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Admission of "Palestine" as a Member of a Specialized Agency and Withholding Payment of Assessments in Response

Frederic L. Kirgis

Washington and Lee University School of Law, kirgisr@wlu.edu

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ADMISSION OF "PALESTINE" AS A MEMBER OF A
SPECIALIZED AGENCY AND WITHHOLDING THE
PAYMENT OF ASSESSMENTS IN RESPONSE

I. INTRODUCTION

In May 1989, the Palestine Liberation Organization, claiming to represent a new state of "Palestine," sought full membership in the World Health Organization. The United States Government threatened to withhold its assessed dues to the WHO if it admitted "Palestine," as represented by the PLO, into its membership.¹ At its meeting later that month, the World Health Assembly voted to defer the PLO's application for a year.²

The PLO has said that it will pursue its application not only to the WHO, but also to such other specialized agencies as the Food and Agriculture Organization, the International Labour Organisation, the International Telecommunication Union, and UNESCO.³ The United States is currently a member of all of these agencies except UNESCO. It appears that the U.S. Government is prepared to withhold all dues assessed to it by any specialized agency of which it is a member, if the agency admits "Palestine" to full membership.⁴

This Editorial Comment addresses the questions whether "Palestine," as represented by the PLO, is eligible for membership in the specialized agencies, and whether U.S. withholding of all dues in response to Palestinian membership would be permissible as a matter of international law, so long as the United States remains a member of the organization from which the funds are withheld. The Comment does not address the lawfulness of U.S. withdrawal from these organizations. It should be noted, though, that if the United States decided to withdraw from an organization that admitted "Palestine"—an option that seems highly questionable as a matter of policy if there were no other reason for a decision to withdraw—it would be bound to follow the organization's established procedure for withdrawal. Insofar as this involves a waiting period from the giving of notice until withdrawal is effective, the United States during that period would remain a member with the normal obligations—including any obligation of a member to pay dues.⁵

The constituent instruments of the specialized agencies define the qualifications of membership in differing terms.⁶ One constant for full member-

¹ See N.Y. Times, May 7, 1989, §1, at 5, col. 1.

² N.Y. Times, May 13, 1989, at 3, col. 5.

³ Wash. Post, May 11, 1989, at A36, col. 2.

⁴ As a practical matter, this issue will not arise in the United Nations itself. Under UN Charter Article 4(2), as interpreted by the International Court of Justice in *Competence of the General Assembly for the Admission of a State to the United Nations*, 1950 ICJ REP. 4 (Advisory Opinion of Mar. 3), a recommendation of the Security Council is required before the General Assembly may admit a new member. Unless circumstances change substantially, the United States presumably would veto any such recommendation involving the PLO.

⁵ This is made explicit in the ILO Constitution, Article 1(5), during the 2-year waiting period required by that article. It would also be the case in any other agency that requires advance notice of intent to withdraw, since notice would not be equivalent to withdrawal.

⁶ Some provide for associate, as well as full, membership. This Comment is concerned only with full membership, since that is what the PLO currently seeks.

ship, though, is a form of international personality variously referred to in the constituent instruments as "state,"⁷ "nation"⁸ or "country."⁹ Approval for membership normally requires a two-thirds vote of the plenary body, but only a simple majority is required by the WHO.¹⁰ In some agencies there are procedural preconditions to the vote, such as screening by a committee to determine the applicant's capacity to perform the obligations of membership.¹¹

It is very doubtful that "Palestine" currently qualifies as a state under international law. A recent definition of state, based on an older, widely recognized definition, says: "Under international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities."¹²

Even though the Palestine National Council has declared "the establishment of the State of Palestine,"¹³ and even though many governments (the exact number is unclear) have apparently recognized such a state, several other governments have withheld recognition on the ground that "Palestine" does not meet the conditions required to be a state. When the United Nations General Assembly adopted its resolution on the "Question of

⁷ For example, the WHO Constitution provides, "Membership in the Organization shall be open to all States." WHO Constitution, July 22, 1946, Art. 3, 62 Stat. 2679, TIAS No. 1808, 14 UNTS 185. The Constitution of the ILO provides for membership by states members on Nov. 1, 1945, "and such other States as may become Members" under other paragraphs of Article 1. Constitution of the ILO, Oct. 9, 1946, Art. 1(2), 62 Stat. 3485, TIAS No. 1868, 15 UNTS 35. The Convention on International Civil Aviation defines ICAO membership in terms limited to members of the United Nations and other "States." Convention on International Civil Aviation, Dec. 7, 1944, Arts. 91-93, 61 Stat. 1180, TIAS No. 1591, 15 UNTS 295.

