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# Measuring Up: Do the Palestinian Homelands Constitute a Valid State Under International Law?

## I. Introduction

On November 15, 1988, the Palestine Liberation Organization's (PLO) governing body, the Palestine National Committee, issued a declaration of independence for the Israeli-occupied West Bank and Gaza Strip.<sup>1</sup> In addition, the PLO accepted United Nations Security Council Resolution 242, and in doing so, implicitly accepted co-existence with Israel.<sup>2</sup> As a result of the November 15 declaration, controversy has arisen over whether the Palestinian Homelands constitute a valid state under international law.

The "traditional" definition of a "state" as adopted by the Montevideo Convention on the Rights and Duties of States requires that the state as "person" under international law must possess: (a) a permanent population; (b) a defined territory; (c) a government; and (d) the capacity to enter into relations with other states.<sup>3</sup> Should the Palestinian Homelands be found to possess these qualifications for statehood, there remains further disagreement over whether this alone is enough to qualify as a state. There is considerable contention among writers as to whether recognition is declaratory or constitutive; that is, whether a state, possessing the necessary qualifications, exists prior to recognition or whether it is brought into being by the act of recognition.<sup>4</sup> This Note concludes that the Palestinian Homelands possess the necessary qualifications for statehood. Furthermore, recognition is a declaratory act, unnecessary to bring a state into existence. In view of these facts, this Note asserts that the Palestinian Homelands constitute a state under international law.

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1. Friedman, *Egypt Looks to U.S. for Next Move to Nudge Israel Toward Talks*, *Christian Sci. Mon.*, Nov. 16, 1988, at 7, col. 1.

2. *Id.* (citing S.C. Res. 242, 22 U.N. SCOR, Supp. (Res. & Dec.) at 8-9, U.N. Doc. S/INF/22/Rev. 2 (1967)).

3. 1 D. O'CONNELL, *INTERNATIONAL LAW* 284 (2d ed. 1970) (citing the Montevideo Convention on the Rights and Duties of States, Dec. 26, 1933, art. 1, 49 Stat. 3097, 165 L.N.T.S. 19, 25).

4. P. JESSUP, *A MODERN LAW OF NATIONS* 43 (1948).

## II. The Requirements of Statehood

### A. A Permanent Population

In satisfaction of the requirements of statehood, the territories of the West Bank and Gaza Strip remain predominantly Palestinian.<sup>5</sup> This permanent population strongly supports the PLO and the declaration of independence.<sup>6</sup> The Palestinians constitute a "people," united in their goal of an independent Palestinian State.<sup>7</sup> The Palestinians view the declaration as a method to translate their uprising against Israeli-rule into tangible political gains.<sup>8</sup> On the date marking the uprising's twelfth month, Palestinians showed their support for both the uprising and the declaration with a general strike: they blocked roads, closed businesses and displayed outlawed national flags.<sup>9</sup>

### B. A Defined Territory

The West Bank and the Gaza Strip form the territory of the new Palestinian State.<sup>10</sup> While it may be argued that the territory is not under Palestinian control, Israel's claim to the territory is disputed as well. United Nations Security Council Resolution 242 calls for Israel's withdrawal from these and other Arab lands it militarily occupied in 1967, in exchange for peace.<sup>11</sup> Every nation, including the United States, has declared that the territories occupied by Israel in the 1967 war are "occupied territories" in both a factual and legal sense.<sup>12</sup> Israel alone declares that these territories are "liberated."<sup>13</sup> The PLO has abandoned the Palestine National Charter's call for Israel's destruction, yet Israel remains opposed to a two-state solution to the Arab/Israeli conflict.<sup>14</sup>

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5. Friedlander, *The PLO and the Rule of Law: A Reply to Dr. Anis Kassim*, 10 DEN. J. INT'L L. & POL'Y 221, 231 (1981).

