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**THE PRE-TRIAL CHAMBER I**

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

**“SITUATION IN THE STATE OF PALESTINE”**

**PUBLIC**

**Corrected version of PSE Situation: ICC-01/18-101 + Anxs 1 and 2 March 16, 2020**

**Observations on behalf of The Touro Institute on Human Rights and the Holocaust on “a ruling  
on the Court’s territorial jurisdiction in Palestine”**

**Source: *Amicus Curiae* The Touro Institute on Human Rights and the Holocaust**

**Document to be notified in accordance with regulation 31 of the *Regulations of the Court***

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In accordance with the leave granted by paragraph (c) of the Court’s Order of February 20, 2020, the following observations pertain to the question of jurisdiction set forth in paragraph 220 of the Prosecutor’s Request pursuant to article 19(3) of the Rome Statute filed on January 22, 2020 (“the Prosecutor’s Request” or “the Request”). This submission will be divided into two parts, the first on the Prosecutor’s reliance on UN sources, and the second on self-determination and statehood. In Part 1, this submission elaborates on the lack of legal merit for the Prosecutor’s reliance on UN sources and argues that Pre-Trial Chamber’s dependence on such sources is unjustified and wrong as a matter of law. In Part 2, this submission argues that the Prosecutor’s interpretation of the right of self-determination and application of the criteria of statehood, are deficient and wrong as a matter of law.

***PART 1: The Prosecutor’s Reliance on UN Sources to support territorial jurisdiction***

1. The Prosecutor relies<sup>1</sup> on numerous UN sources<sup>2</sup> in support of legal claims arguing for the Court’s territorial jurisdiction. Such reliance is unjustified and wrong as a matter of law.
2. The Prosecutor rests her case for the Court’s territorial jurisdiction “primarily” on United Nations sources, and in particular, the UN General Assembly’s resolutions. In her own words: “In so concluding, the Prosecution has relied on the views of the international community as expressed primarily by the UN General Assembly.”<sup>3</sup> She supports her claim by stressing the fact that in the General Assembly “all member States have an equal vote.”<sup>4</sup>
3. This concept of equality within the United Nations, often referred to as “international equality,” relates to equality between states rather than between human beings. In fact, each year the General Assembly adopts a resolution (highly contentious, adopted in 2019 by a vote of 131 for, 53 against (the democracies), and 7 abstentions), entitled “Promotion of a democratic and equitable international order” that replaces “equal” with the deliberately subjective, government-focused idea of “equitable” participation in decision-making.<sup>5</sup>
4. Accordingly, references to “equal” votes at the UN General Assembly and its related bodies does not refer to a human rights principle. Voting outcomes depend, instead, on the

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<sup>1</sup> Office of the Prosecutor, “Situation in the State of Palestine,” “Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine,” No. ICC-01/18, January 22, 2020 (hereinafter [Prosecutor’s submission](#)), para. 155

<sup>2</sup> See Annexes 1 and 2 for lists.

<sup>3</sup> [Prosecutor’s submission](#) paras. 11, 44

<sup>4</sup> [Prosecutor’s submission](#) paras. 11

<sup>5</sup> “Affirms that... (h) The right to equitable participation of all, without any discrimination, in domestic and global decision-making;” Promotion of a democratic and equitable international order,” [UNGA resolution 74/150](#), December 18, 2019, para. 6(h), and see para. 10

relative weight of blocs reflecting political rather than legal interests. In practice, on the majority of votes relating to issues involving Israel and the Palestinians, bloc voting by 56 member states of the Organization of Islamic Cooperation (OIC), 21 member states of the Arab League, or the 119 members of the Non-Aligned Movement, ensure an automatic majority against the State of Israel. While the PTC is obliged to interpret and apply law consistently with internationally recognized human rights,<sup>6</sup> UN actors often have different priorities. For example, less than half of both the General Assembly and the UN Human Rights Council, and a small fraction of the Arab League, the OIC and the NAM, are fully free democracies.<sup>7</sup>

5. The Prosecutor's reliance on General Assembly resolutions, therefore, does not meet the standard of consistency with internationally recognized human rights, starting with equality rights. In 2019 there were 27 General Assembly resolutions critical of the human rights record of specific UN member states. Of these, 18 or 67%, were focused on Israel alone. In 2003 the General Assembly adopted a resolution on Palestinian children<sup>8</sup> with only four votes opposed while a resolution condemning terrorist attacks on Israeli children had to be withdrawn, because of amendments to delete the word "Israeli" before every mention of the word "children" were guaranteed a General Assembly majority. In 2018 the U.S. Ambassador to the United Nations pointed to the fact that the General Assembly "has adopted 700 resolutions condemning Israel and not one single resolution condemning Hamas."<sup>9</sup> In plain terms, and as acknowledged by UN Secretary-General Ban Ki-moon, this record is discriminatory.<sup>10</sup> Touting this body, its outcomes, and these resolutions as carrying legal weight because they are the result of "equal" votes, is to interpret and apply the law consistently with majoritarianism, but not human rights.

6. Reliance on political determinations within the United Nations is even more egregious on matters relating to Israel since Israel has been subjected to a unique level of bias and

<sup>6</sup> Rome [Statute](#) of the International Criminal Court July 17, 1998, 2187 UNTS 90, Article 21(3); and see [Prosecutor's submission](#), para. 155

<sup>7</sup> According to Freedom House rankings, of the member states of the United Nations, 23 of 47 (49%) of the UN's highest human rights body, the Human Rights Council, and 85 of 193 (44%) of the General Assembly, are fully free democracies. Only 1 of 21 states in the Arab League, 3 of 56 states in the OIC, and 29 of the 119 states in the NAM are fully-free democracies. [Freedom in the World 2019](#), Freedom House, February 4, 2019

<sup>8</sup> "Situation of and assistance to Palestinian children," UN General Assembly resolution A/RES/58/155, adopted December 22, 2003, 106 in favor, 5 against, 65 abstentions

<sup>9</sup> Ambassador Nikki Haley, UN General Assembly, Meeting records of the 47th plenary meeting of the 73rd session, [A/73/PV.47](#), December 6, 2018

<sup>10</sup> "During the past 10 years, I have argued that we must never accept bias against Israel within United Nations bodies. Decades of political manoeuvrings have created a disproportionate volume of resolutions, reports and conferences criticizing Israel." Statement by Secretary-General Ban Ki-moon, in United Nations, Security Council, Meeting records of the 7839th meeting, [S/PV.7839](#), December 16, 2016

discrimination within the organization, including for many decades through exclusion from the regional groupings which has deprived it of access to group consultations and the ability to be elected to key bodies. The State of Israel is one of the few states that has never been a member of the Security Council; nor has it ever been a member of the UN Commission on Human Rights or the UN Human Rights Council.

7. The Prosecutor also justifies her reliance on the General Assembly: “because the General Assembly bears ‘permanent responsibility’ for the resolution of the question of Palestine.”<sup>11</sup> The argument is self-promoting and circular, since it purports to assign control to itself. And the claim is to “the permanent responsibility of the United Nations towards the question of Palestine until it is satisfactorily resolved in all its aspects.”<sup>12</sup> Satisfactorily resolved to the UN means not to the parties; it means through UN fiat and not through negotiations. The assertion is purely political, with no legal analysis or basis.

### ***The Prosecutor’s reliance on the General Assembly***

8. The General Assembly is a political body, composed of states, rather than judges and independent experts. The UN Charter itself makes it quite clear that the General Assembly does not have capacity to make law<sup>13</sup> but to “make recommendations”.<sup>14</sup>

9. This remains true no matter how many times such political resolutions are adopted by the Assembly or its subsidiary bodies.<sup>15</sup> Moreover, claims that repetition amounts to sufficient state practice so as to amount to customary law necessitate close examination of vote outcomes, explanations of vote, and voting patterns of the world’s various groupings to determine representative characteristics.<sup>16</sup>

<sup>11</sup> [Prosecutor’s submission](#), paras. 11, 44, 124

<sup>12</sup> [Prosecutor’s submission](#), para. 124, quoting UN General Assembly resolution 67/19 (2012), adopted November 29, 2012

<sup>13</sup> “[Use of the Terms ‘Declaration’ and ‘Recommendation’](#)”, Memorandum of the Office of Legal Affairs, United Nations, April 2, 1962, E/CN.4/L.610; Eric Suy, “Innovation in International Law-Making Processes,” *The International Law and Policy of Human Welfare*, Macdonald, Johnston, Morris eds.) 1978, p. 190, quoted by “[Third report on identification of customary international law](#),” by Michael Wood, Special Rapporteur, March 27, 2015, A/CN.4/682, fn. 126

<sup>14</sup> “The General Assembly shall initiate studies and make recommendations...” [UN Charter](#), Article 13

<sup>15</sup> On the absence of *opinio juris* see: Stephen M. Schwebel, “[The Effect of Resolutions of the U.N. General Assembly on Customary International Law](#),” *Proceedings of the Annual Meeting of the American Society of International Law* Vol. 73 (April 26 - 28, 1979); Bruno Simma (ed.), *The Charter of the United Nations, A Commentary*, (OUP), c. 1985 (para. 47); International Court of Justice, [North Sea Continental Shelf cases](#) (Federal Republic of –Germany v. Denmark; Federal Republic of Germany v. the Netherlands), Judgment, 20 February 1969, 1969 General List Nos. 51 and 52, para. 77

<sup>16</sup> International Court of Justice, [Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion](#), 8 July 1996, 1996 General List No. 95, para. 70; See also the role of those with a “special relationship with the subject-

10. The Prosecutor's reliance on UN sources for her claims of territorial jurisdiction includes a vast array of organizations and fora, without any regard to their legal status, credentials, or authority. Specifically, the Prosecutor rests her case on determinations and statements of:

The General Assembly; the "Emergency Special Session" of the General Assembly; Bodies created by the General Assembly: the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories; the Committee on the Exercise of the Inalienable Rights of the Palestinian People, the UN Conciliation Commission for Palestine; General Assembly programs: UN Development Programme (UNDP), UN Conference on Trade and Development (UNCTAD); Subsidiary bodies of the General Assembly: the Human Rights Council; Bodies created by the UN Human Rights (Commission)/Council: the UN Special Rapporteur on the Situation of Human Rights in the Palestinian Territory Occupied since 1967; the UN International Fact-Finding Mission on Israeli Settlements in the Occupied Palestinian Territory; the UN Independent Commission of Inquiry on the 2014 Gaza Conflict; the UN Independent International Commission of Inquiry on the Protests in the Occupied Palestinian Territory; The UN Secretariat and its departments and offices: Office of the Secretary-General; The missions created by the Secretary-General: UN Special Coordinator for the Middle East Peace Process (UNSCO); Office of the UN High Commissioner for Human Rights (OHCHR); Office for the Coordination of Humanitarian Affairs (OCHA); Office of Legal Affairs (OLA); UN specialized agencies (under the Economic and Social Council (ECOSOC): UN Educational, Scientific and Cultural Organization (UNESCO); World Health Organization (WHO)

The Prosecutor relies on all these UN organs, bodies, agencies, funds and programs to find territorial jurisdiction, in addition to the Security Council, despite the fact that only the latter has the capacity to make law, and even then, under limited and carefully circumscribed circumstances.

