EUROPEAN CENTRE FOR LAW AND JUSTICE

1 March 2024

VIA OVERNIGHT DELIVERY SERVICE

H.E. Yamazaki Kazuyuki
Ambassador Extraordinary & Plenipotentiary
Permanent Representative of Japan
to the United Nations
Incoming President of the Security Council
605 Third Avenue – 28th floor
New York, NY 10158

Re: Attempt by Palestinian Leaders to Obtain UN Recognition of a Palestinian State

Your Excellency:

By way of introduction, the European Centre for Law and Justice (ECLJ) is a non-governmental organisation located in Strasbourg, France, dedicated to the promotion and protection of human rights around the world. The ECLJ has held Special Consultative status with the United Nations Economic and Social Council since 2007.[1]

As you may recall, on 29 November 2012, the UN General Assembly (GA) agreed to change the Palestinian Authority's (PA) status *at the UN* from an "Entity" enjoying Observer status to that of a "Non-member State" with Observer status.[2] It is important to understand that the GA's actions did not—indeed, could not—create a Palestinian State. Moreover, despite the status change decision (and a more recent move at the UN to treat Palestine as a "State"[3]), the reality of Palestinian "statehood" is belied by the fact that Palestine does not meet the customary international law requirements for statehood,[4] nor does any UN entity possess the authority to create a state where one does not otherwise exist.

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[1] Consultative Status for the European Centre for Law and Justice, U.N. DEP'T OF ECON. & SOC. AFFS: NGO BRANCH, http://esango.un.org/civilsociety/ (follow "Advanced Search" hyperlink; then search organization's name for "European Centre for Law and Justice").

[2] U.N. Gen. Assembly, Dep't of Pub. Info., *General Assembly Votes Overwhelmingly to Accord Palestine 'Non-Member Observer State' Status in United Nations*, U.N. MEETINGS COVERAGE AND PRESS RELEASES (29 Nov. 2012), https://www.un.org/press/en/2012/ga11317.doc.htm.

[3] On 27 September 2018, for example, the PA was elected "to chair the Group of 77 for the year 2019"; and on 17 October 2018, the UN General Assembly passed a resolution which permits the PA to participate "in the sessions and work of the General Assembly and the international conferences convened under the auspices of the Assembly . . . for the duration of the chairmanship by the State of Palestine of the Group of 77".). G.A. Res. 73/5, ¶ 1 (17 Oct. 2018), *available at* https://www.un.org/en/ga/73/resolutions.shtml.

[4] The Montevideo Convention on the Rights and Duties of States (1933) contains the "best known formulation of the basic criteria for statehood". James Crawford, *The Criteria for Statehood in International Law*, 48 BRIT. Y.B. INT'L L. 93, 111 (1977); *see also* Convention on Rights and Duties of States, art. 1, 26 Dec. 1933, 49 Stat. 3097, 165 L.N.T.S. 19, *available at* https://treaties.un.org/doc/Publication/UNTS/LON/Volume%20165/v165.pdf. *See, e.g.*, JOSHUA CASTELLINO, INTERNATIONAL LAW AND SELF-DETERMINATION: THE INTERPLAY OF THE POLITICS OF

As addressed below, the effect of the GA's 2012 decision *is at most an internal administrative change for the UN and its agencies*. Hence, despite actions to the contrary by the GA, no facts on the ground have changed—"Palestine" remains a non-state entity incapable of becoming a member state of the UN.

Previously, on 23 September 2011, officials from the Palestine Liberation Organisation (PLO) submitted their application to the United Nations seeking UN membership of an Arab Palestinian State in the West Bank and Gaza Strip.[5] To date, there have not been nine affirmative votes in the Security Council to admit such a "state", the number required by Article 27(2) of the UN Charter.[6] It is our view that this failed attempt by the PLO is a result, at least in part, of the recognition by the Member States of the following historical record.

It is important to note that the 1949 *armistice lines* which define the West Bank and Gaza Strip (frequently referred to as the pre-'67 lines) have never been regarded as international boundaries. From 1949 until 1967, the portions of Palestine not under the control of the State of Israel remained under belligerent military occupation by Egyptian and Jordanian armed forces. No Arab Palestinian State has ever existed in these territories.

