borne and exercised by the people, not by a State, and, therefore, do not stand to be compromised nor prejudiced by decisions on the admission of a State to an international organisation or its recognition by other States.

Moreover, once Palestine is able to fully exercise its sovereign rights and independence, namely when the occupation is brought to an end, the Palestinian State will need to define and establish the legal foundations of Palestinian nationality.²⁶ The Palestinian leadership will then need to carefully examine and define whom it represents diplomatically in negotiations in order to ensure that the rights of Palestinian refugees are not undermined.

Therefore, concerns with regards to the effects of the admission of Palestine to the UN along the 1967 borders on the future determination of Palestine's borders by the Palestinian people are of a political nature and should not be conflated with the legal effects of these processes. The September initiatives will not result in any erosion of rights, or the prejudice of their future exercise, because they do not as such consist of an exercise of any right, nor are they guaranteed to bring about any change in the situation of occupation. What they are meant to achieve is the furtherance of the claims to provide the Palestinian people with the means to exercise these rights.²⁷

6. Are the September initiatives an exercise of the Palestinian people's right to self-determination?

Statehood as such and the determination of the borders and government of an entity are two separate matters. The former, as discussed above, is not a legal matter as such, whilst the latter are matters that are determined by a people in the course of the exercise of their right to self-determination.

In practice, the exercise of the right to self-determination would require the popular participation of the Palestinian people as a whole – including the local population of the OPT, Palestinian refugees, the Palestinian Diaspora as well as Palestinian citizens of Israel. A referendum is the most common practical means for the exercise of the right to self-determination by a people, as was the case of Southern Sudan that has recently been admitted as a member State of the UN.²⁸ The conduct of a referendum would also provide further legitimacy and leverage to any initiative of the current Palestinian representatives, if these were intended to include matters that concern, for instance, the delineation of territorial borders.

²⁶ See in this respect the seminal work of M. Qafisheh, *The International Law Foundations of Palestinian Nationality: A Legal Examination of Nationality in Palestine under Britain's Rule* (Martinus Nijhoff Publishers, The Netherlands, 2008). See also V. Kattan, *From Coexistence to Conquest: International Law and the Origins of the Arab-Israeli Conflict, 1891-1949* (Pluto Press, New York, 2009) 209-232.

²⁷ J. Quigley (n 4) 251-252.

²⁸ 'UN Welcomes Southern Sudan as 193rd Member State', UN News Service, 14 July 2011 <<http://www.un.org/apps/news/story.asp?NewsID=39034&Cr=South+Sudan&Cr1=>> accessed 17 July 2011.

7. Can the September initiatives be seen as constituting a violation of agreements between Israel and the PLO, namely the Israel-PLO Interim Agreements 1995 (Oslo Accords)?

The PLO-Israel Interim Agreements (Oslo Accords) are not a treaty under international law and do not stand to compromise or adjust any of the rights guaranteed to the occupied Palestinian population under the Geneva Conventions. As such, these agreements, concluded between the Occupying Power and the representative of the occupied population for the administration of the occupied territory, do not negate the rights and obligations under international humanitarian and human rights law. Neither does occupation, as discussed above, negate Palestine's statehood status under international law. As such, the right to self-determination and the sovereignty of the Palestinian people, which has been reiterated on countless occasions by the international community, cannot be modified or limited in any way by the Oslo Accords.

Since the September initiatives are a means to reassert Palestinian sovereignty and to strengthen Palestine's position in the international legal order, on the basis of its already existing and determined legal status and rights, they do not constitute a violation of the Oslo Accords, nor bring about any change in the status of the territory or rights of either party.

* * * *

Further Reading:

Camille Mansour, 'Palestinian Options at the United Nations', *Al-Ayyam*, 10 July 2011 (in English at Institute of Palestine Studies) <<http://palestine-studies.org/columndetails.aspx?t=2&id=34>>.

Victor Kattan, 'Palestinian Statehood: a Turning Point', *Open Democracy*, 6 July 2011 <<http://www.opendemocracy.net/victor-kattan/palestinian-statehood-turning-point>>.

Hélène Michou, 'Towards Declaration of a Palestinian State?', *FRIDE (A European Think Tank for Global Action)*, Policy Brief, No 79, June 2011 <<http://www.fride.org/publication/920/towards-declaration-of-a-palestinian-state>>.

Victor Kattan, 'A State of Palestine: The case for UN Recognition and Membership', *Al-Shabaka*, Policy Brief, May 2011 <<http://al-shabaka.org/policy-brief/politics/state-palestine-case-un-recognition-and-membership>>.

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Victor Kattan, 'The Case for UN Recognition of Palestine', *Electronic Intifada*, 14 June 2011 <<http://electronicintifada.net/content/case-un-recognition-palestine/10079>>.

Rashid Khalidi, 'On the Possible Recognition of Palestine in the UN', *Jadaliyya*, 28 June 2011 <<http://www.jadaliyya.com/pages/index/2002/on-the-possible-recognition-of-a-palestinian-state>>.

