



Membership in International Treaties of Contested States: The Case of the Permanent Court of Arbitration

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1. Introduction

This Reflection provides an analysis of the legal issues which have arisen in relation to the request of Palestine and Kosovo to join the PCA system under the 1907 Convention for the Pacific Settlement of International Disputes (1907 Convention). Membership to the PCA is open to all States by ratification of the 1899 or the 1907 Convention (PCA Conventions).¹ The PCA provides administrative support in international arbitrations involving various combinations of States, State entities, international organizations and private parties.² This function of the PCA fulfills a general community interest,³ namely ensuring access to international justice mechanisms and furthering peaceful dispute resolution.⁴ The PCA Administrative Council is composed of member States' diplomatic representatives accredited to the Netherlands, under the chairmanship of the Netherlands Minister for Foreign Affairs. This body, in consultation with the PCA

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¹ Convention for the pacific settlement of international disputes, 29 July 1899; Convention for the pacific settlement of international disputes, 18 October 1907, available at <<https://pca-cpa.org/en/documents/pca-conventions-and-rules>>.

² For more information see <<https://pca-cpa.org/en/services/arbitration-services>>.

³ More generally on community interests see Bruno Simma, From Bilateralism to Community Interest in International Law, in *Recueil des Cours* (Collected Courses of the Hague Academy of International Law), Vol. 250 (1994), (Martinus Nijhoff Publishers, 1997). See also André Nollkaemper, International Adjudication of Global Public Goods: The Intersection of Substance and Procedure, 23(3) *European Journal of International Law* (2012), pp. 769-791.

⁴ For the role of international dispute settlement in enforcing community interests see inter alia Rüdiger Wolfrum, 'Enforcing Community Interests through International Dispute Settlement: Reality or Utopia?', in Ulrich Fastenrath *et al.* (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press, 2011), pp. 1132-1148.

Secretary-General, shapes the policy of the organization by providing general guidance on the work of the PCA and supervising its administration, budget and expenditure.⁵

The recent objections that have been raised against Palestine and Kosovo joining the PCA pose several legal questions.⁶ *First*, whether the 1907 Convention or general international law allow for such objections; *second*, what are the duties of the State depositary in such cases; and *third*, how to settle membership disputes between PCA member States and aspiring member States? While this development at the PCA concerns more generally the ability of States whose statehood is contested to join international treaties and international organizations, this Reflection focuses solely on the process of Palestine and Kosovo joining the PCA through the 1907 Convention. Although based on two old peace treaties, the PCA system is especially interesting, since it serves the peaceful settlement of disputes as an important aim of international law. Objections concerning membership in the PCA might obstruct a State's access to international justice mechanisms.

Palestine and Kosovo sent a letter to the Netherlands, the PCA State depositary, notifying it about their intention to join the 1907 Convention, respectively on 30 October 2015 and on 6 November 2015. In accordance with its Article 95, the 1907 Convention entered into force for Palestine on 29 December 2015 and for Kosovo on 5 January 2016. While that should have been the end of the matter, the situation concerning Palestine's and Kosovo's membership to the PCA is *currently pending* before the PCA Administrative Council which meets on 14 March 2016. In this Reflection, I shall *first* address the issue of conditions for membership in the PCA. While the process of Palestine and Kosovo joining the PCA has its own specificities, and these States face different challenges in the international arena, this analysis includes both since the objections raised against them are of a similar nature. *Then*, I will turn to the duties of the State depositary, the Netherlands, and the PCA Administrative Council under such circumstances. *Finally*, I will provide some concluding remarks on whether Palestine and Kosovo are legally entitled to membership in the PCA.

2. Conditions for Membership in the PCA

In this section, I shall first address the issue of statehood of Palestine and Kosovo and then turn to the practice concerning membership in the PCA.

2.1 The Statehood Question

Noting the character of the international legal rules determining what are 'States', Crawford has pointedly asked whether these rules are sufficiently certain to be applied in specific cases or have been kept so uncertain or open to manipulation as not to provide any standards at all.⁷ While much depends on the interpretation of these

⁵ For more information see <<https://pca-cpa.org/en/about/structure/administrative-council>>.

⁶ The US, Israel, and Canada have expressed their objections with regard to Palestine. The Russian Federation, Mexico, and Georgia have expressed their objections with regard to Kosovo. For the full text of these objections see the official website of the State depositary, the Netherlands, at <https://treatydatabase.overheid.nl/en/Verdrag/Details/003316_w.html>.

