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PRE-TRIAL CHAMBER I

Before: **Judge Péter Kovács, Presiding Judge**
Judge Marc Perrin de Brichambaut
Judge Reine Adélaïde Sophie Alapini-Gansou

SITUATION IN THE STATE OF PALESTINE

PUBLIC

Observations on the Prosecutor's Request on behalf of the Non-Governmental Organisations: The Lawfare Project, the Institute for NGO Research, Palestinian Media Watch, and the Jerusalem Center for Public Affairs

Source: **The Lawfare Project**
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The Office of the Prosecutor
Fatou Bensouda
James Stewart

Counsel for the Defence

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants

The Office of Public Counsel for Victims
Paolina Massidda

The Office of Public Counsel for the Defence

States' Representatives

Amici Curiae
- Professor John Quigley
- Guernica 37 International Justice Chambers
- The European Centre for Law and Justice
- Professor Hatem Bazian
- The Touro Institute on Human Rights and the Holocaust
- The Czech Republic
- The Israel Bar Association
- Professor Richard Falk
- The Organization of Islamic Cooperation
- The Lawfare Project, the Institute for NGO Research, Palestinian Media Watch, and the Jerusalem Center for Public Affairs
- MyAQSA Foundation
- Professor Eyal Benvenisti
- The Federal Republic of Germany
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- Prof. Laurie Blank, Dr. Matthijs de Blois, Prof. Geoffrey Corn, Dr. Daphné Richemond-Barak, Prof. Gregory Rose, Prof. Robbie Sabel, Prof. Gil Troy and Mr. Andrew Tucker
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- Intellectum Scientific Society

- The International Commission of Jurists
- Dr. Robert Heinsch and Dr. Giulia Pinzauti
- The Republic of Austria
- The International Association of Democratic Lawyers
- The Office of Public Counsel for the Defence
- The Honourable Professor Robert Badinter, the Honourable Professor Irwin Cotler, Professor David Crane, Professor Jean-François Gaudreault-DesBiens, Lord David Pannick and Professor Guglielmo Verdirame
- The Palestinian Center for Human Rights, Al-Haq Law in the Service of Mankind, Al-Mezan Center for Human Rights and Aldameer Association for Human Rights
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- Professor Malcolm N Shaw
- Hungary
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Introduction

1. In accordance with the Chamber's Order of 20 February 2020 granting the undersigned Organisations leave to submit Observations on the Prosecutor's Request, the undersigned Organisations respectfully submit these written observations on the question of jurisdiction set forth in Paragraph 220 of the Prosecutor's Request with respect to the so-called "Situation in Palestine".

2. As set forth in detail below, under well-settled principles of international law, there is no presently-existing "State of Palestine" capable of referring matters to the International Criminal Court. A State that does not exist is not capable of delegating sovereign jurisdictional competencies to the ICC. Accordingly, the Court lacks jurisdiction with respect to the so-called "Situation in Palestine".

I. The Article 12 Preconditions To The Exercise of ICC Jurisdiction are Not Met Because There Is No "State of Palestine"

3. Article 12 of the Rome Statute prescribes preconditions to the exercise of ICC jurisdiction. These preconditions are predicated on the existence of a State.[1] Specifically, in situations which are referred to the Office of the Prosecutor ("OTP") by a State pursuant to Article 13(a) or (c), or where the OTP has initiated an investigation *propio motu*, the existence of a State Party is a necessary precondition for the exercise of jurisdiction.[2]

4. There is no definition of the word "State" in the Rome Statute. Therefore, the term "State" is to have the same meaning as it has in general (customary) international law.[3] The customary test of statehood holds that a state must consist of four elements: a defined territory, a permanent population, a government in total control of the territory, and the capacity to engage in foreign relations. These elements are commonly referred to as the Montevideo Criteria.[4]

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[1] The word 'State' in Article 12 is, *prima facie*, to be interpreted in accordance with its ordinary meaning. Article 31(1) of the Vienna Convention on the Law of Treatises, Vienna (the "VCLT"), 23 May 1969, United Nations, UN Treaty Series, Vol 1155, p. 331. The VCLT applies to this analysis pursuant to Article 21(1)(b).

[2] Sovereign legal title to territory on which alleged crimes occur is a precondition to the Court's exercise of jurisdiction for purposes of Article 12(2)(a); the objective existence of a State is a necessary precondition to the Court's exercise of jurisdiction for purposes of Article 12(3) and Article 12(2).

[3] *See* fn. 1, *supra*.

[4] Convention on Rights and Duties of States, adopted by the Seventh International Conference of American States, 26 December 1934, 165 LNTS 19 (the "Montevideo Convention"), Art I.

5. Under the customary meaning of the term in international law, "Palestine" is not a State.[5] Its existence, and the status and extent of the territory, is not fixed, and is dependent on a negotiated settlement between Israel and the Palestine Liberation Organization ("PLO").[6] Neither is there a permanent population, given the express understanding between the parties that borders are to be determined in final status negotiations. Similarly, "Palestine" lacks a government in total control of the territory.[7] On the one hand, its purported government shares with Israel control over some territory it clams for itself. On the other hand, there is currently no functioning, unified government that actually exerts control over the entirety of the territory the Prosecutor purports to include in the so-called "State of Palestine."[8] Finally, "Palestine" lacks the capacity to engage in foreign relations, as it lacks all other elements of statehood that would allow it to do so.[9]

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[5] Although beyond the scope of this Observation, *amicus curiae* note that since "Palestine" is not a State, its purported accession to the Rome Statute under Article 125 is invalid. To the extent accession was erroneously permitted in light of U.N. General Assembly resolution 67/19 of 29 Nov. 2012, according "Palestine" the status of "non-member observer State" in the UN, it must be noted that this resolution did not purport to make a *legal* determination as to whether "Palestine" qualifies as a state, and was explicitly limited to the UN in its effect. Moreover, the powers granted to the General Assembly by the UN Charter are generally recommendatory and advisory, such that according a status on an entity does not have preclusive or binding legal effect (see Section II below). *See*, *e.g.,* Voting Procedure on Questions relating to Reports and Petitions Concerning the Territory of South-West Africa, Advisory Opinion, 1955 I.L.J. Rep. 67, 115 (June 7, 1955)(General Assembly resolutions generally "are not legally binding upon the Members of the United Nations…and are in the nature of recommendations".).

[6] Apart from territorial issues, including border demarcation, other final status issues to be resolved include, but are not limited to, security, water and settlements. This was agreed to by the PLO during the course of negotiating the Oslo Accords. The "Oslo Accords" refers to the series of agreements signed between the State of Israel and the Palestine Liberation Organization as part of a peace process. These agreements include the Declaration of Principles on Interim Self-Government ("DOP"), signed 13 Sept. 1993, available at: https://mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/declaration%20of%20principles.aspx; The Agreement on the Gaza Strip and the Jericho Area, signed 4 May 1994, available at: https://mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/agreement%20on%20gaza%20strip%20and%20jericho%20area.aspx; and the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (the "Interim Agreement", also known as "Oslo II"), signed 28 Sept. 1995, available at: https://mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/the%20israeli-palestinian%20interim%20agreement.aspx

[7] Effective government is central to a claim of statehood. This criterion has two aspects: the actual exercise of authority, and the right or title to exercise that authority. To be a state, an entity must possess a government in general (and exclusive) control of its territory.

[8] Since June 2007, there have been two competing governments in the so-called Palestinian territories: one in what is colloquially referred to as the "West Bank", and one in the "Gaza Strip". The West Bank has been governed by what is generally recognized to be the Palestinian Authority, which has been dominated by the Fatah faction since its creation. In the Gaza Strip, Hamas took over governance by force and has remained in power since June 2007. In brief, there is no single government that exerts control over "Palestine".

[9] In Article IX (5)(a) of the Interim Agreement, the PLO expressly agreed to limit its conduct of foreign relations: "In accordance with the DOP, the Council will not have powers and responsibilities in the sphere of foreign relations, which sphere includes establishment abroad of embassies, consulates or other types of foreign

6. The Montevideo Convention provides a restatement of customary international law.[10] This restatement was reinforced by the Arbitration Commission of the Conference on Yugoslavia (the "Badinter Commission"), set up by the Council of Ministers of the European Economic Community in August 1991 to provide the Conference with legal advice. According to the Badinter Commission, "the state is commonly defined as a community which consists of a territory and a population subject to an organized political authority; that such a state is characterized by sovereignty".[11] The Badinter Commission's definition of a state is largely a re-phrasing of the Montevideo Criteria.[12]

7. The Montevideo Criteria remains the prevailing interpretation of customary international law, as shown by the practices of states during the dissolution of Yugoslavia,[13] the former Soviet Union and Czechoslovakia. As the International Criminal Tribunal for the Former Yugoslavia stated, "These four criteria…have been used time and again on questions relating to the creation and formation of states. In fact, reliance on them is so widespread that in some quarters they are seen as reflecting customary international law".[14]

A. The "State of Palestine" does not fulfill the Montevideo Criteria because it lacks a defined territory.

8. With respect to the first of the Montevideo Criteria, the purported "State of Palestine" does not exist because it lacks a "defined territory". The extent of its territory is not fixed, with the PLO having agreed, during the course of negotiating the Oslo Accords,

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missions and posts or permitting their establishment in the West Bank or Gaza Strip, the appointment of or admission of diplomatic and consular staff, and the exercise of diplomatic functions".
https://mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/the%20israeli-palestinian%20interim%20agreement.aspx

[10] Apart from the criteria for statehood set forth in Article I, the Montevideo Convention explicitly states in Article III that "[t]he political existence of the state is independent of recognition by the other states." Recognition is not determinative of statehood (and neither is statehood determinative of recognition). This reinforces the view that U.N. General Assembly resolution 67/19 is an aspirational and recommendatory statement that conveys no preclusive or binding legal effect.

[11] Opinion No. 1, 29 Nov. 1991.

