The State of Palestine Exists

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I am grateful to the organizers of this conference for inviting me to speak on the applicability to the State of Palestine of the Montevideo Convention on the Rights and Duties of States. While I have been involved with the Palestinian cause for a quarter of a century, I must confess that I was not previously aware of the Montevideo Convention. However, I now know that it was a pioneering multinational treaty addressing the vexing question, "What is a state?" under international law and that it remains relevant, not simply within the Western Hemisphere and among its state signatories, but also beyond, including with respect to Palestine.

The convention was signed in this city on December 26, 1933, by all the Spanish-speaking states of this hemisphere except Bolivia, as well as by Brazil, Haiti and the United States of America. At the Seventh International Conference of American States, which gave birth to the convention, U.S. President Franklin D. Roosevelt declared his "Good Neighbor Policy," which promised a less aggressive American approach to inter-American relations, and this more respectful and egalitarian spirit in state-to-state relations is reflected in the provisions of the convention.

Article 1 of the convention sets the following agreed criteria for a state to exist under international law:

> 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.

In this context, it is important to recognize the distinction between the existence of a state and the diplomatic recognition of a state by other states. Article 3 of the convention specifically states:

> The political existence of the state is independent of recognition by other states. Even before recognition the state has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organize itself as it sees fit, to legislate upon its interests, to administer its services, and to define the jurisdiction and competence of its courts.

Indeed, diplomatic recognition is a fundamentally political issue. No state can be compelled to recognize another state or prevented from doing so. The United States of America provides extreme examples, in both directions, of the absolute discretion of states to grant or refuse recognition. For 30 years, the United States refused to recognize the People's Republic of China, whose existence was scarcely in doubt. On the other hand, during the 50 years prior to the collapse of the Soviet Union, the United States continued to recognize the three Baltic states, which had been effectively absorbed into the USSR by the end of World War II. The prewar flags of Estonia, Latvia and Lithuania continued to fly at fully accredited embassies in Washington.

This Baltic precedent might be usefully recalled if the United States were to argue that, much though it would like to be able to recognize the State of Palestine and hopes to be able to do so at some time in the future, it would be legally impossible to do so now, since its territory is effectively occupied by another state.

The criteria for statehood set forth in Article 1 of the convention did not purport to create international law. Rather, Article 1 restated and codified customary international law as existing in 1933. In fact, the convention's four criteria — a permanent population, a defined territory, government and capacity to enter into relations with the other states — set what today must seem a very low bar for qualifying as a state and, accordingly, for the rights enjoyed by all states, regardless of recognition, as set forth in Article 4 of the convention, as follows:

> States are juridically equal, enjoy the same rights, and have equal capacity in their exercise. The rights of each one do not depend upon the power which it possesses to assure its exercise, but upon the simple fact of its existence under international law.

Palestine, currently recognized by 112 other states, clearly qualifies as a state under the convention's criteria. So does Kosovo, currently recognized by 75 states, even though most states, as well as the United Nations as an institution, still consider its entire defined territory to be the sovereign territory of Serbia. So does the Sahrawi Arab Democratic Republic in Western Sahara, currently recognized by 49 states and a member state of the African Union, even though its government is based abroad, in Tindouf, Algeria, while virtually its entire territory has been occupied by the Moroccan army for the past 35 years. So do South Ossetia, Abkhazia, the Turkish Republic of Northern Cyprus and Transnistria, recognized by four, four, one and no states, respectively.

Interestingly, Israel does not qualify as a state under the convention's criteria, since it has consciously chosen never to define its territory and borders, knowing that doing so would necessarily place limits on them.

Since 1933, customary international law has become somewhat more restrictive on the criteria for, at least, "sovereign statehood." (The words "sovereignty" and "independence" do not appear in Article 1 of the convention.) The convention's requirement for "a defined territory" is now commonly tightened to "a defined territory over which sovereignty is not seriously contested by any other state," while the convention's requirement for "government" is now commonly stated as "effective control over the state's territory and population." With the bar raised higher

in these two respects, all but one of the aspiring "states" cited earlier fail to qualify as "sovereign states," in all except Israel's case because sovereignty (the state-level equivalent of title or ownership) over their defined territory is vigorously contested by another state which (except in the case of Morocco and Western Sahara) is recognized by most other states as the legal sovereign. Palestine alone still qualifies.

Jordan renounced its claim to sovereignty over the West Bank in July 1988. While Egypt administered the Gaza Strip for 19 years, it never asserted sovereignty over it. While Israel has formally annexed East Jerusalem and an arc of surrounding territory (an annexation recognized by no other state, not even the United States of America), it has for 44 years refrained from asserting sovereignty over any other portion of the West Bank or the Gaza Strip, an act that would raise awkward questions about the rights (or lack of them) of those who live there.

The Oslo process has permitted a governmental Trojan horse called the Palestinian Authority to be dragged into the occupied territories and to start building the structures of a state which, until recently, dared not speak its name.

Since November 1988, when Palestinian statehood was formally proclaimed, the only state asserting sovereignty over those portions of mandatory Palestine that Israel conquered in 1967 (aside from expanded East Jerusalem, as to which Israel's sovereignty claim is universally rejected) has been the State of Palestine. Its sovereignty claim is therefore both literally and legally uncontested, even if not yet universally recognized.

