

Synopsis of Pro-Israel Submissions on ICC Jurisdiction



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SYNOPSIS OF PRO-ISRAEL SUBMISSIONS ON ICC JURISDICTION

On March 16, 2020, over a dozen pro-Israel organizations submitted *amicus curiae* briefs to the International Criminal Court (“ICC” or the “Court”) “on the situation of Palestine”. In addition, seven states (Czech Republic, Hungary, Austria, Germany, Australia, Brazil, and Uganda) submitted briefs contesting the Court’s jurisdiction. Canada publicly reiterated its stance that a Palestinian state currently does not exist. The foregoing actions were taken following the ICC Prosecutor’s (“OTP” or the “Prosecutor”) December 20, 2019 ruling that (1) Palestine is an a state for the purpose of the jurisdictional preconditions of the Rome Statute and (2) that there is sufficient evidence that war crimes were committed to justify opening a criminal investigation. Thereafter, ICC invited organizations to submit observations on the question of the ICC’s jurisdiction over “Palestine”, being the areas known as Judea and Samaria, east Jerusalem, and the Gaza Strip.

Background:

On May 22, 2018, the Palestinian Authority (“PA”), a State Party to the Rome Statue of the International Criminal Court, the international treaty that established the ICC (the “**Rome Statute**” or the “**Statute**”) referred “the situation in Palestine” to the Court¹ Following the PA’s referral, the OTP opened a preliminary investigation into the situation in order to establish whether the Rome Statute’s criteria for an investigation were met. Under Article 53(1) of the Rome Statute, the OTP must consider issues of jurisdiction, admissibility, and the interests of justice in making this determination. As previously mentioned, on December 20, 2019, the OTP ruled that her preliminary examination concluded that all criteria for opening an investigation have been met. Although the Prosecutor asserted in her decision that the ICC has jurisdiction over the situation, she requested that the Pre-Trial Chamber 1 rule on the ICC’s territorial jurisdiction under Article 12(2)(a) of the Rome Statute². Subsequently, on January 28, 2020, the Pre-Trial Chamber of the ICC called for the submission of observations on the scope of the Court’s territorial jurisdiction in “the situation in Palestine”.

¹ . The PA accepted the Court’s jurisdiction over alleged crimes committed since June 13, 2014. On January 2, 2015, the PA acceded to the Rome Statute by depositing its instrument of accession with the UN Secretary-General. The Rome Statute entered into force on April 1, 2015.

² Section 12(2)(a) states. Inter alia, “...(T)he Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court...(where) (t)he State on the territory of which the conduct in question occurred...”

The issues of the Court's jurisdiction and Palestinian statehood are preliminary questions that must be settled before the Court can discuss the cases' merits. Notwithstanding the preliminary nature of these issues within the context of the ICC's deliberations, the determination of these issues is crucial for both sides. For the Palestinians, they must first and foremost have the status as a State before the Court under the Rome Statute only a state has the ability to delegate jurisdiction to the ICC to prosecute war crimes carried out in their State's territory³. The pro-Israeli position is that:

- the Court has no alternative but to reject the ICC's jurisdiction over what's called "the situation in Palestine" as "Palestine" is not a State according to international law.
- The PA does not have authority over criminal matters within the vast majority of territory (in other words, the PA cannot delegate authority that the PA itself does not have).
- A Palestinian state can only result from an agreement between both sides.
- Israel possesses strong legal claims to the disputed territories and as such, the territorial scope of a Palestinian state, should it arise, can only be determined through negotiations.
- The Palestinians are weaponizing the Court against Israel, claiming rights resulting from statehood that they do not otherwise possess.
- The PA's submissions to the Court prolong the conflict by disincentivizing Palestinian compromise and rejecting the long-held paradigm of a bilateral negotiated settlement between the parties.

This document will provide a brief synopsis into the main arguments against Palestinian statehood and the ICC jurisdiction on this matter. The contributing organizations and individuals advocating Israel's position are: Prof. Laurie Blank, Dr. Matthijs de Blois, Prof. Geoffrey Corn, Dr. Daphné Richemond-Barak, Prof. Gregory Rose, Prof. Robbie Sabel, Prof. Gil Troy, Mr. Andrew Tucker, Prof. Robert Badiner, Prof. Irwin Cotler, Prof. David Crane, Prof. Jean-Francois Gaudreault-DesBiens, Lord David Pannick, Prof. Guglielmo Veditore, Ambassador Dennis Ross, Prof. Eyal Benvenisti, Todd F. Buchwald, Steven J. Rapp, Prof. Malcolm Shaw, UK Lawyers for Israel, the International Legal Forum, Bnai Brith UK, the Simon Wiesenthal Center, the Jerusalem Initiative, the Israel Forever Foundation, Shurat

³ In their submissions to the ICC, the Palestinians claim the entire territory along the pre-1967 Armistice lines (Judea, Samaria, East Jerusalem and Gaza) as the territory that comprises its state.