[12] Notably, the Badinter Commission – like the Montevideo Convention – identified "the effects of recognition by other states as purely declaratory". Opinion No. 1, *supra*. This further reinforces the view that U.N. General Resolution 67/19 is an aspiration, and recommendatory *purely declaratory* statement that lacks preclusive or binding effect. Therefore, the recognition of a "State of Palestine" for the limited purpose of according it a non-member status within the United Nations does not provide a sound *legal* basis for accession to the Rome Statute under Article 125 or as a basis for the exercise of jurisdiction under Article 12.

[13] *See* Badinter Commission opinions.

[14] *Prosecutor v. Slobondan Milosevic*, Case No. IT-02-54-T, Decision on Motion for Judgement of Acquittal, ¶86 (Int'l Crim. Trib. for the Former Yugoslavia, 16 June 2004).

to leave the status and scope of the entire territory unresolved, with borders left as a permanent status issue for an agreed-upon settlement at a later date. The issue of Palestinian statehood and the extent of the territory of such a state is a *political* dispute that Israel and the PLO expressly agreed to resolve through a *political* mechanism – negotiations. It is not appropriate for this Court, established to adjudicate individual criminal liability under highly limited and specific circumstances, to substitute its judgment for that of parties to a civil peace process. To do so would constitute an improper exercise of the Court's jurisdiction in violation of the Rome Statute.

9. From a *legal* perspective, no Palestinian entity holds, or has ever held, sovereign title over the Gaza Strip, Judea and Samaria, or eastern Jerusalem. This territory has always been under the control of other political entities. Judea and Samaria, for example, were occupied by Jordan from 1948 until June 1967, as a result of Jordan waging a war of aggression against Israel, following the latter's declaration of independence in May 1948 and the departure of British forces. The General Armistice Agreement between the Hashemite Kingdom of Jordan and Israel of 3 April 1949, U.N. Doc. S/1302, expressly stated at Art. VI(9) that "[t]he Armistice Demarcation Lines…are agreed upon by the Parties *without prejudice to future territorial settlements or boundary lines or to claims of either Party relating thereto"*. (Emphasis added). In 1967, when an armed conflict again erupted between Israel and its neighbors (including Jordan), Judea and Samaria did not have a government that could claim to represent their interests as their sovereign. Neither did the Gaza Strip.[15] During the period of Jordanian occupation (1948-1967), the annexation of this territory by Jordan and claims of sovereignty were not generally recognized by the international community.[16] More consequentially, no *Palestinian* state has ever held sovereign title to that territory.[17]

[15] The Gaza strip was, effectively, directly administered by an Egyptian military governor from 1949, when it was demarcated in an Egyptian-Israeli armistice agreement, to 1967 when Israel gained physical control of the territory.

[16] Prior to the Jordanian occupation in 1949, Judea and Samaria were governed by Great Britain pursuant to the Mandate for Palestine adopted by the League of Nations on 24 July 1922. The area had been officially under military government since the British occupied it from the Ottoman Empire during World War I. The Mandate provided for the administration of the area by the British with the goal of **establishing the Jewish national home** west of the Jordan River, as stated in the 1917 Balfour Declaration.

[17] To the contrary, it could be argued that the Badinter Commission's expansive interpretation of *uti possidetis* (which provides, in essence, that an emerging state presumptively inherits its pre-independence administrative

B. The "State of Palestine" does not fulfill the Montevideo Criteria because it lacks a discernable population.

10. The second Montevideo Criteria is inherently connected to the first; the absence of a defined territory, coupled with the express understanding that the creation of a state and the determination of its territory could only occur through negotiation contingent upon the agreement of both Israel and the PLO, means that there is no discernible permanent population over which a purported "State of Palestine" has control.[18] As with the first Montevideo Criteria, the existence of a permanent population is a *political* issue that Israel and the PLO expressly agreed to resolve through a *political* mechanism – negotiations. It is not appropriate for this criminal Court to substitute its judgment for that of the parties.

C. The "State of Palestine" does not fulfill the Montevideo Criteria because it lacks a government in total control of its territory.

11. The third Montevideo Criteria, a government in total control of its territory, is not met by the so-called "State of Palestine" for several reasons. First and foremost, there simply is no single government in total control of its purported territory, as the Prosecutor herself admits.[19]

12. While certain areas of Judea and Samaria are, pursuant to the provisions of the Oslo Accords, subject to the limited administration of the Fatah-controlled Palestinian Authority ("PA"), since 2007, the Gaza Strip has been under the effective control of Hamas.

13. On 8 October 1997, Hamas was designated as a Foreign Terrorist Organization by the United States Department of State under section 219 of the Immigration and Nationality Act. This designation prohibits the provision of "material support or resources" to Hamas. Hamas is designated as a terrorist organization by, *inter alia*,

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boundaries), dictates that the State of Israel inherit the boundaries of the Mandate of Palestine as they existed in May 1948.

[18] Fixing and adjusting borders (whether by 'land swaps' or by other means) necessarily suggests a Palestinian population that is neither fixed nor permanent. The suggestion that the "Palestinian" population should be based purely on Arab ethnicity, to the exclusion of all Jews (including those who hold legitimate titles to land in the claimed "State of Palestine" and whose families were forced by the Jordanians/Egyptians armies to leave the area in 1948), is entirely inconceivable. Such a State, predicated on racist principles, would in and of itself be morally offensive and contradictory to the goals of the international community. Yet that is precisely the state that the Palestinian Authority clearly intends to form: one that is racially cleansed of all Jews. *See*, *e.g.,* https://palwatch.org/page/15137. That is the (purported) state that the Prosecutor's Request endorses.

[19] Prosecutor's Request, para. 5.

countries as diverse as the United States of America, Canada, Japan, Paraguay and Israel. The European Union has also designated Hamas (in addition to several Palestinian groups) as a terrorist organization.[20] A terrorist organization lacks the authority to 'govern' anyone. Accordingly, it is inconceivable that the International *Criminal* Court would legitimize terrorism by affording Hamas any form of recognition, even implicit, as a government or an entity with the moral or legal authority to govern. Legitimizing Hamas would seriously compromise and prejudice the ICC's own legitimacy and credibility.

14. As set forth more fully below, the PA wields *limited* control over an area that comprises less that 40% of Judea and Samaria, subject to the outcome of the permanent status negotiations, as agreed in the 1995 Interim Agreement (Oslo II). In the remaining area of Judea and Samaria, the PA has no territorial jurisdiction whatsoever. Stated differently, there is no sovereign government in total control of its territory.

15. As agreed by the PLO and Israel in the Oslo Accords, neither the PA nor Hamas hold any control or jurisdiction whatsoever over Jerusalem.

16. Sovereignty "is supreme authority, which on the international plane means not legal authority over all other states but rather legal authority which is not in law dependent on any other earthly authority".[21] The bilateral agreements that established the PA expressly state that Israel maintains all residual powers and responsibilities not delegated to the PA. Therefore, the PA's authority to govern is dependent on and derivative – *not* co-equal – to Israel's. Consequently, the PA cannot claim to be a sovereign government in total control of its territory, and is subject to the outcome of the permanent status negotiations which have yet to be concluded.[22]

17. Moreover, the PA's administrative powers fall far short of sovereign authority. The Interim Agreement expressly provided that "Israel shall continue to carry the responsibility for defense against external threats…as well as the responsibility for

[20] *See* https://eur-lex.europa.eu/legal-content/en/TXT/HTML/?uri=CELEX:32019D1341&from=en.
[21] Robert Jennings and Arthur Watts, *Oppenheimer's International Law: Peace*, Vol. 1, pg. 122 (9th ed. 2009).
[22] In fact, the PA acknowledges that it is not a sovereign government in total control of its territory: "[t]he administrative powers accorded to the PA by the Interim Agreements are much more limited than the powers of a government." Memorandum entitled "Implications of Change in de facto Control in Gaza" from the Negotiations Support Unit to Dr. Saeb Erekat (19 June 2007), available at: http://www.ajtransparency.com/en/projects/thepalestinepapers/20121822587187346.html.

overall security of Israelis and Settlements…and will have all powers to take the steps necessary to meet this responsibility".[23] In accordance with the Interim Agreement which, it bears repeating, was *agreed to* by the PLO, the PA lacks full control over many of the other key attributes of sovereignty, such as criminal jurisdiction, tax collection, airspace, and even jurisdiction over Israelis. Clearly, the Interim Agreement did not contemplate the immediate creation of a sovereign Palestinian government in total control of its territory. Palestinian statehood was – and remains – a political aspiration, not a legal fact, and remains subject to a bilateral negotiation process to determine the permanent status of the territory.

D. The "State of Palestine" does not fulfill the Montevideo Criteria because it lacks the capacity to engage in foreign relations.

18. The "State of Palestine" also fails to meet the fourth Montevideo Criteria, the capacity to engage in foreign relations, since it lacks all other elements of statehood that would allow it to do so. The lack of a unified government exerting control over the entirety of its claimed territory prevents the reliable or effective exercise of foreign relations. The net result of the Interim Agreement was the creation of a PA with limited administrative powers, not the creation of a sovereign state with the capacity to engage in foreign relations.[24]

E. Conclusion

19. The so-called "State of Palestine" does not meet the Montevideo Criteria for definition of a "State" such as to render the exercise of jurisdiction appropriate, especially in light of the explicit acknowledgment by the parties to the Oslo Accords that the permanent status of the territories – whether as a sovereign state or part of a federation or confederation – was an issue that the PLO agreed to negotiate at a later date, in the permanent status negotiations, which have not yet been concluded.

20. A State that does not exist is not capable of delegating sovereign jurisdictional competencies (since it does not possess them) to the ICC. The Prosecutor's attempt to

[23] Interim Agreement, Art. XII(1).

[24] Non-governmental organizations, transnational agencies and national administrative bodies can all be said to engage in some form of 'foreign relations'. However, without a sovereign government to give meaning to and effectuate the consequences of those foreign relations, those relations carry no weight. In other words, the exercise of foreign relations is meaningless outside the context of a sovereign state. Hamas, for example, can agree to purchase weapons from Iran. That agreement is not an exercise in foreign relations. It is an exercise in terrorism.

exercise jurisdiction in this manner is a violation of States' rights of sovereignty. See Section III, *infra*.

