



9 September, 2009

His Excellency Luis Moreno-Ocampo
Prosecutor, International Criminal Court
Post Office Box 19519
2500CM The Hague
The Netherlands

Via FAX: 31-70-515-8555
And FEDEX

RE: Legal Memorandum Opposing Accession to International Criminal Court Jurisdiction
by Non-State Entities

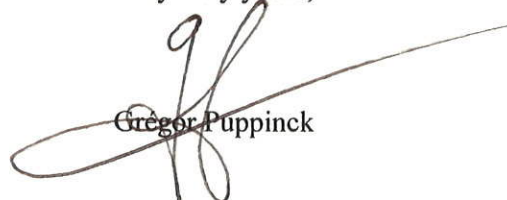
Dear Mr. Moreno-Ocampo:

Enclosed please find the first of a series of legal memoranda that we are submitting in opposition to accession to International Criminal Court (ICC) jurisdiction by non-state entities like Palestine. As we indicated in our previous letter to you, dated 9 July, 2009, we are committed to providing you with a series of legal memoranda explaining why Palestine and similar non-state entities should not be permitted to accede to the Court's jurisdiction. We trust that these legal memoranda will prove helpful to you in deciding to reject the January 2009 Palestinian Declaration lodged with the Registrar.

Among our concerns is that the ICC, to be effective, must not become a battleground for political disputes rather than a forum for ensuring justice. Were the ICC to permit non-state entities like Palestine to recognise the jurisdiction of the Court, it would insert itself into a political conflict that requires diplomacy and negotiations between the parties. We fear also that it could open a Pandora's Box, leading to a flood of similar declarations by other non-state entities, thereby diluting the effectiveness of the Court and disrupting its activities.

We will be supplementing the enclosed legal memorandum with others in the near future.

Very truly yours,



Gregor Puppink

Enclosure

**LEGAL MEMORANDUM IN OPPOSITION TO THE
PALESTINIAN AUTHORITY'S JANUARY 2009 ATTEMPT TO
ACCEDE TO ICC JURISDICTION OVER ALLEGED ACTS
COMMITTED ON PALESTINIAN TERRITORY SINCE 1 JULY 2002¹**

INTRODUCTION

On 22 January 2009, in The Hague, Mr Ali Khashan, “Minister of Justice” for the “Government of Palestine” (“Palestinian Authority” or “PA”), lodged a Declaration with the Registrar of the International Criminal Court (“ICC” or the “Court”)². The stated purpose of the Declaration was to “recognize[] the Jurisdiction of the International Criminal Court” over acts allegedly committed in “the territory of Palestine” retroactive to 1 July 2002³. The Declaration cited Article 12, paragraph 3, of the Statute of the International Criminal Court (“Statute” or “Rome Statute”) as the legal basis for its recognising ICC jurisdiction⁴. “Due to the uncertainties . . . as to the *existence or non-existence of a State of Palestine*”⁵, the Registrar responded cautiously with respect to the Declaration. On 23 January 2009, the day after the PA Declaration was lodged, the Registrar “acknowledged receipt of the

¹This is the first of a series of legal memoranda opposing non-state entities’ attempts to accede to ICC jurisdiction as expressed in a prior letter of concern to the ICC Prosecutor. Letter from Hans-Christian Krüger, et al., to His Excellency Luis Moreno-Ocampo, Prosecutor, Int’l Criminal Court (9 July 2009). A copy of this letter is attached as Exhibit A.

²Ali Khashan, Minister of Justice, Palestinian Nat’l Auth., Declaration Recognizing the Jurisdiction of the International Criminal Court (21 Jan. 2009) [hereinafter “Declaration”], *available at* <http://www2.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279777/20090122PalestinianDeclaration2.pdf>.

³*Id.* Note that Article 11 of the Rome Statute limits ICC jurisdiction to States that become Parties after the Rome Statute came into force (i.e., 1 July 2002) to those crimes committed *after* entry of the new State Party, “unless that *State* has made a declaration under article 12, paragraph 3”. Rome Statute of the Int’l Criminal Court, Conference of Plenipotentiaries on the Establishment of an Int’l Criminal Court, art. 11(2), U.N. Doc. A/CONF.183/9 (17 July 1998) [hereinafter “Statute” or “Rome Statute”] (emphasis added), *reprinted in* 37 I.L.M. 998 (1998), *available at* http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_English.pdf. Note also that Article 12 limits access to “States”. The PA simply disregarded the “State” limitation and submitted a declaration for retroactive application of jurisdiction pursuant to Article 12(3). *Id.* art. 12(3).

⁴Declaration, *supra* note 2. Article 12 is entitled “Preconditions to the exercise of jurisdiction”. Rome Statute, *supra* note 3, art. 12. Article 12, paragraph 3, reads, in pertinent part, as follows: “If the acceptance of a *State* which is not a Party to this Statute is required under paragraph 2, that *State* may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question . . .”. *Id.* art. 12(3) (emphasis added). Note the repetitive and exclusive use of the term “State”. Paragraph 2, referred to in the foregoing quotation, is also limited solely to “States”. *Id.* art. 12(2).

⁵Int’l Criminal Court, Structure of the Court, Registry, Declarations Art. 12(3), <http://www2.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Registry/Declarations.htm> (last visited 13 Aug. 2009).

[D]eclaration”, but noted that such receipt was subject to a further “determination on the applicability of Article 12 paragraph 3’ to the [D]eclaration”⁶. In other words, the Registrar declined to confirm the validity of the lodging under Article 12(3) of the Statute. The Registrar’s concerns doubtless centred on the explicit language of Article 12(3) that restricts resort to ICC jurisdiction under that provision to “States”⁷ and on the fact that Palestine is widely recognised as a non-state entity⁸.

Although the Rome Statute clearly limits resort to ICC jurisdiction under Article 12(3) solely to “States”⁹, the ICC Prosecutor has apparently taken the PA Declaration under advisement (where it currently remains). This legal memorandum unequivocally advises against entertaining the idea of recognising ICC jurisdiction, as has been put forward by the PA, over Palestinian “territory”¹⁰ (which means, by extension, over the Palestinian-Israeli conflict¹¹ and, serendipitously, the internecine Fatah-Hamas conflict). ICC recognition—if granted—would constitute *de facto* recognition of Palestinian statehood, a politically oriented act sure to complicate, rather than further, resolution of those crises¹². The ICC Prosecutor’s

⁶*Id.*

⁷Note that each subparagraph of Article 12 restricts itself to “States”. Rome Statute, *supra* note 3, art. 12.

⁸See *infra* pp. 12–20.

⁹See Rome Statute, *supra* note 3, art. 12. There are numerous other places where the Statute refers to “States”. See, e.g., *id.* pmb1., arts. 2, 3(2), 4(2), 8(3), 9(1) & (2)(a), 11(2), 13(a), 14(1) & (2), 17(1)(a)–(b) & (3), 18(1)–(5) & (7).

¹⁰See, e.g., Luis Moreno-Ocampo, *Impunity No More*, Op-Ed., N.Y. TIMES, 1 July 2009, <http://www.nytimes.com/2009/07/02/opinion/02iht-edocampo.html> (noting that “the Palestinian National Authority accepted the jurisdiction of the court” and that “the Arab League sent the court its first-ever fact-finding report on crimes committed in Gaza”); see also Catherine Philp & James Hider, *Prosecutor looks at ways to put Israeli officers on trial for Gaza ‘war crimes’*, TIMESONLINE, 2 Feb. 2009, http://www.timesonline.co.uk/tol/news/world/middle_east/article5636069.ece (reporting that the ICC Prosecutor is “examining the case for Palestinian jurisdiction over alleged crimes committed in Gaza”). But see Aaron Gray-Block, *ICC Prosecutor Says Has No Jurisdiction in Gaza*, REUTERS, 14 Jan. 2009, <http://www.reuters.com/article/newsMaps/idUSTRE50D5MM20090114> (quoting the Prosecutor as declaring that the ICC lacks jurisdiction unless “the relevant non-party state voluntarily accepts the jurisdiction . . . or [unless] the United Nations Security Council refers a situation”).

¹¹On 14 January 2009, presumably in response to numerous submissions and complaints filed regarding ongoing events occurring in the Gaza Strip during Israeli Operation Cast Lead, Mr Moreno-Ocampo publicly declared that he lacked jurisdiction to investigate allegations against Israel because Israel is not a Party to the ICC Statute. Gray-Block, *supra* note 10. This undoubtedly played a part in the PA’s lodging of its Declaration on 22 January 2009, and the Prosecutor’s extended consideration of possible jurisdiction. See Moreno-Ocampo, *supra* note 10 (noting that “the Palestinian National Authority accepted the jurisdiction of the court” and that “the Arab League sent the court its first-ever fact-finding report on crimes committed in Gaza”); see also Fatou Bensouda, Deputy Prosecutor, Int’l Criminal Court, Remarks at the Fifteenth Diplomatic Briefing of the International Criminal Court (7 Apr. 2009), in FIFTEENTH DIPLOMATIC BRIEFING OF THE INTERNATIONAL CRIMINAL COURT: COMPILATION OF STATEMENTS 8 (Int’l Criminal Court ed., 2009), available at http://www.icc-cpi.int/NR/rdonlyres/1E5F488B-2FA9-40F4-9378_A386AF6CBA6E/280246/Compilation_of_Statements_15_DS1.pdf (stating that “[t]he [Office of the Prosecutor] will examine all issues related to its jurisdiction [in its review of the PA Declaration]”). Nonetheless, the ICC Prosecutor still must recognise the fact that Palestine is not a “State”, see *infra* pp. 12–20, and that ICC participation and membership are limited to “States”, see Rome Statute, *supra* note 3, art. 12.

¹²See *infra* pp. 12–15 (identifying one of the key issues to be resolved from the Israeli-Palestinian conflict as creating a Palestinian state, something that even the PA readily admits has not yet happened). Recognising the PA as eligible to accede to ICC jurisdiction, a privilege limited solely to “States” by the Rome Statute, has

recognition of PA accession to ICC jurisdiction, despite Palestine's current undeniable status as a non-state entity, would violate the express language of the Statute, would arrogate to the Prosecutor authority which exclusively resides in the UN Security Council, would be a misinterpretation of prosecutorial discretion, and may put the Court in danger of politicisation. The idea of politicising the Court¹³ is particularly disconcerting; indeed, such a prospect was one of the principal reasons why the United States, among others, declined to accede to the Statute and participate in the Court at the outset¹⁴.

