

Forum: The Algiers Declaration on Palestine

The Creation of the State of Palestine

*Francis A. Boyle **

The Elements of Palestinian Statehood

The Intifadah has been a time of terrible tragedy and great suffering for the Palestinian people. And yet, paradoxically, it has also proven to be the time of their greatest glory, an affirmation of their essential dignity as an independent people. As a result of these elemental processes, the Unified Leadership of the Intifadah requested the Palestine Liberation Organization (PLO) to proclaim the existence of a new state of Palestine in recognition of the courage, suffering, and bravery of the Palestinian people living under Israeli occupation. On 31 July 1988 the creation of the Palestinian state became an inevitability when King Hussein of Jordan announced that he was terminating all forms of administrative and legal ties with what he called the West Bank. And on 15 November 1988 the independent state of Palestine was proclaimed by the Palestine National Council meeting in Algiers, by a vote of 253 to 46, as well as in front of Al-Aksa Mosque in Jerusalem, the capital of the new state, after the close of prayers.

I will not bother to discuss at great length the legal basis for the Palestinian people to proclaim their own state. This matter has already been analyzed in detail by me in a position paper that was requested by the PLO in 1987 and later published in the summer 1988 issue of *American-Arab Affairs* entitled "Create the State of Palestine!" Generally put, however, there are four elements constituent of a state: territory, population, government and the capacity to enter into relations with other states. As I argued in my position paper, all four characteristics have been satisfied by the newly proclaimed independent state of Palestine.

Indeed, as long ago as 1919 the Palestinian people were provisionally recognized as an independent nation by the League of Nations in League Covenant Article 22(4) as well as by the 1922 Mandate for Palestine that was awarded to Great Britain. This provisional recognition continues into effect today because of the conservatory clause found in Arti-

* University of Illinois.

1 EJIL (1990) 301

The following two articles have been published by the kind permission of the authors:

Francis A. Boyle
James Crawford

Francis A. Boyle

cle 80(1) of the United Nations Charter. Pursuant to the basic right of self-determination of peoples as recognized by U.N. Charter Article 1(2) and by the International Court of Justice in its *Namibia* and *Western Sahara* Advisory Opinions, the Palestinian people have proceeded to proclaim their own independent state in the land they have continuously occupied for thousands of years.

1. Territory

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/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.

2. Population

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.

3. Government

During the course of his various public pronouncements in Europe during December 1988, Yasir Arafat, Chairman of the Executive Committee of the Palestine Liberation Organization, stated that the PLO is currently serving as the Provisional Government of the state of Palestine. Acting in conjunction with the Unified Leadership of the Intifadah, this Provisional Government already controls substantial sections of occupied Palestine as well as the entire populace of occupied Palestine. It is thus already exercising effective control over large amounts of territory and people and is providing basic administrative functions and social services to the Palestinian people living in occupied Palestine and abroad. This is all that is required for there to be a fulfillment of this criterion for statehood under international law.

4. The capacity to enter into international relations.

Over 114 states have already recognized the newly proclaimed state of Palestine, which is more than the 93 that maintain some form of diplomatic relations with Israel. Furthermore, on 15 December 1988 the United Nations General Assembly adopted Resolution 43/177, essentially recognizing the new state of Palestine and according it observer-state status throughout the United Nations Organization. That resolution was adopted by a vote of 104 in favor, the United States and Israel opposed, and 44 states abstaining. For

The Creation of the State of Palestine

reasons fully explained in my position paper, the General Assembly's recognition of the new state of Palestine is constitutive, definitive, and universally determinative.

The Framework for Negotiating a Comprehensive Middle East Peace

The Intifadah will continue until the Israeli government is willing to sit down and negotiate an overall peace settlement with the PLO. In this regard the Palestine National Council (PNC) has taken several steps in the Palestinian Declaration of Independence and in the Political Communiqué attached thereto in order to establish the framework necessary for negotiating a comprehensive peace settlement with Israel. In addition, Yasir Arafat has made several public pronouncements in his official capacity as Chairman of the Executive Committee of the PLO, which is functioning as the Provisional Government of the state of Palestine. As such, Arafat's statements constitute Unilateral Declarations of Intention that are binding upon the PLO and the state of Palestine as a matter of customary international law. Indeed, Arafat has just become the first President of the state of Palestine.