6. See Moffett, *Palestinians Set to Declare Territories Independent*, Christian Sci. Mon., Nov. 10, 1988, at 1, col. 1. "The declaration comes in response to pressures from residents of the West Bank and Gaza." *Id.*

7. Friedlander, *supra* note 5, at 230. "A 'people' consists of a community of individuals bound together by mutual loyalties, an identifiable tradition, and a common cultural awareness, with historic ties to a given territory. Their collective behavior is based upon the pursuit and implementation of specific goals which give the community at large a group identity and a shared sense of values." *Id.*

8. Moffett, *supra* note 6, at 29, col. 1.

9. *Id.*

10. See text accompanying notes 1-2.

11. Friedman, *supra* note 1, at 7, col. 1 (citing S.C. Res. 242, 22 U.N. SCOR, Supp. (Res. & Dec.) 8-9, U.N. Doc. S/INF/22/REV. 2 (1967)).

12. Kassim, *A Response to Professor Robert A. Friedlander*, 10 DEN. J. INT'L L. & POL'Y 237, 239 (1981).

13. *Id.*

14. Moffett, *Political Program Transforms Basis for Dealing With Israel*, PLO Sources Say, Christian Sci. Mon., Nov. 16, 1988, at 7, col. 2; Houk, *World Backing is Key for Newly Independent State*, Christian Sci. Mon., Nov. 10, 1988, at 9, col. 1.

Arguments have been put forward that the PLO, recognized as the sole and legitimate representative of the Palestinian people, does not control any defined territory and therefore, cannot claim authority or status as the government of the Palestinian State.<sup>15</sup> Official control over a territory, however, is not a decisive criterion for statehood.<sup>16</sup> The American experience in Vietnam is an excellent example. The United States forces were in control of the territory of South Vietnam, while the Viet Cong was in full control of the population.<sup>17</sup> As Israel's contested admission into the United Nations shows, this still may not prevent an entity from becoming a member, though the existence of one of the traditional qualifications of statehood may be in dispute.<sup>18</sup> Although the criteria for United Nations membership are not identical with the criteria for Statehood, one requirement is that the applicant be a state.<sup>19</sup> In admitting members to the United Nations, the extent of population and territory seems to be of less significance in practice than the degree of autonomy and the stability of government.<sup>20</sup>

### C. Government

The PLO, from both factual and judicial perspectives, is the legitimate successor to the Arab Higher Committee and subsequently the Government of All Palestine, and thus the sole and legitimate representative of the Palestinian people.<sup>21</sup> The PLO exercises powers that can only be implemented by governmental authorities. These powers are manifested in various forms such as extradition powers and taxation authority.<sup>22</sup>

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15. Kassim, *The Palestine Liberation Organization's Claim to Status: A Juridical Analysis Under International Law*, 9 DEN. J. INT'L L. & POL'Y 1, 29-30 (1980) (citing 30 U.N. SCOR, U.N. Doc. S/INF/31, at 7 (1975)). "The successive resolutions passed by United Nations organs reflect and emphasize the world community's view that the PLO is the sole and legitimate representative of the Palestinian people. The most significant development in this regard is the Security Council's decision, taken first in 1975, to invite the PLO to participate in its discussions as if it were a United Nations member state." *Id.*

16. *Id.* at 28.

17. *Id.*

18. D. O'CONNELL, *supra* note 3, at 287. "The Arab States objected to Israel's membership on the ground of doubt as to defined territory . . . ." *Id.*

19. P. JESSUP, *supra* note 4, at 47.

20. D. O'CONNELL, *supra* note 3, at 285.

21. See Kassim, *supra* note 15, at 15-18. Kassim outlines the development of the Government of All Palestine and, its successor, the Arab Higher Committee until the Committee itself was succeeded by the PLO in 1964.