⁷ James Crawford, *The Creation of States in International Law*, second edition (Oxford University Press, 2006), p. 45 (Crawford, *Creation of States*).

criteria,⁸ an area where States retain a large degree of discretion, *prima facie* both Palestine and Kosovo satisfy the formal criteria for being a State. Palestine is currently recognized by 137 States.⁹ On 29 November 2012, the UN General Assembly (UNGA) accorded non-Member Observer State status to Palestine.¹⁰ Palestine is a member to several international organizations and regional organizations as the Organization of Islamic Cooperation (OIC) and the League of Arab States (LAS). Palestine is also a party to several international human rights and humanitarian law treaties and since 1 April 2015 a member of the International Criminal Court (ICC). Kosovo is recognized at present by 111 States;¹¹ including all neighboring States (except Serbia). In the *dispositif* of its 2010 advisory opinion on Kosovo, the International Court of Justice (ICJ) held that the declaration of independence of Kosovo adopted on 17 February 2008 *did not violate international law*.¹² The general conclusion of the ICJ states clearly that ‘the adoption of the declaration of independence of 17 February 2008 did not violate general international law, Security Council resolution 1244 (1999) or the Constitutional Framework. Consequently *the adoption of that declaration did not violate any applicable rule of international law*.’¹³ On 27 October 2015, Kosovo signed the Stabilization and Association Agreement (SAA) with the European Union, and on 21 January 2016 the European Parliament gave its consent, a step which paves the way for Kosovo joining the EU.¹⁴ Kosovo is a member of UN agencies such as the International Monetary Fund (IMF) and World Bank (WB), as well as many other regional, European and global organizations and multilateral forums. As Crawford has noted, recognition is an institution of State practice that can resolve uncertainties as to status and allow for new situations to be regularized.¹⁵ Both the *prima facie* fulfillment of the formal criteria for statehood, as well as the recognition by more than half of UN member States of both Palestine and Kosovo, provide strong support for their claim to statehood.

2.2 Practice concerning Membership in the PCA

The criteria for the adherence of new members in the PCA system have been subject to extensive discussions. Different positions were advanced during the drafting of the 1899 Convention. Because of those, the compromise adopted in Article 60 of the 1899 Convention and Article 94 of the 1907 Convention was to leave the conditions concerning the adherence of new member States to be decided in the future. The three different positions concerning the right to adhere to the PCA Conventions can be summarized as follows:

⁸ See generally Andrea Bianchi, Daniel Peat, and Matthew Windsor (eds), *Interpretation in International Law* (Oxford University Press, 2015).

⁹ Full list of States that have recognized Palestine at <<http://palestineun.org/about-palestine/diplomatic-relations>>.

¹⁰ UNGA Resolution A/RES/67/19, 29 November 2012.

¹¹ Kosovo Ministry of Foreign Affairs at <<http://www.mfa-ks.net/?page=2,224>>.

¹² *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, ICJ Reports 2010, p. 453, para. 123(3) emphasis added (*Kosovo Independence case*).

¹³ *Kosovo Independence case*, p. 452, para. 122, emphasis added.

¹⁴ General Secretariat of the Council, Stabilisation and Association Agreement (SAA) between the European Union and Kosovo signed, Press Release 762/15, 25 October 2015.

¹⁵ Crawford, *Creation of States*, n 7, p. 26.

1. An absolute right of all Powers to adhere to the Convention by means of a simple declaration;
2. A right dependent on the express consent of all the contracting States, or on their tacit consent, which they would be considered to have been given if, within a fixed time, no Power opposed the adhesion;
3. A right dependent on the consent of a majority, subject to the vote of the Permanent Council (Administrative Council), so that no one State would have the right of veto in this matter.¹⁶

During the discussions concerning Article 60 of the 1899 Convention, the prominent Dutch international lawyer and 1911 Nobel Peace Prize laureate, Mr Tobias Asser, pointed out that the authors of this Convention must necessarily desire that all Powers, even those which were not represented during the 1899 diplomatic conference, join in this work of general interest.¹⁷ He expressed his hope that the *very nature of the Convention in question seems to admit of a broad and liberal system in the matter of the right to adhere*.¹⁸ The Preambles of both the 1899 Convention and the 1907 Convention emphasize the *maintenance of peace* through the *friendly settlement of international dispute* and *strengthening of international justice* through the permanent institution of a Tribunal of Arbitration, *accessible to all*.

Specific rules concerning conditions for the adherence of new members to the PCA were not developed either during the adoption of the 1907 Convention, or subsequently for over 100 years. The different practices concerning membership in the PCA followed by individual States and the PCA Administrative Council over the years are varied and inconclusive. Membership in the PCA has increased according to two different types of situations: *first* that where individual States have notified the Netherlands as State depositary of their intention to join the PCA; and *second*, that where the PCA Administrative Council, with the help of the State depositary, has invited other States to join. When a State takes the initiative to join the PCA system, there is no provision for approval by other States, neither in the PCA Conventions, nor in general international law and practice. In contrast, the PCA Administrative Council has retained a degree of control with regard to who are the addressees of its invitations for joining the PCA.