21. Moreover, the Court's acceptance of jurisdiction would improperly infringe on the parties' express agreement to politically negotiate the contours and conditions precedent necessary for Palestine to fulfill the Montevideo Criteria and become a sovereign state. The issue of Palestinian statehood is reserved to the parties to that negotiation, and is therefore a nonjusticiable political question.

II. General Assembly Resolutions Are Not Dispositive Of The Law Or The Facts In This Case

22. The Prosecutor explicitly acknowledges that "Palestine does not have full control over the Occupied Palestinian Territory"; the "West Bank and Gaza are occupied and East Jerusalem has been annexed by Israel"; and the "Palestinian Authority does not govern Gaza".[25] She further admits that "the territory of Palestine appears to be in dispute between those States most directly concerned - Israel and Palestine" and that "the question of Palestine's Statehood under international law does not appear to have been definitely resolved".[26]

23. Yet, strangely, the Prosecutor has dismissed these fatal legal and factual obstacles to the exercise of jurisdiction. Instead, determined to wade into the most legally and factually complex and intractable political dispute of the past 100 years, the Prosecutor asks the Court to "rule on jurisdiction" (or, more correctly, recognise that the ICC may exercise jurisdiction) in the "Situation of Palestine". Specifically, the Prosecutor seeks a ruling under article 19(3) "to confirm that the scope of the Court's territorial jurisdiction in Palestine comprises the West Bank, including East Jerusalem, and Gaza."[27] She states it is "necessary" that her investigation rest "on the soundest legal foundation".[28]

24. Contrary to her assertion, however, the Prosecutor has not built her case on a strong, unassailable legal or factual foundation. Rather, she has decided to proceed on an invented theory lacking any legal precedent. Namely, that the Court should disregard the plain meaning of the term "State" under international law and in the Rome Statute,

[25] Prosecutor's Request at para. 5.
[26] *Id.* at paras. 35, 5.
[27] *Id.* at para. 18.
[28] *Id.* at para. 20.

ignore the fact that "Palestine" does not meet the Montevideo Criteria, and instead exercise jurisdiction in the "Situation of Palestine" because the "international community has recognised the right of the Palestinian people to self-determination and to an independent and sovereign State."[29]

25. In place of sound and binding legal instruments, the Prosecutor has chosen to advance this fringe theory on the basis of highly selective, misleading, and/or one-sided sources. These include non-binding, politically-generated General Assembly resolutions that have absolutely no legal basis and represent nothing more than the political consensus of the automatic majority of states voting for them.

26. The Prosecutor explains that in crafting her theory, she "has relied on the views of the international community as expressed primarily by the UN General Assembly". She claims that these "pronouncements are significant because the General Assembly bears 'permanent responsibility' for the resolution of the question of Palestine[30] and is the UN's chief deliberative body where all member States have an equal vote".[31] The Prosecutor relies on these resolutions to support many of her legal and factual propositions including: the existence of a Palestinian state; the current territorial scope of that state; the legal status of that territory including whether it is occupied; the authorization of Rome Statute membership; and the nature and extent of legal injury suffered. This reliance is wholly misplaced. Nothing in these resolutions supports the Prosecutor's novel legal proposition that the purported injury to self-determination rights can substitute for the threshold requirement of the existence of a State, mandated by the Rome Statute.

A. General Assembly resolutions are not binding law, nor do they establish "matters of fact".

[29] *Id.*, at para. 219.
[30] The Prosecutor is misleading on this point. The resolutions cited "[r]eaffirm[] the permanent responsibility of the United Nations with regard to the question of Palestine". They do not say that the General Assembly specifically is entrusted with this responsibility. Nevertheless, whether the General Assembly proclaims itself as having such responsibility is legally irrelevant. Even if the General Assembly did have "permanent responsibility", such status has no bearing as to whether the information contained in the resolutions the Prosecutor relies upon is accurate as a legal or factual matter. Therefore, each resolution and the contents therein must be evaluated individually. It is also important to note that several of the resolutions cited by the Prosecutor do not reflect considered wording or renewed assessment of facts on the ground. Instead, they appear to be cut and pasted from previous resolutions.
[31] Prosecutor's Request at para. 11 (emphasis added).

27. The UN Charter makes clear that the General Assembly "may make *recommendations*" to UN Member States or to the Security Council.[32] Apart from budgetary matters and establishing subsidiary organs, the General Assembly "has no legal power that affects the outside world. When it makes recommendations, these are indeed recommendations and not legally binding decisions".[33] As international Jurist Stephen Schwebel has commented, General Assembly resolutions are not "binding on the States Members of the United Nations or binding in international law at large. It could hardly be otherwise".[34] He adds that "not a phrase of the Charter suggests that [the General Assembly] is empowered to enact or alter international law".[35]

28. Nevertheless, the Prosecutor improperly asserts unproven legal claims as fact on the basis of political statements made by the General Assembly.

29. The General Assembly frequently employs legal rhetoric in its resolutions, but this does not turn such language into uncontroverted fact. For instance, while the General Assembly routinely refers to territory located across the 1949 Armistice lines as "Occupied" by Israel, this is merely a moniker and does not reflect specific findings of any binding legal process or judicial body. By the same token, the term "Palestinian territory" is no less a moniker inasmuch as there has never been any binding or authoritative international declaration, resolution, agreement or determination as to the fact that the territory is Palestinian. The fact that the expression "occupied Palestinian territory" has become political *lingua franca* in General Assembly resolutions and in statements by international personalities, including those of the Prosecutor herself, does not render it to be an authoritative or accepted and binding legal term and, as such, should not be a factor in the Court's considerations.

30. In another example, the Prosecutor claims that Resolution 67/19 "reaffirm[ed] the right of the Palestinian people to self-determination and to independence in their State

[32] UN Charter Chapter IV. *See* https://www.un.org/en/sections/un-charter/un-charter-full-text/. (Emphasis added).
[33] Regional Academy of the UN, "Revitalization of the General Assembly by reforming its procedures", 2016 at 6. http://www.ra-un.org/uploads/4/7/5/4/47544571/revitalizing_the_un_general_assembly_final_draft.pdf
[34] Stephen M. Schwebel, "The Effect of Resolutions of the U.N. General Assembly on Customary International Law", 73 Am. J. Int'l Law 301 (1979). Schwebel also rejects the notion praised by the Prosecutor that General Assembly resolutions have more force because of "one country one vote". He, in fact, explains that the Assembly is actually "unrepresentative" because so many of the represented governments "are themselves not representative of their peoples".
[35] *Id.*

of Palestine on the Palestinian territory occupied since 1967".[36] This resolution is aspirational in nature and did not grant Palestinians statehood status, nor could it as the General Assembly does not have the power to establish states. In fact, many of the Member states supporting the resolution clarified that their vote *did not constitute the recognition* of an existing Palestinian state.[37] Notably, **Italy said its vote was explicitly conditioned on Palestinian promises that "Palestine" would not use such a vote to join the ICC.**[38] Since the Court is now forced to consider this case, such Palestinian promises were clearly hollow.

31. The Prosecutor cites to Resolution 43/177 as "[a]ffirming the need to enable the Palestinian people to exercise their sovereignty over their territory occupied since 1967" based on the supposed 31 July 1988 Jordanian relinquishing "of its claim to the West Bank" and its recognizing "the right of the Palestinian people to secede from the territory and to create an independent State".[39] Nevertheless, the Prosecutor herself openly acknowledges that Jordan "occupied the West Bank, including East Jerusalem from the 1949 Armistice Agreements until the 1967 war".[40] Under the Prosecutor's own theory, therefore, Jordan had no sovereign rights that it was able to assign to the PLO.[41] She does not explain why Arab occupation of Judea and Samaria and eastern Jerusalem conferred Jordan with assignable sovereign rights over the territory, while according to her, the exact same legal status confers no rights to Israel.

32. The Prosecutor also misleadingly cites several resolutions that include a reference to the "need for respect for and preservation of the territorial unity, contiguity and integrity of all the Occupied Palestinian Territory, including East Jerusalem".[42] These

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[36] Prosecutor's Request, para 12.
[37] *See, e.g.,* statements of Denmark, Switzerland, Finland, and Belgium, available at: https://unispal.un.org/DPA/DPR/unispal.nsf/0/C05528251EA6B4BD85257AE5005271B0.
[38] "We took that decision in the light of the information we received from President Abbas on the constructive approach he intends to take after this vote. I refer in particular to his readiness to resume direct negotiations without preconditions and to refrain from seeking membership in other specialized agencies in the current circumstances, or pursuing the possibility of the jurisdiction of the International Criminal Court. With regard to the latter, Italy would not accept instrumental actions intended to question Israel's inalienable right to defend itself." https://unispal.un.org/DPA/DPR/unispal.nsf/0/C05528251EA6B4BD85257AE5005271B0.
[39] *See* Prosecutor's Request, at paras. 60-61
[40] *Id.* at para. 60.
[41] Shmuel Berkowitz, "The Status of Jerusalem in International and Israeli Law," Jerusalem Center for Public Affairs, 2018, at 45, 50, available at https://jcpa.org/pdf/berkowitz_jerusalem_web_covers.pdf.
[42] Prosecutor's Request, at para. 12, n19. The relevant paragraph for the cited resolutions states: "stresses the need for the removal of checkpoints and other obstructions to the movement of persons and goods throughout

statements were *not* made in the context of defining the existing territory of a Palestinian state, as the Prosecutor implies. Rather, this phrase is used in the context of removing obstacles to the movement of goods and people for humanitarian purposes. In any event, on its face, this phrase is nonsensical as Gaza is located many dozens of kilometers from Judea and Samaria and eastern Jerusalem, and has never been "contiguous" with these areas at any point in history.

