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ARTICLES

THE CASE OF PALESTINE AGAINST THE USA AT THE ICJ: A NON-STARTER OR PRECEDENT-SETTER?

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I. INTRODUCTION

On September 28, 2018, Palestine lodged a complaint at the International Court of Justice (ICJ) against the United States, arguing that the latter's shifting of its Israeli embassy to Jerusalem violates the Vienna Convention on Diplomatic Relations (VCDR)[1] and it should be shifted.[2] This article seeks to address the legal issues that may arise before the ICJ in this case. This article, not being an *amicus curiae* brief or advocacy piece, seeks to engage in academic discourse on the issues and not argue for or against the case of the disputing parties. While this is an issue where realpolitik may well be intrinsically connected with the law, the former is by no means the focus of the article and is only looked into when otherwise inevitable.

President Trump's decision to move the embassy aligns him with the position taken by U.S. Congress with the passing of Jerusalem Embassy Act in 1995 (EA).[3] However, although the EA required the U.S. executive branch to shift the embassy to Jerusalem, it provided the President with an option to seek a waiver, which presidents preceding President Trump persistently availed.[4] The prior presidents also argued the power of recognition is a purely executive matter, an argument that the U.S. Supreme Court accepted in *Zivotofsky v. Kerry* (*Zivotofsky*).[5] President Trump, however, opted to deviate from the position of his predecessors and finally moved the U.S. embassy to Jerusalem on May 14, 2018.[6]

This relocation is critical for Palestine because if other states follow the U.S.'s decision to relocate, it could gradually lead to an international

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[1] *See generally*, Vienna Convention on Diplomatic Relations, April 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95.

[2] Press Release, I.C.J., The State of Palestine Institutes Proceedings against the United States of America, I.C.J. Press Release No. 2018/47 (Sept. 28, 2018).

[3] Jerusalem Embassy Act of 1995, Pub. L. No. 104-45, Nov. 8, 1995, 109 Stat. 398.

[4] Stephen Farrell, *Why is the U.S. Moving its Embassy to Jerusalem?*, REUTERS (May 7, 2018), https://www.reuters.com/article/us-usa-israel-diplomacy-jerusalem-explai/why-is-the-u-s-moving-its-embassy-to-jerusalem-idUSKBN1I811N.

[5] Zivotofsky v. Kerry, 135 S. Ct. 2076, 2081 (2015). Zivotofsky, who was born in Jerusalem, wanted to have his place of birth on his passport to be Israel. As the executive branch did not recognize any country's sovereignty over Jerusalem, his birthplace on his passport was listed as "Jerusalem." The Court determined that by passing the Foreign Relations Authorization Act in 2002, which entitled persons born in Jerusalem to have Israel listed as their place of birth, Congress usurped the President's executive power to recognize foreign states.

[6] Alexandra Ma, *Trump Has Officially Moved the US Embassy in Israel to Jerusalem—and More than 58 Palestinians Are Dead in Protests*, BUS. INSIDER (May 14, 2018), https://www.businessinsider.com/us-embassy-officially-moves-to-jerusalem-palestinians-die-in-protests-2018-5.

recognition that undivided Jerusalem falls within Israel's territories.[7] This may undermine Palestine's effort to establish a state in the West Bank and the Gaza Strip, with East Jerusalem as its capital, which Palestine has sought to do consistently for quite some time.[8] This prospect holds despite a disclaimer in the declaration by President Trump in December 2017, stating that the "United States continues to take no position on any final status issues. The specific boundaries of Israeli sovereignty in Jerusalem are subject to final status negotiations between the parties. The United States is not taking a position on boundaries or borders."[9] This move by President Trump is also a clear reversal from the former position of the United States, as evident from the U.S. Secretary of State's position quoted in the D.C. Circuit's judgment in *Zivotofsky* that:

> Any unilateral action by the United States that would signal, symbolically or concretely, that it recognizes that Jerusalem is a city that is located within the sovereign territory of Israel would critically compromise the ability of the United States to work with Israelis, Palestinians and others in the region to further the peace process.[10]

As I noted last year, President Trump's "decision to relocate the U.S. embassy from Tel Aviv to Jerusalem is an unequivocal recognition of Israel's claim to the united city of Jerusalem."[11] In addition, I noted that "to imply that by doing this, the U[.]S[.] has not taken any decision on boundaries or borders" seems unpersuasive.[12] The discussion that follows first chronicles the procedural developments in the case so far. It then surmises the legal effect of potential non-appearance of the United States in this case, the *locus standi* of Palestine for filing this case, the compliance of United States' action with the VCDR, the issue of the case of affecting the rights of a third party (Israel), and the justiciability of political questions by the ICJ. The article concludes by arguing that while Palestine's case is likely to face some substantial hurdles

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[7] Md. Rizwanul Islam, *Palestine Objects to US Embassy Move at ICJ*, BANGKOK POST (Oct. 6, 2018), https://www.bangkokpost.com/opinion/opinion/1553566/palestine-objects-to-us-embassy-move-at-icj.

[8] *Id. See also* Press Release, General Assembly, As General Assembly Debates Question of Palestine, Members Call for Swift Action to Jump-Start Israeli-Palestinian Talks, Realize Two-State Solution, U.N. Press Release GA/12095 (Nov. 29, 2018).

[9] Pres. Proc. No. 9683, 82 Fed. Reg. 58331 (Dec. 11, 2017).

[10] Zivotofsky v. Sec'y of State, 725 F.3d 197, 217 (D.C. Cir. 2013).

[11] Islam, *supra* note 7.

[12] *Id.*

at a procedural level, the case seems to be a persuasive one at a substantive level.

II. PROCEDURAL DEVELOPMENTS

On a procedural level, it is important to note that in a letter communicated to the Registry of the ICJ, the United States indicated a belief that it does not stand in a treaty relationship with Palestine with regard to either the VCDR or its Optional Protocol (OP).[13] On October 3, 2018, the United States also withdrew from the OP.[14] For these reasons, the United States requested the ICJ to take the case off its Registry.[15] Palestine, on the other hand, asked that the Court decide the issues of jurisdiction and of merit together.[16] The ICJ decided that it would first decide on the jurisdiction of the Court and the admissibility of the application.[17] The jurisdiction of the ICJ is decided on the basis of the date when the Court is *seised* of the matter and events subsequent to that would have no effect on jurisdiction of the Court unless "events occurring subsequent to the filing of an application may render the application without object such that the Court is not called upon to give a decision . . . ."[18] This would be so even if the matter arguably becomes factually moot as the Court decided in *Congo v Belgium.*[19] In that case, Belgian parliament implemented law of universal jurisdiction and subsequently, Belgium issued an arrest warrant against Abdoulaye Yerodia Ndombasi, the Minister of Foreign Affairs of the Democratic Republic of the Congo for racially hateful speech.[20] Congo alleged that this was a violation of customary international law of immunities.[21] When the case was decided, Yeorida held no ministerial position and thus, Belgium argued that the ICJ lacked jurisdiction because the matter had become moot.[22] However, the ICJ rejected this claim, as the Court found that since Congo alleged the invalidity of the warrant of arrest and Belgium

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[13] Relocation of the United States Embassy to Jerusalem (Palestine v. U.S.), Order, ICJ General List No. 176 (Nov. 15) [hereinafter Order of November 15]. *See generally* Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 596 U.N.T.S. 487.

[14] Raberta Rampton, Lesley Wroughton, & Stephanie van den Berg, *U.S. Withdraws from International Accords, Says U.N. World Court 'Politicized'*, REUTERS, (Oct. 3, 2018), http://www.reuters.com/article/us-usa-diplomacy-treaty-idUSKCN1MD2CP.