⁸ The FAO Constitution provides that the Conference may decide to admit "any nation which has submitted an application for membership and a declaration made in a formal instrument that it will accept the obligations of the Constitution as in force at the time of admission." Constitution of the United Nations Food and Agriculture Organization, Oct. 16, 1945, Art. II(2), 12 UST 980, TIAS No. 4803.

⁹ The International Telecommunication Convention provides that membership in the ITU is open to "any sovereign country" that is properly approved by the membership. International Telecommunication Convention, Nov. 6, 1982, Art. 1(1)(c), in G. WALLENSTEIN, INTERNATIONAL TELECOMMUNICATION AGREEMENTS, Binder *, pt. 3 (1985). Membership in the Universal Postal Union is also limited to "any sovereign country." Constitution of the Universal Postal Union, July 10, 1964, Art. 11(2), 16 UST 1291, TIAS No. 5881, 611 UNTS 7, as amended Nov. 14, 1969, 22 UST 1056, TIAS No. 7150, 810 UNTS 7.

¹⁰ WHO Constitution, *supra* note 7, Art. 6.

¹¹ *See, e.g.*, Standing Orders of the International Labour Conference, Art. 28, in INTERNATIONAL LABOUR OFFICE, CONSTITUTION OF THE INTERNATIONAL LABOUR ORGANISATION AND STANDING ORDERS OF THE INTERNATIONAL LABOUR CONFERENCE 46 (1988). The ILO screening is more than a formality. *See* Vignes, *La Participation aux organisations internationales*, in A HANDBOOK ON INTERNATIONAL ORGANIZATIONS 57, 67 (R.-J. Dupuy ed. 1988).

¹² RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §201 (1987) [hereinafter RESTATEMENT (THIRD)]. The definition is based on the Montevideo Convention on Rights and Duties of States, Dec. 26, 1933, Art. 1, 49 Stat. 3097, TS No. 881, 165 LNTS 19.

¹³ Palestine National Council's Declaration of Independence, in UN Doc. A/43/827-S/20278, Ann. III, at 15 (1988), reprinted in 27 ILM 1668, 1670 (1988).

Palestine" in December 1988, it did not recognize a Palestinian state; nor did it call the PLO a provisional government. Instead, it acknowledged that the Palestine National Council had proclaimed the State of Palestine, affirmed the need to enable the Palestinian people to exercise sovereignty over the occupied territories, and changed the PLO's designation to "Palestine" in the UN system.¹⁴

If we leave aside the rather academic debate over the "constitutive" and "declaratory" theories of recognition¹⁵ and try to look objectively at only one aspect of the situation, it is clear that the population within the present territory of "Palestine," no matter how that territory may be defined, never has been under the control of the PLO or of any other indigenous government while the current claim of state status has been asserted. This alone would deprive "Palestine" of current state status under traditional principles.¹⁶

Enough has been said to show that a credible challenge, at the very least, may be made to the current claim of a Palestinian state. For the purposes of this Comment, a firm conclusion on this point is necessary only if the eligibility of "Palestine" for membership in the specialized agencies, and the lawfulness of the withholding of dues, turn on it. Obviously, if the challenge is somehow unpersuasive and "Palestine" is actually a state, and if it is then admitted by the proper procedure, dissenting members could not lawfully withhold otherwise obligatory dues in protest. More credibly, the definition of "state," "nation" or "country" in the constituent instrument of a specialized agency that admits "Palestine" might not be the same as the definition of "state" in customary international law.¹⁷ In that case, a determination of state status would be irrelevant.

It is not entirely fanciful to think that a "state" for purposes of admission to a specialized agency might be something other than a "state" for purposes of customary international law.¹⁸ It is generally left to each organ of an intergovernmental organization to interpret those parts of the constituent

¹⁴ GA Res. 43/177 (Dec. 15, 1988), adopted by a vote of 104-2 (Israel, United States)-36, with 15 member states absent and one (Iran) not participating in the vote. The General Assembly took no vote in 1989 on a draft resolution that would have construed "Palestine" to be the State of Palestine. The decision not to press for a vote occurred after the United States threatened to withhold its dues. N.Y. Times, Dec. 6, 1989, at A3, col. 4.

¹⁵ See RESTATEMENT (THIRD), *supra* note 12, §201 Reporters' Note 1; J. CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 16-25 (1979).

¹⁶ Cf. Italian Corte de cassazione decision of June 28, 1985, *Re Arafat*, 109 FORO ITALIANO II, at 277 (1986), translated in part in 7 ITAL. Y.B. INT'L L. 295 (1986-87). But see Flory, *Naissance d'un Etat palestinien*, 93 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 385, 396-99 (1989); Quigley, *Palestine's Declaration of Independence: Self-Determination and the Right of the Palestinians to Statehood*, 7 B.U. INT'L L.J. 1, 25-28 (1989).

