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Conflict

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Excerpt

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PART ONE

A NEW TYPE OF STATE

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## I

## Why Palestine and Statehood?

In 1996, Yassir Arafat said he planned to declare Palestine a state. Israeli Prime Minister Benjamin Netanyahu threatened that if he did, Israel would reoccupy sectors of the West Bank of the Jordan River that it took in 1967 but turned over to a Palestinian administration under a 1993 agreement. Netanyahu said that a declaration of Palestine statehood would nullify the Israeli-Palestinian agreement.

The strong Israeli reaction underscored the explosive character of the statehood issue in the Israeli-Palestinian relationship. As far as the Israeli government was concerned, Palestine statehood might come at the end of a process of negotiation but not before. If statehood were to materialize for Palestine, it would be on terms negotiated with Israel, which might involve significant constraints on Palestine's freedom of action. Statehood was to be the reward for an agreement in which Israel might gain major concessions in return for recognizing Palestine as a state.

In early 2009, the explosive character of the Palestine statehood issue surfaced in another way. Israel had just invaded the Gaza Strip, incurring criticism for overreaching in its tactics. Television viewers watched as bombs fell on urban communities in densely populated Gaza City. A United Nations storage depot was hit, destroying supplies that were much needed by the civilian population. In the Hague, the International Criminal Court was deluged with missives from human rights organizations suggesting that the bombing might be criminal in nature, as war crimes.

The Court's jurisdiction to investigate war crimes is limited, however. Palestinian officials invoked a clause in the Court's statute that provides for jurisdiction if the state in whose territory the crimes occur files its consent. In the name of Palestine, they gave their consent. It would be valid if Palestine were a state.

Suddenly the issue of Palestine statehood loomed large. Statehood for Palestine had been asserted in a 1988 declaration that led to recognition by some states but not by others. The Palestinians were recognized as enjoying a right of self-determination, but it was not clear what that meant. Palestine had been admitted to observer status at the United Nations but not to membership in the organization. Palestinian institutions exercised administrative authority in the territory Palestine claimed, but the Israeli army did as well. In light of these contradictory circumstances, could Palestine be considered a state?

#### THE CONTEXT OF PALESTINE'S EMERGENCE

Modern Palestine appeared on the international landscape in an unusual manner. Palestine's status was defined by decisions made by the organized international community, decisions that included not only Palestine but also other territories whose fate was at issue during the Great War that would come to be called World War I.

The decisions were made around a conference table outside Paris at the end of that war. The major powers conferred to resolve the status of territories they were wresting from a defeated foe. Palestine was one of those territories.

As will be seen, a decision was made to eschew colonial acquisition in favor of a solution that fell in between colonial rule on the one hand and independence on the other. The status devised for these territories would confound an entire generation of lawyers, who would strain to fit it into the categories known to the law for analyzing territorial arrangements.

#### STATEHOOD

Beyond the story of how Palestine emerged, any analysis of Palestine's status raises the question of statehood and what it entails. Answering the question of whether Palestine is a state requires an understanding of what it takes to be a state. That exercise draws one into a realm informed in part by legal norms, but also by history and circumstance. Must a putative state have total control over its affairs? Must it be independent? Must it be recognized as a state by the community of nations? Answers to these background questions are not obvious. Strange as it may seem, the international community has not developed hard and fast rules about statehood.

Nonetheless, the law is far from irrelevant. While issues of fact are important, the facts remain to be assessed under rules of law. James Crawford, a student of statehood, calls the creation of a state “a mixed question of law and fact.”<sup>1</sup> David Raič, another student of the subject, refers to states as “legal persons.”<sup>2</sup> If a state is a “legal person,” there must be some way in which a state becomes constituted as such. One finds, in fact, a set of criteria that are said to be the requirements for statehood. These criteria, which will be examined in Chapter 16, contemplate control over a defined population in a defined territory by a government capable of entering into relations with other governments.

Analysts of statehood have raised penetrating questions, however, about whether such a definition comports with reality. Stephen Krasner, for example, deconstructs the sovereign-state model with a blistering attack on its premises. International practice of accepting various entities as states, he avers, does not conform to the idea of a territory ruled by an administration that is universally regarded as representing a state.<sup>3</sup>

If one asks whether Italy is a state, the answer seems obvious. But the international landscape is also dotted with so-called microstates. Some of these, as will be seen in Chapter 19, have little control over their own affairs. A larger, outside state may play a major role in the microstate's affairs. Nonetheless, such entities seem to be states. One finds states in which a government once existed but has ceased to function, leading to anarchy. One also finds states whose territory is occupied by a foreign army.

Even for what one may regard as “obvious” states, the requirements for their statehood often escape ready definition. European states do not control their own affairs in many important spheres of activity. Supranational institutions routinely order the states of Europe to change their policies regarding economic affairs or the observance of human rights.

