

The Creation of the State of Palestine: Too Much Too Soon?

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I. Introduction

It seems to be difficult for international lawyers to write in an impartial and balanced way about the Palestine issue. Most of the literature, some of it by respected figures, is violently partisan. It is true that this only reflects much of the political and personal debate about Palestine. Still, such a level of partisanship in legal discourse is disturbing. Perhaps the sceptics are right in claiming that "impartiality" is a facade and a pretence, in which case Boyle at least has the merit of honesty and lack of hypocrisy in his pleading. But the problem is that, if they are right, we should not merely give up the pretence but the game itself. And the obstinate fact remains that the actors, most of the time, continue to use the language of law in making and assessing claims. (International law scholars are not like critics in an empty theatre). That the language of law is used implies that these claims can be assessed, on the basis of values which extend beyond allegiance to a particular party, country, bloc or religion.

It may be conceded that Boyle's evident and – if his work is to be read as stating a legal claim rather than as a disguised oath of allegiance – regrettable partisanship has illustrious antecedents, on both sides of the dispute. Even so, an unusually high proportion of what Boyle has to say is directed at issues of strategy and is concerned to advocate a certain position within the overall spectrum of the Palestinian cause. However, those views are supported by legal arguments of various kinds, which call for separate examination. To the extent that it involves propositions of international law, Boyle's thesis, as outlined in "The Creation of the State of Palestine"¹ and stated in more detail elsewhere,² involves three basic propositions:

(1) Having regard to the classical "four elements constituent of a state", Palestine, under the provisional government of the Palestine Liberation Organization, is already a state in international law: "all four characteristics have been satisfied by the newly proclaimed independent state of Palestine."

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¹ Boyle, 'The Creation of the State of Palestine', *EJIL* (1990) 301.

² See Boyle, 'Create the State of Palestine!' (1988) 7 *Scandinavian Journal of Development Alternatives* 25.

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(2) The General Assembly, whether as the successor of the League of Nations with respect to the mandate system or by virtue of the authority to recognize the new state, and in its Resolution 43/177 has "essentially" done so, such recognition "being constitutive, definitive, and universally determinative." (Boyle has however already stated that the Palestine National Council's Declaration of Independence was "definitive, determinative and irreversible").

(3) To add yet a third level of determinacy (to make assurance trebly sure), he adds that other states, and in particular Israel and the United States, are bound to accept the new state, either because the international status of the Palestinian people had already been "provisionally recognized" in Article 22 of the League of Nations Covenant, a position preserved by Article 80 of the Charter, or (in the case of Israel) because its acceptance of the Partition Resolution was a "condition for its admission" to the United Nations.

Other questions which he discusses include the present legal status of Jerusalem, and the partly related issue of the modalities for terminating the Israeli occupation of the occupied territories. Boyle's "solution" for the Jerusalem problem would involve a demilitarized "*corpus separatum*", under United Nations auspices, with neither side relinquishing its claim to sovereignty over the Old City. His suggestion for an orderly termination of Israeli occupation seems to be involve the imposition of a trusteeship with the United Nations itself, apparently, as administering authority. Both suggestions raise complex legal issues: for example, are the occupied territories "now held under mandate" within the meaning of Article 77(1)(a) of the United Nations Charter, and if not, which state or states are currently "responsible for their administration"? But they raise even more formidable difficulties at the levels of policy, practicality and finance, and there seems no need to discuss them in detail here. But it is necessary to say at least something about the other three arguments.

II The Status of Palestine under the Traditional Criteria for Statehood

It is a curious feature of modern discussions of territorial status that the "traditional definition" of a state, as expressed in the four criteria referred to in the Montevideo Convention on the Rights and Duties of States of 1933,³ continues to exercise so strong a hold. It is even more curious when the Montevideo definition, which looks to the ostensibly separate elements of territory, permanent population, government and the capacity to enter into relations with other states, is then minutely examined – in some cases one would say tortured – in order to be able to argue that a particular entity fits within those criteria.

