

MEMORANDUM

TO: Dr. Mahmoud Abbas (Abu Mazen)

FROM: NSU

DATE: December 23, 2001

RE: International Precedents for Transitional Sovereignty

I. Goal

To describe common elements of transitional sovereignty in international precedents since the end of the Cold War and apply those common elements to a theoretical model of Palestinian transitional sovereignty. This is not meant to be a prescriptive model but rather to provide an example of what the international community has been willing to support in other examples of transitional sovereignty. Each example is relatively unique, as is the case of Israeli occupation of Palestinian territory. However, there are common themes throughout that may be useful in informing Palestinian assessments of any future transitional arrangement.

II. Background

Since the end of the Cold War, a number of peoples and states have fought for and, to some extent, gained independence. However, the extent of sovereignty each state has managed to negotiate or otherwise obtain has differed. Some nations have negotiated or seek to negotiate a substantial level of autonomy within a state. Some nations have fought and negotiated for all the trappings of a state without formal recognition of their statehood and conditional upon a more powerful state's approval. Some nations have fought and negotiated for full internationally recognized statehood, albeit with substantial limits on the exercise of their sovereignty. In every example, however, the negotiated agreements are concluded with the anticipation, explicit or not, that the limits on sovereignty are limited in time. **At some point in the future, the full right of self-determination and the full exercise of sovereignty are desired.**

Those who negotiate for "intermediate" sovereignty realize that they are temporarily suspending their right to exercise or fight for the right to exercise full independence because current geo-political realities make it practical and because there may be more to gain from the international community by allowing such "intermediate" sovereignty in the short term.

The considerations of real-politick are generally not meant to be a renunciation of those rights to which that nation, people, or state may be entitled.¹

¹ Although independence may be implemented in stages, there is formal recognition and reaffirmation by the U.N. General Assembly, the Security Council, the International Court of Justice, and specific state practice that respect for the fundamental rights of the inhabitants of a territory or state must be implemented regardless of the stage of independence that territory be in.

III. Elements of Sovereignty

There are several traditional requirements for the full exercise of sovereignty:

- Ability to exercise control over borders.
- Ability to exercise control over all territory.
 - Ability to exercise permanent sovereignty over natural wealth and resources.
 - Ability to exercise control over economic borders and customs territories.
- Ability to exercise control over population.
 - Ability to pass laws.
 - Ability to enforce laws.
- Ability to engage in international/external relations/internationally recognized statehood.
 - Ability to enter into treaties with other states and international organizations.

IV. Palestinian Sovereignty

The primary goal of the negotiations is the extension of full Palestinian sovereignty and jurisdiction over all the territories of the West Bank and Gaza Strip that came under Israeli control in June 1967. Stephanie Koury has prepared a memorandum listing the details of a full exercise of Palestinian sovereignty.

V. Examples of “Intermediate” Sovereignty

As noted above, the full exercise of sovereignty has not always been possible. There are several examples in the last decade that provide instruction for Palestinians on transitional arrangements for the exercise of sovereignty. Each of the examples below created a relatively unique model. They are not presented as precedents for Palestinian sovereignty, but only as illustrative examples of the range of options already utilized by some nations and states.

A. Statehood with almost no sovereignty

Tatarstan

In 1994, Tatarstan and the Russian Federation signed an agreement that defined the former as a state entitled to participate in international relations but with the limitation that it could not enter into any international agreement that contravened the Russian Constitution or Russian international obligations. In exchange for the right to participate in international relations, Tatarstan limited its sovereign right to choose which international agreements it could sign to those approved by the Russian government.

B. No immediate statehood but with some functional sovereignty

Chechnya

Chechnya concluded the Khasavyurt Agreement with Russia in 1996 after a somewhat successful war for independence that cost tens of thousands of lives. The inability of the Russian military to effectively occupy Chechnya combined with the heavy casualties the Russian Army suffered eventually led to the 1997 Treaty of Peace between the two nations functionally treating Chechnya as an independent state in most aspects. Unlike the agreement with Tatarstan, the treaty mandates no dependence on the Russian Constitution and calls for a final agreement between the Russian Federation and the Chechan Republic by December 31, 2001.