Victor Kattan, 'Palestinian Statehood: Individual Nations, not the U.N., will have the Final Say', *Los Angeles Times*, 17 June 2011 <http://opinion.latimes.com/opinionla/2011/06/blowback-palestinian-statehood-united-nations.html?utm_source=Al-Shabaka+announcements&utm_campaign=b552cea33a-Media_Summary_6_28_11_GA&utm_medium=email>.

Omar Dajani, 'September Song', *Foreign Policy*, 24 May 2011 <http://mideast.foreignpolicy.com/posts/2011/05/24/september_song?sms_ss=facebook&at_xt=4ddd05187a1958%2C1>.

Valentina Azarov, 'A Comment on Palestine's Statehood, Recognition and UN Membership', *International Law Observer*, 22 June 2011 <<http://internationallawobserver.eu/2011/06/22/a-comment-on-palestine%E2%80%99s-statehood-recognition-and-un-membership/>>.

III. Al-Haq's Questions and Answers:

Palestine's UN Initiatives and the Representation of the Palestinian People's Rights

As part of the ongoing public debate about Palestine's United Nations (UN) initiatives, a number of concerns have been raised with regards to potential changes in the mechanism of representation of the Palestinian people at the international level, both inside and outside of the UN system. In particular, it has been pointed out that the new profile of the State of Palestine could affect future rights claims, including the rights of return, to reparations and self-determination of all the Palestinian people – the Diaspora, refugees, Palestinians with Israeli citizenship and the Palestinians in the occupied territory, namely the West Bank, including East Jerusalem, and Gaza Strip.

Although the details of the UN initiatives remain unknown, two main scenarios have been contemplated by public debate. Will the PLO be maintained in its present role and functions, while the State, which exists separately from the PLO, takes a seat at the UN? Or, will the PLO's role and functions be ceded to the State, which gains a seat at the UN, while the PLO ceases to function both inside the outside of the UN?

To answer these questions, this legal brief, based on a strict application of international law and contemporary legal practice, examines the following four issues: (I) the UN initiatives and mechanisms for the representation of the Palestinian people's rights (II) the representation of the Palestinian people's rights by the State of Palestine; (III) the status and role of the PLO; and (IV) the possible effects of the UN initiatives on the representation of the rights of the Palestinian people.

This brief supplements the analysis conducted in Al-Haq's 'Questions & Answers on Palestine's September Initiatives at the United Nations' (published on 20 July 2011).

I. Mechanisms for the Palestinian People's Representation and the UN Initiatives

I. What are the latest reported developments with regards to the Palestinian leadership's plans for the UN initiatives?

The Palestinian representatives have recently confirmed that the September initiatives at the UN will involve a simultaneous two-pronged strategy consisting of (i) the submission of an application for membership of the UN to the Secretary General (who will present it to the Security Council); and (ii) the adoption of a UN General Assembly (GA) resolution that reasserts the rights of the Palestinian people as affirmed in numerous UN resolutions, invites the recognition of the State of Palestine by individual States and its admission to international organisations, and supports Palestine's application for UN membership.

“The PLO, of its own right, would be able to continue to fully exercise its mandate outside the UN system, whilst also ensuring the representation of all the Palestinian people's claims through the seat of the State at the UN.”

These processes are reportedly expected to be initiated on 20 September 2011.¹ However, the vote on the GA resolution is not expected to take place before October or even November 2011. Meanwhile, the application for UN membership will take considerably longer to materialise. The procedure is expected to be further hindered by the US veto at the Security Council (SC), which would trigger a debate between the SC and the GA, prolonging the admission process.² The Palestinian leadership could either re-submit the application on a later date, or wait for the GA to vote on the SC report on the reasons for their negative recommendation on the application for full membership.

2. Do the UN initiatives consist of a formal change in representation mechanisms for the Palestinian people, inside or outside of the context of the UN?

The nature of the changes and their implications will depend greatly on the manner in which the Palestinian leadership undertakes the UN initiatives. Reports about the UN initiatives do not indicate that they will entail any formal changes in the representation mechanisms of the Palestinian people, such as an express dissolution of a representative body or transformation of one body into another.³

The UN initiatives are reportedly concerned with the enhancement of the existing State of Palestine's status in the UN. In other words, the State, which already exists separately to the PLO, is looking to enter the UN system.⁴ As a result of the State taking a seat at the UN, the Palestinian representation at the UN would be upgraded to that of an 'Observer state' or Member State. If this were the case, the PLO, of its own right, would be able to continue to fully exercise its mandate outside the UN system, whilst also ensuring the representation of its claims on behalf of all the Palestinian people through the seat of the State at the UN. If the reports are wrong, however, and the UN initiatives are intended to bring the PLO's exercise of its mandate and functions to an end, an important danger flag needs to be raised.

3. How does international law define representation? What different representational capacities exist? In which international fora is representation relevant?

