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Maximilian Bertamini
PhD Student and Research Associate at IFHV

NACHFRAGEN:
maximilian.bertamini@rub.de

IFHV

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Statehood in Motion? Thinking Aloud About the Legal Relevance of Recognizing Palestine

Introduction

As of recently the vast majority of states recognizes Palestine as one of them. With 143 votes in favor the UN General Assembly adopted Resolution ES-10/23 on 10 May 2024. For some supporters this step was merely a reiteration of a position taken long ago. Others, especially western states, took a novel stance by recognizing Palestine explicitly. Spain, Ireland and Norway made headlines by – formally and individually – recognizing Palestine's statehood beyond the UN resolution.

International lawyers tend to meet the widespread recognition of Palestine with a degree of reservation. After all, the majority opinion holds (p. 470) that recognition is not constitutive (Art. 3) for statehood, but merely declaratory (p. 21). Instead, international lawyers direct their attention at whether an entity meets the objective criteria for statehood: a permanent population, living in a defined territory and organizing itself under an effective government (cf. Art. 1 Montevideo Convention; Georg Jellinek, Allgemeine Staatslehre, pp. 394-434).

And yet, the recognition of Palestine comes from a group of states which is larger (albeit slightly) than that which condemned Russia's invasion of Ukraine. The latter is as illegal as it gets and concerns a cornerstone of the international legal order. So, realistically, it seems that a majority of around 140 states is the pinnacle of state support any international matter can currently receive. In a legal order shaped by the conduct and will of its subjects, the fact that this pinnacle is reached in the recognition Palestine must surely leave a dent in prevailing declaratory theory, must it not?

This Bofax reflects on the meaning of recognition for statehood in international law. It offers three arguments on why declaration might become increasingly relevant from a legal point of view – at least for Palestine.

Recap of Recognition and Statehood

The two main pillars of the discourse on recognition and statehood are the constitutive and the declaratory theory, with a few hybrid theories (cf. p. 23-34) in between.

Under the constitutive theory, declarations of recognition by other states are decisive for the legal existence of an entity as a state. To me, the strongest legal argument for the constitutive theory is this:

As legal persons under and subjects of international law, states have rights and obligations vis-à-vis other states, simply by virtue of being equally sovereign as states. This means that the existence of every new state creates obligations of the previously existing states in relation to the new state's territory and government. Such obligations can generally not be incurred without or even against a state's sovereign will.

The strongest arguments *against* the constitutive theory are by default arguments *for* the declaratory theory, according to which only objective criteria matter for an entity's statehood. One of these counterarguments is that reliance on recognition would ultimately subject the concept at the heart of statehood, namely a people's self-determination (see para. 102), to the calculations of other states. Recognition could be withheld for political, religious or other reasons that do not warrant the restriction of self-determination. Another argument against recognition and in favor of demanding objective elements, indicating the effective exercise of self-determination, is this: A core benefit of international law and a major incentive for states to observe it is the rule-based stability and predictability that an international order provides. These values are at stake, if it is uncertain, who international law's subjects are. If statehood existed as a relative concept, contingent upon who recognizes whom, the purpose of a (hardly enforceable!) international order would be severely undermined.

Both self-determination as the *Raison d'Etre* of endowing states with rights under international law and the stability an unambiguous international order provides are undoubtedly good reasons for the dominance of the declaratory theory of recognition. And yet, the elements developed by Jellinek are largely academic in nature and rarely find occasion for application. In this context, a statement by Hersch Lauterpacht (p. 91) comes to mind:

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Maximilian Bertamini
PhD Student and Research Associate at IFHV

NACHFRAGEN:
maximilian.bertamini@rub.de

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The guiding juridical principle applicable to all categories of recognition is that international law, like any other legal system, cannot disregard facts and that it must be based on them provided they are not in themselves contrary to international law.

That the state of Palestine exists is a fact in the eyes of the international community of states. And it is something that international law therefore cannot disregard. In reflection on this thesis, three arguments shall be presented.

Argument 1: Questions of Statehood arise rarely, therefore Other States' Reactions hold Greater Weight

The first argument rests on the logic of the identification of customary international law (CIL). When it comes to CIL, state practice and opinio iuris are required. Both must – in general – be widespread and uniform. They also need to occur consistently over a significant amount of time, although the temporal requirement can be compensated for, if practice and opinio iuris of affected states are overwhelming (para. 73).

