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**RESEARCH PAPER ON THE 'STATEHOOD
STATUS' OF PALESTINE THROUGH THE LENS OF
THE MONTEVIDEO CRITERIA OF STATEHOOD
AND PRE-TRIAL CHAMBER. ('PTC')**

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Abstract:

Amongst a surfeit of unresolved questions in International Law, the conflict between Palestine and Israel is not only a provocative subject but also raises a significant point of contention regarding the status of Palestine within the international community. The status of Palestine beyond its persisting conflict with Israel also encompasses its 'statehood status', which has for long been an argumentative issue in the global arena. The paper endeavours to examine the 'statehood status' of Palestine through the lens of the *Montevideo Criteria of statehood* and Pre-Trial Chamber. ('PTC'). The paper begins by succinctly listing out the elements under the Montevideo Criteria to attain statehood and goes on to comprehensively breakdown the two theories of statehood, namely Declaratory and Constitutive theory. The paper further endeavours to provide a brief history of Palestine and its statehood claims and the decision rendered by the Pre Trial Chamber vis a vis the jurisdiction of Palestine.

Brief History of Palestine and its statehood claims.

In the International Legal Jurisprudence, the concept of 'states' is not codified with an universally accepted definition even though states have earned the moniker of 'prime legal persons'¹ in the realm of international law. It is instructive to highlight that in order to determine whether an entity can be observed as a state, one must resort to the *Montevideo Criteria of statehood* which enunciates the following conditions to be fulfilled as set forth in Article 1 namely : a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with other states.² The first element underlines the presence of a permanent population that, "if states are territorial entities, they are also aggregates of individuals."³The second element posits the presence of governmental control over a *defined territory* with no precondition of a minimum area. The third requirement is the presence of a government that can exercise independent and effective authority over the population and territory. The last element finds its essence in independence, highlighting the capacity of the entity to enter relations with other states, highlighting the importance of recognition by other countries, as well as its formal statement that it is not subject to any other sovereignty, thereby unaffected by factual dependence upon other states. Finally, it refers to the legal capacity of an entity to participate in public international relations, including the legal competence to carry out its obligations.

However, even though the international legal rules governing the pertinence of recognizing states are present, there is an intricate interplay of legal norms and politics where factors like 'convenience' and 'superior powers' may supersede the existing norms. The same may be encapsulated by the two theories of statehood, which will be explained sequentially in the paper.

Declaratory Theory

This theory, in consonance with the traditional positivist doctrine, endows supremacy on states and implies that fulfilling the elements in the Montevideo Convention is sufficient to attain statehood. Article 6 of the Convention states, "the recognition of a state merely signifies that the state which recognizes it accepts the personality of the other with all the rights and duties determined by

¹ Malcolm N. Shaw, "International Law" (8th edn 2017) pp 156

² Convention on the Rights and Duties of States, Article 1.

³ James Crawford, "The Creation of States in International Law"(2nd edn 1979) pp 46

international law.”⁴Therefore it does not hold recognition as a necessary element for statehood. Instead, it states that recognition is extraneous for statehood as it relies on facts for the same rather than the opinion or discretion of individual states, and recognition should be automatic.⁵

Constitutive Theory

While the declaratory theory has amassed considerable scholarly consensus, a deluge of detractors have assailed this theory on the premise that statehood cannot be exclusively interpreted as a factual question since it stems purely from a legal context.⁶ The key question here is whether a political entity can be viewed as a state under international law, despite the absence of recognition of existing states. This is precisely wherein the constitutive theory has answered the question negatively. The constitutive theory posits that an entity cannot be labelled as a state merely by possessing fundamental attributes of statehood, and it becomes so, only by virtue of recognition from states.⁷ Once the factual criteria of statehood, government and population is adhered to, the very same factuality must be approved by existing states, failing which the entity would be deprived of the rights inherent in international law.⁸

The interpretation of the term “recognition” is in consonance with 19th century discourse on legal positivism, which has emphasised upon the consensual nature of international law, which prescribes that existing states were conferred with the right to consent to the formation of the new state.⁹ However, the constitutive theory has attracted trenchant criticism for its lack of nuance since it fails to set up precise standards pertaining to statehood, like the precise states in number essential to obtain legal recognition or the quantum of international recognition an entity must be conferred with. Moreover, where only a certain part of the legal community has granted recognition to an entity’s statehood, it has remained unclear on whether that entity can be considered fully as a state. Herein, Palestine must lay recourse to the self-determination principle which prescribes that a country can ascertain its statehood by forming their own government and populace.

⁴ Convention on the Rights and Duties of States, Article 6.

⁵ William T. Worster, “Law, Politics, and the Conception of the State in State recognition theory.” Boston University International Law Journal, (vol. no. 1 August 2009) pp. 119.

⁶ Jena Abhinav and Lath Adhiraj, “The Lauterpacht Doctrine: An Objective Attempt Towards State Recognition?” 1 February 2021.

