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**MEMORANDUM**

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**To:** Palestinian leadership

**From:** Negotiations Support Unit

**Subject:** Legal approaches to be advanced at the ICC in order to protect overall Palestinian strategy and realize Palestinian rights and interests

**Date:** 25 March 2009

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This memorandum provides advice and recommendations regarding the legal approach the leadership should advance at the ICC that best protects its overall strategy to realize Palestinian rights and interests.

**I. BACKGROUND**

The Palestinian leadership is seeking to have the International Criminal Court (ICC) exercise its jurisdiction with respect to crimes committed in the occupied Palestinian territory (oPt), and in particular those associated with Israel's 22-day aggression on Gaza. The ICC may do so, *inter alia*, if "the State on the territory of which the conduct in question occurred" [emphasis added] has accepted the jurisdiction of the Court. On 21 January 2009, the "Government of Palestine ... recognize[d] the jurisdiction of the Court for the purpose of identifying, prosecuting and judging the authors and accomplices of acts committed on the territory of Palestine since 1 July 2002." The clear presumption in this statement is that Palestine is already a state.

This is a potentially significant departure from the position that the leadership has assumed since the early 1990s, that a Palestinian state will only emerge upon termination of the Israeli occupation, and may have significant strategic implications for permanent status negotiations.

Therefore, it is important for the leadership to submit legal arguments in support of its declaration orally and in writing in order to avert a misinterpretation of the Palestinian position by the Court and others to the detriment of Palestinian rights and interests.

## II. POSSIBLE LEGAL ARGUMENTS

There are three main approaches to arguing Palestinian statehood under international law:

- i. The state of Palestine came into existence during the occupation;
- ii. Palestine existed as a state prior to the occupation; and
- iii. Palestine enjoys functional statehood for the application and implementation of international humanitarian law (IHL) and prosecution of war crimes.

*i. The state of Palestine came into existence during the occupation*

This approach is based on the premise that a Palestinian state emerged during the Israeli occupation, after the 1988 Declaration of Independence and most likely some time after Israeli troops left limited parts of the oPt and the PNA assumed some territorial and functional control over those areas.

*ii. Palestine existed as a state before the occupation*

The approach is based on the premise that the state of Palestine has existed since the British mandate period, and that it continues to exist, albeit under Israeli occupation and over the territory that the PLO currently argues is the territory of Palestine.

*iii. Palestine enjoys functional statehood for the application and implementation of international humanitarian law and prosecution of war crimes*

This approach is based on the premise that, short of actual statehood, Palestine is a “state” for the purpose of Article 12 of the Rome Statute because it is “sufficiently an international entity for the prohibition of armed attack on others to be applicable.” In other words, if Palestine is enough of an international entity to be bound by IHL, and bound by international law prohibitions on the use of force, in the same way that it would be if it were a recognized state, then Palestine should also be treated as a “state” by *the* court that is responsible for the enforcement of IHL and the punishment of war crimes. This approach is consistent with the practice of the ICRC, and with IHL, in treating non-state entities as capable of bearing legal rights and duties.

## III. ANALYSIS

If the leadership asserts that Palestine is already a state, the ICC is likely to respond to its claim in one of three ways: (1) a determination that Palestine is not a state, (2) a vague response declining jurisdiction without determining whether or not Palestine is a state, or (3) a finding that Palestine is indeed a state.

In the event of Responses #1 or #2, neither are likely to have any major impact on the recognition or non-recognition, as the case may be, of Palestine by Israel or any other member of the international community, though Israel or other states could still hold the

leadership to the position it currently takes in the future and, in particular, in permanent status negotiations.

In the event of Response #3, the Court's determination is likely to elicit one of three responses: (a) no change in the position of Israel or a critical mass of other states<sup>1</sup> regarding the status of the oPt; (b) re-assertion by Israel and possibly a critical mass of other states that Palestine is not a state; or (c) recognition by Israel and possibly a critical mass of other states that Palestine is a state.

Scenario (3)(a) is likely to mean that a determination by the Court that Palestine is a state will not change the existing status of the oPt, though the Court's determination would strengthen any *future* Palestinian assertion of statehood. However, either of Scenarios (3)(b) or (3)(c) are likely to bear the same risks and benefits as the unilateral declaration of independence that the PLO contemplated in 2000. Those risks and benefits hinge not just upon the claim of statehood itself, but also upon the uncoordinated (*i.e.*, unilateral) nature of the claim.