## RECOGNITION

One especially murky concept that invades discussions of statehood is recognition. An entity purporting to be a state must, it is said, be recognized by entities already regarded as states. Some measure of acceptance may be required if an entity is to function effectively as a state. Yet some entities manage with minimal contact with other states. Rhodesia functioned largely on its own from 1965 to 1980, after the major powers

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decided that the style of rule in Rhodesia violated international standards. If an entity appears to possess the attributes normally associated with statehood, it is, arguably, a state even if other states refuse to deal with it.

If recognition is required, the question arises about how it must be expressed. Must a putative state produce a pack of letters from other states in which they say that they recognize it? Can recognition be presumed from the conduct of states? If states interact with an entity in ways that one finds interaction only among states, can that be taken as recognition? This book will not seek to resolve the many difficult issues surrounding recognition. Yet they cannot be avoided. They will be examined in Chapter 18.

#### SOVEREIGNTY IN RELATION TO STATEHOOD

A term that causes unease in analyzing statehood is “sovereignty.” Diplomats and scholars often use it to mean a condition that inevitably accompanies statehood. It is often taken to express the essence of statehood, after Jean Bodin, who analyzed the concept in the sixteenth century. Bodin wrote that “Sovereignty is the absolute, perpetual power of the state, superior to the laws.”<sup>4</sup> Sovereignty is said to be an attribute of the state. A state is said to “enjoy” sovereignty.

The term “sovereignty” is, however, sometimes used to refer to the rights of a people rather than the rights of a state. Thus, a given people is said to enjoy sovereignty within a particular territory. Even as applied to states, the term may have multiple meanings. Krasner identifies four distinct usages. One relates to recognition. Is the entity recognized by other states? If it is, then it is sovereign. A second usage implies that no outside actor controls decision making for the entity purporting to be a state. Only a state that controls its own affairs is sovereign. A third usage Krasner identifies relates to the domestic realm. Does the entity have control over what occurs there, or does one find a general situation of control by various local factions to the exclusion of control by a central authority? The term in this meaning often appears as an adjective modifying the word “control.” One speaks of whether a central authority has “sovereign control” over all the territory it claims or, indeed, over any of the territory it claims.

A fourth usage that Krasner identifies is one he calls “interdependence” sovereignty. Does the entity control the flow of persons, goods, and information across its borders? States are sometimes said to have lost

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“sovereignty” if they cannot control the knowledge flow that comes in digital form. They cannot control public health because of the ease with which persons can move from one place to another. They cannot control their economies because of international capital flows.

These various meanings of the term “sovereignty” might seem to imply that it is held by some single entity with respect to a given territory. Yet one finds suggestions that sovereignty in certain situations may be divisible. In later chapters, certain analysts of the situation of Palestine in the years following World War I will be seen to speak of Palestine’s sovereignty as being split.

Krasner cites as an example of ambiguity in the use of the term “sovereignty” the so-called exclusive economic zone. This is an offshore area of ocean space in which a coastal state has the right to control fisheries but not foreign shipping, which it must allow unimpeded.<sup>5</sup> The authoritative international statement on maritime law, the United Nations Convention on the Law of the Sea, recites that the coastal state has

sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil.<sup>6</sup>

Given that other states have rights of passage for their shipping, the use of the term “sovereign” in regard to natural resources suggests that a state may have sovereignty for some purposes but not for others. One analyst calls this “functional sovereignty.”<sup>7</sup> The matter is even murkier when one realizes that even with regard to natural resources, the coastal state’s rights, according to maritime law, are not exclusive, even though the UN Convention calls them “sovereign” rights. The Convention makes clear that a coastal state must allow other states to fish in the exclusive economic zone to the extent that the coastal state does not exploit a particular species to the maximum sustainable yield.<sup>8</sup> Hence, the coastal state’s “sovereign” right over fisheries is subject to obligations to other states. If a “sovereign” right confers only partial rights, the implication is that sovereignty does not give total control.

In any event, the term “sovereignty” need not be the focus of attention in assessing whether an entity, such as Palestine, is a state. Sovereignty may be a way of describing an entity regarded as a state, but it is not a criterion for statehood.<sup>9</sup> Despite the ambiguities involved in defining “statehood” and “sovereignty,” and over whether such recognition is required and what it may mean, it will be suggested that the concept of

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statehood is not without significance for Palestine. The issue of whether Palestine is a state is more than an exercise in definition and categorization. If Palestine is a state, it may involve itself in the life of the international community in ways that may materially enhance the situation of its people. If Palestine is a state, it may be better positioned to achieve independence. In the early 1990s, when negotiations for a final status with Israel appeared to be close to resolution, the matter was less pressing because it was widely thought that independence would come soon. But nearly two decades on, that independence remains elusive.

While statehood and what it entails form a background for analyzing the status of Palestine, such an analysis of Palestine may in turn help clarify the very meaning of statehood. In particular, the status created for Palestine after World War I involved control by an outside state, yet with attributes for Palestine that arguably were those of a state. If one can speak of statehood in such a situation, then the commonly understood concept of statehood may need revision.

