

# **THE INVOLVEMENT ISSUE OF PALESTINE STATEHOOD IN UNITED NATIONS**

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## ***Abstract***

*The purpose of the study was to assess and to examine the involvement of Palestine statehood in the United Nations for six decades. Although there are principles of international law in the Montevideo Convention that set out the definition, rights and duties of statehood which, in turn regulate the states' behaviours by imposing obligations and sanctions; the Palestine's people repeated requests for statehood has not yet been solved for long period of time. The general objective of this study was to define and to characterize the notion of statehood as it exists in the present-day international legal order, and to examine whether or not such criteria exist in Palestine. To achieve these objectives, non-doctrinal research design and qualitative research approach were used to collect primary data from key informants using interview guide. Secondary data were also generated from relevant different documents through documentary analysis template/matrix. The findings of the study show that the opposition by two veto powerful states alone prevented Palestine's rights to be admitted as a member state to the UN. However, the UN was found to be have an arbitrator role. Palestine used the unilateral action to acquire statehood, but her attempt failed. Therefore, the PLO had only observer entity status. Nevertheless, Palestines believed that more than two-third of the General Assembly would recognize their statehood. In the UN, there were double standards. There was also undemocratic nature of voting in the Organization. The relationship between the United States and Israel in the UN influenced the Palestine's claims for statehood. Regarding Palestine, the UN's situation became a gridlock which had prevented its claims from pursuing further. In the final analysis, the power of decision making got absorbed in the hands of the "Big Five" states which may hinder UN from realizing its 1945 envisaged purposes. In conclusion, the favours on the part of the two veto powers from Israel, as well as undemocratic voting practice in the UN has created unfavourable situation and struggling path for Palestine to achieve statehood status. It is recommended that those who are engaged in the issue should become more proactive and should be genuine in promoting the already established principles and criteria of the statehood in international law to resolve the*

## **Introduction**

Palestinians have applied for statehood to the UN Security Council on the 23<sup>rd</sup> of September 2011. The application to statehood is said to be rebuffed by an American veto. If the issue is taken to the UN General Assembly and in case it wins, then an overwhelming majority of the Palestine entity will gain an “observer” status. Obviously, it is a position short of membership. President Mahmoud Abbas told to thrilled crowds back home that he had conveyed their dreams of statehood to the international community with his address to the UN General Assembly and a formal request for membership. He said, "We went to the United Nations carrying your hopes, your dreams, your ambitions, your suffering, your vision and your need for an independent Palestinian state."<sup>1</sup> The Palestinians have elevated hopes that the UN membership will change things for them.

The Israel's Government and the Congress of United States insist that Palestinian statehood is premature. However, beyond the will of these parties, principles of international law are there to regulate their behaviors by imposing obligations and sanctions.

The Montevideo Convention on the Rights and Duties of States is a treaty signed at Montevideo, Uruguay during the Seventh International Conference of American States on December 26, 1933. It codifies the declarative theory of statehood as accepted part of customary international law.

At the Conference, Franklin D. Roosevelt who was the then President of United States of America and the Secretary of State Cordell Hull declared

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<sup>1</sup> The Economist, Oct 2011.

the Good Neighbor Policy, which opposed US armed intervention in inter-American affairs. The Convention was signed by 19 states. The acceptance of three of the signatories was subject to minor reservations. Those states were Brazil, Peru and the United States.<sup>2</sup>

The Convention sets out the definition, rights and duties of statehood. Most well-known is Article 1, which sets out the four criteria for statehood that have sometimes been recognized as an accurate statement of customary international law as it stipulates: “The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states.”

Furthermore, the first sentence of Article 3 of the Convention explicitly states that, "The political existence of the state is independent of recognition by the other states." This is known as the declarative theory of statehood. A fundamental remark must be underlined by the conditions of Article 1 are limited by Article 11, which forbids the use of military force to obtain sovereignty. Article 11 reflected the contemporary Stimson Doctrine, and it is now a fundamental part of international law through paragraph 4 of the Article 2 of the Charter of the United Nations. Article 11 of the Convention allows a clear distinction between sovereign and puppet states; the latter ones are being excluded from international recognition of statehood.<sup>3</sup>

Some professionals have questioned whether or not these criteria are sufficient, as they allow less-recognized entities like the Republic of China (Taiwan) to claim full status as states. According to the alternative

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<sup>2</sup> Wikipedia. (2012). *Montevideo Convention*, the free encyclopedia, Retrieved on April 6, 2012 from [http://www.en.wikipedia.org/wiki/Montevideo\\_Convention](http://www.en.wikipedia.org/wiki/Montevideo_Convention)

<sup>3</sup> George C. Herring. (2008). *From colony to superpower: U.S. foreign relations since 1776*, Oxford: Oxford University Press, p. 499.

constitutive theory of statehood, a state exists only insofar as it is recognized by other states. The international community has rejected the claim to statehood by numerous entities despite their effective control over their respective territories. The UN Security Council has issued resolutions calling upon member states of the UN to defer from recognizing the four Bantustan states of the Republic of South Africa. The declaration of independence by Katanga from the Congo, Biafra from Nigeria, Chechnya from Russia, Srpska Republic from Bosnia and Herzegovina, Nagorno-Karabakh from Azerbaijan, South Ossetia from Georgia, Abkhazia from Islamic Republic of the Comoros, Somaliland from mainland Somalia respectively has not been recognized by the international community although they have had effective control of their respective territory.

The issue of Palestine evolved through several stages of negotiation talks and discussions and the UN has been actively dealing with the issues of Palestine's statehood. The UN committee has had a very difficult time to understand the problem in Palestine in its accurate context. Their comments on their understanding of the prevailing situation are quoted below.

