

## **Palestine in International Law Perspective**

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### ***Abstract***

*The purpose of this research is to determine whether the state of Palestine has met the criteria as a sovereign state or not according to international law perspective. To answer this question, it will be used two theories related to the establishment of statehood, namely; constitutive theory and declarative theory. The constitutive theory stresses that a nation or government may become the subject of the international law if other nations acknowledge them as a state. While the declarative theory emphasizes that a nation can only be classified as statehood if it fulfills the normative criteria as stipulated in the Montevideo Convention, these are; permanent population, a defined territory and government. After analyzed, it is found that Palestine has actually fulfilled the criteria or requirement as a sovereign state based on the two above theories. The state already has permanent population, a defined territory and effective government. Similarly, Palestine has been recognized by 136 countries out of 193 countries in the world. There is only political matter which makes superpower states such as the United States of America have not given yet the recognition to the Palestine. Due to superpower states, more less it will affect Palestine to gain more recognition from other countries. However, Palestine is a sovereign state now based on the international law perspective. The methodology used in this research is by collecting primary resources such as journals, books, the United Nations document and other several secondary resources, and then these are analyzed and come up with a conclusion.*

**Key words:** *Palestine, Sovereignty, Perspective, International Law.*

## **A. Introduction**

The debate regarding whether Palestine has become sovereign state or not continues to happen until current day. For those supporting Palestine state argue that it is a sovereign state now because Palestine has already possessed government, territory, flag and also permanent populations. Conversely, for those who disagree argue that although Palestine has met the above criteria, but they do not have full control yet over its territory. Some parts of Palestine territories are still under Israel control. Therefore they perceive that Palestine cannot be categorized as a sovereign state yet until they have full control to its territory.

However, the current United Nations General Assembly Resolution on Non-Member Observer States which allow these non-member state's flag, including Palestine's flag, to be flown in front of the United Nations headquarter in New York, may indicate that Palestine has been acknowledged as a sovereign state. The reason is, it has been recognised by the International organisation which consists of 193 countries around the world, at least based on the declarative theory of statehood. Or might be not yet because some powerful countries such as United States and China have not admitted yet Palestine as statehood. This essay will examine more about the issue by using statehood theories approach.

## **B. Analyses**

In general, there are two theories related to statehood. The first is constitutive theory and the second is declarative theory. The constitutive theory emphasizes that states or governments can become the subject of International law if other states recognise them first. This means that if these statehoods do not obtain recognition then they cannot be categorised as states although they have fulfilled the requirement to become states such as population, territory and government . Thus, the recognition is an essential factor according to the constitutive theory. Meanwhile, the declarative theory reveals that a state will be classified as statehood if those states could meet normative requirements as stipulated in the Montevideo Convention.

### **a. Criteria of Statehood Based on Montevideo Convention (Declarative Theory)**

Montevideo Convention on the Rights and Duties of States is formulated during the seventh International Conference of American States on December 26, 1933 in Uruguay. The

convention has encouraged the declarative theory in order to be accepted as part of the international customary law. The convention was signed by 19 countries and has become the primary sources in the efforts to define statehood .

Article 1 of the Convention states that there are four criterias that should be fulfilled by a state to become a sovereign state, namely; permanent population, a defined territory, government and capacity to enter into legal relations with other states . Now, let begins with the first criteria that is possessing permanent populations. In the Oxford dictionary, population is defined as inhabitants who inhabit a particular place or region continuously without moving to elsewhere then become permanent resident in that new area. However, there is no further explanation for how long (the minimum period) these people have to live in one area so that they are categorised as permanent populations. But the key point as permanent populations is this population should have bred for long time (multiple generations) in the area. Perhaps, this is the best way to describe the meaning of permanent population.

This criteria is one of the very important aspects for statehood. Logically, how states might claim themselves as sovereign states if there are not people living there. Therefore, permanent populations explain that there is state and there are people then they need to be governed. So, government can exist if there are people or population living in the area. Nonetheless, there is no further provision as well regarding the minimum number of permanent population that should be fulfilled by statehood. But, based on some examples, the number seems to be more flexible. Nauru for example, in 1973 only had 6,500 people of permanent population. Surely for a state this is very small number but they are acknowledged as a sovereign state.

