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Palestine is a State: A Horse with Black and White Stripes is a Zebra

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PALESTINE IS A STATE: A HORSE WITH BLACK AND WHITE STRIPES IS A ZEBRA

John Quigley*

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INTRODUCTION

The article *Israel, Palestine, and the ICC* by Daniel Benoliel and Ronen Perry, published in Volume 32 of the *Michigan Journal of International Law*, makes a case against a possible assertion of jurisdiction by the International Criminal Court over war crimes that may have been committed by persons on either side of the 2008–2009 war in Gaza.¹ Benoliel and Perry argue that the International Criminal Court is powerless to investigate or to prosecute such war crimes, despite the strong possibility that such crimes were committed. Concern over such possible crimes has been widely expressed at the international level, including a study produced by a panel convened by the Human Rights Council of the United Nations.²

In the abstract, Benoliel and Perry could be correct. The fact of the commission of war crimes does not automatically create jurisdiction over them in the International Criminal Court. The Rome Statute of the

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1. Daniel Benoliel & Ronen Perry, *Israel, Palestine, and the ICC*, 32 MICH. J. INT'L L. 73 (2010).

2. U.N. Human Rights Council, Report of the United Nations Fact-Finding Mission on the Gaza Conflict, U.N. Doc. A/HRC/12/48 (Sept. 25, 2009).

International Criminal Court, the court's founding treaty, provides for jurisdiction only in a limited way, broadly requiring some connection to a state that is party to the Rome Statute.³ But even absent any connection to a state party, jurisdiction also results if the state in whose territory a war crime was committed confers jurisdiction upon the court by lodging a declaration to that effect with the court's registrar.⁴

Neither Israel nor Palestine is a party to the Rome Statute.⁵ However, Palestine lodged a declaration conferring upon the International Criminal Court jurisdiction over war crimes committed in the territory of Palestine.⁶ Benoliel and Perry dispute the effectiveness of that declaration by asserting that Palestine is not a state.⁷ A substantial segment of their argument is in the form of a reply to my position to the contrary, as published in the *Rutgers Law Record*.⁸ Benoliel and Perry recount the principal points of my argument and give their arguments to the contrary.

My article was quite brief and made the case for Palestine's statehood only in a preliminary fashion. A fuller analysis is found in my recent Cambridge University Press book on Palestinian statehood.⁹ In that book, I explain Palestine's legal status in detail, beginning with the constitution of Palestine as a state in the League of Nations era and following through with the acceptance of Palestine as a state by the contemporary international community. After World War I, the Arab territories of the Turkish empire were taken from it and became states of their own, subject to temporary administration by either France or Britain. Palestine was administered by Britain until it withdrew in 1948, whereupon part of its territory was taken by a new state, Israel, another part (the Gaza Strip) was administered as Palestinian territory by Egypt, and still another part (the West Bank of the Jordan River) was provisionally merged into Jordan, which nonetheless recognized an underlying Palestinian sovereignty. In recent decades, the international

3. Rome Statute of the International Criminal Court art. 12, July 17, 1998, 2187 U.N.T.S. 3.

4. *Id.* art. 12(3).

5. ICC—The States Parties to the Rome Statute, <http://www.icc-cpi.int/Menus/ASP/states+parties/> (last visited Mar. 29, 2011).

6. Palestinian Nat'l Auth., Ministry of Justice, Office of the Minister, Declaration Recognizing the Jurisdiction of the International Criminal Court, Jan. 21, 2009, available at <http://www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279777/20090122PalestineianDeclaration2.pdf>.

7. Benoliel & Perry, *supra* note 1, at 80–101. It has been asserted that the International Criminal Court could decide that it has jurisdiction over the 2008–2009 Gaza War without resolving the question of Palestine statehood. In this Article, I do not address that possibility.

8. John Quigley, *The Palestine Declaration to the International Criminal Court: The Statehood Issue*, 35 RUTGERS L. REC. 1 (2009).

9. JOHN QUIGLEY, *THE STATEHOOD OF PALESTINE: INTERNATIONAL LAW IN THE MIDDLE EAST CONFLICT* (2010).

community has dealt with Palestine in a way that assumes its statehood, in particular, by asking it to negotiate borders and, in the case of many states, by formally recognizing Palestine and establishing diplomatic relations with it.¹⁰

The pages that follow explain why there is no validity to the points made by Benoliel and Perry as they seek to challenge my arguments on Palestine's statehood.¹¹

I. ARGUMENT NUMBER ONE: THE U.N. GENERAL ASSEMBLY'S ACCEPTANCE OF PALESTINE AS A STATE

Benoliel and Perry dispute my position that Palestine's statehood has been accepted by the international community as represented by the U.N. General Assembly. They make three points: (1) that my position reflects the constitutive theory of statehood, a theory they find wanting; (2) that the U.N. General Assembly in recent years has acted as if Palestine is not in fact a state; and (3) that assertions of Palestine's statehood made in 1948 and in 2009 are inconsistent with the claim of statehood on which I rely.¹² None of these three points is valid.