*Palestine has become the acid test of human conscience....” Mr Asafa Ali, and Mr Zephrin described it as, “One of the most celebrated and well known problem in our epoch,” MrMuniz said, “The General Assembly is dealing with one of the most painful and stirring dramas of all times.” Mr Van Roijen spoke of the Palestine’s problem as: “painful and unfortunately complicated.” Mr Thors, on the other hand, described it as: “a very painful problem perhaps one of the most delicate problems of the world and the most explosive one.” Mr Carias felt that the issue at stake was exceptionally dramatic.<sup>4</sup>*

The Israeli-Palestinian conflict has often had legal and political dimensions. These dimensions cannot be said to be mutually exclusive. They are inextricably intertwined with one another. Most of the principles of

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<sup>4</sup> Jacob Robinson. (1947). *Palestine and the United Nations, prelude to solution*. Westport Connecticut: Greenwood Press Publishers. Pp.198-200.

international law initially started out as purely political agendas and ultimately ended up into principles of international law. Therefore, recognition is at times thought to be of a political act than a legal act. However, what was purely thought to be a political act generates a legal obligation to the recognizing state. This research paper emphasizes on the principles of international law which regulate recognition of state by imposing obligations and sanctions. The study tried to answer the following research questions include: (i) Is Palestine a state according to the principles of international law? (ii) Is the Palestinian bid for statehood premature? (iii) Do internationalizing the Palestinians question and involving UN achieve the Palestinian's dream? and (iv) What will be the effect of acquiring "observer status" in the UN for Palestine towards achieving statehood?

To that end, the general objective of this study was to define and to characterize the notion of statehood as it exists in the present-day international legal order, and to examine whether or not such criteria exist in Palestine. Specifically, the study tried: (i) to explore the traditional criteria and the contemporary criteria of statehood through the declarative theory and made a critical analysis of the question of whether or not the existing factual situations forming part of statehood support the existence of Palestine as an independent and sovereign state; and (ii) to assess whether or not Palestine would be constituted as state through international recognition regardless of the fulfillment of the traditional criterion of statehood. This is done through the constitutive theory of recognition and the practice of the international community. As the study was inspired by the Palestine bid for statehood to the United Nations, it examined the role of UN in fulfilling Palestine statehood.

As the study tried to assess the basic principles of recognition of statehood under international law, its scope was delimited to cover the international legal and political status of the entity labeled as Palestine beginning from the time it was placed under the British Mandate by the League of Nations, its status during the era of the United Nations, makes a deeper analysis of the Montevideo Convention and whether or not Palestine satisfies the criteria of statehood set forth in the Convention. The study was also aspired to answer such questions as: What international legal and political status can we attach to Palestine? What are the roles and the responsibilities of the United Nations on Palestine to deal with and to make an inference of statehood? Generally, it explored the effect of a UN membership or an “observer status” both in principle and in practice. The study also considered the practical and procedural politics of the UN versus principles of international law.

## **Literature Review**

According to Forji Amin George, Palestine can basically be classed into three different generations:

*the ancient Palestine (Philistine or "Biblical Palestine"), the classical/contemporary Palestine (used to include the whole territories of Israel and Palestine, then placed under the protectorate of United Kingdom since 1918 - The State of Israel was created in 1948 by UNO in agreement with the unanimous international community (except for Arab countries), on the part of this territory), and, finally, the new Palestine (Palestine as it is or is to be, today excluding Israel).*<sup>5</sup>

State of Palestine is also said to be proclaimed: “in 1988, but in exile. Land was granted to the state by Egypt (Gaza Strip) and Jordan (west Bank), but

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<sup>5</sup> Forji Amin George. (2004). Is Palestine a state? Helsinki University, Retrieved on April 6, 2012, from [http://www.expertlaw.com/library/international\\_law/palestine.html](http://www.expertlaw.com/library/international_law/palestine.html)

under full Israeli occupation, and parts of these lands were used to establish Jewish colonies.”<sup>6</sup>

There are seven chief and foundational events of an insuperable importance that have brought about the current international status of Palestine. These are: The Ottoman Administration of Palestine, the British Mandate for Palestine, the 1947 UN Partition Resolution for Palestine, Palestinian territory occupied by Israel in the 1967 war and which still remains under the occupation, the west Bank and the Gaza since 1967, Jerusalem and the old city; and the status of the west Bank and the Gaza after the 1995 Interim Agreement between the two parties.<sup>7</sup>

State recognition signifies the decision of a sovereign state to treat another entity as also being a sovereign state. Recognition can be either expressed or implied and is usually retroactive in its effects. It does not necessarily signify a desire to establish or maintain diplomatic relations. There is no definition that is binding on all the members of the community of nations on the criteria for statehood.<sup>8</sup> In actual practice, the criteria are mainly political, but not legal. Having cited the recognition of the unborn Polish and Czech States in World War I, L.C. Green explained that, “since recognition of statehood is a matter of discretion; it is open to any existing state to accept as a state any

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<sup>6</sup> *ibid*

<sup>7</sup> Awol K. Allo. (2006). Fundamental principles of recognition under international law Vis-à-vis the question of Palestine: A critical appraisal of the factual situations and the UN Resolutions, Addis Ababa University, at 2.

<sup>8</sup> Broms B. (1991). "IV Recognition of States." *International Law: Achievements and prospects*. UNESCO Series, Mohammed Bedjaoui (Ed.). Martinus: Nijhoff Publishers. Pp. 47-48.

entity it wishes, regardless of the existence of territory or of an established government.”<sup>9</sup>

In international law, there are however several theories regarding when a state should be recognized as sovereign.<sup>10</sup> These theories include: constitutive theory, declarative theory, state practice, and de facto and de jure states.