For a time, Chechnya was effectively independent in that it had control over its own territory, was able to control its own borders, was able to elect its own representatives, and had limited ability to conduct relations with other states. Chechnya issued its own passports, applied for membership in international organizations and sought diplomatic recognition as an independent state. Nevertheless, it was re-occupied by the Russian Army in 1999 in violation of the Treaty of Peace. Russia alleged the reoccupation was a legitimate response to terrorist bombings in Moscow, Volgograd, and Buynaksk that killed nearly 300 civilians.² Chechnya had not negotiated any legal status or treaty arrangements that would have made the Russian re-invasion less likely.

C. No immediate statehood and shared sovereignty

Kosovo

In Kosovo, NATO's war with the Federal Republic of Yugoslavia (FRY) resulted in an agreement that created an informal international protectorate without formal independence for a specified period of time.³ During that time an International Implementation Mission (IIM) would assume control of Kosovo's foreign and monetary policy related to the region and would control the borders, as well as participate in the repatriation of the 750,000 refugees created by the war.⁴ The IIM would also create a Kosovar police force and would assist in maintaining internal security. The IIM also has the authority to issue binding instructions, to arbitrate between the opposing sides and to dismiss local officials who obstruct the implementation of the agreement.

Kosovo's population was given substantial autonomy on domestic matters with regular elections for its own president, parliament and a government headed by a prime minister who controls most matters relating to Kosovo including local administration, education and health. Kosovo's new government is allowed to conduct foreign relations.

² Chechen involvement in the terrorist attacks was never proven and no Chechen organization took credit for the blasts. The international community tended to treat the re-invasion as an internal Russian matter and concentrated on the humanitarian aspects of the crisis.

³ U.N. Security Council Resolution 1244 (1999) established an international security presence in Kosovo to provide for the safe and free return of all refugees and displaced persons to their homes and to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo.

⁴ EU statement 09553/98 noted that refugee return will require close international monitoring to generate confidence on the part of those returning that the rule of law has been re-established and authorized the EU to "play its full part in an increased international monitoring effort."

East Timor

On 30 August 1999, East Timorese voted in a direct, secret and universal ballot to begin a process leading towards independence. A United Nations Transitional Administration in East Timor (UNTAET) was created to administer the territory and exercise legislative, military and executive authority during the transition period.⁵ This was a response, in part, to a wave of violence initiated by Indonesian-government affiliated militias and settlers which killed hundreds of East Timorese and displaced as many as 500,000 from their homes.⁶ Ultimately, under international pressure, the Indonesian government agreed to accept the “assistance” of the international community, and began withdrawing all armed forces, police, and administration officials from East Timor.⁷

UNTAET’s mandate consists of the following main elements: to provide security and maintain law and order throughout the territory of East Timor; to establish an effective administration; to assist in the development of civil and social services; to ensure the coordination and delivery of humanitarian assistance, rehabilitation and development assistance; to support capacity-building for self-government; and to assist in the establishment of conditions for sustainable development. This mandate is currently set to end on 31 January 2002, but may be amended if independence is delayed.

D. Immediate statehood and limited sovereignty*Bosnia and Herzegovina (“Bosnia”)*

On the sliding scale of intermediate sovereignty, Bosnia comes closest to being fully independent and being allowed to fully exercise its people’s right to self-determination. Bosnia achieved recognition for its independence first, before it actually could lay claim to all the implementing elements of sovereignty and was then forced to fight a four-year war to exercise that independence concluding in the Dayton Accords. The Accords combined elements of an international protectorate over Bosnia with the theoretical constructs of full sovereignty for an undetermined period.

All three of Bosnia’s largest ethnic groups, Slavic Muslims (Bosniaks), Slavic Orthodox Christians (Bosnian Serbs), and Slavic Catholics (Bosnian Croats) are allowed to practice a limited form of self-government within an overarching but almost powerless central government. The desperate attempts by the central Bosnian government to maintain a multi-ethnic citizen state outlook was replaced by Dayton with a cooperative-ethnic quilt in the short run which is expected to lead, realistically or not, back to the concept of a pluralistic citizen-state.