There is no comprehensive set of legal rules on the representation of people's rights in international law – the law neither governs the legitimacy of a representative body nor the type of legal entity that can claim rights on behalf of a people. The right to self-determination, along with other human rights provisions, including civil and political rights as enshrined in the International Covenant on Civil and Political Rights (ICCPR), presupposes the ultimate right of the people to ensure that their institutions represent them effectively, regardless of the form of those institutions. Ultimately, as discussed below, the rights concerned are borne individually and collectively by the people, whom the law leaves to decide upon the form and content of their representative bodies.

¹ See also, E. El-Shenawi, 'In 'historic initiative', Palestinians set date for UN statehood bid for recognition' *Al Arabiya News*, 13 August 2011 <<http://www.alarabiya.net/articles/2011/08/13/162139.html>> accessed 20 August 2011; G. Shefler, 'Palestinians set date for statehood showdown at UN' *Jerusalem Post*, 13 August 2011 <<http://www.jpost.com/DiplomacyAndPolitics/Article.aspx?id=233625>> accessed 20 August 2011; and H. Sherwood, 'Palestinians to present statehood bid to UN general assembly' *The Guardian*, 14 August 2011, <<http://www.guardian.co.uk/world/2011/aug/14/palestinian-statehood-un-general-assembly>> accessed 20 August 2011.

² The GA is likely to send its recommendations to the SC on how to proceed with the application. There is no State that has been rejected UN membership before. It has taken as long as 10 years for Jordan, for instance, to get membership, but the end result was positive. Notably, whilst waiting for the approval of the application for membership, there are other paths within the UN system that can be pursued more readily. See, for further information, T.D. Grant, *Admission to the United Nations: Charter Article 4 and the Rise of International Organisation* (Martinus Nijhoff, Leiden, 2009).

³ 'PLO Status not Affected by State UN Recognition, says Executive Committee', *Wafa News*, 5 September 2011 <<http://english.wafa.ps/index.php?action=detail&id=17227>> accessed 12 September 2011.

⁴ The State's current existence is discussed in Al-Haq's Questions and Answers on the Palestinian Initiatives at the United Nations, July 2011, 2-4 <http://www.alhaq.org/pdfs/qa_july_2011.pdf>.

The representational scope and capacities of a particular body vary depending on the purpose and institutional context in which it seeks to present claims – whether it is before an international tribunal or an international organisation. Although international law is not concerned with the legitimacy of the representation of a State’s nationals by that State and its government – be it a democracy or a dictatorship – it differentiates between the legal personalities and representational capacities of different types of representative bodies, for instance a State versus a non-state actor like the PLO. As such, the legal personality of the representative body could procedurally limit the capacities of that representative body to make claims on behalf of certain persons and groups before certain international fora.⁵ For instance, in diplomatic relations and international tribunals, States can only represent their nationals.

“No limitations exist on the State’s ability to bring forward human rights claims also on behalf of those who are not its nationals through its participation in the UN system.”

Nonetheless, the limitations on the State’s capacity to represent claims of non-nationals, due to the restrictions imposed on diplomatic relations between States,⁶ are only relevant to the representation of these claims before international tribunals and in bilateral relations with other States. Therefore, no limitations exist on the State’s ability to bring forward human rights claims also on behalf of those who are not its nationals through its participation in the UN system, where the representation of claims is usually about, as opposed to individual, collective rights and interests.

II. The Status and Representational Capacities of the PLO

I. What are the current status and representational capacities of the PLO?

The PLO was established in 1964 and the political will of the Palestinian people is its only source of legitimacy. This was clearly set out in the Palestinian Charter, reiterated in the Palestinian Declaration of Independence in 1988 and is recognised by the international community. The PLO’s role as a national liberation movement acting as the sole legitimate representative of the Palestinian people has been recognised by the international community of States and the UN,⁷ where it was accorded a seat in 1974 as an ‘Observer entity.’⁸ This role was enhanced over the years, granting the PLO rights and competences beyond those the UN usually affords an ‘Observer entity.’⁹

Outside of the UN system, the PLO functions as a transnational public body having been generally recognised as the legitimate representative of the Palestinian people and granted with far-reaching representational capacities by many of the States in which it operates.¹⁰ As the undisputed representative of the Palestinian people both inside and outside the UN system, with the principal role of safekeeping the rights of the Palestinian people and their internationally recognised patrimony,

⁵ See, for further discussion, J Quigley, *Consular Law and Practice* (Oxford University Press, Oxford, 2008) 129.

⁶ See, I. Brownlie, *Principles of Public International Law* (7th edition, Oxford University Press, Oxford, 2008) 477-481, 399-403 and 303-305.