The constitutive school of thought maintains that personality is created by recognition as oppose to the factually existing situation. It defines a state as a person of international law if and only if it is recognized as sovereign by other states. Recognized nations did not also have to respect international law in their dealings with them.<sup>11</sup>

However, a state may also use any criteria when judging if they should give recognition and they have no obligation to use such criteria. Although states may only recognize another state if it is to their advantage.<sup>12</sup> It is in the course of recognition that the state can solely become an international person and a subject of international law.<sup>13</sup>

The "declarative" theory, on the other hand, defines a state as a person in international law if it meets the following criteria: (a) a defined territory; (b) a permanent population; (c) a government; and (iv) a capacity to enter into relations with other states. The declarative model was most eminently expressed in the 1933 Montevideo Convention. Article 3 of the Convention declares that “statehood is independent of recognition by other states. In

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<sup>9</sup> Yoram Dinstein, and Mala Tabory (Eds.). (1990). *Israel yearbook on human rights*, pp.135-136 [4]. Martinus: Nijhoff Publishers.

<sup>10</sup> Thomas D. Grant. (1999). *The recognition of states: Law and practice in debate and evolution. Chapter 1*. Westport, Connecticut: Praeger.

<sup>11</sup> Hillier Tim. (1998). *Sourcebook on public international law*, Routledge. P. 201.

<sup>12</sup> Thomas D. Grant. (1999). *Supra* note 10.

<sup>13</sup> Lassa Oppenheim, and Ronald Roxburgh. (2005). *International law: A treatise*, the Law Book Exchange, Ltd. P. 135.



contrast, recognition is considered a requirement for statehood by the constitutive theory of statehood.”<sup>14</sup>

Concerning recognition of states, state practice theory is said to fall somewhere between the declaratory and the constitutive approaches.<sup>15</sup> International law does not require a state to recognize other states.<sup>16</sup> Recognition could also be withheld when a new state is seen as an “illegitimate” state along the lines of Apartheid South Africa, which is a move that the United Nations Security Council described as the creation of an “illegal racist minority régime.”<sup>17</sup> On the other hand, Northern Cyprus’s recognition was withheld from a state created in Northern Cyprus due to illegal invasion of the land by Turkey in 1974.<sup>18</sup>

*De facto* and *de jure* states are those which exist both in law and in reality. Good number sovereign states in the world are states of *de jure* and *de facto*. Nevertheless, sometimes states may exist only as *de jure* states having an organization which is recognized as having sovereignty over and being the legitimate government of a territory over which they have no actual control. Numerous continental European states also maintained governments-in-exile during the Second World War which continued to enjoy diplomatic

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<sup>14</sup> Convention on Rights and Duties of States.(1933). *Article 3*, Dec. 26.

<sup>15</sup> Shaw, Malcolm Nathan. (2003). *International law* (5<sup>th</sup> ed.). Oxford: Cambridge University Press. P. 369.

<sup>16</sup> Opinion No.10 of the Arbitration Commission of the Conference on Yugoslavia Cited in Wikipedia, the free encyclopedia. (2012). Montevideo convention. Retrieved on April 6, 2012 from [http://www.en.wikipedia.org/wiki/Montevideo\\_Convention](http://www.en.wikipedia.org/wiki/Montevideo_Convention)

<sup>17</sup>United Nations Security Council Resolution 216

<sup>18</sup> United Nations Security Council Resolution 541

relations with the Allies, despite the fact that their countries were under Nazi's occupation.<sup>19</sup>

Generally, states may also end up having sovereignty over a territory, but lacking international recognition. When this happens, these states are considered to be *de facto* states by the international community. They are also viewed as *de jure* states only according to their own respective law and by those states that recognize them. Somaliland is, for instance, commonly considered to be such a state.<sup>20</sup>

The foregoing paragraphs examined the general rules en route for attributes of statehood under international law, including the question of recognition as well as the traditional criteria for statehood enunciated in the Montevideo Convention of 1933. Now, let us thus consider the question: Is Palestine a state according to principles of international law?

There are fundamentals of recognition under international law. To begin with, there is no clear defining formula for the principles of recognition. This fact has at times led some governments to question their actions with regard to whether or not they have extended recognition to a certain entity through their acts. According to Worster, there are two elements of recognition theory: "The first element is whether the new state exists before the recognition by other states or not; and the second element is the degree of discretion that states have to grant or withhold recognition."<sup>21</sup>

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<sup>19</sup> Wikipedia, the free encyclopedia(2012),Montevideo convention, retrived April 6,2012 from en.wikipedia.org/wiki/Montevideo\_Convention

<sup>20</sup> Arieff, Alexis (November 2008), "De facto Statehood? The Strange Case of Somaliland". Yale Journal of International Affairs. Retrieved 2012-01-04

<sup>21</sup> William Thomas Worster. (2009). Law, politics and the conception of the state recognition theory. *Boston University International Law Journal*, 27, 115.

Several writers on international law have agreed that recognition is a political act of the executive in which the recognizing state indicates its interest to acknowledge the factual situation existing on the ground and to accept certain legal consequences arising from such act of acknowledgment.<sup>22</sup>

With regard to what constitutes the origin or formation of state, different analysts have responded differently depending on what character of the state is seen to prevail. Thus, there is no standard model for the origins of statehood. Therefore, the criteria for a state which must be fulfilled before IT gets recognition can be formulated in diverse ways.

Several analysts have held that state practice clearly favours the declaratory model, that is, the entity exists as a state before recognition.<sup>23</sup>The declaratory theory (which is more in harmony with international practice) holds that recognition is merely an acceptance by state of an existing fact. It will be constituted, not just by the consent of others, but on its own merits by its own efforts.<sup>24</sup>

In the study, the student researcher further attempted to answer the question whether or not the Palestinian entity meets the conditions and traditional criteria of statehood to be labeled as a state under international law. This was attempted on the basis of international legal or political status of Palestine criterion of statehood. Therefore, the existence or absence of Palestine's statehood will be examined in the light of constitutive and declaratory principles of recognition.