⁷ Zounuzy Zadeh Ali, “International law and the Criteria for Statehood,” Faculty of Law Department of International and European Law, (2012)

⁸ Ibid

⁹ Supra note 7

Brief History of Palestine and its statehood claims.

In 1947, the United Nations General Assembly (hereafter, UNGA) approved Resolution 181, which created the Arab states of Palestine and the Jewish states of Israel in the territory of Palestine. Israel eventually seized the Arab lands and occupied the Gaza Strip, East Jerusalem, and West Bank engendering hostilities. The series of wars have led to a humanitarian crisis wherein Israeli Defence Force as well as the Palestinian groups such as Hamas have been in conflict because of the forced displacement of Palestinians.¹⁰ with no truces or peace agreements coming to their aid. The Palestinian Liberation Organization (hereafter, PLO) obtained observer status at the UNGA in 1974 and internationally has diplomatic recognition as the delegate of the Palestinian people. Principal authority concerning Municipal governance has been vested in the Palestinian Authority (PA).¹¹ It had made numerous efforts to gain statehood recognition both at the United Nations and internationally, finally achieving formal recognition from the UNGA in 2012 when it received 'non-member state' status.¹² Having laid down both theories of Statehood, the Montevideo Criteria for Statehood and the events that transpired in Palestine, one must apply them in the context of Palestine.

The first component is the presence of a 'permanent population.' Despite the establishment of the state of Israel, the international community has consistently recognized the existence of a Palestinian community wherein the UN and the rest of the world employ the words "Palestinians" or "Palestinian refugees" in reference to the population residing in Gaza, West Bank and Palestinian refugees worldwide. Moreover, it can be inferred from the government documents that Israel has recognised Palestinians inevitably admitting that they are a nation.¹³ Although the primary contention here is to examine if Palestinian authorities have control over a permanent population, independent of whether it is constituted only by Palestinians. In the present case, these two concepts overlap because the population in the Occupied Palestinian Territory (Hereafter, OPT) comprises mainly of Palestinians. Palestine has five million people, with more than three million living in the West Bank and almost two million residing in the Gaza Strip.¹⁴ In conclusion, we can affirm that the Palestinian authorities

¹⁰ John Quigley, *The Statehood of Palestine: International Law in the Middle East Conflict* (New York: Cambridge University Press, 2010), 133.

¹¹ PLO vs PA, Passia (September 2014).

¹² Robert McMahon & Jonathan Masters, *Palestinian Statehood at the UN*, Council on Foreign Rels. (November 30, 2012)

¹³ Joshua Berzak, "The Palestinian Bid for Statehood: Its Repercussions for Business and Law", *Journal of International Business Law* 12, no. 1 (2013) pp. 14.

¹⁴ Palestinian Central Bureau of Statistics, "Population Indicators 2017".

control a permanent population in the OPT.

The second element is the existence of a defined territory. Palestine has established its borders, and an overwhelming majority of the international community, including the UN and the EU, recognizes the 'Green Lines' as a legitimate partition between Palestinian and Israeli territory, including West Bank, Gaza Strip and East Jerusalem. The international community has approved that Palestine and Israel should use the pre-1967 borders as a starting point for further deliberations regarding the border issue.¹⁵ The territorial integrity of Palestine has been recognized both by the Security Council through Resolution 242 and the ICJ in its Advisory Opinion on the Legal Consequences of the Construction of a Wall in the OPT.¹⁶ Even though the territory of Palestine can be contested to be fragmented, the territory of a state in international law does not require continuity.¹⁷

The third element highlights the presence of a government exercising effective and independent control over the set territory and population that cannot be mechanically applied to a situation of belligerent occupation. In instances like this, the pre-existing government would, under such an occupation, "lack the capacity to function independently in a wide variety of governmental spheres." This would tantamount to saying that any existing militarily occupied state ceases to be a State. States like Bosnia, and East Timor had governments lacking the capacity to independently function in multiple governmental spheres and had no control over their bodies during periods of civil conflict. The fact that the interim Iraqi government with limited governmental powers, when Iraq was under American occupation, did not see any Montevideo Convention criteria obstacles to joining the Rome Statute of the ICC demonstrates that agreements as to what limited powers a government may have under belligerent occupation should not affect other external capacities.

Under the fourth element, the competence of the Palestinian Authority (PA) to engage in foreign relations has been exhibited through its membership in the PLO and its triumphant negotiation of international agreements with comprising of both states and organizations. Even though the PLO appears as the intermediary for these associations, there is substantial overlap between the PLO and

<http://pcbs.gov.ps/site/langen/881/default.aspx#Population>. (Last Accessed February 4th, 2018).

¹⁵ Susan Panganiban, "Palestinian Statehood: A Study of Statehood through the Lens of the Montevideo Convention, 63.

