EUROPEAN CENTRE FOR LAW AND JUSTICE

1 April 2019

VIA OVERNIGHT DELIVERY SERVICE

H.E. Christoph Heusgen
Ambassador
Permanent Representative of the Federal Republic
of Germany to the United Nations
Incoming President of the Security Council
871 United Nations Plaza
New York, NY 10017

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

Your Excellency:

By way of introduction, the European Centre for Law & Justice ("ECLJ") is an international not-for-profit law firm located in Strasbourg, France, dedicated to protecting human rights and religious freedom in Europe and elsewhere around the world. The ECLJ also holds Special Consultative Status as an NGO before the United Nations[1].

As you know, 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

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[1]NGO Branch, U.N. DEP'T ECON. & SOC. AFFAIRS, Consultative Status for the European Centre for Law and Justice (2007), http://esango.un.org/civilsociety/ (accessed by searching "European Centre for Law and Justice" in the iCSO Database).

[2]U.N. Gen. Assembly, Dep't of Pub. Information, *General Assembly Votes Overwhelmingly to Accord Palestine 'Non-Member Observer State' Status in United Nations*, U.N. (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, para. 1 (17 Oct. 2018), *available at* http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/73/5. It is worth noting that

> [t]he Group of 77 is *the largest intergovernmental organization of developing countries in the United Nations*, which provides the means for the countries of the South to articulate and promote their collective economic interests and enhance their joint negotiating capacity on all major international economic issues within the United Nations system, and promote South-South cooperation for development.

About the Group of 77, THE GROUP OF 77 AT THE UNITED NATIONS, http://www.g77.org/doc/ (last visited 26 Oct. 2018) (emphasis added).

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international law requirements for statehood[4], nor does any UN entity possess the authority to create a state where one does not otherwise exist.

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 Palestinian Liberation Organisation (PLO) submitted their application to the United Nations seeking UN membership of an Arab Palestinian State in the West Bank and the Gaza Strip. 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[5]. 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 historic 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. In fact, it was at Arab insistence that the 1949 lines be designated as mere armistice lines, not international boundaries, because Arab States did not want to confer any form of international legitimacy on the newly proclaimed Jewish State of Israel. 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 the Gaza Strip, respectively, and Israel acquired control of those territories. Following the 1967 war, the UN Security Council adopted Resolution 242[6]. Note, first, that the language in that Resolution requires that Israel withdraw "from territories"[7] 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*[8]. Note, second, that the

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[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 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 AFF. 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]U.N. Charter art. 27, para. 2.

[6]S.C. Res. 242 (22 Nov. 1967), *available at* https://unispal.un.org/DPA/DPR/unispal.nsf/0/7D35E1F729DF491C85256EE700686136.

[7]*Id.* at para. 1(i).

[8]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).

Resolution requires "secure . . . boundaries"[9]—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 . . ."[10]. Furthermore, following the 1973 Arab-Israeli war, the UN Security Council adopted Resolution 338[11] 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, Mahmoud Abbas, Chairman of the Executive Committee of the PLO, relied on GA Resolution 181 (II)[12] to provide instruction to the GA for its member application. Notwithstanding the fact that the representative of the Arab Higher Committee for Palestine flatly rejected Resolution 181 (II)[13] 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[14]. However, Resolution 181 (II)[15], along with GA Resolution 194 (III)[16], 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[17]. 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[18]. In sum, if President Abbas desires to rely on Resolution 181, he must, at a minimum, recognise a Jewish state, bounded by internationally recognized defensible borders, and give up his claim to East Jerusalem as Palestine's capital.

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[9]S.C. Res. 242, *supra* note 6, para. 1(ii).

[10]*Id.*

[11]S.C. Res. 338 (22 Oct. 1973). *available at* https://unispal.un.org/DPA/DPR/unispal.nsf/0/7FB7C26FCBE80A31852560C50065F878.

[12]G.A. Res. 181 (II) (29 Nov. 1947), *available at* https://unispal.un.org/DPA/DPR/unispal.nsf/0/7F0AF2BD897689B785256C330061D253.

[13]United Nations Palestine Commission Communication from the Representative of the Arab Higher Committee for Palestine, U.N. Doc. A/AC.21/6 (19 Jan. 1948), *available at* https://unispal.un.org/DPA/DPR/unispal.nsf/0/94E30EC5AD0385B885256FB2006BB5AF.