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<sup>22</sup> Supra note 15 at 295

<sup>23</sup> Martha J. Peterson. (1997). Recognition of governments: Legal doctrine and state practice. P. 26 cited in William Thomas Worster. Supra note 33 at p. 11.

<sup>24</sup> M.N. Shaw supra note 15 at p. 296.

In order to assess whether or not Palestine is a state according to principles of international law, the main criteria or the traditional criteria of statehood which are set out under Article 1 of the Montevideo Convention are considered. These are: (a) defined territory; (b) permanent population; (c) government; and (d) capacity to enter into relations with the other states.

## **Defined Territory**

There are different views on this criterion of statehood. Among the advocates of this belief is Francis Boyle who says:

*The territory of a state does not have to be fixed and determinate. For example, Israel does not have fixed and permanent borders (except most recently with respect to Egypt) and yet it is generally considered to be a state. Thus, the state of Palestine does not have to have declared borders either. Rather, borders will be negotiated between the government of Israel and the government of Palestine. This is the same way peace negotiations would be carried out between any other two states or governments in dispute over the existence of their respective borders. To be sure, however, it is quite clear from reading the Palestinian Declaration of Independence and the attached Political Communiqué that the PLO contemplates that the new state of Palestine will consist essentially of what has been called the West Bank and Gaza Strip, with its capital being East Jerusalem.<sup>25</sup>*

Forji Amin George, in contrast, said that the disintegration of the Palestinian territories undermines the requirement of a defined territory, noting that borders were one of the permanent status issues left unresolved by the Oslo Accords.<sup>26</sup> Even though Crawford avoids discussing those four criteria stated

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<sup>25</sup> Francis A. Boyle. The creation of a state of Palestine. EJIL (online version) , vol. 1, No 1, art.20@www.ejil.org

<sup>26</sup> *Declaration of Principles on Interim Self-Government* (“Oslo Agreement”), 13 September 1993; A/48/486, S/26560 (11 October 1993). See also *The Interim Agreement on the West Bank and the Gaza Strip* (“Oslo II”), 28 September 1995; A/51/889, S/1997/357 (5 May 1997). Cited in Summary of submissions on whether the declaration lodged by the Palestinian National Authority meets statutory requirements International Criminal Court, 3 May 2010, retrieved on April 10, 2012 from [http:// www. icc cpi.int/nr/rdonlyres/Palestinefanal.pdf](http://www.icc.cpi.int/nr/rdonlyres/Palestinefanal.pdf) at p. 9.

in the Montevideo Convention separately and prefers to focus on the notion of state independence prerequisite to statehood, he also maintains that Palestine is not a state, for it lacks a substantial control over the territory in general.<sup>27</sup> He has chosen to discuss the existence of a defined territory in connection with the principle of an effective government in control of those territories.

## **Population**

Population in this case refers to the existence of an organized political community on a particular territory, exclusively or substantially who is exercising control over one another.<sup>28</sup> Francis Boyle concludes:

*In occupied Palestine, there lives the population of the Palestinian people; they have lived there forever since time immemorial. They are the original inhabitants and occupants of this territory. They are fixed and determinate, and so they definitely constitute a distinguishable population. They have always been in possession of their land and therefore are entitled to create a state therein.*<sup>29</sup>

The characteristic of the Palestinian population has not been contested by Crawford either, but he argues that Palestine is not a state at the present state of international law. The criterion of a "permanent population" is connected with that of territory and constitutes the physical basis for the existence of a state. Who belongs to a permanent population is determined by the internal law on nationality, which international law leaves to the discretion of states.<sup>30</sup> In many respects, this criterion is satisfied by Palestine. The

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<sup>27</sup> J. Crawford, *Supra* note 80 at p. 3

<sup>28</sup> Montevideo convention *Supra* note 29

<sup>29</sup> Francis A. Boyle, The creation of a state of Palestine, *Supra* note 83 at p. 2

<sup>30</sup> Peter Malanczuk. (1997). Akehurst Modern introduction to international law (7<sup>th</sup> ed.). p. 76.

Palestinian authority can identify a group of people that are permanently resident in the West Bank and Gaza strip territory.<sup>31</sup>

According to the data collected in 2000,<sup>32</sup> the population of the West Bank was 2, 237, 194; Gaza Strip 1, 274, 868 (in which the growth rate of the West Bank was 3.0%, while Gaza Strip was 3.7%; and the population density expressed in density per sq. mi was 989 in the West bank and 9, 172 in the Gaza strip. Palestine also has the ethnicity or race of the West Bank: 83% of the Palestinian Arab and others; 17 % Jewish; whereas in the Gaza Strip: 99.4% Palestinian Arab and others and Jewish0.6%.<sup>33</sup>

## **Government**

A government which is independent and has effective control of the territory it claims to rule is an essential condition in recognition of state and in the concept of statehood. The government should be in effective control of its territory and population in that state.

However, there are also been instances entities have been denied international recognition for the fact that the criteria of self determination is lacking although there was governmental control. An example for this is Rhodesia. In this regard, Boyle argues Palestine fulfills the international law criteria of statehood.

Writers like Oppenheim, on the other hand, argue a sovereign government is a must. Those on this side of the argument argue that even though there may be precedents demonstrating the recognition of states based on the right to

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<sup>31</sup> Tal Becker, International Recognition of a unilaterally declared Palestinian state: Legal and policy dilemmas. Jerusalem center for Public Affairs (see [www.jcpa.org/art/becker1.htm](http://www.jcpa.org/art/becker1.htm))

<sup>32</sup> [www.infoplease.com](http://www.infoplease.com)

<sup>33</sup> *ibid.*

self determination before effective control was established, those recognitions are predicted on factors, such as the attainment of effective control within a foreseeable timeframe, or the fact that effective control is already being exercised over part of the territory.