¹⁷ Even where the applicant is required to be a "state," it does not inexorably follow that this means the traditional definition of a state. The meaning of a term or concept in one context is not necessarily its meaning in all contexts. For example, "treaty" has a narrower meaning in U.S. constitutional law than it does in international law. Compare U.S. CONST. Arts. II, §2, and VI, with Vienna Convention on the Law of Treaties, Art. 2(1)(a), May 23, 1969, 1155 UNTS 331, reprinted in 8 ILM 679 (1969).

¹⁸ Cf. D. BOWETT, *THE LAW OF INTERNATIONAL INSTITUTIONS* 385 (4th ed. 1982).

instrument that apply to its own functions, in the absence of an effective request to an international tribunal or other body to render an authoritative interpretation.¹⁹ If the entity seeking membership is required only to be a "country," or even a "sovereign country," its eligibility probably would not turn on its acquisition of all the elements of a "state" by any definition.²⁰

Even if "Palestine" need not meet the traditional requirements of a "state" to be eligible for membership in a specialized agency, it does not necessarily follow that it could lawfully be admitted. The specialized agencies have functions to perform. They depend on their members to assist them in the performance of those functions, or in some cases to carry out the functions themselves. For a new member, to do so normally would require at least some measure of control over the claimed territory and population by the political body applying for membership in the name of the new entity. To define an eligible entity as a "state," "nation" or "country" is to imply this much, whether or not the definition calls for all the attributes of a state. Thus, the new entity's eligibility would depend on its ability to carry out—at least in substantial measure—the essential, ongoing obligations of membership.²¹ In the case of "Palestine," the PLO currently does not have that ability.

Arguably, practice involving Namibia runs counter to the position taken in the preceding paragraph. Preindependent Namibia, represented by the United Nations Council for Namibia, was admitted as a full member of some specialized agencies. But the juridical propriety of its admission is at least questionable. In the ILO, Namibia was admitted despite an opinion from the ILO Legal Adviser concluding that full membership would be improper until Namibia became able to exercise all the rights and discharge all the obligations of membership.²² The Legal Adviser relied particularly on the Permanent Court of International Justice's opinion that the Free City of

¹⁹ With respect to the United Nations itself, this appears clearly in the Report of the Rapporteur of Committee IV/2 at the San Francisco Conference, Doc. 933, IV/2/42, 13 UNCTAD Docs. 703, 709 (1945).

²⁰ See Omeorogbe, *Functionalism in the UPU and the ITU*, 27 INDIAN J. INT'L L. 50, 55, 60–61 (1987).

²¹ There has been debate about whether the United Nations has abandoned the express condition in UN Charter Article 4(1) that applicant states be, in the judgment of the Organization, able and willing to carry out the obligations of membership. See J. CRAWFORD, *supra* note 15, at 140. The debate has centered on the relatively recent practice of admitting microstates. The question about their ability and willingness to carry out the obligations of membership has revolved primarily around their ability to maintain military forces at the call of the Security Council under chapter VII of the Charter. But the chapter VII obligations with which they could not comply are dead letters.

The microentities that have been admitted to the United Nations are "states," no matter how small. See I. BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 88 (3d ed. 1979). They are capable of carrying out the principal, ongoing obligations of UN membership. Thus, their admission to the United Nations does not imply abandonment (or nonexistence) of a condition based on ability to participate in the fulfillment of an organization's purposes, if the means of fulfilling the purposes are taken as they exist at the time of admission.

²² See International Labour Conference, 64th Sess., Provisional Record of Proceedings 24/20, 24/21 (1978).

Danzig was ineligible for ILO membership so long as the conduct of its foreign relations was subject to the consent of the Government of Poland.²³

The Namibia precedent thus is not entirely convincing. Moreover, one might distinguish it on the basis of the direct UN appointment of an administering body to take the place of a government authoritatively held by the Security Council to have lost its legitimacy in the defined territory.²⁴ This action gave the General Assembly's request to the specialized agencies that they grant full membership to the UN Council for Namibia²⁵ a legal basis so far unavailable in the case of "Palestine."²⁶

In any event, if the preindependent Namibia precedent is both applicable and convincing, whether "Palestine" is a state becomes a moot point and the withholding of dues would be improper. The real question is: if "Palestine" is *not* eligible for membership (because it is not a "state" or because—not needing to be a "state"—it is nevertheless incapable of carrying out the obligations of membership), could the United States lawfully withhold all of its assessed dues in response to a vote to admit "Palestine" as a full member? If the answer is no, there is no scenario in which a firm conclusion regarding the status of "Palestine" as a state would determine the withholding issue.

