



10 January 2018

VIA OVERNIGHT DELIVERY SERVICE

HE António Guterres
Secretary-General of the United Nations
760 United Nations Plaza
New York, New York 10017

RE: Palestinian Authority Decision to Accede to Various International Treaties & Conventions in Response to Decisions by the Government of the United States to Recognise Jerusalem as the Capital of Israel & to Move its Embassy There

Your Excellency:

By way of introduction, the European Centre for Law and Justice (“ECLJ”) is an international, Non-Governmental Organisation (“NGO”), dedicated, *inter alia*, to the promotion and protection of human rights and to the furtherance of the Rule of Law in international affairs. The ECLJ has held Special Consultative Status before the United Nations/ECOSOC since 2007¹.

On 6 December 2017, the U.S. Trump Administration formally recognised Jerusalem as the capital of Israel and stated that it would begin the process of moving the U.S. embassy from Tel Aviv to Jerusalem. That was a lawful act by a sovereign State, subject to neither censure nor approval by foreign powers. Soon thereafter, in a fit of pique and as an attempt to retaliate against the U.S. decision², Mahmoud Abbas, chairman of the Palestinian Authority (PA), announced that the PA intended to accede to 22 different international conventions and agreements in response to the U.S. action. For a variety of reasons, including, but not limited to, the PA’s inability to accede to such treaties as a “state” (since it fails to meet minimal criteria for statehood under customary international law), its wholly disingenuous and illegitimate reasons for signing on to such agreements, and its clear breach of the Oslo Accords in doing so, Palestinian accession to such agreements must be rejected. To do otherwise would undermine the terms of the agreements to which the PA purported to accede.

¹Consultative Status for the European Centre for Law and Justice, U.N. DEP’T ECON. & SOC. AFF., <http://esango.un.org/civilsociety/consultativeStatusSummary.do?profileCode=3010> (last visited Nov. 2, 2012).

²The President Signs Accession to 22 International Agreements and Organizations that Enhance the Legal Personality of the State of Palestine, WAFA (July 18, 2017), http://www.wafa.ps/ar_page.aspx?id=qW1ZD0a807341613804aqW1ZD0.

A. There is currently no Palestinian “State” able to sign conventions

Despite the General Assembly vote to change the PA’s status at the UN from “Entity” with Observer status to “Non-Member State” with Observer status, no actual *legal* change has occurred with respect to the creation or existence of a Palestinian “State”.

Under the UN Charter, the General Assembly has no lawful authority whatsoever to create or recognise a “State”. *The UN does not officially recognise states or declare statehood*; such actions are the responsibility of individual governments³. Further, when the States of the world gather together to make decisions as members of the UN General Assembly, they are bound by the explicit terms of the UN Charter as to what they may do. Hence, were the General Assembly to attempt to either create or recognise a “State”, its actions would exceed its authority under the Charter and would be *ultra vires*.

As U.S. Permanent Representative Susan Rice correctly noted when the PA’s status within the General Assembly was changed, “[n]o [General Assembly] resolution can create a state where none exists”⁴. The United Kingdom’s representative 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”⁵. Germany’s representative expressed similar concern by stating that Palestinian statehood could only be achieved through “direct negotiations”⁶. Hence, even States that voted for the status change resolution clarified at the time that they were not formally recognising a “State of Palestine” *per se*.

The four *indicia* of statehood set forth in the Montevideo Convention⁷ are considered to reflect the *requirements for statehood* under customary international law⁸, requirements that the PA has *never* met (i.e., either *before* or *after* adoption of the status change resolution by the General Assembly). In light of the fact that the PA fails to meet the Montevideo criteria⁹, “Palestine” simply cannot be a “State”, *no matter how many UN Member States*

³Member States: About UN Membership, U.N., (emphasis added) <http://www.un.org/en/sections/member-states/about-un-membership/index.html> (last visited Dec. 11, 2012).

⁴Joe Lauria et al., *U.N. Gives Palestinians ‘State’ Status*, WALL STREET J. (Nov. 29, 2012, 11:13 PM), <http://online.wsj.com/article/SB10001424127887323751104578149193307234514.html>.

⁵*Id.*

⁶*Id.*

⁷Conference of American States, Montevideo Convention on the Rights and Duties of States art. I, Dec. 26, 1933. Under the convention, a state “should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with other states”.