33. Similarly, the Prosecutor cites Resolution 3092 (and Security Council Resolution 446) referring to the applicability of Geneva Conventions in "Arab territories occupied by Israel since 1967". Yet, while these resolutions express an opinion on the applicability of the Geneva Conventions in certain areas, they say nothing about the territorial scope of an extant Palestinian state.[43]

34. Above all, the resolutions cited by the Prosecutor consistently and explicitly recognize that the two sides need to negotiate final status issues, including borders.[44] In other words, the scope of such territory has yet to be defined.

B. General Assembly resolutions are the product of a manifestly political and institutionally biased body.

35. The Prosecutor's claims that the Court should accept General Assembly resolutions as a "matter of fact" because they reflect the "views of the international community" (a term without legal relevance and undefined by the Prosecutor).[45] Contrary to the Prosecutor's assertion, General Assembly resolutions are the product of a manifestly

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the Occupied Palestinian Territory, including East Jerusalem, and the need for respect and preservation of the territorial unity, contiguity and integrity of all of the Occupied Palestinian Territory, including East Jerusalem".

[43] Moreover, in Resolution 446, the US, UK, and Norway abstained, http://unscr.com/en/resolutions/446, while the vote for Resolution 3092 was 105-4-20 (yes-no-abstain).

[44] For example, Resolution 73/19 stresses "the urgent need" to "restore a political horizon for advancing and accelerating meaningful negotiations aimed at the achievement of a peace agreement"; Resolution 71/23 "achieving a just, lasting and comprehensive settlement . . . is imperative"; "promote meaningful negotiations"; Resolution 43/177 affirms "the urgent need to achieve a just and comprehensive settlement in the Middle East". Even Resolution 67/19, often cited by the Prosecutor, calls for "the resumption and acceleration of negotiations…that resolve[] all outstanding core issues," implicitly recognizing that a "State of Palestine" does not exist, and can only exist as part of "negotiations within the Middle East peace process".

[45] The Prosecutor extensively refers to the term "international community" but does not define its meaning or legal relevance. Because she bases a significant part of her brief on resolutions and publications of the General Assembly and its subsidiary bodies, she must not consider Israel and the United States, among others, to be part of the "international community", as these countries consistently reject the one-sided resolutions issued by the General Assembly. In addition, many other members of the "international community" manifestly disagree with the Prosecutor and her effort to open an investigation in this situation, including Australia, Uganda, Germany, Hungary, Brazil, Austria, the Czech Republic, and Canada.

political body exhibiting long-standing institutional biases. In relying on these statements, the Prosecutor ignores the following realities:

36. Since the 1960s, the General Assembly has been heavily dominated by three overlapping blocs of countries - the Organization for Islamic Cooperation ("OIC", 56 countries),[46] the Non-Aligned Movement ("NAM"), and the Group of 77 ("G-77", originally 77, today, a group of 135 developing countries).[47] During the Cold War, the NAM grew to more than 100 countries and could "guarantee" the success or failure of any General Assembly resolution.[48] By 1971, the Group of 77 constituted two-thirds of the Assembly's membership.[49] As a result, this group constitutes an automatic majority and can pass any vote at the General Assembly.[50] In addition, during the Cold War, the Soviet Union also exercised considerable influence in driving the agenda and debate at the General Assembly.[51] Members of the Soviet bloc pressured the other political blocs such as the NAM and the Group of 77, while also disrupting or obstructing consensus positions within regional groups.[52] This influence impacted the number and wording of politically biased resolutions adopted by this UN body.[53]

37. The debate process at the General Assembly is often contentious and politically divided. The highest percentage of contested votes involves issues related to the Middle East.[54] Votes on these resolutions frequently have many "no" votes and abstentions.

38. Contrary to the Prosecutor's assertion, just because a resolution was adopted does not mean it is indicative of international will - just that the vote was unable to overcome

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[46] A majority of the members of the OIC do not recognize the existence of Israel or have severed diplomatic relations. It is ironic that these countries, half of whom are not members of the Court, and often use the UN as a cover for their own violations of human rights and humanitarian law, presume to instruct the Court to accept jurisdiction in this case. In addition, according to the NGO Freedom House, a majority of the countries in these blocs are classified as "not free" or only "partly free". https://freedomhouse.org/explore-the-map?type=fiw&year=2020&status[not-free]=not-free&status[partly-free]=partly-free&status[free]=free. It is unclear why the predominant views of such countries should carry more weight than other countries simply because they are more numerous.

[47] https://unchronicle.un.org/article/voice-majority-group-77s-role-un-general-assembly

[48] Report to Congress on Voting Practices in the United Nations US Department of State 1985 at 8.

[49] The Oxford Handbook of International Organizations Edited by Jacob Katz Cogan, Ian Hurd, and Ian Johnstone Oxford 2016.

[50] Daniel Patrick Moynihan, "The United States in Opposition," *Commentary Magazine*, March 1975; Daniel Patrick Moynihan, *A Dangerous Place* (Berkley 1978).

[51] Report to Congress on Voting Practices in the United Nations US Department of State 1985, pg. 8.

[52] *Id.* at 9.

[53] Moynihan, *A Dangerous Place*, *supra*.

[54] See, Cogan, et. al., *Handbook of International Organizations*.

the dominance of the Soviet bloc, the NAM, the G-77, and the OIC.[55] In fact, "explicit criticism of a country by name" does not reflect any legal or factual truth but rather reflects the "act of powerful blocs against countries unable to defend themselves in the UN context".[56]

39. In addition, just because a country votes for a particular resolution does not mean it agrees with every aspect of the resolution or that other considerations motivated its vote. Votes may be acquired through "horse trading".[57] For instance, during the debate on Resolution 67/19, many of the countries did not believe "Palestine" legally constituted a state, but voted for the resolution in order to show their support for continued negotiations with Israel on the permanent status and settlement of this dispute.[58]

40. The Prosecutor appears to be advancing the proposition that jurisdiction should be established in this case because some members of the automatic majority and politically-biased General Assembly would like that to be so. But this is not a legal argument.[59] For instance, if a vast majority of the General Assembly voted that the Earth was flat, such a vote would not make it true as a *matter of fact*,[60] or as a matter of law. So, too, a resolution expressing frustration regarding the terms of or compliance with a treaty would not invalidate that agreement. In other words, majority

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[55] Many of the resolutions cited by the Prosecutor were extremely divided. For example, Resolution 2535 was 48 in favor, 22 no, and 47 abstentions. Resolution 3237 was 95 in favor, 17 against, 19 abstentions, and 7 absences. Resolution 3236 was even more divided with 89 yes, 8 no, 37 abstain, and 4 absent. https://www.un.org/unispal/document/auto-insert-198975/. The no votes and abstentions represented a broad cross-section of geographically diverse countries, large and small, including Austria, Australia, Bolivia, Botswana, Brazil, Burma, Chad, Colombia, the Gambia, Uganda, the US, and Venezuela.
See https://digitallibrary.un.org/record/657494?ln=en.

[56] Report to Congress on Voting Practices in the United Nations US Department of State 1985, at 9.

[57] Report to Congress on Voting Practices in the United Nations US Department of State 1985 at 20.
See also, Daniel Patrick Moynihan, A Dangerous Place (Berkley 1978); Regional Academy on the United Nations, Revitalizing the General Assembly by Reforming its Procedures," 2016 ("One representative makes the remark that certain topics may be 'pet projects' for a limited number of countries. Other countries do not try to bar the implementation of resolutions on these topics, but "may not feel attached to their implementation."),http://www.ra-un.org/uploads/4/7/5/4/47544571/revitalizing_the_un_general_assembly_final_draft.pdf.

[58] https://unispal.un.org/UNISPAL.NSF/0/19862D03C564FA2C85257ACB004EE69B.

[59] As Judge Schewebel has noted "if the principle of the sovereign equality of states has meaning, it must mean that the minority is as entitled publicly to state and to press for its views as the fashionable majority". 73 AJIL at 309.

[60] As former Israeli ambassador to the UN, Abba Eban, famously quipped about politicized UNGA voting, "If Algeria introduced a resolution declaring that the earth was flat and that Israel had flattened it, it would pass by a vote of 164 to 13 with 26 abstentions".

views as expressed in General Assembly resolutions (or other UN resolutions) are irrelevant to establishing facts as a legal matter.

41. It is also impossible to assess the validity of General Assembly resolutions without mentioning the body's obsession with, and hostility and bias towards, Israel.[61] Any resolution relating to Israel passed by the General Assembly must therefore be viewed through this lens. Since Israel's admission to the UN, the OIC and Arab League, working in conjunction with the Soviet Union, promoted diplomatic boycotts of Israel in UN frameworks;[62] in the 1970s and again in 1982, they tried to have Israel replaced by the PLO,[63] and until 2000, Israel was barred from being a member of any regional group - the primary way in which business is conducted at the General Assembly.[64] Many of the General Assembly debates underpinning the resolutions relied upon by the Prosecutor are poisoned by antisemitic bile.[65] By erasing this essential history, either by design or lack of knowledge, the Prosecutor has demonstrated the weakness of basing her case on General Assembly resolutions.

42. The General Assembly has issued more resolutions targeting Israel than the rest of the world combined.[66] For example, between 1973-78, the Assembly passed more than 80

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[61] As former US Ambassador Jeanne Kirkpatrick has noted, the UN campaign against Israel is "comprehensive, intense, incessant and vicious". Juliana Geran Pilon, "The United Nations' Campaign Against Israel," Heritage Foundation, June 1983, at 2.

[62] In addition, as noted by legal scholar Robert Barnidge, even after 1967, this attitude did not change: "[i]t was not a question of the Arab world being willing to accommodate a Jewish State with territorial adjustments; the Arabs remained opposed, as they always had been to a Jewish State of any kind." Robert P. Barnidge, Jr., *Self Determination, Statehood, and the Law of Negotiation: The Case of Palestine.* (Oxford: Hart Publishing 2016) at 69. The NAM was similarly hostile, In October 1964, Egyptian President Nassar hosted the annual NAM summit conference and secured a declaration branding Jewish self-determination as a form of "racism". *Id.* at 66. By 1973, the NAM Conference went so far as calling for the eradication of Zionism itself, called for a full boycott of Israel, and demanded the blocking of Jewish immigration to anywhere in the territory of Mandated Palestine west of the Jordan River. *Id.* at 78.