22. *Id.* at 24. "The official policy proclaimed by the PLO with regard to plane hijacking is that it is a crime punishable under the Palestine Penal Code . . . . [I]n November 1974, eleven men hijacked a British Airways jet in Dubai, later surrendering in Tunis. These hijackers were ultimately turned over to the PLO which later announced that it had inflicted severe punishment on them." *Id.* at 24, n.133. "However, [i]t is regarded that El-Al Israel Airlines is a military institution and that all its pilots are military reserve officers." *Id.* at 25. "The PLO exercises tax powers whereby, directly and indirectly, it levies taxes on Palestinians working in various countries." Several Arab countries have laws deducting 3-6% of the monthly salaries

Internally, the PLO has structured itself as a government in process.<sup>23</sup> The Palestine National Charter and its Fundamental Law have modeled PLO institutions after those of established governments.<sup>24</sup> The Palestine National Committee serves as the "Palestine Parliament" with supreme legislative authority.<sup>25</sup> The Executive Committee is the "Palestine Cabinet" which has various departments and agencies to serve Palestinian values.<sup>26</sup> The Political Department, with PLO offices in various countries acting as "embassies," serves as the Ministry of Foreign Affairs.<sup>27</sup> The Military Department serves as the Ministry of Defense, in charge of all military operations including regular troops, guerrillas, and the purchase and manufacture of weapons.<sup>28</sup> The Palestine National Fund is similar to a Ministry of Finance and National Economy.<sup>29</sup> The Department of Information, in charge of the PLO newspapers, radio stations, and news agency, and the Departments of Education, Social Affairs, Research and Planning, Health, and Occupied Territories also exist.<sup>30</sup>

In addition, the Palestine National Congress created a judiciary by means of the Revolutionary Court Order under the PLO.<sup>31</sup> The Chairman of the PLO Executive Committee set up the Revolutionary Penal Code, the Revolutionary Code of Criminal Procedures, and the Revolutionary Rehabilitation Code in 1979, which apply to all Palestinian people.<sup>32</sup>

While the title "government" appears to be more prestigious than "organization," it is the basis of the power and authority exercised that is the crucial criterion, not the title.<sup>33</sup> The PLO acts as the government of the Palestinian State. Compared to its predecessors, the Arab Higher Committee and the Government of All Palestine, the PLO has established an unprecedented level of authority and representation.<sup>34</sup> As previously mentioned, it exercises typical governmental powers, has established social controls, and exercises political power over the Palestinian people both in and outside the West

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of Palestinians working in their countries for payment to the Palestine National Fund. *Id.*

23. *Id.* at 26.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at 27.

28. *Id.* at 26.

29. *Id.* at 27.

30. *Id.*

31. *Id.* At its sixth session, held in 1969, the Palestine National Congress resolved to create the Revolutionary Court Order under the PLO. *Id.*

32. *Id.* The codes are applied to all resistance groups of the PLO as well as "to all sectors of the Palestine People." *Id.*

33. *Id.* at 32.

34. Kassim, *supra* note 15, at 15-18.

Bank and Gaza Strip territory.<sup>35</sup> According to existing legal norms, a nation "is a community of peoples, adhering to a single sovereignty, accepting mutually binding authority structures and occupying a given territory within ascertainable geographic boundaries. This collective entity, upon exercising political power and establishing social controls, becomes a nation-state . . . ."<sup>36</sup> Thus the occupants of the Palestinian Homelands, and their government, the PLO, as a collective entity, meet the qualifications of a nation-state.

#### D. Capacity to Enter into Relations with Other States

While a state may be admitted to the United Nations regardless of some disputed qualifications of statehood, the decisive legal criterion governing the attitude towards admission has been the capacity to conduct foreign affairs.<sup>37</sup> The PLO, as government of the Palestinian State, possesses this capacity. After being granted permanent observer status by the United Nations in 1974, the General Assembly called for the invitation of the PLO "to participate in all efforts, deliberations and conferences on the Middle East which are held under the auspices of the United Nations, on an equal footing with other parties . . . ."<sup>38</sup>

The United Nations Security Council invited the PLO in 1975 to participate in its discussion concerning the Israeli raids on Palestinian refugee camps in Lebanon.<sup>39</sup> The invitation was extended to the PLO as if it were a member state in accordance with rule 37 and not on the basis of rule 39 of the Security Council rules of procedure.<sup>40</sup> Rule 37 applies to "[a]ny member of the United Nations which is not a member of the Security Council . . . ;" whereas rule 39 applies to "persons."<sup>41</sup> The Security Council again invited the PLO to participate under rule 37 in 1976 and 1978 in discussions concerning the Middle East situation.<sup>42</sup>