⁸See, e.g., JOSHUA CASTELLINO, INTERNATIONAL LAW AND SELF-DETERMINATION 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”); Pamela Epstein, *Behind Closed Doors: “Autonomous Colonization” in Post United Nations Era—The Case for Western Sahara*, 15 ANN. SURV. INT’L & COMP. L. 107, 119 (2009) (internal citation omitted) (“Although the Montevideo Convention was created as a regional treaty, it has developed into customary international law and the criteria have become a touchstone for the definition of a state . . .”); Tzu-Wen Lee, *The International Legal Status of the Republic of China on Taiwan*, 1 UCLA J. INT’L L. & FOREIGN AFF. 351, 392 n.70 (1997) (“[The Montevideo] Convention is regarded as representing in general terms the criteria of statehood under customary international law”).

⁹Palestine fails to meet the criteria of the Montevideo Convention for a variety of reasons. For instance, three political bodies claim the right to control Palestine—Israel, Hamas, and the PA. In addition, the PA “is subject to the Oslo Accords, which explicitly stipulated that this body is not independent and that its actual control of

assert that it is or would like it to be and notwithstanding the prior UN Secretary-General's contrary belief when he forwarded the Palestinian document of accession to the Registrar of the International Criminal Court. In order to be a "State", certain facts on the ground must exist; such facts are wholly lacking in the case of Palestine. Consequently, under customary international law, no Palestinian "State" currently exists. Accordingly, no Palestinian official may lawfully sign any international agreement that requires that signatories be States. As was aptly noted by former PA spokesman Ghassan Khatib concerning Palestine, "[w]e have too many symbols of a state, what we lack is attributes of a state"¹⁰. This sentiment was echoed by PA Prime Minister Fayyad's assertion that the General Assembly resolution constituted "powerful symbolism"¹¹ as opposed to actual statehood. Even PA leader Mahmoud Abbas has himself conceded that there is no Palestinian state. For example, as he announced in late 2016, 2017 would be "the year of the independent Palestinian state."¹² It clearly makes no sense to express one's hopes of attaining something in the future if one already possesses it.

B. The conventions are not being signed in good faith

PA officials have made it clear that their signing of these international conventions has nothing to do with a genuine interest in upholding the norms contained within them, but is merely being done in reprisal for the United States' decision to recognise Jerusalem as Israel's capital and move its embassy from Tel-Aviv to Jerusalem.¹³ A similar thing happened in 2014 when the PA was upset with Israel over issues involving the release of prisoners.¹⁴ Should the PA's accession to these agreements be permitted to occur, the meaning and value of such agreements will be forever cheapened and tarnished. As long as the PA treats international instruments with cynicism and disrespect—i.e., purely as another means to pursue its political agenda—then those charged with administering such treaties must be diligent in ensuring that the character and solemnity of these instruments remains intact by refusing to allow the PA to accede to them purely for political reasons. Moreover, the fact that the PA is failing to abide by the terms of treaties it has already signed makes its accession to any new ones that much more suspect. As a prime example, in clear violation of several treaties, PA funds are regularly used to reward terrorist activities¹⁵. Further, the Hamas terrorist organization, which is intermittently part of the PA, routinely holds Israeli citizens hostage in blatant violation of a host of international norms.

the area and ability to enter into relations with other states are not absolute, but rather subject to various limitations." Amichai Cohen, *U.N. Recognition of a Palestinian State: A Legal Analysis*, THE ISR. DEMOCRACY INST. (Nov. 29, 2012), <https://en.idi.org.il/articles/6779>. Moreover, Palestine lacks a defined territory and a permanent population because "the location of the borders and the size of the population of the [potential] Palestinian state are at the center of a controversy that has been the subject of negotiations . . . for years". *Id.*

¹⁰ Joshua Mitnik, *Palestinians Adopt Name to Show off New 'State' Status*, WALL STREET J. (Jan. 6, 2013), <http://online.wsj.com/article/SB10001424127887323482504578225523760483386.html>.

¹¹ *All Things Considered*, NPR (Dec. 1, 2012) (emphasis added), <http://www.npr.org/2012/12/01/166313016/the-state-of-palestinian-statehood> (Interviewing PA Prime Minister Salam Fayyad). "Symbolism", no matter how "powerful", is not the same as actual statehood.

¹² *Abbas: 2017 will be the Year of Palestinian Statehood*, TIMES OF ISR. (Dec. 31, 2016), <https://www.timesofisrael.com/abbas-2017-will-be-the-year-of-palestinian-statehood/>.

¹³ Noa Landau, *The Full List: The International Treaties Abbas Seeks to Join to Protest Trump's Jerusalem Move*, HAARETZ (Dec. 29, 2017, 10:13 AM), <https://www.haaretz.com/middle-east-news/palestinians/1.831908>.