As a result of the 1967 Arab-Israeli war, Jordanian and Egyptian forces retreated from the West Bank and Gaza Strip, respectively, and Israel acquired control of those territories. Following the 1967 war, the UN Security Council adopted Resolution 242.[7] Note, first, that the language in that Resolution requires that Israel withdraw "from territories"[8] it captured—not from "all" territories or "the" territories it captured. We know from historical record that these were *intentional omissions from the language of the Resolution.*[9] Note, second, that the Resolution requires "secure . . . boundaries"[10]—something that did not exist prior to 1967 as evidenced by the persistent attacks mounted against Israel from Arab-controlled territory and would not exist today if the *status quo ante* were reinstated. Note, third, that the Resolution calls for the termination of all "states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area . . . ."[11]

TERRITORIAL POSSESSION WITH FORMULATIONS OF POST-COLONIAL 'NATIONAL' IDENTITY 77 (2000) (citing D.J. HARRIS, CASES AND MATERIALS OF INTERNATIONAL LAW 102 (5th ed. 1997) ("The Montevideo Convention is considered to be reflecting, in general terms, the requirements of statehood in customary international law".); Tzu-wen Lee, *The International Legal Status of the Republic of China on Taiwan*, 1 UCLA J. INT'L L. & FOREIGN AFFS. 351, 387 n.70 (1996–97) ("[The Montevideo] Convention is regarded as representing in general terms the criteria of statehood under customary international law".).

[5] President of the State of Palestine, Letter dated 23 Sept. 2011, from the President of the State of Palestine addressed to the Presidents of the Security Council and the General Assembly, U.N. Doc. A/66/371 (23 Sept. 2011), *available at* https://www.un.org/unispal/document/auto-insert-184036/.

[6] U.N. Charter art. 27, ¶ 2.

[7] S.C. Res. 242 (22 Nov. 1967), *available at* https://www.un.org/securitycouncil/content/resolutions-adopted-security-council-1967.

[8] *Id.* at ¶ 1(i).

[9] Lord Caradon, permanent representative of the United Kingdom to the United Nations from 1964–70 and chief drafter of Resolution 242, aptly noted the following:

> Much play has been made of the fact that we didn't say "the" territories or "all the" territories. *But that was deliberate*. I myself knew very well the 1967 boundaries and if we had put in the "the" or "all the" that could only have meant that we wished to see the 1967 boundaries perpetuated in the form of a permanent frontier. This I was certainly not prepared to recommend.

YORAM MEITAL, EGYPT'S STRUGGLE FOR PEACE: CONTINUITY AND CHANGE, 1967-1977 49 (1997) (emphasis added).

[10] S.C. Res. 242, *supra* note 7, ¶ 1(ii).

[11] *Id.*

Furthermore, following the 1973 Arab-Israeli war, the UN Security Council adopted Resolution 338,[12] which reiterates the call to implement the terms of Resolution 242. Subsequent resolutions as well as agreements made under the auspices of the international community have cited Resolution 242 as the basis for resolving the Arab-Israeli conflict.

Each of the principles set forth in Resolution 242 is predicated on negotiations between Israel and its neighbors. What the Palestinians have attempted to do by approaching the UN directly is to forego having to make the concessions that negotiations require to determine what a future Arab Palestinian state will look like. In so doing, they are seeking to undermine the terms of Resolution 242. A Palestinian attempt to unilaterally effect change in the status of the territory and adopt the 1949 armistice lines as internationally recognised boundaries explicitly runs counter to Resolutions 242 and 338.

Additionally, in his letter dated 23 September 2011 to the UN Secretary-General,[13] Mahmoud Abbas, Chairman of the Executive Committee of the PLO, relied on GA Resolution 181 (II)[14] to provide instruction to the GA for its membership application. Notwithstanding the fact that the representative of the Arab Higher Committee for Palestine flatly rejected Resolution 181 (II)[15] at the time it was adopted, there are two other problems with his reliance on this resolution.

First, President Abbas has claimed East Jerusalem as Palestine's capital.[16] However, Resolution 181 (II),[17] along with GA Resolution 194 (III),[18] designated Jerusalem as an international zone *to be administrated by the UN*. Again, if President Abbas desires to rely on Resolution 181 (II), he cannot pick and choose which parts he likes and reject the rest.

Second, while Resolution 181 (II) does support the creation of an Arab state, it also calls for the creation of a *Jewish* state.[19] Therefore, if President Abbas desires to rely on Resolution 181 (II), he must also recognise its provision for a Jewish state. President Abbas, however, continues to refuse to recognise Israel as a Jewish state.[20]

In sum, if President Abbas desires to rely on Resolution 181, he must, at a minimum, give up his claim to East Jerusalem as Palestine's capital, as well as recognise a Jewish State, bounded by internationally recognised defensible borders.

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[12] S.C. Res. 338 (22 Oct. 1973), *available at* https://www.un.org/securitycouncil/content/resolutions-adopted-security-council-1973.

[13] President of the State of Palestine, *supra* note 5.

[14] G.A. Res. 181 (II) (29 Nov. 1947), *available at* https://undocs.org/Home/Mobile?FinalSymbol=A%2FRES%2F181(II)&Language=E&DeviceType=Desktop&LangRequested=False.