### **Capacity to enter into Relations with Other States**

According to Boyle with regard to capacity to enter into relations with the other states, Palestine has been recognized by over 114 states which are more than the 93 which maintain the same form of diplomatic relations with Israel. On 15<sup>th</sup> of December 1988, the United Nations General Assembly also had adopted Resolution 43/177 which had an effect of recognizing the new state of Palestine and accorded it and observer state status throughout the United Nations' Organization. The Resolution was adopted by a vote of 104 in favour, but the United States of America and Israel opposed, and 44 states abstained. Boyle also asserts that the General Assembly's recognition of the new state of Palestine is constitutive, definitive, and universally determinative.<sup>34</sup>

Crawford, Shaw and many others, on the contrary; say the capacity to enter into international relations with other state is an important aspect of the very existence of the state and serves as an indication of the significance in relation to recognition by other states. Thus, Palestine lacks the general capacity to conduct foreign relations under the Accords since critical functions held to be indispensable to statehood are expressly excluded from the powers and responsibilities of the Palestinian Council.”<sup>35</sup> However, the reality seems to be that Palestine has embassies in numerous nations,

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<sup>34</sup> Francis A. Boyle, The creation of a state of Palestine, *Supra* note 83 at 2-3

<sup>35</sup> *Supra* note 98 at 11

including Ethiopia. Most of the states that have recognized Palestine are granted Palestine to open embassies and to conduct relations.

### **Supplementary Criteria of “Statehood”**

Current international practice shows that several additional criteria have been acknowledged as prerequisites for statehood.<sup>36</sup> These contemporary criteria for statehood require that an entity seeking recognition show that it has not been established as a result of illegality and that it is willing and able to abide by international law. A third criterion is that it constitutes a viable entity and, finally, its claim to statehood is compactable with the right to self-determination.

In order to qualify for recognition, a state must not emerge as a result of illegality. Palestine is said to have a lawful claim to statehood. In 1919, the Palestinian people were provisionally recognized as a member nation by the League of Nations.<sup>37</sup> This provisional recognition is maintained today because of the conservatory clause found in Article 80 (1) of the UN Charter.

The condition that state should be willing and able to abide by international law has become a regular feature of the recognition policy of states and international organizations. The following statement by its Chairman shows the position of Palestine on this aspect: ”The PLO commits itself to the Middle East peace process and to a peaceful resolution of the conflict between the two sides and declares that all outstanding issues relating to permanent status will be resolved through negotiations.”<sup>38</sup>

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<sup>36</sup> Becker *Supra* note 95 Cited in Forji Amin George *Supra* note 5

<sup>37</sup> League covenant, article 22 (4), as well as the 1922 mandate for Palestine; Cited in Forji Amin George *Supra* note 5

<sup>38</sup> Chairman Arafat's expressed an unconditional statement on September 9, 1993 cited in Forji Amin George *Supra* note 5



The other criterion is a viable entity. To ensure that a state will continue to satisfy the criterion for statehood after its recognition proof of its viability is generally required. Since the peace process had started in 1993, many of the most central state institutions were already established for Palestine. The Palestine controls part of the West Bank and the Gaza Strip, there's an elected president, a government, police, a juridical system. Beginning from 1995, there has even been authenticated Palestinian passport (which is only recognized by 29 countries in the world).<sup>39</sup>

The General Assembly Resolution No. 59/179 (A/RES/59 179) on the right of the Palestinian people to self – determination begins by stating that, “awareness of the development of friendly relations among nations, based on respect for the principles of equal rights and self-determination of peoples, is among the purposes and principles of the United Nations as defined in the Charter.”<sup>40</sup> The United Nations Covenant on Human Rights adds to this by stipulating that, “all peoples have a right to self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development.”<sup>41</sup> The vocabulary of self-determination has been contested by the international community in the context of the Palestinian people. According to the basic right of self-determination of peoples as recognized by the UN Charter Article 1 (2) and by the International Court of Justice in its Namibia and Western Sahara Advisory’s opinions, “the Palestinian people have proceeded to proclaim

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<sup>39</sup> Encyclopedia of the Orient-<http://i-cias.com> Cited in Forji Amin George *Supra* note 5

<sup>40</sup> G. A. Resolution No-59/179 (A/RES/59 179), UN DOC, Para 1

<sup>41</sup> Article 1 of both the UN covenants on Human Rights

their own independent state in the land they have continuously occupied for thousands of years.”<sup>42</sup>

## **Criteria of Constitutive Theory**

According to the constitutive theory of recognition, an entity is a state if and only if it is recognized by other states. Though there is no strict rule in the international law that majority recognition is binding on third states that withheld recognition. Crawford further argues that there is no rule which has contemplated the minority non-recognition evades statehood. He states that the State of Palestine should have been recognized by still more number of states to “command a quasi-unanimous support which would be required to establish a particular rule of international law to the effect that Palestine is a state.”<sup>43</sup>

In summary, the main criteria or the traditional criteria of statehood are those set out in Article 1 of the Montevideo Convention, namely, (a) permanent population; (b) defined territory; (c) government; and (d) capacity to enter into relations with the other states.

## **Research Methodology**

In this study, non-doctrinal legal or socio-legal research design (i.e. research about law) and qualitative research approach were used by the student researcher. The researcher tried to investigate through empirical data on how law and legal institutions had affected or moulded human attitudes and what impact on society they created. The research tools/instruments used to gather primary and secondary data included interview guide and documentary

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<sup>42</sup> A. Boyle, The creation of a state of Palestine, *Supra* note 83 at 2

<sup>43</sup> Crawford, *Supra* note 80 at 5

analysis template/matrix respectively. The required primary data were collected from the identified key informants in face-to-face interaction by using the interview guide which consisted of the pre-determined open-ended questions on the focused issues (such as relevant established legal principles and norms, opinions of international judicial and semi-judicial institutions, opinions of qualified publicist in the field, treaties and agreements, the state of mind of the international community of states as manifested through their independent actions, and the UN resolutions and their prior practices with respect to recognition of newly emerging states have been heavily relied upon to substantiate the various line of arguments) of the study under consideration.