[63] Moynihan, at 172; See also, Report to Congress on Voting Practices in the United Nations US Department of State 1986, at 39, (Kuwait tried to block Israel's credentials to the General Assembly), available at https://books.google.co.il/books?id=cTxvF8OhWmUC&pg=SA111-PA34&lpg=SA111-PA34&dq=report+to+congress+on+voting+practices+1984&source=bl&ots=YPsdWFpJoX&sig=ACfU3U3IKBcojWq7-yK5BS5AIuiFgo9qeA&hl=en&sa=X&ved=2ahUKEwjN3-bc1pToAhVpRBUIHQEIAJ4Q6AEwBHoECAoQAQ#v=onepage&q=guarantee&f=false.

[64] Opinion of Sir Robert Jennings, QC 4 November 1999, available at https://mfa.gov.il/MFA/InternatlOrgs/Issues/Pages/Opinion%20regarding%20the%20Exclusion%20of%20Israel%20from%20the.aspx; https://books.google.co.il/books/about/The_Treatment_of_Israel_by_the_United_Na.html?id=xAauJ84AalAC&redir_esc=y.

[65] At a December 1980 debate for instance, Jordan's ambassador "accused the Jewish 'people's cabal, which controls and manipulates and exploits the rest of humanity by controlling the money and wealth of the world.'" https://www.heritage.org/report/the-united-nations-campaign-against-israel.

[66] Mitchell Bard, "The UN relationship with Israel," Jewish Virtual Library, available at:

anti-Israel resolutions.[67] In 1982, this number reached 44 alone.[68] This pattern continues to this day. In 2019, there were 18 resolutions against Israel, 2 against Russia, and 1 each against the US, North Korea, Iran, Myanmar, and Syria.[69] As noted by a US official, "each year the UN General Assembly adopts a number of resolutions related to the situation in the Middle East. These perennial resolutions – some of whose very titles are evidence of their lack of balance – do nothing to advance the search for a just, lasting, and comprehensive peace in the region".[70]

43. In one notable case, the Prosecutor favorably relies on Resolution 3236 as an example of the "views of the international community". She does not mention that following its passage, Yassar Arafat reportedly described to a Lebanese newspaper the genocidal intent of this resolution, "compris[ing] the liquidation of Zionist existence".[71] She also ignores the fact that countries like the UK rejected Resolution 3236, because, by granting observer status to the PLO, responsible for shocking acts of terrorism, the resolution "brings into question the nature of the UN as it has hitherto been accepted".[72] If Arafat's sentiments reflect the "views of the international community", besides common decency, these sentiments are completely at odds with the object and purpose of the UN Charter, and of course, the Rome Statute.

44. Furthermore, the Prosecutor selectively chooses some lines from a few General Assembly resolutions to place exclusive blame on Israel for the lack of Palestinian sovereignty. These resolutions erase Jewish self-determination and other legal rights relating to the territory; they exclude the history of Arab and Palestinian rejectionism in negotiating a solution to the conflict; and they routinely and deliberately ignore Palestinian terrorism (including airline hijackings, the 1972 Munich Olympics massacre, and suicide bombings) and other factors as to why the conflict persists. The

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https://www.jewishvirtuallibrary.org/the-u-n-israel-relationship.

[67] Juliana Geran Pilon, "The United Nations' Campaign Against Israel," Heritage Foundation, June 1983, at 3-4.

[68] *Id*.

[69] Statistics provided by UN Watch, https://unwatch.org/2019-un-general-assembly-resolutions-singling-out-israel-texts-votes-analysis/.

[70] C. David Welch, Testimony Before the House International Relations Committee, July 1999, available at https://1997-2001.state.gov/policy_remarks/1999/990714_welch_un-israel.html.

[71] Juliana Geran Pilon, "The United Nations' Campaign Against Israel," Heritage Foundation, June 1983, at 5. To this day, the PA relies on 3236 as justification for terror against Israel : https://palwatch.org/page/15361; https://palwatch.org/page/14986; https://palwatch.org/page/14859; https://palwatch.org/page/13842; https://palwatch.org/home/search?q=3236.

[72] Remarks of UK representative, 22 November 1974, A/PV.2296, available at https://unispal.un.org/DPA/DPR/unispal.nsf/0/7219F7FE733B856485256236005A4700.

Prosecutor also fails to mention that many of these resolutions insist on negotiations between the parties to determine borders of two states. These facts are missing from the Prosecutor's brief, yet are directly relevant to the validity of her argument.

C. The Prosecutor's reliance upon resolutions and publications of other UN bodies is misplaced.

45. Reliance by the Prosecutor on the resolutions and publications of other UN bodies is similarly flawed. For example, under the UN Charter, only Security Council resolutions adopted under Chapter VII are legally binding.[73] Regardless, the Prosecutor **cites no such resolutions** to support her fringe theory for jurisdiction. In addition, the resolutions she relies upon do not support her contentions. For instance, she relies on Resolutions 298, 242, 338, and 399 to support the claim that Jerusalem is part of Palestinian territory, but none of these resolutions claim that Jerusalem is the territory of a "State of Palestine", nor that Jerusalem was ever under Palestinian sovereignty, and none of them were adopted under Chapter VII of the UN Charter.

46. Reliance on resolutions and publications of the Human Rights Council, a subsidiary body of the General Assembly, is even more questionable. Obsession and politicization directed towards Israel destroyed the Commission on Human Rights, the Council's predecessor entity, and is even more pronounced with the Council.[74] Israel is still the only country with its own permanent agenda item.[75] During the first 9 years of the HRC's existence, the Council passed 61 resolutions against Israel versus 56 against the rest of the world combined.[76] During that same period, 7 out of 17 Special

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[73] See, e.g. Chapter VII of the UN Charter; Malcolm N. Shaw, *International Law*, (Cambridge 2d ed. 1986) at 557.

[74] In 2005, Annan noted "We have reached a point at which the commission's declining credibility has cast a shadow on the reputation of the United Nations system as a whole . . . and undermined by the politicisation of its sessions and the selectivity of its work."
https://webcache.googleusercontent.com/search?q=cache:Z15Xga5du0QJ:https://www.scotsman.com/news/world/annan-admits-un-is-failing-to-prevent-human-rights-abuses-1-706943+&cd=8&hl=en&ct=clnk&gl=il

[75] "Mr. Ban voiced disappointment at the Council decision to single out Israel as the only specific regional item on its agenda, "given the range and scope of allegations of human rights violations throughout the world." https://unwatch.org/report-in-9-years-existence-unhrc-condemned-israel-more-times-than-rest-of-world-combined/. Koffi Annan remarked "There are surely other situations, beside the one in the Middle East, which would merit scrutiny at a special session,"https://www.worldjewishcongress.org/en/news/annan-chides-un-human-rights-council-over-israel-focus

[76] UN Watch, https://unwatch.org/report-in-9-years-existence-unhrc-condemned-israel-more-times-than-rest-of-world-combined/

Sessions were directed at Israel. Syria was next at 4.[77] European Union countries refuse to take part in Item 7 debates and the United States left the Council in 2018 over the extreme anti-Israel bias.[78] In 2014, human rights expert Christine Cerna remarked, "impartiality is not a requirement sought by the Council for the appointment of experts when it comes to Israel".[79]

47. In her one-sided historical narrative of the Arab-Israeli conflict, the Prosecutor relies primarily (62 citations) on an anonymous report[80] published by the Committee on the Exercise of the Inalienable Rights of the Palestinian People[81] ("CEIRPP"). Professor Julius Stone noted multiple distortions and outright lies in this publication, and remarked that it was "highly improper" for CEIRPP "to commission, publish, and disseminate, as views of the organization itself, partisan theorizing in support of one side."[82] The Prosecutor also neglects to inform that CEIRPP (Resolution 3376) was established alongside the notorious "Zionism is racism" Resolution 3379 (adopted in 1975 but repealed in 1991).[83] Due to the politicized nature of the Committee and its founding concurrent with the auspices of an antisemitic resolution, many countries

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[77] https://unwatch.org/report-in-9-years-existence-unhrc-condemned-israel-more-times-than-rest-of-world-combined/

[78] https://www.jpost.com/Israel-News/Politics-And-Diplomacy/Western-nations-boycott-UNHRCs-Agenda-Item-7-debate-in-which-countries-discuss-Israel-457907. In 2019, Austria, Australia, Denmark and the UK voted no to all Council resolutions on Israel to protest the extreme anti-Israel bias. https://www.jpost.com/Israel-News/Denmark-Austria-UK-Australia-to-oppose-anti-Israel-resolutions-at-UNHRC-584215. The UN Special Rapporteur on freedom of religion and belief has also remarked that parts of the UN are antisemitic, singling out Item 7 as a "problem" and that this antisemitism undermines work at the UN as a whole. https://www.uscirf.gov/uscirf-events/uscirf-hearing-global-efforts-counter-anti-semitism (beginning at 30:10).

[79] Cerna's full comment: "In my view Israel has a unique status in the UN Human Rights Council. Impartiality is not a requirement sought by the Council for the appointment of experts when it comes to Israel. I was selected as the consensus candidate of the Consultative Committee for the post of UN Special Rapporteur on the Occupied Palestinian Territories earlier this year, but the Organization of Islamic Cooperation and the League of Arab States both officially opposed me, which killed my candidacy. They opposed me for 'lack of expertise,' although my entire professional life has been involved with human rights, but because I had never said anything pro-Palestinian and consequently was not known to be 'partial' enough to win their support. The candidate that they officially supported was considered to be partial in their favor. No other special procedures mandate is similarly biased. At the end of the day, neither I nor the OIC candidate was appointed, but the Indonesian diplomat, Makarim Wibisono, who was appointed, was considered sufficiently 'pro-Palestinian' to be acceptable to the OIC. Consequently, I don't think Bill Schabas could have been selected to lead the 'independent' inquiry if he hadn't made the comments he had made about Netanyahu." https://www.ejiltalk.org/after-gaza-2014-schabas/

[80] Origins and Evolution of the Palestine Problem. No authors are listed, nor the names of the individuals involved in drafting the publication.