A. *The Constitutive Theory of Statehood*

Benoliel and Perry challenge my assertion that an acknowledgment of Palestine statehood was reflected in U.N. General Assembly Resolution 43/177 of December 15, 1988.¹³ In that resolution the General Assembly acknowledged the declaration issued in 1988 by the Palestine National Council, in which the Council asserted Palestine statehood dating back to the era of the League of Nations.¹⁴ Benoliel and Perry say that my position was based on "a constitutive-state-recognition theoretical structure,"¹⁵ by which they mean the concept that entities become states only when determined to be such by the international community. This concept would involve attributing to the General Assembly the role of determining which entities are states. Other scholars hold to a

10. See generally *id.*

11. The fact that this reply is limited to Benoliel and Perry's specific references to my work should not be taken to imply my approval of the analysis contained in the remainder of their article.

12. Benoliel & Perry, *supra* note 1, at 81.

13. G.A. Res. 43/177, U.N. GAOR, 43d Sess., U.N. Doc. A/RES/43/177, at 62 (Dec. 15, 1988); Benoliel & Perry, *supra* note 1, at 81–87.

14. G.A. Res. 43/177, *supra* note 13; Declaration of Independence, in letter dated Nov. 18, 1988 from the Permanent Representative of Jordan to the United Nations addressed to the Secretary-General, U.N. Doc. A/43/827, S/20278 (Nov. 18, 1988).

15. Benoliel & Perry, *supra* note 1, at 81–84.

so-called declaratory theory of statehood, under which states exist as a matter of fact, with their recognition—either individually or collectively—not being required.¹⁶

My article, in fact, was not based on any particular theory of recognition. My position is that, under either theory, Palestine is a state. I took the approbation of the Palestinian declaration by such a large number of states as an indication that these states regard Palestine as a state. Proponents of a declaratory theory may say that Palestine exists and that these states simply noted that fact. Proponents of a constitutive theory may say that acceptance of Palestine by so many states made Palestine into a state. Regardless of which theory about recognition one holds, the widespread acceptance of Palestine reflected in Resolution 43/177, taken together with further indications of acceptance in subsequent years, shows Palestine's statehood.

Benoliel and Perry cite the fact, which is true, that most western European states did not grant formal diplomatic recognition to Palestine in the wake of the 1988 Palestinian declaration.¹⁷ They recite, as is also true, that some of the states that declined to recognize Palestine "did so on the grounds that they wanted a more definite indication of Palestine's positive attitude towards Israel, such as an explicit act of recognition of Israel."¹⁸ Benoliel and Perry take this reticence to recognize Palestine as an indication of Palestine's non-statehood. However, they miss the obvious implication of the position taken by these European states. If a state says that it will recognize a putative state if the latter takes a particular action that could be taken at any time, then the former must regard the latter as a state. Otherwise, it would make no sense to say that it will recognize statehood upon performance of the desired action. The position of these western European states in 1988 and 1989, far from showing that they did not regard Palestine as a state, shows that they did. Benoliel and Perry miss the distinction between acknowledgment of statehood on the one hand, and diplomatic recognition on the other. The fact that a state does not recognize a putative state through some formal act of recognition does not necessarily mean that it does not regard the latter as a state.

Benoliel and Perry find a rejection of Palestine's statehood in a document titled "Road Map," adopted on April 30, 2003 by the so-called Quartet: the Russian Federation, the United States, the European Union, and the United Nations.¹⁹ Benoliel and Perry assert that the Road Map

16. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 87–88 (5th ed. 1998).

17. Benoliel & Perry, *supra* note 1, at 82.

18. *Id.* at 82–83.

19. A Performance-Based Road Map to a Permanent Two-State Solution to the Israeli-Palestinian Conflict, in Letter dated May 7, 2003 from the Secretary-General addressed to the

reflects a negation of Palestine statehood because the Road Map, in their view, contemplated “two-party negotiations toward Palestinian statehood.”²⁰ They give no explanation for why they construe the Road Map to contemplate negotiations toward Palestinian statehood. In fact it does not. The 1993 Declaration of Principles that provided a framework for Israel–Palestine negotiations did not call for negotiations about the statehood of Palestine, any more than it called for negotiations about the statehood of Israel.²¹ Rather, it called for a political accommodation between the two states.

