

AMNESTY INTERNATIONAL QUESTIONS AND ANSWERS

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Palestinian non-member state observer recognition at the UN

As a human rights organization, Amnesty International takes no position on the question of Palestinian statehood, which is a political issue outside our mission. However, the recognition of Palestine's status as a non-member observer state has important implications for human rights concerns in the Occupied Palestinian Territories (OPT).

BACKGROUND ON THE PALESTINIAN STATEHOOD RECOGNITION

The leadership of the Palestinian Authority (PA) and the Palestine Liberation Organization (PLO) secured the recognition of Palestine as a non-member observer state of the United Nations on 29 November 2012. The vote at the UN General Assembly in New York was decided by 138 votes in favour, 41 abstentions, and 9 against. Palestine is now in a position to accede to the Rome Statute of the International Criminal Court (ICC) and other human rights and international humanitarian law treaties.

Notwithstanding the recognition of Palestinian statehood, the Palestinian government continues to have limited effective control over the territory to which it lays claim.

Amnesty International is calling on the Palestinian government to accede to all relevant treaties without delay.¹

QUESTIONS AND ANSWERS

Q.1 What is Amnesty International's position on the UN recognition of Palestinian statehood?

Amnesty International does not take a position on the resolution of the Israeli-Palestinian conflict, the question of whether Palestine is a state or what its borders should be, or on the UN recognition of Palestinian statehood. As a human rights organization, our concern is that any resolution, initiative or agreement fully respects the human rights of Palestinians and Israelis, including access to justice, truth, and reparations.

Q.2 Does the recognition of Palestinian statehood affect the legal standards applicable in the OPT, or Israel's obligations as the occupying power?

International humanitarian law, in particular the Fourth Geneva Convention and the Hague Regulations, apply to any situation of belligerent occupation, regardless of whether or not the territory in question is recognized as a state. The key question is whether a foreign power exercises "effective control" and governance over the local population. Neither recognition of Palestine by any number of states nor any resolution by the UN Security Council or General Assembly, will

change the effective control which Israel maintains over the Palestinian population in the West Bank, including East Jerusalem, and the Gaza Strip, which together form the OPT.

In the West Bank, Israel maintains full civil and military control over the air space, border crossings, and 60 per cent of the land area (designated “Area C” under the Oslo Accords). Israeli military courts and the High Court of Justice² have ruled that the entire territory, including the limited areas designated as “Area A” under the Oslo Accords, remain under occupation. In Gaza, Israel maintains direct control over the air space, territorial waters, all but one of Gaza’s land crossings, and the perimeter of the Gaza Strip. Israel controls the passage of people and goods into and out of both parts of the OPT, which are considered as one territory under the Oslo Accords and international humanitarian law. Furthermore, Israel controls the Palestinian population registry and has refused to update it or process any requests for family unification since 2000, which means that tens of thousands of Palestinians in the West Bank and Gaza Strip are considered illegal residents by the Israeli authorities and live in constant fear of deportation.

For all of these reasons, Israel remains the occupying power in both the West Bank, including East Jerusalem, and the Gaza Strip. Its obligations as an occupying power, including its responsibility for the welfare of the Palestinian population and the protection of civilians, are unchanged by the recognition of Palestine or upgrade in its status at the UN.

Israel’s actions in the OPT will also continue to be subject to its obligations under the international human rights treaties it has ratified, as has been repeatedly affirmed by the treaty-monitoring bodies, as well as customary rules of international human rights law. Treaties ratified by Israel include the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, and the Convention on the Rights of the Child.

As explained below, the statehood bid could also affect the legal standards applicable to the PA.

Q. 3 Does the recognition of Palestine allow for Palestinian ratification of international human rights conventions and treaties, including the Rome Statute of the International Criminal Court (ICC)?

State status requirements to become a party to human rights conventions and treaties vary from treaty to treaty. Some treaties allow all states to become a party, as for instance the Rome Statute of the ICC. Others require UN membership, an invitation from the UN General Assembly or being a party to the Statute of the International Court of Justice.