[15] Order of November 15, *supra* note 13.

[16] *Id.*

[17] *Id.*

[18] Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. Rep. 3 (Feb. 14), at ¶ 32.

[19] *Id.*

[20] *Id.* at ¶¶ 13-15.

[21] *Id.* at ¶ 21.

[22] *Id.* at ¶ 18.

defended it, the object of the dispute subsisted, despite factual changes in the events.[23] Thus, it may be argued that had the ICJ possessed jurisdiction in the matter before the United States' withdrawal from the OP, it would continue to possess the jurisdiction notwithstanding the withdrawal.

The ICJ fixed May 15, 2019 as the deadline for Palestine to submit its memorial and November 15, 2019 as the deadline for the United States to submit its counter-memorial.[24] Given the United States' assertion denying the jurisdiction of the ICJ and non-appointment of an agent before the Court's order on November 15, 2018, it is unclear as to whether the United States would submit a counter-memorial and take part in further proceedings of the Court at all. Since the Palestinians exchanged a note verbale on July 4, 2018 with the U.S. Department of State about this matter,[25] it is a little curious why the United States did not withdraw from the OP before the filing of the Palestinian Case at the ICJ. A plausible explanation for this is that the U.S. government did not foresee Palestine bringing a case to the ICJ about this.

III. THE EFFECT OF POTENTIAL NON-APPEARANCE OF THE USA

The consequence of non-appearance before the ICJ is addressed in Article 53(1) of the ICJ Statute.[26] This provides when a party to a dispute before it does not appear or defend its case, the other party may petition that the Court decides the case in its favor.[27] However, it is incumbent on the Court that before it does so, it is satisfied that there is ICJ jurisdiction over the matter and that the case is well-founded in fact and law.[28] Thus, Article 53 protects the non-appearing party from unfounded claims upheld against it, which differs from many municipal legal systems where the courts may pass default judgement relatively easily against a non-appearing party.[29]

As a matter of law, even though the United States has not yet appeared before the ICJ, for jurisdiction purposes, the United States has become a party to the case and the ICJ may proceed to decide it. The support for this proposition may be found in the *Fisheries Jurisdiction Case*[30] observing:

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[23] *Id.* at ¶ 32.

[24] Order of November 15, *supra* note 13.

[25] Relocation of the United States Embassy to Jerusalem (Palestine v. U.S.), Application Instituting Proceedings, General List No. 176, ¶ 35, (Sept. 28) [hereinafter Palestine Instituting Proceedings].

[26] Statute of the International Court of Justice art. 53(1), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 93 [hereinafter ICJ Statute].

[27] *Id.*

[28] *Id.* at art. 53(2).

[29] *See infra* note 39 and the accompanying text.

[30] Fisheries Jurisdiction Case (U.K. v. Ice.), Judgment, 1974 I.C.J. Rep. 3 (July 25) [hereinafter Fisheries Jurisdiction].

> It is to be regretted that the Government of Iceland has failed to appear in order to plead its objections . . . . The Court however, as an international judicial organ, is deemed to take judicial notice of international law, and is therefore required in a case falling under Article 53 of the Statute, as in any other case, . . . to consider on its own initiative all rules of international law which may be relevant to the settlement of the dispute. It being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the parties, for the law lies within the judicial knowledge of the Court.[31]

In a similar vein, in the *United States Diplomatic and Consular Staff in Tehran*, when Iran did not appear at the ICJ to defend the case brought against it by the United States, the Court regretted the former's lack of presentation but felt that by dint of the settled jurisprudence, it had to apply Article 53 of the Statute and decide *propiro motu* the question of admissibility of the application and the question of jurisdiction on the basis of materials before it.[32] In doing this, the Court, inter alia, assessed the letters communicated to it by Iran to deny jurisdiction.[33] When a party does not appear, the appearing party may enjoy somewhat greater leeway in establishing the facts claimed by it.[34] This is natural because in some way the voice of the non-appearing party would be missing in the Court. In *Corfu Channel*, the Court took the view that when a party does not appear, the Court is under a duty to assess whether or not the

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[31] *Id.* at ¶17.

[32] United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgment, 1980 I.C.J. Rep. 18, ¶ 33 (May 24) [hereinafter Diplomatic Staff in Tehran].

[33] *Id.*

[34] The following paragraph of the dissenting opinion of Judge Sir Robert Jennings in Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 528, 544 (June 27), eloquently explaining the point:

> One is bound to observe that here, where questions of fact may be every bit as important as the law, the United States can hardly complain at the inevitable consequences of its failure to plead during the substantive phase of the case. It is true that a great volume of material about the facts was provided to the Court by the United States during the earlier phases of the case. Yet a party which fails at the material stage to appear and expound and explain even the material that it has already provided, inevitably prejudices the appreciation and assessment of the facts of the case. There are limits to what the Court can do, in accordance with Article 53 of the Statute, to satisfy itself about a non-appearing party's case; and that is especially so where the facts are crucial.

case filed is well-founded.[35] However, the duty obliges the Court to assess their accuracy in all details. Underscoring the impracticability of such rigorous scrutiny in some situations, the ICJ decided "[i]t is sufficient for the Court to convince itself by such methods as it considers suitable that the submissions are well founded."[36]

The above, of course, does not mean that the Court is only limited to the materials presented to it by the appearing party and any communication presented by the non-appearing party. The Court may, for instance, rely on matters of public knowledge as it did in *Diplomatic Staff in Tehran*.[37] The Court may also appoint external experts as it did in *Corfu Channel*.[38] However, in relying on these sources, the Court has to be cognizant that it does not somehow end up doing what the absent party had to. The ICJ explained in *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua Case*) that "[t]he intention of Article 53 was that in a case of non-appearance neither party should be placed at a disadvantage; therefore the party which declines to appear cannot be permitted to profit from its absence . . . ."[39] While there are no specific rules ensuring this, the ICJ in *Nicaragua Case* simply asserted that "[t]he treatment to be given by the Court to communications or material emanating from the absent party must be determined by the weight to be given to these different considerations."[40] Thus, we are left no wiser on what the different considerations could be in a particular case. However, in all cases, the Court is required to determine and apply the relevant rules of international law, and this is all the more important when one of the parties would not appear before it.[41]

International law is still based on the consent of states. Starting with the Hague Peace Conferences and the Covenant of the League of Nations and further bolstered by the Briand Kellogg Pact of 1928, there has been a growing leaning toward peaceful settlement of international disputes.[42] Thus, as a matter of policy, it may be submitted that states should appear before the ICJ to promote a peaceful resolution of international disputes. The same view is also consonant with the U.N. Charter and ICJ Statute both of which speak of

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[35] The Corfu Channel Case (U.K. v. Alb.), Judgment, 1949 I.C.J. 244, 248 (Dec. 15) [hereinafter Corfu Channel].

[36] *Id.*

[37] Diplomatic Staff in Tehran, 1980 I.C.J. Rep at ¶ 12-13.

[38] Corfu Chanel, 1949 I.C.J. at 247.

[39] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 31 (June 27) [hereinafter Nicaragua Case].

[40] *Id.*

[41] U.K. v. Ice., 1974 I.C.J. at 9.

[42] General Treaty for Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57.

peaceful settlement of international disputes.[43] At another level, some economically powerful states advocate for greater recourse to international courts and tribunals in economic matters such as trade and investment.[44] At the same time, they are sometimes recalcitrant to appear in the international courts and tribunals in matters in which they do not any have strong economic or strategic incentives to do so[45] is somewhat hypocritical. A principled approach to international law would demand that economically strong states would have a uniform approach in embracing dispute settlement in all areas of international law, not just in areas where they believe that their economic imperatives suits resorting to international law.