The 2003 Road Map, moreover, in a clause Benoliel and Perry do not mention, anticipated recognition of Palestine by the major powers by the end of 2003 at the latest, if certain conditions were met by the two parties.²² As matters developed, those conditions were not met, but the fact that the Quartet anticipated the possibility of early formal recognition of Palestine makes sense only if the Quartet members considered there to be a Palestinian state that could be recognized. Hence, the Road Map, far from negating Palestine’s statehood, assumed it.

B. A U.N. General Assembly Retrenchment on Palestinian Statehood

Benoliel and Perry argue that even if it can be said that the U.N. General Assembly, by its Resolution 43/177 in 1988, acknowledged Palestine’s statehood, the United Nations has subsequently called for a two-state solution and thus retrenched from its 1988 view.²³ But calling for a two-state solution does not, as just indicated, imply that Palestine is not a state.

Any implication that the General Assembly retrenched after 1988 on Palestine statehood is, moreover, belied by the General Assembly’s action of adopting Resolution 52/250, on July 7, 1998. Benoliel and Perry omit mention of this resolution. Titled “Participation of Palestine in the Work of the United Nations,” it accorded Palestine a series of parliamentary privileges that are accorded only to member states of the

President of the Security Council, U.N. Doc. S/2003/529 (May 7, 2003) [hereinafter Performance-Based Road Map]; Benoliel & Perry, *supra* note 1, at 82.

20. Benoliel & Perry, *supra* note 1, at 82.

21. See Declaration of Principles on Interim Self-Government Arrangements, *in* Letter dated Oct. 8, 1993 from the Permanent Reps. of the Russian Federation and the United States of America addressed to the Secretary-General, art. 5, U.N. Doc. A/48/486, S/26560 (Oct. 11, 1993) (calling for negotiations on “Jerusalem, refugees, settlements, security arrangements, borders, relations and cooperation with other neighbours, and other issues of common interest”).

22. See Performance-Based Road Map, *supra* note 19, at 6 (describing a “Phase Two” to begin June 2003).

23. Benoliel & Perry, *supra* note 1, at 84–85.

United Nations, in particular, the right to participate in the general debate of the General Assembly, and the right to reply to statements made by delegates of member states.²⁴ Far from retrenching, the General Assembly was reaffirming its view of Palestine as a state by according it privileges that the United Nations accords only to U.N. member states.

Benoiel and Perry note the actions in 1989 of the World Health Organization and the U.N. Economic, Social and Cultural Organization in deferring action on applications for Palestine's membership in those organizations.²⁵ They depict these actions as reflecting "reservations about the status of Palestine."²⁶ They fail to mention that the primary reason for the deferral was threats of withdrawal of funding by the United States.²⁷ The issue of Palestine's legal status was hardly decisive in the deferrals.²⁸

Moreover, Benoiel and Perry fail to mention other U.N. organs that routinely treat Palestine as a state. The Security Council lets Palestine participate in debates at Security Council sessions like any U.N. member state.²⁹ The U.N. High Commissioner for Human Rights accords human rights advisory services to Palestine—services that she is authorized to accord only to states.³⁰ The Secretary-General has recorded treaties ratified by Palestine—treaties open only to states.³¹

C. Two "Competing" Palestinian Claims to Statehood

Benoiel and Perry argue that the 1988 Palestinian declaration of statehood is somehow ineffective because of one earlier and one more recent declaration of Palestinian statehood.³² The first that they mention

24. G.A. Res. 52/250, Annex, U.N. GAOR, 52d Sess., U.N. Doc. A/RES/52/250 (July 13, 1998).

25. Benoiel & Perry, *supra* note 1, at 85.

26. *Id.* at 85.

27. QUIGLEY, *supra* note 9, at 165.

28. *Id.* at 164–67.

29. U.N. SCOR, 30th Sess., 1859th mtg. at 9, U.N. Doc. S/PV/1859 (Dec. 4, 1975); see generally Leo Gross, *Voting in the Security Council and the PLO*, 70 AM. J. INT'L L. 470, 475–79 (1976) (discussing the voting in the Security Council on December 4, 1985 regarding the proposal to confer on the Palestine Liberation Organization (PLO) a right to participate in the Security Council's proceedings).

30. G.A. Res. 48/141, ¶ 4(d), U.N. GAOR, 48th Sess., U.N. Doc. A/RES/48/141 (Dec. 20, 1993); OHCHR in Occupied Palestinian Territory (2004–2007), OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, <http://www.ohchr.org/EN/Countries/MENARegion/Pages/PSSummary.aspx> (last visited Feb. 18, 2011).

31. See, e.g., U.N. Secretary-General, Agreement on International Roads in the Arab Mashreq Beirut, May 10, 2001: Palestine: Ratification (Jan. 5, 2007), http://untreaty.un.org/English/CNs/2006/1201_1300/1275E.pdf ("The Secretary-General of the United Nations, acting in his capacity as depositary, communicates the following: The above action was effected on 28 November 2006.").