*NOTE: Irrespective of how the ICC, Israel and other states react to a Palestinian assertion of statehood today, how the leadership makes this assertion now could impact the success of our overall strategy and positions on permanent status issues in the future. This is because the leadership's words and deeds are evidence of how the PLO perceives Palestine's status under international law and over time may even bind the PLO, and could affect a later consideration by the ICC, another international organization or other states of the status of Palestine.*

***Scenario (3)(b): ICC determines that Palestine is a state, but Israel and possibly a critical mass of other states disagree***

*Merits*

- There becomes a **possibility that the ICC would decide to exercise its jurisdiction** over the events that took place in Gaza. Although it is not clear whether the Court would actually do so, this initial determination would likely have several effects:
  - ❖ It would have a significant **deterrent effect**. Israel would think twice about carrying out further attacks on Palestine.
  - ❖ It may generate considerable **diplomatic and media attention and pressure** to both hold Israel accountable for alleged war crimes and address the Palestinian-Israeli conflict.
  - ❖ It would **bolster the Palestinian leadership in the domestic arena**. The leadership would be seen as having won a diplomatic victory against Israel and having made significant efforts to hold Israel accountable. This would help to

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<sup>1</sup> About 100 states already recognize the state of Palestine. Of the remaining states, certain "heavyweight" states would be determinative of "a critical mass".

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counter allegations that the leadership did not do enough during the Israeli offensive and even colluded with Israel in its attacks on Gaza.

### *Risks*

- If one assumes that the Interim Agreement remains legally binding on the parties, Israel may take the position that the Palestinian assertion of statehood, similar to a unilateral declaration of independence, amounts to a unilateral change in the status of the oPt and thus a **fundamental breach of the Interim Agreement**.
- ❖ There is a possibility that, on that basis, Israel would terminate the Interim Agreement. However, it is more likely that Israel would regard the Agreement as “suspended” in whole or in part, and apply it selectively.
- ❖ The risk is not as significant from a practical perspective as it seems from a legal perspective. The fact of the matter is that Israel has already eroded most of the major benefits for Palestinians from the Interim Agreement and kept in place the provisions that serve its interests.
- Israel may react to the Palestinian assertion of statehood by **freezing the peace process**. Again, the risk is not that significant in light of the fact that negotiations are unlikely to resume soon anyway in the existing political climate.

### ***Scenario (3)(c): ICC determines that Palestine is a state, and Israel and a critical mass of other states agree or are likely to agree***

### *Merits*

- Recognition of statehood should be accompanied by recognition and acceptance of the concomitant rights associated with statehood (*i.e.*, sovereignty, full member of the international community, etc.)<sup>2</sup>. Therefore, this should **strengthen Palestinians’ assertion of those rights** against Israeli violations or threats thereof.

*E.g.*, If a determination of statehood on even part of the oPt were accepted by Israel, it would raise the threshold for Israeli military incursions into that part of the oPt.

- Furthermore, Palestine would likely have **recourse to international mechanisms for enforcement** of its rights, which would further strengthen respect of its rights.

### *Risks*

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<sup>2</sup> These rights include: (1) the right to organise its political, economic and cultural affairs, free of outside intervention; (2) the right to claim maritime zones and exclusive control over the exploitation of their resources, including fish, oil and gas; (3) the right to issue passports and visas, and to determine who are its nationals; (4) the right to enter into treaty relations with any other state; and (5) the right to become a member of the United Nations and other international and regional organizations.

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- The international community may come to regard the Palestine problem as a **mere border dispute**, rather than as a case of military occupation, thereby **diminishing political pressure for prompt resolution** of remaining issues. For example, recognition of statehood in less than all of the oPt, or an SPB, may enable Israel to claim that the terms of UNSCR 242 have been fulfilled and that it has withdrawn from “territory occupied in the recent conflict”.
- ❖ This may indefinitely **postpone** final status negotiations and the **realization of Palestinian national and individual rights**. An SPB, as a formal interim phase, would especially entrench the *status quo* and postpone final status negotiations.
- ❖ This postponement would **allow Israel time to unilaterally impose** its final status vision. For example, the ‘interim phase’ from Madrid to today has seen the settler population increase from 75,000 to 470,000.
- Recognition of statehood may **raise expectations** that the PNA can and should assume **responsibilities** in fields over which it does not really have control.<sup>3</sup> Conversely, recognition of statehood may diminish expectations that Israel assume its responsibilities as an occupying power under IHL (because Israel could claim that the occupation has ended).<sup>4</sup>
- Asserting the existence of a Palestinian state in advance of ending the occupation raises the following questions: What are the borders of the state? Should the ICC exercise jurisdiction over events in Gaza? What about events in Area C? And events west of the Wall? What about events in East Jerusalem? And if Israel responds positively to an ICC determination that Palestine is a state, it is sure to be with the strategic intent to advance the idea of a **state with provisional borders** (SPB) with the international community and Palestinians. Recognition by Israel and possibly a critical mass of other states of Palestinian statehood on only *part* of the occupied territory could **prejudice border negotiations from both legal/political and physical points of view**.
- ❖ An SPB could weaken Palestine’s claim to the remaining part of the oPt. If Israel asserts by deed and word its sovereignty over the remaining part of the oPt, and Palestine fails to protest this assertion regularly and at appropriate moments, then Palestine’s claim to the remaining part of the oPt would be weakened (because it would appear to be consenting to the provisional border as the *de jure* border between Israel and Palestine). In fact, even if Palestine appropriately