In light of Article 94 of the U.N. Charter and Articles 59 and 60 of the ICJ Statute, it is likely that if the ICJ eventually finds jurisdiction and renders a judgment in favor of Palestine, the United States would likely be bound by such judgment. However, the judgment's practical value would be meaningless because, pursuant to Article 94 of the U.N. Charter, the US, as a member of the U.N. Security Council, can veto down any measure against it.[46] In any event, the Security Council has yet to enforce a judgment by the ICJ.[47] That, of course, in no way diminishes the jurisprudential or moral value of the Court's judgments.

IV. IS PALESTINE A STATE OR CAN IT BE A PARTY BEFORE THE ICJ?

Article 34 of the ICJ Statute states that "[o]nly states may be parties in cases before the Court."[48] Thus, an obviously thorny issue for Palestine to get this case settled by the ICJ may be to prove that it is a state. It is likely that the United States would argue that Palestine merely has an observer status in the United Nations[49] and is not yet a state,[50] and hence, Palestine does not

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[43] U.N. Charter arts. 38, 52; ICJ Statute art. 4.

[44] *See generally* Ernst-Ulrich Petersmann, *Proposals for Strengthening the UN Dispute Settlement System–Lessons from International Economic Law*, 3 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW (1999).

[45] *Id.*

[46] U.N. Charter art. 94.

[47] Aloysius P. Llamzon, *Jurisdiction and Compliance in Recent Decisions of the International Court of Justice*, 18 EUR. J. INT'L L. 815, 822 (2007).

[48] ICJ Statute art. 34.

[49] Initially, in 1974 it was the Palestine Liberation Organization which was granted the observer status and it was in 1988 that the U.N. General Assembly changed this to Palestine. *See* G.A. Res. 43/177 (Dec. 15, 1988). In 1998, the status of Palestine was somewhat upgraded; it was allowed to take part in the U.N. but not to vote. *See* G.A. Res. 52/250 (July 7, 1998).

[50] John Bolton, the former U.S. National Security Advisor, has been quoted saying that the "so-called state of Palestine's move to the ICJ would be blocked." *See* Dierdre

qualify as a party before the ICJ. There is a scholarly opinion that the observer status is not even a springboard to gain eventual statehood.[51] On this point, Palestine's argument could be based on the non-member observer *state* status granted by the U.N. General Assembly through its Resolution 67/19 of November 29, 2012.[52] The counterargument to giving a definitive emphasis on this Resolution would be that it is not the United Nations, rather individual states who recognize states.[53]

And if the Court takes the constitutive theory of recognition,[54] then the status of this Resolution could be somewhat diminished. However, in the contemporary era, the recognition of states is generally considered declaratory.[55] Article 1 of the Montevideo Convention on the Rights and Duties of States did not mention recognition as one of the elements of statehood.[56] Article 6 of the Convention has categorically proclaimed "[t]he recognition of a state merely signifies that the state which recognizes it accepts the personality of the other with all the rights and duties determined by international law."[57] In three of its ten opinions, the Commission set up by the European Economic Community to arbitrate the orderly dissolution of Yugoslavia also took the view that the recognition of states is only declaratory.[58] However, it is

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Shesgreen, *Bolton Says U.S. Will Block Legal Challenge from So-Called State of Palestine' over Embassy Move,* USA TODAY (Oct. 3, 2018), www.usatoday.com/story/news/world/2018/10/03/bolton-blasts-legal-challenge-so-called-state-palestine/1513340002/. For a detailed analysis on the issue of Palestine's statehood from a general international law point of view *see, e.g.*, Francis A. Boyle, *The Creation of the State of Palestine*, 1:1 EUR. J. INT'L L. 301 (1990); JOHN QUIGLEY, THE STATEHOOD OF PALESTINE: INTERNATIONAL LAW IN THE MIDDLE EAST CONFLICT (Cambridge Univ. Press, Cambridge, 2010); *cf.* James Crawford, *Creation of the State of Palestine: Too Much Too Soon?* 1:1 EUR. J. INT'L L. 307 (1990).

[51] *See, e.g.*, JAMES. CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW, 195 (Oxford Univ. Press, Oxford, 2d ed. 2006).

[52] G.A. Res. 67/19, ¶ 2 (Nov. 29, 2012) [hereinafter Resolution].

[53] SIMON CHESTERMAN ET AL., LAW AND PRACTICE OF THE UNITED NATION: DOCUMENTS AND COMMENTARY 205 (2d ed. 2016).

[54] The proponents of this theory argue that it is only through recognition of a new state by other states that a new state may gain statehood. This theory is a vestige of the nineteenth century idea of the European states that they had the right to determine which new states would be admitted to or be excluded from the family of nations. *See* ANTONIO CASSESE, INTERNATIONAL LAW 74 (2d ed. 2005).

[55] *See generally* MARTHA J. PETERSON, RECOGNITION OF GOVERNMENTS: LEGAL DOCTRINE AND STATE PRACTICE, 1815-995 (1997).

[56] Montevideo Convention on the Rights and Duties of States, art. 1, Dec. 26, 1933, 165 L.N.T.S. 19.

[57] *Id.* at art. 6.

[58] Opinion No. 1, Conference on Yugoslavia Arbitration Comm'n, 92 I.L.R. 162, 163 (Nov. 29, 1991); Opinion No. 8, Conference on Yugoslavia Arbitration Comm'n, 92 I.L.R. 199, 201 (July 4, 1992); Opinion No. 10, Conference on Yugoslavia Arbitration Comm'n, 92 I.L.R. 206, 208 (July 4, 1992). The advocates of this declaratory theory argue that

somewhat unlikely that the ICJ would consider the view of the Commission, as it does not too often refer to the decisions of other international courts or tribunals which could be driven by an awareness of the Court's pre-eminent status as the World Court.[59] However, even by the more restrictive of the two theories of state recognition, the constitutive theory, the fact that as many as 140 states formally recognized Palestine as a state by August 2018[60] could be indicative of its statehood. Having said that, the limitation to this approach of ascertaining Palestine's statehood could be the myriad of uncertainties about the territory of Palestine and also the competing claims of governance between Fatah and Hamas.

One point apparent from the Court's decision in the Construction of a Wall Advisory Opinion of 2004 (*Construction of a Wall*) is that, at least until that point, the Court did not consider Palestine as a state.[61] This would be clearly evident from the following observation:

> The Court considers that it has a duty to draw the attention of the General Assembly, to which the present Opinion is addressed, to the need for these efforts [the Roadmap and other Security Council resolutions] to be encouraged with a view to achieving as soon as possible, on the basis of international law, a negotiated solution to the outstanding problems and *the establishment of a Palestinian State*, existing side by side with Israel and its other neighbours, with peace and security for all in the region.[62] [Emphasis added]

By drawing the attention of the U.N. General Assembly for the establishment of the State of Palestine, clearly, the Court expressed the view that at that point in time, Palestine lacked statehood. This is also interesting to note

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recognition is nothing but a formal declaration of an already existing fact. Therefore, recognition is not a precondition of a state's statehood, instead just a formal declaration of it. The newly emerged states in the twentieth century tend to support this theory.

[59] However, the relative reticence is not any strict rule as the ICJ, in some cases, does refer to the precedents of other courts and tribunals. *See, e.g.*, Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Merits, 2010 I.C.J. 639, ¶ 66 (Nov. 30) ("Although the Court is in no way obligated . . . to model its own interpretation . . . on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body . . . to achieve the necessary clarity and the essential consistency of international law . . .").