HaDin Israel Law Center, the Lawfare Project, the Institute for NGO Research, Palestinian Media Watch, the Jerusalem Center for Public Affairs, the European Centre for Law and Justice, and the Israel Bar Association.

ARGUMENTS SUPPORTING THE ISRAEL CASE AT THE ICC

- 1) **The Court has no way to “satisfy itself” that it has jurisdiction** – The ICC does not possess universal jurisdiction over all individuals. Rather, the Court’s jurisdiction depends on, and is a result of, the acceptance of that jurisdiction by a State, which in turn delegates its criminal jurisdiction to the ICC. Article 19(1) of the Rome Statute requires the Court to “satisfy itself that it has jurisdiction in any case”, highlighting the foundational prerequisite of jurisdiction. The ICC’s Pre-Trial Chamber previously ruled that this requirement implies that the Court must “attain the degree of certainty” that the jurisdictional criteria of the Rome Statute have been met. Article 12(2) of the Rome Statute establishes the Court’s jurisdiction over the territory of States that are party to the Statute. Article 125 (accession) states that the Rome Statute is open to “all States”. “All States” is a technical term developed to help the Secretary-General of the ICC determine if an entity can be considered a state for the purposes of a convention when there is political opposition to recognition of the state. The Prosecutor argues that “States” in Article 12(2) should be understood the same way as in Article 125, that is, that the technical process of state accession to the Rome Statute should replace the substantive test of statehood under the Montevideo Convention (explained below.) Nevertheless, in the unique circumstances surrounding the situation of “Palestine”, the Court cannot satisfy itself that “Palestine” exists as a state or has the territorial scope of such a state. As there is no definition of the word “State” in the Rome Statute, the term “State” is to have the same meaning as it has in (customary) international law. Accordingly, there is no basis in international law for the Prosecutor’s assertion that there is a unique definition of “State” for the Rome Statute that stands apart from the declarative theory of statehood established by international law in 1933 by the Montevideo Convention on the Rights and Duties of States.

- 2) **“Palestine” is not a State** – “Palestine’s” accession to the Rome Statute does not, in and of itself, create statehood. Article 125 of the Rome Statute (accession) merely governs the administrative process of accession to the Rome Statute. This technical

procedure can in no way replace the substantive test of whether an entity is a sovereign State. The 1933 Montevideo Convention on the Rights and Duties of States codified the declarative theory on the prerequisites for statehood as follows; States must have: (1) a permanent population, (2) a defined territory, (3) government, and (4) the capacity to enter into relations with another State. Palestine does not meet these criteria; its territory is indeterminate and undefined; it has limited sovereignty; and it is ruled by the PA which does not exercise complete “effective control”. Factual examples supporting these assertions are as follows; (i) Israel maintains control for all external security; (ii) Israel retains responsibility for internal security in relation to Israelis, Area C and settlement communities; (iii) Jerusalem was excluded from the Oslo Accords and remains under sole Israel sovereignty; (iv) the PA does not control its airspace; (v) major aspects of tax collection are controlled by Israel; and (vi) the PA has very limited jurisdiction over criminal matters (as a matter of law, the PA does not have criminal authority over Israeli citizens in the territory it claims before the Court, nor under Area C under the Oslo Accords, but only has limited personal authority over Palestinians in limited spheres). These examples clearly indicate a lack of sovereignty. Sovereignty and effective control over a territory is one of the major criteria of statehood under the Montevideo Convention.

- 3) **Palestinian statehood should not be measured by alternative criteria** - No other criteria can replace the requirements for statehood codified Montevideo Convention, nor is there any compelling reason to measure Palestinian statehood by more flexible criteria not otherwise accepted by international law. Recognition of “Palestine” by some individual states is merely declarative and does not replace the codified requirements of statehood. Furthermore, the right to “self-determination” accorded to all peoples does not automatically entail statehood. Neither do United Nations General Assembly resolution have any power under international law to create states. UNGA 67/19, the resolution on which the Prosecutor and the Palestinians rely, itself expresses Palestinian statehood in aspirational terms. The UN Secretary-General’s Report of March 8, 2013 emphasizes that the status accorded to the Palestinians by the resolution “does not apply to organizations or bodies outside the United Nations.” The ICC was clearly one of the bodies to which UNGA 67/19 was not intended to apply.