[81] Juliana Geran Pilon, "The United Nations' Campaign Against Israel," Heritage Foundation, June 1983, at 5.

[82] Julius Stone, *Israel and Palestine: Assault on the Law of Nations* (Johns Hopkins Univ. Press 1981) at 6.

[83] Although the resolution was repealed, CEIRPP and many other UN agencies continue to promote the antisemitic "Zionism is racism" canard.

have refused to take part as members of this committee and have refused to fund this agency.[84] In 2020, Ukraine resigned from this Committee, citing inherent bias.[85]

D. Conclusion

48. The UN resolutions and publications cited by the Prosecutor are, legally speaking, insignificant. They are not binding, set no precedent, and have no preclusive effect. They do not carry the force of law. The Prosecutor chooses a few resolutions and publications, while ignoring contradictory evidence (see Section III). Reliance on General Assembly and other UN resolutions cannot be used as a shortcut or as a means to circumvent the need to present a solid, legally-based case, and engage in the requisite and appropriate legal analysis.

49. Nothing in the resolutions cited by the Prosecutor supports her invented theory that alleged self-determination violations can allow the OTP to circumvent the binding requirement of statehood in the Rome Statute. If anything, these resolutions repeatedly stress that the two sides need to negotiate a solution to the conflict, including territorial issues, without interference. In other words, even the resolutions she relies upon weigh against her arguments and the Court's competence to intervene in this complex dispute.

50. Nothing in the UN resolutions cited by the Prosecutor gives legal effect to some entity referred to as a "State of Palestine," or gives this Court jurisdiction over the so-called "Situation in Palestine".

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[84] The majority of members do not have diplomatic relations with Israel and reject its existence. https://www.un.org/unispal/committee/membership/.
The Anti-Defamation League has documented that CEIRPP "is an anachronistic forum for bias against Israel and the most disturbing manifestation of institutional prejudice against the Jewish State within the U.N.", "35 Years of Demonizing Israel, July 2009, at 3, https://www.adl.org/sites/default/files/documents/israel-international/un-international-organizations/c/CEIRPP-FINAL-REPORT-2009.pdf In addition to CEIRPP, she heavily leans on non-credible reports and pronouncements from anti-Israel figures and countries appointed to inherently biased mandates, such as the Special Rapporteur on the Palestinian Territories and the Special Committee for the Investigation of Israeli Practices. (para. 91) The Special Committee Reports cited by the Prosecutor were authored by countries with no or highly volatile diplomatic relations with Israel (e.g Malaysia, Sri Lanka, Senegal). It is also important to note that the reports produced by these procedures are not drafted on the basis of vigorous methodology or credible fact-finding. A department of a few OHCHR staffers in Geneva author most of these reports based upon unverified claims presented by a non-pluralistic group of highly political non-governmental organizations. Based on multiple conversations with OHCHR officials and the Institute for NGO Research, the staffers who draft these reports have no independent verification capability. See, e.g., Gerald Steinberg and Anne Herzberg (eds), *Filling in the Blanks: Documenting Missing Dimensions in UN and NGO Investigations of the Gaza Conflict* (2015).

[85] JNS, "Ukraine leaves UN Committee on Palestinians, " January 8, 2020, https://www.israelhayom.com/2020/01/08/ukraine-leaves-un-committee-on-palestinians/.

III. The Oslo Accords Did Not Give The So-called "State of Palestine" Sovereignty Or Jurisdiction Over Territory It Now Claims To Control

51. Contrary to the OTP's opinion that "limitations to the PA's jurisdiction agreed upon in the Oslo Accords cannot and should not bar the exercise of the Court's jurisdiction in Palestine pursuant to article 12(2) (a)" (para 189), the first time in history that any part of Gaza, Judea or Samaria came under any form of Palestinian administration was in the context of the Oslo Accords.

52. The Accords, which are binding between Israel and the PLO, provided the legal and ***political*** framework for the creation of a Palestinian entity that would be charged with the limited powers and jurisdiction needed for the self-rule of the **Palestinians** resident in those areas. In order to implement the Accords, countersigned by the United States of America, Russia, the European Union. Egypt and Norway (and endorsed by the UN). legislation was required both in Israel,[86] on the one hand, and in Gaza, Judea and Samaria, on the other.

53. The area of Judea and Samaria, referred to by Jordan as the "West Bank" following the 1949 Armistice Agreement signed between Israel and Jordan, had never before been regarded as a separate territory. In order to ensure that the Armistice lines were **never seen as a "border"**[87] between Israel and Jordan,[88] the 1949 agreement stipulated, at the demand of Jordan: "No provision of this Agreement shall in any way

[86] The laws passed in Israel to adopt the Oslo Accords included, *inter alia*, the Law Implementing the Agreement Regarding the Gaza Strip and Jericho (Financial arrangements and sundry provisions)(Legislative amendments), 5755-1994 (https://www.nevo.co.il/law_html/law01/177_002.htm); the Law Implementing the Agreement Regarding the Gaza Strip and Jericho (Jurisdiction and other provisions) (Legislative amendments), 5755-1994 (https://fs.knesset.gov.il/13/law/13_lsr_211074.PDF); the Law Implementing the Preparatory Transfer of Powers to the Palestinian Authority (Legislative amendments and other provisions), 5755-1995 (https://www.nevo.co.il/law_html/law01/176_001.htm); the Law Implementing the Interim Agreement Regarding the West Bank and the Gaza Strip (Jurisdiction and other provisions) (Legislative amendments), 5756–1996 (https://www.nevo.co.il/law_html/law01/177_006.htm#Seif5);

[87] While Israel accepted the 1947 Partition Plan set out in UNGA resolution 181 (https://mfa.gov.il/mfa/aboutisrael/maps/pages/1947%20un%20partition%20plan.aspx) the surrounding Arab countries rejected the decision, opting instead to launch military operations to destroy the nascent Jewish State. The demand of the Arab countries that the Armistice Lines never be seen as borders was based on two main arguments. Firstly, the recognition of the Armistice Lines as "borders" would assume that on the other side of the "border" was a legitimate country. The Arab countries rejected the legitimacy of Israel and would not agree to the creation of a "border" between Israel and its neighbours. Secondly, during the Arab initiated hostilities, Israel gained territory as compared to the Partition Plan. Accordingly, since the Arab countries were not willing to accept Israel's legitimacy, they were similarly not willing to accept any other entity that controlled an area larger than the map attached to the Partition Plan. For further details see: https://web.archive.org/web/20110822123836/http://unispal.un.org/unispal.nsf/b792301807650d6685256cef0073cb80/93037e3b939746de8525610200567883?OpenDocument.

[88] As part of the hostilities, Jordan illegally occupied Judea and Samaria in 1948 and controlled the area until 1967.

prejudice the rights, claims and positions of either Party hereto in the ultimate peaceful settlement of the Palestine question, the provisions of this Agreement being dictated exclusively by military considerations".[89] The agreement further stipulated that "[the Armistice Demarcation] Lines defined in articles V and VI of this Agreement are agreed upon by the Parties without prejudice to future territorial settlements or boundary lines or to claims of either Party relating thereto".[90]

54. While the Armistice lines were not a "border" in any way, from 1949 to 1967, the lines *de facto* separated Israel and Jordan.[91]

55. The line separating the Gaza Strip from Israel was first demarked in the Armistice Agreement signed between Israel and Egypt in 1949.[92]

56. Article IV(3) of the agreement specifically provided:

"It is emphasised that it is **not the purpose of this Agreement to establish, to recognise, to strengthen, or to weaken or nullify, in any way, any territorial, custodial or other rights**, claims or interests which may be asserted by either Party in the area of Palestine… The provisions of this Agreement are dictated exclusively by military considerations and are valid only for the period of the Armistice".[93]

57. Article V(2) added: "The Armistice Demarcation Line is **not to be construed in any sense as a political or territorial boundary**, and is delineated without prejudice to rights, claims and positions of either Party to the Armistice as regards ultimate settlement of the Palestine question".[94]

58. While the armistice line could in no way have been regarded as a "border", from 1949 to 1967, the line *de facto* separated Israel and Egypt.

[89] https://mfa.gov.il/mfa/foreignpolicy/mfadocuments/yearbook1/pages/israel-jordan%20armistice%20agreement.aspx, Art II(2).
[90] *Id*., Art. VI(9).
[91] While now claiming Judea and Samaria as the "State of Palestine", article 24 of the original 1965 Palestine Liberation organization [Herein: "PLO"] Charter provided that "This Organization [The PLO] does not exercise any territorial sovereignty over the West Bank in the Hashemite Kingdom of Jordan, on the Gaza Strip or in the Himmah Area".
[92] Egypt seized control of the Gaza Strip in 1948 and held it until 1967.
[93] https://mfa.gov.il/mfa/foreignpolicy/mfadocuments/yearbook1/pages/israel-egypt%20armistice%20agreement.aspx. (Emphasis added).
[94] *Id.*(Emphasis added).

59. Having taken control of Gaza (from Egypt) and Judea and Samaria (from Jordan) in June 1967, the Israeli Defence Force ("IDF") issued "Ordinances" in which it declared that the areas had come under Israeli Military control.[95]

60. Since 1967, only seven Ordinances have been issued. Two were issued immediately.[96] Two of the remaining Ordinances were issued pursuant to the first of the Oslo Accords,[97] and focused on the creation of the PA and the initial transfer of powers and authority to the newly created entity that had *limited* powers and jurisdiction in the Gaza Strip and the area of the city of Jericho only.