In March 1978, after Israel invaded Lebanon to uproot PLO bases, the PLO showed its ability to conduct foreign affairs and ful-

35. See text accompanying notes 21-32.

36. Friedlander, *supra* note 5, at 230.

37. D. O'CONNELL, *supra* note 3, at 288.

38. Friedlander, *supra* note 5, at 233 n. 71 (citing G.A. Res. 3237, 29 U.N. GAOR, Supp. (No. 31) 4, U.N. Doc. A/9631 (1974)). See also Kassim, *supra* note 15, at 29 (citing G.A. Res. 3375, 30 U.N. GAOR, Supp. (No. 34) 3, U.N. Doc. A/10034 (1975)).

39. Kassim, *supra* note 15, at 20.

40. *Id.* (citing 30 U.N. SCOR, U.N. Doc. S/INF/31, at 7 (1975)).

41. *Id.*

42. *Id.* The decision to invite the PLO to participate in the debate was adopted in 1976 by 11 votes to 1 (the United States), with 3 abstentions. *Id.* at 2, n.2 (citing 30 U.N. SCOR, U.N. Doc. S/INF/32, at 1 (1976)). When the Council convened on Mar. 19, 1978, to discuss Israel's invasion of southern Lebanon, the PLO was invited to participate at the request of Kuwait. At the suggestion of the United States representative, the Kuwaiti proposal was put to a vote and was adopted 10 votes to 1, with 4 abstentions. *Id.* at 2, n.2 (citing U.N. Chronicle, Apr. 1978, at 6).

fill international obligations as is required of a sovereign state.<sup>43</sup> The Chairman of the PLO's Executive Committee was able to agree to and enforce the United Nations Secretary General's appeal for a general cease-fire.<sup>44</sup> Israel's Chief of Staff admitted in a Jerusalem Post interview that the success of the United Nations interim forces in the territory depended upon the PLO's acceptance of the cease-fire.<sup>45</sup> This amounts to an admission of the PLO's ability to fulfill international obligations.

The Arab League Council accepted Palestine, represented by the PLO, as a full member of the Arab League, equal to all other members, in 1976.<sup>46</sup> The Arab League is a regional political organization concerned with the collective security and the preservation of the political independence and territorial integrity of member states.<sup>47</sup> The PLO's admittance as a full member represents a significant legal development of the PLO's status under public international law.<sup>48</sup> It further illustrates that as government of the State of Palestine, the PLO possesses the capacity to conduct foreign affairs.

In addition, the PLO is a member of several international institutions established to serve community values.<sup>49</sup> An example of this is the Arab Bank for Economic Development in Africa, established in 1974 by eighteen sovereign states for the purpose of financing economic development schemes in Africa.<sup>50</sup> The multilateral treaty constituting the Bank granted it the status of "an international institution enjoying full international legal status."<sup>51</sup> Palestine, represented by the PLO, was admitted as a Bank member with the powers accorded to other member governments.<sup>52</sup>

The Arab Fund for Economic and Social Development was constituted in 1968.<sup>53</sup> By Decree No. 4 of 1976, the Fund's Board of

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43. *Id.* See also D. O'CONNELL, *supra* note 3, at 285. It is clearly the intention of the United Nations Charter "that only fully sovereign states possessed of capacity to fulfill the obligations of membership are qualified for admission." *Id.*

44. Kassim, *supra* note 15, at 24.

45. *Id.* (citing Jerusalem Post, Mar. 31, 1978, at 1, cols. 1-4).

46. *Id.* at 22 (citing Doc. No. D3462/S.66/M.2-919/1976, released by the Secretariat of the League of Arab States).

47. *Id.*

48. *Id.*

49. *Id.* at 21.

50. *Id.* (citing the Agreement establishing the Arab Bank for Economic Development in Africa, art. 3, para. 1, Feb. 18, 1974 (English text released by principal office of the Bank, at Khartoum, Sudan)).

