

Legal Status of Palestine

By Kavitha Giridhar

Since the breakup of the Ottoman Empire, Palestine has been struggling to gain statehood. After World War I, Palestine, along with several other Arab nations, was placed under British rule. When Britain pulled out of the area, every Arab state was granted independence except Palestine. In 1917, Britain called for a Jewish nation to be created in the land of Palestine. As the region became more troubled by mass immigration and violence, Britain handed the matter over to the United Nations. The United Nations (UN) issued a resolution in which it called for a separate Israeli and Palestinian state. Israel accepted this partition and in 1948 declared its independence. Israel has since been recognized as a state by most other states and international organizations. However, Palestine rejected this partition and, despite its attempts, has still not received statehood status. This article will determine whether Palestine has met the requirements for statehood by answering three legal questions: 1) Has Palestine met the requirements for *de facto* statehood? 2) Has Palestine achieved *de jure* statehood? 3) Does Palestine have the right to self-determination?

In order for an entity to be considered a state, it must possess the following qualifications as laid out by the 1933 Montevideo Convention: “a) a permanent population; b) a defined territory; c) government; and d) the capacity to enter into relations with the other states.”¹ These qualifications have been used as the basis for statehood by the international community. Palestine argues that it has met these requirements and therefore has achieved *de facto* statehood. However, to be considered a state an entity must function independently of any other authority.

¹ The 1933 Montevideo Inter-America Convention on the Rights and Duties of a State, 26 December, 1933. Article 1.

Under the Declaration of Principles and the following agreements, it is clear that Palestine is not in full control in any of these four areas. Israel has maintained its overall authority of the region.

It would seem that Palestine has fulfilled the first criterion of a permanent population. The Palestinian peoples share a common culture, history, and nationality and reside in both the West Bank and Gaza Strip. However, it has been contested whether a state can solely have a permanent population or whether it must also exert control over this population. As stated by the Third U.S. Restatement of the Law, the population must be “under the control of its own government.”² While Palestine has been granted many powers over its people, it is still not independent of Israeli control.

The other criteria are met with much more controversy; the second requirement which calls for a defined territory is arguably the most contested of them all. For a state to meet this criterion, it needs to show that first, it has sovereign title over the land and secondly, that the land is adequately defined.³ Palestine does not have sovereign title over the West Bank or the Gaza Strip. The area was granted to Israel as early as 1917 by the British in the Balfour Declaration.⁴ In the Balfour Declaration, Britain recognized the need for a Jewish state and granted the Palestinian land for this purpose. Later Britain turned the issue of a Jewish state over to the League of Nations, but the Balfour Declaration was upheld through the Mandate for Palestine.⁵

² American Law Institute, *Third Restatement of the Foreign Relation Law of the United States* § 201 (1986).

³ Becker, Tal. “International Recognition of a Unilaterally Declared Palestinian State: Legal and Policy Dilemmas.” *Jerusalem Center for Public Affairs*. <<http://www.jcpa.org/art/becker2.htm>>

⁴ Balfour Declaration. 2 November, 1917. The Balfour Declaration of 1917 was a letter from Arthur James Balfour, British Secretary of State for Foreign Affairs to Lord Rothschild for the English Zionist Federation. In this letter Balfour shows his sympathy for the Zionist Movement. He writes, “His Majesty’s Government view with favour the establishment in Palestine of a national home for the Jewish people, and will use their best endeavours to facilitate the achievement of this object, it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country.”

⁵ The Mandate for Palestine. 24 July, 1922. The Council of the League of Nations. Preamble, para. 2. “The Principal Allied Powers have also agreed that the Mandatory should be responsible for putting into effect the

This mandate established the legal right of the Jewish peoples to the land of Palestine. The Permanent Court of International Justice, the UN Special Commission on Palestine, and the Council of the League continue to uphold the Mandate for Palestine.