[60] *Colombia Recognises Palestine as Independent State*, TRT WORLD (Aug. 9, 2018), http://www.trtworld.com/americas/colombia-recognises-palestine-as-independent-state-19463.

[61] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 162 (July 9).

[62] *Id.*

that in declaring the construction of walls in occupied territories illegal, the Court did not ask Israel to compensate Palestine, but rather the persons affected.[63] This is a departure from the *Chorzow Factory* formula where a state in breach of an international obligation was to compensate the state to whom the obligation was owed.[64] This is apparent as the Permanent Court of International Justice (PCIJ) stated in *Chorzow Factory* that "the Polish Government is under an obligation to pay, as reparation to the German Government [not directly to the companies suffering loss], a compensation corresponding to the damage sustained by the said Companies."[65] Thus, the following observation of the ICJ would also reinforce that it did not consider Palestine as a state at the time of delivering its opinion:

> Israel is accordingly under an obligation to return the land, orchards, olive groves and other immovable property seized from any *natural or legal person* for purposes of construction of the wall in the Occupied Palestinian Territory. In the event that such restitution should prove to be materially impossible, Israel has an obligation to compensate *the persons* in question for the damage suffered. The Court considers that Israel also has an obligation to compensate, in accordance with the applicable rules of international law, *all natural or legal persons* having suffered any form of material damage as a result of the wall's construction.[66]

However, it may be argued that the difference between the *Construction of a Wall* and the *Chorzow Factory* is due to the fact that the former is an advisory opinion and the latter is a judgment in a case filed by Germany seeking remedy against Poland seeking remedy.[67] In other words, in the *Construction of a Wall*, Palestine was not a party to the case, and hence, the ICJ did not ask Israel to compensate Palestine.[68] Again, the practice of the ICJ followed in the *Construction of a Wall* connotes that the ICJ viewed Palestine as an unusual case.[69] Article 66 of the ICJ Statute allows only states and international organizations to make submissions before the Court during advisory

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[63] *Id.* at ¶¶ 149-153.

[64] Factory at Chorzow, Judgment, 1928 P.C.I.J. (ser. A) No. 27, at 48 (Sept. 13) [hereinafter Chorzow Factory].

[65] *Id.* at 63.

[66] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. at ¶ 153 (emphasis added).

[67] *Id.* at ¶136; Chorzow Factory, 1928 P.C.I.J. (ser. A) No. 27.

[68] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. 136.

[69] *See infra* notes 70-71 and the accompanying text.

opinion proceedings.[70] Despite that, the Court allowed Palestine to make submissions on a footing like the other parties on the basis of Palestine's observer status in the U.N. and it being a co-sponsor of the draft resolution seeking advisory opinion in the case.[71] In doing this, the ICJ took a leap beyond the text of the relevant resolutions of the General Assembly, because none of the resolutions deals with the *locus standi* of Palestine before the Court. Since Palestine could in no way be an international organization, it may be said that the Court considered that Palestine was competent to make submissions like a state.

It is true that there is a gulf of difference between making a submission before the Court in the course of its advisory opinion hearings and making a claim against another state in its contentious jurisdiction. Nonetheless, the advisory opinion approach may be an avenue for the ICJ to find jurisdiction without pronouncing anything definitive on the statehood of Palestine. Or even if the Court concludes that Palestine is not yet a state, by taking this relaxed procedural approach, the Court may assume jurisdiction. However, given the substantial difference between making a claim as a party in a contentious case before the ICJ and making submissions before the Court in the course of an advisory opinion, the court taking this path seems rather unlikely. And the clear language of Article 34 of the Statute makes it all the more difficult to hold that any entity other than a state may invoke the contentious jurisdiction of the ICJ.[72]

Assuming, *arguendo*, that Palestine is a state or competent to file a claim before the Court like states, the next issue for Palestine is whether it can file a case before the ICJ as a non-member of United Nations. Unlike the prior issue, this seems to be an easier question. The Palestinian Government invoked Article 35(2) of the Statute of ICJ which provides that "[t]he conditions under which the Court shall be open to other states [not parties to the Statute] shall, subject to the special provisions contained in treaties in force, be laid down by the Security Council."[73] The Security Council Resolution 9 of 15 October 1946 also provides for the conditions of admissibility of claims by states which are not parties to the ICJ Statute.[74] Thus, if the ICJ decides that Palestine is a state for the purposes of its Statute, then Palestine seems to have the right to invoke the jurisdiction of the ICJ. In this case, the Court may find

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[70] ICJ Statute art. 66.

[71] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Request for Advisory Opinion, 2003 I.C.J. 428, ¶ 2 (Dec. 19).

[72] ICJ Statute art. 34.

[73] *Id.* at art. 35(2). *See States Not Parties to the Statute to Which the Court May Be Open*, INT'L CT. JUST., https://www.icj-cij.org/en/states-not-parties (last visited Sept. 16, 2019).

[74] S.C. Res. 9, ¶ 1 (Oct. 15, 1946).

its jurisdiction under Article 1 of the OP to which both Palestine and the U.S. happen to be contracting parties.[75]

As per Article 93(2) of the U.N. Charter, states which are not members of the UN may become parties to the ICJ Statute on conditions to be determined by the General Assembly upon the recommendation of the Security Council.[76] In the past, states like Switzerland, Liechtenstein, and San Marino used this category before joining the United Nations.[77] As already discussed, considering Palestine as an observer state and co-sponsor of the Draft Resolution requesting the Advisory Opinion in *Construction of a Wall*, the ICJ allowed it to submit a written statement and to participate in the oral proceedings before it,[78] which may provide a sort of a footing for Palestine to submit its case before the ICJ through this avenue.

V. SETTLING THE CASE WITHOUT DEALING WITH THE QUESTION OF PALESTINE'S STATEHOOD SUBSTANTIVELY

Another way of dealing with the case without dealing with the question of Palestine's statehood as a substantive question of international law could be that the ICJ may apply a limited procedural test of statehood by resorting to Article 81 of the *Vienna Convention on the Law of Treaties* (VCLT).[79] Article 81 states that the VCLT is open to "signature by all States Members of the United Nations or of any of the specialized agencies."[80] Since Palestine joined the United Nations Educational, Scientific and Cultural Organization (UNESCO), a specialized agency of the United Nations on 23 November 2011 as a member state, it can be argued that it is a state fulfilling the procedural threshold of bringing a claim before the ICJ.[81] If this happens, the ICJ may decide on the merits of the case by avoiding the thorny question of Palestine's statehood as a matter of general international law.

However, some international legal agreements are already open to entities which are not states, for example, the WTO agreements, which include Hong

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[75] Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, *supra* note 13, at art. 1.

[76] U.N. Charter art. 93(2).

[77] Rosalyn Cohen, *The Concept of Statehood in United Nations Practice*, 109 U. PA. L. REV. 1127, 1163 (1961).

[78] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Request for Advisory Opinion, 2003 I.C.J. 428, ¶ 2 (Dec. 19).

[79] Jude Vidmar, *Palestine v United States: Why the ICJ Does Not Need to Decide Whether Palestine is a State*, EJIL: TALK (Nov. 22, 2018), http://www.ejiltalk.org/palestine-v-united-states-why-the-icj-does-not-need-to-decide-whether-palestine-is-a-state/.

[80] Vienna Convention on the Law of Treatises art. 81, May 23, 1969, 1155 U.N.T.S. 331.

[81] Vidmar, *supra* note 79.