In addition, the researcher employed documentary analysis template as a research instrument/tool to collect secondary data from sources (like books, journals, magazines, media outlets, published and unpublished empirical based research reports and other relevant documents available to the study were used). Generally, archival materials had an invaluable contribution in assessing features and facts about the problem under investigation.

## **Presentation and Analysis of Data**

As mentioned above, collective recognition reached by means of an international decision signifies the importance of the international community in its control over membership to international organization. Although this conception has been disputed over the last century owing to the political nature of recognition, membership in such organizations remains an insuperable evidence of statehood.

## **Palestine Statehood and Involvement of UN**

In the case of the United Nations, states must meet the conditions enunciated under Article 4 of the Charter. Since membership to the United Nation is open only to states, admission can be taken as a conclusive evidence of statehood. Nevertheless, it is to be noted that this is not binding on third states who do not want to recognize the entity admitted to the UN membership.

The situation of Palestine in the presence of the UN and its admission as a member had been impeded by the United States who fervently opposed to the unilateral establishment of the state of Palestine. In deciding upon the membership of an entity, the General Assembly of the UN should receive the recommendation of the Security Council to which the United States has strongly opposed to the unilateral creation of the state of Palestine. The fact that there is a veto power in Security Council makes the voting system in the UN very undemocratic. The opposition by two states alone has prevented Palestine's right to be admitted to the UN as a member state of the UN.

### **UN's Role as an Arbiter of Statehood Status**

Many scholars prefer and support the theory of UN serving as an arbiter of statehood status. However, cases of recognition of states by force of UN obligations fail to be clear. Among the critics forwarded against this theory is the fact that, (a) it rests in practice and does not have any set statements of law; and (b) the practice appears to be inconsistent.<sup>44</sup> Among one of the advocates, Lauterpacht suggested for a supra-national organ that would

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<sup>44</sup> Thomas Worster *supra* note 33 at 49.

conclusively determine statehood status.<sup>45</sup> Thus, Dugard later proposed the UN had taken on the role Lauterpacht already suggested.<sup>46</sup>

Therefore, in order to be admitted to membership in the United Nations, an applicant must: (1) be a state; (2) be peace-loving; (3) accept the obligations of the Charter; (4) be able to carry out these obligations; and (5) be willing to do so.<sup>47</sup> Thus, those principles appear to be vulnerable.

### **The “Unilateral Action” by Palestine to acquire Statehood**

The Palestinian leaders call it “Plan B,” whereas the U.S and Israel refer to it as a “unilateral act”. “Plan B” represents a versatile move toward achieving recognition of a Palestinian State from four major international bodies: the U.N. Security Council, the U.N. General Assembly, the International Court of Justice (ICJ), and the International Criminal Court (ICC). The Palestinian Authority (PA), which declared unilateral statehood more than two decades ago,<sup>48</sup> is thus not restricting its push for recognition to individual nations.<sup>49</sup> However, it is not an easy process.

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<sup>45</sup> Lauterpacht, Recognition in International Law, *Supra* note 34, at 55. Cited in Thomas Worster *supra* note 33 at 49.

<sup>46</sup> John Dugard. (1987). Recognition and the United Nations 2-3. Cited in Thomas Worster *supra* note 33 at 49.

<sup>47</sup> Conditions of Admission of a State to membership in the United Nations, Advisory Opinion. [1948] *I.C.J.* 57, 62 (May 28). Cited in Thomas Worster *supra* note 33 at 49.

<sup>48</sup> See Palestine National Council: Political Communiqué and Declaration of Independence, Nov. 15, 1988, U.N. Doc. A/43/827-S/20278, Annex III (Nov. 18, 1988), *reprinted in* 27 I.L.M. 1668 (1988). As a point of clarification, the Palestinian Authority refers to the administrative body established during the Oslo Accords to govern sections of the West Bank and Gaza Strip. See *Palestinian Authority*, ENCYCLOPEDIA BRITANNICA ONLINE, <http://www.britannica.com/EBchecked/topic/439781/Palestinian-Authority-PA> (last visited Apr. 24, 2011). The Palestine Liberation Organization (PLO), which preceded the PA, “was formed in 1964 to centralize the leadership of various Palestinian groups that previously had operated as clandestine resistance movements.” The preeminent political party within the PLO is Fatah, once led by Yasser Arafat and now by Mahmoud Abbas. See *Palestine Liberation Organization*, ENCYCLOPEDIA BRITANNICA ONLINE,

Palestinian officials have thus begun pursuing a new diplomatic strategy: asking individual countries to recognize an independent Palestinian state on the 1967 borders. Currently, the Palestine Liberation Organization (PLO) has only observer entity status.

Collective recognition by the UNGA would constitute strong evidence that Palestine is nevertheless a State that fulfills the requirements laid down by international law. Thus a somewhat ambiguous Palestinian statehood might be consolidated by a UNGA resolution that receives unequivocal support.

As mentioned above, Israel itself is not recognized by many Arab and Muslim States. Moreover, collective recognition does not entail UN membership.

In order to be admitted as a member state, Palestine needs the approval of the 15-member UN Security Council. Palestinians believe over two-third of the General Assembly would recognize their statehood. Thus, the Palestinians have gone for the second option, though this would not result in full membership, resolution submitted to the General Assembly. .

There might be another obstacle to UN membership. The Palestinian application might be vetoed not only due to a reluctance to support any avenue that is not based on bilateral negotiations, but it might also reflect a material doubt whether Palestine qualifies for membership at this stage. Under the UN Charter membership is open to “peace-loving states” that are able and willing to carry out the obligations contained in the Charter.

