



23 August 2021

**Via Overnight Delivery Service  
& First Class Mail**

His Excellency Karim Asad Ahmad Khan  
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Your Excellency:

We at the European Centre for Law and Justice (“ECLJ”) would like to take this opportunity to congratulate you on your recent assumption of the office of Prosecutor of the International Criminal Court. We wish you well in your new position and hope that you acclimatise quickly to your new responsibilities and surroundings. As was our practice with both your predecessors, you can expect to receive communications from us from time to time which we hope will be helpful to you and your team.

By way of introduction, the ECLJ is an international, Non-Governmental Organisation (NGO), dedicated, *inter alia*, to the promotion and protection of human rights and to the furtherance of the rule of law in international affairs. The ECLJ has held Special Consultative Status before the United Nations/ECOSOC since 2007<sup>1</sup>.

Like the ICC, the ECLJ wishes to see the perpetrators of the most heinous international crimes brought to justice. Like the ICC, we also stand for the principle that justice must be achieved solely pursuant to the rule of law and well-established legal norms. We are concerned, however, that in certain cases the latter principle has not been consistently upheld by the ICC and its organs. As you are no doubt aware, some of the positions adopted by your immediate predecessor have led to considerable criticism by many States, parties to the Rome Statute and non-parties alike. We believe that most of the criticism could have been avoided had your immediate predecessor not sought to expand ICC jurisdiction at the expense of well-established principles of customary international law. We also believe that such actions have done untold damage to the Court.

How you choose to deal with these issues will determine not only the level of success you ultimately achieve as ICC Prosecutor, but also whether the ICC as an institution will shed its reputation as a politicised court. We hope one example will suffice to demonstrate the damage that can occur to the Court, its reputation, and its constituent institutions when a prosecutor bends the rules.

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<sup>1</sup>*Consultative Status for the European Centre for Law and Justice*, U.N. DEP'T ECON. & SOC. AFF., <http://esango.un.org/civilsociety/consultativeStatusSummary.do?profileCode=3010> (last visited 9 Aug. 2021).

The move by your immediate predecessor to have Pre-Trial Chamber I (“PTC I”) recognise Palestine as a State so that the Office of the Prosecutor (“OTP”) could investigate alleged crimes by Israelis in the “occupied Palestinian territories” (often abbreviated “oPt”) pushed the limits too far. We believe that both the former Prosecutor’s request and the PTC I two-judge majority ruling in her favour were poorly reasoned and disregarded well-established customary international law principles on determining statehood. Your predecessor’s actions and PTC I’s questionable ruling have left you and the Court in an awkward position. The ICC and the OTP have been thrust into what is arguably the world’s most intractable political morass. Further, the decision has reinforced the view of many that both OTP personnel and ICC judges are willing to sacrifice well-established international law principles on the altar of what they see as a desirable political outcome.

Your predecessor’s reasoning that Palestine should be regarded as a State was frankly outrageous. She herself conceded (1) that “Palestine does not have full control over the Occupied Palestinian Territory and its borders are disputed”, (2) that “[t]he Palestinian Authority does not govern Gaza”, and (3) that “the question of Palestine’s Statehood under international law does not appear to have been definitively resolved”.<sup>2</sup> Those admissions in and of themselves indicate her own understanding that Palestine failed to meet the customary international law definition of a State and, as Presiding Judge Kovács aptly noted in his dissent, the situation “cannot be easily matched with the wording of article 12(2)(a) of the [Rome] Statute, specifically ‘the State on the territory of which’” language.<sup>3</sup> Nonetheless, she asked PTC I to consider Palestine a State “for the strict purposes of the [Rome] Statute”,<sup>4</sup> thereby suggesting that international law can be either ignored or distorted beyond recognition to reach the ends the OTP seeks to achieve.

The international community has repeatedly and consistently taken the position that the territorial dispute between Israelis and Palestinians must be resolved by negotiations between the parties. By your predecessor’s own admission<sup>5</sup> and Presiding Judge Kovács’ affirmation,<sup>6</sup> the territories in question in the Situation of Palestine constitute *disputed* territories whose ownership (including borders) must be determined via bilateral negotiations between the claimants—the means already explicitly agreed-to by both Israelis and Palestinians in a series of agreements between them.<sup>7</sup> Until such negotiations have been concluded, the entity known as “Palestine” lacks defined territory, a prerequisite for statehood and a prerequisite for the ICC to exercise jurisdiction under

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<sup>2</sup>Situation in Palestine, No. ICC-01/18-12, Prosecution Request Pursuant to Article 19(3) for a Ruling on the Court’s Territorial Jurisdiction in Palestine, ¶¶ 5, 35 (22 Jan. 2020) [hereinafter Prosecutor’s Request], [https://www.icc-cpi.int/CourtRecords/CR2020\\_00161.PDF](https://www.icc-cpi.int/CourtRecords/CR2020_00161.PDF).