As the League of Nations dissolved, the issue of Palestine was handed over to the United Nations. In UN General Assembly Resolution 181, the United Nations called for a partition of the land into both a Jewish State and an Arabic State.⁶ Resolution 181 is often used as evidence of Palestine's sovereign title over the West Bank and Gaza Strip, though this remains unfounded. The United Nations tried to create a state, which goes well beyond the powers granted to it by the UN Charter. As stated in Chapter IV, Article 10, UN resolutions are only recommendations and not binding law.⁷ Furthermore, the UN abandoned Resolution 181 with the passing of Security Council Resolutions 242⁸ and 338⁹.

Additionally, it was Palestine's rejection of Resolution 181 that prevented its adoption. In the Palestine National Charter, Article 19 it states that "The Partition of Palestine, which took place in 1947, and the establishment of Israel, are fundamentally invalid..."¹⁰ For decades Palestinians have declared the partition void, therefore rejecting sovereign title to the area. Also, by signing the Declaration of Principles (DOP) in 1993, Palestine acknowledges that sovereign title of the West Bank and Gaza Strip had not yet been resolved. Article V of the DOP states that future permanent status negotiations shall cover the issue of borders in the future, but as of right

declaration originally made on November 2nd 1917, by the Government of His Britannic Majesty, and adopted by the said Powers, in favor of the establishment in Palestine of a national home for the Jewish people."

⁶ United Nations General Assembly Resolution 181. 29 November, 1947. Part II.

⁷ United Nations Charter, Chapter IV, Article 10. 1945. "The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters."

⁸ UN Security Resolution 242. 1967.

⁹ UN Security Resolution 338. 1973.

¹⁰ The Palestine National Charter. 17 July 1968. Article 19.

now, Palestine does not have sovereignty over the land.¹¹ The DOP and latter agreements granted certain powers to Palestine but never sovereign title over the land.

The second part of territory is definition. As of this time, Palestine does not have a sufficiently defined territory. In the past, entities have been denied statehood due to such fragmentation. For example, Britain did not recognize Bophuthatswana because it consisted of six regions, and Lithuania was not recognized in 1919 by the Allied Powers because its borders were not sufficiently defined.¹² In same manner, the land of Palestine is too fragmented and to interspersed with Israelis (whom they cannot govern) to have a defined territory. Since Palestine does not possess sovereign title over a defined territory, it can be said that it has not met the second requirement of *de facto* statehood.

Thirdly, an entity must have a government to be considered a state. The *Encyclopedia of Public International Law* states that “the government, in exercising its power, must be capable of acting independently of foreign governments.”¹³ Palestine does not possess such independence for it rules under the overarching authority of Israel. The Declaration of Principles (DOP), which was signed by both sides, gave limited powers to the Palestinian National Authority. Article I, Section 1 of the DOP states that:

“Israel shall transfer powers and responsibilities as specified in this Agreement from the Israeli military government and its Civil Administration to the Council in accordance with this Agreement. Israel shall continue to exercise powers and responsibilities not so transferred.”¹⁴

¹¹ Declaration of Principles On Interim Self-Government Arrangements. 13 September 1993. Article V(3). “Jerusalem, refugees, settlements, security arrangements, borders relations and cooperation with other neighbors, and other issues of common interest.”

¹² Becker, supra note 3.

¹³ Doehring, Karl. “State,” *Encyclopedia of Public International Law*. R. Bernhardt, ed. 423, 424, 1981.

¹⁴ DOP, supra note 3 at Article 1(1).

All of Palestine's powers are granted by Israel, plainly showing Palestine's lack of independent authority over the area. The DOP also makes clear that there are certain powers that Palestine does not possess. Palestine can create an internal security force but not an army; Israel will continue to defend the area from external threats.¹⁵ Palestine also needs Israel's cooperation in economic fields. In the Interim Accord of 1995, Annex VI Article 4 and 5 define Israel's role in helping with infrastructure, agriculture, industry etc. in the Palestinian area.¹⁶ Palestine also cannot enter into any relations with foreign nations, though this will be discussed later on.