Even applying the Montevideo Convention, in a relatively superficial way, in accordance with its terms, it is difficult to see how Palestine could constitute a state. Its whole territory is occupied by Israel, which functions as a government in the territory. The Palestine Liberation Organization has never functioned as a government in respect of the occupied territories. But the Montevideo Convention treats statehood essentially as an existing state of affairs, as a matter of fact as much as a matter of law.⁴ And as a matter of fact, notwithstanding that allegiance, neither the PLO nor the Palestine National Council

³ 165 *LNTS* 19.

⁴ See J. Crawford, *The Creation of States in International Law* (1979) 36-48 for an examination and critique of the Montevideo formula.

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has been in a position to exercise the whole range of governmental powers within the territory concerned. That they may have a right to do so – or, more accurately, that the Palestinian people may have a right to choose a representative authority to govern themselves – is beside the point, from the perspective of the Montevideo formula. That formula is concerned with the existence of secure governing authority rather than with any right to exercise that authority in future. It should be recalled that the Montevideo Convention was drafted at a time when the principle of self-determination was not generally recognized in international law, and when the implications of the nascent rule prohibiting the use of force between states in this context had not been worked out. It may be that the idea of statehood, imperfectly expressed in the Montevideo Convention, has been modified by these developments. But it is curious that the debate about the statehood of entities such as Palestine is still conducted in terms of that Convention. Boyle's essay is a good example of this.

Rather than examining separately the four apparently discrete criteria listed in the Montevideo formula, it is preferable to focus on the notion of state independence as a prerequisite for statehood. Essentially that notion embodies two elements – the existence of an organized community on a particular territory, exclusively or substantially exercising self-governing power, and secondly, the absence of the exercise of another state, and of the right of another state to exercise, self-governing powers over the whole of that territory.⁵

From this perspective, the often stated proposition that the absence of clearly delimited boundaries is not a prerequisite to statehood is axiomatic. Boundaries are the consequence of territory. But territory, in the context of statehood, is not "something owned." It is the basis in space for the organized community which is the state. No doubt the PLO directly and indirectly exercises considerable influence within the occupied territories, and commands the allegiance of a significant part of the population of those territories. But this falls far short of what is required in terms of the first element, the existence of an organized self-governing community. Moreover, that Israel's governmental power and authority over those territories does not amount, for the most part, to a claim of sovereignty, that it would be unlawful if it did amount to a consensus that the Palestinian people are entitled to form a state – none of this could affect the point that they do not currently do so, if the generally-accepted principle of state independence is applied. In this respect Boyle fails to face up either to the law or the facts.

Of course there are other conceptions of statehood under which different results might be reached. The first and most obvious alternative – though Boyle does not rely upon it – is the constitutive theory of statehood. According to this view an entity is a state if, and only if, it is recognized as such by other states. But the difficulty is that the constitutive theory inevitably leads to extreme subjectivity in the notion of the state. There is no rule that majority recognition is binding on third states in international law. At present Palestine has been recognized as a state by over 100 states, but it does not yet command anything like the level of quasi-unanimous support as such which would be required to establish a particular rule of international law to the effect that Palestine is a state. In the absence of such a "particular" rule, the constitutive theory leads inevitably to the proposition that another state is not bound to treat an entity as a state if it has not recognized it. Since the crucial actors here are the United States and Israel, which vehemently do not recognize Palestine as a state, the theory leads nowhere. In any event, there are compelling reasons for rejecting the constitutive theory, and most modern authorities do so.⁶

⁵ *Id.*, 48-71.

⁶ *Id.*, 15-24, with references to other authorities.

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The second alternative would be to seek to take advantage of developments in international law since 1945 which have arguably modified the conception of statehood from that implied by the Montevideo formula. There has been a certain departure from the notion of a state as an effective territorial community independent of other states. Instead, notions of entitlement or disentanglement to be regarded as a state have been influential, at least in some situations. Thus entities which would have otherwise qualified as a state may not do so because their creation is in some significant sense illegitimate (Rhodesia, the Bantustans, the Turkish Federated States of Cyprus). Palestine involves the converse problem, that of an entity which is not sufficiently effective to be regarded as independent in fact, but which is thought entitled to be a state.