INTERESTS OF CONCERNED PARTIES

Concerned parties in this matter are former International or Government officials, practising attorneys, and university professors from Europe and North America, as well as the public interest law firm, European Centre for Law and Justice ("ECLJ"), a UN-accredited Non-Governmental Organisation ("NGO"), located in Strasbourg, France. Parties joining this legal memorandum are identified as follows:

- Hans-Christian Krüger served as the Secretary of the European Commission on Human Rights from 1976 to 1997, and also served as Secretary General Adjunct for the Council of Europe, where he specialized in the safeguarding of human rights via the European Court of Human Rights. He speaks fluent English, having received his law degree from the University of Michigan. He is also an Honorary Bench Member of Lincoln's Inn, London. He serves as Senior Counsel and Department Head of the Human Rights section of the CAA Law Firm in Strasbourg, France;

political implications and would create untold mischief in the international community by implying that the PA had, in fact, already achieved statehood, something that its own leaders deny. *Id.*

¹³See, e.g., Bill Richardson, U.S. Ambassador, Statement at the United Nations (17 June 1998), available at <http://www.un.org/icc/speeches/617usa.htm> (noting at the outset of the Rome Conference the U.S. concern about the Prosecutor's role and concluding that the Prosecutor's right to initiate investigations and seek indictments would lead to "confusion and controversy" and result in decisions that "inevitably will be regarded as political"); Philippe Kirsch, QC, & Darryl Robinson, *Initiation of Proceedings by the Prosecutor*, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 657, 659 (Antonio Cassese et al. eds., 2002) (noting that some delegations feared either that the Prosecutor "could be overwhelmed with petitions and frivolous complaints" or that he might "initiate politically motivated or frivolous complaints").

¹⁴See, e.g., Marc Grossman, Under Sec'y of State for Political Affairs, Remarks to the Center for Strategic and International Studies (6 May 2002) (explaining the Bush Administration's refusal to become a party to the Rome Statute based on the U.S. belief "that the ICC is built on a flawed foundation" which "leave[s] it open for exploitation and politically-motivated prosecutions"); see also Brett D. Schaefer & Steven Groves, *The U.S. Should Not Join the International Criminal Court*, in EXECUTIVE SUMMARY BACKGROUNDER 1 (The Heritage Found., No. 2307, 2009), available at http://www.heritage.org/Research/InternationalOrganizations/upload/bg_2307-2.pdf ("Regrettably, although the [C]ourt's supporters have a noble purpose, there are a number of reasons to be cautious and concerned about how ratification of the Rome Statute would affect U.S. sovereignty and how ICC action could affect politically precarious situations around the world."); cf. WILLIAM H. TAFT IV ET AL., U.S. POLICY TOWARD THE INTERNATIONAL CRIMINAL COURT: FURTHERING POSITIVE ENGAGEMENT, at vii-viii (Am. Soc'y of Int'l Law ed., 2009) ("Yet another test for the ICC will be how it handles the declaration lodged, on January 22, 2009, by the Palestinian National Authority (PNA) pursuant to Article 12(3) of the Rome Statute with respect to 'acts committed on the territory of Palestine since July 1, 2002.' The matter raises issues about the authority of the Prosecutor, and of the ICC, to treat as a State an entity which is not generally recognized as a State and which is not a U.N. member." (citation omitted)). Members of the ASIL task force included former president of the International Court of Justice Stephen Schwebel and former judge of the International Criminal Tribunal for the former Yugoslavia Patricia Wald.

- John Ashcroft served as United States Attorney General during the first term of President George W. Bush, from 2001 until 2005. Mr Ashcroft was previously the Governor of Missouri (1985-1993), a U.S. Senator from Missouri (1995-2001), and both the Attorney General of Missouri (1976-1985) and State Auditor of Missouri (1973-1975). He graduated from Yale University and then received his J.D. degree from the University of Chicago. After law school, he briefly taught business law and worked as an administrator at Southwest Missouri State University. He currently leads a strategic consulting firm, The Ashcroft Group, LLC, located in Washington, D.C., and a law firm, The Ashcroft Law Firm, LLC, headquartered in Kansas City, Missouri, with regional offices in Austin, Boston, Dallas, and St. Louis. He also serves as a Distinguished Professor of Law and Government at Regent University and is a Senior Fellow of the Law and Justice Institute, a project of the American Center for Law and Justice and Regent University;
- Jay Alan Sekulow, Chief Counsel of the European Centre for Law and Justice (ECLJ), Strasbourg, France, and Chief Counsel of the American Center for Law and Justice (ACLJ), Washington, D.C., U.S.A.; Has presented oral arguments in numerous United States Supreme Court cases on an array of constitutional issues and has filed several briefs with the Court on issues regarding national security and the law of war; Has had several landmark cases become part of the legal landscape in the area of religious liberty litigation; Twice-named one of the “100 Most Influential Lawyers” in the United States by the *National Law Journal*; Listed as “one of the 90 Greatest Washington Lawyers of the Last 30 years” by the *Legal Times*; Faculty member, Office of Legal Education, United States Department of Justice; B.A. (*cum laude*) and J.D. (*cum laude*), Mercer University; Ph.D., Regent University; Dissertation on American Legal History and author of numerous books, law review articles, and other publications;
- François-Henri Briard, Avocat au Conseil d’État and Attorney at Delaporte, Briard & Trichet, Paris, France; President, Paris Chapter of the Federalist Society; Has litigated before the French Supreme Court for more than twenty years and represents major United States companies in France; Has worked on issues regarding Franco-American trade, foreign investment in France, and economic intelligence; Member, Historical Society, United States Supreme Court; President and co-Founder, Vergennes Institute (co-founded with Justice Antonin Scalia to foster cooperation between the U.S. and French Supreme Courts); President, Institute des Hautes Études de Defense Nationale (Institute for National Defense Studies);
- Jean Paillot, Partner, CAA Law Firm, Strasbourg, France; Founder, French Centre for Law and Justice; Director of AGF, AFC, and APPF, family associations in Strasbourg; Heavily involved in the issues of human dignity, international human rights, and international law;
- Thierry Daniel, Attorney and Director of French-German relations, CAA Law Firm, Strasbourg, France; Primarily practises in the areas of labour law, civil law, business law, criminal law, and human rights; Member, Strasbourg Bar Association (admitted 1989);
- Paul Diamond, Barrister, London, England, United Kingdom; Specialist in European and EU aspects of international law, practicing in the fields of administrative law, public law, employment law, education law, police law, civil rights, family law, and

trademark law; Received legal education from Oxford University and LL.M from Cambridge University;

- Robert W. Ash is the ACLJ's Senior Litigation Counsel for National Security Law. Emphasizing national security law and First Amendment Law, Mr Ash is a graduate of the U.S. Military Academy and served twenty-two years on active duty as a U.S. Army officer. His duties included service as a military strategist for the Secretary of Defense in the Office of the Assistant Secretary of Defense for Strategy and Plans in the Pentagon. Mr Ash was selected as an Olmsted Scholar and studied at the University of Zurich for two years, and he served as a Congressional Fellow in the office of Senator John McCain for one year. A graduate of Regent University School of Law, Mr Ash also serves as a member of the faculty of the School of Law and the Robertson School of Government at Regent. At Regent, he teaches courses on national security law, international law, comparative law, First Amendment law, and business associations;
- Grégor Puppincq has served the European Centre for Law and Justice since 2000 and is specialized in the area of Human Rights, European law, and International law. He has been involved in numerous important cases before the European Court of Human Rights, with an emphasis in the fields of freedom of religion, belief and expression, family law, and bioethics. He is a founder of the French Centre for Law and Justice. As the ECLJ's representative to the United Nations, Mr Puppincq has submitted several expert reports to the Human Rights Council, including a fact finding report on Israel and the Palestinian Territories in conjunction with the official visit by the UN Special Rapporteur on Freedom of Religion. After earning his Master of Law degree from the Law School of Paris II, Mr Puppincq graduated from the "Institut des Hautes Etudes Internationales" where he specialized in International and European Law. Mr Puppincq studied defense and military law with the "Institut des Hautes Etudes de Défense Nationale" and served for a mission in the secretariat of the Western European Union. Mr Puppincq holds his Ph.D. (*summa cum laude*) from Poitiers Law School, where his dissertation entitled "Author of the bioethical norms" discussed the new mechanisms of elaboration of the norms in the field of bioethics. Since 2003, Mr Puppincq has taught Human Rights, international law and constitutional law at the Law School of University of Haute-Alsace. He also serves regularly as an expert to the Council of Europe and the Organization for Security and Co-operation in Europe (OSCE);
- Brett Joshpe, Attorney, New York, New York, U.S.A.; Co-author of the book, *Why You're Wrong About the Right: Behind the Myths: The Surprising Truth About Conservatives*; Has appeared on an extensive list of radio programs, both regional and national, including those of Lars Larson, Michael Reagan, Thom Hartman, Alan Colmes, and Andrew Wilkow; Has appeared on C-SPAN Book TV, MSNBC, and appears frequently on The Fox News Strategy Room; Regular contributor to American Spectator and Townhall.com, and has also been published in The Washington Times, Human Events, Front Page Magazine, and Forbes.com; Author of the recent article, *International Criminal Court wants to expand jurisdiction*, The Washington Examiner, 22 July 2009; B.A., Cornell University (with Distinction); J.D., Harvard University;
- Dr. Andrzej Bryk is a professor of constitutional law at Jagiellonian University in Krakow, Poland, where he serves as Chair of Constitutional History for the Legal