Kong Special Administrative Region (Hong Kong SAR) or Macao as members.[82] Although this allows Hong Kong SAR or Macao to be parties to the WTO treaties and WTO dispute settlement body, it does not mean that the treaties allow them to be parties before the ICJ. Again, the membership criteria of UNESCO and ICJ Statute are different. Article II: 2 of the UNESCO Constitution states that:

> Subject to the conditions of the Agreement between this Organization and the United Nations Organization… states not members of the United Nations Organization may be admitted to membership of the Organization, upon recommendation of the Executive Board, by a two-thirds majority vote of the General Conference.[83]

This would imply that the UNESCO Convention takes a more relaxed approach along the line of VCLT's wider embrace regarding statehood as a condition for membership. On the other hand, the membership criteria of the ICJ Statute are that a state would either have to be a member of the U.N. or be especially eligible to invoke the jurisdiction of the Court under Article 35(2), discussed above.[84] Hence, it seems unlikely that the ICJ would hold that Palestine's membership of UNESCO suffices the procedural threshold of being a state for invoking its jurisdiction in a contentious case.

Support for this line of argument that Palestine may fulfill the procedural threshold of invoking ICJ's contentious jurisdiction comes from the ICC Prosecutor's decision of January 2015 to open the preliminary examination in regard to Palestine's status observer member state of the United Nations.[85] The official statement explained:

> For the Office, the focus of the inquiry into Palestine's ability to accede to the Rome Statute has consistently been the question of Palestine's *status* in the UN, given the UNSG's role as treaty depositary of the Statute. The UNGA Resolution 67/19 is therefore determinative of Palestine's ability to accede to the

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[82] *Understanding the WTO: The Organization, Members and Observers*, WORLD TRADE ORG. (June 20, 2019), https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm.

[83] Constitution of the United Nations Educational, Scientific and Cultural Organization art. II, ¶ 2, Nov. 16, 1945, 4 U.N.T.S. 275.

[84] *See supra* notes 73-78 and the accompanying text.

[85] Alina Miron, *Palestine's Application the ICJ, Neither Groundless Nor Hopeless. A Reply to Marko Milanovic,* EJIL: TALK (Oct. 8, 2018), www.ejiltalk.org/palestines-application-the-icj-neither-groundless-nor-hopeless-a-reply-to-marko-milanovic/.

> Statute pursuant to article 125, and equally, its ability to lodge an article 12(3) declaration.[86]

However, regard should be had to the wording of article 12(3) of the Statute of the ICC, which states: "If the acceptance of a State which is not a Party to this Statute is required . . . that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question."[87] When we compare this pronouncement in the ICC Statute with the wording in Article 34(1) that "[o]nly states may be parties in cases before the Court,"[88] the contrasting approach seems to be evident. Whereas Article 34 emphasizes the fact of statehood of a party as a prerequisite for invoking the contentious jurisdiction, Article 12(3) simply states that a non-party state may accept the jurisdiction of ICC.[89] Article 12(3) relates to matters within "[t]he State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;" or "[t]he State of which the person accused of the crime is a national."[90] That is to say, Article 12(3) of the Statute of the ICC relates to matters within the territories of the state that accepts the jurisdiction, whereas Article 34 of the ICJ Statute does not necessarily have any such territorial limitation.[91] Thus, on the balance, it remains doubtful as to what extent the ICJ may or should take the identical approach of the ICC.

However, even if in this case, there is a difficulty in treating Palestine as a state qualified to invoke the contentious jurisdiction of the Court. From a broader policy point of view, there is a considerable policy reason to interpret the term 'state' more liberally. This has been explained eloquently by Cohen:

> A claim to become a party to the Statute of the Court is a claim to limited participation. A fortiori, this is true of a claim to appear before the Court on a single occasion. The undoubted desirability of having as many states as possible subject to the compulsory jurisdiction of the Court and, reciprocally, with access to the Court, together with the fact that the claim is of a limited nature, provide the expectation that in this context the

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[86] Press Release, Int'l Criminal Court, The Prosecutor of the International Criminal Court, Fatou Bensouda, Opens a Preliminary Examination of the Situation in Palestine, (Jan. 16, 2015) (emphasis added).

[87] Rome Statute of the International Criminal Court art. 12 ¶ 3, July 17, 1998, 2187 U.N.T.S. 90.

[88] ICJ Statute art. 34, ¶ 1.

[89] *Compare* ICJ Statute art. 34, ¶ 1, *with* Rome Statute of the International Criminal Court art. 12, ¶ 3.

[90] Rome Statute of the International Criminal Court art. 12 ¶ 3.

[91] *Id.*; ICJ Statute, art. 34.

> term "state" will be interpreted liberally, that is, will bear a slightly less distinct relationship to the formal legal criteria of statehood.[92]

While there may be some policy reasons, from a point of view interested in promoting greater recourse to the settlement of disputes through legal means, in this particular case it is uncertain whether the Court takes a narrow textual approach or a liberal approach.

VI. THE SHIFTING OF THE U.S. EMBASSY AND VCDR

Palestine acceded to the OP on March 22, 2018.[93] On May 1, 2018, the United States communicated to the Depository of the U.N. that it considers that the "'State of Palestine' is not qualified to accede to the Optional Protocol" and hence, it would "not consider itself to be in a treaty relationship with the 'State of Palestine' under the Optional Protocol."[94] On this particular point, it seems that neither VCLT nor customary international law provides any direct guidance as to the consequences of the USA's assertion. Only this far may be said with some degree of conviction that the USA's declaration cannot, *ipso facto*, have any implication for Palestine's rights and obligations in relation to other parties to the VCDR. To hold otherwise would be tantamount to saying that a treaty party can unilaterally determine the legal status of accession of another party which is clearly untenable. That would give a treaty party effectively veto power over a majority of other treaty parties without whose consent the objected state could not have acceded to the treaty in the first place.

However, to the extent that the United States wants to deny its treaty relationship with Palestine, the answer seems to be that the United States may do so at its will. The basis of treaty rights and obligations is the consent of the parties.[95] Hence, when a treaty party unequivocally denounces its treaty relationship with another treaty party, it is difficult to see how the two parties can owe any treaty obligations to each other. Possibly, the only question about the

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[92] Cohen, *supra* note 77, at 1163.

[93] U.N. Secretary-General, Optional Protocol to the Vienna Convention on Diplomatic Relations Concerning the Compulsory Settlement of Disputes: State of Palestine: Accession (Mar. 23, 2018).

[94] U.N. Secretary-General, Optional Protocol to the Vienna Convention on Diplomatic Relations, Concerning the Compulsory Settlement of Disputes: United States of America: Communication, (May 1, 2018), *available at* https://treaties.un.org/doc/Publication/CN/2018/CN.228.2018-Eng.pdf.

[95] *See* Vienna Convention on the Law of Treatises, *supra* note 80, at 332 (Preamble, stating "[t]he States Parties to the present Convention . . . that the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized.").

United States' position on this could be that since the United States felt that it was in no treaty relation to Palestine, why, after a short period of Palestine filing its case at the ICJ, the United States withdrew from the OP. The rationale behind this is unclear, perhaps this far can be said that the United States simply wanted to stress its lack of interest in participating in the case. Thus, it may pose a jurisdictional hurdle for Palestine and the case may end here. Had the United States accepted the compulsory jurisdiction of the ICJ under the Optional Clause, i.e., Article 36(2) of the ICJ Statute,[96] Palestine could potentially (though perhaps only theoretically) have another opening to overcome the jurisdictional barrier.