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<http://www.britannica.com/EBchecked/topic/439725/Palestine-Liberation-Organization-PLO> (last visited Mar. 1, 2012). Cited in Adam G. Yoffie (2011), *The Palestine Problem: The Search for Statehood and the Benefits of International Law*, *The Yale Journal of International Law*. Available at <http://www.yjil.org/docs/pub/36-2-comment-Yoffie-palistine-problem.pdf>

<sup>49</sup> Up to this point, the Palestinian Authority has focused its independence declaration efforts primarily on individual nations in Latin America. *Jerusalem Post* Feb 2 .2011.

It is hard to understand why the denial of Palestine's membership is not a double-standard. Therefore, there is undemocratic nature of voting in the United Nations.

The power of the veto assures that each of the 'Big Five' can never be reprimanded or condemned in a resolution and that allies are protected and free from enforcement action. In addition, the special relationship between US and Israel seems to have influenced the holdup of the long overdue state of Palestine. In the words of Henry Kissinger,

*The survival and security of Israel are unequivocal and permanent moral commitments of the United States. Israel is a loyal friend and a fellow democracy, whose very existence represents the commitment of all free peoples. We will never abandon Israel either by failing to provide crucial assistance or by misconceived or separate negotiations or by irresolution when challenged to meet our own responsibility to maintain the global balance of power.*<sup>50</sup>

Virtually all Western countries share the United States' strong support for Israel's legitimate right to exist in peace and security. Another author in the field of study further explains the attitude of the US citizens towards the Palestine issue:

*When the focus of the poll is on the Palestinians only, as opposed to all Arabs; the average percentage of sympathy toward Israel drops to 42 and toward the Palestinians increases to 16.4. On April 1998 poll, Zogby International inquired about American opinion on the impasse in the Middle East peace process. While 6 percent blamed Israel and 9 percent blamed the Palestinians, 62 percent placed the blame on both sides. When the same*

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<sup>50</sup> Henry Kissinger. (1977). Israel and the United States, address before the American Jewish Congress, April 4, 1976, printed in John Norton Moore, *The Arab-Israeli Conflict: Readings and documents* (Princeton: Princeton University Press), pp. 871-872. Cited in Saliba Sarsar. (2004). The question of Palestine and United States behavior at the United. *International Journal of Politics, Culture, and Society*, 17(3), 457-470, Springer Stable URL: <http://www.jstor.org/stable/20007691> .Accessed: 05/06/2012 05:26 at 460.

*Americans were questioned as to whom the American administration should pressure, 8 percent said Israel, 6 percent said the Palestinians, but 66 percent held that the pressure should be applied on both side.<sup>51</sup>*

Saliba Sarsar also says, “American candidates for office have always paid close attention to their Jewish possible voters. Several American Jews have influential positions in government”. These facts thus highly influence the voting behaviors of the US under the UNSC.

The US then abstained reluctantly on UNSC Resolution 1322, which condemned “acts of violence, especially the excessive use of force against Palestinians, resulting in injury and loss of human life.” Finally, on December 20, 2002, the US vetoed a UNSC draft resolution, 1385, that condemned Israel for killing British UNRWA official Iain Hook during a raid on a Jenin refugee camp on the West Bank, and for its deliberate destruction of a UN World Food Programme warehouse in Gaza. This shows how the behaviour of US actually influences the works of the UN and hinders the performances of the UN.

Because of the long standoff of issues, like Palestine statehood and the undemocratic nature of voting in the UN coupled with the reality over the years, several diplomats and scholars question the true role and worth of the UN and its Charters. The Jordanian Diplomat, Hazem Zaki Nusebeh, for example, states:

*The UN Charter is a masterpiece in Utopia. It makes exhilarating reading, and its basic principles and precepts are unassailable but a proviso might be added that, in the most crucial issues, the voices,*

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<sup>51</sup> Mideast Mirror. (May 1, 1998), James A. Bill and Robert Springborg. (2000). *Politics in the Middle East*. New York: Addison Wesley Longman. p. 277 cited in Saliba Sarsar. (2004). The question of Palestine and United States behavior. *The United, International Journal of Politics, Culture, and Society*, 17(3), 457-470. SpringerStable [URL: http://www.jstor.org/stable/20007691](http://www.jstor.org/stable/20007691) .Accessed: 05/06/2012 05:2



*conscience and votes of the overwhelming majority of mankind remain unheeded and ineffectual, because power evidently lies somewhere else.*<sup>52</sup>

Henry Cattan also argues, "... the Security Council's resolution suffers from inherent deficiencies which make it ineffective. Its principal deficiency is that it has ignored the root of the conflict and sought to establish a peace which, without redress of the wrongs done in Palestine, can be only illusory."<sup>53</sup> He also writes, "The UN is under a clear and imperative duty to intervene, and intervene effectively to restore right and justice in Palestine as this is the only way that the Arab-Israeli conflict can be resolved peacefully. Not only does peace in the Middle East depend upon the discharge of the UN of its obligations in this matter, but also the UN's very future as an instrument for the preservation of law and justice among nations is at stake."<sup>54</sup> However, there is undemocratic nature of voting in the UN which has taken power away from the organs of the UN and concentrate it in the hands of the 'Big Five'. In the end, this results in absorption of power in decision making in just the 'Big Five' states and hinders the achievement of the purposes of the UN provided in the 1945.<sup>55</sup>

## **Conclusion and Recommendation**

### **Conclusion**

The question of Palestine progressed through several stages of negotiations, talks and discussions and the UN has been front and center of the issue. There is a widespread belief that the issue of Palestine can be resolved

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<sup>52</sup> Hazem Zaki Nuseibeh. (1981). *Preface. Palestine and the United Nations*. London: Quartet Books.

<sup>53</sup> Henry Cattan. (1969). *Palestine, the Arabs and Israel*. London: Longman. P. xiii.

