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ISSUES BRIEF

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BUILDING A DEMOCRATIC PALESTINE: AN AUSTRALIAN CONTRIBUTION TO LEGAL AND INSTITUTIONAL DEVELOPMENT IN THE PALESTINIAN TERRITORIES

EXECUTIVE SUMMARY

The current fragile ceasefire between Palestinian militants and Israel has raised hopes of an end to four years of violence. To sustain that ceasefire both Israel and the Palestinian Authority must meet their respective commitments under the “Road Map for Middle East Peace”. For the PA this means preventing terrorist attacks against Israel and undertaking political, legal and security reforms. These reforms are also critical to meeting the Palestinian public’s own demands for an end to lawlessness and corruption. Given Australia’s expertise in legal and institutional development, the Australian government’s commitment to promoting democracy and peace in the Middle East and its sound relationship with both the PA and the government of Israel, Australia should lend what support it can to the Palestinian effort to establish strong foundations for a stable, prosperous and democratic Palestinian state.

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Introduction

Today an opportunity exists to end four years of violence in Israel and the Palestinian territories, and beyond this, to create the basis for a stable, prosperous and democratic Palestinian state living in peace with its neighbour, Israel. A new Palestinian leadership has committed itself to preventing terrorist attacks against Israel and restoring law and order in the Palestinian territories. The Israeli government is planning to withdraw settlements and troops from Gaza and parts of the West Bank. And the US Administration has stepped up its involvement in efforts to help both sides find a way back to negotiations.

The history of Israeli-Palestinian peacemaking is, however, littered with false dawns. Ultimately, the current progress will only be sustained if both Israel and the Palestinians – supported by the international community – implement their respective commitments under the “Road Map for Middle East Peace” and return to the negotiating table. But it is also vital that all sides learn from the mistakes of the past. One critical failure was the missed opportunity to build strong public institutions based upon the rule of law in the Palestinian territories during the “Oslo years”.¹ This contributed significantly to the second Palestinian Intifada that began in September 2000.

Avoiding past mistakes

The Intifada was born of a number of factors, not least the decision by the late Palestinian leader, Yasser Arafat, to return to a strategy of violence. But one factor that is often overlooked was the

frustration felt by ordinary Palestinians over the failure of the Oslo process to meet their national, political and economic aspirations. Not only had Oslo not brought Palestinian statehood, it saw a decline in living standards, undemocratic governance and widespread corruption. In this respect the Intifada was as much a revolt against Oslo and everything associated with it, including the Palestinian Authority (PA), as it was a violent uprising against Israel.

The weakness of Palestinian public institutions and the lack of a commitment to democracy and the rule of law contributed to the outbreak of the Intifada in three critical ways. Firstly, the authoritarian nature of Yasser Arafat’s rule prompted a disgruntled “young guard” within Arafat’s own Fatah movement to use the Intifada in an effort to demonstrate that they could achieve through violence what the “old guard” had failed to achieve through negotiations with Israel.² Their motivations were not simply nationalistic. They hoped a successful Intifada would see them replace the old guard leadership that had been keeping them from positions of political power.

Secondly, the failure of the PA leadership to deliver either national goals or good governance critically undermined its legitimacy. Arafat undoubtedly saw advantage in using terrorism to pressure Israel. But he also understood it as a threat to his own leadership because his legitimacy, and that of the PA, had been badly eroded by mismanagement, corruption and a failure to deliver economic prosperity. In this weakened state, even if the PA leadership had been willing to prevent terrorist attacks against Israel, as some members of the old guard had privately been urging, it would have been

¹ A reference to the Oslo I and II Accords of 1993 and 1995 that provided the basis for limited Palestinian self-rule in the West Bank and the Gaza Strip.

² See Khalil Shikaki, *Palestinians Divided*. *Foreign Affairs* 81 (1) 2002.

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hampered by its weakened legitimacy and the breakdown of the rule of law.

Thirdly, the weakness of Palestinian public institutions and the rule of law meant that the PA lost its monopoly on the use of armed force well before the Intifada began. These deficiencies meant that Hamas and elements of Fatah, but also criminal gangs that would play a significant role in the Intifada, were not prevented from acquiring arms and acting above the law. The public's lack of faith in the legal system meant that ordinary Palestinians were often forced to turn to extra-legal or traditional mechanisms to redress injustices. The large number of distinct security forces operating without public accountability also contributed to lawlessness and violence, with some actively complicit in attacks against Israel.

