

Background Guide

International Court of Justice

Relocation of the US Embassy to Jerusalem (State of Palestine v United States of America)

SBSMUN 2019

Chairperson: Firdaus Mohandas

The International Court of Justice

General

The International Court of Justice is the principal judicial organ of the United Nations, established in June 1945 by Article 7 of the Charter of the United Nations. It consists of 15 judges serving nine-year terms, each of a different nationality, and operates from the Peace Palace in The Hague. These judges are elected by the General Assembly and the Security Council from within a nominated list. The functions of the ICJ can be separated into two categories: to settle legal disputes submitted by states in accordance with international law (otherwise known as its contentious jurisdiction), and to provide opinions on legal questions referred to it by the organisations authorised to do so in Article 96 of the UN Charter (otherwise known as its advisory jurisdiction).

Judgements delivered by the ICJ in the former capacity – i.e., settlements as to disputes between states – are binding on the parties concerned. This is provided for by Article 94 of the UN Charter, which states that 'each member of the United Nations undertakes to comply with the decisions of the ICJ in a case to which they are a party. In coming to a decision that is 'in accordance with international law', the Court draws from four important sources (see Article 38 of the ICJ Statute): international conventions, international custom, the generally recognised principles of law, and the opinions of important jurists and academics. The precise scope and relative importance of each of these is somewhat uncertain – critics have argued that a more 'rigorous and systematic approach' is needed in the area¹. Specific complaints have been that there is unevenness in the methodology used to determine 'international custom' or 'general principles', and that the use of these concepts carries with it certain problematic assumptions (the idea of general principles, for example, 'presupposes a universal concept of law'² – the existence of which one may reasonably contest).

The ICJ must use the same means to identify the relevant international law in cases where it issues an advisory opinion. As the decisions of the ICJ are only binding on the parties to the case at hand, and advisory opinions do not have any 'parties' per se, it follows logically that these do not have binding force. Having said that, they do carry significant legal weight and moral authority, and are often relied upon by international legal organisations in carrying out their affairs. The Court has backed this up in some of its dicta, stating that the 'purpose of the advisory function is not to settle – at least directly – disputes between states, but to offer legal advice to the organs and institutions requesting the opinion'. Important issues on which the Court has issued such opinions include the legality of nuclear weapons³ and implications of reservations to the Genocide Convention⁴. These constitute an important mode by which the status of international law can be clarified and developed in a clear and consistent fashion.

¹ Yee, Sienho. "Article 38 of the ICJ Statute and Applicable Law: Selected Issues in Recent Cases". *Journal of International Dispute Settlement*, 2016.

² Gutteridge, H.C. "The Meaning and Scope of Article 38 (1) (c) of the Statute of the International Court of Justice." *Transactions of the Grotius Society*, 1952.

³ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, International Court of Justice, 8 July 1996.

⁴ *Advisory Opinion Concerning Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, International Court of Justice, 28 May 1951

The ICJ at SBS MUN 2019

The case at hand (State of Palestine v the United States of America), of course, falls within the contentious jurisdiction of the ICJ. Typically, such a dispute before the ICJ involves advocates for either side presenting their arguments, with judges then deliberating and arriving at a decision on the matter. However, as such a system has certain shortcomings in an MUN setting (particularly inequality in speaking opportunity), this has been modified so that the committee instead consists of a panel of 15 judges. Rather than seeking to secure a particular outcome, the aim of each of the judges in committee must be to weigh up the legal issues at hand and accordingly arrive at the correct decision on the facts. The rules of procedure followed by committee shall be relatively flexible, and modified in order to best facilitate debate – delegates should aim to ensure a strong grasp of the relevant content rather than preempt particular procedural requirements.