⁷ This cardinal role was assigned to the PLO by the international community as a form of fulfillment of its own obligations towards the Palestinian people in the aftermath of Israel’s war of secession in 1948. As such, the PLO was formally recognised and incorporated into the UN system as the sole legitimate universal representative of all the Palestinian people. See, for a discussion on the PLO’s status, A. Kassim, ‘The PLO’s Claim to Status: A Juridical Analysis Under International Law’, 9 *Denver Journal of International Law* 1 (1980) 26-31.

⁸ UNGA resolution 3210 (XXIX), 14 October 1974; UNGA resolution 3236 (XXIX), 22 November 1974, para. 4; and UNGA resolution 3375 (XXX), 10 November 1975.

⁹ For examples of rights granted to PLO by the international community, see J. Quigley, *The Statehood of Palestine: International Law in the Middle East Conflict* (Cambridge University Press, New York, 2010) 137-148. B. Simma, *The Charter of the United Nations: A Commentary* (2nd edition, Oxford University Press, Oxford, 2002) Vol. II, 177-194

¹⁰ International law does not prescribe a clear set of rules for the determination of the current status of the PLO outside of the UN system. The PLO has been treated as a ‘government in exile’ or a ‘provisional government’ for the State of Palestine. J. Quigley (n 9) 150-157.

the PLO has been granted functional rights by individual States and international organisations that fit its internationally recognised mandate.¹¹ Articles 5 and 26 of the PLO Charter define the PLO's representational competences broadly to encompass all Palestinians everywhere.¹² Those articles, like the rest of the PLO Charter, will remain in force notwithstanding the results of the UN initiatives, as discussed below.

The PLO's mandate consists of bringing about the means for the exercise of the right to self-determination by all the Palestinian people, and its objectives include the establishment of a Palestinian State and the exercise of the rights of Palestinian refugees to return to their homes.¹³ Due to the Israeli occupation, the State of Palestine is currently unable to conduct its own external relations; therefore, the PLO is mandated by the State to function as the 'Government of Palestine' in the conduct of the State's international relations¹⁴— a role that was also acknowledged by the GA.¹⁵

As such, the PLO has a double representational capacity, it is: (1) the representative of the State of Palestine in the conduct of the State's international relations, with a view to bring Israel's occupation to an end; and (2) the representative of all other claims on behalf of all the Palestinian people, such as the claims of Palestinian refugees whose homes are located in what is now internationally recognised as the territory of the State of Israel. Until all the Palestinian people are fully able to enjoy their rights, the PLO cannot be prevented from exercising its representational capacities to the extent necessary for it to perform its internationally recognised mandate.

“The PLO has a double capacity. It is the representative of the State of Palestine in its international relations and the representative of all the Palestinian people, including refugees.”

2. Does the emergence of the State of Palestine in the UN cause the PLO to dissolve or lose any of its competences?

Since the PLO's mandate is based on the people's will, with an internationally recognised role as the sole legitimate representative of the Palestinian people, it can only be dissolved in accordance with its own structures and the will of the Palestinian people. Hence, its dissolution cannot be brought about unintentionally. Neither can its dissolution result from an upgrade of the Palestinian representation at the UN. Even after such an upgrade, the PLO could continue to sit at the UN, as the representative of the State in the conduct of its international relations.

¹¹ On arrangements the PLO has with States that allow for its provision of welfare services to Palestinian refugee communities under the jurisdiction of those states, see J. Quigley (n 9) 137-148.

¹² Article 5 of the PLO Charter: "The Palestinians are those Arab nationals who, until 1947, normally resided in Palestine regardless of whether they were evicted from it or have stayed there. Anyone born, after that date, of a Palestinian father - whether inside Palestine or outside it - is also a Palestinian." Article 26 of the PLO Charter: "The Palestine Liberation Organization, representative of the Palestinian revolutionary forces, is responsible for the Palestinian Arab people's movement in its struggle - to retrieve its homeland, liberate and return to it and exercise the right to self-determination in it - in all military, political, and financial fields and also for whatever may be required by the Palestine case on the inter-Arab and international levels."

¹³ "The refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and for loss of or damage to property which, under principles of international law or in equity, should be made good by the Governments or authorities responsible"; UNGA resolution 194(III), adopted 11 December 1948, UN Doc A/RES/194 (III).

¹⁴ The PLO was declared as the 'Provisional Government' of the State of Palestine in 1988. See, 'Al-Haq's Questions and Answers on the Palestinian Initiatives at the United Nations' (n 4).

¹⁵ UNGA resolution 43/177, adopted 15 December 1988, U.N. Doc. A/43/49.