Sustaining the ceasefire, building prosperity

The current ceasefire between Palestinian militants and Israel is dependent on both sides' meeting their respective commitments under the Road Map. As a first step Israel is obliged to freeze settlement construction and withdraw its forces from Palestinian cities and towns. For its part the PA is obliged to undertake reform and prevent terrorist attacks against Israel.

Abu Mazen has said repeatedly and publicly that the violent Intifada has damaged Palestinian national interests. In the short term he has negotiated a ceasefire with groups such as Hamas and is proposing to absorb militant Fatah members into the security forces. With a view to making Palestinian security forces more accountable, Abu Mazen has also reduced the number of distinct commands from twelve to three and has subordinated them to the Minister of the Interior.

None of these essentially political steps can be sustained, however, without further urgent legal and institutional reform. Enabling legislation for the security reforms is required, in particular, to enshrine the principle that only the authorised security forces have the right to carry arms in Palestinian society. The diverse mix of customary, *shari'a* and extant legislation currently in force in different parts of the West Bank and Gaza needs to be reconciled. And a transitional justice system is needed to enable the PA to meet its Road Map obligations to end violence and to strengthen its legitimacy in the eyes of the Palestinian public by fighting corruption.

Israel's disengagement from Gaza and parts of the West Bank, slated for August/September 2005, adds even greater urgency to the legal and institutional reform effort. Hamas and others are likely to view the withdrawal as a vindication of their strategy of violence and terrorism. This will place pressure on Abu Mazen's ability to sustain the current fragile ceasefire by political persuasion alone. At some point it is likely that he will have to enforce the ceasefire or risk losing international support. While this will primarily require the exercise of considerable political will on his part, it will also need to be grounded in due legal process to help legitimise enforcement actions in the eyes of the broader Palestinian public.

Actions to sustain the current ceasefire are only a first step, however. In parallel it will also be essential to provide Palestinians with greater confidence in their political and economic future. In large part this is dependent on reassuring Palestinians that current steps are only a prelude to a resumption of negotiations with Israel over permanent status issues. But it is also heavily dependent on the PA's own efforts to restore its

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legitimacy by ending corruption and lawlessness and building economic prosperity in the Palestinian territories. In particular, unless Palestinians see, at the very least, a quality of life dividend, hopes that the forthcoming Israeli withdrawal from Gaza and parts of the West Bank will short-circuit future violence are likely to be disappointed.

In an effort to build upon the generally improved outlook that has marked Israeli-Palestinian relations over recent months, international donors are again committing themselves to a significant program of development assistance for the Palestinians. The Quartet has appointed a special envoy, the soon-to-retire World Bank chief, James Wolfensohn, to ensure that Israel's Gaza and partial West Bank disengagement leads to a rapid improvement in the wellbeing of Palestinians living in those areas.

None of this international assistance will be effective without rebuilding the rule of law in the Palestinian territories. Development assistance will not reach the Palestinians who need it most, nor will efforts to improve Palestinian economic performance work. While Abu Mazen has committed his government to the fight against corruption, unless it is grounded in law, any anti-corruption drive will be open to charges of political manipulation. There is a practical need for transparent and non-arbitrary mechanisms and processes to arrest, detain and try officials accused of corruption. Moreover, both the willingness of donors to provide development assistance and the prospects for attracting foreign investment are critically dependent on transparency, sound economic laws and strong public institutions.

Practical assistance

The Australian Government has often expressed its support for efforts to end the Israeli-Palestinian

conflict and for democratisation in the Palestinian territories. In a speech to the Lowy Institute in March 2005 Prime Minister Howard underlined the link between democratisation and peace in the Middle East, arguing that "a viable, democratic Palestinian state is crucial to lasting stability and justice" in the region.³ Foreign Minister Downer has also argued that the "best long term guarantee of Israel's security is a viable, democratic Palestinian state" and has committed Australia to playing "an appropriate, practical role to support efforts toward Israeli-Palestinian peace".⁴

Translating these commitments into effective programs is not always easy – even for the US. The Bush Administration's adoption of a democratic agenda for the Palestinian territories and the broader Middle East is not given the credit that it deserves. Fairly or unfairly, there is a high degree of suspicion about the Administration's objectives in the region. This often makes local reform partners reticent about cooperation with US agencies. Moreover, Washington's - and for that matter Brussels' - heavy involvement in the political tracks of the Israeli-Palestinian conflict can sometimes conflict with the quiet, pragmatic work needed to strengthen Palestinian public institutions on the ground.