32. Benoiel & Perry, *supra* note 1, at 85.

was issued in 1948 by the All-Palestine Government.³³ This entity, based at the time in Gaza, tried to put in place a governing authority for Palestine as Britain was withdrawing from Palestine and leaving it without a governing authority.³⁴ The second “competing” claim cited by Benoliel and Perry dates from 2009 and was issued by an anti-Hamas leader in Gaza who declared an Islamic republic in Gaza.³⁵

Benoliel and Perry suggest that the 1948 and 2009 acts somehow nullify the 1988 declaration. Why assertions at other times of Palestinian statehood should negate Palestine’s statehood, Benoliel and Perry do not explain. There is no reason to consider other assertions of Palestinian statehood as casting doubt on the 1988 assertion.

II. ARGUMENT NUMBER TWO: WHETHER THE PALESTINE STATE ASSERTED IN 1988 WAS A NEW STATE

Benoliel and Perry attempt to refute my argument that the statehood asserted by the Palestine National Council in 1988 was not of a new state, but of a state that already existed. They challenge my position that Palestine, as a Class A mandate under the League of Nations, was a state already in that era.³⁶ But beyond a bald assertion, Benoliel and Perry cite nothing that would demonstrate that Palestine was not a state in the League era. In particular, they mention nothing of the practice of the states of that era in regard to Palestine, which is where one must look to determine if Palestine was then a state. Had Benoliel and Perry examined that state practice, they would have seen that Palestine was accepted as a state, even though it was administered by Great Britain under the mandate system established by the League.³⁷

Most critically, Benoliel and Perry fail to account for a major international instrument of the era bearing on the status of Palestine, the 1923 Treaty of Lausanne.³⁸ It was in this treaty that Turkey gave up its territories

33. *Id.*

34. Ahmed Hilmi Pasha, Cablegram dated Sep. 28, 1948 from the Premier and Acting Foreign Secretary of the All-Palestine Government to the Secretary-General Concerning Constitution of All-Palestine Government, U.N. Doc. A/C.1/330 (Oct. 14, 1948), available at <http://unispal.un.org/UNISPAL.NSF/0/62B1867E967323068025648E0041673D>.

35. Benoliel & Perry, *supra* note 1, at 86–87.

36. *Id.* at 87–88.

37. See generally QUIGLEY, *supra* note 9, at 52–64 (arguing that despite Palestine’s status as a British mandate, Palestinian statehood was reflected in the conclusion of treaties in the name of Palestine, the regulation of nationality, the representation in proceedings over inheritance of the Ottoman debt, and the Permanent Court of International Justice’s recognition of Palestine as a state).

38. Treaty of Lausanne, July 24, 1923, 28 L.N.T.S. 12.

in the Arab world following its defeat in World War I.³⁹ The Treaty of Lausanne, to which the World War I allies were party, more than once refers to Turkey's Arab territories (Iraq, Syria, and Palestine), all of which became Class A mandates as "states" that were "detached" from Turkey.⁴⁰ The Treaty of Lausanne thus reflected an assumption that the Class A mandate territories, including Palestine, were "states." Under the League Covenant, the independence of these states was "provisionally recognized," and they were to be made independent in due course.⁴¹ The Class A mandates were states temporarily under the administration of an outside state.

Had Benoliel and Perry examined relevant League-era sources, they would have seen that the Permanent Court of International Justice (PCIJ) referred to Palestine as a state. This reference came in the well-known case involving concessions that had been granted to a Greek national named Mavrommatis by Turkey while it still controlled Palestine.⁴² The case raised the issue of the status of those concessions following the demise of the Turkish empire, meaning that the PCIJ needed to determine what kind of entity had replaced Turkey in the territory of Palestine.⁴³ The Court said that Palestine was a successor state to Turkey.⁴⁴

Additionally, Palestine was found to be a state in arbitration proceedings over responsibility for the Ottoman public debt.⁴⁵ States that were a party to most favored nation treaties with the United Kingdom regarded Palestine as a state such that they would benefit from any trade preference that the United Kingdom accorded to Palestine.⁴⁶ Furthermore, during the League era, the states of the international community dealt with Palestine on the basis of its being a state.⁴⁷ They accepted Palestine passports and concluded treaties with Palestine, even though it was Britain that negotiated them on Palestine's behalf.⁴⁸ A distinction

39. *Id.* art. 16.

40. *Id.* arts. 30, 46; Protocol Relating to Certain Concessions Granted in the Ottoman Empire art. 9, July 24, 1923, 28 L.N.T.S. 203.

