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February 5, 2024

VIA OVERNIGHT DELIVERY SERVICE

The Honorable Antony J. Blinken
United States Secretary of State
2201 C Street NW
Washington, DC 20520

Dear Secretary Blinken:

It has been long-standing United States policy that any recognition of a Palestinian state must come through direct negotiations between the parties, i.e., the State of Israel and the Palestinian people,¹ rather than through recognition at the United Nations or by the United States. Contrary to this long-standing U.S. policy, however, reports indicate that you have recently “asked the State Department to conduct a review and present policy options on possible U.S. and international recognition of a Palestinian state after the war in Gaza.”² This is extremely concerning for several reasons, both legally and politically.

First, such recognition by the U.S. Government would ignore the customary international law criteria on statehood,³ the very criteria that the U.S. Government (including your office⁴) has previously asserted against unilateral recognition of Palestinian statehood.⁵ Nothing has changed

¹ Barak Ravid, *Scoop: State Department Reviewing Options for Possible Recognition of Palestinian State*, AXIOS (Jan. 31, 2024), <https://www.axios.com/2024/01/31/palestine-statehood-biden-israel-gaza-war>.

² *Id.*

³ 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 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”).

⁴ Press Release, Antony J. Blinken, *The United States Opposes the ICC Investigation Into the Palestinian Situation*, U.S. DEP’T OF STATE (Mar. 3, 2021), <https://www.state.gov/the-united-states-opposes-the-icc-investigation-into-the-palestinian-situation/>.

⁵ Kali Robinson, *What Is U.S. Policy on the Israeli-Palestinian Conflict*, COUNCIL ON FOREIGN RELATIONS (last updated July 12, 2023), <https://www.cfr.org/background/what-us-policy-israeli-palestinian-conflict>, [hereinafter *U.S. Policy on the Israeli-Palestinian Conflict*].

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on the ground with respect to meeting the legal criteria on statehood and yet U.S. policy now appears to be disregarding the same criteria.

Second, the only way to a peaceful resolution of the Israeli-Palestinian conflict is a process of direct peaceful negotiations between Israeli and Palestinian leaders. This process has been recognized not only by many United Nations resolutions, both by the Security Council and the General Assembly,⁶ but also by the United States.⁷ Moreover, until now, peaceful negotiations between the parties have been the *only* solution the United States has supported.⁸ Further, the United States has rejected the idea of unilateral recognition of a Palestinian state without negotiations between the parties regarding final status issues, such as borders and security.

Third, recognizing Palestinian statehood without peaceful negotiations between the parties would sabotage the decades long efforts of several U.S. administrations, both Democrat as well as Republican, to bring the parties to the negotiation table.⁹

Fourth, recognizing Palestinian statehood after the horrific attacks of October 7, 2023, would reward the terrorist groups that do not seek a two-state solution but are bent on eradicating the State of Israel and the Jewish people.

Regarding the legal criteria for statehood, on March 3, 2021, your office issued the following statement: “The Palestinians do not qualify as a sovereign state and therefore, are not qualified to obtain membership as a state in, participate as a state in, or delegate jurisdiction to the ICC.”¹⁰ That statement was correct then and is correct now. Nothing in terms of fulfilling the legal requirements for statehood has changed.

Consistent with your March 3, 2021, statement, the so-called “state” of Palestine has *never* met the four indicia of statehood set forth in the Montevideo Convention, which are considered to reflect the *requirements for statehood* under customary international law.

Article 1 of the Montevideo Convention established four prerequisites to statehood: (a) a permanent population; (b) a defined territory; (c) a government; and (d) a capacity to enter relations with other states.¹¹

The Palestinian Authority (PA) fails to meet at least three of these criteria. While even Israel agrees that the Arab population in the Gaza Strip and the West Bank has the right to self-determination and has made numerous attempts to materialize their desire to have a state of their own, the reality on the ground is that Palestinians lack at least three Montevideo criteria, albeit due to their own actions. The attack of October 7, 2023, is just one example of such actions. In

⁶ See e.g., G.A. Res. ES-10/20, ¶ 16 (June 13, 2018); G.A. Res. 66/225, at 2 (Dec. 22, 2011); G.A. Res. 77/25, ¶ 2 (Nov. 30, 2022); S.C. Res. 1073, ¶ 3 (Sept. 28, 1996); S.C. Res. 1322, ¶ 6 (Oct. 7, 2000); S.C. Res. 1397, ¶ 2 (Mar. 12, 2002).