- History Institute. He has extensive experience lecturing on the political philosophies of Europe and the United States. He graduated cum laude from Jagiellonian University with a Masters in Political and Legal Doctrines and then earned his Ph.D. in Political Philosophy and Science. He studied Political and Constitutional Theory at Harvard University where he also lectured on Eastern European Politics and Society;
- Ed Morgan, Professor of Law, University of Toronto, Toronto, Ontario, Canada; Attorney, Civil Litigation, Davies, Ward & Beck, Toronto (1989-1997); Law Clerk to Madam Justice Bertha Wilson, Supreme Court of Canada (1984-1985); Practised at all levels of the Canadian court system as well as at the Inter-American Court of Human Rights and the Decolonization Committee of the United Nations; Has provided expert evidence on international law to numerous U.S. federal and state courts in jurisdictional disputes and conflict of laws cases; Represented many public interest groups in numerous constitutional and public interest appeals and has argued sovereign immunity cases in Ontario courts, U.S. federal courts, and the Supreme Court of Canada on behalf of, and in challenges to, a number of national governments; B.A., Northwestern University; LL.B., University of Toronto; LL.M., Harvard University;
 - Geoffrey Corn, Associate Professor of Law, South Texas College of Law, Houston, Texas, U.S.A.; Lieutenant Colonel (ret.), Judge Advocate General Corps, United States Army, with tours of duty as a tactical intelligence officer in Panama, Chief Prosecutor for the 101st Airborne Division, Chief of International Law for the United States Army in Europe, Regional Defense Counsel for the Western United States, Instructor of international law at Army JAG School, and Former Senior Advisor on law of war matters for the United States Army; Routinely provides expert assistance to military, government, and non-governmental agencies; Contributor to the legal affairs website *Jurist*, and to the foreign affairs and national security daily, *World Politics Watch*; Frequent participant in national and international conferences related to national security law issues; Faculty Advisor, National Security Law Society, South Texas College of Law; B.A. (*magna cum laude*), Hartwick College; J.D. (highest honours), George Washington University School of Law; LL.M. (distinguished graduate), Army Judge Advocate General School;
 - David Velloney, Associate Professor of Law, Regent University School of Law, Virginia Beach, Virginia, U.S.A.; Lieutenant Colonel (ret.), Judge Advocate General Corps, United States Army, with tours of duty as a field artillery officer, 10th Mountain Division, Legislative Counsel for the Secretary of the Army and Deputy Staff Judge Advocate for Fort Riley, Kansas, Associate Professor at the Judge Advocate General School, Senior Defense Counsel at Fort Knox, Kentucky, Officer in Charge of the Law Center in Augsburg, Germany, Command Judge Advocate for Task Force Able Sentry in Skopje, Macedonia, Trial Counsel (Criminal Prosecutor), Administrative Law Attorney, and Legal Assistance Attorney in Vilseck and Grafenwoehr, Germany; B.S. (distinguished cadet), United States Military Academy; J.D., Yale Law School; LL.M. (honour graduate), Army Judge Advocate General School;
 - The European Centre for Law and Justice (ECLJ), a public interest law firm located in Strasbourg, France, committed to defending the rule of law and the rights of believers in Europe; the ECLJ is also an NGO accredited to the United Nations.

All parties share a mutual commitment to eradicate crimes and atrocities that shock the human conscience, but each of the parties is equally committed to the principle that legitimacy demands that applicable law—in this instance the express limitations on ICC jurisdiction established by the Rome Statute—be respected in relation to any action undertaken to investigate allegations of such crimes and atrocities. The parties are concerned that if the Prosecutor allows the PA to recognise jurisdiction of the ICC, this will seriously offend the rule of law (1) by violating the express terms of the Rome Statute, (2) by arrogating to the Prosecutor prerogatives expressly designated in the Statute exclusively to the UN Security Council, (3) by exceeding the Prosecutor’s discretion, and (4) by politicising the Court.

The parties are further concerned that the Prosecutor’s refusal to summarily reject the PA Declaration and his decision to continue evaluating its viability will exacerbate the perception among States (including perhaps even States Parties to the Statute) that it was perhaps an error to vest the Prosecutor with broad discretion to determine who may be brought before the Court. This is because such actions by the Prosecutor may, in such a legally clear cut case, be perceived as politicising the investigatory and judicial function of the Court, thereby making such non-party States less likely to recognise ICC jurisdiction in the future, an outcome that will undermine the credibility of the Court and its effectiveness in bringing the world’s worst criminal offenders to justice¹⁵.

SUMMARY OF ARGUMENT

The express terms of the Rome Statute limit membership and consensual participation in the ICC to “States”. ICC jurisdiction extends only to those situations involving crimes set forth in the Rome Statute that either take place in the territory of a State Party to the Statute

¹⁵See, e.g., Schaefer & Groves, EXECUTIVE SUMMARY BACKGROUNDER, *supra* note 14, at 15–16.

A far more significant test will arise if the prosecutor decides to investigate (and the court’s pre-trial chamber authorizes) a case involving a non-ICC party without a Security Council referral or against the objections of the government of the involved territory.

This could arise from the prosecutor’s monitoring of the situation in Palestine. Even though Israel is not a party to the Rome Statute, the ICC prosecutor is exploring a request by the Palestinian National Authority to prosecute Israeli commanders for alleged war crimes committed during the recent actions in Gaza. The request is supported by 200 complaints from individuals and NGOs alleging war crimes by the Israeli military and civilian leaders related to military actions in Gaza.

Palestinian lawyers maintain that the Palestinian National Authority can request ICC jurisdiction as the *de facto* sovereign even though it is not an internationally recognized state. By countenancing Palestine’s claims, the ICC prosecutor has enabled pressure to be applied to Israel over alleged war crimes, while ignoring Hamas’s incitement of the military action and its commission of war crimes against Israeli civilians. Furthermore, by seemingly recognizing Palestine as a sovereign entity, the prosecutor’s action has arguably created a pathway for Palestinian statehood without first reaching a comprehensive peace deal with Israel. This determination is an inherently political issue beyond the ICC’s authority, yet the prosecutor has yet to reject the possibility that the ICC may open a case on the situation.

Id. (citations omitted).

or are committed by a State Party's nationals (or are committed in the territory or by the nationals of a non-Party "State" that specially accedes to ICC jurisdiction pursuant to Article 12(3)). The only exceptions to the foregoing are situations referred to the ICC Prosecutor by the UN Security Council, which is not bound by territorial and nationality limitations when making referrals to the Prosecutor pursuant to Chapter VII of the UN Charter. Since Palestine is not now—and has never been—a "State", the PA's attempt to recognise ICC jurisdiction is *ipso facto* invalid. Further, since the UN Security Council has not referred a situation involving Palestine or its "territory" to the Prosecutor, the ICC lacks jurisdiction to investigate or prosecute alleged violations which may have occurred there. Moreover, the Prosecutor has no express or inherent authority or discretion under the Statute to extend ICC jurisdiction to non-State entities (like Palestine). That right has been expressly reserved in the Statute to the UN Security Council operating under Chapter VII of the UN Charter. Hence, the Prosecutor runs the risk of abusing his discretion by failing to reject the PA Declaration within a reasonable time after it was lodged with the Registrar. The Prosecutor's continued inaction in rejecting this PA declaration would be inexplicable, and would raise damaging questions about the willingness of the International Criminal Court and its Prosecutor to observe the express statutory limitations on its jurisdiction.

ARGUMENT

No court may lawfully act if it lacks jurisdiction over the offenses in question and the persons accused. The ICC was conceived as both a court of limited jurisdiction and a court of last resort. First, the Court is limited to investigating and prosecuting only those crimes expressly listed in the Statute¹⁶. Second, the Court is limited to prosecuting only such listed crimes that are committed in specified territory or by specified persons¹⁷. Third, the Court may resort to prosecuting such listed crimes only where a State is proved to be unable or unwilling to properly investigate and prosecute alleged perpetrators of such crimes itself¹⁸.

The remainder of this memorandum focuses primarily on the second limitation, to wit, determining where and by whom the listed crimes must be committed in order to meet ICC jurisdictional requirements, and on whether the Prosecutor in this matter is acting within the limits set by the Statute for his office. Part I of the Argument examines the jurisdictional limits of the Court, including who may be prosecuted and how such crimes may be brought to

¹⁶See Rome Statute, *supra* note 3, art. 5(1); *see also id.* arts. 6, 7, 8 (providing definitions of genocide, crimes against humanity, and war crimes). The crime of aggression has not yet been defined and, hence, cannot currently be prosecuted. *See id.* art. 5(2) (noting that the crime of aggression may only be prosecuted once it is properly defined in accordance with procedures set forth in the Statute).

¹⁷*See id.* arts. 12, 13(b).

¹⁸*See id.* art. 17.

the attention of the Court for investigation, indictment, and prosecution. Part II demonstrates clearly that Palestine does not qualify as a “State” and, hence, cannot place territory or persons under ICC jurisdiction. Part III explains the unique role given to the UN Security Council under the Rome Statute and shows that the Security Council’s role precludes the Prosecutor from extending the Court’s reach beyond the territory and nationals of the States consenting to jurisdiction under the Statute. Part IV examines the statutory limits on the Prosecutor’s discretion in initiating investigations and seeking indictments to prosecute Article 5 crimes and, thereby, demonstrates that the Prosecutor lacks authority to extend ICC jurisdiction to reach non-State entities like Palestine. Part IV concludes that the Prosecutor’s failure to promptly reject the PA Declaration based on the clear language of Article 12(3) may amount to an actionable abuse of prosecutorial discretion. The Prosecutor’s continued inaction in rejecting the PA Declaration would be inexplicable, and would raise damaging questions about the willingness of the ICC and its Prosecutor to observe the express statutory limitations on its jurisdiction.

I. ICC JURISDICTION EXTENDS TO THE MOST SERIOUS CRIMES (1) COMMITTED ON THE TERRITORY OF A CONSENTING “STATE”; OR (2) COMMITTED BY A NATIONAL OF A CONSENTING “STATE”; OR (3) COMMITTED IN A SITUATION REFERRED TO THE COURT BY THE UN SECURITY COUNCIL ACTING UNDER CHAPTER VII OF THE UN CHARTER.

The ICC was conceived and created to prevent the need to create ad hoc tribunals that were being periodically formed by the UN Security Council to administer justice to individuals accused of committing the most serious crimes in various conflicts around the world¹⁹.

Under the Rome Statute, the ICC has jurisdiction only in the following five specific “situations”²⁰:

- (1) Where the alleged Article 5 crimes²¹ were committed on the territory of a State Party to the Statute (or on an aircraft or vessel registered in that State)²²;
- (2) Where the person accused of committing Article 5 crimes is a national of a State Party to the Statute²³;

¹⁹Past examples include the ad hoc tribunals dealing with the grave crimes committed in former Yugoslavia and in Rwanda. Such tribunals were created by the UN Security Council acting under Chapter VII of the UN Charter.