The ICCPR, ICESCR, and the International Convention on the Elimination of All Forms of Racial Discrimination do not require UN membership as a condition for ratification, as they are also open to members of any of its specialized agencies (Palestine is already a member state of UNESCO), any state party to the Statute of the International Court of Justice or any state invited to become a party by the General Assembly. Accession would formalize Palestine’s human rights obligations and subject it to monitoring and regular review by the relevant treaty bodies. Like any other state, Palestine is also bound by customary international human rights law even if it does not ratify human rights treaties.

The Rome Statute is open to accession by all states, and UN membership is not a requirement. One state, which is not even a UN non-member observer state, the Cook Islands, has been a party to the Rome Statute since 2008 without any state objecting to this. Obtaining non-member

observer state status at the UN bolsters Palestine's claims to statehood and thus its eligibility to become a party to the Rome Statute.

Q. 4 How does the recognition of statehood affect efforts to pursue accountability for crimes under international law committed during the 2008-2009 conflict in Gaza and southern Israel, and what is Amnesty International calling for in this regard?

Amnesty International documented evidence that war crimes were committed by both Israeli forces and Palestinian armed groups during the 2008-2009 conflict in Gaza and southern Israel,³ and the UN Fact-Finding Mission on the Gaza Conflict concurred with this assessment in its September 2009 report.⁴ After monitoring the domestic investigations of both parties, Amnesty International concluded that both the Israeli government and the Hamas de facto administration have failed to conduct prompt, thorough and independent investigations in conformity with international law, and failed to prosecute those suspected of criminal responsibility of crimes under international law.⁵

Crimes under international law may be investigated, and if sufficient admissible evidence exists, prosecuted, by any state exercising universal jurisdiction, even when there is no link between the state and the incident in question. Whether the suspect is a national of a state or not is irrelevant. Amnesty International calls upon all states to exercise universal jurisdiction over crimes under international law, including those documented in the 2008-2009 Gaza conflict – as also recommended in the Report of the UN Fact-Finding Mission⁶. States should investigate and, if sufficient admissible evidence is found, prosecute those suspected of criminal responsibility for crimes under international law committed before, during and after the conflict before their national courts, regardless of the nationality of the victims or suspects.

Amnesty International has also called on the ICC Prosecutor to request a determination from the Pre-Trial Chamber on the validity of a January 2009 declaration made by the Palestinian Authority under Article 12(3) of the Rome Statute, accepting the ICC's jurisdiction over crimes "committed on the territory of Palestine since 1 July 2002."⁷ This declaration would potentially cover all crimes committed in Gaza and southern Israel documented in the UN Fact-Finding Mission report.

The ICC Prosecutor received various submissions on whether the PA declaration meets statutory requirements and conducted a preliminary examination into crimes committed during the Gaza conflict. On 3 April 2012, the Office of the Prosecutor concluded that it was unable to proceed with investigating and prosecuting these crimes unless the relevant UN bodies (in particular, the Secretary General and General Assembly) or the ICC Assembly of States Parties (made up of 121 states that have ratified the Rome Statute) decide that Palestine qualifies as a state within the meaning of the provision under which the Palestinian Authority had lodged the declaration.⁸ This condition is now met.⁹

Alternatively, Palestine can make a new declaration under article 12(3) of the Rome Statute since receiving non-member observer state status at the UN in order for the ICC to re-consider investigating crimes committed during the 2008-2009 Gaza conflict. In the event that the Palestine declaration were not accepted by the Pre-Trial Chamber – a decision that would be subject to appeal - ICC jurisdiction could be triggered by a Security Council referral to the Prosecutor or, if Palestine were to become a state party to the Rome Statute, by a Palestine – or any other state party - referral to the Prosecutor or the Prosecutor herself opening an investigation *motu proprio*.

Amnesty International continues to call on the UN General Assembly to reconsider the UN Fact-Finding Mission Report. The General Assembly should refer the report to the Security Council with the recommendation that it refer the Gaza situation to the Prosecutor of the ICC, pursuant to

Article 13(b) of the Rome Statute.¹⁰

Q. 5 What about the pressure not to pursue accountability mechanisms in the event of statehood recognition that was placed on Palestinian diplomats prior to the vote?