For Palestine, this criteria is not a problem at all because before the declaration of Palestine state, there were people who inhabited the country, even since the British colonised the state. Although in 1948 majority of Palestinian people had to leave their own land due to the Arab-Israel war, but some of them returned back when the war was ended. Thus, regarding this first criteria, Palestine totally fulfils the requirement because it has permanent population since the country declared or established. The current number of Palestinian population is approximately 4,5 million people who are living in the Palestinian territory and there is around 6

million who are living overseas (diaspora). This means that they are ready to become a sovereign state since the country is declared.

The second criteria is having a defined territory. As commonly known that a state consists of territories, without them it cannot be admitted as a state. By having territories, states can practice its activity. That's the reason why to have a defined territory is a vital aspect. Moreover, territory is reflecting state's sovereignty, without sovereignty there is not state. Nonetheless, although it is required the existence of territories, there is not stipulation how large the area should be owned by statehood. Although it has a very small area, as long as they have full control to the area/territory then it can be called states. Monaco and Nauru for example, which only have 1.5 and 21 square kilometres of their territory, but they have full control to the territory, then they are admitted of having defined territory. Jean Bodin, a sovereign theorist states that sovereignty is the main aspect of states. At the end, the meaning of sovereignty is defined when statehood could fulfil the characteristic of territory, population, government and more importantly those characteristics are practiced effectively .

For Palestine, however, perhaps it is a bit difficult to determine regarding a defined territory because the dispute with Israel still happens until now. The current Palestine territory is divided into three main areas, namely; Gaza Strip, East Jerusalem and West Bank . Those area are separated. Gaza Strip and West Bank are separated by the Israeli territory. In addition, the territory such as West Bank and Gaza Strip are still under Israel's government control. Therefore, there is a question arose regarding this, whether due to this separated territory then could reduce the meaning of a defined territory? Which means that it also will be affecting the lack of control to the territory as well.

If it is referred to the above explanation the answer is might be yes, because it is required full control on the territory. But, the United Nations has answered this question by pointing out that the Palestine territory integrity has been admitted and confirmed by the International Court Justice and the General Assembly in its Security Council resolutions . So, in the case of Palestine, the limitation of control to its territories would not obscure the integrity as required by the defined territory criteria because it is caused by the occupation of foreign state (Israel). Thus, it can be said that bringing the case of Palestine separated territory and also its limitation to

control its territory than Palestine cannot be categorized as sovereign state is irrelevant criteria for them.

The third criteria is possessing government. The presence of the government criteria has become one of the core criterias of establishing statehood. If the territory and population have existed, then how it is called a state if the population and territory are not governed by an effective government. Therefore, it is clear that the government or effective government has become another new important factor for statehood. International law itself defines territory by referring to how far the territory could be controlled by a government.

For Palestine, it is still unclear yet whether the current government could be called an effective government as meant by the government criteria, because they do not have full control to its territory. Some parts of Palestine territory are controlled by the Israeli government, such as West Bank and Jerusalem. The similar thing also happens in Gaza Strip in which after withdrawing the Israeli military in 2005, the Israeli government still takes the control on the area . This means that, the Palestinian government has not full controll to its territory. Indeed, it has government, but it seems they do not have the 'effective government', perhaps. Therefore, it is still debatable regarding the government criteria whether it needs to have an effective government and is able to control its territory or as long as it has government (normatively) then it is acceptable.

For those who support Palestine state argue that in the Montevideo Convention the term of government is not referring to the effective term. Instead, it refers to a new state practice where its territory can be recognised as state although they could not exercise full authority when the recognition is given, but as long as they have self-determination rights then they could be recognised as statehood. This is why Palestinian government is recognised by United Nations to have the effective government because they have self-determination rights to its territory.

The similar description but different result experienced by Bosnia and Herzegovina and East Timor in the past. At that time, the international world refused to recognise their territories although they had government because they had lack of self-determination rights. The self-determination rights are becoming important when there is limeted levels of having effective government as experienced by Palestine. This self-determination rights are regulated in the

Article 1 paragraph 2 of the United Nations Charter and applies to everyone equally. This right was given by the United Nations to Palestine and therefore the Palestinian government is considered as having effective government although its territory are separated.

