



## RUTGERS LAW RECORD

*The Internet Journal of Rutgers School of Law | Newark*  
[www.lawrecord.com](http://www.lawrecord.com)

Volume 36

Legal Implications of Operation Cast Lead, Part 2

Spring 2010

### PALESTINE STATEHOOD: A REJOINDER TO PROFESSOR ROBERT WESTON ASH

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Professor Robert Weston Ash, in his response to my article *The Palestine Declaration to the International Criminal Court: The Statehood Issue*, takes issue with my position that Palestine is a state.<sup>1</sup> He thinks it is not. Professor Ash argues that Palestinian officialdom itself understands that Palestine is not a state (his Part I), that the international community does not treat Palestine as a state (his Part II), and that Palestine lacks the attributes of statehood (his Part III).<sup>2</sup> On none of these points is Professor Ash's argument persuasive. Palestinian officialdom does regard Palestine as a state. The international community does as well. And the asserted lack of attributes involves a misunderstanding by Professor Ash of what is required for statehood in the specific situation in which a state's territory has come under belligerent occupation. This rejoinder follows Professor Ash's scheme, including his sub-categories.

*I. Professor Ash's Part I: statements by Palestinian officials and Palestinian participation in the peace process*

*A and B: Statements by Palestinian officials*

In sub-parts (A) and (B), Professor Ash cites statements by Palestine Liberation Organization (PLO) and Palestinian Authority (PA) officials, and by the PLO Negotiations Affairs Department, that, in his view, reflect Palestine statehood as a "future event," and to that extent a negation of a claim to present statehood.<sup>3</sup> Here Professor Ash misconstrues a series of statements by Palestinian officials. He takes statements in which they speak of establishing an "independent state" as proof that they do not regard Palestine presently as a state. These statements focus on independence, namely, on having control over their territory by ending Israel's belligerent

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<sup>1</sup> Robert Weston Ash, *Is Palestine A "State"? A Response to Professor John Quigley's Article, "The Palestine Declaration To The International Criminal Court: The Statehood Issue"*, 36 RUTGERS L. REC. 186 (2009), <http://www.lawrecord.com/files/36-Rutgers-L-Rec-186.pdf>.

<sup>2</sup> *Id.* at 188, 193, 197.

<sup>3</sup> *Id.* at 188-91.

occupation of it. These statements are not inconsistent with a claim of present statehood. Palestine lacks independence but does not lack statehood. What these officials are calling for is an end to the occupation of the territory of Palestine. They are not saying that Palestine is not presently a state.

### C. *The peace process*

In sub-part (C), Professor Ash argues that Palestinian participation in the peace process that began in Oslo in 1993 proves that no Palestine state currently exists.<sup>4</sup> Professor Ash here repeats the argument that the Government of Israel has made, based on the 1995 Interim Agreement between Israel and the PLO.<sup>5</sup> He refers to a provision in which the PLO agreed that the PA would not engage in foreign relations, and specifically that it would not establish embassies abroad.<sup>6</sup> Engaging in foreign relations is an attribute of a state, so Professor Ash argues that what he sees as a lack of a capacity to do so negates a claim to statehood. The provision to which Professor Ash refers indeed is found in the 1995 Interim Agreement, but that provision has no relevance to the conduct of foreign relations by the PLO. The 1995 Interim Agreement in fact specifically provides that “Neither Party shall be deemed, by virtue of having entered into this Agreement, to have renounced or waived any of its existing rights, claims or positions.”<sup>7</sup> As of 1995, the PLO already maintained an extensive network of embassies abroad and routinely engaged in diplomacy.<sup>8</sup>

Professor Ash finds a negation of Palestine statehood in Article 31(7) of the 1995 Interim Agreement, which states that neither party will change the status of the West Bank or Gaza pending the outcome of negotiations with the other. But that provision is irrelevant to Palestine statehood, which had been declared already in 1988.<sup>9</sup> An assertion of Palestine statehood post-1995 involves no change in status for the West Bank or Gaza.

Additionally, Professor Ash argues that under the 1995 Interim Agreement Israel retains control over external defense, hence that there is a lack of exercise of control over territory from the standpoint of Palestine.<sup>10</sup> Control of territory is, to be sure, a normal requirement for statehood.<sup>11</sup> What Ash omits is the fact that the West Bank and Gaza, even after the 1995 Interim Agreement, remained under Israel’s belligerent occupation.<sup>12</sup> A state whose territory is occupied is obviously unable to exercise control, but that circumstance does not negate its statehood.<sup>13</sup>

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<sup>4</sup> *Id.* at 192-93.

<sup>5</sup> Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, Sept. 28, 1995, U.N. Doc. A/51/889, S/1997/357, *reprinted in* 8 PAL. Y.B. INT’L L. 353 (1994-95).