41. League of Nations Covenant art. 22, para. 4.

42. Mavrommatis Jerusalem Concessions (Greece v. Gr. Brit.), 1925 P.C.I.J. (ser. A) No. 5, at 7 (Mar. 26).

43. QUIGLEY, *supra* note 9, at 59; see *Mavrommatis Jerusalem Concessions*, 1925 P.C.I.J. (ser. A) No. 5, at 31–32.

44. QUIGLEY, *supra* note 9, at 59–60; see *Mavrommatis Jerusalem Concessions*, 1925 P.C.I.J. (ser. A) No. 5, at 31–32 (noting that Palestine had inherited some of the rights and obligations of statehood from Turkey).

45. *Affaire de la Dette publique ottomane* [Ottoman Public Debt Case] (Bulg., Iraq, Palestine, Transjordan, Greece, It., Turk.), 1 R.I.A.A. 529, 609–10 (Perm. Ct. Arb. 1925).

46. QUIGLEY, *supra* note 9, at 61–64.

47. *Id.* at 53.

48. *Id.* at 53–58.

here was drawn between the power to make treaties, which rested with Britain, and the capacity to do so, which rested with Palestine.⁴⁹

Benoliel and Perry concede that the United Nations, by virtue of Article 80 of the U.N. Charter, recognized Palestine's League-era status.⁵⁰ Article 80 preserves the mandate-derived rights of states and peoples.⁵¹ Benoliel and Perry challenge, however, the United Nations' "legitimacy" to recognize Palestine's League-era status. They object that the United Nations was not the lawful successor to the League of Nations.⁵² Why the question of succession as between the League and the United Nations should matter, they do not explain. What is key here is that the states forming the United Nations did, via Article 80 of the U.N. Charter, preserve the rights of League-era states, including Palestine's.

III. ARGUMENT NUMBER THREE: STATEHOOD AS AFFECTED BY BELLIGERENT OCCUPATION OF A STATE'S TERRITORY

Moving forward in time to the period following the June 1967 war, Benoliel and Perry reply to my point that one cannot expect a state to be in control of its territory if its territory is occupied by the army of a foreign state. Benoliel and Perry here assert that independence is required for statehood, and that a state whose territory is under foreign occupation is not independent.⁵³ Their insistence on independence as a prerequisite for statehood flies in the face of the international practice in the League era, when, as indicated, the Class A mandates were regarded as states despite being administered by an outside state.⁵⁴ But even if independence were a requirement as a general matter, independence is not demanded when a territory is occupied, at least if by "independence" one means the actual ability to control the territory independently from any other state. A state whose territory is occupied lacks independence in that sense. By the logic of Benoliel and Perry, Denmark was not a state while occupied by Germany during World War II.

Benoliel and Perry assert that the supposed independence criterion for statehood is present only in the event of "the nonexistence of exercise of power by an alternative state—or even the absence of a right, vested

49. See generally ARNOLD MCNAIR, *THE LAW OF TREATIES* 36 n.1 (1961) (distinguishing international capacity and treaty-making power).

50. Benoliel & Perry, *supra* note 1, at 90.

51. U.N. Charter art. 80, para. 1.

52. Benoliel & Perry, *supra* note 1, at 90.

53. *Id.* at 91–92.

54. QUIGLEY, *supra* note 9, at 42–51.

in another state, to actualize such governing power.”⁵⁵ Here they refer, as if it were a fact, to “Israel’s sovereignty claim over practically most of the land and key areas in the West Bank with reference to its borders, airspace and underground water resources.”⁵⁶ Benoliel and Perry extend Israel’s supposed sovereignty claim to the “settlement blocs,” to Palestinian land that has been purchased by Israelis, to the old city of Jerusalem, and to the border with Jordan.⁵⁷

The indicated segments are areas in which Israel may hope to gain rights under an agreement with Palestine, but Israel has made no claim of sovereignty, except perhaps with respect to Jerusalem.⁵⁸ Israel has denied the applicability in the West Bank of human rights treaties to which it is a party, on the ground that the West Bank is not under its sovereignty.⁵⁹ Benoliel and Perry in fact concede that Israel’s aspirations in regard to the territory of the West Bank are just that, and not a present claim to sovereignty, when they refer to “high expectations within Israeli negotiation teams that portions of the occupied territories in the West Bank will be ceded to Israel.”⁶⁰

By referring to segments of West Bank territory that may be “ceded” to Israel in negotiations, Benoliel and Perry impliedly concede not only that Israel has no present sovereignty claim but that sovereignty rests with Palestine. Cession of territory is carried out between states. If the specified territories would be *ceded* by Palestine, they must presently be part of Palestine’s territory. Otherwise, Israel would not gain them by cession.