- 4) **The indeterminate nature of “Palestine’s” territory** – “Palestine’s” territory cannot be effectively determined, and indeed is the subject of mutually contradictory claims made by the Palestinians themselves. The PA asserts the Court’s jurisdiction over a Palestinian state comprising of Judea, Samaria, East Jerusalem, and Gaza. First, the PA lacks effective control over Gaza due to its control by the Hamas terrorist organization (Hamas has ruled Gaza since 2007, long before the Prosecutors believes Palestine to be regarded as a State). Second, the PA claims that Israel has occupied Judea, Samaria, Gaza and East Jerusalem in 1967, meaning that it is Israel, and not the Palestinians that exercise effective control over this territory. Third, the PA itself recently submitted to the International Court of Justice⁴ that Jerusalem (and the surrounding area) is a *corpus separatum*, i.e. an area neither under Israeli nor Palestinian sovereignty. Fourth, the official Fatah and Palestinian Liberation Organization (“**PLO**”) position is that “Palestine” comprises all of the territory of Mandatory Palestine, from the Mediterranean Sea to the Jordan river. This irredentist message is repeated daily in the education system, official maps, and communications of the PA, which rejects a Palestinian state limited to the pre-1967 armistice lines. The international community has long held that the issue of final borders must be determined in bilateral negotiations between the parties. This paradigm lies at the foundation of the Oslo Accords and every international declaration, including resolutions of the General Assembly of the United Nations and in every declaration by countries that support the establishment of a Palestinian state.
- 5) **Palestinian criminal jurisdiction** – As noted above, Article 12 of the Rome Statute presupposes that there is a state that has the ability to delegate its own existing jurisdiction to the Court. The PA does not possess the requisite jurisdiction and thus cannot delegate it to the Court in order for the Court to exercise jurisdiction. The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip of 1995 explicitly states that the PA does not have criminal jurisdiction over Israeli nationals. Furthermore, the PA does not possess jurisdiction over Area C of Judea and Samaria, in which all of the Israeli communities are located. According to the Interim Agreement, the jurisdiction of the PA does not extend to Jerusalem (the issue of

⁴ On September 28, 2018, the PA instituted proceedings against the United States of America with respect to a dispute concerning alleged violations of the Vienna Convention on Diplomatic Relations of April 18, 1961, relating to the decision of the United States to move the American Embassy in Israel from Tel Aviv to Jerusalem.

Jerusalem has always been relegated to final negotiations between the parties). The Prosecutor fundamentally misunderstands the nature of the Oslo arrangements. The Prosecutor distinguishes between *prescriptive* jurisdiction, meaning the prerogative to legislate over a territory, and the ability to *exercise* or enforce jurisdiction. While she understands the Oslo Accords as agreements that *limit* Palestinian enforcement over jurisdiction that they "inherently" possess, she attempts to argue that the PA somehow possess prescriptive jurisdiction over the entire territory. However the Oslo Accords *created* the Palestinian entity and enumerated its powers and authorities. As such, the PA does not have, nor *has it ever had*, legislative authority or criminal jurisdiction over Israel, settlements, Area C, and East Jerusalem. To summarize, the scope of the "territory" on which the Court may exercise criminal jurisdiction under Article 12(2)(a) of the Rome Statue remains unclear at best. The determination of territorial boundaries remains one of the many outstanding issues to be negotiated between Palestinians and Israel as part of a comprehensive peace settlement.

- 6) **The continuing validity and legitimacy of the Oslo Accords** – As explained above, the Oslo Accords sets out the division of authority between Israel and the PA in Judea, Samaria, and Gaza. Since their signing two and a half decades ago, they continue to be the framework for the Palestinian-Israeli relationship. The Palestinians themselves maintain the continuing validity of the Oslo Accords and daily administration in the PA proceeds according to the agreements. The Palestinians maintain daily administrative powers based on the Oslo Accords while simultaneously denying the jurisdictional provisions of these agreements before the Court. The Prosecutor implies that the Oslo Accords were forced upon the Palestinians by the stronger Israeli party and as such, they should not be relied upon as indicative of the PA's jurisdiction or status. However, this is a serious misrepresentation of the historical record. The Palestinians entered freely into these agreements, proved to be active and effective negotiators, and were assisted by qualified legal counsel throughout the process. The Oslo Accords are the mechanism that created the Palestinian Authority. This process was supported by the international community and assisted by numerous countries. The Palestinian and Israeli leaders responsible for the Accords were awarded Nobel Peace Prizes, in recognition of the significant breakthrough that Oslo represented between the parties. It is disingenuous and untenable for the Prosecutor to dismiss legal and jurisdictional arrangements in the Oslo Accords.