²⁰The Rome Statute refers to both “situations” and “crimes”. See, e.g., Rome Statute, *supra* note 3, arts. 13(a)–(b), 14(1). The term “situation” is used to guide the Prosecutor to investigate a conflict generally so that anyone who may have committed one of the “crimes” identified in Article 5 may be prosecuted, irrespective of which side he may have fought on. As such, it is conceivable that individuals from both sides of a conflict could be tried for having committed Article 5 crimes.

²¹See *supra* note 16 and accompanying text.

²²Rome Statute, *supra* note 3, art. 12(2)(a).

- (3) Where the alleged Article 5 crimes were committed in the territory of a *State* that is not a Party to the Statute (or on an aircraft or vessel registered in that *State*), and that *State* has acceded to ICC jurisdiction with respect to alleged crimes and situations in question, through the procedure set forth in Article 12(3) of the Statute²⁴;
- (4) Where the person accused of committing Article 5 crimes is not a national of a State Party, but his *State* of nationality has accepted ICC jurisdiction with respect to alleged crimes and situations in question, through the procedure set forth in Article 12(3) of the Statute²⁵; or
- (5) Where a situation in which one or more of the crimes set forth in Article 5 of the Statute appear to have been committed is referred to the ICC Prosecutor by the UN Security Council, acting under Chapter VII of the UN Charter²⁶.

Article 12 of the Rome Statute sets forth plain and irreducible “[p]reconditions to the exercise of jurisdiction” by the Court²⁷. It states unequivocally that acceptance of the Court’s jurisdiction is limited to “States”²⁸, which is significant since Article 12(3) was the vehicle the PA sought to use to accede to ICC jurisdiction²⁹. According to Mahnoush Arsanjani formerly with the UN Office of Legal Affairs, “Article 12 sets a broad jurisdiction for the Court in accordance with which the Court may exercise jurisdiction when it has the consent of the *State* of the territory where the crime is committed *or* the consent of the *State* of the nationality of the accused”³⁰. Becoming a State Party to the Statute constitutes automatic acceptance of ICC jurisdiction for the crimes listed in Article 5, when such crimes were either committed on the State Party’s territory or by one of the State Party’s nationals. Further,

²³ *Id.* art. 12(2)(b).

²⁴ *Id.* art. 12(2)(a) & (3).

²⁵ *Id.* art. 12(2)(b) & (3).

²⁶ *Id.* art. 13(b). The UN Security Council is the only entity that may extend the reach of the ICC beyond the territory and nationals of a State Party (or a consenting non-party “State”) to the Rome Statute. See Hans-Peter Kaul, *Preconditions to the Exercise of Jurisdiction*, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, *supra* note 13, at 583, 612.

²⁷ Rome Statute, *supra* note 3, art. 12.

²⁸ Article 31(1) of the 1969 Vienna Convention on the Law of Treaties provides: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose”. Vienna Convention on the Law of Treaties, art. 31(1), 23 May 1969, 1155 U.N.T.S. 331. The term “State”, in UN and international practise refers to recognised, sovereign nation-states. Convention on the Rights and Duties of States art. 1, 26 Dec. 1933, 49 Stat. 3097 [hereinafter “Montevideo Convention”], available at http://avalon.yale.edu/20th_century/intam03.asp.

²⁹ *Supra* note 4 and accompanying text.

³⁰ Mahnoush H. Arsanjani, *The Rome Statute of the International Criminal Court: Exceptions to the Jurisdiction*, in MAURO POLITI & GIUSEPPE NESI, THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A CHALLENGE TO IMPUNITY 51 (2002) (first and third emphases added); see also Rome Statute, *supra* note 3, art. 12(2).

non-Party *States* may also accede to ICC jurisdiction over their territory and nationals, either in general or for specific situations³¹.

Article 125 of the Statute notes that only a “State” is eligible for “[s]ignature, ratification, acceptance, approval or accession” to the Rome Statute³². Article 12 speaks of “acceptance” of the jurisdiction of the Court, and, in particular, Article 12(3) invites the retrospective “acceptance” of jurisdiction by a non-Party *State*³³. Professor Otto Triffterer noted in his Commentary on the Rome Conference that, “[i]n accordance with normal modern practice for multilateral treaties, the [ICC] Statute [was] open for signature by all *States*”³⁴.

Article 13 provides that where statutory jurisdiction is otherwise well-founded under Article 12, the ICC *may* investigate and prosecute the crimes listed in Article 5 in three circumstances:

(a) A situation in which one or more of such crimes appears to have been committed is *referred to the Prosecutor by a State Party* in accordance with article 14;

(b) A situation in which one or more of such crimes appears to have been committed is *referred to the Prosecutor by the Security Council* acting under Chapter VII of the Charter of the United Nations; or

(c) *The Prosecutor has initiated an investigation* in respect of such a crime in accordance with article 15³⁵.

There is no provision in the Rome Statute that permits *non-State entities* to accede to ICC jurisdiction. The only provision in the Statute that can extend ICC jurisdiction to reach non-State entities is Article 13(b), since the UN Security Council is not constrained by any territorial or nationality limitations with respect to the referral of Article 5 crimes to the Prosecutor. The only constraint in the Statute on the Security Council is that the Council must be “acting under Chapter VII of the [UN] Charter”³⁶. As such, unless Palestine is a State (which even Palestinian officials admit it is not³⁷) or the UN Security Council has referred the matter under Chapter VII of the UN Charter, the Prosecutor appears to act in abuse of his discretion by continuing to entertain the PA Declaration.

³¹ See Rome Statute, *supra* note 3, arts. 11(2), 12(3).

³² *Id.* art. 125.

³³ *Id.* art. 12(3).

³⁴ OTTO TRIFFTERER & KAI AMBOS, COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 1287 (1999) (emphasis added).

³⁵ Rome Statute, *supra* note 3, art. 13 (emphasis added).

³⁶ *Id.* art. 13(b).

³⁷ See *infra* pp. 12–15.

II. BECAUSE PALESTINE IS NOT A “STATE”, PALESTINE IS INCAPABLE OF ACCEDING TO ICC JURISDICTION OVER TERRITORY OR PERSONS PURSUANT TO ARTICLE 12(3) OR ANY OTHER ARTICLE.

As shown below, there is overwhelming and incontrovertible evidence that Palestine is not a “State.” As such, it is incapable of acceding to ICC jurisdiction, and its attempt to do so should have been rejected.

A. That Palestinian Officials Repeatedly Admit that Palestine is Not a “State” Conclusively Proves that Palestine Does Not Meet the Conditions Required to Accede to ICC Jurisdiction.

Of prime importance concerning whether Palestine is a State is the position consistently taken by PA officials themselves. PA authorities repeatedly admit that Palestine is not currently a State—a *fact which by itself should put the issue to rest*. If Palestinian leaders themselves admit that no Palestinian State currently exists, there is no reason for the international community—or the ICC Prosecutor—to disbelieve them and ponder the issue further. With respect to the January 2009 PA Declaration, because Article 12(3) requires that a “State” lodge such a declaration, it would have been in the PA’s interest to claim statehood; however, they did not do so. Moreover, as recently as 4 February 2009 (i.e., *after* the 22 January 2009 lodging of the PA Declaration with the ICC Registrar), PA President Mahmoud Abbas, in a speech before the European Parliament concerning the then recently concluded Israeli military operation in the Gaza Strip, accused Israel of “preventing [the Palestinian] people from attaining their ultimate goal: an end to occupation, gaining freedom and the right to self-determination and the *establishment of an independent Palestinian state . . .*”³⁸.

One day later, on 5 February 2009, President Abbas appeared with British Prime Minister Gordon Brown at a press conference. In answering one of the questions put to him, President Abbas emphasised the need for international support for “the Arab peace initiative which calls for *the two state solution*”³⁹. Mr Abbas continued: “I believe the Arab peace initiative does point the way forward. I believe that the general terms of an agreement are well known to everyone: an Israel that is secure within its own borders, *a Palestinian state that is viable . . .*”⁴⁰. Taken together, President Abbas’s statements refute any notion that an independent Palestinian state currently exists (or existed when the PA Declaration was lodged with the ICC Registrar in January 2009).

³⁸Press Release, Mahmoud Abbas, President, Palestinian Nat’l Auth., Mahmoud Abbas at the European Parliament (4 Feb. 2009) (emphasis added), *available at* http://www.europarl.europa.eu/news/expert/infopress_page/030-48165-033-02-06-903-20090203IPR48164-02-02-2009-2009-true/default_en.htm.

³⁹Mahmoud Abbas, Press Conference with British Prime Minister Gordon Brown and Palestinian National Authority President Mahmoud Abbas (5 Feb. 2009) (emphasis added), *available at* <http://www.number10.gov.uk/Page18253>.

⁴⁰*Id.* (emphasis added).

Even PLO Chairman Yasser Arafat, during his tenure in office, publicly recognised that Palestinian statehood remained a future goal. At the Arab Summit in Beirut in March 2002, for example, Mr Arafat said the following:

We are all confident in the inevitability of victory, as well as in the inevitability of achieving our national and Pan-Arab goals . . . including the right of return, the right to self-determination and the *establishment of the independent state of Palestine*, with holy Jerusalem as its capital.

. . . .

Beloved brothers, I would like to tell you in frank and precise terms that we want our national, firm and inalienable rights, the rights that are supported by international legality, the rights of our refugees, our right to self-determination and to the *establishment of our independent state*, on the whole territory which was occupied in 1967, with holy Jerusalem as its capital⁴¹.

Moreover, the current position espoused by President Abbas that Palestinians are *looking forward* to achieving statehood is consistent with a long line of speeches made by Mr Abbas and others. For example, Mr Abbas said the following in his inaugural speech as PA President in 2005: “The greatest challenge before us, and the fundamental task facing us is national liberation. The task of ending the occupation [and] *establishing the Palestinian state . . .*”⁴².