Australia is never going to be a key political player in Israeli-Palestinian peacemaking. But it does have the experience to make a significant contribution to Palestinian state-building. In East Timor, Solomon Islands, Iraq and in the past in the Palestinian territories, Australia has gained experience in pragmatic and effective approaches to legal and institutional development. By further extending its

³ "Australia in the World" Inaugural Lowy Lecture by the Hon. John Howard MP, Prime Minister of Australia to the Lowy Institute for International Policy, 31 March, 2005

⁴ "Australia and the Middle East: Enduring Interests" speech by the Hon. Alexander Downer MP, Minister for Foreign Affairs, to the Institute of Diplomacy, Amman Jordan, 22 May 2003.

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expertise to the Palestinians, Australia would make a tangible contribution to both the efforts to end violence and to building the foundations of a stable, democratic Palestinian state at a time when even Washington's resources are stretched by the current political ferment in the Middle East.

An Australian contribution

Australia has, in fact, already played a pioneering role in efforts to help Palestinians establish the rule of law and build strong public institutions. In the early Oslo years, under the Rule of Law Assistance Program (ROLAP I and II), Australia supported, among other things, the PA's effort to formulate a strategic development plan for the legal sector, the training of Palestinian judges and the building of a forensic capability for the Palestinian police. Indeed, Australia's early involvement was important in demonstrating to other larger donor countries that it was possible to work in this complex and politically sensitive area of Palestinian development.

With the current more favourable environment, there now exists an excellent opportunity for Australia to renew its efforts. In March of this year, a PA Presidential decree established a Steering Committee for the Development of the Judiciary and Justice with the objective of accelerating legal and institutional reform. Also in March the PA and donors committed to a program of reform, including in the legal sector, at the "London Meeting On Supporting the Palestinian Authority" hosted by the Blair Government.

At the London meeting, donors provided a general commitment to support the training and infrastructure requirements of the Palestinian judiciary and provide advice and assistance on the legal aspects of security reform. The US, the EU and

Japan, among others, have committed to specific projects including court house construction and judicial training. Further support will be needed to build the capacity of the Palestinian Ministry of Justice and the Supreme Judicial Council once uncertainties surrounding their respective roles in the Palestinian justice system are resolved.

There are a number of areas within which Australia could provide assistance including capacity building, judicial training and legal education. One possible area of assistance would be to help Palestinian organisations to build upon and in some cases incorporate customary law and its institutions – which many Palestinian came to rely on throughout the Intifada when the formal legal system became inoperative – into the legal development effort. Australia has had experience with this process, most recently in Iraq.

Ultimately, consultation with the PA, other donors and stakeholders would be required in the first instance to determine areas in which Australia is best placed to contribute. Any new program of assistance should be managed and overseen by the Australian Government, but draw on the expertise of the non-government sector and legal professionals in Australia. Any program would also benefit from being formalised through a Memorandum of Understanding with the PA that sets out both sides' specific commitments and includes realistic benchmarks.

Enabling security reforms

One initial area for Australia to focus on would be the legal aspects of security sector reform. While legal development in the Palestinian territories is ultimately a long-term project, there is a pressing need to address the legal issues surrounding security

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sector reform. In Iraq, Australian military lawyers gained an excellent reputation for their ability to work with Iraqis to adapt and strengthen the existing legal system to meet the challenges of a new political situation. Australia could make a similar contribution through the provision of legal experts and technical assistance to, for example, help Palestinians draft the enabling legislation for security reforms.

This sector of Palestinian legal and institutional development is of course especially sensitive, first and foremost for the Palestinians, but also for Israel and the United States. But it is for this reason that Australia is strongly placed to make a contribution. A framework for any Australian assistance is already present in the form of a coordinating group of donor countries providing support to Palestinian security reform led by US General William E. Ward. Australia's status as a non-player in the political process, combined with its typically pragmatic approach to these types of programs, means an Australian contribution would not only be acceptable to all the main players, but would also be highly effective.

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