First, the Declaration of Independence explicitly accepts the General Assembly's Partition Resolution 181(II) of 1947. The significance of this cannot be overemphasized. Prior thereto, from the perspective of the Palestinian people, the Partition Resolution was deemed to be a criminal act perpetrated upon them by the United Nations. The acceptance of the Partition Resolution in their actual Declaration of Independence itself signals a genuine desire by the Palestinian people to transcend the past forty years of history and to reach an historic accommodation with Israel on the basis of a two-state solution. The Declaration of Independence is the foundational document for the state of Palestine. It is definitive, determinative, and irreversible.

Second, in the Declaration of Independence the Palestine National Council declared its commitment to the purposes and principles of the United Nations Charter, to the Universal Declaration of Human Rights and to the policy and principles of non-alignment. This last commitment indicates quite clearly that the state of Palestine would be prepared to forswear any type of security treaty arrangements with the Soviet Union along the lines of the one currently in existence between Syria and the U.S.S.R. This is clearly intended to be a confidence building measure for the benefit of Israel.

Third, in the Declaration of Independence the Palestinian National Council declared that without prejudice to its natural right to defend the state of Palestine, the PNC rejected "the threat or use of force, violence and intimidation against its territorial integrity and political independence or those of any other state." This latter commitment clearly applies to Israel.

Fourth, in the Political Communiqué attached to the Declaration of Independence the Palestine National Council indicated its willingness to accept United Nations supervision over occupied Palestine on an interim basis in order to terminate Israeli occupation. The Palestinian plan for U.N. supervision could be implemented by means of a U.N. trusteeship imposed upon Palestine in accordance with Chapter XII of the United Nations Charter. The PNC's expressed willingness to accept temporary U.N. supervision (or even temporary supervision by U.S. troops) over their state is clearly intended to serve as another confidence building measure for the benefit of Israel.

Fifth, in the Political Communiqué the Palestine National Council has called for the convocation of an International Peace Conference on the Middle East on the basis of U.N. Security Council Resolution 242 (1967) and 338 (1973) that shall guarantee the legitimate national rights of the Palestinian people, first and foremost among which is

Francis A. Boyle

their right to self-determination. In other words, the Palestine National Council has now explicitly accepted Resolutions 242 and 338. The PNC's solemn acceptance of Resolutions 242 and 338 represents a significant concession by the Palestinians. The 1947 U.N. Partition Plan called for the Palestinian people to have a much larger section of historic Palestine for their state than do the 1967 boundaries set forth in Resolutions 242/338. In this regard, I should point out that Israel officially accepted the Partition Resolution in its own Declaration of Independence and as a condition for its admission to membership in the United Nations. By comparison, today the PLO would be prepared to accept boundaries for the state of Palestine that would consist essentially of the West Bank, Gaza Strip and East Jerusalem.

Sixth, in the Political Communiqué the PNC indicated its willingness to establish a voluntary confederation between the states of Jordan and Palestine if necessary in an attempt to accommodate the United States and Israeli governments' wishes that Palestine somehow be linked to Jordan, a wish expressed in the Allon Plan of 1976, the Camp David Accords of 1978 and more recently in the so-called Reagan Peace Plan of 1982. Despite their strident opposition to the latter two approaches when initiated by the United States government, the Palestinian people are now prepared to accommodate the objective of establishing some type of confederal link between Jordan and Palestine. The PNC's acceptance of confederation with Jordan is intended to be yet another confidence building measure for the benefit of Israel.

Seventh, in the Political Communiqué the PNC "once again states its rejection of terrorism in all its forms, including state terrorism..." In this regard, on 6 December 1988 Yasir Arafat stated that he renounced all forms of terrorism and was ready to start negotiations that would eventually lead to peace in the Middle East. Furthermore, at his Geneva press conference on 14 December 1988, Arafat accepted Resolutions 242 and 338 without directly coupling them with demands for Palestinian independence; he specifically stated that Israel has the right to exist in peace and security, and declared: "We totally and absolutely renounce all forms of terrorism including individual, group and state terrorism." With that statement Arafat technically fulfilled all the conditions set forth by the United States government in order for it to commence negotiations with the PLO.

Therefore, on 14 December 1988 President Ronald Reagan authorized the start of a diplomatic dialogue between the United States and the PLO. In his Statement on American relations with the PLO of that date, President Reagan called for "the beginning of direct negotiations between the parties, which alone can lead to such a peace." The implication was quite clear that the "parties" to which Reagan was referring meant the PLO and Israel. Thus it now appears to be the implicit position of the United States government that the next stage in the development of the Middle East peace process must be direct negotiations between Israel and the PLO.