The fourth criteria is having capacity to enter into relations with other states. This criteria is difficult to define. According to Dapo Akande, he suggested that this criteria might be understood as independence. With this Independence status, it can provide capacity to enter into legal relations with other states as a state. But, the question is, what is independence and how it is gained. To answer this question, it should be seen based on two aspects. The first is factual and the second is legal aspect. Factual aspect means about the physical ability of statehood to govern territory without directed by others states. Meanwhile from legal aspect means that there is not other states which claim the territory as it has been claimed by others. If these two aspects exist then it will be easier to gain statehood because they are considered to have capacity to enter into legal relations with other states.

This criteria has rose some arguments whether Palestine is qualified or not with this requirement. On one side, it argues that Palestine has the above capacity, but might be based on Dapo Akande's suggestion Palestinian state is still having problem with legal aspect because the dispute territory with Israel still happens until now. But interestingly, Palestine has signed and ratified some of the international agreements, for example the UNESCO Cultural and Heritage Charter and the Arab Charter on Human Rights.

Adding to this, they have been engaging with many states to make agreements, such as Indonesia . On the other side, the Oslo Accord does not include Palestine from statehood's certain basic function, for example the opening of Palestinian diplomatic mission overseas or oppositely the opening of the International diplomatic office or consulate in Gaza Strip and West Bank . But, given they have involved in some international agreements with other sovereign states, I personally perceive that Palestine has the capacity to enter into relations with other states.

Thus, from the above explanation it can be summarised that, firstly, Palestine is clearly having permanent population, a defined territory and also government which governs the country. Secondly, Palestine has been able to engage in diplomatic relationship with other states

and international organisations. Thirdly, Palestine is clearly has its own effective government which is elected through elections. So, it can be concluded that Palestine fulfils the Article 1 of the Montevideo Convention and as a result can be admitted as a sovereign state.

### **b. Criteria of Statehood Based on the Constitutive Theory**

As it has been mentioned at the beginning of this essay that the constitutive theory emphasises that the recognition from others states to become statehood. This means that when a state has had territory, population and also government, it is not automatically become a state. Based on this theory, it needs sufficient recognition from others sovereign states. In the ground, this theory is more practiced than the declarative theory. This means that, although statehood has fulfilled the requirement based on the Article 1 of the Montevideo convention, then it becomes useless if the recognition from other states cannot be gained. The recognition according to this theory is a precondition to be admitted a state .

What about Palestine, does it fulfil this theory so that it can be called statehood? The fact shows that Palestine has been acknowledged by around 136 out of 193 countries in the world. This number potentially increases. So, in my opinion, 136 is a sufficient number of recognition. In addition, Palestine has had diplomatic offices in some countries. Indonesia, for example, Palestine has its embassy since 90's. Even, currently Indonesia has opened its consulate office in Palestine. The similar conditions also happens in some other countries in which Palestine has established its diplomatic offices . Interestingly, the current United Nations General Assembly Resolution on Non-Member Observer States which allows Palestine flag to be flown in front of the UN headquarter has strengthened if Palestine also fulfils the constitutive theory. Surely, this resolution can strengthen the bargain of Palestine to gain the recognition from other powerful countries as well.

### **C. Conclusion**

To conclude this essay, it can be summarised that ideally based on the criteria on the Montevideo convention and also the constitutive theory, Palestine is clearly can be considered as a sovereign state because it fulfils the requirement. But, again, this is normative aspect only which means that Palestine cannot merely rely on the matter because the other states cannot be pushed to accept the recognition.

Although normatively all of the requirements have been fulfilled, but again the basic foundation to be called a state is when a state is treated like a state by other states or other international organisations. If states feel already treated like sovereign state then it can be called as a state. Palestine in my opinion, based on the above facts they can be called as a state because they have been treated like a state by other states and International organisations as well. Moreover, they have involved in many international agreements and also become non-member observer states in the UN forum. So, based on these facts Palestine can be considered as a sovereign state for the purposes of public International law.

Perhaps, the only problem for acknowledgement of Palestine as a sovereign state is merely related to political aspects from a country. For example, why until now the US does not recognize Palestine, it is related to their political interest with Israel. Another example is Kosovo which has proclaimed its independence, but until now it is still not recognized as a country by China and Russia. Likewise Palestine although there are around 136 out of 193 countries around the world which have recognised it as a sovereign state, but it seems not strong enough yet, due to the powerful countries have not admitted them yet. So, it is not about normative criteria anymore, but it is rather about political aspects. Therefore, Palestine ought to use political approach as well in order to gain recognition from superpower countries.

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