11. While the Prosecutor heavily relies on UN resolutions, she does so highly selectively. UN Security Council resolutions 242 and 338 are the only resolutions which both parties accepted as terms of reference for bilateral negotiations, and yet, they are effectively ignored.

12. The quality of the Prosecutor's reliance on the UN for legal authority does not improve with quantity. Under the Charter, the General Assembly has no authority to make law.<sup>17</sup> It cannot delegate authority it does not have.<sup>18</sup> The bodies created by the General Assembly have no authority to make law. The subsidiary bodies of the General Assembly have no

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matter of the practice." Malcolm Shaw, *International Law*, 8th Edition (Cambridge University Press, 2017); Bruno Simma (ed.) (1985), para. 47, and p. 239 (fn. 93)

<sup>17</sup> Form and Legal Nature of Recommendations, Bruno Simma et al. (ed.) *The Charter of the United Nations: A Commentary*, 3<sup>rd</sup> edition, OUP, 2013; *South-West Africa, Second Phase*, ICJ Reports (1966), p. 50; *Continued Presence of South Africa in Namibia*, ICJ Reports (1971), p. 280; The Sixth Committee (Legal Committee) of the UN can draft legal instruments, but they create legal obligations only as a result of subsequent consent, or accession and ratification of states parties, not from mere adoption.

<sup>18</sup> *nemo dat quod non habet*

authority to make law. The bodies created by the subsidiary bodies of the General Assembly have no authority to make law. Under the Charter, the UN Secretariat, starting with the Secretary-General, has no authority to make law. The departments and offices within the Secretariat have no authority to make law. The missions created by the Secretary-General have no authority to make law. Under the Charter, the specialized agencies of the Economic and Social Council have no authority to make law.<sup>19</sup>

***Spurious uses by the Prosecutor of General Assembly resolutions as sources of law***

13. The Prosecutor claims to rely on the General Assembly, among other things, for the following conclusions:

(a) “The Prosecution submits that...the Court’s territorial jurisdiction extends to the Occupied Palestinian Territory, namely the West Bank, including East Jerusalem, and Gaza. In so concluding, the Prosecution **has relied on** the views of the international community as expressed primarily by the UN General Assembly.”<sup>20</sup>

(b) “the Prosecution considers that, for purposes of the Statute, the Court’s territorial jurisdiction under article 12(2)(a) extends to the Occupied Palestinian Territory, which covers the West Bank, including East Jerusalem, and Gaza. The Prosecution **primarily relies on** UN General Assembly resolutions, which reflect the views of the international community...”<sup>21</sup>

(c) “The Prosecution thus **relies on** the right of the Palestinian people to self-determination and on the position adopted by the international community, in particular, the United Nations to determine the scope of the Court’s territorial jurisdiction in Palestine.”<sup>22</sup>

14. For instance, the Prosecutor places significant reliance on General Assembly resolution 67/19, adopted in 2012, entitled the “Status of Palestine in the United Nations.”<sup>23</sup> The resolution, it should be noted, was not adopted by consensus, but by vote; in the affirmative were 138 or 73% of the total members present and voting. The party whose interests were “especially affected”<sup>24</sup> – namely, Israel – voted against. A sizable number of geographically-diverse states refused to vote in favor (50 or 27% of the members present and voting). Even

<sup>19</sup> See: Bruno Simma et al. (2013)

<sup>20</sup> Emphasis added. [Prosecutor’s submission](#) para. 11

<sup>21</sup> Emphasis added. [Prosecutor’s submission](#) para. 44

<sup>22</sup> Emphasis added. [Prosecutor’s submission](#) para. 193

<sup>23</sup> Emphasis added. [Prosecutor’s submission](#) para. 11, 44

<sup>24</sup> Bruno Simma (ed.), (1985), para. 238

some states that voted in favor indicated in their explanations of vote that they did not interpret the resolution to mean that “Palestine” was gaining or had gained statehood.<sup>25</sup>

15. In another example, she points in support of her jurisdictional claims to the resolutions of the 10<sup>th</sup> Emergency Special Session of the General Assembly.<sup>26</sup> None of these resolutions were adopted by consensus. Every one was opposed by Israel and the United States.<sup>27</sup>

16. The context from which these resolutions emerged is also significant in determining what if any weight to afford them. There have been ten emergency special sessions of the UN General Assembly in its history – five have been about Israel – and the last and tenth one has remained effectively in permanent session since it has been convened and then “reconvened” eighteen times since 1997, most recently in June 2018. In the period of time since the procedure has been harnessed for use against Israel, the world has witnessed tragic atrocities resulting in the deaths and displacement of millions and millions of people; not one of these tragedies prompted even a single emergency special session.

17. In total, the Prosecutor “relies” on 58 General Assembly resolutions, 56 of which were not adopted by consensus. But for a handful of cases,<sup>28</sup> these resolutions were opposed by Israel and almost invariably also by the United States. After the early years of the United Nations, all of the Israel-focused resolutions were forced through by large majorities of states, many of whom did not or still do not have diplomatic relations with Israel and continue to dispute the Jewish state’s right to exist. This routine outpouring of anti-Israel bias in the General Assembly is, and has always been recognized to be, political in nature. The Prosecutor is effectively borrowing from a parallel universe to argue that such a political campaign can serve as a basis for a legal claim that the Court has territorial jurisdiction over the “Occupied Palestinian Territory,” that the territory of the “State of Palestine” is the West Bank including East Jerusalem and Gaza, that Palestinians can accede to treaties, that Palestinians have a right to a state in the “Occupied Palestinian Territories,” and that Palestinians don’t need to meet the Montevideo criteria of statehood.

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<sup>25</sup> These were: Belgium, Finland, Honduras, Italy, Switzerland,

<sup>26</sup> [Prosecutor’s submission](#) para. 11, footnote 16, [UNGA resolution ES-10/17](#) (2007); [Prosecutor’s submission](#), para. 44, fn. 75, [UNGA resolution ES-10/17](#) (2007); [Prosecutor’s submission](#), para. 59, fn. 144, [UNGA resolution ES-10/19](#) (2017), [Prosecutor’s submission](#), para. 1; para. 78, fn. 260, [UNGA resolution ES-10/14](#) (2003); [Prosecutor’s submission](#), para. 79, fn. 266, [UNGA resolution ES-10/15](#) (2004), [Prosecutor’s submission](#), paras. 2-3; [Prosecutor’s submission](#), para. 79, fn. 266; para. 87, fn. 303, [UNGA resolution ES-10/17](#) (2007); [Prosecutor’s submission](#), para. 179, fn. 559, [UNGA resolution ES-10/13](#) (2003)

<sup>27</sup> For [details](#)

<sup>28</sup> Generally not focused on Israel, or before Israel became a member state, or in the early years of the United Nations.



***The UN Committee on the Exercise of the Inalienable Rights of the Palestinian People***

The UN Committee on the Exercise of the Inalienable Rights of the Palestinian People was created on the same day as the infamous Zionism-is-racism resolution<sup>29</sup> and intended to implement its message. Though the Zionism-is-racism resolution was formally rescinded by the General Assembly in 1991, the Committee was left intact and is still going strong.<sup>30</sup> The Committee is an overtly political body, composed of 25 UN member states, 11 of which do not even have diplomatic relations with Israel. Each year the Committee sponsors an annual International Day of Solidarity with the Palestinian People on the anniversary of the November 29, 1947 partition resolution. Notwithstanding that the resolution was intended to launch a Jewish and an Arab State, the Committee marks the UN's original two-state decision by banishing the flag of Israel and displaying only the flag of the "State of Palestine." The Committee's annual session includes invited special guests who call for the removal of a Jewish state altogether, "that is a free Palestine from the river to the sea."<sup>31</sup> The Committee's reports and publications – rife with extreme historical inaccuracies, deep prejudice, and libelous accusations – within a clearly political construct – are liberally and improperly used by the Prosecutor as a source of legal acumen for the current issue.<sup>32</sup>

***Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and other Arabs in the Occupied Palestinian Territories.***

18. The Committee was created in 1968 and is the only UN human rights investigative "committee" composed of the official representatives of UN member states - currently Sri Lanka, Malaysia and Senegal - without even the pretense of independence or expertise. One of those states, Malaysia, does not even have diplomatic relations with Israel. The Committee was established by a highly contentious and divisive resolution.<sup>33</sup> Its mandate is "to

<sup>29</sup> [UNGA resolution 3379\(XXX\)](#), November 10, 1975

<sup>30</sup> [UNGA resolution 46/86](#), December 16, 1991

<sup>31</sup> Marc Lamont Hill, The full quote is: "So as we stand here on the 70th anniversary of the Universal Declaration of Human Rights and the tragic commemoration of the Nakba, we have an opportunity to not just offer solidarity in words but to commit to political action, grassroots action, local action, and international action that will give us what justice requires. And that is a free Palestine from the river to the sea." Invited to speak as the only representative of civil society, [Special Meeting of the Committee on the Exercise of the Inalienable Rights of the Palestinian People in observance of the International Day of Solidarity with the Palestinian People](#), UN WebTV, November 28, 2018.

<sup>32</sup> [Prosecutor's submission](#), paras. 128, 138, 157, 168, 177, 188, 200. And see Prosecutor's Request, para. 188, fn. 602. Note that the Prosecutor sometimes confuses the Committee on the Exercise of the Inalienable Rights of the Palestinian People with the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and other Arabs in the Occupied Palestinian Territories.

<sup>33</sup> [UNGA resolution 2443\(XXIII\)](#), December 19, 1968. Adopted by a vote of 60 in favor, 22 against, 37 abstentions.

investigate Israeli practices affecting the human rights of the Palestinian people and other Arabs of the occupied territories.” There is no reference to any actions, policies, or practices by Palestinians, or to any interest in actions affecting the human rights of Israelis. The composition of the body is political. Its mandate is political. Its purpose is overtly antithetical to the Charter’s “equal rights of nations large and small.”

19. And yet, the Prosecutor uses the reports of the Special Committee to support her contentions both that Israel is at fault and that Palestinians are relieved of responsibility for impediments to self-determination.<sup>34</sup> Her assignment of legal value to the Committee reports is both improper and ill-informed. Each of the Special Committee reports<sup>35</sup> that were cited by the Prosecutor was met by a strong negative reaction and followed by sharply divisive resolutions of the General Assembly. Not a single vote on the Special Committee reports upon which she relies achieved a majority of the UN membership.<sup>36</sup>

***Spurious uses by the Prosecutor of Human Rights Council resolutions as sources of law***

20. The Prosecutor relies on the resolutions of the UN Human Rights Council as good authority for binding Palestinian self-determination to particular territory (the “OPT”), for tying self-determination to statehood, for placing blame for the non-realization of self-determination on Israel, and for waving the requirements of the Montevideo criteria for statehood – all of which she uses to establish territorial jurisdiction.