An Overview of the Issue

On December 6th, 2017, United States President Donald Trump announced that the US would recognise Jerusalem (rather than Tel Aviv) as the capital of Israel moving forward. He added that, accordingly, the US would be relocating its embassy from Tel Aviv to Jerusalem. Both announcements were praised by the Israel government, but largely condemned by the international community – a UNSC resolution condemning the decision was vetoed by the US despite the other 14 member states supporting it. The Embassy to Jerusalem was finally opened in May 2018, in the face of heavy protest by Palestinian officials. On 28th September 2018, Palestine brought a case in the ICJ against the US, alleging that the relocation of the embassy breached the 1961 Vienna Convention on Diplomatic Relations (when read alongside other relevant pieces of international law), and requested that the Court make a declaration to this effect. It was also requested that the Court order the US to withdraw its diplomatic mission from the city, and to take 'all necessary steps' to comply with its obligations in the future. The significance of this, as well as the full legal complexity of the case, require an understanding of the history of the area. A majority of this context will be left to delegate research, as the focus of this background guide is on providing an insight into the legal issues.

The Roots of the Conflict

Like any conflict, there are undercurrents to the present situation in Jerusalem that date back to well beyond the twentieth century. However, a useful starting point is the defeat of the Ottoman Empire by the Allied Powers towards the end of World War One. The Ottoman Empire, which encompassed a number of now-independent states in the Middle East, had controlled the area since the early sixteenth century. It was partitioned on communal lines, and divided into independent nations, as well as French and British mandates. Palestine and Transjordan together formed one British mandate, with the ostensible aim of administering the territories until such time as they were 'able to stand alone'.

This created a great deal of controversy due to the foreign policy of the United Kingdom in the preceding years. On one hand, the British government had exchanged a number of letters with Arab leaders who

helped them overthrow the Ottoman Empire in which they agreed to recognise Arab independence after the war (the McMahon-Hussein Correspondence of 1915-16). This independence was meant to stretch to the entire region, with the exception of certain 'portions of Syria'. The optimism generated by the Correspondence was placed into jeopardy by a British public statement that announced support for the establishment of a 'national home for the Jewish people' in Palestine (the Balfour Declaration of 1917). The Declaration was made in light of increasing support for the concept within Britain (largely a geo-political calculation designed to gain a loyal sphere of influence within the Middle East) as well as of the growth of Zionism across Europe (a reaction to anti-semitic and exclusionary nationalist movements). Finally, any goodwill Britain could have hoped to have was undermined significantly by the fact that a 1915 secret treaty between France and the UK known as the Sykes-Picot Agreement was exposed to the public in 1917. The Agreement made it clear that there would be an eventual partition of the Ottoman Empire between the two nations, with the Palestine region falling under 'international administration'.

The British mandate of Palestine was unsurprisingly greeted with intense hostility when officially assigned in 1920: the local population had been denied the independence they were promised, they had discovered this through a leak rather than direct communication, and the security of their lands seemed significantly compromised. This dissatisfaction was only exacerbated by the fact that Jewish immigration to Palestine continued to rise, with around 400,000 Jews moving between 1922 and 1939. This was initially prompted by British endorsement, but was mostly a result of the spread of fascism and the related anti-semitism across Europe. The British did attempt to limit this through the imposition of immigration quotas in 1939, but these made little difference in the face of the horrors of the Holocaust: 110,000 Jews sought refuge in the 15 years that followed.

As tensions within the region grew – including strikes and armed insurrections – the Second World War drew to a close. Despite other League of Nations A-Class Mandates being returned to their previous sovereign status, a United Nations Special Committee was formed to deal with the question of Palestine. The key features of the Committee's report were the creation of independent Jewish and Arab states, along with a special international regime ('corpus separatum') for Jerusalem. The United Nations General Assembly adopted this proposal in 1947⁵, with 33 countries voting in favour and 13 voting against. The Arab reaction to this, in contrast to most Jewish groups, was one of serious outrage. Most Arab leaders declared immediately after the vote that they would not consider themselves bound by the resolution, that it violated the UN Charter's principle of national self-determination, and that it had been obtained under 'great pressure and duress'. Several Arab League representatives openly announced their willingness to prevent the enforcement of the resolution by whatever means necessary, even if these were military in character. A civil war broke out in the area, with Jewish and Arab communities clashing – the outcome being over 3000 casualties and a delay in the actual implementation of the UN Resolution.