In February 2005, shortly after his inauguration as PA President, Mr Abbas said the following at an Egyptian summit meeting in Sharm el-Sheikh:

[J]ust less than one month ago the Palestinian people went to the ballot boxes for the presidential elections, which were held after the departure of President Yasser Arafat. In this remarkable democratic practice, the Palestinian people embodied through this election[] their [decision for a] just peace that will put an[] end to dictates of war, violence and occupation. *Peace that means the establishment of a Palestinian state . . .*⁴³.

Further, on 24 November 2008, President Abbas addressed the General Assembly of the United Nations in observance of the International Day of Solidarity with the Palestinian

⁴¹Yasser Arafat, Palestine Liberation Org. (“PLO”), Address at the Arab summit in Beirut (27 Mar. 2002) (emphasis added), available at <http://www.al-bab.com/arab/docs/league/arafat02.htm>. Note that Mr Arafat did not speak as if Palestine were already an independent state, despite the Palestine National Council’s 1988 publicly announced Declaration of Independence for Palestine—a Declaration made while the PLO was in exile in Tunisia. See Yasser Arafat, PLO, Speech at UN General Assembly (13 Dec. 1988), available at <http://mondediplo.com/focus/mideast/arafat88-en>. Hence, even Mr Arafat discounted the importance and effect of the 1988 Declaration.

⁴²Mahmoud Abbas, President, Palestinian Nat’l Auth., Inauguration Speech (15 Jan. 2005) (emphasis added), available at <http://electronicintifada.net/bytopic/historicalspeeches/338.shtml>.

⁴³Mahmoud Abbas, President, Palestinian Nat’l Auth., Speech at Egypt Summit (8 Feb. 2005) (emphasis added), available at <http://edition.cnn.com/2005/WORLD/meast/02/08/transcript.abbas>.

People. In that speech, Mr Abbas clearly confirmed the aspirational nature of the current drive for an independent Palestinian state:

We highly appreciate your significant role in supporting our efforts to enable our people to realize their goals. We are certain that your role contributes in [a] clear and effective way in enhancing international solidarity with our just cause and enlarges the circle of international support for *the aspirations of our people for freedom and independence and the establishment of their State . . .*⁴⁴.

Continuing his UN speech, Mr Abbas referred to Jerusalem as “the capital of our future independent State”⁴⁵.

One final example should suffice to demonstrate that President Abbas (representing the PA in general) has no illusions that a state of Palestine currently exists. At the recent Fatah conference in Bethlehem, Mr Abbas continued to express his vision and hope for a *future* Palestinian state⁴⁶.

On the official website of the PLO Negotiations Affairs Department⁴⁷, there are a number of documents confirming that Palestinian statehood remains a future prospect. For example, the PLO Negotiations Affairs Department has published a “Negotiations Primer” that describes the purposes of Palestinian negotiations as a means “to realize Palestinian national rights of self-determination *and statehood*”⁴⁸ and to achieve “the end of Israeli occupation and the *establishment of a sovereign and independent Palestinian state*”⁴⁹. In its introduction to the section on Frequently Asked Questions (“FAQ”), the PLO Negotiations Affairs Department wrote the following:

The 15th of November 2008 marks the twentieth anniversary of the Palestinian Declaration of Independence. The Declaration was made at the

⁴⁴Mahmoud Abbas, President, Palestinian Nat'l Auth., Speech on the Occasion of the International Day of Solidarity with the Palestinian People (24 Nov. 2008) (emphasis added), available at <http://www.un.int/palestine/AbbasSolidarity08.shtml>. In his UN address, President Abbas does refer to 1988, when the Palestine National Council issued a Declaration of Independence while in exile in Tunisia. *Id.* Nevertheless, not even current Palestinian officials appear to take that Declaration seriously, as evidenced by President Abbas's numerous admissions that statehood does not yet exist.

⁴⁵*Id.* (emphasis added).

⁴⁶See Rory McCarthy, *Fatah Holds First Party Conference for 20 Years*, GUARDIAN.CO.UK, 4 Aug. 2009, <http://www.guardian.co.uk/world/2009/aug/04/fatah-conference-abbas-west-bank> (“[President Abbas] insisted that he still believed in the peace talks which began in the early 1990s, even though *they have failed to create a Palestinian state*”). (emphasis added). In a letter addressed to the same conference, Saudi King Abdullah likewise acknowledged the absence of a Palestinian state: “I can honestly tell you, brothers, that even if the whole world joins to found a Palestinian independent state, and if we have full support for that, this state would not be established as long as the Palestinians are divided”. Khaled Abu Toameh, *Palestinian Rift Worse Than Israel*, JERUSALEM POST, 5 Aug. 2009, <http://www.jpost.com/servlet/Satellite?cid=1249418529052&pagename=JPArticle%2FshowFull>. Such a statement clearly shows that the Saudi king (a prominent figure in the greater Arab community) also acknowledges that Palestine is not a state.

⁴⁷See PLO Negotiations Affairs Department, <http://www.nad-plo.org/> (last visited 12 Aug. 2009).

⁴⁸PLO NEGOTIATIONS AFFAIRS DEP'T, NEGOTIATIONS PRIMER 4 (2008) (emphasis added), available at <http://www.nad-plo.org/news-updates/magazine.pdf>.

⁴⁹*Id.* at 12 (emphasis added).

19th Session of the Palestinian National Council (PNC), the highest Palestinian legislative authority, and provided the first official Palestinian endorsement of a two-state solution to the Israeli-Palestinian conflict.

Twenty years later, Palestinians are still waiting for Israel to respond in kind to this historic compromise by ending its 41-year old occupation of Palestinian territory and *supporting the establishment of an independent, viable, sovereign Palestinian state* living side-by-side with Israel in peace and security⁵⁰.

These are unequivocal admissions that Palestine is not yet a State. Question five of the FAQ asks: “Why have the Palestinians failed to attain statehood, twenty years after their Declaration of Independence?”⁵¹. The answer provided to that question, though laying sole blame on Israel, openly admits that all efforts to attain statehood in the intervening period failed⁵².

In sum, there is no “State” of Palestine in existence at this particular point in history, as even the Palestinians readily admit. As such, the PA is incapable of acceding to ICC jurisdiction pursuant to the clear language of Article 12(3), and the Prosecutor should promptly reject the PA attempt to do so.

B. That Palestine Is Not Recognised as a State by the UN General Assembly, by the ICC Assembly of States Parties, or by the International Court of Justice is Additional Proof That the International Community Does Not Recognise Palestine as a “State”.

Although it is true that Palestinian officials actively participate in activities at the UN in New York and elsewhere, Palestine enjoys only observer status at the United Nations. It is not a member of the UN General Assembly, and, hence, its representatives are not permitted to vote. Only *States* may become UN members⁵³. Unlike the Holy See, which is undoubtedly an internationally-recognized State, Palestine is not included or seated in the category of “Non-member *State* having received a standing invitation to participate as observer in the sessions and the work of the General Assembly and maintaining permanent observer mission at Headquarters”⁵⁴. Instead, Palestine is listed under “*Entities* having

⁵⁰PLO NEGOTIATIONS AFFAIRS DEP'T, THE HISTORIC COMPROMISE: THE PALESTINIAN DECLARATION OF INDEPENDENCE AND THE TWENTY-YEAR STRUGGLE FOR A TWO-STATE SOLUTION 1 (2008) (emphasis added), available at <http://www.nad-plo.org/news-updates/Historic%20Compromise%20FAQs%20FINAL.pdf>.

⁵¹*Id.* at 3.

⁵²*Id.*

⁵³UN Charter art. 4, para. 1 (noting that membership is available to “peace-loving *states*” (emphasis added)).

⁵⁴Executive Office of the Sec’y-General, Protocol & Liaison Serv., *Publication of Permanent Missions to the United Nations*, at 308, U.N. Doc. ST/SG/SER.A/299 (March 2009) (emphasis added), available at <http://www.un.int/protocol/bluebook/bb299.pdf>.

received a standing invitation to participate as observers in the sessions and the work of the General Assembly . . .”⁵⁵.

Palestine was also not credentialed as a participating “State” at the Rome Conference in 1998 that resulted in the creation of the ICC. The official roster of “Participating States” at the Conference includes the names of 163 States; it does not include the PA or Palestine as a “State”. Rather, Palestine was placed under the category of “Other Organizations” in the diplomatic roster of the Conference⁵⁶. Further, two Palestinian delegates⁵⁷ were listed as representing an “Organization[]”, *not* a “State”⁵⁸. In subsequent meetings of the ICC Preparatory Commission, the PA was present in the category of “Entities, intergovernmental organizations and other bodies having received a standing invitation to participate as *observers* in the sessions and the work of the General Assembly”⁵⁹.

The ICC consistently treats the PA as an organisation and not a state. A prominent example of this took place on 13 February 2009 at the ICC States Parties meeting in New York City, where Palestine was properly grouped with “Entities, intergovernmental organizations, and other entities”⁶⁰.

The International Court of Justice, in its advisory opinion in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories (Advisory Opinion)*⁶¹, confirmed that the Palestinian territories have not achieved statehood.

This conclusion was buttressed by Judge Elaraby (whose separate opinion in the *Legal Consequences* case articulated Palestinian rights at their highest), who gave a history of Palestine and concluded that no sovereign Palestinian state existed: “On 14 May 1948, the independence of the Jewish State was declared. The Israeli declaration was ‘by virtue of [Israel’s] natural and historic Right’ and based ‘on the strength of the resolution of the United

⁵⁵*Id.* at 309 (emphasis added).

⁵⁶United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 15 June to 17 July 1998, *Official Records*, at 5, 44, U.N. Doc. A/CONF.183/13 (vol. II) (2002) [hereinafter “UN Conference on Establishment of the ICC”], available at http://untreaty.un.org/cod/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf.

⁵⁷These delegates were the PA General Delegate to Italy, Mr Nimer Hammad, and the Counselor of the Permanent Observer Mission of Palestine to the United Nations, Mr Marwan Jilani.

⁵⁸See UN Conference on Establishment of the ICC, *supra* note 56, at 44.

⁵⁹See United Nations Preparatory Commission for the International Criminal Court, New York, 8–19 Apr. 2002, *List of Delegations*, at 10, U.N. Doc. PCNICC/2002/INF/6 (30 Apr. 2002) (emphasis added), available at <http://unbisnet.un.org:8080/ipac20/ipac.jsp?session=124267251TD72.61417&profile=bibga&uri=full%3D3100001~!677148~!1&booklistformat=#focus>.