Moreover; obtaining UN membership for the State of Palestine, which will remain a State under occupation, does not in itself amount to an exercise of the right to self-determination. The eventual unimpeded independence of the State of Palestine would facilitate the exercise of the right to self-determination only of a subset of the Palestinian people. Therefore, the emergence of the State on the international level does not annul or prejudice the other elements of the PLO's mandate, namely the pursuit of means for the exercise of the right to self-determination by all Palestinians, part and parcel of which is the Palestinian refugees' right to return to their homes that are now located within the internationally recognised territory of Israel.¹⁶

As a result of the admission of the State of Palestine to the UN, the State takes a seat in the UN whilst the officials of the PLO would continue to function as the State's representatives in its external relations. In addition, the PLO would also continue to act in its other capacities as the internationally recognised representative of all the Palestinian people in the exercise of their right to self-determination.¹⁷

III. Representation of Rights by the State of Palestine

I. What are the representational capacities of the State of Palestine?

A State is a sovereign entity that exercises its authority over its territory and its dependents, namely its nationals and those who have an effective link therewith.¹⁸ As such, its capacity to represent individuals, even those bearing its nationality, is limited in its actions by international rules concerning relations between States.¹⁹ These limits primarily concern the State's ability to represent certain claims on behalf of individuals before specific international fora, including their representation before international tribunals and in diplomatic relations.²⁰

Despite these limitations, under the international law doctrine of erga omnes obligations, a State can in effect make claims for the human rights of individuals who are not its nationals as its own interest. Every State has the right to invoke the responsibility of any other State for gross violations of human rights. Therefore, the State of Palestine could raise international claims with regards to serious human rights violations committed against the Palestinian people as a whole.²¹ This is particularly relevant to the claims that a State can make against other States within the context of an international organisation such as the UN.

¹⁶ Although Israel's borders remain provisional, certain areas are clearly within Israel's territory and have been recognised as such through international practice.

¹⁷ The core content of the right to self-determination is the ability of a people to "determine their political status, and freely pursue their economic, social and cultural development." UNGA resolution 1514 (XV), 15 December 1960, The Declaration on the granting of independence to colonial countries and peoples, para. 2; Articles 1 (2) and 55 of the UN Charter 1945. This right to a "free choice" has to be coupled with substantive entitlements, such as natural resources and territory, otherwise it is simply meaningless; C. Drew, 'The East Timor story: International Law on Trial', 12 *European Journal of International Law* 651. See also, J. Quigley, 'Self-determination in the Palestine context' in S. Akram et al. eds, (Routledge, London, 2011) 209 et seq.

¹⁸ The criteria for nationality under international law requires an effective link between the person and the State when the person does not formally bear the nationality of that State. I. Brownlie (n 6) 407-418.

¹⁹ See on the limitations on diplomatic protection, I. Brownlie (n 6) 383-387. Another set of considerations exists for those who have dual nationality, "a state may not offer diplomatic protection to one of its nationals against a State whose nationality such person also possesses." The use of the term 'against' refers to rights claims that concern the internal affairs of the defendant state. Article 4, *Convention on Certain Questions Relating to the Conflict of Nationality Law*, 13 April 1930, League of Nations, Treaty Series, vol. 179, p. 89, No. 4137, <http://www.unhcr.org/refworld/docid/3ae6b3b0.html> accessed 1 September 2011. At present, Palestinians with Israeli nationality can formally be represented by the PLO, although the PLO's current structures and substantive functions do not fulfill this dimension of its mandate. Ongoing reforms within the context of the PLO are intended to redress this situation and develop structures to allow for the PLO to maintain relations with parts of its constituency inside Israel.

²⁰ See further on the limitations on the jurisdiction and sovereignty of States in the international legal order; I. Brownlie (n 6) 292-294. A. Cassese, *International Law*, (2nd edition, Oxford University Press, Oxford, 2005) 53-54.

²¹ This is the case especially for violations of the right to self-determination; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Rep 2004, paras. 88, 155. Article 48, ILC Draft Articles on State Responsibility 2001. J. Quigley, *The Genocide Convention: An International Law Analysis (International and Comparative Criminal Justice)* (Ashgate, Aldershot, 2006) 253-260. See also, O. Schachter, *International Law in Theory and Practice* (Martinus Nijhoff, Dordrecht, 1991) 342-344.

As a Member or 'Observer State' within the UN system, the State of Palestine can be accorded the same substantive and procedural rights that the PLO has to call for action under the UN Charter, or by UN agencies and treaty bodies, on matters pertaining to the exercise of the rights to self-determination and reparations of all Palestinians. However, this would not include actions that assume the State's authority to negotiate and conclude binding agreements on behalf of Palestinians who are not its dependents. This internationally recognised authority (and responsibility) currently rests solely with the PLO, and considerable legal obstacles exist to the acquisition and exercise of such authority by any State, including the State of Palestine.

“The State of Palestine and the PLO are two separate and different bodies, each with its own international legal personality, despite their overlapping constituencies, which they represent in different capacities.”

No State questions the authority of the PLO as a non-state actor and sole representative of the Palestinian people to conclude binding agreements on behalf of their nationals and dependents on matters relating to the implementation of their rights to self-determination and reparations.²² Importantly, in light of the above, Palestinian refugees from what is now the internationally recognised territory of Israel should not be considered nationals of the State of Palestine within the OPT, unless they expressly choose to obtain the nationality of the State.

