



INSS Insight No. 389, December 3, 2012

Israel's Response to UN Recognition of a Palestinian State

Pnina Sharvit Baruch

On November 29, 2012 the United Nations General Assembly approved the Palestinian request for recognition of Palestine as a non-member "observer" state.

Substantive claims can be made to contest the legal basis of the Palestinian claim to statehood. Before an entity may be called a state it must meet certain conditions, including the establishment of effective governance over a certain territory and population. The Palestinians themselves, however, claim that the area of the West Bank is de facto under Israeli occupation. In addition, it cannot be claimed that the Palestinian government in Ramallah has control over the Gaza Strip. Therefore, a valid claim could be made that the Palestinian entity does not meet the criterion for effective governance. Moreover, the Palestinian Authority has avoided declaring itself a state. While the PLO issued such a declaration in 1988, it was evident at the time that the PLO met none of the criteria for statehood, and most of the world ignored the declaration. It could now be claimed that absent a current formal declaration of statehood by the Palestinians themselves, there is no place for recognition from the UN.

Clearly, however, political considerations alone, rather than legal reasoning, shaped the position of most of the voting nations. Some of the nations voted as expected, in line with their automatic support of any resolution supporting the Palestinians as well as any resolution opposing Israel. Others voted for the resolution to express their dissatisfaction with the lack of progress toward resolution of the Israeli-Palestinian conflict.

With the UN recognition, the Palestinians are able to seek participation in international organizations and treaties open only to states. In addition, they are able to resubmit to the prosecutor of the International Criminal Court (ICC) the request to investigate allegations of all war crimes in the West Bank and the Gaza Strip on the basis of the previous prosecutor's opinion, which stated that UN recognition of a Palestinian state would provide sufficient grounds for a Palestinian request for such an investigation. This is liable to raise the issue of the legality of the settlements in context of the relevant paragraph in the court's constitution. The request would likely refer to all the events since July 2002 (when the ICC constitution entered into force), although some have countered

the validity of a retroactive case. It should be pointed out that an ICC investigation would cover all actions by all parties, that is, including those by the Palestinians.

At the same time, it is unlikely that General Assembly recognition of a Palestinian state will lead to any change in the reality in the territories, first and foremost given the continued IDF presence in the area and the existing limitations on the PA. Legally too, there will be no practical change: UN recognition means that "Palestine" is seen as a state, but a state still – according to most if not all countries in the world – under Israeli occupation. The test of occupation is a factual test, based on the question of who has effective control of the area. The recognition of a Palestinian state will not change this reality, and therefore Israel will continue to have both the rights and obligations of the occupier (at least in all that pertains to the West Bank; it is debated whether the Gaza Strip remains under Israeli occupation). In addition, there are limitations on both sides rooted in mutual agreements, and while there is controversy as to their legal status – and the possibility exists that Israel might revoke them – it seems that the international community would likely continue to view them as binding.

Against this background, it appears that the answer to how Israel should react to the General Assembly resolution to recognize a Palestinian state is to focus on the international arena rather than on practical steps on the ground. As demonstrated below, however, the two are related.

Regarding the international community, Israel must minimize the possible damage that an upgrade in the PA's status could cause by working in various organizations – for example, the International Civil Aviation Organization, the International Telecommunications Union, and others – to make sure that Israeli interests are not at risk. This needs to be in conjunction with intensive diplomatic activity, as a significant rise in the scope and intensity of Palestinian claims against Israel can be expected. It is also necessary to work with the ICC, directly or indirectly, to allay the concern about legal action against Israeli citizens. While it is clear that the ICC is not eager to get involved in this charged conflict and deal with explicitly political issues, it would probably face pressure to open such investigations. Israel's main message to the international community must be to avoid actions liable to complicate resolution of the conflict, e.g., actions that widen the gap in the Palestinian population between expectations and fulfillment or measures that add obstacles to a conflict that is already complex enough. It would also be appropriate to consider how to use the positive implications of the recognition of a Palestinian state, e.g., by pointing out the Palestinian responsibility for what develops in its territory.

Regarding the domestic arena, as mentioned above, the concept of a Palestinian state has no viable possibility of generating practical changes. Therefore, the response to the PA

should be passive, ignoring the change that is meaningless from Israel's point of view. In this context, two points are important: first, actions liable to topple the PA – e.g., cutting off funds and severing contact on important issues – run counter to Israel's interests. Israel has no desire to control some two million Palestinians again, run their day-to-day affairs, see to their education, healthcare, and welfare needs, and so on. Toppling the PA would return the responsibility to Israel. Second, legally (and one could also say morally) Israel has obligations to the Palestinian population in the West Bank by virtue of controlling it (whether one contends that Israel is an occupying force or that Israel is there because of sovereign right, as posited in the report of the committee headed by Justice Edmond Levi's). Steps damaging the welfare of the Palestinian population or constituting collective punishment of the Palestinians are illegal.

As for decisions regarding the expansion of settlements, the legal reasoning raised against them is not changed by the UN recognition, nor are the arguments based on political considerations, which view the settlement expansion as an obstacle to future reconciliation. However, the Palestinians will have a stronger status and additional forums to sound condemnations, and therefore the criticism over such actions can be expected to intensify.

The international and domestic levels are related: the more Israel acts in a way that harms Palestinians in the West Bank or is perceived as narrowing the chances of a political agreement, the more it will further reduce its chances of success in the international arena.

Finally, an analysis of the practical ramifications of UN recognition of a Palestinian state is not complete without addressing the potential impact of a renewal of Israeli-Palestinian negotiations. Clearly direct talks can help reduce tensions on the ground and might help to manage the conflict, if not to resolve it. Yet there is also significance to negotiations in the international arena. The international community could be more easily persuaded not to take actions in international forums that are detrimental to Israeli interests if this could give negotiations a chance to progress.