To the same effect have been several recent statements by President Bush's Secretary of State James Baker that the Israeli government will probably have to begin negotiating a peace settlement directly with the PLO because all the Palestinian people living in occupied Palestine accept the PLO as their sole and legitimate representative. The long-standing hope of the United States government and the Israeli government that there could be found quislings among the people living in occupied Palestine who could negotiate a so-called peace settlement with Israel that would allow for the outright return of this territory to Jordanian rule has now been effectively repudiated by America. In this regard, on 3 April 1988 President George Bush bluntly stated that Israel should end its occupation of Arab lands and that the Palestinians must be given their political rights by means of an international peace conference.

The Creation of the State of Palestine

Jerusalem

Various individuals and organizations have given an ominous interpretation to the fact that the Palestinians proclaimed Jerusalem to be their capital. Although I am not authorized to speak for the PLO, I know that they are certainly prepared to be flexible with respect to negotiating over the ultimate status of Jerusalem. In all fairness, however, I should point out that neither Israel nor Palestine nor both together have the basic right under international law to dispose of Jerusalem. Rather, the 1947 Partition Resolution called for the creation of an international trusteeship for the city of Jerusalem that was to be administered as a *corpus separatum* apart from both the Jewish state and the Arab state contemplated therein.

Yet I do not believe it would be necessary to go so far as to establish a separate United Nations trusteeship for the city of Jerusalem under Chapter XII of the U.N. Charter. Rather, all that would need to be done is for the Israeli army to withdraw from the city of Jerusalem and a special United Nations Middle East Peace Supervision Force (UNMEPS) to be substituted in its place. UNMEPS would maintain security within the city of Jerusalem while the provision of basic services to the inhabitants would continue much as before.

The simple substitution of a U.N. peacekeeping force for the Israeli army would have the virtue of allowing both Israel and Palestine to continue making whatever claims to sovereignty they want with respect to the city of Jerusalem. Thus, Israel could continue to maintain that Jerusalem is the sovereign territory of Israel, its united capital, and shall remain as such, one and undivided forever. The Israeli Knesset would remain where it is as a capital district and the Israeli flag could be flown anywhere throughout the city of Jerusalem.

Likewise, the state of Palestine could maintain that Jerusalem is its sovereign territory and capital. Palestine would be entitled to construct a parliament building and capital district within East Jerusalem, perhaps on the Mount of Olives near where there is a community center today. The Palestinian flag could also be flown anywhere within the territorial domain of the city of Jerusalem. Both Israel and Palestine would be entitled to maintain ceremonial honor guards, perhaps armed with revolvers, at their respective capital districts. But no armed troops from either Israel or Palestine would be permitted within Jerusalem.

The current residents of Jerusalem would be citizens of either Israel, or Palestine, or both, depending upon the respective nationality laws of the two states involved. Current residents of Jerusalem would be issued a United Nations identity card to that effect, which would give them and only them the right to live within the city of Jerusalem. Nevertheless, all citizens of the state of Palestine would be entitled to enter Jerusalem through U.N. checkpoints at the eastern limits of the city. Likewise, all citizens of the state of Israel would be entitled to enter Jerusalem at U.N. checkpoints located at the western limits of the city. Yet mutual rights of access for their respective citizens to the two states through Jerusalem would be subject to whatever arrangements could be negotiated between the government of Israel and the government of Palestine as part of an overall peace settlement.

In addition, both Israel and Palestine would have to provide assurances to the United Nations that foreign tourists and visitors would be allowed unimpeded access through their respective territories in order to visit the Holy Sites in the city of Jerusalem. Some type of U.N. transit visa issued by UNMEPS should be deemed to be sufficient for this purpose by both governments. Of course this right of transit could not be exercised in a manner deleterious to the security interests of the two territorial sovereigns.

Francis A. Boyle

The Next Step Toward Peace

Quite obviously opportunity for peace has been created by the Palestinian Declaration of Independence, its attached Political Communiqué, and subsequent public statements made by Yasir Arafat acting in his official capacity. What is needed now from the Bush administration is the same type of dynamic leadership and will for peace that was demonstrated by the Carter administration at Camp David over a decade ago. Failure by the governments of the United States and Israel to seize this moment for peace will only make another general war in the Middle East an inevitability.