Amnesty International is concerned at reports that several states, including the United Kingdom and the USA, put pressure on Palestinian diplomats prior to the UN General Assembly vote to renounce accountability mechanisms for crimes under international law. Amnesty International opposes any such attempts to prevent the Palestinians from acceding to the Rome Statute of the ICC. Such attempts contravene the fundamental principle that justice should be accessible to all, regardless of nationality or political affiliation and aim at undermining the integrity of the ICC. These efforts appear to be designed to entrench impunity for crimes under international law, in particular those committed during the 2008-2009 conflict in Gaza and southern Israel, by preventing both Palestinian and Israeli victims from accessing justice through the ICC.

Q. 6 How does Palestinian statehood affect efforts to pursue accountability for apparent violations of international law committed during the November 2012 conflict in Gaza and southern Israel, and what is Amnesty International calling for in this regard?

Amnesty International has called on Israel and Hamas to conduct prompt, thorough, independent and effective investigations of apparent violations of IHL committed by the Israeli armed forces and Palestinian armed groups respectively. However, Israel has a poor record of accountability for violations committed by its own forces, while Hamas has failed to embark on any accountability efforts. Palestine's new position at the UN and its potential accession to the Rome Statute could be crucial in spurring accountability mechanisms in the future. To support this, Amnesty International is calling on the international community to send expert monitors with the ability to investigate violations of IHL and international human rights law to the Gaza Strip and Israel. Until such investigations have taken place, with anyone found responsible for abuses brought to justice, the Security Council should impose an arms embargo on all parties to the conflict. Pending such an embargo, all states should immediately suspend transfers of weapons, munitions and related equipment to Israel, the Hamas de facto administration, and Palestinian armed groups in Gaza.¹¹

Q. 7 How does the statehood recognition affect efforts to pursue accountability for human rights violations, abuses, and crimes under international law by the PA and the Hamas de facto administration in Gaza?

Palestinian accession to international human rights treaties such as the ICCPR, ICESCR, and the International Convention on the Elimination of All Forms of Racial Discrimination would strengthen efforts to pursue accountability for serious ongoing human rights violations. These include arbitrary arrests, torture and other ill-treatment of detainees, non-enforcement of judicial decisions (including for the release of detainees), excessive or unnecessary use of force against demonstrators and other arbitrary restrictions on freedom of expression and association. As a state party to international human rights treaties, Palestine would be subject to regular monitoring by UN treaty bodies, and would be obliged to take necessary steps to prevent human rights violations by government bodies and its security forces.

In Gaza, the Hamas de facto administration regularly commits similar serious abuses to those of the PA in the West Bank. In addition, since gaining control over Gaza in June 2007, the Hamas authorities have been responsible for executing people after unfair trials in military and civilian

courts, failing to prosecute members of armed groups suspected of criminal responsibility for summary killings, and failing to prevent Palestinian armed groups from launching indiscriminate rockets into southern Israel, which constitutes a war crime. The impact of the Palestine statehood bid on efforts to pursue accountability for these abuses by the Hamas authorities is less straightforward. In Gaza, the Hamas de-facto administration exercises many state functions, including the administration of justice, and arguably should be bound by the obligations under international law undertaken by the state of Palestine. In any event, Hamas would continue to have obligations under international humanitarian law. The PA also bears some responsibility for the actions of armed groups and non-state actors from within its territory, subject to the extent of its control and the means of action at its disposal.

What is clear is that if Palestine were to become a party to the Rome Statute of the ICC or if ICC jurisdiction were triggered by any of the mechanisms discussed above, the prospects of enforcing individual criminal responsibility for crimes under international law committed or ordered by members of Hamas and other Palestinian armed groups would be greatly enhanced, as the ICC can investigate and prosecute crimes under international law whether committed by state or non-state actors.

Amnesty International is calling for Palestine to become party to all relevant human rights and international humanitarian law treaties.

Q. 8 What are the implications of Palestinian statehood for the status of Israeli settlements in the OPT?

The recognition of Palestinian statehood does not affect Israel's status as the occupying power in the West Bank and Gaza Strip, and it does not affect the status of Israeli settlements in the OPT. The establishment and retention of civilian settlements in occupied territory violates international humanitarian law, specifically Article 49 of the Fourth Geneva Convention, which prohibits an occupying power from transferring its own civilian population into the territory it occupies, and Article 55 of the Hague Regulations, which forbids an occupying power from changing the character and nature of state property, except for security needs or for the benefit of the local population. The "transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies" is considered a war crime under Article 8(2) of the Rome Statute of the ICC, "when committed as part of a plan or policy or as part of a large-scale commission of such crimes."

