

Legal Fact Sheet – Palestinian Statehood According to International Law

International law has various theories about the attributes of statehood, and as a result there are widely-differing opinions among experts as to whether Palestine possesses these attributes. The declarative theory recognises the statehood of a territorial entity as long as the normative conditions of the Montevideo Convention¹ are met. In contrast, the constitutive theory requires other countries to recognise the statehood of this territorial unit. There are also other arguments which are based on historical considerations.

Attributes of Statehood as Defined by the Declarative Theory

Article 3 paragraph 1 of the Montevideo Convention states that “the political existence of the state is independent of recognition by the other states.” This is generally understood to mean that the sovereignty of a state should be declarative, i.e. based on purely normative principles and independent of political recognition by other states. If this declarative theory of statehood is to be followed, then four basic criteria need to be present, as set out in the 1933 Convention. These are:

- a) A permanent population: the criterion of a permanent population presents no problems and is unchallenged in the case of the Palestinian territories.
- b) A defined territory: here expert opinions vary widely. The Palestinian territories are divided into the West Bank, the Gaza Strip and East Jerusalem and the border between the Palestinian territories and Israel is disputed. This has raised questions about whether this fragmentation and indeterminate borders undermine the required conditions for territorial integrity.² In answer to this it has been pointed out that the territorial integrity of Palestine has been recognised and confirmed in UN Security Council resolutions, by the General Assembly and the International Court of Justice.³ The limited level of control over the territories would not compromise its integrity because this is due to a foreign occupation. So it is argued that the fragmentation of

1 The Montevideo Convention was signed by 19 American states on December 26, 1933. It covers the rights and duties of states.

2 Cf. Robert Weston Ash, “Is Palestine A State? A Response to Professor John Quigleys Article ‘The Palestine Declaration to the International Criminal Court: The Statehood Issue’,” Rutgers Law Record, 36, 2009.

3 Cf. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion), ICJ Report 136, July 9, 2004, articles 87-88.

the territories and the lack of defined borders are not relevant criteria.⁴

Exclaves and fragmented territories such as Gaza, East Jerusalem and the West Bank also exist in other regions and states such as Alaska, Gibraltar and Kaliningrad. At the same time, it is difficult to use the lack of defined borders between the Palestinian territories and Israel as an argument against the criterion of a defined territory when the same undefined border also applies to Israel, where it is not considered a problem.

c) A government: it is debatable whether, in terms of international law, the Palestinian government exercises sufficient authority over its territories. The problem is that the Palestinians only have full control over parts of their territories. In the Oslo Accords only certain sections of the Palestinian territories were granted limited autonomy,⁵ while 83 per cent of the West Bank is under the total or partial control of Israel.⁶ Also in the Gaza Strip, after the evacuation and the withdrawal of the Israeli military in 2005, the control of external security still remained with Israel. However, it is disputed whether it is absolutely necessary for the government to have effective control over its territories or whether the existence of a normative government is sufficient.

Supporters of Palestinian statehood argue that the word "government" is not qualified by the adjective "effective" in the Montevideo Convention. Instead it points to a new state practice where territorial units can be recognised as states even if they do not exercise full authority at the time this recognition is granted. This is the case with the Democratic Republic of Congo, Bosnia and Herzegovina, East Timor, Kosovo and Guinea-Bissau. At the same time other territorial units have been refused international recognition despite exercising governmental authority because they lacked the right to self-determination (as happened in Rhodesia). Therefore it has been proposed that the internationally-recognised right to self-determination should be applied to balance out the lack of an effective government.⁷

The right to self-determination is an inalienable right which applies equally to all

4 Cf. Alain Pellet, "The Palestinian Declaration and the Jurisdiction of the International Criminal Court," *Journal of International Criminal Justice* 2010, 8 (4), 981-999; John Quingly, *Rutgers Law Record*, Vol. 35, 2009.

5 Cf. "The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip" (Oslo Accords), <http://mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/THE+ISRAELI-PALESTINIAN+INTERIM+AGREEMENT> (accessed June 27, 2011).

6 United Nations Office for the Coordination of Humanitarian Affairs (OCHA) (ed.), "Restrictions on Palestinian Access to the West Bank," June 2010.

7 Cf. Hans Köchler, "The Palestine Problem in the Framework of International Law," *I.P.O. Research Papers*.

peoples and which is set out in Article 1 Paragraph 2 of the Charter of the United Nations. This right has been granted to the Palestinians in a series of UN resolutions.⁸ It is also argued that Palestine's attributes of statehood should not depend on the wishes of Israel, as an occupying force cannot affect a government's sovereignty.⁹

This is countered by the argument that even before the occupation the West Bank and Gaza Strip were not sovereign, so the assumption that an occupying force has no effect on sovereignty is not applicable in this case.¹⁰

d) A capacity to enter into relations with other states: there is disagreement about whether Palestine has this capacity. On the one hand it is argued that the Palestinians have signed and ratified a range of international agreements such as the Arab Charter on Human Rights and the UNESCO Cultural Heritage Charter. In addition, the Palestinian government is holding talks with other states. On the other hand the argument is that the Oslo Accords excluded certain basic functions of statehood from the Palestinian government's area of responsibility, such as the decision on the establishment of Palestinian diplomatic missions abroad or international diplomatic missions in the West Bank and Gaza Strip.¹¹

Recognition by other States

This purely declarative theory has, however, been widely questioned. The fact that a country meets the requirements of the Montevideo Convention is meaningless if it is not internationally recognised. The "constitutive theory of sovereignty" requires recognition by other states as a prerequisite for statehood.