IV. ARGUMENT NUMBER FOUR: ACKNOWLEDGMENT BY ISRAEL OF PALESTINE’S STATEHOOD

Benoliel and Perry react to my point that Israel, by demanding recognition from the Palestine Liberation Organization (PLO), as Israel did in 1993, tacitly acknowledged that the PLO represents a state.⁶¹ My point was that recognition is an act carried out between states. If Israel de-

55. Benoliel & Perry, *supra* note 1, at 92. Here Benoliel and Perry rely on JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 66 (2d ed. 2006).

56. Benoliel & Perry, *supra* note 1, at 92–93.

57. *Id.* at 93.

58. Basic Law: Jerusalem, Capital of Israel, 34 LSI 209 (1979–1980) (Isr.) (declaring “Jerusalem, complete and united” to be the capital of Israel).

59. Human Rights Comm., 99th Sess., 2718th mtg., ¶ 15, U.N. Doc. CCPR/C/SR.2718 (Aug. 31, 2010) (statement of Ms. Rubinstein (Israel) that Israel’s obligations under the International Covenant on Civil and Political Rights do not extend to the West Bank or the Gaza Strip since its obligations apply only in Israel’s “national territory”).

60. Benoliel & Perry, *supra* note 1, at 94.

61. *Id.* at 95.

manded recognition of itself as a state, as Prime Minister Yitzhak Rabin did of Chairman Yasser Arafat,⁶² Israel must have deemed the entity from which it demanded recognition to be the representative of a state. Here, Benoliel and Perry again raise the constitutive theory of recognition and claim that my point about recognition is embedded in it.⁶³ Why it matters on what theory of recognition my point is based they do not make clear. My point was not in any event based on any particular theory of recognition. Instead, it was simply that Israel's demand reflected an assumption on Israel's part that Palestine was a state.

The fact that Israel was making such an assumption was obvious to Benjamin Netanyahu, who, as an opposition politician in 1993, objected to Rabin's agreement with Arafat (Declaration of Principles). From the floor of the Knesset, Netanyahu objected that the mutual recognition that was part and parcel of the Rabin-Arafat agreement amounted to recognition by Israel of the Palestine state. The Declaration of Principles, Netanyahu pointed out, recited that the Government of Israel and the Palestinian team recognized each other's legitimate and political rights.⁶⁴ Addressing Rabin directly, Netanyahu asked:

[W]hat are the legitimate and political rights of any nation? A state. What are the legitimate political rights of the Israeli nation? A state. What are the mutual legitimate political rights with the Palestinians? A state for them too. And you gave this away not as a beginning of an agreement, but even before the negotiations on the permanent arrangements have started.⁶⁵

Netanyahu was correct. Israel had just acknowledged in writing that it considered Palestine to be a state.

Benoliel and Perry claim that the "crucial actors" in regard to the question of Palestine statehood are the United States and Israel.⁶⁶ Why the question of Palestine statehood lies in the hands of these two states, they do not explain. The statehood of an entity purporting to be a state is a matter that involves the interaction of that entity with the international community generally.

62. See Permanent Observer Mission of Palestine to the U.N., Letters of Mutual Recognition (Sept. 9, 1993), <http://www.un.int/wcm/content/site/palestine/cache/offonce/pid/12478;jsessionid=AC4737AF63317142AB1CF82F65E7DB15> (letter of Arafat to Rabin recognizing Israel and letter of Rabin to Arafat recognizing the PLO, the latter commitment by Rabin being made "in the light of the PLO commitments included in your letter").

63. Benoliel & Perry, *supra* note 1, at 95.

64. *Opposition Leader Netanyahu Criticizes Agreement with PLO During Knesset Debate*, BBC SUMMARY OF WORLD BROADCASTS, Sept. 23, 1993, ME/1801/MED, at 6, available at LEXIS, News Library, BBCMIR File.

65. *Id.*

66. Benoliel & Perry, *supra* note 1, at 96.

Starting from this dubious premise, Benoliel and Perry find a negation of Palestine's statehood in the Israeli-Palestinian Interim Agreement of 1995 that set the terms for Palestinian control of some sectors over which Israel exercised belligerent occupation.⁶⁷ They cite the Interim Agreement's Article 31(7) that says neither side shall change the status of the West Bank or Gaza Strip during the time that negotiations proceed.⁶⁸ They take this provision to preclude an assertion of Palestinian statehood prior to the conclusion of negotiations and claim that any Palestinian assertion of statehood would change the status of the West Bank and Gaza.⁶⁹

In fact, an assertion of Palestinian statehood changes nothing, as is made clear by another provision of the very Article that Benoliel and Perry cite. They omit mention of the immediately preceding subsection, Article 31(6). It provides: "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."⁷⁰

Palestine's statehood was, of course, declared in 1988, hence Palestinian statehood was a "claim" or a "position" of the Palestinian party to the Interim Agreement. Palestine's statehood, moreover, as already indicated, was guaranteed by Article 80 of the U.N. Charter, hence Palestinian statehood was an "existing right."⁷¹ Article 31 taken in its totality in no way prevented an assertion of Palestinian statehood. An assertion of Palestinian statehood would not change the status of the West Bank or the Gaza Strip.