¹⁶ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion (The Hague, International Court of Justice, July 9th, 2004)

¹⁷ James Crawford, *The creation of States in International Law*, (2nd edn pp 47).

the PA. Together these entities preserve active diplomatic networks and partake in numerous international organizations at distinct levels of engagement. Furthermore, Palestine has acquired bilateral recognition from around 137 states and has lately received formal recognition from certain European governments. It has also instituted embassies, missions, and general delegations in several countries, emphasizing on its capacity to determine relations with other states.

Pre-Trial Chamber

The ruling rendered by the PTC is path-breaking given that it has kickstarted conversations surrounding the myriad of complexities involved in Palestine's claim to statehood. On February 5th, 2021 - The PTC unequivocally held that it had territorial jurisdiction over Palestine, including the West Bank, Gaza, and Jerusalem.¹⁸ While tackling the issue of jurisdiction, the PTC was tasked to decide whether Palestine qualifies as a state, to ascertain whether such a claim can be brought before the forum of ICC or whether it be incompatible with the objectives of the Rome Declaration.¹⁹ The ICC is deprived of the competency to examine the issues of statehood. Therefore, the chamber opined that since Palestine is a state party to the Rome Statute, it qualifies as a 'state' for the objectives outlined under Article 12(a) of the Rome Statute.²⁰

PTC's ruling encompasses a bold interpretation of Article 12(a) of the Rome statute, which stipulates that 'the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute'. The majority foregrounded their opinion in the Rome Statute and contended that since Palestine prior accession to the Rome statute, cannot be arbitrarily revoked.²¹ The Chamber noted that a perusal of Article 12(a) makes it conspicuous that the word 'following' draws out a nexus between 'state parties to this statute' and the 'conduct in question to have occurred in the state', which demonstrates that Palestine is a state party to the statute. Essentially, the Rome statute does not mandate Palestine to satisfy the elements of statehood enshrined under international law but must interpret article 12(a) considering the circumstances of every case.²²

¹⁸ Situation in the State of Palestine, ICC-01/18-143, ¶ 118 (Pre-Trial Chamber 1, Feb. 5, 2021).

¹⁹ Questions and Answers on the Decision on the International Criminal Court's Territorial Jurisdiction in the Situation in Palestine, Int'l Crim. Ct. (Feb. 15, 2021), <https://www.icc-cpi.int/itemsDocuments/palestine/210215-palestine-q-a-eng.pdf>.

²⁰ supra note 6

²¹ Situation in the State of Palestine, ICC-01/18-143, ¶ 112 (Pre-Trial Chamber 1, Feb. 5, 2021).

²² Rome Statute of the International Criminal Court art. 12(3) (Rome, 17 July 1998) U.N. Doc. A/CONF.183/9 of 17 July 1998, entered into force 1 July 2002.

Another acute observation was that while the judges remained mute on the issue of statehood, the majority placed heavy reliance on UNGA resolutions. Intriguingly, the chamber took recourse to the 2016 security council resolution, which laid out how Israeli settlements in Palestine infringes upon international law and is a major hindrance in achieving Palestinian statehood.²³ The chamber also took cognisance of the General Assembly Resolution 67/19 which explicitly recognised Palestine's right to self-determination and asserted that the right to self-determination tantamount to an internationally recognised human right as per Article 21(3) of the Rome Statute, which provides unflinching proof that international bodies such as the UN and ICJ had already affirmed the right to self-determination vis a vis Palestine.²⁴ Therefore, The PTC decision is heralded as progressive since as a formal international body, it can steer conversations towards Palestinian statehood under international law.

Conclusion

Palestine meets the basic requirements for statehood as enunciated in the Montevideo criteria. However, it could be contended that some elements are only partially fulfilled due to lack of complete control of its borders, territory and internal political problems, there is enough evidence supportive of the Palestinian statehood within the meaning of the Montevideo criteria. Although, recognition in the current political context is imperative to derive all rights and obligations attached to being a state. Most of the states and the decision of the ICC suggest the significance of 'recognition' in international law and its coherence with the constitutive theory's emphasis on 'recognition'. Moreover, the *Institut de Droit International's* 1936 Resolution declares that "the existence of new States with all connected legal effects is not affected by the refusal of one or more States to recognize."²⁵ The unstable status of Palestine's statehood may also create plights for the ICC's investigation and may necessitate a special tribunal to both prosecute perpetrators and dismantle the racial domination and oppression wherein Israel-a non-state party may threaten the funding of the ICC.²⁶

²³ ibid

²⁴ Supra note 21

²⁵ Institut De Droit International: Resolutions Concerning the Recognition of the New States and New Governments, Am. J. Int'l L. (Supplement: Official Documents) 163, 185 (Oct. 1936).

²⁶ Abhinav Mehrotra, "Israel-Palestine Conflict: Need for a Special Tribunal and ICC." The Geopolitics, 26th March 2022