21. It is necessary, therefore, to examine the legitimacy of such reliance and the legal conclusions extrapolated therefrom.

22. The UN Human Rights Council has no capacity to make law. It is a subsidiary body of the General Assembly. It can only “make recommendations.”<sup>37</sup> It is a political entity comprised of 47 states. Notwithstanding that it is a human rights body, members do not

<sup>34</sup> [Prosecutor’s submission](#), paras. 91, 166, 169, 176, 177

<sup>35</sup> Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories (hereinafter, Special Committee), [A/71/352](#), August 23, 2016; Report of the Special Committee, [A/72/539](#), October 18, 2017; Report of the Special Committee, [A/73/499](#), November 9, 2018; Report of the Special Committee, [A/74/356](#), September 20, 2019

<sup>36</sup> Resolution on the report: [UNGA resolution 71/95](#), December 6, 2016. Adopted by a vote of 91 in favor, 11 against, 73 abstentions; Resolution on the report: [UNGA resolution 72/84](#), December 7, 2017. Adopted by a vote of 81 in favor, 10 against, 77 abstentions; Resolution on the report: [UNGA resolution 73/96](#), December 7, 2018. Adopted by a vote of: 78 in favor, 10 against, 84 abstentions; Resolution on the report: [UNGA resolution 74/87](#), December 13, 2019. Adopted by a vote of: 81 in favor, 13 against, 80 abstentions

<sup>37</sup> “Human Rights Council,” United Nations General Assembly Resolution 60/251, A/RES/60/251, adopted March 15, 2006, <https://undocs.org/a/res/60/251>; paras. 5(c), 5(i)

actually have to respect human rights in order to stand for election and succeed.<sup>38</sup> For all but two years since it was created in 2006, and for three of the four years upon which the Prosecutor depends on its output, less than half of the Council’s member states were even free democracies.<sup>39</sup> States at the very bottom of the Freedom House “not free” scale, but nonetheless members of the Council in 2019 for instance, were: Afghanistan, Angola, Bahrain, Cameroon, China, Cuba, Democratic Republic of the Congo, Egypt, Eritrea, Iraq, Qatar, Rwanda, Saudi Arabia, and Somalia. The Council is master of its own agenda which has just ten permanent items, one of which is on “Human rights situations that require the Council’s attention”<sup>40</sup> and another on “Human rights situation in Palestine and other occupied Arab territories.”<sup>41</sup> That is, one entire agenda item is devoted to criticism of Israel at each and every regular session, while just one other is for all other states and the rest of the world when they can get the Council’s attention at all. Since its creation in 2006 the Council has adopted more resolutions condemning Israel than any other country on earth. It has adopted nothing at all on 85% of the world’s states.

23. UN Secretary-General Kofi Annan said of the Human Rights Council: “I am worried by its disproportionate focus on violations by Israel.”<sup>42</sup> Evidently, the Prosecutor is not.

24. The UN Human Rights Council is an overtly political body, with an overtly anti-Israel bias. And yet the Prosecutor – wrongly – invokes this Council as an appropriate source of guidance to interpret and apply the law consistently with the requirements of internationally-recognized human rights. Every one of the resolutions upon which the Prosecutor relies<sup>43</sup> was introduced and orchestrated by the Organization of Islamic Cooperation (OIC) – making their political, as opposed to a legal, character even more obvious.

25. The Prosecutor then seeks to rely, in legal terminology, on the fruit of the poisonous tree, relying not only on the resolutions adopted by this highly politicized body, but also on the unashamedly hostile reports commissioned and produced as a result of those resolutions. To

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<sup>38</sup> They are supposed to “pledge” to respect human rights (A/RES/60/251, para. 8), but many states that are successfully elected do not even do that.

<sup>39</sup> Freedom in the World, Freedom House rankings, for detailed analysis see [Human Rights Voices](#).

<sup>40</sup> Agenda item 4, V. Agenda and Framework for the Programme of Work, B. Agenda, [HRC resolution 5/1](#), June 18, 2007 (hereinafter HRC resolution 5/1)

<sup>41</sup> Agenda item 7, V, HRC resolution 5/1

<sup>42</sup> UN Secretary-General Kofi Annan’s address to mark International Human Rights Day in New York City, 8 December 2006, SG/SM/10788, HR/4909, OBV/601

<sup>43</sup> [HRC resolution 37/35](#), March 23, 2018; [HRC resolution 34/30](#), March 24, 2017; [HRC resolution 37/34](#), March 23, 2018; [HRC resolution 34/29](#), March 24, 2017; [HRC resolution 37/36](#), March 23, 2018; [HRC resolution 31/36](#), March 24, 2016

give just one example, of the political process through which the “legal” source material relied upon by the Prosecutor is produced:

(a) A fact-finding mission on “settlements” and only the “rights of the Palestinian people” is created by a resolution in 2012 sponsored by a group of states led by the Organization of Islamic Cooperation (OIC), and co-sponsored by the Group of Arab States;<sup>44</sup> the resolution first “affirms” Israel’s “very serious violations...of the human rights of the Palestinian people” and then creates a so-called “independent international fact-finding mission,”

(b) A report is produced in 2013 finding that only Israel is in violation of any rights; it finds “facts” such as:

“The first settlement established was Kfar Ezyon, in September 1967. In the early years, the establishment of settlements followed a typical pattern. The settlers had access to the highest-ranking Government officials, played on their emotional ties to the land and encouraged these officials to lead and participate in establishing and expanding settlements through, inter alia, the seizure of land for ‘military purposes.’<sup>45</sup>

Actually, Kfar Etzion had existed since 1927 as a Jewish farming community and its residents brutally murdered in successive Arab attacks since that time.<sup>46</sup>

(c) The report is “welcomed” in a 2013 resolution sponsored by a group of states led by the OIC and the Arab Group, and the resolution calls for a follow-up report from the High Commissioner for Human Rights.<sup>47</sup>

(d) Then the High Commissioner produces a report in 2014,<sup>48</sup> followed by another Human Rights Council resolution in 2014 sponsored by the OIC and the Arab Group to follow-up the report with another follow-up report from the High Commissioner,<sup>49</sup> and the High Commissioner produces another report in 2015,<sup>50</sup> followed by another Human Rights Council

<sup>44</sup> [HRC resolution 19/17](#), March 22, 2012

<sup>45</sup> “Report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem,” [A/HRC/22/63](#), February 7, 2013, para. 24

<sup>46</sup> “Kfar Etzion had existed since 1927 as a Jewish farming community, on land legally purchased for that purpose. They would have discovered that the Jewish residents had been brutally massacred and exiled during the Arab uprising of 1936, later returning in 1943, only to be massacred once again and taken prisoner in 1948 by the Jordanian Arab Legion and irregular forces.11 The re-establishment of the village by the offspring of those same massacred Jews, and their re-entry into the same homes owned by them for decades prior to 1967, was ignored by the fact-finding mission, which ironically preferred to adopt the viewpoint of those who had carried out the massacres and to call for the removal of Kfar Etzion.” Alan Baker, “[Biased, Prejudiced, and Unprofessional: The UN Human Rights Council Fact-Finding Mission Report on Israeli Settlements](#),” Jerusalem Center for Public Affairs, March 17, 2013

<sup>47</sup> [HRC resolution 22/29](#), March 22, 2013

<sup>48</sup> Report of the UN High Commissioner for Human Rights (hereinafter, High Commissioner), [A/HRC/25/39](#), January 10, 2014

<sup>49</sup> [HRC resolution 25/28](#), March 28, 2014

<sup>50</sup> Report of the High Commissioner, [A/HRC/28/43](#), January 12, 2015

resolution in 2015 sponsored by the OIC and the Arab Group to follow-up the report with another follow-up report from the High Commissioner,<sup>51</sup> and the High Commissioner produces another report in 2016,<sup>52</sup> which is followed by another Human Rights Council resolution sponsored by the OIC and the Arab Group to produce another follow-up report that was asked to produce a blacklist (euphemistically referred to as a “database”) of Israel-related businesses that the Human Rights Council deems offensive.<sup>53</sup> This list was ultimately produced and published by the High Commissioner for Human Rights in February 2020.<sup>54</sup> The Prosecutor excerpts segments of this ballooning saga of resolutions and reports driven by the UN Human Rights Council and presents them as buttressing legal conclusions about self-determination, about statehood, about the application of the Montevideo criteria, and about the scope of the Court’s territorial jurisdiction “in Palestine.”<sup>55</sup>

26. The same is true of the machinations of the “UN Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967,” quoted by the Prosecutor in support of her jurisdiction conclusions. The job of this Rapporteur was created by the UN Commission on Human Rights in 1993 by a vote of 26 in favor (China, Cuba, Iran, Libya, Sudan, Syria...), 16 against (Australia, Austria, Canada, France, Germany, Japan, UK, USA...) and 5 abstentions. The resolution reads “Decides to appoint a special rapporteur with the following mandate: (a) To investigate Israel's violations of the principles and bases of international law, international... (c) until the end of the Israeli occupation of those territories;”<sup>56</sup> The mandate could not be more political and less juridical. It is totally one-sided, calling for no investigation of any other party, and prejudices the outcome, determining that Israel has violated international law before the “investigation” even begins. Additionally, in contrast to the required frequent review and renewal of every other country-specific special procedure, there is never any reconsideration of the mandate on the basis of an analysis of current conditions. With the creation of the UN Human Rights Council, the position of this Special Rapporteur was rolled over. Individuals selected for the job by the Council have been specifically chosen for their well-known anti-Israel views.<sup>57</sup> Their reports, statements, press

<sup>51</sup> [HRC resolution 28/26](#), March 27, 2015

<sup>52</sup> Report of the High Commissioner, [A/HRC/31/42](#), January 8, 2016

<sup>53</sup> [HRC resolution 31/36](#), March 24, 2016

<sup>54</sup> Report of the High Commissioner, [A/43/71](#), February 12, 2020

<sup>55</sup> [Prosecutor’s submission](#) para. 153, footnote 515; para. 164, footnote 535, para. 167, footnote 540.

<sup>56</sup> Commission on Human Rights [resolution 1993/2A](#), February 19, 1993

<sup>57</sup> See for instance: Richard Falk, “[Slouching toward a Palestinian Holocaust](#),” The Transnational Foundation for Peace and Future Research, June 29, 2007. Falk was appointed to the position in 2008. Michael Lynk, “Peace, Human Rights and the Rule of Law: Canada’s Role in the Middle East,” Group of 78 Annual Policy Conference, September 25-27, 2009, available at [Human Rights Voices](#). Lynk was appointed to the position in

releases, and wide-ranging public advocacy are notoriously partisan; in spite of the theoretical requirements of “impartiality” and “objectivity,” the current mandate-holder in particular defends his job description and refused to challenge it.<sup>58</sup> The results of his extreme partiality are an injudicious and inappropriate source of legal guidance.