When the British Mandate over Palestine expired (14th May, 1948), something of a power vacuum was created in the area, with no international presence remaining to even administer the Jerusalem regime. The Jewish People's Council thus gathered in Tel Aviv, and approved a proclamation which entailed the 'establishment of a Jewish state....to be known as the State of Israel'. The United States responded by recognising the provisional government as the *de facto* authority of the new Israeli state. However, members of the Arab League (Syria, Iraq, Egypt Transjordan) then entered the region, transforming the existing civil war into a full-scale conflict. When the hostilities ceased, after 10 months and around

⁵ UN General Assembly, *Palestine: question of an international regime for the Jerusalem area and the protection of the Holy Places*, 9 December 1949, A/RES/303

25,000 deaths, Israel controlled the area allotted to it by the UN Resolution along with around 60% of the area that had been allotted to Palestine. It also took control, importantly, of West Jerusalem. The demographic result was also to force 700,000 Palestinian Arabs out of their homes, while roughly that number of Jews moved into Israel in the three years following the war, most of whom had been expelled from their previous residences in the Middle East.

Subsequent Events

Events that followed the First Arab-Israeli War are of limited significance for the committee, and thus will be dealt with relatively briefly. Some of the key events that could have a bearing on the case will be dealt with specifically.

- i. **The Palestine Liberation Organisation:** In 1964, the Palestine Liberation Organisation was founded in Cairo by the Arab League. Despite the PLO having a separate leadership structure, it is generally accepted that Egypt had *de facto* control over its operations. The publicly declared goal of the PLO was to destroy the state of Israel through armed struggle and to create an independent Palestinian state in its place, facilitating the ‘restoration of the Palestinian homeland’.
- ii. **The Six-Day War:** In 1967, Israel launched a pre-emptive attack on Egypt, citing various incidents before the strike as acts of war on the latter’s part. These included Egypt’s naval blockade of the Straits of Tiran directed against Israeli shipping and its military buildup in the Sinai Peninsula. Despite Jordan and Syria supporting Egypt in the conflict, Israel’s superior military capability meant that the war lasted only six days. Israel gained control over the Gaza Strip from Egypt, and the West Bank and East Jerusalem from Jordan (the first two of which were part of the state of Palestine the UN Resolution intended to form). Jewish settlements were soon set up in each of these regions in the years that followed.
- iii. **Increased Recognition:** In the face of rising insurgency on the part of the PLO (and corresponding Israeli measures designed to weaken it), its global status as the representative of the Palestinian people continued to grow. In 1974, both the UN General Assembly and the Arab League recognised its status as such, with the former granting it the right to participate in deliberations on Palestine. The UNGA went on to affirm the Palestinian right to self-determination⁶, to officiate its contact with the United Nations, and to add the ‘Question of Palestine’ to the UN agenda. Finally, the PLO was given observer status as a “non-state entity” for the purposes of the UN, which allowed it to participate in all assembly sessions.
- iv. **First Intifada:** In 1987, there was the first occurrence of a unified uprising within the territory controlled by Israel. The uprising – known as the first intifada – was marked by violent attacks and riots, as well as general strikes and civil disobedience. Israeli forces responded with brutal crackdown measures, including 80,000 soldiers equipped with tear gas and live ammunition. The death toll appears to have been around 300 Israelis, and 2000 Palestinians. The Intifada was spurred on by the creation of the Hamas – an offshoot of the Gaza Wing of the Muslim Brotherhood – which launched a number of

⁶ UN General Assembly, *Question of Palestine*, 22 November 1974, A/RES/3236,

attacks against both Israeli military targets and citizens. In the midst of this violence, the Palestinian National Council (the legislative body of the PLO) proclaimed an independent State of Palestine at a meeting in Algiers. The UNGA then acknowledged this declaration, replacing the state's previous official designate 'PLO' with 'Palestine'.