[14]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.

[15]G.A. Res. 181 (II), *supra* note 12, Part III (A).

[16]G.A. Res. 194 (III) (11 Dec. 1948), *available at* https://unispal.un.org/DPA/DPR/unispal.nsf/0/C758572B78D1CD0085256BCF0077E51A.

[17]*See* G.A. Res. 181 (II), *supra* note 12, Part I (A).

[18]The Associated Press. *Report: Abbas Reiterates Refusal to Recognize Israel as 'Jewish State'*, HAARETZ.COM (1 Dec. 2007), http://www.haaretz.com/news/report-abbas-reiterates-refusal-to-recognize-israel-as-jewish-state-1.234351.

More recently, 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[19]. Specifically, in the Interim Agreements, the PLO agreed to refrain from acts intended to change the status of the territories outside of peace talks[20]. *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 insist on pursuing the UN option, 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[21].

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"[22]. 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.

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[19]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* http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/the%20israeli-palestinian%20interim%20agreement.aspx; 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.

[20]*See* Interim Agreement, *supra* note 19, art. XXXI(7).

[21]*About UN Membership*, U.N., http://www.un.org/en/sections/member-states/about-un-membership/index.html (last visited 30 Oct. 2018) (emphasis added).

[22]U.N. Charter art. 4, para. 1 (emphasis added).

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 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[23]. Israel would no longer be bound by these same agreements if this breach occurs. In fact, the PA's actions before the GA 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[24], an internationally-declared terrorist organisation[25] that refuses to even recognise the right of UN Member State Israel to exist[26], 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.

One wonders if the Palestinians are even serious about peace with Israel. 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[27]. Furthermore, while President Abbas makes statements about peace and a two-state solution, Palestine's teachers and media are educating the children to believe that Israel does not even exist[28]. In fact, the logo of the Permanent Observer Mission of Palestine to the United Nations omits Israel completely from the territory of the former Palestine Mandate, signifying Palestinian refusal to recognise Israel's legitimate existence[29]. This open stance against Israel makes it clear that Palestine cannot be viewed as a peace-loving nation.

In sum, by deciding to take their case to the UN, the Palestinians have attempted to bypass peaceful negotiations with Israel in an attempt to accomplish at the UN what the PLO has been

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[23]*See* Interim Agreement, *supra* note 19, art. I.

[24]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/.

[25]*See, e.g.*, OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, U.S. DEP'T OF STATE, COUNTRY REPORTS ON TERRORISM 2008 (2009), *available at* http://www.state.gov/documents/organization/122599.pdf (detailing the United States' categorisation of Hamas as a terror organisation); Council Common Position (EU) 2009/67, 2006 O.J. (L 23/27) 37 (EN), *available at* http://eur-lex.europa.eu/eli/compos/2009/67/oj (detailing the EU's recognition of Hamas as a terrorist organisation).

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

[27]*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 22 Sept. 2011), MEMRI TV, *available at* http://www.memritv.org/clip/en/3130.htm (last visited 30 Oct. 2018).

[28]*Palestinian Authority TV Teaches Kids 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 Maps Omitting Israel*, JEWISH VIRTUAL LIBRARY, http://www.jewishvirtuallibrary.org/jsource/History/palmatoc1.html (last visited 30 Oct. 2018).

[29]The logo appears on the webpage of the Permanent Observer Mission of Palestine to the United Nations which describes the Palestinian Liberation Organization (PLO). *Palestine Liberation Organization*, PERMANENT OBSERVER MISSION PALESTINE TO THE U.N., http://palestineun.org/about-palestine/palestine-liberation-organization/ (last visited 30 Oct. 2018).

unable to accomplish through direct negotiations, largely due to its own unwillingness to make the compromises necessary to achieve peace.

In the interests of peace and justice for both Israel and the Palestinians as well as of the rule of law in the international arena, the Palestinians' attempt to renege on their international obligations and collapse the Peace Process with Israel must continue to be rejected by the international community. The UN Security Council should not entertain a subsequent Palestinian request for admission until the Palestinians have resolved the outstanding issues between them and the Israelis via direct negotiations without preconditions.

Sincerely,

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Chief Counsel

Robert W. Ash
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