II. WITHHOLDING IF A NONSTATE IS IMPROPERLY ADMITTED AS A FULL MEMBER

The Constituent Instrument and Treaty Law

The analysis must begin with the constituent instrument of the specialized agency that admits "Palestine" to membership. If the instrument imposes no duty to pay assessed dues, withholding for any reason short of bad faith would be lawful. But the constituent instruments of the specialized agencies typically do impose duties to pay dues.

For example, the WHO Constitution empowers the Health Assembly to approve the budget and "apportion the expenses among the Members"; it also refers to the members' "financial obligations" and provides a sanction for failure to meet them.²⁷ The FAO Constitution provides, "Each Member Nation and Associate Member undertakes to contribute annually to the Organization its share of the budget, as apportioned by the Conference."²⁸ The ILO Constitution says that the "expenses of the [ILO] shall be borne by the Members in accordance with the arrangements" established by the

²³ Free City of Danzig and International Labour Organization, 1930 PCIJ (ser. B) No. 18 (Advisory Opinion of Aug. 26).

²⁴ See GA Res. 2248, S-V GAOR Supp. (No. 1) at 1, UN Doc. A/6657 (1967); SC Res. 276, 25 SCOR Res. & Dec. at 1, UN Doc. S/INF/25 (1970); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 ICJ REP. 16 (Advisory Opinion of June 21).

²⁵ GA Res. 32/9E, 32 GAOR Supp. (No. 45) at 19, UN Doc. A/32/45 (1978).

²⁶ At this writing, the General Assembly had not made a similar request regarding "Palestine." The point is that even if it does so, it would not have the same legal basis for its request as it did with the Council for Namibia.

²⁷ WHO Constitution, *supra* note 7, Arts. 7, 56.

²⁸ FAO Constitution, *supra* note 8, Art. XVIII.

Constitution, and imposes a sanction for failure to pay.²⁹ The International Telecommunication Convention refers to members' "contributions," but says that "Members shall pay in advance their annual contributory shares, calculated on the basis of the budget approved by the Administrative Council."³⁰ The Convention on International Civil Aviation authorizes the ICAO Assembly to "apportion the expenses of the Organization among the contracting States on the basis which it shall from time to time determine" and provides a sanction for failure to pay.³¹ Other examples could be given.

The question is thus one of possible excuse from a member state's international obligation to pay assessed dues. There is an initial question of the applicable source of international law. Although the specialized agencies' constituent instruments are multilateral treaties, it is not clear that international treaty law applies to the rights and duties of members when an organ—as distinguished from a member or a group of members acting in a way that does not purport to bind the organization—acts inconsistently with the instrument. Instead, the source may be the constitutional or administrative law of the organization, or of international organizations generally.³²

This problem, though, may be more conceptual than practical. It is reasonably safe to assume that general sources of international law—such as treaty law and the law of state responsibility—would apply by analogy even if not directly, in the absence of applicable provisions on remedies in the constituent instruments themselves.³³ This Comment considers these sources first, and then turns to an argument based on inherent powers of members of international organizations.

One treaty law argument, based on Article 62 of the Vienna Convention on the Law of Treaties, may be dismissed quickly. Article 62 permits a party to suspend the operation of a treaty if there has been an unforeseen, fundamental change of circumstances that constituted an essential basis of the parties' consent to be bound, and if the change radically transforms the

²⁹ ILO Constitution, *supra* note 7, Art. 13(3) and (4).

³⁰ International Telecommunication Convention, *supra* note 9, Art. 15(2) and (7).

³¹ Convention on International Civil Aviation, *supra* note 7, Arts. 61, 62.

³² See Cahier, *L'Ordre juridique interne des organisations internationales*, in A HANDBOOK ON INTERNATIONAL ORGANIZATIONS, *supra* note 11, at 237, 242–47; Zoller, *The "Corporate Will" of the United Nations and the Rights of the Minority*, 81 AJIL 610, 630–34 (1987). In the first UN admissions case, the International Court of Justice said, without identifying the source of law, "The political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgment." Admission of a State to the United Nations (Charter, Art. 4), 1948 ICJ REP. 57, 64 (Advisory Opinion of May 28).

Vienna Convention on the Law of Treaties, *supra* note 17, Art. 5, says that it applies to any treaty that is the constituent instrument of an international organization, "without prejudice to any relevant rules of the organization." The intent of Article 5 seems to be to regulate the relations between states members of an organization, but not necessarily to regulate the internal law of organizations. The Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, Mar. 20, 1986, UN Doc. A/CONF.129/15, reprinted in 25 ILM 543 (1986), does not apply to the internal affairs of international organizations.