⁷ *U.S. Policy on the Israeli-Palestinian Conflict*, *supra* note 5.

⁸ *Id.*

⁹ *Id.*

¹⁰ *The United States Opposes the ICC Investigation Into the Palestinian Situation*, *supra* note 4.

¹¹ Seventh Int’l Convention of Amer. States, Montevideo Convention on the Rights and Duties of States, art. 1, 26 Dec. 1933, 165 LNTS 19 [hereinafter Montevideo Convention].

fact, the U.S. Government is well aware of the indiscriminate attacks carried out from the Gaza Strip and the West Bank toward Israeli population centers. Such attacks and the Palestinian leaders' lack of good faith negotiations are the major reasons for the Palestinians not having a defined territory to form a state.

As such, first, the so-called Palestinian state lacks a defined territory. Its territory cannot be based on the UN General Assembly's recommending a partition plan in Resolution 181(II) because it was not accepted by the Arabs and, thus, did not materialize. Palestinian territory cannot be based on the 1949 armistice lines either, which are wrongly labeled as "pre-1967 borders." The Palestinian leaders entered into agreements in which they agreed to discuss borders in the permanent status negotiations, which is yet to occur.¹²

For the United States to recognize a Palestinian state would be tantamount to delineating its territory before agreed-to bilateral negotiations take place between the parties. Until the boundaries of a future Palestinian state are determined via bilateral negotiations, no Palestinian state actually exists. It is a simple fact that determination of the borders of a future Palestinian state is required before any State may recognize its statehood.

Second, concerning the existence of a Palestinian government, it is questionable to what degree the PA can effectively govern and control "Palestinian territory," however defined.¹³ To demonstrate effective government, a state should have "a government or a system of government in general control of its territory, to the exclusion of other entities . . ."¹⁴ Apart from the shared control of the West Bank between Israel and the PA under the Oslo Accords,¹⁵ the PA has no control whatsoever in Gaza. Hamas leaders who govern Gaza openly oppose the PA and its authority.¹⁶ In fact, Hamas, Palestinian Islamic Jihad (PIJ), and other terrorist organizations use the Gaza Strip as a launching pad to attack Israel. Hence, there is a lack of government and territorial control in the so-called "Palestinian territories" on the part of Palestinian authorities.

Third, concerning the capacity to enter into relations with other states, pursuant to a series of agreements between Israel and the Palestinian Liberation Organization (PLO), the PA was specifically formed as a provisional body with clearly delineated limits to its authority until the permanent status negotiations are completed.¹⁷ Under the terms of the Interim Agreement

¹² See Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, Isr.-PLO, Sep. 28, 1995, U.N. Doc. A/51/889, [hereinafter Interim Agreement], https://peacemaker.un.org/sites/peacemaker.un.org/files/1L%20PS_950928_InterimAgreementWestBankGazaStrip%28Oslo11%29.pdf. *passim* (referring repeatedly to "issues that will be negotiated in the permanent status negotiations").

¹³ See Jeremie Bracka, *No "State"-ing the Obvious for Palestine: Challenging the ICC Prosecutor on Territorial Jurisdiction*, JUST SECURITY (Feb. 27, 2020), <https://www.justsecurity.org/68841/no-state-ing-the-obvious-for-palestine-challenging-the-icc-prosecutor-on-territorial-jurisdiction/>.

¹⁴ JAMES R. CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 59 (2d ed. 2006).

¹⁵ See Interim Agreement, arts. III(1), XI(2), *supra* note 12.

¹⁶ Steven Erlanger, *Can the Palestinian Authority Really Govern Gaza After the War?*, THE N.Y. TIMES (Nov. 24, 2023), <https://www.nytimes.com/2023/11/24/world/middleeast/palestinian-authority-gaza-war.html>.