⁶⁰See International Criminal Court, Assembly of States Parties, New York, 9–13 Feb. 2009, *Delegations to the second resumption of the seventh session of the Assembly of States Parties to the Rome Statute of the International Criminal Court*, at 50, U.N. Doc. ICC-ASP/7/INF.1/Add.2 (26 Mar. 2009), available at http://www.icc-cpi.int/iccdocs/asp_docs/ICC-ASP-7-INF.1-Add.2.pdf.

⁶¹2004 I.C.J. 136.

Nations General Assembly'. *The independence of the Palestinian Arab State has not yet materialized*⁶².

* * * * *

The consistent diplomatic practises of the UN General Assembly, the ICC Rome Conference, the ICC Preparatory Commission, and the ICC Assembly of States Parties as well as the International Court of Justice advisory opinion make clear that Palestine is not a “State” for purposes of Article 12(3). Thus, the PA Declaration is of no effect and should be promptly rejected by the Prosecutor⁶³.

C. That Palestine Does Not Meet the Four Basic Statehood Requirements Set Forth in the Montevideo Convention Also Confirms That Palestine is Not a “State” as Commonly Understood in the International Community.

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 States⁶⁴.

These criteria are prime indicia of statehood. A number of these criteria have been—and continue to be—problematic for the PA to claim statehood. Pursuant to a series of agreements between Israel and the PLO, the PA was specifically formed as a provisional body with clearly delineated limits to its authority until PA status negotiations were completed⁶⁵.

Under the terms of the 1995 Interim Agreement (“IA”) between Israel and the PLO, for example, the PA agreed to forego a general capacity to enter into diplomatic relations with other States⁶⁶. Specifically, under Article 9(5), with the exception of “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”⁶⁷. Additionally, the PA agreed

⁶²*Id.* at 251 ¶ 2.3 (Sep. Op. Elaraby) (emphasis added).

⁶³The prosecutor should also take note of how the Swiss responded in 1989 when the PLO sought to accede to the Geneva Conventions. The Swiss Government, as the repository of the Geneva Conventions, refused to accept PLO accession to the Conventions on the ground that Palestine was not a State. See JAMES R. CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 440 (2006) (citing Note of Information sent from Switzerland to States Parties to the Convention and Protocol (13 Sept. 1989)).

⁶⁴Montevideo Convention, *supra* note 28.

⁶⁵Note that the PA was *not* created by Palestinians acting independently; rather, the PA was established by virtue of a series of Israel-Palestinian agreements (the Oslo Peace Process) as an initial step to an eventual two-state solution. Palestine Facts, Israel 1991 to Present: PA Origins, What is the Palestinian Authority and How Did it Originate?, http://www.palestinefacts.org/pf_1991to_now_pa_origin.php (last visited 19 Aug. 2009).

⁶⁶See Israeli-Palestine Liberation Organization: Interim Agreement on the West Bank and Gaza Strip, 28 Sept. 1995, art. 9(5), 36 I.L.M. 551, 561 (1997) [hereinafter “IA”].

⁶⁷*Id.* art. 9(5)(a)–(b).

that dealings between PA officials and foreign officials “shall not be considered foreign relations”⁶⁸.

It is also questionable to what degree the PA can effectively govern and control “Palestinian territory”. 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 . . .”⁶⁹. Of particular note on this point are agreements between Israel and the PLO that explicitly stipulate that neither party may initiate or take any step to change the status of the West Bank and Gaza Strip prior to completing negotiations of a permanent agreement⁷⁰. Further, under the IA, the West Bank is divided into three types of Areas, designated A, B, and C⁷¹. The degree of PA control varies in each area, with the most control in Areas A and the least control in Areas C⁷². Even in Areas A, where the PA exercises the most control, the PA still does not control individual Israelis in such areas, and it does not control the airspace or external security⁷³. In Areas B, the PA controls public order and civilian affairs of Palestinian residents, but Israel retains control of Israelis and all airspace, security, and so on⁷⁴. In Areas C, Israel continues to exercise control over most governmental fields⁷⁵. Taken together, Areas A and B constitute approximately 40% of the entire West Bank; Areas C constitute the remainder, which remains under virtually total Israeli control. The Gaza Strip is currently under total Hamas (not PA) control, and the Hamas leaders who govern Gaza openly oppose the PA and its authority.⁷⁶ PA governance in Gaza is, therefore, nonexistent. Currently, the PA has no effective authority to speak for what transpires in the Gaza Strip.

National courts in the United States, Canada, and the United Kingdom have all confirmed that entities like the PA (or its parent organization, the PLO) lack one or more of the Montevideo Convention’s indicia of sovereignty and, thus, do not qualify as juridical persons in international law.

The House of Lords has insisted that in order to qualify as a state, an entity exercising some administrative authority must exercise “all the functions of a sovereign government, in

⁶⁸*Id.* art. 9(5)(c).

⁶⁹CRAWFORD, *supra* note 63, at 59.

⁷⁰*See* IA, *supra* note 66, art. 31(7).

⁷¹*See id.* arts. III(1), IX(2).

⁷²*See id.*

⁷³*See id.* arts. V(2)(a), VIII(1)(a), XIII(4).

⁷⁴*See id.* art. V(3).

⁷⁵*Id.*

⁷⁶Steven Erlanger, *Hamas Seizes Broad Control in Gaza Strip*, N.Y. TIMES, 14 June 2007, at A1, available at <http://www.nytimes.com/2007/06/14/world/middleeast/14mideast.html>; *see also* *Hamas Says Gaza Now Under Control*, BBC NEWS, 15 Aug. 2009, http://news.bbc.co.uk/2/hi/middle_east/8203713.stm (detailing Hamas’ restoration of order following an insurrection in southern Gaza).

maintaining law and order, instituting and maintaining courts of justice, adopting or imposing laws regulating the relations of the inhabitants of the territory to one another and to the Government”⁷⁷. According to the British Foreign Office, “the new regime should not merely have effective control over most of the State’s territory, but . . . it should, in fact, be firmly established”⁷⁸. The PA fails that test, since it neither controls most of the territory that it claims to be part of Palestine nor is it firmly established.

Applying a similar analysis to the situation of Palestine, the courts of the United States have emphasised that both the PLO and PA have lacked both “defined territor[ies]” and “permanent population[s] under [their] control”⁷⁹. The courts have also specifically pointed to the fact that the PLO has not been admitted as a state by the UN, despite the UN’s general support for Palestinian self-governance⁸⁰.

With respect to the conduct of foreign relations, the Supreme Court of Canada has confirmed that the ability to independently conduct foreign affairs is one of the ordinary attributes of legal sovereignty. The hallmark of a state, as opposed to, for example, a colony, is that while a colonial administration may have a substantial amount of domestic self-rule, it is the sovereign parent that handles international relations. Thus, the fact that Newfoundland chose to leave conduct of foreign relations to the British government following the Imperial Conference of 1926 distinguished that territory from the other self-governing Dominions, and effectively undermined Newfoundland’s claim to independent statehood⁸¹. Again applying a similar analysis to Palestine, U.S. courts have noted that the Israel-PLO agreements creating the Palestinian Authority “expressly denied the PA the right to conduct foreign relations”, making it “transparently clear that the PA has not yet exercised sufficient governmental control over Palestine [to achieve statehood]”⁸².

The PA’s failure to satisfy the above two criteria demonstrates, once again, that the Palestinian Territories—the West Bank and Gaza Strip--do not even remotely qualify as a “State”. As such, the Prosecutor has no reasonable basis in the Rome Statute to entertain the PA attempt to accede to ICC jurisdiction. Accordingly, he should reject the Declaration promptly.

* * * * *

⁷⁷The Arantzazu Mendi, [1939] A.C. 256 (H.L.) (U.K.).

⁷⁸485 Parl. Deb., H.C. (5th Ser.) (1951) (2410–11).

⁷⁹Knox v. PLO, 306 F. Supp. 2d 424, 434–36 (S.D.N.Y. 2004).

⁸⁰Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44, 48 (2d Cir. 1991).

⁸¹Reference re Seabed and Subsoil of the Continental Shelf Offshore Newfoundland [1984] S.C.R. 86, 104.

⁸²See, e.g., Ungar v. Palestinian Authority, 402 F.3d 274, 291–92 (1st Cir. 2005) (citing D.J. HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 226 (5th ed. 1998); GEOFFREY R. WATSON, THE OSLO ACCORDS: INTERNATIONAL LAW AND THE ISRAELI-PALESTINIAN PEACE AGREEMENTS 68–72 (2000)).

In light of the abundant evidence set forth above, it is clear that “Palestine” is currently not a “State”. Hence, under the Statute, the PA was incapable of acceding to ICC jurisdiction under Article 12(3) in January 2009, and the Prosecutor was mistaken to take the PA Declaration under lengthy advisement. Instead, he should reject it.

III. THE ROME STATUTE EXPRESSLY RESERVES TO THE UN SECURITY COUNCIL EXCLUSIVE AUTHORITY TO EXTEND THE ICC’S REACH BEYOND THE TERRITORIAL AND NATIONALITY LIMITATIONS SET FORTH IN ARTICLE 12.

Assuming, *arguendo*, that there were a sufficient factual basis to justify an investigation into crimes within the subject-matter jurisdiction of the Court committed in “Palestinian territory”, doing so would still be an abuse of prosecutorial discretion and an improper usurpation of a function acknowledged by the States Parties to be within the exclusive province of the UN Security Council. Accordingly, based on the express terms of the Statute, the Prosecutor lacks competence to even consider asserting jurisdiction over events in “Palestinian territory”.

As discussed more fully in Part IV, Article 12 of the Statute establishes clear limitations on the Prosecutor’s authority to exercise his discretion to initiate an investigation into alleged violations of the substantive provisions of the Statute. Because the PA lacks the requisite *dramatis personae* of a State, the events that have occurred in Palestinian territory since 1 July 2002 do not fall within this discretion. Yet, the fact that the Prosecutor did not summarily reject the request by the PA to investigate these events creates the inference that he believes there might be some basis to conclude that a further investigation of violations of international law are merited by his office, or he may even believe that they may have actually occurred. This, however, is insufficient to trigger an exercise of his prosecutorial power.