- v. **Peace Talks:** The first intifada was followed by a number of positive steps in the direction of lasting peace between 1991 and 2000. First, a US-Soviet sponsored conference brought together Israel, Lebanon, Syria, Jordan, and Palestinian representatives. In 1993, newly elected Israeli Prime Minister Yitzhak Rabin as well as PLO leader Yasser Arafat signed the Oslo Declaration to officially end the First Intifada and to plot Palestinian self-government. In keeping with the Declaration, Israel withdrew almost entirely from Gaza and Jericho, while the PLO set up administrative branches (known as the Palestinian National Authority in these regions. Despite some mistrust on either side over these agreements, they were seen as immensely significant on the global stage: leaders from both countries were awarded the Nobel Peace Prize 'for their efforts to create peace in the Middle East.'
- vi. **Second Intifada:** Negotiations began to break down in 2000, mostly on the subject of further Israeli withdrawal from the West Bank area. It was in this context that then right-wing opposition leader Ariel Sharon visited a site in Jerusalem (Temple Mount or Haram esh-Sharif) venerated as holy by both Jews and Muslims. This was seen as a highly provocative gesture, and met with violence – ranging from stone pelting to suicide bombing, and leaving around 1000 Israelis dead in the next five years. Israeli forces responded with targeted killings as well as tank and air attacks, killing 30000 Palestinians in the process. The situation was worsened by the creation of an Israeli barrier in and around the West Bank, seen by the Palestinians as a tool to grab more territory – notably, the ICJ later declared this barrier to be illegal in an advisory opinion⁷. Some respite was finally provided by a 2005 Summit, where both sides agreed to cease acts of violence and reaffirmed their commitment to the 'Roadmap for Peace' – which involved both accepting Israel's right to exist and establishing a viable, sovereign Palestinian state.
- vii. **Gaza Invasion:** After the Hamas – labelled a terrorist organisation by Israel – won parliamentary elections in 2005, a constant stream of low-scale conflict persisted for the next few years. Things escalated in 2008, where Israel invaded the Gaza Strip with the ostensible purpose of stopping Palestinian rocket fire and weapon smuggling into the region. Hamas stated that any rocket fire was only a response to Israeli military actions that allegedly had already broken the previously existing ceasefire. Israeli attacks began with police stations and suspected rocket firing teams, but stretched to a number of political and administrative institutions. A ceasefire was finally declared in early 2009 by Israel, after around 1500 Palestinian deaths (including close to 800 civilians) and 13 on the Israeli side. A 2009 UN Special Mission produced a report which accused both the Israeli Defence Forces and Palestinian Militants of war crimes and crimes against humanity for their involvement.

⁷ *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, International Court of Justice, 9 July 2004

viii. Recent Developments: Israel has on two occasions – 2012 and 2014 – launched military campaigns against Gaza-based armed groups. These have each ended in uneasy ceasefires, and have each received criticism on the grounds that they are indiscriminate and disproportionate, and thus constitute human rights violations. In spite of the persistent violence, Palestine moved towards increased internal stability, with Hamas and Fatah (the dominant party in the PLO) forming a unity government in 2014 – only for the union to fall apart quickly. There has, however, been increased international recognition: a 2012 Resolution⁸ upgraded Palestine’s status from an ‘observer entity’ to a ‘non-member observer state’. The title of ‘State of Palestine’ is now used in official UN documents, and 137 out of 193 UN member states have recognised the existence of the state.

Current Situation

Today, the concept of “Palestinian territory” is used to describe the West Bank (including East Jerusalem) and the Gaza Strip – the territory, essentially, that was occupied by Israel in the 1967 War. In practice, there is some level of political control by the Palestinian National Authority in parts of the West Bank, but there remains significant Israeli occupation which continues to restrict the extent of the PNA’s autonomy. The Gaza Strip has far lower Israeli presence, and is currently controlled by Hamas – continuing over a decade of powerful support the organisation has enjoyed in the region. Ramallah – controlled by the Fatah party – is the administrative centre of the state of Palestine. Israel maintains control over the city of Jerusalem, proclaiming it its capital – a proclamation it has in common with the Palestinian state. A majority of Israel’s major governmental institutions, however, have been moved to the city, including the Knesset, the Bank of Israel, the Cabinet, and the Israeli Supreme Court. Peace talks between the two states have generally stalled, mostly over disputes about Israeli military withdrawal and Palestinian disarmament.

The Case Before The International Court of Justice

Palestinian Application

As mentioned above, Palestine’s application to the International Court of Justice requests a declaration that the US relocation is inconsistent with international law as well as an order directed towards the United States to withdraw its diplomatic mission. The legal case that is put forward has two separate, if not entirely unrelated, elements. The strands of reasoning that the application appears to bear will be briefly explained:

1. The establishment of the diplomatic mission is in breach of the Vienna Convention on Diplomatic Relations of 1961.
 - 1.1. The Vienna Convention on Diplomatic Relations states that diplomatic missions must be established on the territory of the receiving state.