¹⁷ Note that the PA was *not* created by Palestinians acting independently; rather, the PA was established by virtue of a series of Israeli-Palestinian agreements (the Oslo Peace Process) as an *initial step* to an eventual two-state solution. *The Palestinian Authority: History and Overview*, JEWISH VIRTUAL LIBRARY, <https://www.jewishvirtuallibrary.org/palestinian-authority-history-and-overview> (last visited Feb. 2, 2024).

between Israel and the PLO, for example, the PA agreed to forgo a general capacity to enter into diplomatic relations with other states.¹⁸ Specifically, under Article 9(5), with the exception of the PLO's ability to negotiate "economic agreements," "agreements with donor countries," "cultural, scientific and educational agreements," and the like, the PA does "not have powers and responsibilities in the sphere of foreign relations . . . and the exercise of diplomatic functions."¹⁹ Moreover, Article 9(5)(c) of the Interim Agreement expressly declares that dealings between PA officials and foreign officials "*shall not be considered foreign relations.*"²⁰

In light of the fact that the PA fails to meet the Montevideo criteria for statehood, it simply cannot be a "state," no matter how many UN Member States assert that it is. By recognizing the PA's statehood before forcing Hamas and other armed groups in Gaza and the West Bank to surrender and urging Palestinian leaders to enter into good faith negotiations with Israel, other States would not only subvert the decades of efforts toward a peaceful resolution of the Israeli-Palestinian conflict but would reward the terrorists who use every inch of land given to them to commit war crimes against Israel.

The United States must forgo its nascent desire to recognise Palestinian statehood or supporting such recognition at the United Nations since the PA does not meet the international law criteria of statehood. Additionally, consistent with its past practice and understanding what the UN can or cannot do, the United States must also reject the idea of supporting full membership of a Palestinian state at the UN. The UN has no authority to recognize states or grant statehood.²¹

As you know, despite the UN General Assembly vote in November 2012, which changed the PA's status at the UN from "Entity" with Observer status to "Non-Member State" with Observer status, no *legal* (or actual) change occurred with respect to the creation or existence of a Palestinian state. As (former) U.S. Permanent Representative Susan Rice correctly noted at the time in response to those asserting that the General Assembly resolution did in fact convey statehood to the Palestinians, "[n]o [General Assembly] resolution can create a state where none exists."²²

Further, even States that voted for the resolution stated at the time that they were not formally recognizing Palestinian statehood *per se*. For instance, the Permanent Representative from Georgia aptly stated: "*The resolution adopted today could be understood as conferring privileges and rights in line with those of Non-Member Observer States; it did not imply an automatic right for Palestine to join international organizations as a State.*"²³ Similarly, the Finnish Permanent Representative noted that "the Assembly's vote did not entail formal recognition of a Palestinian

¹⁸ See Interim Agreement, art. IX(5), *supra* note 12.

¹⁹ *Id.* art. IX(5)(a)-(b).

²⁰ *Id.* art. IX(5)(c) (emphasis added).

²¹ *About UN Membership*, U.N., <https://www.un.org/en/about-us/about-un-membership> (last visited Feb. 2, 2024) (emphasis added).

²² Joe Lauria et al., *U.N. Gives Palestinians 'State' Status: Member Nations Upgrade Territories' Standing, in Diplomatic Defeat for U.S., Israel; Abbas Issues Warning on Settlements*, WALL ST. J. (Nov. 29, 2012), <http://online.wsj.com/article/SB10001424127887323751104578149193307234514.html>.

²³ 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 (Nov. 29, 2012), <https://www.un.org/press/en/2012/ga11317.doc.htm>.

State. Finland's national position on the matter would be considered at a later date."²⁴ Moreover, the States that abstained raised clear concerns and urged the parties to return to negotiations.

