The strange story of the “conditional” admission of the State of Palestine to the United Nations

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By Enzo Cannizzaro June 11, 2024

On 10 May 2024, the General Assembly (GA) adopted by an overwhelming majority Resolution ES-10/23 on the admission of the State of Palestine to the United Nations. The resolution does not pronounce the admission. After determining in point 1 of the operative part that the State of Palestine meets the requirements for admission under Article 4(1) of the Charter, the GA “recommends that the Security Council (SC) reconsider the matter favourably, in the light of this determination and of the advisory opinion of the International Court of Justice of 28 May 1948, and in strict conformity with Article 4 of the Charter” (para 2). Under Article 4(2) of the Charter, the power to admit a new State is a prerogative of the GA, but on a recommendation from the SC.

The reasons for this apparent procedural reversal can be easily explained in light of various references in the resolution. On 18 April 2024, a draft SC resolution recommending the admission of the State of Palestine to the United Nations (S/2024/312) was not adopted. It received twelve favourable votes, abstentions from the United Kingdom and the Swiss Confederation, and a vote against by the United States. In justifying its vote, which resulted in the rejection of the proposal, the United States generically indicated that Palestine would not meet the criteria of Article 4(1) of the Charter. However, in explaining its vote, the United States specified that “(t)his vote does not reflect opposition to Palestinian statehood, but instead is an acknowledgment that it will only come from direct negotiations between the parties.” The United States also reiterated this position in the debate in the GA. The US Permanent Representative to the United Nations pointed out that “statehood will come from a process that involves direct negotiations between the parties”.

It is plausible to believe that this position, indeed ambiguous, brings together two demands that are not easily reconciled: support for the recognition of the statehood of Palestine, in accordance with the two-state model, and support for the position of the Israeli government, hostile to such solution. Be that as it may, it emerges that the United States made it clear that its unfavourable vote depended, at least partly, on the lack of consent of a third state, a condition additional to the requirements of Article 4(1).

There are elements to compare this case to another that occurred in remote times, relating to the claim of some states to make the outcome of the admission procedure dependant on political conditions different from those laid down by Article 4(1). This impression seems to be confirmed by Resolution ES-10/23, which, in paragraph 2 of the operative part, referred to the Advisory Opinion of the International Court of

Justice of 28 May 1948 on the *Conditions of Admission of a State to the United Nations (Article 4 of the Charter)* (ICJ Reports 1948, p. 57). This advisory opinion, requested by the GA, concerned the conduct of a member that intended to make its vote conditional on the simultaneous admission of other candidate States.

The issue was undoubtedly controversial in 1948 and remains so today. It is a legal dilemma that is difficult to solve, relating to the nature of the Charter and its legal order. On the one hand, the universal vocation of the United Nations requires that the admission of States be subject only to the conditions laid down in Article 4(1), among which the “peace-loving” character of the State acquires a predominant character. On the other hand, it is difficult to curtail the discretion of the main political bodies of the United Nations to the point of imposing on them a legal duty to pronounce the admission where those conditions are met.

In its 1948 advisory opinion, the ICJ found that the conditions of admission laid down in Article 4(1) are exhaustive. Consequently, when these conditions are met, the political discretion of UN organs ceases, and the duty to admit the candidate State is imposed. The opinion clearly states that “(t)he 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”.

Although not devoid of theoretical coherence, this solution remains fragile in practice, particularly regarding the criteria for determining the reasons for an unfavourable vote. Aware of this difficulty, the Court stated that the “additional conditions” would be only those expressed in states’ explanations of vote before the organs of the United Nations. It would, therefore, be impossible for these conditions to derive from other sources revealing States’ intentions or even from psychological or deductive investigations (p. 7).

Even with this clarification, which seeks to objectify the “additional conditions”, the absence of legal remedies makes the existence of a legal duty to proclaim the admission to the UN quite controversial. Not surprisingly, from 1948 up to the present day, the issue only emerged episodically.

The GA’s resolution of 10 May might bridge this logical aporia. After determining that the State of Palestine meets the requirements for admission established in Article 4(1) and having taken note of the SC’s lack of recommendation, which is a prerequisite for the admission by the GA, the resolution adopted “modalities” to involve that State in GA’s activities, conferring on it special powers and prerogatives, many of which are intimately linked to the *status* of a member.

Consequently, the exercise of these powers and prerogatives, carefully specified in the annex, could, even within the limited scope of the GA’s remit, equate the *status* of the State of Palestine with that of a member state. The only immediately perceptible restriction concerns the right to vote, a right permeated with a high symbolic value.

However, this limitation could be amply compensated for by the power to contribute to the formation and implementation of the acts of the GA on equal terms with the member states.

It is not easy to decipher the legal meaning of these measures. While proclaiming its compliance with Article 4(2), the GA has emptied a significant part of its contents. There is, indeed, a clear divergence between the resolution and Article 9 of the Charter of the United Nations, which states that “(t)he General Assembly shall consist of all the Members of the United Nations”. Although the State of Palestine cannot be formally qualified as member of the United Nations, it is empowered, by virtue of the resolution ES-10/23, to exercise powers and prerogatives typical of a member.

From a different perspective, the reasons stated by Resolution ES-10/23 seem to conceive these measures as a form of reaction to the SC’s refusal to fulfil its alleged duty to admit the State of Palestine on the basis of additional conditions to those indicated by Article 4(1).

This impression is upheld by the wording of the resolution, which reiterates its conviction that “the State of Palestine is fully qualified for membership in the United Nations in accordance with Article 4 of the Charter” and expresses “deep regret and concern that, on 18 April 2024, one negative vote by a permanent member of the Security Council prevented the adoption of the draft resolution supported by 12 members of the Council recommending the admission of the State of Palestine to membership in the United Nations”. This reading can be further confirmed by a passage in paragraph 3 of the operative part of the resolution, where the GA pointed out that the measures have been adopted “on an exceptional basis and without setting a precedent”.

All in all, various elements converge on the hypothesis that Resolution ES-10/23 was adopted as a form of reaction to an unlawful conduct of the Security Council, which would have failed in its legal duty to admit a State that meets all the requirements of Article 4(1) of the Charter. One could be tempted to use for this reaction the formula “lawful measures”, which echoes in both the ARS and ARIO, namely the instruments aimed to codify the law of international responsibility. The strangeness of this situation is that this reaction is not addressed to another legal person of international law but, instead, to another organ of the special legal order of the Charter. Although the resolution highlights the exceptional nature of this situation, whereby these measures cannot be regarded as a precedent, one can plausibly maintain that the reaction could be repeated before similar situations.

If that were the case, the resolution or the method which led to its adoption could have systemic effects on the Charter’s legal system. If the GA considered that the SC fails to fulfil its legal obligations under the Charter, it may act to mitigate the effects of that failure without, however, formally infringing the exclusive prerogatives conferred

on the SC by the Charter. At a time when the polarization between the Great Powers makes it difficult to carry out the functions entrusted by the Charter to the Security Council, the resolution AGES-10/23 could indicate a reasonably viable path to achieve the needs and interests of the international community.