[15] United Nations Palestine Comm'n Commc'n from the Representative of the Arab Higher Comm. for Palestine, U.N. Doc. A/AC.21/6 (19 Jan. 1948), *available at* https://www.un.org/unispal/document/auto-insert-211488/.

[16] U.N. Secretary-General, Note dated 23 Sept. 2011 from the Secretary-General addressed to the General Assembly and the Security Council, U.N. Doc. A/66/371-S/2011/592 (23 Sept. 2011), at Annex II, *available at* https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/IP%20S2011%20592.pdf.

[17] G.A. Res. 181 (II), *supra* note 14, Part III(A).

[18] G.A. Res. 194 (III) (11 Dec. 1948), *available at* https://research.un.org/en/docs/ga/quick/regular/3.

[19] *See* G.A. Res. 181 (II), *supra* note 14, Part I(A).

[20] *Arab League, Abbas Reject Recognizing Israel as 'Jewish State'*, REUTERS (9 Mar. 2014), https://www.reuters.com/article/us-israel-palestinians-arabs/arab-league-abbas-reject-recognizing-israel-as-jewish-state-idUSBREA280J920140309.

Moreover, in the 1990s, the PLO consented to negotiate with the State of Israel with the aim of resolving the disagreements between them. The various agreements between the State of Israel and the PLO / PA were negotiated and concluded under the auspices of the international community.[21] Specifically, in the Interim Agreements, the PLO agreed to refrain from acts intended to change the status of the territories outside of peace talks.[22] *The Palestinians' attempt to forego such negotiations by appealing directly to the UN constitutes a material breach of prior Israeli-Palestinian agreements and subverts the international rule of law.* It also indicates that Palestinian agreements cannot be relied upon—Palestinian officials readily breach their word when it suits their purposes.

It is only through direct negotiations between the parties that a just and lasting peace can be achieved. If the Palestinians continue to look to the UN instead of dealing directly with Israel, it will only set back the Palestinian cause by demonstrating to Israel and the world community that Palestinian leaders are not trustworthy negotiation partners. The Palestinians' approach to the UN in lieu of negotiations will rightly be viewed by Israel as a fundamental repudiation of the various Israeli-Palestinian agreements.

In light of the Palestinians' application seeking UN membership, it should be remembered that *the UN does not officially recognise states or declare statehood*; such actions are the responsibility of individual governments:

> The recognition of a new State or Government is an act that *only other States and Governments may grant or withhold.* It generally implies readiness to assume diplomatic relations. The United Nations is neither a State nor a Government, and therefore does not possess any authority to recognize either a State or a Government.[23]

In light of the fact that no UN agency has authority to recognise or declare statehood, the November 2012 General Assembly decision to change the status of the PA at the UN from "Entity" with observer status to "Non-member State" with observer status is solely an internal administrative change for the UN and its agencies. *It does nothing to change the actual status of the PA in fact.*

Also, under Article 4 of the UN Charter, "[m]embership in the United Nations is open to all other peace-loving *States* which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able to carry out these obligations."[24] Since Palestine is not currently in a position to carry out such obligations, any such approach to the UN Security Council must be rejected out of hand.

Moreover, UN consideration of the Palestinians' attempt to bypass negotiations with Israel makes the UN complicit in breaching the solemn agreements entered into by Israel and the

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[21] The "Oslo Accords" and "Interim Agreement" (collectively, the "Interim Agreements"). Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, Isr.-PLO, 28 Sept. 1995, 36 I.L.M. 551 (1997) [hereinafter "Interim Agreement"], *available at* https://www.un.org/unispal/document/auto-insert-185434/; Oslo Accords, Declaration of Principles on Interim Self-Government, 13 Sept. 1993, 32 I.L.M. 1525 (1993), *available at* http://www.jewishvirtuallibrary.org/jsource/Peace/dop.html.

[22] *See* Interim Agreement, *supra* note 21, art. XXXI(7).

[23] *About UN Membership*, U.N., https://www.un.org/en/about-us/about-un-membership (last visited 16 Jan. 2024) (emphasis added).

[24] U.N. Charter art. 4, ¶ 1 (emphasis added).

Palestinians. This scenario could have far-reaching consequences for the PA, because the Interim Agreements form the legal basis for the PA's very existence.[25] Israel would no longer be bound by these same agreements if this breach occurs. In fact, the PA's actions before the General Assembly have already led to responses by Israel that are not in the long-term interests of the Palestinians.