The United Kingdom's representative, for example, expressed grave concern "about the action the Assembly had taken, saying that 'the window for a negotiated solution was rapidly closing.' Israel and Palestine must return to credible negotiations to save a two-State solution. The Palestinian leadership should, without precondition, return to the table."²⁵ Germany's representative expressed similar concern by stating that Palestinian statehood could only be achieved through "direct negotiations."²⁶

For the United States to prematurely recognize Palestinian statehood would be tantamount to bypassing negotiations agreed to by Israeli and Palestinian leaders. Furthermore, the PA's (failed) attempts to reconcile with Hamas,²⁷ an internationally declared terrorist organization²⁸ that refuses to even recognize the right of UN Member State Israel to exist,²⁹ reflect poorly on Palestinian leaders and their commitment to the principles of peace and security. 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 and Hamas (including other terrorist organizations) must not be rewarded for disregarding principles underlying the UN Charter, basic human rights, and the law of armed conflict.

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 Palestinian state, 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. Hamas cannot, under any circumstances, be rewarded with a state.

Based on the widespread celebrations of Palestinians in Gaza, the West Bank, and elsewhere of Hamas' 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. As a senior member of the Fatah

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ Sami Jadallah, *Fatah and Hamas; Reconciliation or Escape Forward*, VETERANS TODAY: WORLD (Apr. 29, 2011), <https://www.veteranstodayarchives.com/2011/04/29/fatah-and-hamas-reconciliation-or-escape-forward/>.

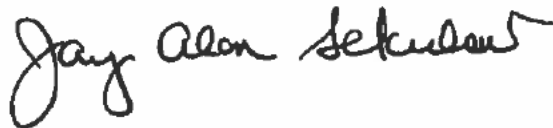
²⁸ See, e.g., BUREAU OF COUNTERTERRORISM, U.S. DEP'T OF STATE, COUNTRY REPORTS ON TERRORISM 2022 (2022), available at https://www.state.gov/wp-content/uploads/2023/11/Country_Reports_on_Terrorism_2022-v3.pdf (detailing the United States' categorization of Hamas as a terrorist organization); Council Common 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 organization).

²⁹ See The Covenant of the Islamic Resistance Movement – Hamas, art. 28 (1988), available at <http://www.memri.org/report/en/0/0/0/0/50/1609.htm>.

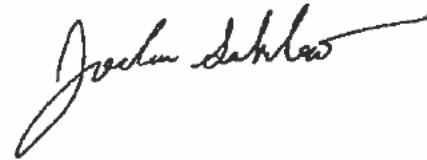
Central Committee, Abbas Zaki, stated, creating a Palestinian state would spell Israel's doom.³⁰ Furthermore, while PA President Mahmoud Abbas makes statements about peace and a two-state solution, Palestinian teachers and media are educating the children to believe that Israel does not even exist.³¹ In fact, the logo of the PLO omits Israel completely from the territory of the former Palestine Mandate, signifying Palestinian refusal to recognize Israel's legitimate existence.³² This open stance against Israel by the PA, coupled with Hamas' recent unbelievable barbarism, makes it clear that Palestinians are currently incapable of assuming the burdens of responsible statehood.

Until Palestinians are ready to foreswear 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. The United States cannot reward terrorist organizations in Gaza by choosing to lend its support for statehood.

Respectfully submitted,



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³⁰ *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 Sept. 23, 2011), MEMRI TV (Sept. 23, 2011), available at <https://www.memri.org/tv/fatah-central-committee-member-abbas-zaki-calls-netanyahu-and-obama-scumbags-and-says-greater>.

³¹ *Palestinian Authority TV Teaches Kids That Israeli Cities Are Occupied Palestine*, PALESTINIAN MEDIA WATCH (Aug. 25, 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, (May 16, 2010), http://palwatch.org/main.aspx?fi=408&fld_id=408&doc_id=2252; *Palestinian Authority: Palestinian Maps Omitting Israel*, JEWISH VIRTUAL LIBRARY, <http://www.jewishvirtuallibrary.org/jsource/History/palmatoc1.html> (last visited Feb. 2, 2024).

³² The logo appears on the official webpage of the PLO. *Palestine Liberation Organization*, <http://www.plo.ps/en> (last visited Feb. 2, 2024).