<sup>6</sup> *Id.*, art. IV(5), at 360.

<sup>7</sup> *Id.*, art. XXXI(6), at 371.

<sup>8</sup> Stefan Talmon, *RECOGNITION OF GOVERNMENTS IN INTERNATIONAL LAW: WITH PARTICULAR REFERENCE TO GOVERNMENTS IN EXILE* 156-57 (Oxford University Press 1998).

<sup>9</sup> PALESTINE NATIONAL COUNCIL, Declaration of Independence, Nov. 15, 1988, U.N. Doc. A/43/827, S/20278, Annex III, 18 November 1988, *reprinted in* 27 I.L.M. 1668 (1988).

<sup>10</sup> Ash, *supra* note 1, at 192.

<sup>11</sup> See Hans Kelsen, *Recognition in International Law: Theoretical Observations*, 35 AM. J. INT’L L. 605, 609 (1941).

<sup>12</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (adv. op.), 2004 I.C.J. 136, at 167 (July 9) [*hereinafter* “Legal Consequences”].

<sup>13</sup> John Quigley, *The Palestine Declaration to the International Criminal Court: The Statehood Issue*, 35 RUTGERS L. REC. 1, 6 (2009), <http://www.lawrecord.com/files/35-rutgers-l-rec-1.pdf>.

## II. Professor Ash's Part II: the international community

### A. UN protocol

In sub-part (A), Professor Ash argues that Palestine is not a state, because at the United Nations it is not credentialed as a state.<sup>14</sup> He writes, correctly, that Palestine “enjoys only observer status” at the United Nations but has not been admitted as a member state.<sup>15</sup> He takes the lack of admission to membership as a negation of Palestine statehood. Professor Ash is correct that, in UN protocol documents, Palestine is not listed in the category “state.” His argument, however, elevates form over substance. He omits the many indications that Palestine is treated as a state at the UN, even though it has not admitted it as a member state.<sup>16</sup> What is key to whether an entity is a state is the attitude of the international community towards it. Formal recognition – an act that by tradition is discretionary and that may involve political considerations -- is not required.<sup>17</sup>

The United Nations first admitted the PLO as an observer, then changed the designation of the observer from “PLO” to “Palestine.”<sup>18</sup> The obvious implication of changing the reference to “Palestine” is that it is a state. One only calls states by such names as they themselves use to refer to themselves. When an effort was made in 1989 to make the implication more explicit, however, the United States used its clout to stop the effort.<sup>19</sup> In that year, a group of Arab states proposed a draft resolution for the UN General Assembly that would have said “that the designation Palestine shall be construed, within the United Nations, as the State of Palestine.”<sup>20</sup> The proponents withdrew the draft resolution a week later, however, after the United States threatened to stop paying its UN dues if the draft resolution was adopted.<sup>21</sup>

The fact that the UN did not take this step, and beyond it an admission of Palestine to the UN as a member state, was a result of fear that the U.S. might carry through with its threats. These threats were openly discussed at the UN. The same was true for Palestine's efforts to gain admission in 1989 to the World Health Organization (WHO) and the UN Economic and Social Organization (UNESCO). WHO's director pled with member states to reject Palestine's application for admission, because he feared that the organization would collapse without the U.S. contribution.<sup>22</sup>

The failure of the United Nations, or its related organizations, to go farther in a formal recognition of Palestine cannot be attributed to a lack of understanding that Palestine is a state. When it has come to very practical issues, like the right of reply in the General Assembly, a right that

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<sup>14</sup> Ash, *supra* note 1, at 194.

<sup>15</sup> *Id.*

<sup>16</sup> Quigley, *supra* note 13, at 7.

<sup>17</sup> Convention on Rights and Duties of States, Dec. 26, 1933, art. 7, 165 L.N.T.S. 19 (stating, “The recognition of a state may be express or tacit.”)

<sup>18</sup> G.A. Res. 43/177, U.N. Doc. A/RES/43/177 (1988), available at <http://unispal.un.org/UNISPAL.nsf/181c4bf00c44e5fd85256cef0073c426/146e6838d505833f852560d600471e25?OpenDocument>.

<sup>19</sup> See Paul Lewis, *Arabs at U.N. relax stand on P.L.O.*, N.Y. TIMES, Dec. 6, 1989, at A3.

<sup>20</sup> U.N. Doc. A/44/L.50 (Nov. 29, 1989).

<sup>21</sup> Lewis, *supra* note 19.

<sup>22</sup> Norman Kempster, *PLO Urged to Drop Bid to U.N. Unit; U.S. Warns It Would Withhold Money for Health Agency*, L.A. TIMES, May 3, 1989, at A9.

attaches only to states,<sup>23</sup> or participation in Security Council debate,<sup>24</sup> a right that similarly attaches only to states, the UN organs have treated Palestine as a state.