2. How do the representational capacities of the State of Palestine differ from those of the PLO?

The underlying difference between the PLO and the State of Palestine lies in their source of authority. The State is territorially confined in the exercise of its jurisdiction and sovereignty, being subject to the restrictions imposed by international law on diplomatic relations between States, and therefore, it represents primarily its nationals and those Palestinians who decide to acquire its nationality. On the other hand, the PLO, a non-state actor in the form of a national liberation movement, has an internationally recognised representational capacity that is broader than that of the State.²³ The PLO represents all Palestinians everywhere, whilst the State of Palestine represents its nationals including Palestinian refugees whose homes are located within its territory, consisting in the West Bank, including East Jerusalem, and the Gaza Strip.

Furthermore, the PLO has been granted rights by individual States, in the exercise of its unique internationally recognised mandate, to maintain direct representational ties with all the Palestinian people, and provide for the direct needs of the Palestinian people under the jurisdiction of another State, for instance, “through the establishment of several institutions in such realms as health, education and social services.”²⁴ On the other hand, through diplomatic channels, a State could, in some cases, conclude special arrangements with individual states to be entitled to provide for the needs of individuals within the territory of another State, including its own nationals. Consequently, the State of Palestine and the PLO are two separate and different bodies, each with its own international legal personality, despite their overlapping constituencies, which they represent in different capacities.

²² There is no international legal rule that prevents a State from concluding binding agreements on behalf of individuals who are not its nationals, or permanently under its jurisdiction, provided that they are not nationals of, or under the permanent jurisdiction (dependents) of other States. The PLO's authority in this respect has been universally recognised as extending to the nationals and other dependents of other States.

²³ See, for example, Articles 2, 4, 12 and 41 of the Vienna Convention on Diplomatic Relations 1961.

²⁴ Permanent Observer Mission of Palestine to the United Nations

<<http://www.un.int/wcm/content/site/palestine/pid/12003>> accessed 7 September 2011.

3. Could the State of Palestine undertake the representational capacities of the PLO in the context of the UN?

The initiatives in the context of the UN do not bring about any formal modification in the role or position of the PLO vis-à-vis the Palestinian people or the international community. Although the State could not undertake all of the PLO's representational capacities, due to its different legal personality, the State is not limited in the types of claims that it is able to make within the specific context of the UN. Notably, the UN initiatives as such do not jeopardise the PLO's role as the State's representative, inasmuch as its officials have been appointed by the State of Palestine in 1988 to conduct the State's external relations and exercise the State's exclusive international rights, responsibilities and authorities. The PLO performs such diplomatic and consular functions on behalf of the State in addition to its own exclusive representational functions.

As a result, the representation of the PLO's constituency and mandate in the UN can be maintained through the State's seat, as either an 'Observer state' or a Member State. As noted above, within the UN system, the State of Palestine has the same capacity to initiate action under the UN Charter and within UN bodies, as the PLO does in its current 'Observer entity' status. Rights claims by the State on behalf of Palestinians in the Diaspora cannot be rejected by virtue of the doctrine of *erga omnes* obligations. However, the State can claim rights and act in other important capacities within the UN and bilaterally, for example by acceding to international mechanisms, including those of international criminal justice. These avenues will remain beyond the scope of the PLO's competences as a non-state actor. Rights claims by the State regarding Israel's continuous violations of international law, including peremptory norms (*jus cogens*), can be advanced more forcefully in the UN system by invoking the rights of States to respect their sovereign rights.²⁵

IV. Possible Effects on the Representation of the Palestinian People's Rights

1. Will the UN initiatives have any implications, legal or political, on the rights of the Palestinian people?

The legal nature and inviolability of the rights of the Palestinian people are such that they cannot be compromised by the State. Neither are the UN initiatives in themselves an exercise of rights – they are only a way to obtain the means to exercise rights.²⁶

The claim that certain rights would be ceded as a result of a representational shift at the UN confuses the issue of representation by a certain type of body with the issue of the exercise of rights by a people. The relationship between, on the one hand, the people and their rights and, on the other, the people and their representatives should be understood and examined separately. Therefore, even if formal institutional adjustments were to be undertaken, which is reportedly not the case, these would not negate the people's rights.

2. Would an upgrade in the Palestinian representation at the UN have an impact on the effectiveness of the representation of rights claims?

The UN initiatives in themselves will not result in any formal institutional adjustments that could redefine the substantive competences of the PLO.²⁷ With the upgrade of the Palestinian representation

²⁵ The cardinal *erga omnes* character of states' obligations is based on the legal status of the norms being violated, including: the prohibition of acquisition of territory by force (illegal *de jure* annexation of East Jerusalem and the *de facto* annexation of large parts of the OPT); systematic violations of the fundamental guarantees of international humanitarian law including settlements; and denial of the right to self-determination.

²⁶ See for further discussion, 'Al-Haq's Questions and Answers on the Palestinian Initiatives at the United Nations', 10.