- 7) **Scope of Investigation** - Initially, the ICC Prosecutor explicitly asserted that the Court identified a reasonable basis to proceed on a small number of allegations that, in the Court's view, fall within its jurisdiction: (i) allegations of crimes by members of the Israeli Defence Forces during the 2014 Gaza conflict (which it notes are being addressed in domestic proceedings); (ii) allegations of crimes by Palestinian armed groups during the 2014 Gaza conflict; and (iii) allegations of crimes committed in the context of Israeli settlement policy, specifically the alleged transfer of Israeli civilians into the West Bank since June 13, 2014. The Prosecutor does not assert that there is a reasonable basis to proceed with an investigation regarding any other specific allegations referred by the PA. To find jurisdiction on other facts would risk commencing an investigation with demonstrated reasonable basis to proceed. Therefore, if the Chamber grants the Prosecution's request to rule on jurisdiction, it would have to make at least one of two findings in order to determine the Court has jurisdiction to open an investigation: (1) The Court has jurisdiction over areas of the "West Bank" in which Israeli civilians have built homes since June 13, 2014 - specifically Area C, or over Palestinian- claimed areas of Jerusalem; or (2) The Court has jurisdiction over events in Gaza during the summer of 2014, before the PA submitted an accession to the Rome Statute. The Palestinians acceded to the Rome Statute in January 2015. As such, the Court does not have the jurisdiction to deal with incidents prior to the PA's accession. The Request relies heavily on the PA's submission of an instrument of accession to the Rome Statute. However, accession taken at its highest can only serve as a factor in evaluating statehood at the time of accession and thereafter. Consequently, for conduct which occurred between 13 June 2014 – the start date self-servingly selected for the PA's purported referral – and the PA's submission of accession, accession cannot support a finding of statehood or of jurisdiction. The case for jurisdiction is thus even more clearly inadequate when it is applied to conduct before April 2015 – meaning the Court has no jurisdiction over allegations related to the 2014 Gaza conflict. In regards to Israeli settlements, the significant challenges regarding the PA's assertion of its criminal jurisdiction over Area C, Israel civilians, and the Gaza Strip were demonstrated above.
- 8) **Any determination requires Israel's participation** – The international community has long refrained from prejudging the territorial boundaries between Israel and the

Palestinians, and has agreed that the dispute must be resolved through negotiations between the parties. The ICC cannot determine the scope of “Palestine’s” territoriality without considering Israel’s position. The *Monetary Gold* principle in international law establishes that an international tribunal cannot rule on the rights and obligations of a state that is not party to the proceedings – in this case Israel – without the consent of that state.

- 9) **The territorial rights of the Jewish people and the State of Israel** – The Mandate for Palestine, approved by the Council of the League of Nations in 1922, was an internationally binding agreement to establish a Jewish national homeland in Palestine. This mandate did not terminate with the dissolution of the League of Nations and was adopted by the United Nations. Subsequent historical developments such as Israeli-Arab wars in 1948 and 1967, as well as the Oslo Agreements, have not changed the basic rights bestowed by the mandate. An examination of the historical record demonstrates that Israel, as the State of the Jewish people fulfilling the principal object of the Mandate for Palestine of reconstituting the Jewish national home in Palestine west of the Jordan/Arava line and the right to settlement in the territory, now has sovereignty over the whole of Jerusalem and the strongest claims to Judea, Samaria, and the Gaza Strip. These rights are incompatible with these areas being the territory of another State.

- 10) **The Application of the Principle of *Uti Possidetis Juris*** – The principle of *uti possidetis juris* dictates that the frontiers of newly independent states are to follow the administrative boundaries of the administrative entity from which they emerge. It is widely accepted as binding under customary international law and indispensable starting point for the legal demarcation of the borders of newly independent states. The historical record shows Israel has the best claim to title over the territory which comprised the Mandate, where it was the only state to emerge in 1948. In light of the doctrine, a new Arab State between the Jordan and the Mediterranean can only be constituted with agreement from Israel; and this position coincides with the prevailing view of the international community that a practical solution can only be found by agreement through bilateral negotiations.