In the case of Palestine, the practice of recognition is very broad and the states engaging in it are all affected, as the existence of a new state necessarily affects the scope of their rights and duties under international law. In how far their practice of recognition is carried by the opinio iuris that recognition is constitutive of statehood, might be subject of some debate. That is because both the UN Resolution recognizing Palestine's statehood and individual declarations like those of Spain, Norway and Ireland at least partly refer to objective elements of statehood.

Then again, the declarations of recognition are generally not comprehensively explained in terms of objective elements. And even though under the declaratory theory, the objective test of statehood is nothing that hinges on the practice of states, the practice of recognition we see in the case of Palestine should not be brushed aside. Disregarding practice would lead to the strange result that the international law of statehood – which was never codified at a global level – was downright immune to evolution based on CIL.

Argument 2: In the Case of Palestine, the Dangers of the Constitutive Theory are not Realized

Arguments for the declaratory theory are not only arguments for self-determination and stability, but also arguments against the implications that come with the constitutive theory. In the case of Palestine, these dangers – arbitrariness of (non-)recognition and relativity – are not realized.

For one, because recognition is so broad that no decisive relativity of Palestine's statehood is to be feared. And for another, because both in the UNGA Resolution and in individual state's declarations of recognition, recourse is taken to the objective elements of statehood. Such qualified recognitions decrease the likelihood of arbitrary recognition significantly and should become the standard for legally relevant state recognitions.

The strongest counterargument to that effect might be the case of Somaliland, which demonstrates the dangers of constitutive recognition. Somaliland remains internationally unrecognized despite fulfilling all objective elements of statehood.

Argument 3: International Law Knows Other Cases in which Statehood does not Rest on Meeting Objective Criteria

From the discourse on failed states comes another perspective on statehood which has interesting implications for the issue in question. When it comes to failed states, statehood is preserved, even when elements of statehood – mostly effective government – are no longer met and have little perspective of being met in the future. Somalia is a prominent example and Sudan is on the brink of becoming one. In cases like this, statehood is a *legal fiction,* carried by other states' recognitions.

The point I am trying to make is not that Palestine is a failed state, but rather that the reasons for maintaining failed states' statehood as a legal fiction could justify ascribing greater legal weight to the recognitions of Palestine.

Scholars identify several considerations that justify maintaining statehood not based on objective criteria. One of them is to give a second chance of self-determination to a people which once successfully demonstrated its willingness and ability to effectively exercise self-determination (p. 36-38 [in German]). In how far this is applicable to Palestine is debatable, given its turbulent history.

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Maximilian Bertamini
PhD Student and Research Associate at IFHV

NACHFRAGEN:
maximilian.bertamini@rub.de

A major consideration which is applicable to Palestine, however, is the continued acceptance of statehood for purposes of the stability created by preventing territorial vacuums or terra nullius (para. 13). This is in turn expected to have a pacifying effect on the region concerned (para. 12).

Israel's objections notwithstanding, accepting Palestine's statehood independently of objective statehood criteria would (legally) settle the territorial status of Gaza, the West Bank and East Jerusalem. It would create legal certainty concerning the applicable law between Israel and Palestine, concerning responsibility for Hamas in terms of Palestinian due diligence and create the conditions for a more stable exercise of Palestinian self-determination. The potential for international stability is certainly comparable to – if not greater than – that of maintaining failed states.

Concluding Remarks

The reasons for the prevalence of the declaratory theory on recognition of states remain valid today. Nevertheless, the resounding recognition of Palestine is an occasion to keep a close eye on the development of the legal requirements of statehood. Conceptualizing state recognition in the logic of CIL and in that of upholding failed states' statehood demonstrates that resting statehood on broad international recognition would not be inconceivable. Whether or not this will have an impact on the law on statehood in general is to be seen.

At the very least, however, there should be new room to argue that even if the declaratory theory of recognition remains the standard, cases of broad recognition may constitute a valid exception. For the case of Palestine specifically, there are good reasons to believe that doubts concerning its objective elements of statehood may not be the decisive factor after all.

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