The States Parties to the Rome Statute were not ignorant of the possibility that offenses defined in the Statute might occur in situations falling outside the consent-based jurisdiction of the Court. Yet, their solution to the concern that this would contribute to impunity for serious violations of international law was not to vest the Prosecutor with the discretion to effectively expand the jurisdiction of the Court. Instead, they included within the Statute an alternate mechanism for bringing such situations before the Court.

Article 13(b) of the Rome Statute permits the Court to exercise jurisdiction in situations “in which one or more of such crimes appear[ing] to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of

the United Nations”⁸³. This provision reflects the clear intent of the States Parties that only the Security Council shall be competent to place before the Court allegations of violations of the Statute that are otherwise barred by the nationality and territoriality limitations on jurisdiction established by Article 12.

Recognising the Security Council’s competence to refer such situations to the Court reflected an evolution of a process that began with the creation of the International Criminal Tribunal for the Former Yugoslavia (“ICTY”)⁸⁴. That Tribunal was created pursuant to the authority vested in the Security Council by Chapter VII to authorise measures for the restoration and maintenance of international peace and security⁸⁵. This legal basis was subsequently validated by the ICTY Appeals Chamber in *Prosecutor v. Tadic*⁸⁶. As a result, at the time of the drafting of the Rome Statute, it was well accepted that Chapter VII of the UN Charter authorised the Security Council to direct the creation of *ad hoc* tribunals to address allegations of serious violations of international law in the context of armed conflicts.

Including within the Statute a provision which permits the Court to exercise jurisdiction over situations referred by the Security Council acting pursuant to its Chapter VII enforcement authority was considered an efficient alternative to the periodic creation of future *ad hoc* tribunals by the Security Council to deal with threats to international peace and security⁸⁷. It reflected the determination of States Parties that impunity for serious violations of international law could in the future, as it had in the past, be considered by the Security Council as a threat to international peace and security, and that efficient investigation and prosecution of such crimes could be important factors in the restoration of peace and security⁸⁸. It also reflected a compromise between a purely consent-based jurisdiction paradigm and a cause-based jurisdiction paradigm⁸⁹.

This compromise, however, involved a delicate balance between the desire to prevent impunity for the most serious violations of international law, the authority of the Prosecutor, and the protection of state sovereignty⁹⁰. Certainly, if preventing impunity were the only concern of the States Parties, they could have vested the Prosecutor with authority to

⁸³Rome Statute, *supra*, note 3, art. 13(b).

⁸⁴See Lionel Yee, *The International Criminal Court and the Security Council: Articles 13(b) and 16*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE* 146 (Roy S. Lee ed., 1999).

⁸⁵*Id.* at 147.

⁸⁶*Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 27–29 (2 Oct. 1995).

⁸⁷Yee, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE*, *supra* note 84, at 148; see also Luigi Condorelli & Santiago Villalpando, *Referral and Deferral by the Security Council*, in *1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT*, *supra* note 13, at 627–37.

⁸⁸Yee, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE*, *supra* note 84, at 147.

⁸⁹See Condorelli & Villalpando, in *1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT*, *supra* note 13, at 627–29.

⁹⁰*Id.* at 629–34.

investigate and refer to the Court not only situations falling within the consent-based jurisdiction of the Statute, but any other situation that he believed justified such action. Of course, such an approach would constitute an invalid intrusion into the sovereignty of those States choosing not to submit to the jurisdiction of the Court. Instead, the States Parties chose to place two significant limits on the ability to extend the jurisdiction of the Court beyond the consent limitations established by Article 12: First, that the situation (to include the failure to investigate) constitute a threat to international peace and security; and second, that only the collective judgement of the Security Council could authorise such an extension⁹¹. Vesting the Security Council with this authority was, therefore, adopted by the States Parties as an effective method for balancing the sovereign interests of states with the need to extend jurisdiction to certain situations beyond the consent jurisdiction of the Court. By linking such an extension to the collective security mechanism of the United Nations, the Statute vitiates any legitimate objection to non-consensual jurisdiction⁹².

It is, therefore, clear that the States Parties to the Rome Statute were not simply attempting to extend the jurisdiction of the Court to States that chose not to accede to the treaty. Instead, they acknowledged the exclusive authority of the Security Council to impose non-consensual jurisdiction on States as an enforcement measure pursuant to Chapter VII of the UN Charter. The significance of this link between non-consensual jurisdiction and the enforcement authority of the Security Council was so profound that even a proposal to authorise Security Council referral pursuant to Chapter VI of the Charter was rejected⁹³.

In light of this recognition, it is clear that only the Security Council acting pursuant to the authority granted by the community of nations through Chapter VII of the UN Charter may refer a situation to the ICC that is otherwise beyond the consent-based jurisdictional limits of the Statute. This is an immense responsibility because it involves extremely complex and delicate matters of international law, diplomacy, and state sovereignty⁹⁴. The States Parties concluded that only the Security Council—not the Prosecutor—possessed the requisite competence and authority to address these competing concerns. By intruding into this realm of authority to authorise enforcement measures in response to threats to international peace and security, the Prosecutor’s action will be outside its legal scope and

⁹¹ *Id.*

⁹² *Id.* at 627–29.

⁹³ Yee, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE*, *supra* note 84, at 148–49.

⁹⁴ See generally *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, (2 Oct. 1995); see also Condorelli & Villalpando, in *1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT*, *supra* note 13, at 627–34.

have the potential to destabilise a complex and delicate process established by the community of nations.

IV. THE PROSECUTOR LACKS BOTH EXPRESS AND INHERENT AUTHORITY TO RECOGNISE THE VALIDITY OF A DECLARATION LODGED BY A NON-STATE ENTITY TO EXTEND ICC JURISDICTION OVER TERRITORY OR PERSONS OF SUCH ENTITY. TO CONSIDER DOING SO VIOLATES THE EXPRESS TERMS OF THE STATUTE AND IS AN ABUSE OF THE PROSECUTOR'S DISCRETION.

Like any other prosecutor, the ICC Prosecutor is vested with discretion. Indeed, the decision of the States Parties to vest the Prosecutor with the discretion to initiate investigations *proprio motu* was one of the more contentious issues related to the negotiation and adoption of the Rome Statute⁹⁵. The decision of the States Parties to ultimately endorse a measured grant of *proprio motu* authority was clearly based on the expectation that the Prosecutor would exercise his discretion properly and respect the jurisdictional limitations imposed on the Court by the Statute. By failing to summarily reject the submission of the PA, the Prosecutor appears to have disregarded this expectation and is in danger of abusing his discretion. In effect, he is unilaterally transforming his limited authority into plenary authority to investigate allegations of war crimes.

Any abuse of prosecutorial discretion is problematic, whether at the national or international level. This very fact was a major source of controversy during the ICC negotiations process⁹⁶. In response, the States Parties purposely limited prosecutorial discretion by permitting the Prosecutor to undertake *preliminary* investigations on his own initiative and to seek and receive evidence from all “reliable sources that he . . . deems appropriate”⁹⁷. If, at some point, the Prosecutor believes that an initial investigation has merit, he must submit “a request for authorization of an investigation”, with supporting evidence, to the Pre-Trial Chamber for its concurrence before he may proceed⁹⁸. The Pre-Trial Chamber, in turn, must determine that “the case appears to fall within the jurisdiction of the Court” before it may authorise the Prosecutor to commence a formal investigation⁹⁹.

As the ultimate “ministers of justice”, prosecutors bear a unique responsibility to ensure justice is served for all parties involved in a dispute. The first element of justice is

⁹⁵See generally Silvia A. Fernandez de Gurmendi, *The Role of the International Prosecutor*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE, *supra* note 84, at 172; see also John R.W. Jones, *The Office of the Prosecutor*, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, *supra* note 13, at 269.

⁹⁶See Fanny Benedetti, *A Report on the Negotiations for the Creation of an International Criminal Court*, 5 HUM. RTS. BRIEF 51 (1997).

⁹⁷Rome Statute, *supra* note 3, art. 15(1)–(2). Such sources include information from States, UN organs, intergovernmental organisations, NGOs, and the like. *Id.* art. 15(2).

⁹⁸*Id.* art. 15(3).

⁹⁹See *id.* art. 15(4).

respect for the principle of legality, which, in turn, requires respect for the jurisdictional limits established by law. Jurisdictional limits on exercising prosecutorial discretion cannot be ignored or waived simply because a prosecutor becomes aware of substantive facts that he believes establish probable cause that a crime has occurred. Jurisdiction is the first principle of legitimate judicial power, and endorsing disregard of jurisdiction—clearly an abuse of discretion—nullifies the limitations imposed on prosecutorial discretion through the law-making process.

Article 13 specifies the circumstances in which the ICC has jurisdiction over the crimes listed in the Rome Statute, one of which is when “[t]he Prosecutor has initiated an investigation in respect of [an Article 5] crime in accordance with Article 15”¹⁰⁰. Article 15(1) states, “[t]he Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes *within the jurisdiction of the Court*”¹⁰¹. Article 12(2) provides that, if the Prosecutor initiates an investigation, the ICC has jurisdiction if either the alleged crime was committed on the territory of a State Party to the Statute or the accused is a national of a State Party to the Statute¹⁰².

ICC jurisdiction requires the following. First, Article 5 limits the Court’s jurisdiction to genocide, crimes against humanity, war crimes, and the crime of aggression (once it is defined)¹⁰³. Second, the Statute requires that the alleged crimes must have been committed on the territory of a State Party or by a national of a State Party to the Statute or on the territory or by a national of a non-Party “State” that specifically accedes to ICC jurisdiction pursuant to Article 12(3)¹⁰⁴. Third, Article 13(b) authorises the UN Security Council to refer situations to the Court when acting under Chapter VII of the UN Charter¹⁰⁵. As previously discussed, only the third option—that is, Security Council referral—permits the Court to venture beyond the requirement of consent to jurisdiction by a recognised State attached to the matter by virtue of the nationality of the offender or the State territory where the events took place. Even a *proprio motu* investigation by the Prosecutor requires either the territorial or nationality nexus before action can be taken.