V. ARGUMENT NUMBER FIVE: ACCEPTANCE BY ISRAEL OF THE PROPOSITION THAT PALESTINE IS A STATE

Finally, Benoliel and Perry dispute my position that Israel has tacitly accepted Palestine as a state by the kinds of interaction it has had with Palestine.⁷² In international practice, the acknowledgment of the statehood of an entity purporting to be a state is done more often through a pattern of conduct than through a formal document. Netanyahu well understood Israel's acceptance of Palestinian statehood, as evidenced by what he said in the previously mentioned Knesset speech where he berated Rabin for concluding the 1993 Declaration of Principles with

67. *Id.* at 96 (citing Interim Agreement on the West Bank and the Gaza Strip, Isr.-P.L.O., Sept. 28, 1995, 36 I.L.M. 551 [hereinafter Interim Agreement]).

68. Benoliel & Perry, *supra* note 1, at 96.

69. *Id.*

70. Interim Agreement, *supra* note 67, art. XXXI, ¶ 6.

71. *See supra* Part II.

72. Benoliel & Perry, *supra* note 1, at 97.

Arafat.⁷³ Netanyahu said that the Declaration of Principles presumed Palestine's statehood. Using a colorful analogy, Netanyahu explained:

When you walk into the zoo and see an animal that looks like a horse and has black and white stripes, you do not need a sign to tell you this is a zebra. It is a zebra. When you read this agreement, even if the words a Palestinian state are not mentioned there, you do not need a sign; this is a Palestinian state.⁷⁴

Netanyahu may not have favored the Declaration of Principles, but he correctly understood its import. Israel was dealing with Palestine as a state. Israel was agreeing to negotiate about borders. Borders have meaning only as between states. NGOs do not have borders. National liberation movements do not have borders. Only states have borders. Thus, once Israel agreed to negotiate borders, it was accepting the fact that the party with which it was negotiating represented a state.

Benoliel and Perry suggest that Palestinian officialdom, by entering into negotiations with Israel, accepted the proposition that Palestine is not yet a state.⁷⁵ However, as indicated above, negotiations under the Declaration of Principles were not to deal with statehood.⁷⁶ Hence, engaging in negotiations carried no implication that Palestinian officialdom did not regard Palestine as a state. What Palestinian officialdom sought through the negotiations was a withdrawal of Israel from Palestine's territory.

Benoliel and Perry say that the suggestion made in some Palestinian circles for a "single state" rather than a separate Palestine bespeaks a negation on the Palestinian side of present Palestine statehood.⁷⁷ However, they never claim that this is a position espoused at the official level on the Palestinian side. Even if it were, it is always open to a state to merge with another, given consent on the other side. Hence, espousal of a single state in the territory of League-era Palestine is not inconsistent with present Palestinian statehood.

Benoliel and Perry point to episodes in the mid-1990s when Arafat vowed to declare Palestine's statehood again. They take these episodes to mean that Palestinian officialdom was speaking of declaring a new state, hence it did not regard Palestine as then being a state.⁷⁸ However, these Arafat statements related to reasserting a statehood already declared in

73. *Opposition Leader Netanyahu Criticizes Agreement with PLO During Knesset Debate*, *supra* note 64.

74. *Id.*

75. Benoliel & Perry, *supra* note 1, at 97.

76. *See supra* note 21 and accompanying text.

77. Benoliel & Perry, *supra* note 1, at 98.

78. *Id.* at 99–100.

1988, and indeed that statehood was indicated in the 1988 declaration as relating back to the Palestine state of the League era. Hence, Arafat's statements of the mid-1990s did not reflect an assumption that Palestine was not a state.

Benoliel and Perry devote considerable attention to the political and administrative split between the West Bank and Gaza, as if this factor somehow negates Palestine statehood. They do not indicate how they consider it relevant, and it is not. The statehood of an entity is not negated by a split in administration as a result of internal differences. Benoliel and Perry do raise the possibility that Gaza might be a state of its own, separate from the West Bank, and they then explain why they think that it is not.⁷⁹ They acknowledge, however, that neither the administration of the West Bank nor that of Gaza espouses such a position.⁸⁰