Furthermore, the 1994 Agreement of the Gaza Strip and Jericho calls for the creation of a joint committee called the Civil Affairs and Cooperation Committee to handle civil affairs in the region.¹⁷ Members from both Israel and Palestine are to meet once a month to discuss civil matters including infrastructure, licensing, hospitalization, transportation and other such matters.¹⁸ In this agreement Israel also states it has authority over "the Settlements, the Military Installation Area, Israelis, external security, internal security and public order" and "shall exercise its authority through its military government" in the region.¹⁹ This again shows that it is Israel who has the overriding authority of the area. These are just some examples of cooperative efforts that are needed in order for Palestine to function. It is clear that the Palestinian government is not independent of foreign government rule, namely Israel, and therefore does not meet the third requirement of statehood.

¹⁵ DOP, supra note 11 at Article VIII.

¹⁶ Oslo Interim Accord. 28 September, 1995. Annex VI Article 4 and 5

¹⁷ Agreement on Gaza Strip and the Jericho Area. 4 May 1994. Article 3(5).

¹⁸ Supra note 17 at Annex II, Article 1A

¹⁹ Supra note 17. Specifically Article V, 3 states: "a) Israel has authority over the Settlements, the Military Installation Area, Israelis, external security, internal security and public order of Settlements, the Military Installation Area and Israelis, and those agreed powers and responsibilities specified in this Agreement. b) Israel shall exercise its authority through its military government, which, for that end, shall continue to have the necessary legislative, judicial and executive powers and responsibilities, in accordance with international law. This provision shall not derogate from Israel's applicable legislation over Israelis in personam"

The last component of *de facto* statehood is the ability of an entity to conduct foreign relations. Palestine cannot make foreign decisions or enter into foreign relations without the cooperation of Israel. Here, again, Palestine does not function independently but rather under Israel's authority. Palestine's ability to enter foreign relations is severely limited by the Interim Accord of 1995. Article IX, Section 5, which lays out the Powers and Responsibilities of the Palestinian Council, states that:

“...the Council will *not* have powers and responsibilities in the sphere of foreign relations, which sphere includes the establishment abroad of embassies, consulates or other types of foreign missions and posts or permitting their establishment in the West Bank or the Gaza Strip, the appointment of or admission of diplomatic consular staff and the exercise of diplomatic relations [emphasis added].”²⁰

When looking at this article, one can clearly see that Palestine does not have the capacity to enter into foreign relations. Under this accord, Palestine is not able to conduct any diplomatic relations. Diplomacy is a key component of foreign relations and, in general, a key component of statehood. States communicate with one another through diplomatic means, and diplomacy is also a formality of recognition.

Article IX Section 5(b) lays out the few circumstances in which Palestine can sign agreements with other states or organizations.²¹ However, this still does not qualify Palestine as having the capacity to enter foreign relations. First of all, section 5(c) clearly states that the

²⁰ Supra note 16 at Article IX Section 5(a).

²¹ Supra note 16 at Article IX Section 5(b). This section stipulates that the PLO can conduct relations with other states or international organizations in only the following cases: “1) economic agreements, as specifically provided in Annex V of this Agreement; 2) agreements with donor countries for the purpose of implementing arrangements for the provision of assistance to the Council; 3) agreements for the purpose of the implementing the regional development plans detailed in Annex IV of the DOP or in agreements entered into in the framework of the multilateral negotiations; and 4) cultural, scientific and educational agreements.”

“agreements referred to in subparagraph 5.b above, shall not be considered foreign relations.”²²

By signing this agreement, Palestine acknowledges that it does not conduct foreign relations.

Furthermore, these exceptions again show that Palestine has limited foreign relations and is not independent from Israel.

Additionally, the DOP Article XI creates an Israeli-Palestinian Economic Cooperation Committee to promote the development of the West Bank and the Gaza Strip.²³ Palestine therefore does not have the capacity to enter into economic agreements with other states without the approval of Israel. Also, as mentioned previously, Palestine does not have the power to create an army.²⁴ A state must have the power to create an army if it so chooses, in order to protect itself in the event that hostile foreign relations arise. Palestine does not have this option. Section 2 of Article IX on Laws and Military Orders reiterates this point: “Both parties will review jointly laws and military orders presently in remaining spheres.”²⁵ Under the terms of both the Interim Agreements and the Declaration of Principles, it is clear that the powers Palestine possesses do not extend to the realm of foreign relations. By signing these agreements, Palestine acknowledged and *accepted* its inability to conduct foreign relations. Without this fourth component, Palestine has not achieved *de facto* statehood.