²⁷ The status of an entity under international law is not determined by the status it is granted within an international organisation. See further on the relation between status at the UN and in international law in 'Al-Haq's Questions and Answers on the Palestinian Initiatives at the United Nations', July 2011. See also, A Duxbury, *The Participation of States in International Organisations* (Cambridge University Press, 2011).

at the UN, the PLO could continue to function inside the UN through the seat of the State, whilst maintaining its current role and capacities outside of the UN system.

Instead, the State, which has its own legal existence, separate to that of the PLO, is entering the UN system under the status of either an 'Observer State' or Member State. The emergence of the State of Palestine within the UN system, as discussed above, cannot bring about an unintended dissolution of the PLO or result in any modification in its mandate, namely because the PLO cannot turn into the State. Rather, the PLO is the one that has brought the State into existence through the realisation of one of its objectives as a liberation movement.

3. Why is it necessary to ensure that the PLO's capacities and function are kept intact, inside and outside of the UN system?

Despite the complementarity of their mandates, the State of Palestine and the PLO hold considerably different representational capacities. Although the shift in representation resulting from the UN initiatives is only relevant to the context of the UN system, the risk that some States would seek to forward their interests by claiming that the PLO has ceased to exist, due to the emergence of the State in the UN, has been highlighted as a cause for concern.

In light of this, it is of prime importance that these concerns be adequately redressed by ensuring the existence of the State of Palestine in parallel to the PLO, whilst emphasising the importance of the role and function of the PLO, in its assigned and acquired competences as a unique representative body for all the Palestinian people.

If the PLO is not maintained separately from the State, and is left to become the 'Government of the State' without preserving its other functions, it would inherit the limitations on the State's representational competences. Equally, the fact that the Palestinian leadership has yet to release detailed information about the manner in which the UN initiatives will be pursued, casts doubt over whether proper attention has been given to the need to preserve the current institutional structures of the PLO beside those of the State.

Additionally, an internal restructuring of the relationship between the PLO and the State of Palestine is required to ensure effective protection of rights by adequately defining the mandates of the State and the PLO respectively. Any upcoming internal reforms of the PLO must comply with the relevant international law standards and ensure the utmost protection of all the rights of the Palestinian people.²⁸ As importantly, the undertaking of reforms must involve all the Palestinian people, in order to ensure the people's enjoyment of their civil and political human rights to participation in public life and in elections.

“The emergence of the State of Palestine within the UN system cannot bring about the unintended dissolution of the PLO, the current institutional structures of which should be preserved separately from those of the State.”

²⁸ These include the rights to participation and to elections as individual civil and political international human rights, which are also part and parcel of the internal facet of the people's right to self-determination. Articles 1 of ICCPR and ICESCR; A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press, Cambridge, 1995) 102-108. See also, H.J. Steiner, 'Political Participation as a Human Right', 1 *Harvard Human Rights Yearbook* 77 (1988). G.H. Fox, 'The Right to Political Participation in International Law', *Yale Journal of International Law* (1992).

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ANNEX:

Application of the State of Palestine for Admission to Membership in the UN

United Nations

A/66/371-S/2011/592



**General Assembly
Security Council**

Distr.: General
23 September 2011

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**General Assembly
Sixty-sixth session
Agenda item 116**

Admission of new Members to the United Nations

**Security Council
Sixty-sixth year**

Application of Palestine for admission to membership in the United Nations

Note by the Secretary-General

In accordance with rule 135 of the rules of procedure of the General Assembly and rule 59 of the provisional rules of procedure of the Security Council, the Secretary-General has the honour to circulate herewith the attached application of Palestine for admission to membership in the United Nations, contained in a letter received on 23 September 2011 from its President (see annex I). He also has the honour to circulate a further letter, dated 23 September 2011, received from him at the same time (see annex II).

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A standard 1D barcode representing the document's identification number.

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Annex I

**Letter received on 23 September 2011 from the President of
Palestine to the Secretary-General**

**Application of the State of Palestine for admission to membership
in the United Nations**

I have the profound honour, on behalf of the Palestinian people, to submit this application of the State of Palestine for admission to membership in the United Nations.

This application for membership is being submitted based on the Palestinian people's natural, legal and historic rights and based on United Nations General Assembly resolution 181 (II) of 29 November 1947 as well as the Declaration of Independence of the State of Palestine of 15 November 1988 and the acknowledgement by the General Assembly of this Declaration in resolution 43/177 of 15 December 1988.

In this connection, the State of Palestine affirms its commitment to the achievement of a just, lasting and comprehensive resolution of the Israeli-Palestinian conflict based on the vision of two-States living side by side in peace and security, as endorsed by the United Nations Security Council and General Assembly and the international community as a whole and based on international law and all relevant United Nations resolutions.

For the purpose of this application for admission, a declaration made pursuant to rule 58 of the provisional rules of procedure of the Security Council and rule 134 of the rules of procedure of the General Assembly is appended to this letter (see enclosure).