³³ Cf. Zoller, *supra* note 32, at 630.

extent of obligations still to be performed. Admission of "Palestine" to any specialized agency would not radically transform the extent (or impact) of other members' obligations. Even if it did, Article 62 does not contemplate suspension of only a nonseparable part of a party's obligations. The obligation to pay assessed dues would not be separable from the remainder of the constituent instrument.³⁴ The United States thus could not rely on the changed circumstances doctrine to withhold its dues.

Article 60 of the Vienna Convention sets forth remedies for material breach of a treaty. As will be noted below, the remedies are rather limited in the case of a multilateral treaty. But before one gets to remedies, one must ask whether the breach in question is "material."

Vienna Convention Article 60(3)(b) defines material breach as "the violation of a provision essential to the accomplishment of the object or purpose of the treaty." A provision in a constituent instrument limiting eligibility for full membership to "states," "nations" or "countries" would be essential to the accomplishment of the organization's purposes, if the purposes require members to exercise national governmental functions. In the case of the ILO, for example, a political entity lacking effective control over a population and a territory would not be able to enact effective labor legislation. Admission of an entity lacking these attributes of a state would thus be inconsistent with an essential provision of the ILO Constitution, the preindependent Namibia precedent to the contrary notwithstanding.

It does not necessarily follow that admission of such an entity would be a material breach of an organization's constituent instrument. The breach in the case of "Palestine" (as in the case of preindependent Namibia) would involve the admission of a single nonstate having a plausible claim to eventual state status. Moreover, the Palestinian entity no longer declares that its claim is tied to a threat or use of force against another state.³⁵ Consequently, its admission to membership would be a relatively minor breach of the essential provision, if we consider the breach only in terms of its effect on the organization's ability to accomplish its purposes through such means (in the case of the ILO) as the adoption and enforcement of labor legislation by

³⁴ See Vienna Convention on the Law of Treaties, *supra* note 17, Art. 44.

³⁵ The declaration says that the "State of Palestine . . . rejects the threat or use of force, violence and intimidation against its territorial integrity and political independence or those of any other State." Palestine National Council's Declaration of Independence, *supra* note 13, at 16, 27 ILM at 1671. The declaration relies on GA Res. 181 (II), 2 GAOR Res. 131, UN Doc. A/519 (1947), the General Assembly's partition resolution, for the legitimacy of the Arab right to sovereignty and national independence in Palestine. The declaration thus recognizes the partition of Palestine between an Arab and a Jewish state, but it does not assert that the boundaries contemplated in the partition resolution have any current significance.

Yasir Arafat has acknowledged the right of all parties concerned in the Middle East conflict, including Israel, to exist in peace and security. See N.Y. Times, Dec. 15, 1988, at A19, col. 5 (transcript of Arafat statement).

Under *Nuclear Tests (Austl. v. Fr.; NZ v. Fr.)*, 1974 ICJ REP. 253 and 457 (Judgments of Dec. 20), unilateral declarations may create binding international obligations, at least if made by, or on behalf of, the government of a state. If "Palestine" were recognized as a state, it is likely that both the Palestine National Council's declaration and the Arafat statement would meet the test of the *Nuclear Tests* cases.

its membership. To consider the breach in terms of its possible effect on a political situation outside the organization would be extraneous to the treaty law issue. To consider the likely effect of the breach on the willingness of individual members to pay their dues would be to beg the question.

The Vienna Convention does not on its face distinguish between significant and insignificant violations of essential treaty provisions. Respect for the efficient operation of treaty regimes, however, suggests that relatively isolated departures from the strictures of even an essential provision are not material breaches if they do not threaten to defeat the purpose of the treaty. The negotiating history of Article 60 tends to support this proposition.³⁶ It is a particularly compelling proposition when the treaty regime takes the form of an international organization serving the needs of humankind. Article 60 thus would not seem to justify the withholding of dues as a response to Palestinian membership in an organization that can accomplish its purposes even with such a nonstate in its midst.

If, contrary to what has just been said, admission of "Palestine" to full membership would be a material breach of a particular constituent instrument, the United States still could not invoke it under the Vienna Convention as a ground for withholding dues. Vienna Convention Article 60(2)(b) permits "a party specially affected by the breach" to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting party.³⁷ This formulation represents a narrowing of a draft article that would have authorized any party to invoke material breach as a ground for suspension between itself and the defaulting party.³⁸ The United States proposed the narrower language, apparently out of concern that the right to invoke a breach for suspension of obligations could otherwise be abused by a party anxious to find a pretext for suspending the operation of a treaty against an offending state.³⁹

The examples the United States gave of a party adversely affected by a breach involved breaches directed specifically at that party.⁴⁰ Admission of "Palestine" as a member of a specialized agency would not be an act directed specifically at the United States; nor would U.S. rights or obligations under a constituent instrument be affected any more (or less) than those of other member states. It is irrelevant that the United States has more strenuous objections than most other states, under present circumstances, to any action that could tend to legitimize the Palestinian claims.