<sup>3</sup>Situation in Palestine, No. ICC-01/18-143-Anx1, Partially Dissenting Opinion of Judge Péter Kovács, ¶ 322 (May 2, 2021) [hereinafter Kovács’ Dissent], [https://www.icc-cpi.int/RelatedRecords/CR2021\\_01167.PDF](https://www.icc-cpi.int/RelatedRecords/CR2021_01167.PDF).

<sup>4</sup>Prosecutor’s Request, *supra* note 2, ¶ 9.

<sup>5</sup>*Id.* ¶¶ 5, 35.

<sup>6</sup>Kovács’ Dissent, *supra* note 3, ¶¶ 280, 322.

<sup>7</sup>The PLO and Israel agreed that the “issues that will be negotiated in the permanent status negotiations [are]: Jerusalem, settlements, specified military locations, Palestinian refugees, borders, foreign relations and Israelis”. Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip art. XVII(1)(a), Isr.-PLO, 28 Sep. 1995, 36 I.L.M. 551 [hereinafter Oslo II].



Article 12(2)(a).<sup>8</sup> The ICC lacks both the authority to grant a recognition of statehood and the authority to delineate a State's territory.<sup>9</sup> No decision on ownership of the territories can legitimately be pronounced by an unauthorized third party, let alone a court set up to deal with criminal matters with no mandate to adjudicate international territorial disputes.

This is not the first time that international bodies have disregarded international law when it concerns Israel. This practice is regrettably all too common among United Nations bodies.<sup>10</sup> But, the ICC is a *judicial* body. For a judicial body to disregard clear-cut international law in favour of a contrived, novel, standard is a greater cause for concern because such actions pollute the legal process and subvert the rule of law. Justice is no longer blind when it applies different strokes to similar folks.

To support her argument that Palestine *should* be considered a State and that the West Bank, East Jerusalem, and the Gaza Strip *should* be considered Palestinian territories, your predecessor relied heavily on non-binding, political decisions and pronouncements by the UN General Assembly ("UNGA") and other UN bodies, arguing: (1) that the change in designation of Palestine by the UNGA from "entity" with observer status to "non-member observer State" status was sufficient for it to become a State Party to the Rome Statute<sup>11</sup>; (2) that the West Bank, East Jerusalem, and the Gaza Strip are "Occupied Palestinian Territories"<sup>12</sup>; (3) that the 1949 armistice lines (often referred to today as the "pre-1967 borders") are international borders<sup>13</sup> despite explicit language to the contrary in the 1949 armistice agreements<sup>14</sup>; and (4) that, because the "international community", through various UN resolutions, associates the Palestinian people's right to self-determination with the so-called "Occupied Palestinian Territories", the ICC must also conclude that those territories are *in fact* Palestinian territories.<sup>15</sup> Not only do all of these arguments lack a legal basis, your predecessor requested the PTC I to apply the well-established customary law principles for determining statehood, to wit, the criteria set forth

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<sup>8</sup>Even if such negotiations take place and Palestine becomes a State with defined borders, the ICC would still need to cross the hurdle that Israel is not a party to the Rome Statute and, under general principles of customary international law, Israel's conduct could not be governed by the Rome Statute.

<sup>9</sup>Kovács' Dissent, *supra* note 3, ¶ 189.

<sup>10</sup>Such as, the UNGA, UNESCO, and Human Rights Council (HRC). *The U.N. and Israel: Key Statistics from UN Watch*. UN WATCH, (23 Aug. 2016). <https://unwatch.org/un-israel-key-statistics/>.

<sup>11</sup>Prosecutor's Request, *supra* note 2, ¶ 8. G.A. Res. 67/19, Status of Palestine in the United Nations (29 Nov. 2012), <https://undocs.org/A/RES/67/19>. *But see* UN admission that no UN agency can create a State. *About UN Membership*, UN, <https://www.un.org/en/about-us/about-un-membership> (last visited 9 Aug. 2021) ("The recognition of a new State or Government is an act that only other States and Governments may grant or withhold. It generally implies readiness to assume diplomatic relations. The United Nations is neither a State nor a Government, and therefore does not possess any authority to recognize either a State or a Government"). Furthermore, Judge Kovács, in his dissenting opinion, stated that "no conclusion can be drawn that the 'Non-Member Observer State' status in the United Nations should be construed *in abstracto* to mean that its holder is a sovereign State." Kovács' Dissent, *supra* note 3, ¶ 219.

<sup>12</sup>Prosecutor's Request, *supra* note 2, ¶¶ 163–64, 167 (citing UNGA and HRC resolutions that call the disputed territories "Occupied Palestinian Territories").

<sup>13</sup>*Id.* ¶ 193.

<sup>14</sup>*See, e.g.*, Israel-Jordan Armistice Agreement, Isr.-Jor., Apr. 3, 1949, 42 U.N.T.S. 303 ("The basic purpose of the Armistice Demarcation Lines is to delineate the lines beyond which the armed forces of the respective Parties shall not move"); *id.* art. VI(9) ("The Armistice Demarcation Lines defined in articles V and VI of this Agreement are agreed upon by the Parties *without prejudice to future territorial settlements or boundary lines or to claims of either Party relating thereto*") (emphasis added).