I should be grateful if you would transmit this letter of application and the declaration to the Presidents of the Security Council and the General Assembly as soon as possible.

(Signed) Mahmoud **Abbas**
President of the State of Palestine
Chairman of the Executive Committee of the
Palestine Liberation Organization

Enclosure

Declaration

In connection with the application of the State of Palestine for admission to membership in the United Nations, I have the honour, in my capacity as the President of the State of Palestine and as the Chairman of the Executive Committee of the Palestine Liberation Organization, the sole legitimate representative of the Palestinian people, to solemnly declare that the State of Palestine is a peace-loving nation and that it accepts the obligations contained in the Charter of the United Nations and solemnly undertakes to fulfill them.

(Signed) Mahmoud **Abbas**
President of the State of Palestine
Chairman of the Executive Committee of the
Palestine Liberation Organization

Annex II

Letter dated 23 September 2011 from the President of Palestine to the Secretary-General

After decades of displacement, dispossession and the foreign military occupation of my people and with the successful culmination of our State-building program, which has been endorsed by the international community, including the Quartet of the Middle East Peace Process, it is with great pride and honour that I have submitted to you an application for the admission of the State of Palestine to full membership in the United Nations.

On 15 November 1988, the Palestine National Council (PNC) declared the Statehood of Palestine in exercise of the Palestinian people's inalienable right to self-determination. The Declaration of Independence of the State of Palestine was acknowledged by the United Nations General Assembly in resolution 43/177 of 15 December 1988. The right of the Palestinian people to self-determination and independence and the vision of a two-State solution to the Israeli-Palestinian conflict have been firmly established by General Assembly in numerous resolutions, including, inter alia, resolutions 181 (II) (1947), 3236 (XXIX) (1974), 2649 (XXV) (1970), 2672 (XXV) (1970), 65/16 (2010) and 65/202 (2010) as well as by United Nations Security Council resolutions 242 (1967), 338 (1973) and 1397 (2002) and by the International Court of Justice Advisory Opinion of 9 July 2004 (on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory). Furthermore, the vast majority of the international community has stood in support of our inalienable rights as a people, including to statehood, by according bilateral recognition to the State of Palestine on the basis of the 4 June 1967 borders, with East Jerusalem as its capital, and the number of such recognitions continues to rise with each passing day.

Palestine's application for membership is made consistent with the rights of the Palestine refugees in accordance with international law and the relevant United Nations resolutions, including General Assembly resolution 194 (III) (1948), and with the status of the Palestine Liberation Organization (PLO) as the sole legitimate representative of the Palestinian people.

The Palestinian leadership reaffirms the historic commitment of the Palestine Liberation Organization of 9 September 1993. Further, the Palestinian leadership stands committed to resume negotiations on all final status issues — Jerusalem, the Palestine refugees, settlements, borders, security and water — on the basis of the internationally endorsed terms of reference, including the relevant United Nations resolutions, the Madrid principles, including the principle of land for peace, the Arab Peace Initiative and the Quartet Roadmap, which specifically requires a freeze of all Israeli settlement activities.

At this juncture, we appeal to the United Nations to recall the instructions contained in General Assembly resolution 181 (II) (1947) and that "sympathetic consideration" be given to application of the State of Palestine for admission to the United Nations.

Accordingly, I have had the honour to present to Your Excellency the application of the State of Palestine to be a full member of the United Nations as well as a declaration made pursuant to rule 58 of the provisional rules of procedure

of the Security Council and rule 134 of the rules of procedure of the General Assembly. I respectfully request that this letter be conveyed to the Security Council and the General Assembly without delay.

(Signed) Mahmoud **Abbas**
President of the State of Palestine
Chairman of the Executive Committee of the
Palestine Liberation Organization



Al-Haq

Al-Haq is an independent Palestinian non-governmental human rights organisation based in Ramallah, West Bank. Established in 1979 to protect and promote human rights and the rule of law in the Occupied Palestinian Territory (OPT), the organisation has special consultative status with the UN Economic and Social Council.

Al-Haq documents violations of the individual and collective rights of Palestinians in the OPT, regardless of the identity of the perpetrator; and seeks to end such breaches by way of advocacy before national and international mechanisms and by holding the violators accountable. The organisation conducts research; prepares reports, studies and interventions on the breaches of international human rights and humanitarian law in the OPT; and undertakes advocacy before local, regional and international bodies. Al-Haq also cooperates with Palestinian civil society organisations and governmental institutions in order to ensure that international human rights standards are reflected in Palestinian law and policies. The organisation has a specialised international law library for the use of its staff and the local community.

Al-Haq is the West Bank affiliate of the International Commission of Jurists - Geneva, and is a member of the Euro-Mediterranean Human Rights Network (EMHRN), the World Organisation Against Torture (OMCT), the International Federation for Human Rights (FIDH), Habitat International Coalition (HIC), and the Palestinian NGO Network (PNGO).