51. *Id.*

52. *Id.* The PLO, representing Palestine, was also admitted as a full member to the Arab Monetary Fund. The Fund was created in 1976 pursuant to an agreement among the governments of twenty-one Arab countries, primarily for the purpose of rectifying deficits in the balance of payments of members states. *Id.* (citing the Articles of Agreement of the Arab Monetary Fund, art. 4(a) (official English text, Nov. 1977)).

53. *Id.* (citing the Agreement Establishing the Arab Fund for Economic and Social Development, May 16, 1968 (English text released by Head Office of the Fund, at Kuwait)).

Governors admitted Palestine, represented by the PLO, as a full-fledged member.<sup>54</sup> "By virtue of Decree No. 6 of 1976, the Board of Governors, having considered [article] 12 of the Agreement establishing the Fund, resolved that the 'Fund accept the guarantee of the [PLO] to loans granted to finance projects in the Palestinian territory . . .'"<sup>55</sup> Article 12 provides, in part, that all lending transactions granted by the Fund to any public or private entity "shall be guaranteed by the [g]overnment" of the state or country in which the project will be initiated.<sup>56</sup> Therefore, the Board of Governors recognized the PLO as the equivalent of a "government."

As has been demonstrated, the Palestinian Homelands, possessed of the traditional qualifications of a permanent population, defined territory, a government, and the capacity to enter into relations with other states, may qualify as a sovereign state under international law.<sup>57</sup> Once in possession of these qualifications, it remains to be seen whether this alone is enough for an entity to qualify as a state, or whether recognition is necessary to bring a state into being.

### III. Recognition is Declaratory

There is no general consensus held by the international community that recognition of a state is declaratory or constitutive.<sup>58</sup> There is disagreement as to whether a state exists prior to recognition or whether it is brought into being by the act of recognition.<sup>59</sup> The split stems from the fact that the declaratory school of thought considers recognition a purely political act, while the constitutive school stresses its legal character.<sup>60</sup>

Opposition to the constitutive view is based on the lack of organization of the international community, as well as the fact that recognition is accorded at the will of established states.<sup>61</sup> Under the constitutive view, the established states have the power to exclude a new aspirant to membership in the community of nations, even though it possesses the necessary qualifications.<sup>62</sup> Certain writers ar-

54. *Id.*

55. *Id.* (quoting the record of the Fifth Meeting of the Board of Governors of the Arab Fund for Economic and Social Development, held at Rabat Apr. 28-29, 1976. *Id.* at 66-67).

56. *Id.* (quoting the Agreement Establishing the Arab Fund for Economic and Social Development, May 16, 1968. (English text released by Head Office of the Fund, at Kuwait)).

57. See text accompanying notes 5-6.

58. P. JESSUP, *supra* note 4, at 43.

59. *Id.*

60. *Id.* at 43-44.

61. *Id.* at 44.

62. *Id.* Indeed, it has been proposed that the United Nations should be universal, all states being members. Under this scheme, members would not independently accord recognition to new states. Rather, the criteria for admission of a new state to the United Nations, and thus the international community, would be the traditional attributes of statehood as well as agreement to the peaceful settlement of disputes called for by the United Nations Charter. In this way, recognition of new states would be only by the decision of the United Nations itself.

gue that there is a duty to recognize when an aspirant actually possesses the attributes of statehood, but there is no organized international machinery to enforce such an obligation.<sup>63</sup>

The constitutive school appears mistaken in its belief that a state comes or could come into existence merely by international recognition. International recognition takes the existence of an independent state for granted.<sup>64</sup> Such recognition, by itself, would not be sufficient to create a new state.<sup>65</sup> It has been stated that:

[t]his is a recognized principle of international theory and practice . . . . International recognition is only a condition for the access of a state into the international community, the state becomes through it a person of international law, but [it] draws its existence from its own internal substance. Its existence is granted at the moment in which its sovereignty has in fact been established.<sup>66</sup>

For an entity to be a sovereign state, it must meet the traditional qualifications of statehood.<sup>67</sup> Furthermore, the fully-sovereign state is one which is not subordinate in its capacity for international action to any other legal entity.<sup>68</sup> However, the state today, and of the future, is tending to become subordinate to a new type of legal entity — the international organization.<sup>69</sup> Thus the term “sovereignty” is a relative one, that when used in reference to a state means no more than that state has plenary but not absolute competence in international law, unfettered by the constitutional constraint of entities like itself.<sup>70</sup>