⁸ UN General Assembly, *Status of Palestine in the United Nations : resolution / adopted by the General Assembly*, 4 December 2012, A/RES/67/19

- 1.1.1. Thirteen separate provisions of the Convention use the formula ‘in the receiving state’ when laying out the framework for a diplomatic mission.
 - 1.1.1.1. Paragraph 1 of Article 3 lays out the functions of a diplomatic mission, and uses the terminology in four out of its six functions, with the only exceptions being negotiation and the promotion of friendly relations.
 - 1.1.1.2. Paragraph 1 of Article 21 refers to the duties of the receiving state, and states that it must facilitate the acquisition ‘on its territory’.
 - 1.1.2. Any diplomatic mission not established in the manner prescribed by the Convention is in breach of the Convention.
 - 1.1.2.1. Paragraph 3 of Article 41 provides that ‘the premises of the mission must not be used in any manner incompatible with the functions...as laid down in the present Convention’.⁹
 - 1.2. Jerusalem is not within the territory of Israel.
 - 1.2.1. The United Nations General Assembly in its 1947 Partition Plan provided for a “Special International Regime” in Jerusalem.
 - 1.2.2. Israel has acquired *de facto* control over Jerusalem only through the illegal and illegitimate use of force.
 - 1.2.2.1. Control over West Jerusalem was taken during the First Arab-Israeli War of 1947, while control was extended to East Jerusalem during the 1967 War.
 - 1.2.2.2. The United Nations Security Council and General Assembly have on multiple occasions labelled Israeli attempts to change the legal status of the city ‘invalid’ and have chosen ‘not to recognise’ their effect.
 - 1.3. Thus, establishing a diplomatic mission to Israel in Jerusalem is in breach of the Vienna Convention.
 - 1.3.1. The United Nations Security Council in 2017 attempted to adopt a resolution that condemned the move and demanded its rescission, only to be vetoed by the United States of America.
 - 1.3.2. The United Nations General Assembly then held a special Emergency Session, passing a resolution in which it urged ‘all states to refrain from the establishment of diplomatic missions in the Holy City of Jerusalem’.
2. The Court has jurisdiction over the matter at hand under Article I of the Optional Protocol to the Vienna Convention on Diplomatic Relations.
- 2.1. Article I of the Optional Protocol, concerning the Compulsory Settlement of Disputes, provides that disputes arising out of the application of the Convention lie within the ICJ’s jurisdiction, and may be brought before the Court by an application made by any party to the dispute and Protocol.
 - 2.1.1. The Optional Protocol is open to accession by all states which may be parties to the Convention.
 - 2.1.2. The Vienna Convention is open to signature by ‘all States Members of the United Nations’ or ‘Parties to the Statute of the International Court of Justice’.
 - 2.1.3. Palestine falls within both these categories, and accordingly its accession to both the Convention and the Protocol are valid and legally effective.

⁹ It is worth noting that this Article states that the mission must not also be incompatible with ‘other rules of general international law’, which Palestine claims it is (see Paragraph 50 of the Application).

- 2.1.4. Thus, the present dispute as to the application of the Convention is being brought by a ‘party to the Protocol’ and falls within the meaning of Article I of the Optional Protocol.
- 2.2. Article II of the Optional Protocol states that after two months have elapsed since the defendant party has been notified, either party may bring the dispute before the Court by application.
 - 2.2.1. Palestine informed the United States of its position that the embassy in Jerusalem was a breach of the Convention on 14th May, 2018.
 - 2.2.2. Palestine then notified the United States that a dispute existed between the two Parties on 4th July, 2018.
 - 2.2.3. As the Application to the Court was brought on 28th September, it falls outside the two month period and thus is legally effective.
- 2.3. Thus, the ICJ has jurisdiction over the dispute regardless of whether the United States assents to the action being brought.

Naturally, the Court must consider not only the issues raised by Palestine, but to judge the validity of the claim as a whole with respect to any relevant rules of international law. In fact, certain potential barriers to the Court granting the Palestinian requests have been excluded in Palestine’s discussion of the legal framework. In particular, this Guide shall provide an insight into four key issues that may block the claim – though of course, judges should feel free to bring in separate possible objections if they see fit.