Generally, states establish their diplomatic missions in the capital city or sometimes other town which is the seat of government of the receiving state, and they tend to follow that government's seat when it moves either permanently or provisionally.[97] However, in exceptional cases, this common practice has not been followed, e.g. in Saudi Arabia, the Foreign Office of the receiving state was in Jeddah, where foreign missions were required to be located, not in Riyadh, the actual seat of the government.[98] This is understandable because the Ministry of Foreign Affairs would be the natural point of contact for the embassy. In case of Israel, most diplomatic missions have remained in Tel Aviv because a shift to Jerusalem would indicate the acceptance of Israel's establishment there of its seat of government, which most governments not been keen to do so far.[99] Another notable exception is Vatican City which, due to its small size, cannot fit in the diplomatic missions of the various sending states and thus, those are located in Rome based on an agreement with the Government of Italy.[100] However, these cases are different from that of the United States re-locating its embassy to Jerusalem because of "the disputed status of the city of Jerusalem making it arguably located beyond the territory of Israel."[101]

Article 12 of the VCDR, 1961 requires that "[t]he sending State may not, without the prior express consent of the receiving State, establish offices forming part of the mission in localities other than those in which the mission

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[96] If a state on a voluntary basis, by a unilateral declaration has communicated to the ICJ under 36(2) that it accepts the jurisdiction of the Court as compulsory ipso facto and without any special agreement, the jurisdiction of the Court can be established for bringing a case against that state. However, in practice, this jurisdiction is also limited as states make declarations under terms and conditions which are solely determined by themselves. *See* Stanimir A. Alexandrov, *The Compulsory Jurisdiction of the International Court of Justice: How Compulsory Is It?*, 5 CHINESE J. INT'L L. 29 (2006).

[97] Islam, *supra* note 7.

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *Id.*

itself is established."[102] However, this Article does not seem to be directly applicable in this case.[103] In other words, Article 12 seems to apply to those situations "when a sending state would want to establish its mission in a locality in which the receiving state [objects to] allow such an establishment."[104] Clearly, the United States embassy in Jerusalem has been based on an agreement between the sending and receiving state, i.e. the United States and Israel.

Another issue about VCDR is its Article 3 states that the functions of a diplomatic mission consist, *inter alia,* in:

> (a) Representing the sending State in the receiving State; (b) Protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law … (d) Ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State (e) Promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations.[105]

The words "in the receiving state" in four of the five clauses in Article 3 may connote that the drafters of the VCDR perceived a nexus between the diplomatic mission and the territory of the receiving state. In this case, the capacity of Israel to give this consent itself is undecided due to the disputed status of the city of Jerusalem. But having said that, for sure, the United States' relocation of its embassy to Jerusalem gives recognition to the Israeli claim and thus, is at odds with the extensive international recognition of Jerusalem as a disputed territory.[106] Indeed, until President Trump's declaration on December 6, 2017, the United States had always acknowledged that no state had sovereignty over Jerusalem.[107] Thus, by moving its embassy to Jerusalem, by its own position, the United States has established its diplomatic mission in Israel in a territory which is under international law, not Israel's territory.

Thus, the special status of Jerusalem "established as a *corpus separatum* under a special international regime" set up by the General Assembly Resolution no. 181(II) of November 29, 1947 creates a moratorium until Israelis and Palestinians agree.[108] Therefore, the territorial situation creates *erga*

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[102] Vienna Convention on Diplomatic Relations, *supra* note 1, at art. 12.
[103] Islam, *supra* note 7.
[104] *Id.*
[105] Vienna Convention on Diplomatic Relations, *supra* note 1, at art. 3.
[106] *Id.*
[107] *See, e.g.*, Waldman v. Palestine Liberation Organization, 835 F.3d 317 (2d Cir. 2016).
[108] G.A. Res. 181 (II), at pt. III(A) (Nov. 29, 1947).

omnes obligations, which differ from most of the generally bilateral in nature VCDR obligations. Beyond the U.N. resolutions, Israel recognized the special status of Jerusalem when it applied for U.N. membership. Mr. Eban, the Israeli representative, stated:

> The question of sovereignty over the area [Jerusalem] has not yet been finally settled and will be settled, perhaps, at the fourth session of the General Assembly. It will not be for the Government of Israel alone to determine that issue of sovereignty. All we can do—and even then only if we are Members of the United Nations—will be to propose formally certain solutions of our own.[109]

It is well-established that a unilateral declaration by a state can create international legal obligations towards other states, as established by the PCIJ in *Eastern Greenland*.[110] In the *Nuclear Tests Case*, the ICJ followed its predecessor's approach and went a step further observing:

> It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding.[111]

Thus, it seems that Israel's own acknowledgement about the contested status of Jerusalem could help Palestine's claim about the disputed status of Jerusalem. This would, in turn, mean that absent an authoritative declaration by the U.N., neither Israel nor Palestine can claim their sovereignty over Jerusalem. Beyond the General Assembly Resolution and Israel's acknowledgement of the special status of Jerusalem, the same was recognized by the ICJ in its advisory opinion in the Wall Case, as the Court categorically stated "the Court

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[109] U.N. GAOR, 3d Sess. 47th mtg. of the Ad Hoc Political Committee at 272-78, U.N. Doc A/AC.24/SR.47 (May 6, 1949).

[110] Legal Status of Eastern Greenland (Den. v. Nor.), 1933 P.C.I.J. (ser. A/B) No. 53, ¶ 195 (Apr. 5).

[111] Nuclear Tests (Aust. V. Fr.), Judgment, 1974 I.C.J. 253, 267, ¶ 43 (Dec. 20).

is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem."[112]

It can be said that whether or not the United States' declaration amounts to a violation of Article 41(2) of the 2001 International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts (Draft Articles)[113] may well become a central substantive issue before the ICJ.[114] This Article states that "[n]o State shall recognize as lawful a situation created by a serious breach . . . nor render aid or assistance in maintaining that situation."[115] According to Article 40 of the Draft Articles, the serious breach would be "obligation arising under a peremptory norm of general international law."[116] If Israel's 1967 obtaining of control over East Jerusalem and the subsequent expansion of municipal boundaries is an annexation, then the recognition of that wrongful annexation may itself amount to a serious breach of international law. If this Israeli action is treated as an annexation, then there is a convincing basis for treating the United States' action as inconsistent with Article 41(2) of the Draft Articles.[117]

Another point which may lend significant force to Palestine's case on this particular point is the UN Security Council Resolutions 476 and 478 of 1980.[118] Resolution 476 "[r]eiterates that all such measures which have altered the geographic, demographic and historical character and status of the Holy City of Jerusalem are null and void and must be rescinded in compliance with the relevant resolutions of the Security Council."[119] Resolution 478 declared that Israel's claim through a law passed by the Knesset in declaring Jerusalem, complete and united, as the capital of Israel violated international law.[120] Before the adoption of Resolution 478, Chile, Ecuador, and Venezuela had announced their decision to withdraw their respective diplomatic missions from Jerusalem.[121] At the time of passing Resolution 478, ten states—Bolivia, Colombia, Costa Rica, the Dominican Republic, El Salvador, Guatemala, Haiti, the Netherlands, Panama and Uruguay—had their missions in Jerusalem. Between August 22 and September 9, all of these States appraised the

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[112] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 200, ¶159 (July 9).

[113] Int'l Law Comm'n, Draft Article on Responsibility of States for Internally Wrongful Act, with commentaries, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (2001).

[114] Islam, *supra* note 7.

[115] Int'l Law Comm'n, *supra* note 113.

[116] *Id.* at 112.

[117] Islam, *supra* note 7.

[118] *Id.*

[119] S.C. Res. 476, ¶ 4 (June 30, 1980).