27. Nevertheless, the Prosecutor quotes the current Special Rapporteur at length to support her contention that Israel is to blame for conditions regarding Palestinian self-determination, with concomitant consequences – she says – for statehood and the satisfaction of the conditions of territorial jurisdiction.<sup>59</sup>

28. Dependence by the Pre-Trial Chamber on the UN sources that are heavily relied upon by the Prosecutor would, therefore, be unjustified and wrong as a matter of law.

***PART 2: First principles: the application and interpretation of the relevant international law and the Rome Statute must be in conformity with internationally recognized human rights***

29. Overall, the Prosecutor maintains that “Pursuant to article 21(3) of the Statute, the Court must interpret and apply the applicable law—including article 12, the term ‘State’ and the relevant statehood criteria— consistently with internationally recognized human rights, including the right of the Palestinian people to self-determination.”<sup>60</sup>

30. The Statute itself actually goes further and requires that the “The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.”<sup>61</sup> In *Gaddafi*, Judge Perrin de Brichambaut elaborated – quoted in agreement by the Prosecutor<sup>62</sup> – that “This obligation of consistency with human rights does not only concern the textual base—the primary sources of the Court—but rather all law that has been identified as

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2016. Summary of remarks include: “Professor Lynk explained...[h]e used to think the critical date in the Palestinian-Israeli conflict was 1967, the start of the occupation. Now he thinks the solution to the problem must go back to 1948, the date of partition and the start of ethnic cleansing.”

<sup>58</sup> Michael Lynk, UN Special Rapporteur, “[The situation of human rights in the Palestinian Territory occupied since 1967 – Press Conference](#),” United Nations, New York, October 26, 2017, UN WebTV. See also: “Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967,” United Nations Human Rights Council, [A/HRC/37/75](#), June 14, 2018.

<sup>59</sup> [Prosecutor’s submission](#) para. 145

<sup>60</sup> [Prosecutor’s submission](#), para. 155

<sup>61</sup> Rome [Statute](#) of the International Criminal Court July 17, 1998, 2187 UNTS 90, Article 21(3)

<sup>62</sup> [Prosecutor’s submission](#), Para. 155



applicable pursuant to the preceding subparagraphs of article 21 of the Statute.”<sup>63</sup> In the *Lubanga* case – and as relied upon by the Prosecutor<sup>64</sup> – the Appeals Chamber said that “[h]uman rights underpin the Statute; every aspect of it, including the exercise of the jurisdiction of the Court.”<sup>65</sup> As a matter of law then, the Court must answer the issue of territorial jurisdiction consistently with “internationally recognized human rights.”

31. The starting point for such a consideration is the UN Charter’s fundamental principle of “the equal rights of men and women and of nations large and small.”<sup>66</sup> The internationally-recognized human rights that inform arguments about territorial jurisdiction must not be applied selectively. To assign and rely upon rights for Palestinians that ignore, exclude or disparage rights for Israelis in the quest for territorial jurisdiction is not “consistent” with “internationally-recognized human rights,” but that is what the Prosecutor’s arguments do.

32. The Prosecutor attempts to establish the Court’s territorial jurisdiction in “the situation of Palestine,” by a series of arguments that rely on the principle of self-determination. These arguments incorrectly extrapolate from self-determination to territorial jurisdiction.

### ***Self-determination and equality rights***

33. The Prosecutor acknowledges that “the right to self-determination is undoubtedly a fundamental human right.”<sup>67</sup> As a principle of the protection of human rights,<sup>68</sup> it is in the framework of human rights that self-determination must be interpreted and applied.

34. Equality lies at the heart of fundamental human rights and self-determination is inextricably tied to this norm. The Prosecutor acknowledges that the UN Charter enshrines the “**equal rights** and self-determination of peoples.”<sup>69</sup>

35. Nowhere in her 112-page request does the Prosecutor ever mention the self-determination of the Jewish people. Instead, she interprets and applies self-determination to promote the inequality of peoples. She rends asunder the standard of “equal rights **and** self-determination.” Ignoring Jewish self-determination and focusing only on the self-determination of Palestinians in order to find jurisdiction is not applying the principle as a human right, but as a tool of discrimination contrary to the Statute’s Article 21(3).

<sup>63</sup> Decision on the ‘Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute’, [Judge Perrin de Brichambaut Separate Concurring Opinion](#), para. 112

<sup>64</sup> [Prosecutor’s submission](#), Para. 156

<sup>65</sup> [Lubanga Jurisdiction AD](#), para. 37

<sup>66</sup> Preamble, [Charter of the United Nations](#), October 24, 1945, 1 UNTS XVI (hereinafter UN Charter)

<sup>67</sup> [Prosecutor’s submission](#), Para. 147

<sup>68</sup> *European Arbitral Tribunal on Yugoslavia, Bulletin No. 2*, January 11, 1992, R.G.D.I.P., 1992, p. 266

<sup>69</sup> Emphasis added. [Prosecutor’s submission](#), Para. 148; Article 1(2), Article 55, UN Charter

### *Self-determination and the rights of others*

36. The right to self-determination as set out in Article 1 of both the ICCPR and ICESCR is conditioned by another principle in both treaties. Article 5(1) says: “nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein.”<sup>70</sup> The interpretation and application of the right of self-determination, therefore, “cannot result in the destruction (or impairment) of any of the other rights protected.”<sup>71</sup> On the contrary, “the rights of both individuals and groups need to be protected against oppressive acts in the name of self-determination.”<sup>72</sup>

37. The Prosecutor, however, invokes in support of territorial jurisdiction (by legitimizing territorial claims to the “Occupied Palestinian Territory” and through bypassing the traditional criteria of statehood) an interpretation of a Palestinian right to self-determination that does impair the rights of others. The human rights of individual Jews and members of the Jewish religious minority are not guaranteed by the Palestinian government – deliberately, as a matter of official behavior – on the territory of what the Prosecutor insists is the “State of Palestine.” On the contrary, Jews in that territory are in dire need of protection against oppressive acts in the name of Palestinian self-determination.

38. Four factual dimensions should affect the legal move from self-determination to statehood and territorial jurisdiction. First, Jewish worshippers and religious sites, located in what the Prosecutor seeks to conclude is Palestinian territory for the purposes of this case, are routinely attacked. Such “acts” are clearly directed to Jews as Jews. The Old City of Jerusalem is the historic capital of the Jewish people and the location of the holiest site in Judaism, the Temple Mount. From 1948 to 1967 Jews were barred from access to the Old City altogether, Jewish synagogues were destroyed and Jewish tombstones ransacked to build lavatories.<sup>73</sup> In the post-1967 era upon which the Prosecutor focuses, Palestinians continue – as a matter of official policy or behavior – to deny the Jewish connection to the Old City,

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<sup>70</sup> International Covenant on Civil and Political Rights, December 16, 1966, UNTS vol. 999, p. 171 (hereinafter [ICCPR](#)); International Covenant on Economic, Social and Cultural Rights, December 16, 1966, UNTS vol. 993, p. 3. (hereinafter [ICESCR](#))

<sup>71</sup> Robert McCorquodale, “Self-Determination: A Human Rights Approach,” 43 *International and Comparative Law Quarterly* 857-885, October 1994, at p. 876

<sup>72</sup> Robert McCorquodale (1994), p. 878

<sup>73</sup> [“Cabinet Report Says Jordan Destroyed 56 Old City Synagogues, Desecrated Cemetery,”](#) November 2, 1967, JTA.org



incite violence against Jewish worshippers on the Temple Mount,<sup>74</sup> and direct lethal violence against Jews in the Old City, other parts of Jerusalem, and other religiously-pivotal sites.<sup>75</sup>

39. Second, Jewish “settlers”<sup>76</sup> – cast by the Prosecutor as responsible for “impeding” Palestinian self-determination (with jurisdictional implications) – are routinely dehumanized by official Palestinian authorities.<sup>77</sup> The Palestinian Authority (PA) representative at the UN Human Rights Council delivered this blatantly false blood libel (as an “explanation of vote”) in March 2016: “Israeli soldiers and settlers kill Palestinian children. They shoot them dead. They will leave them to bleed to death.”<sup>78</sup> The PA representative at the UN in New York, in April 2016 publicly compared Israelis to Nazis.<sup>79</sup> Mahmoud Abbas, in March 2018, said this about the American Ambassador to Israel, who is Jewish: “Son of a dog. They [the settlers] are building on their land? You are a settler and your family are settlers.”<sup>80</sup>

40. Third, dehumanization, as Jewish history demonstrates, is followed by inevitable consequences. Killers of “settlers” are continuously honored in the Palestinian society that the Prosecutor seeks to award with statehood and the Court’s jurisdiction. Such a result is profoundly at odds with the requirement not to interpret and apply self-determination in a manner that does not destroy the rights of others. A tiny fraction of the attacks, in the context of “settlements” and this case, that have been perpetrated by Palestinians – and the official Palestinian reaction – includes the following.

a. In March 2011 in the Jewish “settlement” of Itamar, Palestinians strangled, knifed, and shot to death five members of the Fogel family, including three sleeping children. They

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<sup>74</sup> See, for instance, Wafa, the official PA news agency, July 26, 2016; “Head of the Palestinian Delegation to UNESCO, Mounir Anastas, has similarly stated that the presence of Jews ‘defiles the sanctity and authentic character of the Al-Aqsa Mosque.’” Ma’an, independent Palestinian news agency, July 19, 2016; Itamar Marcus and Nan Jacques Zilberdik, [“Special report: PA brainwashing works, terrorists kill to defend Al-Aqsa Mosque.”](#) Palestinian Media Watch, August 11, 2016. This often takes the form of bogus allegations – blood libels – alleging Israeli efforts to harm it. Nadav Shragai, [“The ‘Al-Aksa Is in Danger’ Libel: The History of a Lie.”](#) March 13, 2012, Jerusalem Center for Public Affairs,

<sup>75</sup> [“Victims of Palestinian Violence and Terrorism since September 2000.”](#) Israel Ministry of Foreign Affairs, last accessed March 12, 2020. This site lists fatalities as a result of terror including in Jerusalem and the Old City within Jerusalem. This site lists fatalities as a result of terror including in Jerusalem and the Old City. “When the Palestinians had exclusive responsibility for security in Bethlehem, Palestinian snipers sat on the rooftops and shot at soldiers and Jewish visitors to Rachel’s Tomb.” Nadav Shragai, [“Bethlehem after Oslo: Terror Spiked in Israel’s Absence.”](#) Jerusalem Center for Public Affairs, October 23, 2018

<sup>76</sup> The word “settler” is a term that is variably used to refer to Jews living in the “Occupied Palestinian Territory” or Jews living in any part of Israel at all, but I will assume for the purposes of this Request that the Prosecutor intends to use “settlers” and “settlements” to refer to the former.