³⁶ For discussion of the negotiating history, see Kirgis, *Some Lingering Questions About Article 60 of the Vienna Convention on the Law of Treaties*, 22 CORNELL INT'L L.J. 549, 550-55 (1989).

³⁷ Article 60(2)(c) gives another ground for suspension, but it applies when the treaty is of such a character that a material breach of one of its provisions radically changes the position of every party with respect to further performance of its obligations. It would be far-fetched to argue that admission to a specialized agency of "Palestine," under PLO auspices, radically changes the position of all members in the manner specified.

³⁸ See Sir Humphrey Waldock's Second Report on the Law of Treaties, [1963] 2 Y.B. INT'L L. COMM'N 36, 73, UN Doc. A/CN.4/SER.A/1963/Add.1.

³⁹ See [1966] 2 Y.B. INT'L L. COMM'N 34-36, UN Doc. A/CN.4/SER.A/1966/Add.1.

⁴⁰ *Id.* at 35.

If, contrary to all that has been said so far, admission of "Palestine" would be a material breach and the United States a party specially affected by it, the Vienna Convention still would not authorize an unrestrained unilateral response. A restriction arises from the law of state responsibility, in particular the law of reprisal, which applies to the action a state party to a treaty may take in response to either a material or a nonmaterial breach.⁴¹ Procedural requirements under the Vienna Convention, as well as under the law of reprisal, do not seem to pose a serious problem. They act as a surrogate in a case like this for the requirement that unilateral disregard of an otherwise applicable duty be "necessary" under the circumstances. Negotiations preceding a vote on admission of a new member would satisfy the spirit, if not always the letter, of any procedural requirements in the Vienna Convention or the law of reprisal.⁴² But under the law of reprisal, the response nevertheless could not be manifestly disproportional to the breach.⁴³ As described by one prominent commentator, "the importance of the rule disregarded [in reprisal] as well as the duration and global effects of its non-application should roughly correspond to those of the unlawful act to which one retaliates."⁴⁴

In the normal law of reprisal between states, a countermeasure is not manifestly disproportional just because it exceeds the breach in intensity by enough to provide some measure of deterrence against repeated or similar breaches.⁴⁵ It does not necessarily follow that the proportionality principle would be equally flexible when applied to reprisals against international organizations. But even if it is, withholding the full amount of a U.S. assessment that constitutes 25 percent of the budget of an organization, as is the case in many specialized agencies, would be manifestly out of proportion to a breach that would not significantly increase the burdens of membership or

⁴¹ See Vienna Convention on the Law of Treaties, *supra* note 17, Art. 73; Kirgis, *supra* note 36, at 559, 567.

⁴² The procedural duty to attempt dispute settlement appears in Vienna Convention Arts. 65 and 66. Since the Vienna Convention would be applied only by analogy, however, its purely procedural provisions might not bind states responding to a breach by an organ of a specialized agency. Even though the law of reprisal supplies a similar procedural duty when one state contemplates a reprisal against another, in the instance addressed in this report—admission of a new member into an international organization—there will have been negotiation and debate before a vote is taken. Thus, a traditional form of dispute settlement will have transpired, in the only forum to which the aggrieved state has ready access.

The caveat is that the aggrieved state could, and perhaps should, try to persuade the appropriate organ to seek an ICJ advisory opinion on the legality of admitting "Palestine." The UN General Assembly, acting under UN Charter Article 96(2), has authorized the specialized agencies to request ICJ advisory opinions on legal questions within the scope of their activities.

⁴³ See Willem Riphagen's Sixth Report on State Responsibility, [1985] 2 Y.B. INT'L L. COMM'N, pt. 1 at 3, 11, UN Doc. A/CN.4/SER.A/1985/Add.1 (pt. 1). See also *Naulilaa Incident Arbitration (Port./Ger.)*, 2 R. Int'l Arb. Awards 1012 (1928), summarized in 6 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 154-55 (1943).

⁴⁴ A. CASSESE, INTERNATIONAL LAW IN A DIVIDED WORLD 244 (paperback ed. 1988).