In an effort to expand the membership of the PCA, in a March 1960 meeting of the PCA Administrative Council, it was decided to extend an invitation to all UN member States that were not a party to the PCA Conventions, asking them to respond whether they considered themselves bound by either of the PCA Conventions (States which were formerly part of a State which ratified or adhered to one of the PCA Conventions), or whether they wanted to adhere to them. The extension of these invitations to other States has been subject to a prior consultation and approbation among the PCA member States. While this latter practice has no explicit basis in the 1899 or the 1907

¹⁶ Oral Report of Mr. Renault on behalf of the Drafting Committee of the Final Provisions addressing Article 60 of the 1899 Convention, Ninth Session dated 28 July 1899, p. 216.

¹⁷ *Ibid.*, p. 217.

¹⁸ *Ibid.*, (emphasis added).

Convention, or the Regulations of the PCA Administrative Council, it indicates a possibility for joining the PCA based on the consent of PCA member States. Subsequently, in a meeting of the PCA Administrative Council in April 1961, the US proposed to extend an invitation not only to the members of the UN, but also to members of the specialized agencies of the UN,¹⁹ whereas the USSR proposed to extend such an invitation to *all States in the world*.²⁰ While both proposals were ultimately withdrawn, this meeting of the PCA Administrative Council shows that membership in the UN does not constitute a *conditio sine qua non* for membership in the PCA.

From a general legal perspective, becoming a party to an international treaty essentially requires that the State concerned accepts and is able to comply with the obligations imposed under that particular treaty.²¹ In interpreting the criteria for UN membership, established under Article 4 of the UN Charter, the ICJ has found that UN member States are *not free to import* into the application of this provision *considerations extraneous* to the conditions laid down therein.²² Applying this rationale to the 1907 Convention, it must be noted *first* that under Article 93, the 1907 Convention is open to 'Powers', an old term which eventually can be taken to mean open to 'all States', including Palestine and Kosovo. A right to participate in general multilateral treaties, like those establishing the PCA, is based on general principles, including equality of sovereignty,²³ non-discrimination, universalism, democratic principle and so on.²⁴ Trying to develop and to enforce specific 'conditions of adherence' can create unnecessary frictions among States and would go against a fundamental principle of international law included in the UN Charter, namely that of the sovereign equality of States.²⁵ Given that the 1899 and the 1907 Conventions promote and support the peaceful settlement of disputes, excluding States from membership in such general dispute-settlement mechanism like the PCA is contradictory with these international treaties *raison d'être* and general international law.

3. Duties of the State Depository and of the PCA Administrative Council

Several States act as depositaries for different international treaties, including the US, the Russian Federation, the UK, Switzerland, Belgium, and the Netherlands. In this section, I shall briefly analyze the duties of the State depository to the PCA under the 1907 Convention and the powers of the PCA Administrative Council.

¹⁹ Minutes of the Administrative Council Meeting dated 27 April 1961, p. 2.

²⁰ *Ibid.*, (emphasis added).

²¹ See generally Duncan B Hollis (ed.) 'Conditions on Joining a Treaty', in *The Oxford Guide to Treaties* (Oxford University Press, 2012), pp. 676-694.

²² *Admission of a State to the United Nations (Charter, Art. 4)*, Advisory Opinion, ICJ Reports 1948, p. 63 emphasis added.

²³ See generally Steven R. Ratner, *The Thin Justice of International Law: A Moral Reckoning of the Law of Nations* (Oxford University Press, 2015), pp. 184-219, especially p. 217.

²⁴ See Daniel Turp and François Roch, 'Commentary to Article 6', in Olivier Corten and Pierre Klein (eds.), *The Vienna Convention on the Law of Treaties: A Commentary* (Oxford University Press, 2011), p. 116 (*Corten and Klein VCLT Commentary*).

²⁵ See Articles 1, 2, 55, and 56 of the UN Charter.

3.1 Duties of the Netherlands as the PCA State Depository

The duties of a State depository of international treaties are important and quite sensitive. As Ouguergouz, Villalpando, and Morgan-Foster have noted, the difficulty of defining the precise role of the depository within the law of treaties is illustrated by the countless expressions used to define such role including, archivist, secretary or notary of the treaty, representative, proxy, trustee, intermediary or delegate of the parties, a means of communication between them, a postbox for international conventions, and so on.²⁶ More generally, the duties of the State depository are defined in Articles 76-80 of the 1969 Vienna Convention on the Law of Treaties (1969 VCLT). Article 76(2) established the fundamental principle of impartiality, aimed at ensuring that the depository does not abuse its position in order to promote its own interests.²⁷ The depository has to maintain its impartiality also with respect to States with which it has no diplomatic relations for whatever reason, or with respect to entities, which it does not recognize as a State.²⁸ Article 77 of the 1969 VCLT provides an enumeration of the functions of the depository, which are essentially of an administrative nature. The State depository may express its own views in its role as a State party to a particular treaty. However, the boundary which separates the administrative and political nature of the issues which arise while carrying out the functions of a State depository is not as clear-cut as it might appear.