Reference is often made to the fact that Palestine has already been recognised by a number of states (129, as of January 27 2012), is a member of many different international organisations and has diplomatic status in various different countries.¹² And the fact that the General Assembly recognised the Declaration of Independence by the Palestinian National Council of November 15, 1988 in Resolution 43/177 is seen as further evidence of recognition

8 United Nations General Assembly (Hrsg.), The right of the Palestinian people to self-determination, A/RES/58/163 (22. Dezember 2003)

9 John Quigley, The Palestine Declaration to the International Criminal Court: The Statehood Issue, in: Rutgers Law Record, 35 (2009).

10 Robert Weston Ash, Is Palestine A "State"? A Response to Professor John Quigley's Article, "The Palestine Declaration to the International Criminal Court: The Statehood Issue", in: Rutgers Law Record, 36 (2009).

11 Annex II, §3 (b) Oslo Accords, Article IX (5)(a), Oslo II.

12 | Denmark, France, Germany Ireland, Italy, Norway, Portugal, Spain and the United Kingdom have raised the status of the Palestinian General Delegation to diplomatic missions and embassies.

of the state.¹³ Only the USA and Israel had voted against recognition, Germany abstained.

The opposing argument is that there is still a significant number of states within the international community which have not granted their recognition. Supporters of this view claim that it is also important that the territorial unit in question actually feels ready to claim statehood, but that the Palestinian National Authority is not yet convinced of its own statehood. Instead it uses the concept of statehood as something it hopes to achieve in the future.¹⁴

These arguments may not be so persuasive in future, as the Palestinians are indeed trying to have their status changed through their application to the United Nations for acceptance and recognition.

Historical Considerations

Further arguments for and against Palestinian statehood are based on historical considerations. It has been argued that the State of Palestine has been a sovereign state since the end of the Ottoman Mandate. During the subsequent British Mandate Palestine was run in accordance with Article 22 of the Versailles Treaty under a class A mandate, a category that was intended for independent nations. In Article 22 of the 1919 treaty it states: "Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognised subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory." At this time Palestinians were also given their own nationality and passports for the first time. Their sovereignty was confirmed in the 1947 resolution of the UN General Assembly that established the partitioning of the historical Palestine and which envisaged the setting up of two individual states.¹⁵ The 1988 Declaration of Independence was therefore declared on behalf of the state that had already been formed in 1948. Others argue on the other hand, that a provisional recognition of sovereignty, as came about through Article 22 of the Versailles Treaty, does not necessarily mean that Palestine should be seen as a state today.¹⁶

13 United Nations General Assembly (ed.), Question of Palestine, A/RES/43/177 (December 15, 1988), background paper for the 62nd United Nations General Assembly, <http://un.org/en/ga/62/plenary/palestine/bkg.shtml> (accessed July 14, 2011).

14 Cf. Weston Ash, "Is Palestine A State?", n. 8.

15 John Quigley, "The Palestine Declaration to the International Criminal Court: The Statehood Issue," Rutgers Law Record, 5, 2009.

16 Cf. Weston Ash, "Is Palestine A State?", n. 8.

A State or Not a State?

The complexity of the discussions as to whether Palestine is a state or not a state is due to the fact that there is no relevant international regulatory framework under which the issue of statehood can be dealt with in its entirety. It is generally recognised that neither the fulfilment of the requirements of the Montevideo Convention nor the many common theories of recognition by other states can definitively settle the issue of the statehood of a territorial unit. Neither the fulfilment of the normative requirements nor recognition as a state can in themselves create a new state. In reality the question of statehood seems to revolve more around how other states actually behave towards a particular territorial unit.¹⁷ This includes acceptance in international organisations (such as the United Nations), diplomatic recognition and being party to international agreements. James Crawford argues that while international recognition is important and can help to strengthen the status of a territorial unit, these days the founding of a state is more a question of law and effectiveness, such as the ability of a state to carry out the functions and take on the responsibilities which are linked to statehood.¹⁸ In short, if you act like a state and are treated like a state, then you are a state. One thing surely does not state a hindrance: the internal preconditions of a state: the United Nations and the World Bank have both attested to the fact that the National Authority is now in a position to govern a stable Palestinian state. According to a report by Robert Serry, the UN Special Coordinator for the Middle East, published on April 12, 2011, "the Palestinian National Authority is functioning like a state in all areas such as health, education, energy, justice and security".¹⁹ The World Bank announced at the beginning of April that the Palestinian Leadership had improved their financial administration and the health and education systems were now at a similar level to those of other countries in the region.²⁰

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17 Jean D'Aspremont, Kosovo and International Law: A Divided Legal Scholarship (ESIL Interest Group on Peace and Security (IGPS), debate with O. Corten, P. d'Argent and M. Kohen, March 2008), S 2

18 James Crawford, The Creation of States in International Law (Oxford: Oxford University Press, 2006) S. 421 ff.

19 Office Of The United Nations Special Coordinator for the Middle East Peace Process (Hrsg.), Palestinian State-Building: A Decisive Period (Brüssel: Ad Hoc Liaison Committee Meeting, April 2011).

20 Weltbank (Hrsg.), Building the Palestinian State: Sustaining Growth, Institutions, and Service Delivery. Economic Monitoring Report to the Ad Hoc Liaison Committee (Brüssel: Ad Hoc Liaison Committee Meeting, April 2011).