The process of transformation is to take place through the return of all refugees to their original homes thereby slowly reconstituting Bosnia’s original ethnic mix of

⁵ UN Security Council Resolution 1272 (1999) of 25 October 1999.

⁶ UN Security Council Resolution 1264 (1999) authorized the establishment of a multinational force but still left the responsibility for ensuring the safe return of refugees to the Indonesian government responsible for their expulsion.

⁷ Indonesia occupied East Timor with US support in 1974. The occupation was never recognized by the international community.

populations.⁸ This, in turn, is expected to undermine ethnic nationalists through provisions for democratic elections for local, regional, and national government positions. This process would be furthered by the arrest of alleged war criminals who continue to dominate the Bosnian Serb political parties.

Implementation is key to such a plan for transitional sovereignty. That implementation, as in Kosovo, is encouraged by a non-Bosnian High Representative with the power to interpret the Dayton Accords, to implement decisions, to override decisions of elected representatives, to remove alleged war criminals or persons who do not support Bosnia's new constitution and its support for the Dayton Accords from electoral ballots, to sanction elections as fair or not, and to implement decisions held up by the central government. He also is tasked with co-coordinating the activities of other international civilian organizations. A non-Bosnian European "high court" presides over the Bosnian Supreme Court with the power to overturn its decisions.

The High Representative does not have authority over the military stabilization force (SFOR), which defends Bosnia's borders and provides for internal security.⁹ The military force along with participants from other nations will maintain the peace until implementation of the Accords has led to the creation of the multi-ethnic pluralistic state that was the original goal of Bosnians. Thus, although Bosnia is nominally independent and is capable of entering into international agreements and is duly recognized as a state by the United Nations, it shares exercise of its sovereignty with the international community until such time as conditions exist for it to act on its own.

VI. Palestinian Transitional Exercise of Sovereignty

It is preferable to negotiate an agreement that provides for the full exercise of sovereignty from the outset. However, political realities may indicate the desirability of transitional arrangements. The overriding goal of any transitional exercise of sovereignty is that it lead to the exercise of full sovereignty at a specified date.

A. Ability to exercise transitional control over borders

- There are no examples of transitional independence in which the occupying army remains.
- The only examples that exist provide for international forces working on behalf of the legitimate state or authority providing control over the borders until such time as the state can assume full control.
- The Palestinian government/Palestinian National Authority should have the authority to determine who is allowed into the Palestinian territories even if exercise of that authority is given to a third party.

⁸ UN Security Council Resolution 1031 (1995) gave the UNHCR a "leading humanitarian role" in assisting with the repatriation and relief of refugees and displaced persons, and stressed the importance of repatriation being "phased, gradual and orderly."

⁹ The United Nations also established, pursuant to UN Security Council Resolution 1995 (1995) a United Nations civilian police force and a United Nations civilian office.

- Palestinians in a transitional arrangement should be allowed to set immigration and travel policy for Palestinian ports and airports, even if implementation is left to an international force.

B. Ability to exercise transitional control over all territory

- There are no examples of transitional independence in which the occupying army remains.
- The ability to exercise transitional control does not necessarily require contiguous territory, although there are no examples since the Cold War where a non-contiguous territory was created, although such a plan was proposed, and rejected, in the case of Bosnia.
- The ability to exercise transitional control requires freedom of movement for Palestinians anywhere within the territory under Palestinian authority as well as within the remainder of the Palestinian territories.
- Territory not within the immediate control of the state or authority can, nevertheless, not be under the control of the occupying power. It is possible in a transitional arrangement to allow international forces working on behalf of the legitimate state or authority to assume responsibility for security and other functions in parts of the state that are not yet under full state control. There can only be **one** force that may bear arms in any given jurisdiction.
- The territory of the Palestinian state, even in a transitional arrangement, will need to include the airspace and maritime boundaries. International forces can control airspace and sea-lanes on behalf of the Palestinian government/Palestinian National Authority in a transitional arrangement.
- Territorial integrity in a transitional arrangement can be provided for through guarantees provided for by the international community or a specific military alliance such as NATO. International military forces in Palestinian territories could act as a trip-wire for defense mechanisms even before Palestinians acquire statehood.