<sup>77</sup> For instance: [“Settlers.”](#) Cartoon in PA daily demonizes Israeli settler, Al-Hayat Al-Jadida, official PA daily, October 15, 2018 Palestinian Media Watch; Itamar Marcus and Nan Jacques Zilberdik, [“‘Settlers’ kill Palestinians for pleasure - hate speech in official PA daily.”](#) Palestinian Media Watch, November 6, 2018

<sup>78</sup> Palestinian Authority, Human Rights Council, March 24, 2016, [Explanation of Vote](#)

<sup>79</sup> April 27, 2016 [Palestinian Rep. Riyad Mansour speaking at a press conference at the UN](#)

<sup>80</sup> Jack Khoury, [“Abbas Assails U.S. Ambassador David Friedman: ‘Son of a Dog, Settler.’”](#) Haaretz, March 19, 2018

decapitated three-month old Hadas. Official PA television broadcast “greetings to the murderers of the Fogel family from the relatives of the killers and the PA host.”<sup>81</sup> The two convicted killers, now serving time in prison, have netted a combined salary of \$132,895 from the PA between their arrest in April 2011 and December 2018,<sup>82</sup> under Palestinian law that pays imprisoned terrorists monthly salaries.<sup>83</sup>

b. In June 2016 a Palestinian stabbed and murdered a 13-year-old Israeli girl while she slept in her bed in the Jewish “settlement” of Kiryat Arba. “Fatah’s official Facebook page immediately posted his picture, declaring him a Martyr – ‘Shahid,’ the highest honor achievable in Islam according to the PA. Wafa, the official PA news agency, likewise honored the terrorist, referring to him as a Martyr – ‘Shahid.’”<sup>84</sup>

c. In July 2017 in the Jewish “settlement” of Halamish, a Palestinian hacked to death 3 Jewish family members celebrating the birth of a child at their Sabbath dinner table. The next day, the official spokesman of the PA Security Forces said: “The extremist settlers’ entry to the Al-Aqsa Mosque is what is encouraging the violence, killing, terror, blood, and hatred, and creating an atmosphere that is appropriate for natural responses of equal value...”<sup>85</sup>

d. In December 2018 Palestinians shot and wounded 7 Israelis, including a pregnant woman and 4 teens, in a drive-by shooting attack next to the “settlement” of Ofra, The pregnant woman was severely wounded; the baby delivered prematurely died three days later. One of the perpetrators was killed in an attempt to arrest him shortly thereafter. The official Facebook page of Mahmoud Abbas’s Fatah party<sup>86</sup> then honored him with this post: “He loved the land that gave him of its bounty, and he honored it and whispered in its ear: ‘I will

<sup>81</sup> [“On PA TV: Glorification of Fogel family murderers.”](#) Palestinian Media Watch, Jan 29, 2012

<sup>82</sup> [“Palestinian Authority Salaries to Terrorists.”](#) Palestinian Media Watch, last accessed March 12, 2020

<sup>83</sup> Law No. 14 (2004) on Aid for Prisoners in Israeli Prisons; See also: PA Regulation No. 18, 2010 (Implemented January 2011) Y. Yehoshua, C. Jacob, [“Palestinian Authority, PLO Officials: Allowances To Prisoners Will Continue; This Issue Is Not Subject To U.S.-Israeli Extortion”](#), Middle East Media Research Institute, June 16, 2017, Middle East Media Research Institute, June 16, 2017. See also Itamar Marcus, [“PMW exposes Abbas’ latest deception: PA salaries to terrorists are not social welfare.”](#) Palestinian Media Watch, July 17, 2017

<sup>84</sup> Itamar Marcus and Nan Jacques Zilberdikk, “PA and Fatah quick to honor murderer who killed 13-year-old girl in her sleep,” June 30, 2016, <https://palwatch.org/page/10448>

<sup>85</sup> Facebook page of Official Spokesman of the PA Security Forces, Adnan Al-Damiri, July 22, 2017, “Slaughterer of 3 Israelis honored in the PA,” Palestinian Media Watch, September 6, 2017, <https://palwatch.org/page/12945>

<sup>86</sup> Posted by the Head of the Fatah Movement Mobilization and Organization Commission’s Information Office, Munir Al-Jaghoub

give you the most precious thing I have - my blood and my soul.’ Martyr

#Saleh\_Barghouti”<sup>87</sup> More official Fatah posts stressed he died for “our Palestinian land.”<sup>88</sup>

41. In 2019 alone, there were 1,050<sup>89</sup> terrorist attacks against Israelis in the West Bank/Judea and Samaria and Jerusalem. These included firebombs, pipe bombs, small arms fire, arson, vehicular attacks, stabbings, grenade, improvised explosive device (IED’s), and stone throwing. (Attacks from the Gaza Strip into Israel in 2019 totaled 1,380<sup>90</sup> and included rockets, anti-tank fire, mortar shells, sniper fire, anti-aircraft fire, and improvised grenades.<sup>91</sup>)

42. These facts have legal implications. The Prosecutor uses Palestinian self-determination to justify territorial claims to this land, and to go further and empower statehood, with concomitant Court jurisdiction. She ignores the legal relevance of the fact that Palestinians – officially – use Palestinian self-determination to destroy and impair the rights of others, starting with the right to life – on this same land. She isn’t talking about an abstract concept; she has no difficulty in resting her case on alleged concrete actions of Israelis.<sup>92</sup> Either these official Palestinian acts count, or the rights of Jews do not. Her argument amounts to the latter, that in this specific “unique” case,<sup>93</sup> self-determination can be interpreted as implying a right of “Palestine” to destroy the rights and freedoms of others. Whereas international law consistent with internationally recognized human rights demands: until such time as this “right” is renounced and abandoned, Palestinian self-determination should not be interpreted, applied, implied or further empowered to justify this Court’s jurisdiction.

### ***Self-determination, statehood and the will of the people***

43. The Prosecutor invokes the self-determination of people over one hundred times to make the case for territorial jurisdiction, relying on an assignment of blame to Israel for its lack of fulfillment. It is therefore necessary to consider more closely the nature and scope of the right

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<sup>87</sup> Official Fatah Facebook page, Dec. 13, 2018. See: Nan Jacques Zilberdik, “[Fatah ‘prays for the souls’ of 2 murderers.](#)” Palestinian Media Watch, December 13, 2018; “[Fatah glorifies terrorist who murdered an unborn baby: ‘He loved the land... and whispered in its ear: ‘I will give you the most precious thing I have – my blood and my soul’.](#)” Official Fatah Facebook page, posted on Palestinian Media Watch

<sup>88</sup> Statement from the Head of the Fatah Movement Mobilization and Organization Commission’s Information Office Munir, Al-Jaghoub,” [Official Fatah Facebook page](#), Dec. 13, 2018; and see Itamar Marcus and Maurice Hirsch, “[Another baby murderer to receive fat salary from the PA.](#)” January 8, 2019

<sup>89</sup> Not counting multiple rockets from a single attack

<sup>90</sup> Not counting multiple rockets from a single attack

<sup>91</sup> *Bi-monthly summaries for 2019: [February 2019](#), [April 2019](#), [June 2019](#), [August 2019](#), [October 2019](#), [December 2019](#)*, Israeli Security Agency (Shin Bet)

<sup>92</sup> [Prosecutor’s submission](#) paras. 15, fn. 265, Para. 158, fn. 554, Para. 210

<sup>93</sup> [Prosecutor’s submission](#) paras. 5, 9, 144

of self-determination, how it is being impeded, and the legal role of the Court in any attempt to solve its violation.

44. The Prosecutor stresses that self-determination “cannot be reduced to the authority of the ruler or the government of the time,” but must be understood “by reference also to a community, society or nation in relation to which governmental authority is exercised.”<sup>94</sup>

45. The International Court of Justice in the *Western Sahara* case<sup>95</sup> said the provisions on the right of self-determination (set out in the UN Declaration on the Granting of Independence to Colonial Countries and Peoples)<sup>96</sup> “confirm and emphasize that the application of the right of self-determination requires a free and genuine expression of the will of the peoples concerned.”<sup>97</sup> The ICJ uses the term: “the principle of self-determination, defined as the need to pay regard to the freely expressed will of peoples...”<sup>98</sup>

46. Contrary to these principles, however, the Prosecutor does reduce the self-determination of the Palestinian people to the dictates of their rulers, building a claim of territorial jurisdiction on top of a right of self-determination without examination of the communities and their relation to the government authorities acting in their name. And without acknowledging the harsh reality and legal consequences of the fact that the “State of Palestine” is a dictatorship, ruled without regard to the freely expressed will of the people.

47. The facts are as follows:

(a) The Palestinian Legislative Council (PLC), the parliament or legislative branch of the Palestinian National Authority, last held elections in January 25, 2006. According to The Basic Law of 2005, the term of the PLC is four years.<sup>99</sup> No elections for this body have been held since that time.<sup>100</sup> In fact, the PLC has not met since 2007. Mahmoud Abbas, Chairman (“President”) of the Palestinian National Authority, has been ruling by decree ever since.<sup>101</sup> On January 6, 2013, Abbas decreed stating that references to the “Palestinian National Authority” were henceforth to be changed to the “State of Palestine.” On December 22, 2018,

<sup>94</sup> [Prosecutor’s submission](#) para. 147

<sup>95</sup> [Western Sahara Advisory Opinion](#), International Court of Justice, October 16, 1975

<sup>96</sup> UN General Assembly resolution 1514 (XV)

<sup>97</sup> [Western Sahara Advisory Opinion](#), International Court of Justice, October 16, 1975, para. 5

<sup>98</sup> [Western Sahara Advisory Opinion](#), International Court of Justice, October 16, 1975, para. 59f

<sup>99</sup> [The Basic Law of 2005 A.D.](#) Concerning the Amendment some of the Provisions of the Amended Basic Law of 2003

<sup>100</sup> Admitted by the Prosecutor as “over 10 years” [Prosecutor’s submission](#), para. 89 but drawing no implications.

<sup>101</sup> Admitted by the Prosecutor, [Prosecutor’s submission](#), para. 89 but drawing no implications.

the PLC was dissolved altogether, with Abbas promising new elections – which have not happened.<sup>102</sup>

(b) Palestinians held “Presidential” elections January 9, 2005, electing Mahmoud Abbas. According to the Basic Law of 2005, the term of the “President” is four years.<sup>103</sup> No elections for President have been held since that time. So Abbas is in the 16<sup>th</sup> year of a 4-year term.