Issue 1: The Jurisdiction of the International Court of Justice

Article 35 of the Statute of the ICJ makes it clear that the competence of the Court extends only to ‘states’, whether or not these states are members of the United Nations. The United States could thus object on the grounds that Palestine is not entitled to bring a claim as it is simply not a state within the meaning of Article 35 – indeed, US National Security Adviser John Bolton has already raised this issue¹⁰.

This issue of statehood could play out in multiple ways. Generally speaking, there are two views of statehood in international law¹¹. The first is that statehood is dependent on external verification – specifically recognition by other states. This essentially relative conception of statehood is referred to as the constitutive theory, and is criticised on several different grounds. For example, some claim that it leaves no room for an ‘invalid’ recognition – contrary to state practice – while others state that it lacks a notion of ‘absolute’ statehood that can be drawn upon. The adoption of such a view by the Court would likely be favourable to Palestine: as stated above, Palestine has been recognised by 137 UN member states.

The second dominant view of statehood is known as the declaratory theory. This theory separates between the recognition of a new state (a political act) and its actual existence (a legal question): the Montevideo Convention on the Rights and Duties of States states that ‘the political existence of the state is independent of recognition by other states’. The criteria used to determine this actual existence are also

¹⁰ Shesgreen, Deirdre. “Bolton Says U.S. Will Block Legal Challenge from ‘so-Called State of Palestine’ over Embassy Move.” *USA Today*, Gannett Satellite Information Network, 3 Oct. 2018,

¹¹ Crawford, James. “The Concept of Statehood in International Law”. *The Creation of States in International Law*. Oxford Scholarly Authorities on International Law, 2007.

often taken from this 1933 Convention: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states. The question of whether Palestine meets these criterion is less clear-cut than with the constitutive theory: particular possible challenges are mounted by its relatively unstable territorial control and political conflicts between the Palestinian National Authority and the Hamas¹². It is worth noting that this declaratory theory seems more dominant in international law discourse today.

Some have argued that the ICJ may avoid a first-principles analysis of Palestine's statehood by drawing a line between procedural and substantive law¹³. More specifically, the Court could state that the use of the word 'state' in the ICJ Statute asks only whether an entity is a 'state' for limited functional purposes rather than in a deeper substantive sense. This functional purpose could be demonstrated with reference to Palestine's status as a non-member state in the United Nations, or even by utilising Palestine's UNESCO membership (a specialised UN agency) as a window to treaty-based statehood. Such an option is undoubtedly open to the Court. However, investigating Palestine's status at a substantive level would also have the important benefit of clarifying the status of international law on the subject, and prove helpful for future discussions on the matter.

Issue 2: The Breach of the Vienna Convention on Diplomatic Relations

The United States may also claim that its actions are simply not in breach of the Vienna Convention on Diplomatic Relations. This could potentially be done on a number of different levels. For one, the US could argue that Palestine's characterisation of the Convention is inaccurate. The fact that the *functions* of the diplomatic mission must be performed in the receiving state does not necessarily mean that the embassy itself must be established within this geographical area. For example, several diplomatic missions to the Vatican actually exist within the territory of Italy – no one has labelled this a breach of the Convention. The linguistic construction of the various relevant Convention provisions will be a key aspect of the job of the committee.

Second, even if the Convention is understood as prescribing the establishment of diplomatic missions within the territory of the receiving state, the US may reject the Palestinian claims on the grounds that the Convention does not purport to be an exhaustive legal framework for such missions. It could be argued that the creation of embassies is a right that has roots in customary international law which date back beyond the Convention: thus, the fact that the mission in Jerusalem falls outside the scope of the Convention does not *ipso facto* invalidate it. Such a claim could be rebutted in two different ways. First, Palestine could argue that the Convention does in fact purport to have such a status as a matter of construction, and anything outside its scope is therefore legally invalid¹⁴. Second, and in the alternative, it could argue that even if the Convention does not make such a claim itself, its status as a treaty which both

¹² Pitta, Michele. "Statehood and Recognition: The Case of Palestine". *Masters in Diplomacy and International Public Service*, University of Barcelona, 2018.