C. Ability to exercise transitional control over population

- There are no examples of transitional independence in which the occupying army remains in control over any part of the population.
- It is possible in a transitional arrangement that Palestinian police forces assume responsibility for all Palestinians in all the Palestinian territories.
- It is also possible in a transitional arrangement that international forces working in conjunction with Palestinian police forces assume responsibility for all Palestinians in all the Palestinian territories.

- The ability of the state to pass and enforce, directly or indirectly, its own laws:
 1. The ability to collect taxes from the Palestinian population.
 2. The ability to provide administrative services to all the Palestinian population in the Palestinian Territories.
 3. The ability by Palestinians to choose their own representatives and form of government.¹⁰

D. Ability to engage in international/external relations/internationally recognized statehood.

- Palestinians may or may not be recognized as a state in a transitional implementation.
- The Palestinian government/Palestinian National Authority would need the ability to enter into international relations concerning at a minimum, political and civil, social, economic, and cultural affairs, even if military treaties are temporarily not allowed.
- The Palestinian government/Palestinian National Authority would need to have the authority to issue internationally recognized passports to all Palestinian citizens.

E. Ability to exercise permanent sovereignty over natural wealth and resources

- Peoples entitled to self-determination have the right of permanent sovereignty over natural resources even before those peoples exercise their right to self-determination.
- All use of Palestinian natural resources by the Israeli occupying forces has to come to an end, even if Palestinians do not assume immediate control over those resources. [A full settlement freeze would limit the damage caused by Israeli use of Palestinian natural resources.]
- All Israeli polluting of Palestinian natural resources has to come to an end, even if Palestinians do not assume immediate control over the resources.
- Regardless of whether Palestinian natural resources are under Palestinian or a third party(ies) administrative control, utilization of the resources must be based on international law and the principles of equitable utilization.

F. Ability to exercise transitional control over economic borders and customs territories

¹⁰ Traditional state sovereignty accepts the acting government of any state as representative of the state despite its democratic credentials. However, in the examples described (except for Tatarstan), the elements of a regularly elected representative government were prescribed as part of any agreement. In part, this is a result of the growing trend to accept a “democratic entitlement” in international law. In other words, if the international community is going to be heavily involved in guaranteeing an agreement, it has typically required democratic institutions (functioning or not) to be created.

- The border regime in a transitional arrangement can be administered by international forces in cooperation with Palestinian personnel on the 1967 border, even if that border is negotiated to a different position. The crossing points set up during the transitional stage can then be moved from the 1967 line to the new border line after permanent status.
- The crossing points of an economic regime can be set at those areas where Palestinian cities adjoin the 1967 border until permanent status talks are concluded.
- Palestinians in a transitional arrangement should be allowed to enter into full economic treaties, arrangements, and membership with other parties without impediment.
- Palestinians in a transitional arrangement should be allowed to set policy concerning economic matters relating to Palestinian ports and airports, even if implementation is left to an international force.

G. Transitional Sovereignty over Jerusalem

In addition to ensuring that all the above sovereign attributes apply with equal force to Jerusalem, transitional sovereignty over the city would also entail:

- Freedom of access to East Jerusalem. Presently, the majority of Palestinians are denied access to East Jerusalem. Transitional sovereignty over the city should translate into freedom of movement into the city, as well as the freedom to assume residency in the city.¹¹
- Shadow Municipality. There is need for a shadow municipality to gradually assume municipal powers and provide services in anticipation of full sovereignty over the city. Such a municipality should be able to engage in the following activities:
 - Tax collection, as opposed to the present status where Palestinians pay around 30% of Jerusalem's tax revenue yet only receive around 5% of municipal services.
 - Provision of basic municipal services, such as garbage collection.
 - Issuing building permits.
 - Registering land ownership.
- Administration of Justice. The jurisdiction of Palestinian laws and courts should extend to the city.
- Health and social services. Palestinians should be given the choice to continue using the Israeli social and health services.¹²

¹¹ In Brcko, Bosnia, the city was occupied by the Serbian Army which refused to leave the city after the Dayton Accords. The status of the city, falling on the dividing line between the two cantons of Bosnia, was left to arbitration. During the period of arbitration, the city remained in Serb hands. The arbitration was delayed past the due date due to political concerns of "instability." The city however, during this time, remained technically open to all Bosnians.