(c) In local council “elections” in 2017 in the West Bank, most races were uncontested and key opposition groups boycotted.<sup>104</sup>

(d) The Palestinian National Council (PNC) is the theoretical decision-making body of the PLO and it claims to represent all Palestinians everywhere. It meets (in theory<sup>105</sup>) annually and is an unelected body (theory notwithstanding). In fact, PNC elections have never been held,<sup>106</sup> and there were 22 years between the last full meetings in 1996 and 2018.<sup>107</sup> ( Hamas, and others, did not participate.) In 2004, a subset of the unelected PNC chose Abbas to be Chairman of the PLO. In 2008, another subset of the unelected PNC chose Abbas as the “President of the **future state** of Palestine.”<sup>108</sup>

(e) As for Gaza, Hamas won the largest number of seats in the 2006 elections for the Palestinian Legislative Council (over Abbas’ Fatah party). In June 2007, Hamas took over Gaza by force, overthrowing Abbas’s PA regime which led to a split between the West Bank and the Gaza Strip. Municipal “elections” in 2017 were not held in Gaza.<sup>109</sup>

In summary, Palestinians have not had any free and fair election in over 14 years. They live under totalitarian regimes not of Israel’s making, ruled by force or fiat.

48. This reality is compounded by the failure of Palestinian leaders to provide and protect freedom of expression. As the UN Committee on the Rights of the Child (CRC) concluded in March 2020, after evaluating Palestinian non-compliance with the Convention on the Rights of the Child: “The Committee is deeply concerned that...the limiting of the right to freedom

<sup>102</sup> [“President Abbas says Constitutional Court ordered dissolution of Legislative Council.”](#) Wafa News, December 22, 2018, Admitted by the Prosecutor, [Prosecutor’s submission](#), para. 89 but drawing no implications.

<sup>103</sup> [The Basic Law of 2005 A.D.](#) Concerning the Amendment some of the Provisions of the Amended Basic Law of 2003

<sup>104</sup> [Freedom in the World 2019: The West Bank](#)

<sup>105</sup> [“The Statute of the PLO Division Two – The National Council.”](#) Palestine National Council

<sup>106</sup> [“Who are You?”: The PLO and the Limits of Representation.”](#) by Osamah Khalil , Al Shabaka: the Palestinian Policy Network, March 18, 2013

<sup>107</sup> [“Palestinian forum convenes after 22 years, beset by division,”](#) Reuters, April 30, 2018; [“Palestinian National Council meets for first time in 22 years,”](#) May 1, 2018, Aljazeera; [“Palestinian National Council Reconvenes in Ramallah: We’ve seen this movie before!”](#), Khalil E. Jahshan, Arab Center Washington D.C., May 4, 2018

<sup>108</sup> Emphasis added. [“PLO Central Council elects Mahmoud Abbas President of the future State of Palestine. \(23 November\).”](#) Chronological Review of Events Relating to the Question of Palestine, Monthly media monitoring review: November 2008, UN Division for Palestinian Rights

<sup>109</sup> Ali Sawafta, Nidal al-Mughrabi, [“Palestinians hold local elections in West Bank but not Gaza”](#), Reuters, May 13, 2017

of expression, including of children, and that according to reports received by the Committee, children had been arrested by the Palestinian Security Forces and the *de facto* authorities in the Gaza Strip for expressing their political opinions.”<sup>110</sup> Restrictive laws criminalizing free speech in the West Bank/Judea and Samaria can include multiple years of imprisonment.<sup>111</sup>

“Under a 1995 PA press law, journalists may be fined and jailed, and newspapers closed, for publishing...news that might harm national unity or incite violence.<sup>112</sup> In 2017, Abbas issued the Electronic Crimes Law prescribing heavy fines and long prison terms for a host of vaguely defined offenses..<sup>113</sup>

49. The Prosecutor, however, repeatedly blames Israel for Palestinian lack of self-determination. She insists that the Court not lift the veil of ignorance and claims the Court has no duty even to look for Palestinian responsibility. In her words: “The Court cannot and should not attempt to identify all the contributing factors.”<sup>114</sup> The “all” is a straw man, and legally spurious.

50. By ignoring Palestinian responsibility for shortfalls in realizing their right to self-determination, the Prosecutor asks the Court to short circuit Palestinian satisfaction of the conditions of statehood. But ruling by force or by fiat is not “one factor” or a “contributing factor”<sup>115</sup> that “impedes” or “obstructs” or “impairs”<sup>116</sup> “the exercise of the Palestinian people of its right to self-determination.” It destroys it. No vote. No elections. No parliament. No legislative body. No free expression. Which means no realization of self-determination, with Palestinians directly to blame.

51. The Prosecutor’s argument is a series of *non sequiturs*, leaps, from a lack of self-determination, to the claim Israel is at fault, to an assertion that the Court should not even look at Palestinian responsibility, to the conclusion that there is no need to satisfy the conditions of statehood. The reality is that since Palestinian autocrats are denying “the will of

<sup>110</sup> [“Concluding observations on the initial report of the State of Palestine,”](#) March 6, 2020, para. 30(a)

<sup>111</sup> [“Blasphemy and Related Laws in Selected Jurisdictions,”](#) The Law Library of Congress, Global Legal Research Center, January 2017, p. 44; [Jordanian Penal Code No. 16 of 1961](#), art. 278; archived at <https://perma.cc/E9E3-BGL2>

<sup>112</sup> [“Freedom in the World 2019: The West Bank,”](#) Freedom House, 2019; [“Memorandum on the 1995 Press Law of the Palestinian National Authority,”](#) ARTICLE 19, the International Centre Against Censorship and The Centre for Media Freedom in the Middle East and North Africa, 15 June 1999

<sup>113</sup> [Presidential Decree No. \(16\) for the year 2017 Regarding Cybercrime](#), signed by Mahmoud Abbas,; [“Freedom in the World 2019: The West Bank,”](#) Freedom House, 2019; “The cybercrime law grants thin-skinned authorities virtually unrestrained power to block websites, conduct surveillance, and assemble reams of data on ordinary people,” Sarah Leah Whitson, Middle East director at Human Rights Watch, [“Palestine: Reform Restrictive Cybercrime Law. Amended Draft Better, but Still Short of International Standards.”](#) Human Rights Watch, December 20, 2017

<sup>114</sup> [Prosecutor’s submission](#) para. 157

<sup>115</sup> [Prosecutor’s submission](#) para. 157

<sup>116</sup> See for instance: [Prosecutor’s submission](#) paras. 9, 43, 101, 146



the people,”<sup>117</sup> the Prosecutor cannot cure the legal defects in their statehood claim by relying on the “self-determination of people”<sup>118</sup> (unless she means the self-determination of the few individuals in positions of power). She cannot legitimately use self-determination – severely impeded by Palestinian rulers’ denial of the will of the people – to satisfy the criterion of statehood that demands respect for the will of the people.

### ***Statehood, Democracy and the Rule of Law***

52. Developments in state practice “suggest the emergence of democracy as an international legal condition of statehood for new states”.<sup>119</sup> The 1992 Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union required, among other things, “respect for the provisions of the Charter of the United Nations...especially with regard to the rule of law, democracy and human rights.”<sup>120</sup> Although developed in the context of recognition, they may “in practice be interpreted as additions to the criteria for statehood.”<sup>121</sup> “Statehood criteria have come to include such substantive criteria as respect for democracy, the rule of law and human rights...”<sup>122</sup> The “State of Palestine” however, is not a democracy,<sup>123</sup> and fails to satisfy what ought to be a key criteria in determining its statehood.

53. The Racial Discrimination Committee (CERD) pointed out in September 2019 that the “State of Palestine” had created a so-called “Independent Commission for Human Rights” in 2005, but that it had never received a single complaint of racial discrimination, which they

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<sup>117</sup> The 2005 elections for the Palestinian President were said “to reflect the will of the people” and have never been replicated. [National Democratic Institute Final Report on the Palestinian Legislative Council Elections](#), January 25, 2006

<sup>118</sup> [Prosecutor’s submission](#) para. 102

<sup>119</sup> This is despite the fact that the standard is not applied to existing undemocratic states, which would raise many different issues. Anne Peters, “Statehood after 1989: ‘Effectivités’ between Legality and Virtuality,” *Proceedings of the European Society of International Law*, Vol. 3, 2010, pp. 9-10; “Self-determination and the criteria of statehood...It is the criterion of government which...has been most affected by the development of the legal right to self-determination...[T]he representative democratic nature of the government has also been put forward as a requirement.” Malcolm Shaw, *International Law (8th ed.)*, Cambridge University Press, 2017, p. 162

<sup>120</sup> Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union, 31 I.L.M. 1486, 1487 (1992)

<sup>121</sup> Shaw (2017), p. 157

<sup>122</sup> [“National sovereignty and statehood in contemporary international law: the need for clarification.”](#) Report by the Committee on Legal Affairs and Human Rights Rapporteur: Ms Marina Schuster, Germany, Alliance of Liberals and Democrats for Europe, Parliamentary Assembly of the Council of Europe, July 12, 2011, para. 41

<sup>123</sup> On the [Gaza Strip](#) and the [West Bank](#) see Freedom House, Freedom in the World 2019, ranking both at the bottom of their scale as “not free.” On the metric of “political rights” the scores were an appalling 3 out of 40 for the Gaza Strip and 4 out of 40 for the West Bank.

speculated “may reveal” “a lack of trust in the judicial system, a fear of reprisals or a lack of will on the part of the authorities to prosecute the perpetrators of such acts.”<sup>124</sup>

54. Reasons for a lack of trust abound, since Palestinian leaders have systematically undermined the rule of law. In 2016, Abbas unilaterally created a Constitutional Court composed of judges selected from his political party, “in what was seen as a largely political move to consolidate power.”<sup>125</sup> Palestinian commentators condemned the move as “confiscating everything and putting all the institutions in [Abbas’s] hands” and warned of misuse.<sup>126</sup> The Court subsequently approved Abbas’s decision to postpone municipal elections<sup>127</sup>; confirmed his ability to revoke Parliamentary immunity of a political rival<sup>128</sup>; and issued a decree to dissolve the Palestinian Legislative Council.<sup>129</sup>

55. In 2019, Abbas issued a decree<sup>130</sup> suspending the High Judicial Council, which nominated judges and supervised the judiciary.<sup>131</sup> Palestinian organizations called it “a blatant interference in the judicial affairs and independence, in form and substance.”<sup>132</sup> According to one Palestinian NGO: “Now that both the legislative and judicial authorities are dissolved; the institutional essence of the state is absent and we are left with a centric political system revolving around the President.”<sup>133</sup> The rule of law, a condition often in practice interpreted as an addition to the criteria for statehood,<sup>134</sup> has been flagrantly disregarded by the leaders of the “State of Palestine.”