¹³ Whitman, Charles. "Palestine's Statehood and Ability to Litigate in the International Court of Justice." *California Western Law Review*, 2013.

¹⁴ Palestine does put forward an argument like this: see Point 1.1.2.1 above.

nations are party to places customary international law on the subject into abeyance. Such an argument would derive its strength from the deeper relationship between these two sources of international law¹⁵.

Finally, and most controversially, the US could argue that Jerusalem is simply not outside the territory of Israel. Such an argument would be logically prior to those above, but would require the US to reject a number of UNSC and UNGA resolutions that have categorically rejected Israel's claim over the city – making it an unlikely decision. It would draw from the general understanding of what constitutes a state's 'territory' in international law¹⁶, and prioritise the factual situation over the matter of international recognition.

Issue 3: The Standing of Palestine

The USA could also reject Palestinian claims on the grounds that Palestine does not have sufficient standing to bring the claim before: 'standing', of course, being refer to a particular level of *legal interest* in the outcome. As Palestine's argument is premised on Jerusalem being under *international* administration, the US may attempt to use this as evidence that the existence of the embassy does not in fact have any bearing on Palestinian interests. There is no explicit requirement for standing in the Statute of the ICJ – a fact which Palestine might make use of in proceedings – but it is generally understood as a matter of principle that some degree of standing is required¹⁷. In particular, many have pointed to the use of the term 'qualite' in the French translation of Article 34, which seems to imply such a precondition.

However, Palestine might yet employ two different strategies to rebut the claim. The first would be to argue that even though in a formalistic sense they do not have a legal interest, the *substantive reality* is that such an interest exists. This is because the function of the UN-mandated *corpus separatum* is to ensure the protection of both Jewish and Arab cultural values: given the importance of the city to people of divergent faiths, it is only fair that neither be given preference. As such, one could see *any interference* with the internationalised regime – including the establishment of a diplomatic mission – as indirectly harming the Palestinian interest in preserving its neutrality.

The second possibility is of a different nature altogether. Palestine could claim that since the obligations enshrined in the Convention are of a fundamental character, upholding them is a matter of interest to the body politic at large. This would sit well with the description of the Convention obligations in *United States Diplomatic and Consular Staff in Tehran*¹⁸: their 'maintenance...is vital for the security and well-being of the complex international community of the present day.' Whether such a notion of interest – that is, interest as a member of the international community – is sufficient to bring an action in the ICJ is

¹⁵ Bilder, Richard et al. "Disentangling Treaty and Customary International Law". *Proceedings of the Annual Meetings (American Society of International Law)*, 1987.

¹⁶ Buxbaum, Hannah. "Territory, Territoriality, and the Resolution of Jurisdictional Conflict". *American Journal of Comparative Law*, 2009.

¹⁷ Kawano, Mariko. "Standing of a State of the Contentious Proceedings of the International Court of Justice." *Japanese Yearbook of International Law*, 2012.

¹⁸ *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, International Court of Justice, 12 May 1981

uncertain, and has not been dealt with in the past. The present case could thus be an opportunity for the Court to clarify the legal position on the matter.

Issue 4: The Clash with *Monetary Gold* Jurisprudence

Palestine may have found a way around the general rule that both parties to a case must accept the jurisdiction of the ICJ via the Optional Protocol to the Vienna Convention on Diplomatic Relations. However, the fact that the decision of the Court is likely to have a bearing on Israeli interests poses another obstacle. In the 1943 case referred to as *Monetary Gold Removed from Rome*, the Court refused to entertain an Italian claim against the three defendant states (the UK, the US, and France) on the grounds that there was 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'¹⁹. This concept was affirmed in the *East Timor (Portugal v Australia)*²⁰. The Court stated that the question of whether an Australian-Indonesian treaty had infringed on Portuguese rights required an assessment of whether Indonesia had the power to make treaties on East Timor's behalf, which in turn depended on the legality of Indonesia's entry into and continued presence in East Timor. An analysis of the last of these points would involve the Court asserting its jurisdiction over Indonesia – who had not given its consent – and thus fell within the *Monetary Gold* principle.