Israel's settlement policy is also inherently discriminatory and results in continuing violations of the rights of Palestinians in the occupied West Bank to adequate housing, health, water and an adequate standard of living. It is also a direct cause of forced evictions of vulnerable communities.

In response to the UN recognition of Palestine, the Israeli government announced that it would accelerate settlement construction above and beyond the expansion that is already under way in East Jerusalem and elsewhere in the West Bank. Not only are settlements illegal under international law, and also cause the violations of a myriad of Palestinian human rights, they also place arbitrary restrictions on Palestinians' freedom of movement. Military checkpoints, by-pass roads with priority access for settlers, and no-go areas around settlements all restrict Palestinian movement in the West Bank in ways that are not solely responses to security threats or are not proportionate in duration and impact to any such threats. The regime of restrictions on movement that have been imposed in relation to the settlements amounts to the collective punishment of the population of the West Bank. The recent Israeli statements regarding settlement expansion raise concerns that these measures will be exacerbated.

Amnesty International continues to call on Israel to immediately halt the expansion of settlements in the West Bank, including East Jerusalem, as a first step towards completely removing Israeli settlements from the OPT.¹²

Q. 9 How are Israeli-Palestinian relations redefined under international law following the recognition of Palestinian statehood?

Israel's was one of the nine votes, alongside the United States, Canada, the Czech Republic, Panama and four Pacific island nations, cast against the UN General Assembly resolution granting Palestine non-member observer state status.

In addition to announcing the construction of new units in settlements in the West Bank, the Israeli government has halted the transfer of tax revenues collected on behalf of the Palestinian Authority, according to media reports.

Restrictions on movement of goods and people by Israel have already put a stranglehold on the Palestinian economy and forced many Palestinians into dependence on humanitarian aid. Amnesty International has repeatedly urged Israel to lift completely its blockade on Gaza, which imposes a collective punishment on more than 1.4 million Palestinians in clear violation of international law. Amnesty International is concerned that withholding money or resources will exacerbate the humanitarian situation.

Israel, as the occupying power, is forbidden from using collective punishment and is responsible for the welfare of the occupied population

Q. 10 Does the recognition of Palestinian statehood have implications for the international representation of Palestinian refugees, or Palestinians' right to return?

The issue of who represents the Palestinian people and their rights internationally is a matter for Palestinians to decide.

The rights of Palestinian refugees relating to their everyday life, whether they are civil and political rights or economic, social and cultural rights, must be respected by the states under whose jurisdiction they live. These rights are guaranteed by international law and are not affected by the recognition (or lack thereof) of a Palestinian state. Likewise, the right to return is a right guaranteed to every Palestinian refugee individually and cannot be compromised by any change in the status of Palestine at the UN or the recognition (or lack thereof) of a Palestinian state. It applies not only to those who were directly expelled and their immediate families, but also to those of their descendants who have maintained close and enduring connections.¹³

Q. 11 What implication does the recognition of Palestinian statehood have for the status of Palestinian prisoners held by Israel?

Further international recognition of Palestinian statehood could enable Palestine to ratify the Geneva Conventions and additional protocols. The PLO submitted a letter of accession to Geneva Conventions on behalf of the State of Palestine in 1989. The Swiss Federal Council, which is the authority that is notified of ratifications or accessions to the treaty, stated that it was not in a position to decide whether the letter constituted a valid instrument of accession, "due to the uncertainty within the international community as to the existence or non-existence of a State of Palestine." Palestine's new status at the UN may be sufficient to settle this uncertainty in the eyes of the Swiss Federal Council.

The Third Geneva Convention regulates the treatment of prisoners of war during armed conflicts and situations of partial or total occupation of the territory of a High Contracting Party. If Palestine becomes a High Contracting Party to the Third Geneva Convention, Israel could be obliged to grant prisoner-of-war status to Palestinian combatants who were part of the regular armed forces, or members of other militias or organized resistance movements provided that they fulfilled certain conditions. These conditions, enumerated in Article 4(2) of the Convention, require combatants to distinguish themselves from civilians by having a fixed, distinctive sign recognizable at a distance and carrying arms openly, and to conduct operations in accordance with the laws and customs of war in order to receive prisoner-of-war status.