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<sup>124</sup> [“Concluding observations on the combined initial and second periodic reports of the State of Palestine.”](#) Committee on the Elimination of Racial Discrimination, CERD/C/PSE/CO/1-2, September 20, 2019, paras. 17, 18

<sup>125</sup> [“Mapping Palestinian Politics: Constitutional Court”](#), European Council on Foreign Relations, last accessed March 13, 2020

<sup>126</sup> Nidal al-Mughrabi, Ali Sawafta, [“With new decree, Palestinian leader tightens grip.”](#) *Reuters*, April 11, 2016,

<sup>127</sup> [“Mapping Palestinian Politics: Constitutional Court”](#) European Council on Foreign Relations, last accessed March 13, 2020

<sup>128</sup> Gwenyth Gamble Jarvi, [“Palestine constitutional court allows president to revoke lawmaker immunity,”](#) *The Jurist*, November 7, 2016

<sup>129</sup> [“President Abbas says Constitutional Court ordered dissolution of Legislative Council.”](#) Wafa News, December 22, 2018

<sup>130</sup> [“President lowers judges’ retirement age, establishes new interim judicial council.”](#) *Wafa News*, July 18, 2019

<sup>131</sup> [“MAPPING PALESTINIAN POLITICS: High Judicial Council \(HJC\)”](#), European Council on Foreign Relations, last accessed March 13, 2020

<sup>132</sup> [“Palestinian President Undermines Judiciary Independence.”](#) Palestinian Centre for Human Rights, July 22, 2019

<sup>133</sup> Raji Sourani, Director of the Palestinian Centre for Human Rights, *Id.* See also: [2018 U.S. State Department Country Reports on Human Rights Practices: West Bank and Gaza](#), March 13, 2019

<sup>134</sup> Shaw (2017) p. 150.



### *Statehood and Human Rights*

56. The Prosecutor selectively chooses what factors beyond the Montevideo criteria to consider when determining Palestinian statehood. She cherry picks which internationally recognized human rights matter, lands on a narrow conception of self-determination, and claims it to be determinative.<sup>135</sup> But interpreting the law consistently with internationally recognized rights should mean taking great care not to interpret self-determination without due regard to the rights of individuals and groups – such as women, children, and LGBTQ rights – great care not to apply the rules enabling statehood in a manner that further enables their oppressors. While self-determination is supposed to mean that peoples “**freely** determine their political status and **freely** pursue their economic, social and cultural development,”<sup>136</sup> the Prosecutor relies on self-determination to support statehood claims that further empower the very Palestinian power-brokers who disempower Palestinian women and girls.

57. Instead, while self-determination is supposed to mean that peoples “**freely** determine their political status and **freely** pursue their economic, social and cultural development,”<sup>137</sup> the Prosecutor relies on self-determination to support statehood claims that further empower the very Palestinian power-brokers who disempower Palestinian women and girls. The Committee on Discrimination Against Women (CEDAW) issued concluding observations on Palestinian non-compliance with the Convention on the Elimination of Discrimination Against Women, in 2018. CEDAW expressed concern about persistent discriminatory stereotypes that “perpetuate the subordination of women” in Palestinian society; “the high prevalence of gender-based violence against women, in particular so-called “honour killings” and domestic and sexual violence,” rules of evidence that say the testimony of a man is considered to be equivalent to that of two women, and give male guardians the legal capacity to contract marriages on behalf of their female relatives<sup>138</sup> In March 2020, the UN Committee on the Rights of the Child (CRC) issued concluding observations on Palestinian non-compliance with the CRC Convention, expressing serious concern about the pervasive practice of child “marriages”<sup>139</sup> – a form of institutionalized rape. None of this can be blamed

<sup>135</sup> [Prosecutor’s submission](#), paras. 137, 138, 178.

<sup>136</sup> Emphasis added, Art. 1(1) [ICCPR](#), and Art. 1(1) [ICESCR](#)

<sup>137</sup> Emphasis added, Art. 1(1) [ICCPR](#), and Art. 1(1) [ICESCR](#)

<sup>138</sup> [“Concluding observations on the initial report of the State of Palestine.”](#) CEDAW, July 25, 2018, paras. 26, 46; See also CEDAW’s concern about failure to criminalize marital rape.

<sup>139</sup> [“Concluding observations on the initial report of the State of Palestine.”](#) CRC, March 6, 2020, para. 42; [“Concluding observations on the initial report of the State of Palestine.”](#) CEDAW, July 25, 2018, para. 24

on Israel. Participation and empowerment elaborated in the CEDAW Convention, and the Beijing Declaration and Platform of Action, must inform self-determination. There is no exception clause permitting statehood to rise from self-determination that puts women and girls down.

### ***Palestinian abuse of Palestinian children***

58. The CRC also pointed to other egregious abuse of Palestinian children by Palestinians. It was “deeply concerned” about “[t]he recruitment and use of children in hostilities by non-State armed groups operating from the territory of the State party,”<sup>140</sup> the participation of Palestinian children in “conflict-related activities against Israel in both the Gaza Strip and the West Bank, and reports that such participation has sometimes been encouraged and facilitated and that the death or injury of children has been glorified by authorities of the State party, *de facto* authorities in the Gaza Strip and non-State armed groups;<sup>141</sup> There is abundant evidence of the direct involvement of Abbas’ Fatah party in encouraging and glorifying Palestinian children participating in armed conflict.<sup>142</sup> The “State of Palestine” touted its accession to the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict on April 7, 2014, but has refused to comply with even the duty to report ever since. In one of the most fundamental violations of international humanitarian law,<sup>143</sup> and the right to life, Hamas routinely uses Palestinian children, and other Palestinian civilians as human shields.<sup>144</sup>

59. The CRC was also “concerned about: The high incidence of children being subjected to abuse, neglect and other forms of violence, particularly in schools by teachers and peers;”<sup>145</sup> It was “seriously concerned that:...A high number of children experience sexual violence,

<sup>140</sup> [“Concluding observations on the initial report of the State of Palestine,”](#) March 6, 2020, para. 24

<sup>141</sup> [“Concluding observations on the initial report of the State of Palestine,”](#) March 6, 2020, para. 24

<sup>142</sup> See for instance: Maurice Hirsch and Itamar Marcus, [“Palestinian Media Watch submission to UNICEF: How the PA weaponized Palestinian children against Israel – 2019,”](#) February 2020

<sup>143</sup> See: Article 8.2(b)(xxiii), [Statute](#); Article 28, Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949; Articles 51(7), 58(b), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

<sup>144</sup> In Gaza, Hamas runs summer camps for tens of thousands of Palestinian children and adolescents that include military and weapons training. The Meir Amit Intelligence and Terrorism Information Center, July 18, 2018. See for instance: Summary by the Secretary-General of the Report of the United Nations Headquarters Board of Inquiry into Certain Incidents that Occurred in the Gaza Strip between 8 July 2014 and 26 August 2014, [S/2015/286](#), April 27, 2015; [“Hamas’ use of human shields in Gaza. Time period 2008-2014,”](#) NATO Strategic Communications Centre of Excellence; [“Hamas’ use of civilians as human shields,”](#) Israel Ministry of Foreign Affairs, July 20, 2014

<sup>145</sup> [“Concluding observations on the initial report of the State of Palestine,”](#) March 6, 2020, para. 38

particularly in the school environment, and that child victims of such violence suffer from stigmatization and discrimination; Child victims of sexual violence often lack access to justice owing to recourse to customary mechanisms and that girls who are victims of sexual abuse, in particular rape, have reportedly been required to marry the abuser.”<sup>146</sup> And it was “deeply concerned that... [Palestinian laws] “set the minimum age of criminal responsibility at 12 years, while...in the Gaza Strip, sets it at 9 years.”<sup>147</sup> Such rules are totally at odds with the treaty.<sup>148</sup> They also drew attention to “persistent de facto discrimination... against children belonging to the Bedouin communities, primarily living in Area C.”<sup>149</sup>

60. In Gaza, homosexuality is a crime that was punished as recently as 2016 by death.<sup>150</sup> In 2019, the PA prohibited events by an NGO advocating for gender and sexual diversity in Palestinian society because they were in contravention of “traditional Palestinian values” and accused them of being “foreign agents.”<sup>151</sup>

61. Violation of the rights of Palestinians by Palestinians challenges the Prosecutor’s claims that Israel is to blame for Palestinian shortfalls in meeting the requirements of the Montevideo convention, that statehood necessarily follows just from self-determination regardless of other human rights concerns, and that her overall argument advances human rights protection.

### ***Statehood and racism***

62. Furthermore, statehood claims in conformity with internationally recognized human rights also require the Court to look at the claimants treatment of “the other.” “[S]tatehood criteria have come to include such substantive criteria as...guarantees for ethnic groups and minorities.”<sup>152</sup> In Southern Rhodesia statehood had “no legal validity”<sup>153</sup> because the political entity was based on a racist ideology.<sup>154</sup> State practice supports “a proposition that systematic

<sup>146</sup> [“Concluding observations on the initial report of the State of Palestine,”](#) March 6, 2020, para. 40

<sup>147</sup> [“Concluding observations on the initial report of the State of Palestine,”](#) March 6, 2020, para. 58

<sup>148</sup> The CRC tells Palestinians to “Bring its child justice system fully into line with the Convention,” and “Raise the minimum age of criminal responsibility to an internationally acceptable level of at least 14 years.”

<sup>149</sup> [“Concluding observations on the initial report of the State of Palestine,”](#) March 6, 2020, para. 59

<sup>149</sup> [“Concluding observations on the initial report of the State of Palestine,”](#) March 6, 2020, para. 20

<sup>150</sup> [“ Hamas Executes Prominent Commander after Accusations of Gay Sex,”](#) March 2, 2016, Newsweek

<sup>151</sup> [“AIQaws response to the PA police statement,”](#) AIQaws for Sexual & Gender Diversity in Palestinian Society, August 18, 2019

<sup>152</sup> [“National sovereignty and statehood in contemporary international law: the need for clarification,”](#) Report by the Committee on Legal Affairs and Human Rights Rapporteur: Ms Marina Schuster, Germany, Alliance of Liberals and Democrats for Europe, Parliamentary Assembly of the Council of Europe, July 12, 2011, para. 41

<sup>153</sup> [UNSC Resolution 217 \(1965\),](#) para. 3.