- 11) **The effects of the Prosecutor's Rulings on the Affected Communities** – Judea and Samaria, the territory which the Prosecutor recognizes as belonging to a Palestinian state, form the heartland of the Jewish presence in the land of Israel and contain many of Judaism's most important religious and historical sites. Judea and Samaria are inhabited by Jewish communities whose existence precedes the 1967 war and the 1947 Partition Plan, for example. These communities faced ethnic cleansing following the Jordanian conquest in 1948 and were reconstituted following Israel's victory in 1967. The Prosecutor's ruling ignores the legitimate rights and historical presence of these communities and relies on a biased presentation of region's history. By recognizing maximalist Palestinian claims to the territory while ignoring the affected communities, the Prosecutor threatens their continued existence. The PA continuously delegitimizes the Jewish presence in Judea and Samaria and encourages terrorism and murder against Jews. The complete rejection of the legitimacy of the presence of the affected communities assures that their rights shall not be respected by the PA, and it raises concerns both as to the legal protection under International Humanitarian Law and the Rome Statute and as to actual imminent threat to the lives and welfare of these communities.
- 12) **The PA's referral was not made in good faith and weaponizes the Court against Israel** - It is an oft-cited principle of international adjudication that a party seeking to enforce a right provided to it in a treaty must do so in good faith. This has often been interpreted by courts and scholars in line with the clean hands doctrine, which arises out of traditional equitable principles. The initial date of referral chosen by the PA, June 13, 2014, demonstrates their bad faith. This date marks the beginning of an Israeli operation to locate the terrorists responsible for murdering three Israeli teenagers. It was chosen by the PA to exclude the events prior to the Israeli operation, such as the terrorist acts committed by Palestinian group and those who ordered, solicited, aided and abetted the crime. Treaty rights must be invoked with clean hands. Since the PA has not done so, the Court should not accept jurisdiction.
- 13) **The Prosecutor's Expansive Doctrine of Self-Determination is harmful to state stability worldwide** - The OTP bases its assertion of ICC territorial jurisdiction over the disputed territories on an overly expansive notion of self-determination. Essentially, the OTP relies on UNGA resolutions to demonstrate that the international community

has recognized Palestinian self-determination and the right to statehood in the disputed territories. According to the OTP, this aspirational right to future statehood somehow allows the Palestinians to meet the qualifications for actual present statehood and in a pre-determined territory. The right to self-determination clearly does not inherently mean the right to a State; the acknowledgement of a people's right to self-determination does not equal recognition or the creation of a State, and certainly not in a specific and pre-determined territory. The OTP's assertion that self-determination confers national independence is a very dangerous proposition, which could lead to uncertainty, chaos, and even violence around the world. There are countless ethnic, national and religious groups worldwide that undeniably enjoy the right of self-determination. A conflation of self-determination with the right to statehood (and to rights based on current statehood) will undermine the numerous states dealing with separatist or irredentist movements and encourage the breakup of stable states with minority populations.

14) **Palestinian self-determination and Israeli actions** – The Prosecutor sidesteps the issues of lack of Palestinian effective control over the disputed territory by asserting that Israeli actions, namely the settlements and the security barrier, have prevented Palestinians from exercising their right of self-determination and achieving statehood. This is an ahistorical assertion, given that Israeli actions are hardly the only reason why there is no Palestinian state. The Palestinians rejected statehood offers under the Clinton Parameters in 2000, the Roadmap to Peace in 2003, Israeli Prime Minister Olmert's offer in 2008 or principles presented by US President Barack Obama in 2014. Furthermore, Palestinian acts of systematic terrorism and suicide bombings derailed negotiations and peace efforts.

15) **The Legal Status of Jerusalem's Christian Arab population** – There are currently 12,000 Christian Arabs living in Jerusalem. They enjoy full religious freedom under Israeli law. Israeli sovereignty in Jerusalem extends over several important Christian holy sites, protected by the State of Israel according to the Protection of Holy Place Law. By contrast, the Christian population in the PA has shrunk considerably in past decades, largely due to harassment, discrimination, and abuse from their Muslim neighbours. If the Court asserts jurisdiction over East Jerusalem, it will be deciding unilaterally that Israeli Arab residents of Jerusalem, Christian, and Muslim, who currently enjoy rights and protection in a democratic country, should be placed - or worse, are currently placed

- under the jurisdiction of the corrupt and discriminatory PA. This will have a seriously detrimental effect on the rights and position of the Christian Arab population in Jerusalem.