Furthermore, the PA's (failed) attempts to reconcile with Hamas,[26] an internationally-declared terrorist organisation[27] that refuses to even recognise the right of UN Member State Israel to exist,[28] reflect poorly on Palestinian leaders and their commitment to the principles upon which the UN was founded. This is especially true since the PA has not demanded that Hamas modify its Charter which includes, among numerous objectionable and racist provisions, a call for the destruction of Israel. This establishes beyond doubt that the PA is not serious about resolving its disagreements with Israel. The PA must not be rewarded for disregarding principles underlying the UN Charter and allying itself with the unreformed terrorist organisation, Hamas.

Additionally, in light of the barbaric Hamas attacks of October 7, 2023, on innocent men, women, and children, the PA clearly cannot control a large portion of the so-called "state of Palestine," including Hamas terrorists whose goal remains the total elimination of the State of Israel. Moreover, the brutal images that followed this attack as well as the social media posts of Hamas terrorists gleefully killing innocent men, women, and children, raping women and young girls, and kidnapping children and the elderly, are damning evidence that Hamas desires the complete annihilation of the Jewish state.

Based on the widespread celebrations of Palestinians in Gaza, the West Bank, and elsewhere of Hamas's indiscriminate acts of murder, rape, desecration of bodies, and kidnapping visited upon Israelis, it appears that the Palestinians are neither ready nor able to work with Israel peacefully to resolve their outstanding issues and create a real state. Palestinian President and Fatah party leader Abbas submitted the application for membership to the UN on the same day that Abbas Zaki, a senior member of the Fatah Central Committee, stated that creating a Palestinian state in the 1967 borders would spell Israel's doom.[29] Furthermore, while President Abbas makes statements about peace and a two-state solution, Palestinian teachers and media are educating the children to believe that Israel does not even exist.[30] In fact, the logo of the

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[25] *See* Interim Agreement, *supra* note 21, art. I.

[26] Sami Jadallah, *Fatah and Hamas; Reconciliation or Escape Forward*, VETERANS TODAY: WORLD (29 Apr. 2011), https://www.veteranstodayarchives.com/2011/04/29/fatah-and-hamas-reconciliation-or-escape-forward/.

[27] *See, e.g.*, BUREAU OF COUNTERTERRORISM, U.S. DEP'T OF STATE, COUNTRY REPORTS ON TERRORISM 2022 (2022), *available at* https://www.state.gov/wp-content/uploads/2023/11/Country_Reports_on_Terrorism_2022-v3.pdf (detailing the United States' categorisation of Hamas as a terrorist organisation); Council Common Position (EU) 2009/468, 2009 O.J. (L 151/16) 45 (EN), *available at* https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32009E0468 (detailing the EU's recognition of Hamas as a terrorist organisation).

[28] *See* The Covenant of the Islamic Resistance Movement – Hamas, art. 28 (1988), *available at* http://www.memri.org/report/en/0/0/0/0/0/50/1609.htm.

[29] *Fatah Central Committee Member Abbas Zaki Calls Netanyahu and Obama "Scumbags" and Says: "The Greater Goal Cannot Be Accomplished in One Go"*, (interview on Al-Jazeera television broadcast 23 Sept. 2011), MEMRI TV (23 Sept. 2011) *available at* https://www.memri.org/tv/fatah-central-committee-member-abbas-zaki-calls-netanyahu-and-obama-scumbags-and-says-greater.

[30] *Palestinian Authority TV Teaches Kids That Israeli Cities Are Occupied Palestine*, PALESTINIAN MEDIA WATCH (25 Aug. 2010), http://www.palwatch.org/site/modules/videos/pal/videos.aspx?fld_id=latest&doc_id=2963; *Palestinian Authority TV Kids' Program: Jaffa and Haifa Are in "State of Palestine"*, PALESTINIAN MEDIA WATCH, (16 May 2010), http://palwatch.org/main.aspx?fi=408&fld_id=408&doc_id=2252; *Palestinian*

PLO omits Israel completely from the territory of the former Palestine Mandate, signifying Palestinian refusal to recognise Israel's legitimate existence.[31] This open stance against Israel by the PA, coupled with Hamas's recent unbelievable barbarism, makes it clear that Palestinians are currently incapable of assuming the burdens of responsible statehood.

Until Palestinians are ready to foreswear resort to violence targeting defenseless civilians, cease committing war crimes against both Israelis and their fellow Palestinians in Gaza, and negotiate in good faith, the Palestinians are not ready for statehood, much less UN membership.

Respectfully yours,

Jay Alan Sekulow
Chief Counsel

Shaheryar Gill
Senior Counsel

Authority: Palestinian Maps Omitting Israel, JEWISH VIRTUAL LIBRARY, http://www.jewishvirtuallibrary.org/jsource/History/palmatoc1.html (last visited 16 Jan. 2024).

[31] The logo appears on the official webpage of the PLO. *Palestine Liberation Organization*, http://www.plo.ps/en (last visited 16 Jan. 2024).