Prisoner-of-war status would grant various protections which Palestinian prisoners held by Israel for alleged involvement in armed attacks or membership in armed groups do not currently enjoy. For example, as privileged combatants they could not be prosecuted for attacks on soldiers and military objectives that comply with the rules of IHL, but they could be held as PoWs until the cessation of active hostilities. Although it would not preclude their being tried for attacks against civilians or other serious violations of international humanitarian law. Palestinians from the OPT detained by Israel for allegedly carrying out or planning attacks are currently treated as civilians who have directly participated in hostilities and prosecuted in Israeli military courts or held as administrative detainees, which allows for detention without charge or trial for periods of up to six months, renewable indefinitely.

¹ Amnesty International, *Palestine UN status upgrade should open door to justice*, 30 November 2012, <http://www.amnesty.org/en/for-media/press-releases/palestine-un-status-upgrade-should-open-door-justice-2012-11-30>

² HCJ 2056/04, *Beit Sourik Village Council v The Government of Israel*

³ Amnesty International, *Operation 'Cast Lead': 22 Days of Death and Destruction*, July 2009, <http://www.amnesty.org/en/library/info/MDE15/015/2009/en>.

⁴ *Report of the UN Fact-Finding Mission on the Gaza Conflict*, UN document A/HRC/12/48, 25 September 2009, <http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/FactFindingMission.html>.

⁵ *Amnesty International's assessment of Israeli and Palestinian investigations into the Gaza conflict*, 27 September 2010, <http://www.amnesty.org/en/library/info/MDE15/022/2010/en>; *Amnesty International's updated assessment of Israeli and Palestinian investigations into the Gaza conflict*, Index MDE 15/018/2011, 18 March 2011, <http://www.amnesty.org/en/library/info/MDE15/018/2011/en>.

⁶ *Report of the UN Fact-Finding Mission on the Gaza Conflict*, para.1402 and 1646-1654.

⁷ Amnesty International, *ICC should decide on Gaza conflict investigation*, 27 September 2010, <http://www.amnesty.org/en/news-and-updates/icc-urged-decide-gaza-conflict-investigation-2010-09-27>.

⁸ *Amnesty International's response to the ICC Office of the Prosecutor's statement that it cannot investigate crimes committed during the Gaza conflict*, Index MDE MDE 15/018/2012, Index MDE 15/018/2012, 4 April 2012, <http://www.amnesty.org/en/library/info/MDE15/018/2012/en>.

⁹ Amnesty International, *Palestine UN status upgrade should open door to justice*, 30 November 2012 <http://www.amnesty.org/en/news/palestine-UN-status-upgrade-should-open-door-to-justice-2012-11-30>.

¹⁰ Amnesty International, *Open letter to UN Secretary-General regarding follow-up to the Report of the UN Fact-Finding Mission on the Gaza Conflict*, Index MDE 15/034/2011, 16 September 2011, <http://www.amnesty.org/en/library/info/MDE15/034/2011/en> and *Open letter to Baroness Ashton regarding follow-up to the Report of the UN Fact-Finding Mission on the Gaza Conflict*, Index MDE 15/035/2011, 16 September 2011, <http://www.amnesty.org/en/library/info/MDE15/035/2011/en> and *UN urged to reject Israeli calls to retract Goldstone report*, 7 April 2011, <http://www.amnesty.org/en/news-and-updates/un-urged-reject-israeli-calls-retract-goldstone-report-2011-04-07>.

¹¹ Amnesty International, *Israel/Gaza conflict: UN must impose arms embargo, send international monitors immediately*, 19 November 2012, <http://www.amnesty.org/en/for-media/press-releases/israelgaza-conflict-un-must-impose-arms-embargo-send-international-monitors>.

¹² For more detail on Amnesty International's position on settlements and international law, see: Amnesty International, *Israel and the Occupied Territories: The issue of settlements must be addressed according to*

international law, Index: MDE 15/085/2003, 7 September 2003,
<http://www.amnesty.org/en/library/info/MDE15/085/2003/en>.

¹³ For Amnesty International's policy statement on the Palestinian right to return see: *Israel and the Occupied Territories/Palestinian Authority: The right to return: The case of the Palestinians*, Index: MDE 15/013/2001, 29 March 2001, <http://www.amnesty.org/en/library/info/MDE15/013/2001/en>.