It should be stressed that we are not dealing with the situation of the extinction of states which were once, incontestably, established as such. The situation here involves the establishment of a new state on territory over which other states have claims of one kind or another. On this issue the practice is limited, though it is not non-existent. In the case of a number of former Portuguese territories in Africa (Guinea-Bissau being the best example⁷) the view was taken that the National Liberation Organization's extensive *de facto* control over large parts of the territory in question, and the apparent inevitability of its success, combined with the principle of self-determination, meant that the entity became a state in circumstances in which the recognition of its statehood would otherwise have been premature. Although the arguments in favour of premature statehood were often not set out or were poorly articulated, the importance of the principle of self-determination in such cases seems to have been that it disentitled the former sovereign to rely on its authority over the territory. On the other hand it is significant that in each of these cases the liberation organization did have a significant degree of control in the territory, such that its victory could reasonably be said to be imminent. Moreover the issue presented was one of a simple yes/no kind – independence for the territory in question or the continuation of colonial rule. There was no question of any subsisting claim by the colonial power, or indeed by any other state, to significant parts of the territory in question.

The situation in Namibia provides an instructive contrast. There, notwithstanding the undoubted entitlement of the people of Namibia to self-determination, as declared by the International Court in the *Namibia* case,⁸ and despite the fact that the relevant liberation organization, SWAPO, did have a high degree of allegiance, and a fluctuating degree of control, in Namibia, there was no attempt to treat Namibia as being already legally a state. Instead action was taken to bring about its independence, and in the meantime to seek to protect the rights of the people of Namibia through other means (e.g. the Resolution of the United Nations Committee for Namibia on Permanent Sovereignty over its Natural Resources). In this situation the modalities of achieving independence were of great importance, and were undoubtedly an important factor in leading states to maintain the distinction between the rights of the people of Namibia and their present status. Much the same thing could be said of the Western Sahara, especially having regard to the presence of a relatively powerful neighbouring state with claims over the territory.

Thus although a majority of states have taken the view that the next logical step beyond the Guinea Bissau situation should be taken in the case of Palestine, a significant minority of states opposes that step. There is certainly not the level of support in state practice, nor in the other sources of international law, to support that additional development.

⁷ *Id.*, 260-1.

⁸ ICJ Rep (1971) 16.

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This is not to say that the territory now designated as the territory of Palestine lacks a special legal status, or that appropriate representatives of the people of that territory do not share that status for various international purposes. But the continuing reservations held about the status of Palestine are reflected, both in the practice of international organizations and in the actions of individual states. For example, on 12 May 1989 the 42nd World Health Assembly deferred consideration of the application of Palestine for admission as a member of the World Health Organization. The preamble of the relevant resolution (A42/VR/10) states, in part:

Recognizing in this context that the legal and other issues related to the application of Palestine for membership of the World Health Organization require further detailed study...

Similarly the Executive Board of UNESCO deferred consideration of a Palestinian application for membership of UNESCO, while adopting measures to ensure that Palestine had the fullest possible opportunity (short of membership) of participation in the work of UNESCO.⁹

Another expression of doubt as to the status of Palestine is contained in the Note of Information which Switzerland, as the depository of the 1949 Geneva Conventions on the Laws of War and the 1977 Protocols, addressed to States Parties. In that Note Switzerland reported that it had declined to accept a "communication" from the permanent observer of Palestine to the United Nations office in Geneva, acceding to the Conventions and Protocols, on the grounds that

Due to the uncertainty within the international community as to the existence or the non-existence of a State of Palestine and as long as the issue has not been settled in an appropriate framework, the Swiss Government, in its capacity as depository ... is not in a position to decide whether this communication can be considered as an instrument of accession in the sense of the relevant provisions of the Conventions and their additional Protocols... The unilateral declaration of application of the four Geneva Conventions and of the additional Protocol I made on 7 June 1982 by the Palestine Liberation Organization remains valid.¹⁰

Against this general background some brief comments should be made about two other arguments used by Boyle to support the case for the statehood of Palestine.

III. The Authority of the General Assembly to Recognize Palestinian Statehood

Boyle takes a very extensive view of the General Assembly's authority to recognize Palestinian statehood, specifically by its Resolution 43/177. These seem to be three main bases for this authority. The first involves the "provisional recognition" given to

⁹ See UNESCO 132 EX/31, 29 September 1989, and the associated *Consultation* by Professor Alain Pelet, 7 September 1989.