61. Two other Ordinances[98] focused on the implementation of the additional agreements, creating a wider framework for the operation of the PA and the transfer of some powers from Israel to the PA.

62. Most importantly, Ordinance No. 7 implemented the Interim Agreement, which established the division of Judea and Samaria into areas 'A', 'B', and 'C'.

63. Two of the provisions of the Oslo Accords and the implementing ordinances are of particular relevance to the issue before the Court.

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[95] Israel's military control of the Gaza Strip ended in September 2005. Israeli citizens, who had been resident in the Gaza Strip since 1967, were removed from their homes. The last IDF soldiers left the Gaza Strip on September 11, 2005. The IDF Military Commander declared the end of the Military rule of the Gaza Strip, by Ordinance, on September 12, 2005. While most the following provisions of the Oslo Accords applied, *mutatis mutandis*, to both the Gaza Strip and Judea and Samaria, since the end of the IDF control of the Gaza Strip, it should be seen as a *sui generis* area, similar in nature to area 'A', as defined in the Interim Agreement. Accordingly, the Gaza Strip will not be separately addressed in this submission, unless specifically noted.

[96] Ordinance No. 1 declared that the area was now under IDF Military control (https://www.idf.il/media/30901/%D7%A7%D7%9E%D7%A6%D7%9D-%D7%97%D7%95%D7%91%D7%A8%D7%AA-1-%D7%A6%D7%95-1-8-07061967-09061967.pdf); Ordinance No. 2 provided that the law that had previously been applied in the area, would remain in force, in as much as it did not contradict new legislation. (https://www.idf.il/media/30901/%D7%A7%D7%9E%D7%A6%D7%9D-%D7%97%D7%95%D7%91%D7%A8%D7%AA-1-%D7%A6%D7%95-1-8-07061967-09061967.pdf).

[97] Ordinances No. 4 (https://www.idf.il/media/57080/%D7%97%D7%95%D7%91%D7%A8%D7%AA-154.pdf (May 15, 1994)) and 5 (https://www.idf.il/media/57084/%D7%97%D7%95%D7%91%D7%A8%D7%AA-159.pdf (Dec. 11, 1994)) focused on the implementation of the first agreements, including, inter alia, the Agreement on the Gaza Strip and the Jericho Area, May 4, 1994 (https://mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/agreement%20on%20gaza%20strip%20and%20jericho%20area.aspx) and two additional agreements of Aug. 29, 1994 (https://mfa.gov.il/MFA/ForeignPolicy/Peace/Guide/Pages/Agreement%20on%20Preparatory%20Transfer%20of%20Powers%20and%20Re.aspx) and Oct. 9 1994.

[98] No. 6 (https://www.idf.il/media/57087/%D7%97%D7%95%D7%91%D7%A8%D7%AA-164.pdf (Sept. 10, 1995) implemented the Aug. 27, 1995 Agreement) And No. 7 (https://www.idf.il/media/57087/%D7%97%D7%95%D7%91%D7%A8%D7%AA-164.pdf (Nov. 23, 1995).

64. As addressed more fully below, the first such provision relates to the subjects that were **left to be resolved only in future negotiations** between the parties. The second relates to the extent of the **criminal jurisdiction** granted to the Palestinian entity.

A. The Oslo Accords left numerous issues to be resolved only in future negotiations.

65. The Oslo Accords were reached between Israel and the PLO, which acted as the representative of the Palestinians.

66. It is an unequivocal and undisputed fact that the Oslo Accords left a number of issues, including Jerusalem, settlements, Palestinian refugees, and borders, subject to further negotiations between the parties. This binding agreement between the parties was reflected in repeated provisions of the Oslo Accords.[99] The negotiations **between the parties** on these subjects have not yet been concluded.

67. The Accords were drafted in an "open-ended" language by the parties in that they left open the fundamental question of what the permanent status agreement between the Israelis and Palestinians would eventually entail. Any external dictation (such as this Court's acceptance of jurisdiction on the basis of the existence of a putative "State of Palestine") that purports to finalize a position regarding any of the subjects left open between the parties, would fundamentally undermine the very basis of the Oslo Accords and would prejudice the outcome of such negotiations. Notably, the term "two state solution" coined by former President George W. Bush *has never been agreed upon by the parties* and, in effect, assumes that there will be a Palestinian state. This prejudges the outcome of the negotiations on the permanent status, which could lead to a federation, confederation, condominium, extended autonomy, or any other permutation.

68. Accordingly, since the subject of "borders" was left open in the Oslo Accords, the Prosecutor's attempt to determine the territorial scope of a purported "State of Palestine" based on the 1949 armistice lines is erroneous for a number of reasons.

69. As shown previously, the 1949 Armistice agreements specifically stipulated that the armistice lines were merely a product of "military considerations" that would in no

[99] Declaration of Principles, Article V; Interim Agreement - Article XVII (2)(a).

way prejudice "territorial settlements or boundary lines or to claims of either Party relating thereto."[100]

70. The predication of the Prosecutor to adopt the armistice lines as the "border" of the "State of Palestine" entirely undermines the most fundamental of premises of the armistice agreements and contradicts their express language.

71. Noting the language and status of these areas, the Oslo Accords specifically left the legal status of the entire territory, including the subject of "borders", unresolved between the parties.[101] Concluding that the armistice lines demarcate the "border" (or even the existence) of the "State of Palestine" entirely undermines the most fundamental of premises of the Oslo Accords.

72. Furthermore, the Prosecutor's apparent attempt to recognize a "State of Palestine" within the area demarked by the armistice lines is rejected by the Palestinian leadership as too limiting.

73. The largest faction of the PLO is Fatah, now headed (since the death of Yasser Arafat in 2004), by PA Chairman Mahmoud Abbas. Fatah has controlled the PA since the latter was established.

74. Fatah does not accept the limitation of the "State of Palestine" to Gaza, Judea and Samaria. Rather, Fatah sees the "State of Palestine" as the entire area from the Jordan River in the east, to the Mediterranean Sea, in the west, from Lebanon in the north, to the Red Sea in the south, as "Palestine". In other words, in Fatah's view, the State of Israel does not exist. The PA and Fatah repeatedly state this position.

75. PA schoolbooks contain scores of maps showing the "State of Palestine", and erasing Israel's existence.[102] Teachers in PA schools teach the children to anticipate the end of

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[100] As noted above, the language of the Armistice Agreement between Israel and Egypt was more explicit and provided that the demarcation line should "not to be construed in any sense as a political or territorial boundary."
[101] This agreement also reflected the fundamental provision of UN Security Council resolution 242, which did not, and does not, require Israel to withdraw from **all of the** territories it took control of in 1967. For further discussion of this point, *see*: https://jcpa.org/article/ten-false-assumptions-regarding-israel/; https://jcpa.org/wp-content/uploads/2012/02/Kiyum-lapidoth.pdf;https://jcpa.org/requirements-for-defensible-borders/security_council_resolution_242/.
[102] https://www.impact-se.org/wp-content/uploads/Rejection-of-Peace_-Changes-from-Pre-2016-PA-Curricula.pdf.

Israel and the "liberation of Palestine".[103] PA and Fatah leaders repeatedly confirm this position.[104]

76. Other members of the PLO, such as the Popular Front for the Liberation of Palestine ("PFLP"),[105] similarly reject the notion that a "State of Palestine" is limited to the area the Prosecutor randomly attributed it.[106]

77. Since the PA/PLO/Fatah wields powers (and the authority granted to the Palestinian entity by the Oslo Accords), these clear statements of the actual Palestinian leadership entirely reject and undermine any demarcation of the "State of Palestine" that does not erase Israel.

78. Moreover, while the Prosecutor chooses to ignore reality and discount the ostensible legitimacy of the Hamas rule over the Gaza Strip, the fact is that in the last elections held in the PA in 2006, **Hamas (a terrorist organization) won the outright majority of votes.**[107]

79. Hamas, similar to Fatah, rejects the notion that the "State of Palestine" is limited to the areas demarked by the 1949 armistice lines.

80. Article 11 of the Charter of Hamas, clearly states the territory from the "[Jordan] River to the [Mediterranean] Sea" is "Islamic Waqf consecrated for future Moslem generations until Judgement Day".[108]

81. Given the provisions of the 1949 armistice agreements and the Oslo Accords, and in light of the repeatedly-stated positions of the Palestinian leadership - as opposed to the politically driven machinations of the Prosecutor - it is clear that no factual or legal basis exists upon which the Court could possibly rely in order to demark, unilaterally, the "borders"[109] of the non-existent "State of Palestine".

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[103] https://palwatch.org/page/15697.

[104] *See, e.g.,* :https://palwatch.org/page/17487; https://palwatch.org/page/17393; https://palwatch.org/page/17010; https://palwatch.org/page/16738;https://palwatch.org/page/16291; https://palwatch.org/page/15660; https://palwatch.org/page/15639; https://palwatch.org/page/15404; https://palwatch.org/page/14966. For additional examples, *see* https://palwatch.org/analysis/21-203--21

[105] The PFLP is designated as a terrorist organization by the United States and Canada, among other countries.

[106] *See* https://english.pflp.ps/2014/02/17/abu-ahmad-fouad-the-pflp-entirely-rejects-negotiations-and-political-settlement/.

[107] https://www.elections.ps/Portals/0/pdf/The%20final%20distribution%20of%20PLC%20seats.pdf – In these elections, Hamas ran under the name "Change and Reform".

[108] The Covenant of the Islamic Resistance Movement, 18 Aug. 1988, available at: https://avalon.law.yale.edu/20th_century/hamas.asp.

[109] Even Security Council Resolution 2334, refrained from demarcating the "borders" of the "State of Palestine". On the one hand, when the Council thought it appropriate to use the language "border" it did so specifically. As

82. These statements by the Palestinian leadership are fundamental to the subject before the Court. On the one hand, they reflect the contradictory positions espoused by the Palestinian leadership before different forums regarding the territorial expanse of the "State of Palestine". On the other, they reflect the true intentions of the Palestinian leadership to destroy Israel. The Prosecutor's blindness to these statements further demonstrates the unfounded nature of the Prosecutor's demarcation of the "State of Palestine" based on the Armistice lines.