[120] S.C. Res. 478, ¶ 2 (Aug. 20, 1980).

[121] 1980 U.N.Y.B. 405.

UN Secretary-General that they decided to withdraw their mission from the city.[122] And this resolution has fostered a process of the quite consistent collective international non-recognition of Jerusalem as the capital of Israel.[123]

VII. THE RIGHT OF THIRD PARTY (ISRAEL)

Another formidable barrier to the jurisdiction of the ICJ in this case could be the *Monetary Gold* principle, as propounded in the *Monetary Gold Case* decided by the ICJ in 1954.[124] As a matter of jurisprudence, the core issue before the ICJ was whether it had the third party jurisdiction to settle a legal dispute between Italy and Albania over assets belonging to Italy that Albania expropriated.[125] In 1925, Italian financiers and the Albanian monarchial government agreed to set up a Banking arrangement which established the National Bank of Albania (NBA).[126] As per the arrangement, the NBA would have the exclusive rights to issue bank notes in Albania which were to be backed up by gold reserves physically stored in Rome.[127] Eventually, by September 16, 1943, the Italian government became the owner of 88.5% of the total share capital of NBA, which included its gold reserve in Rome.[128] That same day, the German Nazi forces seized around 2,339 kilograms of this gold reserve and took it to Germany.[129] After the German surrender in 1945, Part III of the *Final Act Regarding Reparations after World War II* provided that monetary gold would be "pooled for distribution … in proportion to [a country's] respective losses of gold through looting or wrongful removal to Germany."[130] It designated France, the United Kingdom, and the United States to be responsible for ensuring equitable distribution of the monetary gold.[131]

An arbitration held under the Final Act decided that the gold seized from the vault of the NBA belonged to Albania.[132] But in the meantime, the newly

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[122] *Id.*

[123] Islam, *supra* note 7.

[124] Marko Milanovic, *Palestine Sues the United States in the ICJ re Jerusalem Embassy*, EJIL: TALK (Sept. 30, 2018), http://www.ejiltalk.org/palestine-sues-the-united-states-in-the-icj-re-jerusalem-embassy/; Monetary Gold Removed from Rome in 1943 (It. v. Fr., U.K., and U.S.), Preliminary Question, 1954 I.C.J. 19 (June 15).

[125] Monetary Gold Removed from Rome in 1943 (It. v. Fr., U.K., and U.S.), Preliminary Question, 1954 I.C.J. 19 (June 15).

[126] D. H. N. Johnson, *The Case of Monetary Gold Removed from Rome in* 1943, 4 INT'L & COMP. L. Q. 93, 96 (1955).

[127] *Id.*

[128] *Id.*

[129] *Id.*; Application Instituting Proceedings, Monetary Gold Removed from Rome (It. v. Fr., U.K., and U.S.), Pleadings, 1953 I.C.J. 8 (May 19).

[130] 14 Dep't St. Bull. 85, 120 (1946).

[131] Johnson, *supra* note 126, at 97.

[132] *Id.*

formed government of Albania on January 13, 1945 nationalized the NBA and seized all its assets including the gold looted by Nazis.[133] However, Albania did not compensate Italy for the expropriation.[134] Again, the U.K. also claimed this gold as partial satisfaction for Albania's refusal to pay compensation as per the ICJ's judgment in *Corfu Channel Case*.[135] Both Italy and the U.K. claimed compensation from Albania, but Albania's shares in the NBA were not enough to satisfy both.[136] A Tripartite Commission for the Restitution of Monetary Gold (involving France, the U.K., and the United States) decided that, should Italy fail to apply to the ICJ on the priority between these two competing claims, the gold would be given to the U.K.[137]

In May 1953, Italy filed a case before the ICJ claiming priority over the U.K.[138] Italy's first submission was that France, the UK, and the United States "should deliver to Italy any share of the monetary gold that might be due to Albania under Part III of the Paris Act of January 14th, 1946, in partial satisfaction for the damage caused to Italy."[139] Rather remarkably, Italy then questioned the jurisdiction of the ICJ to settle this preliminary question.[140] In its judgment, the ICJ decided that since Albania had not consented to the jurisdiction of the Court, it could not decide a question between Albania and Italy.[141] The ICJ reasoned that "[t]o adjudicate upon the international responsibility of Albania without her consent would run counter to a well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent."[142] This principle was followed by the ICJ in the *East Timor Case*.[143]

However, the *Monetary Gold* principle may only apply if the ICJ decides that the judgment would involve the rights of Israel. If the relocation of the U.S. embassy is taken as a decision made by the U.S. administration, then the *Monetary Gold* principle may not apply in this case. Technically speaking, Palestine has not sought to make any claim against Israel; its intended remedy is sought against the United States only.[144] At most, the Palestinian's case

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[133] *Id.* at 96.
[134] *Id.*
[135] *Id.*
[136] *Id.* at 98.
[137] *Id.* at 99.
[138] *Id.* at 93.
[139] Monetary Gold, 1954 I.C.J. at 22.
[140] *Id.* at 24.
[141] *Id.* at 32.
[142] *Id.*
[143] East Timor (Port. v Austl.), Judgment 1995 I.C.J. 90 (June 30).
[144] *See* Palestine Instituting Proceedings at 16, Decision Requested states:

> . . . By the present Application, the State of Palestine therefore requests the Court to declare that the relocation, to the Holy City of Jerusalem, of

involves an issue which entails the legality of an action involving Israel. Indeed, the ICJ may hold that the legality of Jerusalem as the capital of Israel and the relocation of the U.S. embassy to Jerusalem are two distinct issues. In other words, the violation of an international legal obligation by Israel and the acceptance of that violation by the United States are related but distinct issues. Should the ICJ take this direction, then the ICJ may decide on the case notwithstanding the *Monetary Gold* principle.

One commentator has argued somewhat along this line and suggested that in Palestine's case the principle may be interpreted narrowly, and thus the ICJ may find jurisdiction.[145] The argument goes that "the Monetary Gold principle is not about affecting the legal interests of the third State, but about protecting its rights and obligations from international adjudication without its consent."[146] The support for this restrictive reading of *Monetary Gold* is sought from the following passage of the ICJ's judgement in *East Timor* case that "[t]he Court emphasizes that it is not necessarily prevented from adjudicating when the judgment it is asked to give might affect the legal interests of a State which is not a party to the case."[147] The Court would refrain from exercising jurisdiction when the third state's "rights and obligations would thus constitute the very subject-matter of such a judgment made in the absence of that State's consent."[148]

The *Nauru Case*[149] may also give us some idea about the application or otherwise of the *Monetary Gold* principle. There, Nauru alleged that Australia unlawfully exploited its natural resources while working as the joint administering authority (along with New Zealand and the United Kingdom) under a mandate of the League of Nations and then a trusteeship by the United Nations.[150] Australia pleaded that without determining the responsibilities of

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> the United States Embassy in Israel is in breach of the Vienna Convention on Diplomatic Relations.
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> . . . The State of Palestine further requests the Court to order the United States of America to withdraw the diplomatic mission from the Holy City of Jerusalem and to conform to the international obligations flowing from the Vienna Convention on Diplomatic Relations.
>
> . . . In addition, the State of Palestine asks the Court to order the United States of America to take all necessary steps to comply with its obligations, to refrain from taking any future measures that would violate its obligations and to provide assurances and guarantees of non-repetition of its unlawful conduct.

[145] Miron, *supra* note 85.

[146] *Id.*

[147] East Timor, 199 I.C.J. at 104.

[148] *Id.* at 105.

