THE JURIDICAL BASES FOR PALESTINIAN SELF-DETERMINATION

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I. The Sources of International Law

The basic rights of the Palestinian people and their right to constitute a state of their own are based on customary law and treaty law which together form the structure of the world legal order.

Customs are the more historic method of international law-making as compared with treaties. In 1625 when Grotius wrote his classic treatise, De Jure Belli ac Pacis, custom stood as the almost unique method of prescribing international law. While conventions or treaties are created by the explicit agreement of states, customary law is based upon implicit agreement. Article 38 of the Statute of the International Court of Justice merely purports to specify the sources of law which shall be applied by the Court. It is, nevertheless, widely accepted as describing the sources which are available generally in international law. The first paragraph of the article lists treaties, customs and general principles as the main sources. Custom is specified to be “international custom as evidence of a general practice accepted as law.” This carefully worded provision does not require evidence of a universal practice. The historic customary law-making process demonstrates that the rules which are regarded as legally established are based upon the assent of a substantial majority of states. It has not been considered necessary that

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2. I.C.J. Stat., art. 38, para. 1, a, b and c. Sub-section “d” lists judicial decisions and legal writings as subsidiary sources.
3. In the famous case of The Paquete Habana, 175 U.S. 677 (1900), the U.S. Supreme Court based its holding concerning the immunity of coastal fishing boats from capture on such assent. The same point is made by legal writers. See, e.g., Professor Brierly who states: “It would hardly ever be practicable, and all but the strictest of positivists admit that it is not necessary, to show that every state has recognised a certain practice...” as creating customary law. Brierly, The Law of Nations at 61 (6th ed., Waldock, 1963).
universal assent be obtained. General principles are specified as being "the general principles of law recognized by civilized nations". The requirements here are not a combination of state practice and assent as in customary law, but rather a combination of state articulation or formulation along with assent.4

Although much international law is based upon pre-existing state practice, the community of states has the legal capacity and authority to formulate legal rules or principles through a multilateral conference or otherwise, even in the absence of pre-existing practice. The United Nations Charter is a multilateral treaty by which states created the United Nations as a separate factual participant and legal subject of international law.5 The principles set forth in the Charter are binding on all those states which have accepted it as a treaty and become member-states.6 The provisions of the Charter are designed to operate in the context of the contemporary international law decision-making process. Following the ratification and implementation of the Charter, states retain their pre-existing law-making competence. The Security Council (in subject matter restricted to international peace and security) and the General Assembly (concerning a wide range of subjects) are institutions which facilitate the making of international law. The widespread use and reliance upon resolutions of the General Assembly and Security Council which are intended to have law-making effect provide convincing indication that the matters relied upon constitute, at the least, important evidence of the existence of particular rules or principles of international law.7 Authoritative international law writers have found the state practice requirement for customary law-making in the collective acts of states as well as in their individual acts.8 The General Assembly is a collective meeting of the states of the world community which comprise its membership. Its authority is derived directly from the member states which have the same legal authority to develop and make international law in the General Assembly as they do outside of it.9 The advantageous feature of such activity in the

4. Professor Brierly, has accurately characterized general principles as "a dynamic element in international law." Id. at 63. It has also been pointed out that international arbitral tribunals employed general principles of law before the establishment of the International Court of Justice. 1 Oppenheim, International Law: Peace 30 (8th ed., Lauterpacht).