Therefore, Palestine has not met any of the requirements needed to fulfill *de facto* statehood. Palestine does not have a permanent population in which it possesses control over. Nor does Palestine have sovereign title over a defined territory. The Palestine National Authority is an interim government and does not meet the third criterion of an independent government. Finally, Palestine does not have the capacity to enter into foreign relations.

²² Supra note 16 at Article IX Section 5(c).

²³ DOP, supra note 11 at Article XI.

²⁴ DOP, supra note 15.

²⁵ DOP, supra note 11 at Article IX, Section 2.

Palestine has been granted limited powers over the West Bank and Gaza Strip, while Israel still maintains the overarching authority over the area. Until Palestine can act independently of Israel's rule, it cannot be considered a *de facto* state.

Yet, Palestine argues that it has obtained *de jure* statehood. While it is true that a number of states have recognized Palestine as a state, legally it is still not considered one. Individual states' recognition of Palestine, does not amount to statehood. First, premature recognition of a state is a violation of international law.²⁶ In principle a state can only recognize another state when it has met *de facto* requirements of statehood. As proved earlier, Palestine has not achieved *de facto* statehood, and any state's recognition of Palestinian statehood should be considered void under international law.

Second, international organizations have not granted statehood status to Palestine. For example, the World Health Organization, the European Union, and the United Nations do not recognize Palestine as a state. Palestine has Observer Status²⁷ in the United Nations, not Member Status. Palestine shares such status with the Red Cross, the International Institute for Democracy and Electoral Assistance, and 45 other similar entities.²⁸ Such status shows that the UN considers Palestine an international organization rather than a state. States may individually recognize Palestine, but the international community as a whole does not recognize Palestine as a state. Therefore Palestine is not a state by *de jure* standards as well.

Finally Palestine declares that it has a right to self-determination and therefore has the right to rule itself as a state would. The United Nations recognizes a right to self-determination

²⁶ UN Charter, Supra note 7 at Article 2(4). "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

²⁷ A/RES/3237 (XXIX). 22 November, 1974. & A/RES/43/177. 15 December, 1988.

²⁸ United Nations Dag Hammarskjöld Library. "Organizations Granted Observer Status in the General Assembly." 29 February, 2004. < <http://lib-unique.un.org/lib/unique.nsf/Link/R02020>>

in Article I (2).²⁹ Article 3 of the Draft United Nations Declaration on the Rights of Indigenous Peoples defines self-determination as the right of an entity to “freely determine their political status and freely pursue their economic, social and cultural development.”³⁰ Palestine has been granted a great degree of self-determination. Under Article VI (2) of the DOP, Palestine has power over its “education and culture, health, social welfare, direct taxation, and tourism.”³¹ Palestine has the power to freely manage social, cultural, and—to a certain degree—economic affairs. Moreover, nowhere is it stated that the right to self-determination equals a right to statehood. Israel has granted Palestine numerous powers in which it has obtained a great degree of self-determination.

Palestine is an autonomous entity, not a state. Palestine has not yet met the *de facto* requirements of statehood. To recognize Palestine as a state prematurely would only further destabilize the area. The DOP, the Interim Accord and subsequent agreements are accepted by both sides and acknowledge the need for Israel’s authority and presence in the area. While Israel may have the overarching authority of the area, Palestine has been granted a significant degree of self-determination. However, the right to self-determination does not equal a right to statehood. In Israel and Palestine’s search for peace, stability becomes evermore plausible, and with stabilization the chance of Palestinian statehood increases. However, at this point and time, Palestine cannot legally be considered a state under international law.

²⁹ UN Charter, *Supra* note 7 at Article 1(1). Under the Purposes of the UN, Article I(1) states: “To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.”

³⁰ Draft United Nations Declaration on the Rights of Indigenous Peoples. *Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities*. E/CN.4/Sub.2/1994/2/Add.1 (1994). Article 3. “Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”

³¹ DOP *supra* note 11 at Article VI(2).