A similar argument could be made on the present facts. As deciding on whether the US embassy in Jerusalem is valid would involve an examination of the legality of Israel's presence in the region, Israel's lack of consent could prove to be a bar. There may be a couple of strategies available to Palestine to get around this problem. The first would be to assert that the scope of *Monetary Gold* principle is relatively narrow: as the Court emphasised in *East Timor*, it is not 'necessarily prevented from adjudicating when the judgement it is asked to give might affect the legal interests of a state not party to the case', but when this state's 'rights and obligations would...constitute the very subject-matter of such a judgement'. It could be argued that Israel's international law violations do not necessarily need to be considered, as Jerusalem has an independent and special status under international law (demonstrated by a number of UNSC and UNGA resolutions). As such, the special regime could be seen as imposing obligations on *all* states, meaning that Israel's possible violations are not central to the judgement.

In the alternative, it could be argued that the *Monetary Gold* principle should not be applied even if it is applicable. This is because there is no strict concept of binding precedent in the International Court of Justice: the Court is free to come to a decision without being tied by previous decisions. However, generally speaking, the Court has made it clear that it 'will not depart from its settled jurisprudence unless it finds very particular reasons to do so.'²¹ Therefore, if Palestine could point to the existence of powerful normative benefits of *not* following *Monetary Gold* – in this case or in general – it could avoid Israel's possible interests being a bar to the decision.

¹⁹ *Monetary Gold Removed From Rome in 1943 (Italy v France and Ors)*, International Court of Justice, 15 June 1954.

²⁰ *Case Concerning East Timor (Portugal v. Australia)*, International Court of Justice, 30 June 1995

²¹ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)*, International Court of Justice, 11th June 1998.

The Task for Committee

As one can see, there are a host of legal problems that have been laid out, each of which require special and specific attention. These shall now be laid out in the form of questions, most of which the committee should look to resolve.

- i. Does Palestine have the statehood required to bring a claim before the International Court of Justice?
- ii. What calculus – declaratory, constitutive, or a mix of the two – should be used to determine legitimate statehood?
- iii. If a declaratory theory is to be employed, how does Palestine meet the requirements laid out in the Montevideo Convention?
- iv. Does the Optional Protocol to the Vienna Convention on Diplomatic Relations apply in the manner Palestine suggests it does so as to negate the US' consent requirement?
- v. Is the USA in breach of the Vienna Convention on Diplomatic Relations?
- vi. What is the meaning of the phrase 'in the territory of the receiving state' with respect to geographical requirements?
- vii. Does the VCDR purport to provide an exhaustive list of the conditions under which a diplomatic mission may be established?
- viii. What is the relationship between the VCDR and previously existing customary international law?
- ix. Is Jerusalem in fact outside the territory of Israel?
- x. Is there a formal requirement of standing for the International Court of Justice?
- xi. Can such a requirement be satisfied as a 'general member of the international community' who benefits from its rules being upheld?
- xii. If not, can Palestine be said to have sufficient interest in the present outcome specifically?
- xiii. What is the scope of the *Monetary Gold* principle?
- xiv. Does that scope *prima facie* bar Palestine's claim on the present facts?
- xv. Should the *Monetary Gold* principle continued to be followed moving forward?

The Task for Judges

Judges are expected to research and arrive at their own opinions on each of these sub-topics prior to the conference: each judge will present in the opening round of statements in detail as to their views on the issue as a whole. It is essential that judges are well-versed with all the relevant international law – most of which has been provided in this Guide – and use primary sources to develop their views.

Judges will also be expected to create a minimum of a 1000 word document sharing their preliminary opinions on the subject. These should be in Times New Roman, Size 12, and double-spaced. It is recommended that judges use a numbered bullet-point style approach with bolded subheadings to improve clarity and conciseness. The Palestinian Application to the ICJ is a good example of the kind of structure that can be used. This document will not be marked independently, but adherence to the arguments laid out in it during opening statements will be relevant to marking. **The deadline for the submission of this document is 6 PM on Sunday, the 21st of July at sbsmun2019@gmail.com**
Feel free to reach out to me with queries at firdausmohandas@gmail.com

– Firdaus Mohandas
Chairperson, International Court of Justice