⁴⁵ *Air Service Agreement Award (U.S.-Fr.)*, 18 R. Int'l Arb. Awards 417, 443-44 (1978), 54 ILR 304, 338 (1979). See Schachter, *International Law in Theory and Practice*, 178 RECUEIL DES COURS 9, 178-79 (1982 V).

go very far toward defeating accomplishment of the organization's goals. The impact of a zero payment by the United States would not seem to correspond with the effect within the organization of the irregular or unlawful act admitting "Palestine" to membership, even if we allow some leeway for deterrence against similar acts by other organizations.

If admission of "Palestine" to membership is a breach of the constituent instrument but is not a material breach within the meaning of Vienna Convention Article 60, the law of state responsibility would apply wholly apart from the law of treaties.⁴⁶ The principal issue would be rough proportionality, as discussed above.⁴⁷ The argument against full withholding would be equally strong.

Customary International Law and Recognition of States

It is necessary at this point to consider yet another line of argument. If there is a duty under customary international law to refrain from ascribing the status of a state to entities that do not qualify as states, if that duty applies to international organizations, and if an organization violates it by explicitly or implicitly recognizing "Palestine" as a state,⁴⁸ the reprisal/proportionality argument would not necessarily be the same as has been outlined above. The analysis might no longer consider only the rough proportionality of full withholding as against the impact of the breach within an organizational structure; that is, the proportionality analysis would not necessarily be limited to relations within a regime created by a single treaty—the organization's constituent instrument—or within a series of similar regimes established by the constituent instruments of all organizations that might admit "Palestine." Instead, the analysis might weigh full withholding of dues against the impact that recognizing a Palestinian state would have on world order, or at least on the maintenance of order in the Middle East.

Such an analysis would be exceedingly difficult to make in a way that would convince parties on both sides of the Palestine conflict. Fortunately, it is not necessary to make it. The reason is that there appears to be no duty under customary international law to refrain from treating a nonstate political entity as though it were a state. If there is no such duty, a right of reprisal does not arise.

⁴⁶ *See* Vienna Convention on the Law of Treaties, *supra* note 17, Art. 73; Schachter, *supra* note 45, at 175; Kirgis, *supra* note 36, at 571–72.

⁴⁷ On the question whether the United States would be an aggrieved state, the analysis would be somewhat different when it does not deal with Vienna Convention Article 60. When there is a material breach of a multilateral treaty, Vienna Convention Article 60(2)(b) and (c) would circumscribe the universe of aggrieved states. When the breach is not material, the law of reprisal recognizes, without clearly defining, some norms whose violation is *erga omnes*. *Cf.* Schachter, *supra* note 45, at 182–83. The violation of a norm limiting membership in an organization to "states" could be in a sense *erga omnes*, defining the universe of aggrieved states as all members of the organization that did not vote for admission of the nonstate.

⁴⁸ The mere admission of "Palestine," even in an organization limited to "states," would not necessarily imply recognition of a Palestinian state under general international law. *See* text at note 17 *supra*.

The leading work on the attributes of the state in international law treats as a nonissue the recognition of nonstate entities as states.⁴⁹ This passage appears in the context of recognition among states, not recognition by an international organization. But the only relevant difference as regards an international organization would be that it is constrained legally by a treaty—its constituent instrument. This Comment has already disposed of the questions raised by violation by an organization of its constituent instrument. That brings us back to nontreaty law, where there is no reason to transform a nonissue for states into an issue for international organizations.⁵⁰

Moreover, there is some practice by international organizations of admitting nonstates despite “state” requirements in their constituent instruments. I have already mentioned the Namibia example, involving some of the specialized agencies.⁵¹ But the leading example, of course, is the United Nations itself. The UN Charter clearly restricts membership to “states.”⁵² Six of its original members were not fully independent states in 1945.⁵³ Of these, Byelorussia and the Ukraine were not even putative states. It is arguable that some members admitted later were not yet states, as a matter of customary international law, when they were admitted.⁵⁴ Nevertheless, there has been no serious assertion that the United Nations or the specialized agencies violated customary international law by admitting any of these entities.

It is arguable, also, that an international organization of states does not recognize state status simply by admitting an entity to membership, even if the traditional concept of that status is the relevant condition for membership. The argument has been made regarding admission to the United Nations, though at least one prominent commentator disagrees.⁵⁵ Of course, admission to the United Nations means that the applicant has avoided a veto by any of the five permanent members of the Security Council. The veto, as a check against precipitate General Assembly action, gives admission to the United Nations particular significance. If, then, admission to the United Nations does not imply recognition as a state, even less

⁴⁹ J. CRAWFORD, *supra* note 15, at 35.