It was, of course, profoundly gratifying that some 100 states promptly recognized the State of Palestine when it declared its independence in 1988. However, it was then and for several years afterward legally challenging to make the argument that Palestine met the customary international-law criterion for "effective control over the state's territory and population." This is the best argument I could make in an article published in the Washington quarterly journal *Middle East Policy* in early 1993 [Vol. 2, No. 1 – ed.], prior to the "Oslo" Declaration of Principles signed that September on the White House lawn:

> The weak link in the Palestinian claim to already exist as a state is, of course, the fourth criterion, "effective control." The state's entire territory is under the military occupation of another sovereign state. (For seven months, Palestine and Kuwait had that much in common.) Yet "effective control" is not purely a question of guns and the capacity to compel submission by physical force. It also encompasses the allegiance of the population, what is sometimes termed "the general acquiescence of the people."
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> Few states on earth can claim the degree and intensity of allegiance which the people of the West Bank and the Gaza Strip manifest, day after bloody day, to the State of Palestine. When the State of Israel and the State of Palestine issue conflicting instructions to the population, it is abundantly clear which state exercises "effective control" over their allegiances.

> Accordingly, as a matter of customary international law, if not yet of international power politics or Western public consciousness, the status of the occupied territories today is clear and uncontested. The State of Palestine is sovereign, the State of Israel is the occupying power, and UN Security Council Resolution 242, explicitly premised on "the inadmissibility of the acquisition of territory by war," is the internationally accepted basis for terminating the occupation.

The next paragraph of that article is one which I recall with some regret:

> It is absolutely clear that a territory cannot be "autonomous" or "self-governing" under its own sovereignty. Therefore, if the Palestinians were to accept a regime of "autonomy" or "self-government," the ostensible goal of the Israeli-Palestinian bilateral talks, sovereignty would necessarily have to shift elsewhere — presumably to Israel. By agreeing to "autonomy" or "self-government," the Palestinians would be acquiescing, for the first time, in the occupation and would, *de jure*, be renouncing their existing sovereignty over those portions of mandatory Palestine where they still constitute the overwhelming majority of the population. What could possibly induce them to do so?

Of course, as we all know, the Palestinian leadership did do so — and the State of Palestine, while never being formally renounced, was effectively consigned to a dark closet before, in recent months, being brought out again into the light of day, dusted off and polished up, with considerable help from South America.

On the bright side, notwithstanding all its disappointments and humiliations, the Oslo process has permitted a governmental Trojan horse called the Palestinian Authority to be dragged into the occupied territories and to start building the structures of a state which, until recently, dared not speak its name. The State of Palestine, exercising effective control over all the state's population and most of its territory, will emerge from that Trojan horse, fully equipped, before it applies for UN membership in September.

This transformation will, logically, require the prior dissolution of the Palestinian Authority (which, legally, should have ceased to exist in 1999, at the end of the "interim period" provided for in the Oslo Accords) and the accompanying proclamation that all of its ministries and other governmental agencies have become ministries or agencies of the State of Palestine. In this context, it would, of course, be highly desirable for a reconciliation between Fatah and Hamas to be achieved prior to September.

One other article of the convention, Article 11, deserves to be cited. It reads:

> The contracting states definitely establish as the rule of their conduct the precise obligation not to recognize territorial acquisitions or special advantages which have been obtained by force whether this consists in the employment of arms, in threatening diplomatic representations, or in any other effective coercive measure. The territory of a state is inviolable and may not be the object of military occupation nor of other measures of force imposed by another state directly or indirectly or for any motive whatever even temporarily.

The principle expounded in Article 11 of the convention is a precursor both

of the most important principle in the UN Charter, Article 2's prohibition of the acquisition of territory by war, and of UN Security Council Resolution 242, which is explicitly premised on the inadmissibility of the acquisition of territory by war. The applicability of Article 11 of the convention to Palestine is clear and requires no commentary.

While, in recent years, the conduct of the United States of America outside its borders has not been noticeably restrained by legal concerns of either a domestic or an international nature, it is worth noting that the Montevideo Convention of 1933, as a ratified treaty that has not been renounced, has the status of domestic law in the United States. Both domestic and international law require the U.S. government to respect and observe its provisions, which are not subject to any geographical qualifications or limits.

Under both the criteria of the Montevideo Convention and the more restrictive criteria of recent customary international law, the State of Palestine exists — now. Its existence does not require Israeli consent or American recognition. It is a reality that must no longer be ignored.

It is no secret that many long-time friends of the Palestinian people and cause (myself included) have concluded in recent years that a decent two-state solution was no longer conceivable, and that the Palestinian people should henceforth take their inspiration from Martin Luther King, Jr., and Nelson Mandela and pursue, by strictly nonviolent means, the full rights of citizenship in a single democratic state with equal rights and dignity for all.

At least for me, this calculation has been changed by the current strategic decision of the Palestinian leadership in Ramallah to break free from a so-called "peace process" which has been cynically manipulated to perpetuate "process" and prevent peace and to rely instead on the United Nations, international law and the support of decent people around the world by seeking diplomatic recognition of the State of Palestine by a large majority of the world's states, comprising an overwhelming majority of the world's people, prior to applying for full member-state status at the United Nations this September.

Seven of the nine South American states that have recognized the State of Palestine since December have recognized the state explicitly within its full pre-1967 borders. If Palestine, within its full pre-1967 borders, were a UN member state, not simply "the occupied territories," the end of the occupation and peace with some measure of justice, even if not imminent, would instantly become a question of "when," no longer of "whether." The writing would be clearly on the wall.

The Holy Land is rumored to have been the site of miraculous resurrections. The current Palestinian strategy offers the last, best hope of raising the two-state solution from the dead and making it a reality in a form that offers not simply a restructured and renamed occupation but genuine liberation and some measure of justice.

Decent people everywhere should do everything in their power over the next six months to make this last-chance strategy succeed. If it does succeed, a huge debt of gratitude will be owed to the governments and people of South America, who, by their well-timed recognitions of the State of Palestine, have given this strategy credibility, momentum and hope.