¹⁰ Embassy of Switzerland, Note of Information sent to States Parties to the Convention and Protocol, 13 September 1989.

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the sovereignty of the nations subject to "A" class mandates pursuant to Article 22 of the League of Nations Covenant. That provisional recognition would be a right of peoples saved or reserved by Article 80 of the United Nations Charter. But the fact is that, with the exception of Iraq, the "provisional recognition" given by Article 22 did not amount to much.¹¹ In practice the "A" class mandates were subject to the normal mandatory regime, and it was not argued that the status of the territories concerned was that of independent states. In this context the distinction between "state" and "nation", rejected by Boyle, is crucial: certain "peoples" or "nations" were recognized by Article 22 as having rights of a relatively immediate kind, but these did not as yet amount to statehood.

The second element supporting General Assembly Authority, according to Boyle, arises from his assertion that the General Assembly was the successor to the League of Nations with respect to the mandate system. But there was no direct succession between the League of Nations and the United Nations in this or in other respects, and this lack of succession was wholly deliberate. Instead, the International Court in 1950¹² and again in 1971¹³ supported the exercise by the United Nations of authority with respect to mandates on the basis of arguments which did not depend on a rule of succession. Moreover, although the General Assembly acquired power through these means to revoke the mandate for South West Africa, that power was not of a general discretionary or governing kind, but was more in the nature of a declaratory power exercised on behalf of the international community in a situation where no state had sovereignty over the territory concerned. The binding character of that decision, and in particular the legal consequences for states as set out in the *Namibia Opinion*, were in a substantial part due to the operation of Security Council resolutions pursuant to Article 25 of the Charter. No doubt there are important implications for the status of Palestine in these arguments. But they stop far short of the proposition that the General Assembly can recognize Palestine as a state, and not merely for such "internal" purposes of the United Nations as observer status, with an effect which is "constitutive, definitive, and universally determinative." What the position would be if Palestine was actually admitted to United Nations membership is, of course, another question.

IV. The Position of Dissenting or Opposing States

Finally I should briefly note Boyle's arguments to the effect that both the United States and Israel are bound to accept the status of Palestine as a new state, notwithstanding their consistent opposition. So far as the United States is concerned, the principal ground for the argument is based upon the "provisional recognition" by Article 22 of the League of Nations Covenant of the status of the nations under "A" class mandates, a position preserved in Article 80 of the Charter. This argument has already been dealt with. It is only necessary to add, to the extent that it may be relevant, that the United States was not a party to the Covenant. It could be argued that Article 80 cannot have the effect of preserving treaty rights as against states which were not parties to the relevant treaties. Perhaps the better view, however, is that Article 80 is a mere savings clause of an essentially declaratory and limited kind.

So far as Israel is concerned, Boyle's argument is principally based upon the proposition that Israel's acceptance of the Partition Resolution (General Assembly Resolution

¹¹ Crawford, *supra* note 337-40.

¹² *Status of South West Africa Opinion*, ICJ Rep (1950) 128.

¹³ *Namibia Opinion*, ICJ Rep 1071, p. 16.

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181(II) of 29 November 1947) was "a condition for its admission" to the United Nations. The essential point here is that, although the relevant Jewish organization did accept the Partition Resolution when it was first adopted, the Resolution was not accepted by the Arab states involved. Instead war broke out, leading to a cease-fire on quite different boundaries. Israel was not admitted to the United Nations on the basis of a division of territory which in any way reflected the partition resolution. Moreover the Charter makes no provision for "conditional admission."

V. Conclusion

It has to be said that the case for Palestinian statehood presented by Boyle is weak and unconvincing. Indeed it is weaker and more unconvincing than it need have been, having regard to some of the post-1945 developments, and in particular to the case of Guinea Bissau. But if that case is to be justified on the premise "*nasciturus pro jam natus habetur*",¹⁴ the fact remains that a real State of Palestine is by no means yet assured. For a Palestinian State to be properly described as "*nasciturus*", what is needed is statesmanship on all sides, and respect for the rights of the peoples and states of the region. The manipulation of legal categories is unlikely to advance matters.

¹⁴ See Crawford, *supra* note 391-2.