CONCLUSION

The proposition that Palestine is a state may seem strange to some. It was not so strange to a U.S. district judge who had to decide the issue in a 1953 case.⁸¹ A man named Kletter was born in Palestine in 1911, when Palestine was under the control of the Ottoman Turks. As a boy, Kletter accompanied his mother immigrating to the United States, where she was naturalized in 1928, thereby conferring U.S. nationality not only on herself but also on Kletter, then age 17. A few years later Kletter went back to Palestine, where he was naturalized in 1935. But then he returned to the United States and wanted privileges that would come with U.S. nationality.⁸²

Kletter claimed that he was still a U.S. national. He argued that Palestine was not a state, and therefore that his 1935 naturalization there was invalid. The U.S. district court disagreed. It said that Kletter's naturalization in Palestine was valid, thus he was no longer a U.S. national: "[N]aturalization in any foreign state . . . constitutes expatriation. The contention of the plaintiff that Palestine, while under the League of Nations mandate, was not a foreign state within the meaning of the statute is wholly without merit."⁸³ In support, the court said that the United States in 1932 had taken the position that Palestine was a state: "This the Executive branch of the Government did in 1932," the court explained,

79. *Id.* at 101-08.

80. *Id.* at 101.

81. *See* Kletter v. Dulles, 111 F. Supp. 593 (D.D.C. 1953).

82. *Kletter*, 111 F. Supp. at 593-95.

83. *Id.* at 598.

“with respect to the operation of the most favored nations provision in treaties of commerce.”⁸⁴

The court found a reference to the 1932 episode in the State Department’s digest of international law, where it is mentioned as indicating that the United States considered that Palestine was a state.⁸⁵ In 1932, Britain had just enacted comprehensive tariffs on incoming goods but wanted to exempt goods from Palestine. Britain did not want to damage the exports of Palestine, as Palestine was under British administration. But Britain had a problem; it had treaties with a number of states, including the United States, that provided that such states were entitled to the lowest tariff rates Britain charged to any other state. This was the most favored nation provision to which the court referred. If Britain allowed goods from Palestine duty-free, the United States, and indeed a number of other states, including France and Italy, might claim a similar exemption. The issue turned on whether Palestine was a state.

To test the waters, Britain made discreet diplomatic inquiries to ask whether, if Britain were to exempt Palestine, the United States would claim a similar exemption on the basis that Palestine was a state. The United States replied emphatically that it would.⁸⁶ The British government was so anxious to exempt Palestine without losing tariff revenue on goods from the United States and several other states, that it examined the possibility of suing on the matter in the PCIJ. The British government’s own legal office advised against suing, however, because the PCIJ had already said that Palestine was a state that was successor to Turkey with respect to the territory of Palestine.⁸⁷

Benoliel and Perry tried to refute my position that Palestine is a state by adducing a great number of arguments. However, nothing they put forward succeeds. None of the points they make has validity as a matter of legal analysis. Other authors, also in connection with the declaration lodged by Palestine in the International Criminal Court, have attempted to refute Palestine statehood.⁸⁸ Some have made the same arguments as

84. *Id.*

85. *Id.* at 598 (citing 1 GREEN HAYWOOD HACKWORTH, DIGEST OF INTERNATIONAL LAW 115 (1940)). The term was “foreign country,” since that was the term in the treaty, but “country” was used as an equivalent of “state.”

86. The Secretary of State to the British Chargé (Osborne) (Aug. 27, 1932), in 2 FOREIGN RELATIONS OF THE UNITED STATES 1932, at 32 (1947).

87. See QUIGLEY, *supra* note 9, at 64; *supra* notes 42–44 and accompanying text (discussing the PCIJ case).

88. *E.g.*, Int’l Criminal Court, Office of the Prosecutor, Situation in Palestine: Summary of Submissions on Whether the Declaration Lodged by the Palestinian National Authority Meets Statutory Requirements (May 3, 2010), <http://www.icc-cpi.int/NR/rdonlyres/D3C77FA6-9DEE-45B1-ACC0-B41706BB41E5/282852/PALESTINEFINAL201010272.pdf> (summarizing submissions supporting and opposing the PLO’s declaration on grounds of lack of statehood).

Benoliel and Perry. Some have made other arguments. A full assessment of those arguments can be found in memoranda posted by the Office of the Prosecutor. A further contretemps on the issue has been posted by UCLA's *Human Rights & International Criminal Law Online Forum*.⁸⁹ Within the confines of this brief reply, the reasons to demonstrate the existence of Palestinian statehood cannot be fully elaborated. But the failure of authors who reject Palestinian statehood to find persuasive arguments for their view only reinforces the conclusion that Palestine is a state.

89. *Gaza Jurisdiction Debate—Should the ICC Investigate War Crimes in Gaza?*, UCLA HUMAN RIGHTS AND INT'L CRIMINAL LAW ONLINE FORUM, <http://uclalawforum.com/gaza> (last visited Feb. 21, 2011).