⁵⁰ The one context in which recognition as a state may raise an issue under customary international law is this: “A state has an obligation not to recognize or treat as a state an entity that has attained the qualifications for statehood as a result of a threat or use of armed force in violation of the United Nations Charter.” RESTATEMENT (THIRD), *supra* note 12, §202(2). This obligation could apply also to an international organization. Although the PLO may well have used force on a number of occasions in violation of principles of peaceful dispute settlement contained in the Charter, those efforts have had limited success. Of course, it is a premise of this Comment that “Palestine” might be admitted to an international organization even though it has not attained the qualifications of a state.

⁵¹ See text at note 22 *supra*.

⁵² UN CHARTER ARTS. 3 and 4.

⁵³ Byelorussia, the Ukraine, India, the Philippines, Lebanon and Syria. See J. DUGARD, *RECOGNITION AND THE UNITED NATIONS* 53 (1987).

⁵⁴ See *id.* at 60–74.

⁵⁵ See *id.* at 41–80. Dugard concludes after an examination of UN practice that “admission to the United Nations constitutes or confirms the existence of a State.” *Id.* at 79. See also M. TANDON, *PUBLIC INTERNATIONAL LAW* 168 (10th ed. 1965).

would admission to a specialized agency where no veto applies. And even if admission to the United Nations does imply recognition as a state, it would not follow that admission to a specialized agency has the same effect.⁵⁶

The Inherent Power Argument

Finally, it is necessary to consider whether a member has a power inherent in the law of international institutions to withhold dues when a plenary body, acting in violation of the institution's constituent instrument, admits a nonstate as a new member. It has been argued that there is an inherent, or implied, power to withhold payment of assessments, but only when it is indispensable to ensure strict compliance with the organization's undertaking to observe the original intent of its charter.⁵⁷ There has been no authoritative decision upholding such a power.⁵⁸ If it exists, it is a power that would be triggered, of course, by a subjective judgment about the lawfulness of the plenary body's decision. A dispassionate third-party adjudicator might not always agree with that judgment. Moreover, even when the judgment is correct, the power it bestows would be effective only in the hands of the powerful. If international law is to serve as an equalizing instrument rather than simply as a tool of the mighty, we should be slow to find powers, not supported by express agreement or by state practice, that can effectively be wielded only by the well endowed.

Let us nevertheless assume that this power exists. I have already argued that admission of "Palestine" under current circumstances would be inconsistent with most or all specialized agencies' constituent instruments. Arguably, some form of withholding would then be indispensable—or at least highly effective—in ensuring that these agencies uphold the intent of their charters (since lesser countermeasures, such as refusing to deal with the PLO within the agency, would be ineffective). Even so, such an inherent power would be limited. Since the reason for the power would be quite similar to the reason for allowing interstate reprisals, one would expect limits on the power much like those on reprisals. This means that rough proportionality would be required. To exercise an inherent power in a way that would bring an organization to its knees—as would happen if 25 percent of the budget were withheld from an organization using its money efficiently and in accordance with its purposes—surely would exceed the limits of rough proportionality under the circumstances considered in this Comment.

⁵⁶ See text at note 17 *supra*. This would be so, a fortiori, if the applicant need only be a "country," or even a "sovereign country," under the specialized agency's constituent instrument.

⁵⁷ Zoller, *supra* note 32, at 632.

⁵⁸ Perhaps the closest thing to an authoritative decision on this point would be Judge Sir Gerald Fitzmaurice's individual opinion in *Certain Expenses of the United Nations*, 1962 ICJ REP. 151, 203–05 (Advisory Opinion of July 20). But he was referring to a right to withhold payment of expenses assessed in violation of the constituent instrument. That is not the case at hand.

III. CONCLUSION

"Palestine" does not appear to qualify as a "state" under customary international law. That does not necessarily determine its eligibility for admission to the specialized agencies. But even if a nonstate would be eligible under some circumstances, "Palestine" does not seem to qualify with respect to any agency that relies on its members' exercise of essentially governmental powers. The reason is that the body claiming to represent it is currently unable to fulfill the obligations of membership in any specialized agency of that kind.

Nevertheless, there is no persuasive argument that the full withholding of otherwise obligatory U.S. dues would be an internationally lawful response to a specialized agency's decision to admit "Palestine" to regular membership, even if the decision is inconsistent with the agency's own constituent instrument. This is so, whether one considers it as a matter of treaty law, customary law or inherent powers of international organizations.

I do not mean to say that there could be no case in which withholding of dues—perhaps even the full withholding of dues—would be justified. But I do say that the admission of a single ineligible entity, even one in as volatile a setting as "Palestine," would not justify the full withholding of dues by a member whose financial support is crucial to the functioning of the organization.

FREDERIC L. KIRGIS, JR.*

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