#### WHAT THIS BOOK IS NOT

The issue of Palestine statehood is separate from the question of what ultimate status Palestine may have. Even if Palestine is not presently a state, it could become one. Moreover, a people, in their exercise of self-determination, may choose to constitute themselves as an independent state if they have the requisite right in a particular territory. Or they may decide on some other arrangement. They may merge with a neighboring state if that is their choice. If Palestine desires to merge with Jordan, or with Israel, or with anyone else, that is a choice it has a right to make, assuming consent on the other side. Palestine statehood need not inevitably lead to an independent Palestine state.

For purposes of this book, the very terminology reflected in the title is problematic. If one refers to “Palestine,” is one thereby prejudging the issue of statehood? The United Nations refers to the issue on its agenda as the “Question of Palestine.” It calls the observer organization to which it has accorded status “Palestine.” In this book, the term “Palestine” is used without meaning to prejudge status.

A reader will find little in this book on the Israeli-Palestinian conflict as such. Was the project of bringing Jews to settle in Palestine a brilliant blow for self-determination or a violation of that very principle? To whom does the territory of Palestine rightfully belong? The story of the conflict between Jew and Arab under British rule and the establishment

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of Israel in the territory of Palestine has been told by others, and even by this author in his previous books, *Palestine and Israel: A Challenge to Justice*<sup>10</sup> and *The Case for Palestine: An International Law Perspective*.<sup>11</sup> This book restricts itself to the question of statehood as one piece of the larger Israeli-Palestinian puzzle, while hopefully providing enough of the context to make the analysis understandable. Of necessity, the story begins with the Great War that remade the landscape of much of the contemporary world, including the region in which Palestine was to emerge.



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## A Land in Flux

Palestine has long been a territorial designation on the eastern shore of the Mediterranean Ocean. The ancient territory mirrors the expanse that carried the designation Palestine into modern times. In terms of its population, Palestine is one of the most stable areas on the planet. The culture of Palestine's ancient people was impacted by an Arab invasion from the East in the seventh century, which brought to them the Arabic language and the religion of Islam. From 1517, Palestine pertained to the sprawling empire of the Turks, called Ottoman after Othman I, a fourteenth-century Turkish ruler. Under Ottoman administration in Palestine, central governance was weak, leaving the people in the main under their own local rule.<sup>1</sup>

### STATEHOOD IN BRITISH ASSURANCES

World War I brought Great Britain and France into conflict with the Ottoman Empire. Britain shared a common objective with Arabs throughout Ottoman territories – the overthrow of Ottoman rule. The British wanted military help from Arabs. The Arabs wanted an assurance of independence once the Ottomans were defeated. Sir Henry McMahon, the British high commissioner in Egypt, communicated about this mutual assistance with a leader of the Arab nationalist movement, Hussein Ibn Ali, Sherif of Mecca. To seal this marriage of convenience, McMahon made a commitment to Arab independence in a letter dated October 24, 1915:

The two districts of Mersin and Alexandretta, and portions of Syria lying to the west of the districts of Damascus, Homs, Hama and Aleppo, cannot be said to be purely Arab, and should be excluded from the limits demanded. With the above modification, and without prejudice to our

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existing treaties with Arab chiefs, we accept those limits. As for those regions lying within the proposed frontiers wherein Great Britain is free to act without detriment to the interests of her ally, France, I am empowered in the name of the Government of Great Britain to give the following assurances and make the following reply to your letter: (1) Subject to the above modifications, Great Britain is prepared to recognise and support the independence of the Arabs in all the regions within the limits demanded by the Sherif of Mecca.<sup>2</sup>

In other words, the British were promising Arab independence after what they anticipated would be a successful military campaign against the Ottomans. But it would be debated whether the assurance of independence expressed in McMahon's letter covered Palestine. Mersina and Alexandretta were excluded because they were seen, appropriately, as belonging to Turkey. McMahon's reference in the letter to the interests of France was related to Lebanon. As would later be said by a Palestine representative, "The portions excluded [from McMahon's commitment] fell within the then French sphere of interest and claims."<sup>3</sup> France had a long-standing connection in Lebanon with a Roman Catholic population called the Maronites, who in the twelfth century had sided with French Crusaders against the Muslims, and for whom France had intervened militarily during civil strife in 1860. France anticipated that the Maronite territory would become a Christian-majority state after the demise of the Ottoman Empire, hence its exclusion from the state that was to be under the Sherif of Mecca.

The term "district" in the letter probably meant the areas immediately surrounding Damascus, Homs, Hama, and Aleppo. All four are located considerably north of Palestine, Damascus being the most southerly. An area "lying to the west" of the surroundings of Damascus would be southern Lebanon, but not Palestine.<sup>4</sup>

Arab leaders understood the letter in this way: They regarded it as a commitment that Palestine would be part of a single large Arab-majority state or one of a group of Arab-majority states. A few years later, the McMahon letter was read to mean precisely that by the Political Intelligence Department of the British Foreign Office. The Department prepared a memorandum on the point for the British delegation at the Versailles peace conference that followed the war. The memorandum, referring to Palestine, read:

H.M.G. [His Majesty's Government] are committed by Sir Henry McMahon's letter to the Sherif on October 24, 1915, to its inclusion in the boundaries of Arab independence.<sup>5</sup>