*B. The Rome meeting for an international criminal court*

In sub-part (B), Professor Ash says that Palestine was treated as less than a state when it was represented at the 1998 meeting organized in Rome by the United Nations that led to the adoption of the Rome Statute of the International Criminal Court. He is correct that Palestine was listed not with “states.” However, except for several NGOs involved in humanitarian law, only states or organizations of states were invited to participate. What is important about this episode, and this Professor Ash fails to mention, is that Palestine was invited to that meeting. Not being a humanitarian law organization, but rather an entity representing a territory, the only rationale for Palestine’s participation was that it was a state.

*C. The International Court of Justice*

In sub-part (C), Professor Ash says that the International Court of Justice (ICJ) determined that Palestine is not a foreign state by rejecting Israel’s claim of self-defense as a rationale for building a security barrier in the West Bank.<sup>25</sup> Professor Ash says that the ICJ rejected the Israeli rationale because Israel did not claim that the attacks were imputable to a foreign state. The ICJ passage on which Professor Ash relies reads:

Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State.<sup>26</sup>

It does not flow from the Court’s recitation of Israel’s position that the ICJ was saying anything about Palestine statehood. The ICJ simply said that Israel did not claim that Palestine was a state. The ICJ could, perhaps, have gone on to state its own view, but contented itself with rejecting Israel’s argument based on the manner in which Israel asserted it and left the matter there.

Elsewhere in its advisory opinion – and this Professor Ash does not mention -- the ICJ strongly implied that Palestine *is* a state. In addressing the potential long-term consequences of the barrier, the ICJ noted Israel’s assurances of the structure’s temporary character but said that it, the Court, “nevertheless cannot remain indifferent to certain fears expressed to it that the route of the wall will prejudge the future frontier between Israel and Palestine. . . .”<sup>27</sup> The ICJ did not elaborate on its statement about the “future frontier between Israel and Palestine,” but the question of a border between two territorial entities makes little sense unless each of them is a state. The question of a border remained, to be sure, in the future, but in speaking about the frontier, the Court referred to “Palestine,” not to a “future Palestine.”

<sup>23</sup> U.N. General Assembly, 32d session, 27<sup>th</sup> plen. mtg. at 513, U.N. Doc. A/32/PV.27 (Oct. 10, 1977).

<sup>24</sup> U.N. SCOR, 31st sess., 1870th mtg. at 2-3, 12-13, U.N. Doc. S/PV.1870 (Jan. 12, 1976). *See also* Erik Suy, *The Status of Observers in International Organizations*, 160 REC. DES COURS (Hague Academy of International Law) 75, at 138-139 (1978).

<sup>25</sup> Legal Consequences, *supra* note 12, at 194.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 184.

The ICJ, moreover, treated Palestine as a state in the way it treated Palestine as a participant in the advisory opinion litigation. Palestine submitted a written statement and made oral argument.<sup>28</sup> Under the rules applicable to such proceedings, UN member states are invited to submit statements in the nature of legal briefs and to argue before the Court, but it is only states, or inter-governmental organizations, that are so entitled.<sup>29</sup>

Finally, Professor Ash claims that Judge Elaraby, in his separate opinion in the advisory opinion, “concluded that no sovereign Palestinian state existed.” The language of Judge Elaraby cited by Ash reads:

On 14 May 1948, the independence of the Jewish State was declared. The Israeli declaration was "by virtue of [Israel's] natural and historic right" and based "on the strength of the resolution of the United Nations General Assembly". The independence of the Palestinian Arab State has not yet materialized.<sup>30</sup>

Judge Elaraby was saying precisely the opposite of what Professor Ash claims. Judge Elaraby said that the “independence” of the “Palestinian Arab State” has not materialized. He was not saying that Palestine is not a state. Judge Elaraby in fact there refers to Palestine as a state, albeit one whose independence remained in the future. Judge Elaraby was distinguishing statehood from the effectuation of a state’s independence.

#### *D. Switzerland and the Palestine ratification of the Geneva conventions*

In sub-part (D), Professor Ash says that Switzerland indirectly took a position against Palestine statehood when it declined in 1989 to accept Palestine’s attempted ratification of the four 1949 Geneva conventions relating to the law of war. The Government of Switzerland is the depositary of these conventions. Professor Ash concedes that Switzerland, in declining to accept Palestine’s ratification, did not determine that Palestine was not a state. He argues instead that Switzerland indirectly took a position that Palestine was not a state when it said, as it did, that the issue of Palestine statehood was not settled in the international community.