¹⁴ Barak Ravid, *Palestinians Submit Official Bid to Join 15 International Conventions*, HAARETZ (APR. 2, 2014, 5:10 PM), <https://www.haaretz.com/israel-news/1.583409>.

¹⁵ Daniel Schwammmenthal *Why is the West Financing Palestinian Terrorism?*, NEWSWEEK (Nov. 3, 2017, 10:09 AM), <http://www.newsweek.com/why-west-financing-palestinian-terrorism-700861>; *Palestinian Authority Now Uses Half of all Foreign Aid to Reward Terror*, N.Y. POST (July 28, 2017, 7:34 PM), <https://nypost.com/2017/07/28/palestinian-authority-now-uses-half-of-all-foreign-aid-to-reward-terror/>.

C. Signing of the conventions violates the Oslo Accords

The 1993 Declaration of Principles and subsequent agreements (the Oslo Accords) signed by then-Israeli Prime Minister Yitzhak Rabin and then-PLO Chairman Yasser Arafat and witnessed by representatives of the United States, Russia, Egypt, Jordan, Norway, and the European Union, stated, *inter alia*, that there would be ongoing and meaningful final status negotiations between the two sides that would be pursued in good faith. Among the issues to be negotiated were the borders of a future Palestinian State as well as the status of Jerusalem. The PA is continuing to ignore this essential aspect of the Oslo Accords and continues to try to advance its status unilaterally while avoiding genuine peace negotiations. Although Mahmoud Abbas has at times said that he believes the Oslo Accords are no longer binding on the PA,¹⁶ ironically, *when it suits his purposes*, he continues to claim that they are.¹⁷

The language of the Oslo Accords, for example, is clear that the PLO/PA is only permitted to sign agreements with states or international organisations as follows: economic agreements; agreements with donor countries for the benefit of the PLO; agreements to implement regional development plans; or agreements for cultural, scientific, and educational reasons. The treaty language explicitly states that all such negotiations would not constitute “foreign relations” (language which was included to make clear that the Palestinians understood and agreed that all negotiations entered into by the PLO/PA did not constitute “foreign relations” as that phrase was understood in customary international law as a criterion for statehood)¹⁸. Further, both sides agreed that neither would initiate nor take any step that would change the status of the West Bank and the Gaza Strip pending the outcome of the permanent status negotiations¹⁹. The PA’s continued pursuit of Palestinian statehood wholly

¹⁶Michael Martinez, *Mahmoud Abbas: Palestinians ‘Cannot Continue to be Bound’ by Oslo Accords*, CNN (Sep. 30, 2015, 6:11 PM), <http://www.cnn.com/2015/09/30/world/palestinian-president-abbas-oslo-accords-israel/index.html>.

¹⁷*Abbas: Liberman Violated Oslo Accords by Naming PNF a Terror Organization*, JERUSALEM POST (Mar. 17, 2017, 2:27 AM), <http://www.jpost.com/Arab-Israeli-Conflict/Abbas-Liberman-violated-Oslo-accords-by-naming-PNF-a-terror-organization-484448>.

¹⁸Interim Agreement art. IX, Isr.-Palestine, Sep. 28, 1995 (Oslo Agreement), states in relevant part:

5. a. In accordance with the DOP, the Council will not have powers and responsibilities in the sphere of foreign relations, which sphere includes the establishment abroad of embassies, consulates or other types of foreign missions and posts or permitting their establishment in the West Bank or the Gaza Strip, the appointment of or admission of diplomatic and consular staff, and the exercise of diplomatic functions.

b. Notwithstanding the provisions of this paragraph, the PLO may conduct negotiations and sign agreements with states or international organizations for the benefit of the Council in the following cases only:

(1) economic agreements, as specifically provided in Annex V of this Agreement:

(2) agreements with donor countries for the purpose of implementing arrangements for the provision of assistance to the Council,

(3) agreements for the purpose of implementing the regional development plans detailed in Annex IV of the DOP or in agreements entered into in the framework of the multilateral negotiations, and

(4) cultural, scientific and educational agreements. Dealings between the Council and representatives of foreign states and international organizations, as well as the establishment in the West Bank and the Gaza Strip of representative offices other than those described in subparagraph 5.a above, for the purpose of implementing the agreements referred to in subparagraph 5.b above, shall not be considered foreign relations.

¹⁹*Id.* art. XXXI ¶ 7.