<sup>154</sup> Peters (2010), p. 4

and institutionalized discrimination might invalidate a claim to statehood.”<sup>155</sup> The 1992 Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union stress “guarantees for the rights of ethnic and national groups and minorities...”<sup>156</sup>

63. “Internationally-recognized human rights” do not include a right to an apartheid state. But that is precisely the kind of state that Palestinians seek to create. In the “State of Palestine” racism is institutionalized. According to Palestinian decision-makers themselves, “the State of Palestine” is to be free of Jews, Judenrein – in effect “Apartheid Palestine.” Palestinian law prohibits a Palestinian from selling land to a Jew (also referred to as a “citizen” or “subject” of the “enemy state” of Israel) on penalty of “life imprisonment with hard labor.”<sup>157</sup> The Palestinian leadership has repeatedly stressed “we will not allow a single Israeli settler to remain in a Palestinian state.”<sup>158</sup> Jews on the Temple Mount, Judaism’s holiest site – have been described by Abbas in 2015 as “filth.”<sup>159</sup> Addressing the Palestinian National Council in 2018, Abbas said hatred of Jews is legitimate and the Holocaust was deserved.<sup>160</sup> The Charter

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<sup>155</sup> Shaw (2017), p. 163

<sup>156</sup> Which may “in practice be interpreted as additions to the criteria for statehood.” Shaw (2017), p. 163

<sup>157</sup> “Clause 1: The wording of clause 114 of Penal Code Number 16 of 1960 and its amendments will be canceled and replaced with the following wording: 1. Any Palestinian who has attempted through actions, speeches, publications, or another way to cut off part of the Palestinian territories in order to annex it to a foreign state or to bestow [said state] with a right or permit to it, or who has attempted to sell or lease part of the Palestinian territories to an enemy state or to one of its citizens or subjects – will be sentenced to five years of hard labor. 2. The one who commits this will be sentenced with a life sentence with hard labor if his actions described above bore results (i.e., the attempt succeeded)...”, Decision Number 20 of 2014 Regarding an Amendment of Penal Code Number 16 of 1960 and its Amendments, signed “Mahmoud Abbas, President of the State of Palestine Chairman of the PLO Executive Committee,” Ramallah, October 20, 2104; example of application of law as recently as 2018, by the Palestinian Grand Criminal Court, see: [“2018 Report on International Religious Freedom: Israel: West Bank and Gaza,”](#) U.S. State Department, June 21, 2019, pg. 44; Mohammed Daraghme, [“Palestinian gets life sentence over land sale to Israelis,”](#) AP, December 31, 2018

<sup>158</sup> Samannews.com, January 27, 2014, available at [“Chief Palestinian Negotiator Saeb Erekat's Positions On Israel Show Increasing Radicalization,”](#) Memri, August 19, 2015; “I say to [Israel]: Every stone you have built on our land and every house you have built on our land - there is no escaping that they will disappear, Allah willing. And the more they announce houses here or settlements there - they will all disappear, Allah willing, and will be in the garbage dump of history.” Speech by PA Chairman Mahmoud Abbas at the Jalazone refugee camp, PA Presidential Office, Facebook, August 10, 2019, available at: <https://palwatch.org/page/16108>

<sup>159</sup> “Al-Aqsa [Mosque] is ours, the Church of the Holy Sepulcher is ours, it is all ours. They have no right to defile them with their filthy feet, and we will not allow them.” Official PA TV, official website of PA Chairman Abbas, WAFA (the official Palestinian news agency), September 16, 2015; Abbas: We won’t allow Jews with their “filthy feet” to “defile our Al-Aqsa Mosque,” see video, September 17, 2015, [Palestinian Media Watch; The New York Times](#), Sept. 18, 2015

<sup>160</sup> PA Chairman Mahmoud Abbas: “...Jews who migrated to eastern and western Europe were subjected to massacres by some state every 10 to 15 years from the 11th century until the Holocaust that took place in Germany. OK, but why did this happen?...The hatred of the Jews is not due to their religion, but rather due to their social role. If so, it's a different issue. And therefore, the Jewish problem that was common in all of the states of Europe against the Jews was not due to their religion, but rather due to their social role that was connected to usury, and banks, and so forth.” Palestinian National Council, Ramallah, Official PA TV, April 30, 2018, see at: [Video](#), Palestinian Media Watch, May 2, 2018

of Hamas, “The Covenant of the Islamic Resistance Movement,” is an open commitment to genocide. Among other things it says:

“Our struggle against the Jews is very great and very serious. It needs all sincere efforts. It is a step that inevitably should be followed by other steps. The Movement is but one squadron that should be supported by more and more squadrons from this vast Arab and Islamic world, until the enemy is vanquished and Allah's victory is realised... ‘The Day of Judgement will not come about until Moslems fight the Jews (killing the Jews), when the Jew will hide behind stones and trees. The stones and trees will say O Moslems, O Abdulla, there is a Jew behind me, come and kill him.’... There is no solution for the Palestinian question except through Jihad. Initiatives, proposals and international conferences are all a waste of time and vain endeavors... The day that enemies usurp part of Moslem land, Jihad becomes the individual duty of every Moslem. In face of the Jews' usurpation of Palestine, it is compulsory that the banner of Jihad be raised. To do this requires the diffusion of Islamic consciousness among the masses, both on the regional, Arab and Islamic levels. It is necessary to instill the spirit of Jihad in the heart of the nation so that they would confront the enemies and join the ranks of the fighters... Israel, Judaism and Jews challenge Islam and the Moslem people. ‘May the cowards never sleep.’”<sup>161</sup>

64. The contrast to Israel is striking: one-fifth of the population is Arab, Arab political parties actively participate in elections,<sup>162</sup> and Arabs have been Cabinet Ministers, Supreme Court judges and Ambassadors.

65. The “State of Palestine” is a political entity based on a racist ideology, and is currently engaged in and promising to continue, systematic and institutionalized discrimination. As a result, it does not have a legally valid entitlement to statehood that should be affirmed by this Court.

### *Statehood and the unlawful use of force*

66. The Prosecutor stresses “that legal rights cannot stem from an unlawful act,”<sup>163</sup> an obligation that has been “applied in situations resulting from the illegal use of force...”<sup>164</sup> And again: “statehood has not been recognised in cases where State creation has resulted from acts in breach of international law. This includes situations resulting from threat or use of force,”<sup>165</sup> She affirms both “the principle that ‘an entity will...not become a state where it

<sup>161</sup> [The Covenant of the Islamic Resistance Movement](#), 18 August 1988, available at Yale Law School Avalon Project (hereinafter Hamas Charter)

<sup>162</sup> The Joint List, a combination of Arab political parties, won 15 of the 120 Knesset seats during the March 2, 2020 Israeli elections, making them the third largest political party in the Israel’s parliament.

<sup>163</sup> [Prosecutor’s submission](#) para. 149

<sup>164</sup> [Prosecutor’s submission](#) para. 149; [ICJ Namibia Advisory Opinion](#), para. 91

<sup>165</sup> [Prosecutor’s submission](#) para. 141

would emerge in breach of certain fundamental norms of international law”<sup>166</sup> and that “declarations of independence connected with the unlawful use of force or other egregious violations of norms of general international law...may be considered illegal.”<sup>167</sup> And yet, in the case of “Palestine,” the Prosecutor asks this Court to look the other way.

67. In effect, the Prosecutor suggests that Palestinian use of force is not unlawful by promoting the claim to statehood in spite of it, and by rewarding a pattern of destructive behavior over seven decades: violent attacks on Jewish communities in Mandatory Palestine in the early 20<sup>th</sup> century;<sup>168</sup> Palestinian collaboration with the Nazis at the highest levels;<sup>169</sup> Rejection of the General Assembly partition resolution by all Arab states;<sup>170</sup> War of Independence (1947-1949); Sinai Campaign (1956); Six Day War (1967); Yom Kippur War (1973); First Lebanon War (1982-1985); Second Lebanon War (2006). In addition, there was the War of Attrition (1968-1970), the first Palestinian “Intifada” (1987-1993), the second Palestinian “Intifada” (2000-2005), and in response to terror from Gaza: Operation Cast Lead (2008-2009), Operation Pillar of Defense (2012), Operation Protective Edge (2014). In fact, throughout Israel’s history, terrorism by Arab armed groups has never ceased. The repeated Palestinian uses of force intended to destroy the Jewish state have been illegal, in contravention of the Charter prohibition on the threat or use of force.<sup>171</sup> These uses of force did not consist of decades of “lone wolves;” the official policy of the Palestinian government in Gaza is genocide,<sup>172</sup> and the law of the Palestinian National Authority is to pay Palestinians that kill Jews.<sup>173</sup>

<sup>166</sup> Vidmar, *Democratic Statehood*, quoted in footnote 476

<sup>167</sup> [ICJ Kosovo Advisory Opinion](#), para. 81, quoted in [Prosecutor’s submission](#) footnote 476

<sup>168</sup> [Which Came First- Terrorism or Occupation-Major Arab Terrorist Attacks against Israelis Prior to the 1967 Six-Day War](#), Israel Ministry of Foreign Affairs, Undated, last visited March 12, 2020; [A Century of Terror](#), Israel Ministry of Foreign Affairs, Undated, last visited March 12, 2020

<sup>169</sup> Grand Mufti of Jerusalem, Hajj Amin Al-Husayni, [“Hajj Amin Al-Husayni: Wartime Propagandist.”](#) United States Holocaust Memorial Museum, last visited March 12, 2020

<sup>170</sup> [UNGA resolution 181\(IIA\)](#), November 29, 1947. Adopted by a vote of 33 in favor, 13 against, 10 abstentions. Voting against were: Afghanistan, Cuba, Egypt, Greece, India, Iran, Iraq, Lebanon, Pakistan, Saudi Arabia, Syria, Turkey, and Yemen. United Nations, General Assembly, [Official records of the 128th plenary meeting](#), November 29, 1947

<sup>171</sup> [UN Charter](#), Article 2(4)

<sup>172</sup>  [Hamas Charter](#)

<sup>173</sup> Law No. 14 (2004) on Aid for Prisoners in Israeli Prisons; See also: PA Regulation No. 18, 2010 (Implemented January 2011) Y. Yehoshua, C. Jacob, [“Palestinian Authority, PLO Officials: Allowances To Prisoners Will Continue; This Issue Is Not Subject To U.S.-Israeli Extortion”](#), Middle East Media Research Institute, June 16, 2017



68. The stark reality is that Palestinians have continuously used force to attempt to thwart the creation and survival of a *Jewish* state,<sup>174</sup> and thus, to deny the realization of the self-determination of the Jewish people. Israel is the only democratic state in the world where survival necessitates that the majority of its citizens must spend years of their lives in military service, or living within firing range of rocket attacks, or hiding in shelters, not “freely pursuing their economic, social and cultural development.”<sup>175</sup> And yet the Prosecutor refuses to apply the rule – that legal rights cannot stem from an unlawful act, in particular the use of force – to Palestinians. On the contrary, she proposes to answer such unlawful acts on the part of Palestinians with statehood, and the legal right to claim the Court’s territorial jurisdiction.

69. It is submitted that the Prosecutor’s interpretation of the right of self-determination, and application of the criteria of statehood in support of territorial jurisdiction, are wrong as a matter of law.

Respectfully submitted,



Professor Anne Bayefsky  
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 Touro Institute on Human Rights and the Holocaust

Dated this 18th day of March 2020  
 New York, New York

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<sup>174</sup> The lip-service paid to a future undefined “two-state solution” is not a substitute for the actual recognition and acceptance of a *Jewish* state, which has been repeatedly rejected. See Palestine Liberation Organization’s (PLO) Central Council statement, January 14, 2018, [“Update: PLO Central Council decides to suspend Oslo agreement.”](#) January 15, 2018, Wafa News,; [“President Abbas’ speech sets the foundation for independence.”](#) Wafa News, December 1, 2016

<sup>175</sup> See for instance: [Barrage of rocket fire hits southern Israel](#),” Israel Ministry of Foreign Affairs, October 24, 2012 ; [“The Threat to Israel’s Civilian Population and Israel’s Civil Defence Measures, The 2014 Gaza Conflict: Factual and Legal Aspects,”](#) Israel Ministry of Foreign Affairs, June 14, 2015