¹² This may entail some complications with regards to the payments of taxes. Palestinians should be paying taxes under this scenario to the Palestinian state or government. However, many Jerusalemites

- Aside from the above, Palestinians already enjoy a great deal of the functional attributes of sovereignty in Jerusalem. Both health and educational sectors are in Palestinian hands, and until recently Palestinian police was given informal access to the city.

VII. Conclusion

Any Palestinian transitional exercise of sovereignty will require two over-riding elements: 1. an agreed timetable for full exercise of sovereignty and 2. an end to Israeli occupation of Palestinian territories.

Binding Arbitration

A number of international examples set a precedent for including binding arbitration after a particular period of time if the parties are unable to come to an agreement. This would be necessary in any transitional Palestinian arrangement as well. However, how the arbitration is set up is of great importance. The arbitration set up to negotiate the status of Taba specifically incorporated international law in determining the status of the area in dispute. In the case of Brcko, Bosnia, the status of the city was decided by one US arbiter who was heavily influenced by political considerations and not specifically by international law.

Jerusalem

The status of Jerusalem could also be left to binding arbitration if the arbitration was predicated on international law, in the absence of having the occupation forces withdraw. In the meantime, the city would remain under Israeli control but Palestinians would have full freedom of movement into and out of the city even if the Israeli government still controlled most aspects of life in the city.

Full Withdrawal

In all examples of transitional sovereignty, the occupying army has had to withdraw and been replaced either by the national forces of the formerly occupied state or by the international community. There is no example of transitional sovereignty in which the occupation is allowed to continue.

Jurisdiction

Theoretical models can be constructed of such a transitional Palestinian arrangement. The Israeli occupation forces can withdraw to be replaced by international forces or by a combination of national Palestinian forces in a contiguous or non-contiguous area and international forces in the remainder of the Palestinian territories. In the case of the latter, the Palestinian government would still be able to set the laws for the entire Palestinian territories even if enforcement of those laws had to be subcontracted to international forces in parts of the Palestinian territories. This includes Palestinian areas being considered for annexation by Israel.

may not want to give up services currently provided by the Israeli government such as health services. There may need to be provisions established to allow special arrangements in this regard.

This would place any Israelis, or other foreigners including third party nationals on Israeli visas, residing in the Palestinian Territories under Palestinian jurisdiction if in a zone administered directly by Palestinian national forces or under international forces jurisdiction in any other area of the Palestinian Territories, including East Jerusalem.

The Palestinian authorities in a transitional arrangement would also need the right to determine immigration policies including determining which and how many Palestinians could enter the Palestinian Territories. Currently, Israel controls all external border points. In a transitional arrangement, Palestinian national authorities, alone, or in conjunction with international personnel would administer the external border points and enforce Palestinian decisions on immigration.

Freedom of Movement

In either arrangement, Palestinian persons and goods would have to have full freedom of movement throughout the entire Palestinian territories and crossing points for goods and persons would have to be on the 1967 border even if those borders are still to be negotiated. In other words, in a transitional arrangement, crossing points would be set on the Green Line and then moved when necessary upon conclusion of permanent status negotiations, if the border adjustments are mutually agreed to.

Ability to Enter Into International Relations

Transitional arrangements would also need to provide the Palestinian authorities the ability to enter into the maximum number of international relations with temporary limits only on military agreements.

Natural Resources

Transitional arrangements would also need to either transfer control of Palestinian natural resources back to Palestinians or place them under the control of international forces until the conclusion of negotiations. Israel simply could not continue to control and utilize Palestinian natural resources, especially water, in a transitional arrangement.

Under these circumstances, it is difficult to imagine a scenario for transitional independence in which Israeli settlements remained in the contiguous Palestinian zone and in which there was not a complete freeze, at a minimum, on all settlement activity in any internationally administered Palestinian territories.