<sup>54</sup> Henry Cattan. (1973). *Palestine and international law*. London: Longman.

<sup>55</sup> *Supra* note 154, Article 4 sub 1.

through UN's involvement in the issue. But the fact that the issue has remained unresolved for six decades in the hands of the Organization shows the reality is just the opposite.

With regard to statehood, there are two theories which offer different visions of the state. The constitutive theory maintains personality is created by recognition as oppose to the factually existing situation. A state is a subject of international law if it is recognized as such by other states. Declarative theory, on the other hand, defines a state as a subject of international law if it meets criteria provided in the 1933 Montevideo Convention. These criteria include: a defined territory, a permanent population, a government and a capacity to enter into relations with other states.

There is no defined formula for recognition of states. Recognition might indicate the recognizing states' willingness to inter into certain form of normal or official relationship or the recognizing state may express its opinion on the legal status of the entity aspiring recognition. Which meaning of recognition is to be used in the particularity of each case depends on the intention of the recognizing state. States may also simply indicate their willingness to inter into certain form of relations with an entity seeking recognition not only by making formal declarations containing the term recognition but also by other international actions clearly showing the willingness to inter into international relations, such as formal sending and receiving of diplomatic agents.

State practice shows instances where recognition did not create a state. As Montevideo Convention clearly states "the political existence of the state is independent of recognition by the other states". A state is said to be constituted on its own merits by its own efforts. The theory holds that

personality as a state comes with the facts and when these facts cease to exist the personality also lapses. However, this is contested due to the fact that states which have been occupied by superior powers retained their personality. On the contrary, the practice of states also shows where recognition has created a state. This is evidenced from the fact that states only receive international rights and obligations when they are recognized by other states. An act of recognition can also be taken aiding a failed state, or a nearly failed state through financial or military support.

A formal declaration may be made inscribing the term recognition, but what the state meant by the term recognition used in the formal declaration will only be determined by resorting to the intention of the declaring state. At times, two different states may use the very word and mean different things. Therefore, the idea of what a state has intended by its act of recognition depends solely on what that state has intended by its act of recognition. But once recognition is given to an entity, the recognizing state cannot deny the very fact it has acknowledged through its acts and would be prohibited in international law from denying the existence of the fact it has acknowledged.

When we come to the international legal political status of Palestine, it is key to look at whether or not the proclaimed state of Palestine has satisfied the traditional criteria of statehood under the Montevideo Convention on the Rights and Duties of States of 1933. But this Convention should be seen in the light of new developments post 1945, like the right to self-determination of people and the prohibition of the use of force.

Under the Montevideo Convention, states as an international legal and political person should possess a defined territory, a permanent population, a government and a capacity to enter into relations with other states. The

Convention ascribes states' statehood as a matter of fact rather than as a matter of law. Yet those criteria do not appear to be absolute due to the recent developments mentioned above.

An entity can be recognized as a legal person even if it is involved in a dispute with its neighbors with regard to its borders or boundaries. That is why Palestine can be recognized though its borders are not clearly set or under occupation by the Israeli Government, as long as there is a territory which is undeniably part of the entity labeled Palestine on the bases of 1947 G.A. Partition Resolution No.181 (II).

The other requirement is the existence of an organized political community or a population. In Palestine, the populations of the Palestine people currently live there. The third requirement is the existence of an effective government in charge of the territory and the population. Even though several renowned writers consider the existence of an independent and sovereign government as an indispensable element of statehood, the fact that there exists a legal right on the part of the alleged entity whose statehood is under question and the right to self-determination of the Palestinian people serves as an exception to the element. Thus, the existence of an effective government does not by itself elude the existence of a state. In addition to that, Israel's occupation has been repeatedly condemned by the General Assembly and the Security Council of the UN as evidenced by General Assembly Resolutions 58/296 and 59/251. Thus, the presence of Israel as an occupying power on that territory doesn't have any legal consequence.

The last criterion is the capacity of Palestinian entity to enter into international relations. The proclaimed state of Palestine has been recognized by numerous states which maintain several international relations. Collective recognition reached by means of an international decision does signify the

importance of the international community in its control over membership to international organizations.

Time and time again, the General Assembly has dealt with the issue of Palestine and tried to recognize Palestine as a sovereign state, but due to Article 4 of the Charter of the UN which requires the Security Council's recommendation. United States has vetoed any chance of Palestine ever becoming a state. The fact that there is a veto power in the Security Council makes the voting system very undemocratic. This has resulted in inconsistencies in decisions of the UN. Israel's entrance to the UN was less tedious and was granted statehood, but no questions asked. But Palestine's statehood has lasted for six decades without a solution.

The fact that the US has managed to put a standoff through its veto's power forces several scholars to question the worth of the UN in achieving the goal it was created for, i.e. "to maintain international peace and security". This has led diplomats, like Hazem Zaki to call it a "master piece in Utopia".

In a nut shell, even though the UN is looked up to for intervention in times of disorder to restore justice and rights; it has been held back due to the behaviors the member states, particularly the US and the undemocratic nature of voting. This has created an unfortunate situation for Palestine which is struggling through the most unlikely path to statehood.

### **Recommendation**

Several scholars have suggested for some kind of standard so there wouldn't be inconsistencies with regard to granting statehood. A standard would be good but because of politics and other reasons, this is easier said than done. There is the issue of international law not having a real enforcing body to

really be applied properly. This will be the reason setting some kind of standard could be difficult. The declarative model is accepted by many as the closest thing serving as some kind of standard. Many say it restricts old states from having the discretion to recognize or not recognize new states whenever they want to. Thus, a set of standards is recommended as solution for the inconsistencies in granting statehood.

To resolve the issue of Palestine, those who are engaged in the issue should be more proactive and be genuine in promoting the international law. The undemocratic nature of voting in the UN should also be re-worked since concentrating power only on a few states which is affecting the true value of the Organization.

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