[149] Certain Phosphate Lands in Nauru (Nauru v. Austl.), Preliminary Objections, 1992 I.C.J. 240 (June 26).

[150] *Id.* at 246.

New Zealand and the United Kingdom—neither of which were parties to the case—the Court could not decide the matter.[151] The Court distinguished this from the *Monetary Gold* principle by observing that the determination of Albania's responsibility was a precondition deciding on Italy's claims, but here the determination of the responsibility of the two other parties was not a prerequisite for determining Australia's responsibility.[152] The Court accepted that the finding, in this case, could have implications for other parties, but the Court would not have to dwell on that situation and therefore, it felt obliged to exercise jurisdiction.[153] The Court also pointed to the text of Article 59 of the ICJ Statute to underscored that any finding of the Court would not bind a non-party to the case before it.[154]

By analogy, it may be surmised that if the Court decides on the merits of Palestine's claim, obviously, that would have implications for Israel, but the judgment would only bind the parties to the case. Hence, the *Monetary Gold* principle may not preclude the Court from exercising jurisdiction. To clarify, should the Court decide that the relocation of the U.S. Embassy to Jerusalem is illegal, it would only create an obligation on the United States to relocate it, not Israel because the relocation can be done by the U.S. alone. It is plausible to argue that the relocation of the U.S. embassy is a decision of the U.S.'s administration, and although undeniably it would have an effect on Israel, to determine the legality of Israel's action is not directly at issue in this case. That being said, much could hinge on whether the ICJ designates Jerusalem as a contested territory or not. If the ICJ decides that Jerusalem is a disputed territory, then the *Monetary Gold* principle seems much easier to get around for the Court.

There is an argument that since the ICJ did not refer to *Monetary Gold* in *Marshall Islands Nuclear Disarmament*[155], then the ICJ may similarly ignore the principle in Palestine's case. [156] However, too much should not be read from that judgment because the Court in the *Marshall Islands* decided that it did not have to decide on jurisdiction because there was an absence of dispute.[157] Hence, it would appear that the Court did not have to dwell on the *Monetary Gold* principle to arrive at its finding and so the judgement does not

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[151] *Id.* at 255.

[152] *Id.* at 261.

[153] *Id.* at 261-62.

[154] *Id.* at 261.

[155] Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. India), Jurisdiction and Admissibility, 2016 I.C.J. 255 (Oct. 5); (Marsh. Is. v. Pak.), Jurisdiction and Admissibility, 2016 I.C.J. 522 (Oct. 5); (Marsh. Is. v. U.K.), Preliminary Objections, 2016 I.C.J. 833 (Oct. 5).

[156] Miron, *supra* note 85.

[157] Nuclear Disarmament, 2016 I.C.J. at 856.

enlighten us as to how the Court would apply the principle in the case at hand here.

VIII. THE JUSTICIABILITY OF POLITICAL QUESTIONS

It is quite likely that though the case may be intrinsically linked with political ramifications, this would not in itself deter the Court to shy away from exercising jurisdiction. The jurisprudence on this point is more or less settled that simply because a case before the Court has political aspects linked to it, the Court would not deem it unable to deal with the matter, as long as the case poses legal questions.[158] This is backed up by sound policy reasons too. States are political entities and it is quite common that legal disputes between states would involve political questions in one form or the other.[159] Hence, too much sensitivity about political questions may render the Court virtually ineffectual. The law on this point can be found in the following words in the *Kosovo Opinion*:

> [T]he Court has repeatedly stated that the fact that a question has political aspects does not suffice to deprive it of its character as a legal question . . . . Whatever its political aspects, the Court cannot refuse to respond to the legal elements of a question which invites it to discharge an essentially judicial task, namely, in the present case, an assessment of an act by reference to international law. The Court has also made clear that, in determining the jurisdictional issue of whether it is confronted with a legal question, it is not concerned with the political nature of the motives which may have inspired the request or the political implications which its opinion might have.[160]

A similar finding was made in the *Construction of a Wall* when the ICJ stated that "the circumstance that others may evaluate and interpret these facts in a subjective or political manner can be no argument for a court of law to abdicate its judicial task."[161] Thus, as long as the Court finds that there is a legal dispute, the political sensitivity alone would not bar the Court from proceeding with the case. The same principle has been upheld in the context of

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[158] *See infra* note 160 and the accompanying text.

[159] Andrew Coleman, *The International Court of Justice and Highly Political Matters*, 14 MEL. J. INT'L L. 29, 32 (2003).

[160] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403, ¶ 27 (July 22).

[161] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 58 (July 9).

contentious cases too. In *Nicaragua*, when the United States challenged the jurisdiction of the Court arguing that the Case involved political questions, the Court, reiterating its finding in *United States Diplomatic and Consular Staff in Tehran*, rejected the United States' argument and observed, "[N]ever has the view been put forward before that, because a legal dispute submitted to the Court is only one aspect of a political dispute, the Court should decline to resolve for the parties the legal questions at issue between them."[162]

The jurisprudence on this is also consistently applied in *Border and Transborder Armed Actions* where the Court observed:

> [T]he Court is aware that political aspects may be present in any legal dispute brought before it. The Court, as a judicial organ, is however only concerned to establish, first, that the dispute before it is a legal dispute, in the sense of a dispute capable of being settled by the application of principles and rules of international law, and secondly, that the Court has jurisdiction to deal with it, and that that jurisdiction is not fettered by any circumstance rendering the application inadmissible. The purpose of recourse to the Court is the peaceful settlement of such disputes; the Court's judgment is a legal pronouncement, and it cannot concern itself with the political motivation which may lead a State at a particular time, or in particular circumstances, to choose judicial settlement.[163]

IX. CONCLUSION

How the ICJ would handle the case is a matter of conjecture at this stage. While some issues such as the justiciability of political questions are relatively settled jurisprudence, some others such as the statehood of Palestine or its *locus standi* are more uncertain. However, some points may be made with some degree of certainty. Should the Court find that it has jurisdiction in this case and proceeds to hear the case on its merits, that in itself may lead to legal answers to some questions which may then have some degree of impact on resuscitating the peace process in the Middle East. From a realpolitik point of view, if the ICJ only decides that Palestine is a state and then because of the *Monetary Gold* principle or some other reason goes on to hold that it lacks jurisdiction to proceed to the merits, that could mean the end of the case, but

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[162] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Jurisdiction and Admissibility, 1984 I.C.J. 392, ¶ 105 (Nov. 26) (quoting United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgment, 1980 I.C.J. 3, 20, ¶37 (May 24)).

[163] Border and Transborder Armed Actions (Nicar. v. Hond.), Jurisdiction and Admissibility, 1988 I.C.J 69, ¶ 52 (Dec. 20).

still a significant political status boost for Palestine. However, if the Court takes up the highly debated issue of Palestinian statehood, it is unlikely that it would shy away from proceeding with a more jurisprudential issue such as the *Monetary Gold* principle.

Without the advantage of a crystal ball or hindsight, it may be said that should the ICJ decide that it has jurisdiction to proceed to hear the case on merit (by pronouncing on the statehood of Palestine or not), the *Monetary Gold* principle or the violation of VCDR as such may not prove to be an insurmountable barrier for giving its judgement on the merits of the case. Additionally, because of the complex questions this case poses, any judgment by the Court beyond the preliminary issue of admissibility of the case would likely be read and re-read by readers of international law for quite some time. It is somewhat paradoxical that while on merit Palestine seems to have a rather good case, on a jurisdictional level, it has to surmount many challenges which may stand in the way of it going that far. This is perhaps more a reflection of the consent-centric nature of international law than anything to do with this case per se.