Just what constitutes sovereignty is vague. The uncertainty of the concept is easily demonstrated. While it is clearly the intention of the United Nations Charter to admit only fully-sovereign states as members, the organization has admitted nations such as Mongolia, whose independence was in dispute at the time of its admission, and the Congo, whose government's effectiveness, and even existence, was in doubt.<sup>71</sup> Czechoslovakia was found to have established sover-

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*Id.* at 48-49.

63. *Id.* at 44. Jessup argues that there is no single established procedure for according recognition, it may be express or implied, unilateral or joint. Recognition may take the form of a declaration, the conclusion of a treaty, or the exchange of diplomatic representatives. *Id.* at 45.

64. Judgment of April 26, 1921, Supreme Administrative Court, Czech, 1 ANN. DIG. 15, at 17 n.(c). [hereinafter Judgment of April 26, 1921].

65. *Id.*

66. *Id.* (quoting the Judgment of October 16, 1919, Supreme Administrative Court, Czech).

67. See *supra* note 3 and accompanying text.

68. D. O'CONNELL, *supra* note 3, at 284.

69. *Id.*

70. *Id.*

71. *Id.* at 288. The independence of Mongolia was questioned by the United States (for a time) and by China.

eignty over the once-Austrian district of Liberec by declaration months before the actual occupation of the territory.<sup>72</sup> In view of these examples, it is clear that the Palestinian State, with its qualifications for statehood and its capacity to fulfill international obligations, has established sovereignty under this nebulous definition.<sup>73</sup> Therefore, having established sovereignty, the State of Palestine already exists.

Recognition is declaratory. Whether express or implied, by treaty or declaration, recognition merely approves a state of facts which already exists.<sup>74</sup> As acknowledged by the American Republics in the Montevideo Convention on the Rights and Duties of States, recognition merely signifies acceptance by the recognizing state of the new state's personality with all the rights and duties determined by international law.<sup>75</sup> In light of this fact, international recognition is not necessary to create a Palestinian State under international law. International recognition will merely serve to strengthen the claim to that which already exists. Clearly, the objective of recognition is to give the state access to the international community.<sup>76</sup>

#### IV. Conclusion

On November 29, 1947, the United Nations General Assembly passed Resolution 181 which called for the partition of the British-mandate territory of Palestine into Jewish and Arab states.<sup>77</sup> Many writers refer to this resolution as the legal basis for the creation of the State of Israel, but gloss over the fact that it is the legal basis for creating the State of Palestine as well. In the course of twenty-four years, the PLO has taken a more moderate stance. Its declaration of independence recognizes the State of Israel and calls for a two-state solution to the Arab/Israeli conflict. Were Israel to recognize the Palestinian declaration of independence, heeding United Nations Security Council Resolution 242 and withdrawing from the Palestinian Homelands, it would be left territorially intact within pre-1967 bor-

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72. Judgment of January 21, 1921, Supreme Administrative Court, Czech, 1 ANN. DIG. 11, at 13. The Court could not accept the contention that the National Committee, or the Czechoslovak State, exercised sovereignty in the district of Liberec only after the occupation thereof by the Czechoslovak military forces on December 16, 1918. *Id.* [hereinafter Judgment of January 21, 1921].

73. See text accompanying notes 5-56.

74. Judgment of January 21, 1921, *supra* note 72, at 13.

75. Judgment of April 26, 1921, *supra* note 64, at 17n.(c).

76. Montevideo Convention on the Rights and Duties of States, Dec. 26, 1933, art. 6, 49 Stat. 3097, 165 L.N.T.S., 19, 25.

77. Houk, *supra* note 14, at 9, col. 1 (citing G.A. Res. 181 (Resolution Concerning the Future Government of Palestine), U.N. Doc. A/519, at 131-32 (1946)).

ders. International recognition should be accorded to the Palestinian State, approving a set of facts which already exist, so that it may take its place in the international community.

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