Switzerland’s view, as reflected in its statement declining ratification, was that the issue was being handled by the U.N. General Assembly. That body had recently voted its approbation of the 1988 Palestine declaration of independence.<sup>31</sup> Switzerland’s position was that it did not regard it as its function as depositary of the Geneva conventions to usurp the role of the UN General Assembly in determining Palestine’s status. Switzerland’s action thus reflected no position on Palestine statehood, direct or indirect.

### *III. Professor Ash’s Part III: the attributes of statehood*

Professor Ash argues that Palestine is not a state because of a lack of exercise of control over the territory claimed for it. His error here is that he regards it as required for statehood that a state maintain control of its territory even when another state has entered militarily and has taken

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<sup>28</sup> *Id.* at 141.

<sup>29</sup> Statute of the International Court of Justice, art. 66.

<sup>30</sup> Legal Consequences, *supra* note 12, at 251.

<sup>31</sup> G.A. Res. 43/177, *supra* note 18.

control, as Israel did in 1967 in the West Bank and Gaza. Were Professor Ash's proposition true, Kuwait would not have existed as a state once Iraqi military units forced the Kuwaiti leadership to flee in 1990. Yet Kuwait continued to be regarded as a state during this period, while the international community engaged in efforts to restore control to its government.<sup>32</sup>

Additionally, Professor Ash asserts that Israel may have a valid claim to the West Bank and Gaza, and that this may call Palestine statehood into question. Here, he overlooks the fact that Israel has not asserted such a claim, and that the Supreme Court of Israel has ruled repeatedly that the West Bank and Gaza are under Israel's belligerent occupation -- a status that is at variance with a claim to sovereignty.<sup>33</sup>

The entry by the PLO into the peace process that began in 1993, says Professor Ash, is "proof positive that no current Palestinian 'State' exists (because one does not negotiate to obtain what one already possesses)."<sup>34</sup> This assertion is groundless. The Palestinians are negotiating not for statehood, but for a withdrawal of Israel from the territory of their state. The fact that Israel has shown itself willing to enter into negotiations that would set Israel's borders reflects an Israeli understanding that the Palestinian negotiators have the capacity to conclude an agreement that would give Israel internationally recognized borders.<sup>35</sup> The acknowledgement of a border has significance only if it comes from a state. If Palestine were not a state, there would be no point, from Israel's side, in gaining agreement to a border. The peace process reflects the understanding not only of Israel, but of the international community in general, that Palestine is a state.

### *Conclusion*

Professor Ash's attempted refutation of my thesis that Palestine is a state only serves to reinforce the validity of my position. Palestine statehood was declared in 1988 on the basis of a prior existing statehood dating from the interwar period.<sup>36</sup> Palestine functions as a state, albeit under the considerable constraints imposed by the belligerent occupation of its territory.

The fundamental error made by Professor Ash is one that is made by other scholars, and by courts, namely, that they regard statehood as present only if the state enjoys independence, and in particular they ignore the fact that a state whose territory is occupied is unable to exert control over it.<sup>37</sup> On this basis, Palestine statehood is said not to exist. The fact that Professor Ash is not alone in his view makes it all the more significant to show the deficiencies of his approach.

Conclusions on international legal issues must be made on the basis of the practice of states. This proposition is particularly true in regard to the question of whether a particular entity is a state. Those who deny Palestine statehood base their position on abstract concepts relating to the

<sup>32</sup> S.C. Res. 662, U.N. Doc. S/RES/662 (1990) (seeking restoration of the "sovereignty, independence and territorial integrity of Kuwait."), available at <http://www.unhcr.org/refworld/category/LEGAL/KWT/3b00f13750/0.html>.

<sup>33</sup> See, e.g., Tamimi v. Minister of Defence, H.C. 507/85, 41(4) Piskei din 57, excerpted in 18 ISRAEL YB. HUMAN RIGHTS 248, at 249 (1988); accord Yoram Dinstein, THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION 277-279 (2009).

<sup>34</sup> Ash, *supra* note 1, at 200.

<sup>35</sup> See Declaration of Principles on Interim Self-Government Arrangements (Israel-P.L.O.), Sept. 13, 1993, reprinted in 32 I.L.M. 1525 (1993).

<sup>36</sup> See Palestine National Council: Political Communique and Declaration of Independence, Nov. 15, 1988, U.N. Doc.A/43/827, S/20278, Annex III, Nov. 18, 1988, reprinted in 27 I.L.M. 1668 (1988).

<sup>37</sup> See Ash, *supra* note 1.

definition of statehood. They ignore the practice of the international community in relation to Palestine. As indicated in my piece to which Professor Ash has responded, Palestine has been regarded as a state since it was set up as a Class A mandate under the supervision of the League of Nations. That statehood was never extinguished, despite a variety of control arrangements that have intervened in regard to segments of its territory, and despite the fact that independence remains elusive.