B. The extent of the PA's criminal jurisdiction does not include Israelis or Israel.

83. Since the Court functions on the basis of criminal jurisdiction delegated by a State party, it is essential to evaluate what criminal jurisdiction, if any, the Palestinian entity holds regarding Israelis.

84. One of the most fundamental provisions of **all** of the Oslo Accords and the implementing ordinances was that the PA would be **devoid of any criminal jurisdiction regarding Israelis.**

85. This principle was first set down in Article VIII of the Declaration of Principles, which provided that "Israel will continue to carry the responsibility for defending against external threats, as well as the responsibility for overall security of Israelis for the purpose of safeguarding their internal security and public order".

86. The Agreed Minutes[110] to the Declaration of Principles on the Interim Self-government arrangements added:

"1. Jurisdiction of the Council will cover West Bank and Gaza Strip territory, except for issues that will be negotiated in the permanent status negotiations: Jerusalem, settlements, military locations, and Israelis.

2. The Council's jurisdiction will apply with regard to the agreed powers, responsibilities, spheres and authorities transferred to it".

87. Articles V(1)(b) and (c) of the Agreement on the Gaza Strip and the Jericho Area continued:

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the resolution stated: "Reiterating its vision of a region where two democratic States, Israel and Palestine, live side by side in peace within secure and recognized **borders**". But when the "borders" were unclear the resolution reflected this reality: "Underlines that it will not recognize any changes to the 4 June 1967 **lines**, including with regard to Jerusalem, other than those agreed by the parties through negotiations".

[110] https://mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/declaration%20of%20principles.aspx.

"The functional jurisdiction [of the PA] encompasses all powers and responsibilities as specified in this Agreement. This **jurisdiction does not include** foreign relations, internal security and public order of Settlements and the Military Installation Area and **Israelis**, and external security.

"The personal jurisdiction extends to **all persons** within the territorial jurisdiction referred to above, **except for Israelis**, unless otherwise provided in this Agreement". (Emphasis added).

88. Article V(3)(a) further added: "Israel has authority over the Settlements, the Military Installation Area, Israelis, external security, internal security and public order of Settlements, the Military Installation Area and Israelis, and those agreed powers and responsibilities specified in this Agreement".

89. Article VIII(1) added:

"In order to guarantee public order and internal security for the **Palestinians** of the Gaza Strip and the Jericho Area, the Palestinian Authority shall establish a strong police force, as set out in Article IX below. Israel shall **continue to carry the responsibility** for defense against external threats, including the responsibility for protecting the Egyptian border and the Jordanian line, and for defense against external threats from the sea and from the air, as well as the **responsibility for overall security of Israelis** and Settlements, for the purpose of safeguarding their internal security and public order, and will have all the powers to take the steps necessary to meet this responsibility". (Emphasis added).

90. The Interim Agreement further clarified and entrenched the principle that the PA is **devoid of any criminal jurisdiction over Israelis**.

91. Article XVII(1)(a) of the Interim Agreement clearly provided the PA jurisdiction would not include "issues that will be negotiated in the permanent status negotiations: Jerusalem, settlements, specified military locations, Palestinian refugees, borders, foreign relations and **Israelis**". (Emphasis added).

92. Paragraph (2)(c) added: "The territorial and functional jurisdiction of the Council will apply to all persons, **except for Israelis**, unless otherwise provided in this Agreement". (Emphasis added).

93. Ensuring that this principle was **airtight**, Article I(2) of Annex IV of the Interim Agreement added further clarification: "Israel has **sole criminal jurisdiction** over the following offenses: a. offenses committed outside the Territory,[111] except for the offenses detailed in subparagraph 1. b above; and b. offenses committed in the Territory by Israelis". (Emphasis added).

94. Article II(2)(c) added that, "The Palestinian authorities **shall not arrest Israelis** or place them in custody." (Emphasis added).

95. The Oslo Accords also ensured that Israel would continue to hold most powers and jurisdiction in the **maritime area adjacent to the Gaza Strip**. [112]

96. Paragraph 6 of Ordinance No. 7 implemented the provisions of the Interim Agreement, providing that Israel would continue to hold all powers and jurisdictions regarding:

"1) The settlements and the Military installations.

2) Area C

3) **Israelis**

4) Every issue related to the external security of the area, the security and the public order of the settlements and the Israeli military installations

5) Security and public order in areas that are under Israeli security control

6) Other powers and fields of responsibility that remain in the hands of the IDF OC in the area according to the Interim Agreement, including powers and fields of responsibility that were not transferred to the Council in this agreement". (Emphasis added).

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[111] The term "territory" is defined in Article I(1)(a) as follows: "For the purposes of this Annex, "Territory" means West Bank territory except for Area C which, except for the Settlements and the military locations, will be gradually transferred to the Palestinian side in accordance with this Agreement, and Gaza Strip territory except for the Settlements and the Military Installation Area".

[112] Article XIV(1)(b)(4) of the Interim Agreement provided that, "As part of Israel's responsibilities for safety and security within the three Maritime Activity Zones, Israel Navy vessels may sail throughout these zones, as necessary and without limitations, and may take any measures necessary against vessels suspected of being used for terrorist activities or for smuggling arms, ammunition, drugs, goods, or for any other illegal activity".
This provision was a copy of Article XI of Annex I of the Agreement on the Gaza Strip and the Jericho Area. Article XIV(2)(g) further provided that "Boats belonging to Israelis are solely subject to the control, authority and jurisdiction of Israel and the Israel Navy". These provisions were additional to other limitations, including size, travel speed, areas in which the PA registered boats could operate, the size of the PA Coastal Police (up to 10 boats) and the weapons they could carry. Similar provisions also appeared in Article XI of Annex I of the Agreement on the Gaza Strip and the Jericho Area. 1. In addition to the limitations on the PA, Article XIV(a)(iv) further made clear that the PA would have no jurisdiction to allow foreign vessels to approach the Gaza Strip closer than 12 nautical miles.

97. The Oslo Accords **did not**, in any way, shape or form grant the PA any **jurisdiction in Jerusalem**, as defined by the city's municipal borders.[113] Moreover, pursuant to the Oslo Accords, all PA activity of a political or governmental nature in that area was specifically prohibited by Israeli law.[114]

98. The cumulative provisions of both the Oslo Accords and the implementing Ordinances leave no room for any speculation whatsoever. They are clear and unambiguous: the PA was never granted, at any stage, criminal jurisdiction over Israelis.[115]

C. Conclusion

99. At most, the Palestinian entity, as embodied by the PA, is purely a creation, *de facto* and *de jure*, of the Israeli government and the PLO pursuant to the Oslo Accords. The PA was established as an agreed-upon managing body to implement the Accords; the Prosecutor is now attempting (at the behest of the Palestinian leadership) to upgrade this managing body to the status of a sovereign state – something it was never intended to be. In fact, the special regime agreed upon by Israel and the PLO in the Oslo Accords constitutes a *lex specialis* that overrides any other legal regime, and in Article XXXI(8) of the Interim Agreement the parties specifically undertook not to change the status of the territory pending the outcome of the permanent status negotiations. The Court is respectfully requested to acknowledge this important and central point.

100. Consistent with this conclusion, the limited powers and jurisdiction that Israeli authorities delegated to the Palestinian entity **never included** any criminal jurisdiction whatsoever over Israelis.

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[113] Shortly after the Six Day War, Israel applied its civilian law to all of Jerusalem as demarcated in the order of Israel's government dated June 28, 1967 and subsequent decisions of Israel's Minister of the Interior. For further discussion of the borders of Jerusalem, see Israel Supreme Court decision HCJ 256/01 Rabakh et. al. v The Jerusalem Municipal Affairs Court et. al.

[114] See Law Implementing the Interim Agreement Regarding the West Bank and the Gaza Strip (Limitation of Activities), 5755–1994 (https://www.nevo.co.il/law_html/law01/177_005.htm)

[115] On this and other subjects pertinent to the deliberations of the Court, *see* "The International Criminal Court's Lack of Jurisdiction Over the So-Called 'Situation in Palestine,'" State of Israel, Office of the Attorney General, 20 Dec. 2019, available at: https://www.justice.gov.il/Units/YeutzVehakika/InternationalLaw/News/Documents/The%20InternationalCriminalCourt%e2%80%99slackofjurisdictionoverthe%20socalled%e2%80%9csituationinPalestine%e2%80%9d-Memorandum%20oftheAttorney%20General.pdf.

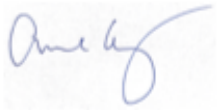
101. Accordingly, since the Palestinian entity was, is and will remain for the foreseeable future, **devoid of any criminal jurisdiction** over Israelis, it is clear that the Court cannot acquire any residual criminal jurisdiction.

102. As set forth more fully above, no "State of Palestine" presently exists that is capable of delegating sovereign jurisdictional competencies to the ICC. The Court's acceptance of jurisdiction would improperly infringe on the parties' express agreement in the Oslo Accords to politically negotiate the contours and conditions precedent necessary for Palestine to fulfill the Montevideo Criteria and become a sovereign state. The issue of Palestinian statehood is reserved to the parties to that negotiation, and is therefore a nonjusticiable political question.

103. Accordingly, the Court lacks jurisdiction with respect to the so-called "Situation in Palestine", and the undersigned Organisations respectfully submit these Observations that the Court should deny the Prosecutor's Request.

Respectfully submitted,

Gerard Filitti, on behalf of The Lawfare Project



Anne Herzberg, on behalf of The Institute for NGO Research

Maurice Hirsch, on behalf of Palestinian Media Watch

Ambassador Dore Gold, on behalf of The Jerusalem Center for Public Affairs

Dated this 16th day of March 2020
At New York, New York and Jerusalem, Israel