As a State depository for the two PCA treaties, the Netherlands has a number of relevant functions, laid down under Articles 91-97 of the 1907 Convention.²⁹ Among others, under Article 93 the Netherlands has an obligation to immediately forward to all the other 'Powers' – read PCA member States – a duly certified copy of the notification, as well as of the act of adhesion, mentioning the date on which it received the notification. As State depository, the Netherlands has rightly abstained from pronouncing on whether Palestine or Kosovo are States. The depository must abstain from such debates, except in the hypothetical situation where the relevant act or document concerned emanates from an entity which *manifestly* lacks the constitutive elements of a State.³⁰ More generally, only if no State participating in the treaty has recognized the entity, or if the entity is manifestly lacking the constitutive elements of statehood, the depository might decide on its own that the entity is not qualified to become a party.³¹

²⁶ Fatsah Ouguergouz, Santiago Villalpando, and Janos Morgan-Foster, 'Commentary to Article 77', in Olivier Corten and Pierre Klein (eds.), *The Vienna Convention on the Law of Treaties: A Commentary* (Oxford University Press, 2011), pp. 1716-1717 (footnotes omitted).

²⁷ Tichy and Bittner 'Commentary to Article 76', in O. Dörr and K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties* (Springer-Verlag Berlin Heidelberg 2012), p. 1297 (Tichy and Bittner 'Commentary to Article 76').

²⁸ Tichy and Bittner 'Commentary to Article 76', p. 1306; see also Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers 2009), p. 930-932.

²⁹ For the full text of the 1899 and 1907 Conventions and other relevant legal texts see <<https://pca-cpa.org/en/documents/pca-conventions-and-rules>>.

³⁰ Fatsah Ouguergouz, Santiago Villalpando, and Janos Morgan-Foster, 'Commentary to Article 77', in *Corten and Klein VCLT Commentary*, p. 1737 (emphasis added).

³¹ Tichy and Bittner 'Commentary to Article 77', pp. 1317-1318.

3.2 The Powers of the PCA Administrative Council

Article 28 of the 1899 Convention and Article 49 of the 1907 Convention which lay down the competences of the PCA Administrative Council emphasize that this body 'will decide all *questions of administration* which may arise with regard to the operations of the Court.' As shown by the *travaux préparatoires* concerning Article 28 of the 1899 Convention (which is similar to Article 49 of the 1907 Convention),³² the word 'administration' was inserted in this Article to limit the competences of the Administrative Council to those of an *administrative nature*.

In the absence of explicit provisions under the 1899 or the 1907 Convention or PCA Regulations to that effect, the PCA Administrative Council is not entitled to suspend or remove from the list of Member States of the PCA those States which have duly notified their intention to be bound by one or both of the PCA Conventions. Suspending or removing a State from membership of the PCA is not a question of administration, but one which has a clear legal and political nature.

4. Concluding Remarks

In its next meeting the PCA Administrative Council should try to solve the current legal limbo concerning the PCA membership of Palestine and Kosovo. From a strict legal perspective, in accordance with Article 95, the 1907 Convention has entered into force for Palestine on 29 December 2015 and for Kosovo on 5 January 2016. Palestine and Kosovo fulfill *prima facie* the criteria for membership in the PCA under the 1907 Convention and general international law and have followed in good faith the requirements for becoming a member of the PCA under the 1907 Convention. The majority of the 117 States which have acceded to one or both of the PCA's founding conventions have recognized Palestine and Kosovo and many others recognize official documents issued by the Palestinian and Kosovar authorities. While the different practices concerning membership in the PCA followed by individual States and the PCA Administrative Council over the years are varied and inconclusive, the Preambles of the 1899 and the 1907 Conventions, the very nature of these conventions establishing a dispute settlement mechanism, as well as subsequent practice seem to support a broad basis for membership in the PCA. The member States of the PCA can adopt specific rules concerning membership, pursuant to Article 60 of the 1899 Convention or 94 of the 1907 Convention, but such rules cannot be applied retroactively to States who have already complied with the present requirements for PCA membership. Membership in the PCA would allow Palestine and Kosovo to have access to international justice and peaceful settlement of international disputes with both State and non-State actors.

³² Excerpt from Minutes of the Fifth Meeting dated 17 July 1899, p. 609.