<sup>15</sup>Prosecutor's Request, *supra* note 2, ¶¶ 193–210.



in Article 1 of the Montevideo Convention of 1933,<sup>16</sup> “less stringently” and more “flexibly” with respect to the question of Palestinian statehood.<sup>17</sup>

Instead of recognising anti-Israel UNGA resolutions to be the non-binding, politicised statements they are, all too frequently motivated by outright antisemitism on the part of some member states, your predecessor chose instead to accord them the force of law. For example, as you are doubtless aware, “armistice lines” are the lines separating opposing military forces when hostilities cease.<sup>18</sup> Yet, your predecessor relied on the UNGA resolutions that repeatedly and incorrectly refer to the 1949 armistice lines as “pre-1967 borders”.<sup>19</sup> For a political body like the UNGA to call armistice lines “borders” is one thing, but for judicial bodies like the OTP and the ICC to embrace such obviously incorrect pronouncements as legally binding is emblematic of the unacceptable approach taken by your predecessor.

Moreover, while acknowledging that the Palestinian Authority (“PA”) and Israel have agreements in place that require resolution of final status issues (including borders) via bilateral negotiations,<sup>20</sup> your predecessor inexplicably and outlandishly argued that the ICC’s exercise of jurisdiction “in no way affects and is without prejudice to any potential final settlement, including land-swaps, as may be agreed upon by Israel and Palestine”.<sup>21</sup> Such assertions are simply incredible. What she essentially asked the judges of PTC I to do was to prognosticate what a final Palestinian-Israeli land agreement would look like—a matter of pure speculation. In effect, your predecessor created a new legal theory which permits *preemptive application of potential jurisdiction*.

Such novel and convoluted argumentations fully vindicate Israel’s decision not to accede to the Rome Statute for fear of being treated neither fairly nor equally by Rome Statute institutions. It is also significant that this view is shared by three of the five Permanent Members of the UN Security Council, including the United States, as well as other States which doubt that the ICC is capable of functioning as an apolitical court.

In sum, your predecessor, instead of faithfully and even-handedly applying the law as it exists, chose to make an exception regarding the so-called “Situation in Palestine” and place her thumb on the Palestinian side of the scale. While having acknowledged that the question of Palestinian statehood is still unresolved and that both Palestinians and Israelis have mutually agreed upon the means to determine what a future State of Palestine will look like (which explicitly includes determining borders which will define where Palestinian sovereignty will ultimately lie), she nonetheless proposed to jettison the law that applies universally to all States and invent a different standard for a case involving

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<sup>16</sup>Convention on the Rights and Duties of States art. 1, 26 Dec. 1933, 49 Stat. 3097, 165 L.N.T.S. 19 (entered into force 26 Dec. 1934); see JOSHUA CASTELLINO, INTERNATIONAL LAW AND SELF-DETERMINATION 77 (2000) (citing D.J. HARRIS, CASES AND MATERIALS OF INTERNATIONAL LAW 102 (5th ed. 1997)) (“The Montevideo Convention is considered to be reflecting, in general terms, the requirements of statehood in customary international law”).

<sup>17</sup>See Prosecutor’s Request, *supra* note 2, ¶¶ 137, 141.

<sup>18</sup>Moreover, in the armistice agreements negotiated in 1949, it was at Arab insistence that the armistice lines not be considered as international borders. See, e.g., Israel-Jordan Armistice Agreement, Isr.-Jor. Art. VI(9), Apr. 3, 1949, 42 U.N.T.S. 303.

<sup>19</sup>See Prosecutor’s Request, *supra* note 2, ¶ 151, ¶ 151 n.510 (citing to multiple UNGA resolutions). (emphasis added)

<sup>20</sup>*Id.* ¶ 72.

<sup>21</sup>*Id.* ¶ 192.

Israel. That is wrong. It is *ultra vires*. It is unethical. And, Your Excellency, it has left you in an invidious position.

We believe that you can reverse the trend of applying the law unevenly, carving out exceptions and hyper-activism in contravention of well-established and unambiguous principles of law. We strongly and respectfully urge you to disclaim the wrong your predecessor committed. In our view, this is essential to restore integrity to the OTP and to put ICC institutions back where they belong, pursuing justice via well-established rules of law and procedure, while eschewing political considerations.

Once again, we wish you well as you assume your new responsibilities. You have inherited an office which has veered off course from its legitimate judicial role of pursuing justice even-handedly within the rules and procedures of the law. The OTP has been led astray by the siren song of political expediency. Justice is supposed to be blind and based on agreed-to rules that apply equally to all. To sustain their legitimacy, the ICC and its institutions must scrupulously, transparently, and honestly operate within these limits.

Respectfully submitted,

A handwritten signature in black ink, reading "Jay Alan Sekulow". The signature is fluid and cursive, with the first name "Jay" being particularly prominent.

Jay Alan Sekulow  
Chief Counsel

A handwritten signature in black ink, reading "Robert W. Ash". The signature is fluid and cursive, with the first name "Robert" being particularly prominent.

Robert W. Ash  
Senior Counsel