The Prosecutor’s office admitted as much in its 14 January 2009 statement. Reuters quoted the Prosecutor as asserting, regarding Gaza, that, since Israel had not consented to ICC jurisdiction, “the ICC lacks such jurisdiction”¹⁰⁶. Reuters continued: “The [P]rosecutor

¹⁰⁰See Rome Statute, *supra* note 3, art. 13(c).

¹⁰¹*Id.* art. 15(1) (emphasis added).

¹⁰²See *id.* art. 12(2).

¹⁰³See *id.* art. 5.

¹⁰⁴See *id.* arts. 12(2)–(3), 13(a), (c).

¹⁰⁵See *id.* art. 13(b).

¹⁰⁶Gray-Block, *supra* note 10.

said crimes committed in other situations can come before the ICC if the relevant non-party state voluntarily accepts the jurisdiction on an ad hoc basis *or if the United Nations Security Council refers a situation*¹⁰⁷. The foregoing statement vividly confirms that the Prosecutor understands that he has no authority to extend the ICC's reach to accommodate declarations by non-state entities (like Palestine) and that such authority resides solely in the Security Council.

In this instance, the Prosecutor does not have authority to initiate an investigation *proprio motu* under the consent-based jurisdiction limits established by the Statute (that the conduct occurred in the territory of a *State Party* or that the individual suspected of a crime is a national of a *State Party*)¹⁰⁸. As noted earlier, neither of these jurisdictional predicates is satisfied in relation to the Declaration lodged by the PA. Accordingly, the appropriate response to the application was immediate rejection.

Additionally, the Prosecutor does not have authority to initiate an investigation *proprio motu* under the non-consensual jurisdiction limits established by the Statute. The Statute expressly reflects the decision of the States Parties to reserve to the Security Council the option of invoking the jurisdiction of the Court to address situations where there is otherwise no jurisdiction by virtue of the consent of a State of nationality or State where events have occurred. There can be no doubt that the Security Council is willing to exercise its authority to refer a situation to the Court when necessary. In 2005, the Security Council passed Security Council Resolution 1593, by which the Council, "acting under Chapter VII of the United Nations Charter, . . . decided to refer the situation prevailing in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court"¹⁰⁹. The Security Council knows how to refer a matter to the ICC; it has done so in the past, *but it has not done so here*. By considering non-consensual jurisdiction beyond the bounds established by the Statute, the Prosecutor may be usurping the role expressly reserved for the Security Council and therefore abusing his discretion.

There are also numerous practical concerns that explain the Rome Statute's refusal to allow non-state entities like the PA or Palestine to avail themselves of ICC jurisdiction. Most troubling is the fact that doing so would open a Pandora's Box vis-à-vis other, potential, non-state claimants like Taiwan, northern Cyprus, or even Kurdistan. If the PA Declaration were

¹⁰⁷*Id.* (emphasis added).

¹⁰⁸See, e.g., Rome Statute, *supra* note 3, art. 12(2).

¹⁰⁹See Press Release, Security Council, Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court, U.N. Doc. SC/8351 (31 Mar. 2005), available at <http://www.un.org/News/Press/docs/2005/sc8351.doc.htm>; see also Amnesty International USA, Darfur and International Criminal Court: Frequently Asked Questions, <http://www.amnestyusa.org/international-justice/international-criminal-court/darfur-and-the-international-criminal-court-faqs/page.do?id=1041203> (last visited 12 Aug. 2009).

accepted, it might soon be followed by other declarations by non-state entities, thereby creating or aggravating significant international political problems around the world. Such potential political problems do not belong in the ICC. Were the Prosecutor to follow the clear language of the Statute, no such problems would arise. By entertaining the PA Declaration, despite express language in the Statute against accession by non-state entities, the Prosecutor may be contributing to confusion and instability in the Court.

The Prosecutor may sympathise with the PA and its Declaration. He may even be of the view that in light of the allegations that may have been alleged by the PA or others, he should conduct further preliminary analysis by his office of these issues, as well as conduct a preliminary analysis as to whether Israel is addressing these issues within its domestic system. He may even believe that the allegations are true. Yet, even if they were taken to be so, none of these concerns can excuse an abuse of prosecutorial discretion and intrusion into the exclusive authority of the Security Council. A prosecutorial decision to even contemplate the merits of this application is not only inconsistent with the express limitations on jurisdiction established by the States Parties to the Rome Statute, it is a confirmation of the worst fears of a number of States who chose to adopt a “wait and see” approach to ICC accession.

It is well known that many of these States (and even States that acceded to the treaty) were particularly concerned with the risk that the broad discretion vested in the Prosecutor might be improperly exercised. At the time of the drafting of Statute, this concern was focused almost exclusively on the exercise of prosecutorial discretion related to complementarity¹¹⁰. The obligation to make preliminary judgements on complementarity is within the authority vested in the Prosecutor. But investigating a situation that is expressly excluded from the scope of the Court’s jurisdiction under the Statute will inevitably confirm the worst fears of non-Party States, and may even invite States Parties to seek amendment to the Statute pursuant to Article 122—or even consider withdrawal from the Statute pursuant to Article 127.

For the foregoing reasons, the Prosecutor should publicly reaffirm the limitations on his jurisdiction and immediately reject the PA Declaration.

CONCLUSION

In light of the foregoing, the concerned parties express serious concerns about requests by non-State entities (such as the PA) to accede to the ICC’s jurisdiction in

¹¹⁰See Rome Statute, *supra* note 3, art. 17.

contravention to the clear language of the Rome Statute. Additionally, such action would be beyond the authority of the Prosecutor's office as granted by the Rome Statute and should be reconsidered. Furthermore, the current diplomatic process seeks a two-state solution to the Israeli-Palestinian conflict, but it also means that establishing the terms of Palestinian statehood requires diplomacy and negotiations between the parties. Any involvement by the ICC in this political conflict will endanger the best efforts of the parties and undermine the standing of the Court. In that light, the Prosecutor should comply with the limitations of his office and reject the PA Declaration as having been improperly lodged by a non-state entity.

09 September, 2009.

Hans-Christian Krüger
Jean Paillot
Thierry Daniel
CAA Law Firm
Strasbourg, France

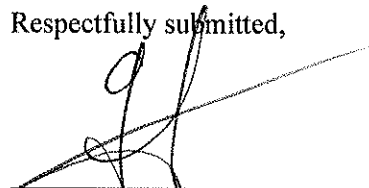
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Regent University School of Law
Virginia Beach, Virginia, U.S.A.

Respectfully submitted,



Grégor Puppinck
European Centre for Law and Justice
Signing for Concerned Parties

John Ashcroft
The Ashcroft Group, LLC
Washington, D.C., U.S.A.

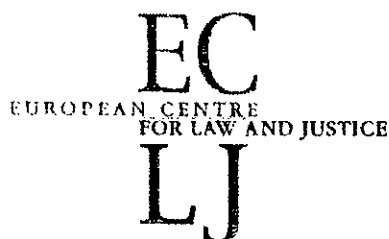
Jay Alan Sekulow
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Brett Joshpe
American Center for Law and Justice
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Dr. Andrzej Bryk
Jagiellonian University
Krakow, Poland

Geoffrey Corn
South Texas College of Law
Houston, Texas, U.S.A.

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Strasbourg, France

Exhibit A



9 July, 2009

His Excellency Luis Moreno-Ocampo
 Prosecutor, International Criminal Court
 Post Office Box 19519
 2500CM The Hague
 The Netherlands

Via FAX: 31-70-515-8555
 And FEDEX

RE: Accession to International Criminal Court Jurisdiction by Non-State Entities

Dear Mr. Moreno-Ocampo:

The undersigned law professors and international human rights lawyers hereby express our concerns about requests by non-State entities (such as the Palestinian National Authority (the "PA")) to accede to the International Criminal Court's (the "Court") jurisdiction in contravention of the clear language of the Rome Statute (the "Statute").

We share a mutual mission to eradicate crimes and atrocities that shock the human consciousness. The Court must undertake this mission in strict conformity with the terms of the Statute. In no event should any temptation for various groups to manipulate the Court as a means for resolving political conflicts be accommodated. Should the Court expand its jurisdiction to encompass non-State entities, it would become a battleground for political disputes rather than a forum for ensuring justice.

Any Court exercise of jurisdiction based upon the PA Declaration would be improper since the PA is not a State within Article 12(3) of the Statute. The current discussion of a potential two-state solution to the Israeli-Palestinian conflict establishes that the matter is a political conflict that requires diplomacy and negotiations between the parties. Any involvement by the Court in this political conflict would undermine the standing of the Court.

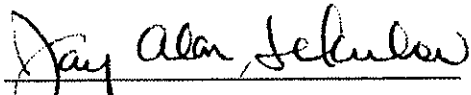
We will supplement this letter with legal memoranda.

Very truly yours,

Hans-Christian Krüger


François-Henri Briard
 (F.H. Briard,

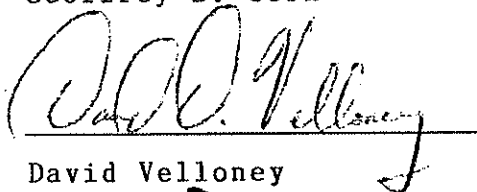
Avocat au Conseil d'Etat)

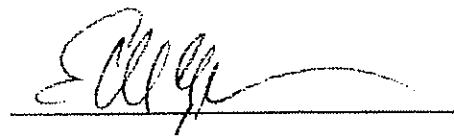

Jay Alan Sekulow

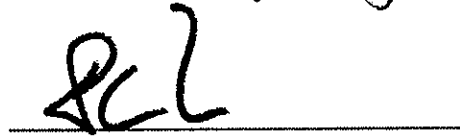

John Ashcroft


Geoffrey S. Corn

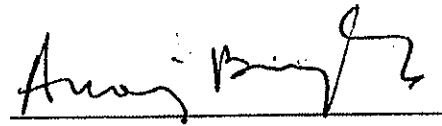

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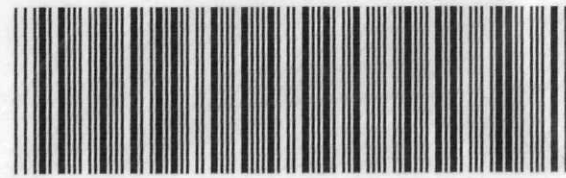
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