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<sup>3</sup> All states have obligations under international law, including: (1) the duty to respect the territorial integrity and political independence of all other states; (2) the duty not to intervene in the internal affairs of any other state; (3) the duty to co-operate with other states in the maintenance of international peace and security; (4) the duty not to allow its territory to be used as a base for attacks against other states; (5) the duty to secure within areas under its jurisdiction and control the observance of fundamental human rights; and (6) the duty to fulfil in good faith any international agreements into which it has entered.

<sup>4</sup> This is arguably what has happened with Gaza after “disengagement”. The legal analysis of most jurists and international organizations is that Gaza remains occupied. However, very few states have reasserted since “disengagement” that Gaza is occupied and in fact behave as if they consider Gaza to be effectively controlled by Hamas and subject to the laws of armed conflict as opposed to the laws of occupation.

protested, its claim to the remaining part of the oPt could be weakened if the international community were to recognize the provisional border. Furthermore, a provisional border would weaken the status of the 1967 border.

#### IV. RECOMMENDATIONS

Based on the foregoing analysis, we rank the legal arguments from highest to lowest preference:

1) ***Palestine enjoys functional statehood for the application and implementation of international humanitarian law and the prosecution of war crimes.***

- ❖ It is most consistent with an objective legal and factual characterization of the status of the oPt.
- ❖ It is consistent with the position that the leadership has assumed since the early 1990s.
- ❖ It is perfectly compatible with the fact that the occupation is on-going. Therefore:
  - political pressure is maintained for a prompt resolution of the Israeli-Palestinian conflict; and
  - it promotes a reasonable expectation of the PNA's responsibilities in light of the constraints imposed by the occupation.
- ❖ It minimizes the risk to borders and the risk of an SPB by characterizing statehood in functional, rather than territorial, terms and limiting the claim of statehood to a very particular purpose, while allowing existing claims to the 1967 border.
- ❖ To some extent, it depoliticizes the issue by sidestepping many of the politically-sensitive issues.

2) ***Palestine existed as a state before the occupation.***

- ❖ It is not incompatible with the assertion that the occupation is on-going. *E.g.*, Kuwait continued to exist during and after Iraq occupied all of it. Therefore:
  - political pressure is maintained for a prompt resolution of the Israeli-Palestinian conflict; and
  - it promotes a reasonable expectation of the PNA's responsibilities in light of the constraints imposed by the occupation.
- ❖ It allows for an assertion of statehood within all of historic Palestine, and at least along the 1967 border, including East Jerusalem. While the PLO has recognized Israel, the borders between the two states remain undefined. After all, even Israel itself has never defined its borders.

**3) *The state of Palestine came into existence during the occupation (NOT RECOMMENDED).***

- ❖ This approach's chance of success is minimal. It will be very difficult to meet the Montevideo criteria for statehood (*i.e.*, permanent population, defined territory, effective government and capacity to enter into foreign relations) under current circumstances. This is because a state of occupation arguably negates the effective control required for the emergence of a state.
- ❖ On the other hand, it may facilitate arguments that the occupation has ended. Therefore:
  - political pressure for a prompt resolution of the conflict is reduced; and
  - it promotes unreasonable expectations that the PNA assume responsibilities in fields over which it does not actually have control.
- ❖ Asserting that Palestine has effective control by a government over its territory and population risks being interpreted as an assertion of statehood only over those parts of the oPt that the PNA actually has some measure of control over, thereby jeopardizing Palestinian claims to the remainder of the oPt.

*NOTE: If the leadership opts for either of approaches 2 or 3, and is serious about pursuing the assertion of statehood as part of a broader strategy, it needs to consistently demonstrate by word and deed that it actually considers Palestine to be a state. E.g., calling for the "restoration", rather than the "establishment" or "creation" of the Palestinian state in all official statements; making all reasonable efforts to exercise effective control over as much of its territory as possible, etc.*