EUROPEAN CENTRE FOR LAW AND JUSTICE

21 May 2018

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& FIRST CLASS MAIL

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RE: THE ISSUE OF ICC JURISDICTION: FACTUAL AND LEGAL ANALYSIS TO ASSIST THE PROSECUTOR IN DETERMINING WHETHER THE ICC MAY LAWFULLY ASSERT ITS JURISDICTION OVER NATIONALS OF THE STATE OF ISRAEL, A NON-CONSENTING, NON-PARTY STATE TO THE ROME STATUTE (PART 2)

Your Excellency:

By way of introduction, the European Centre for Law and Justice (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[1].

On or about 8 February 2018, the ECLJ submitted Part 1 of its Factual and Legal Analysis to you concerning whether the International Criminal Court (ICC) may lawfully assert its jurisdiction over nationals of the State of Israel. In that brief, we informed you that we would be submitting a companion brief dealing with the issue of complementarity. This is the companion brief to which we referred in Part 1. For convenience of the Office of the Prosecutor (OTP) staff, we have attached a copy of our first submission (i.e., Part 1) at TAB A.

In this legal brief, while we continue to insist that the ICC lacks any and all authority to assert jurisdiction over any non-party State to the Rome Statute and the State of Israel, in particular, we nonetheless demonstrate that Israel fully meets the requirements of complementarity as understood by the Rome Statute and as applied by the OTP in situations involving other States. We show that Israel is both willing and able to investigate and

[1] *List of non-governmental organizations in consultative status with the Economic and Social Council as of 1 September 2016*, U.N. Econ. and Soc. Council, E/2016/INF/5 (29 Dec. 2016).

[redacted]

prosecute (*when the evidence so warrants*) its own nationals accused of war crimes and crimes against humanity. Accordingly, the Israeli judicial system fully meets the requirements of complementarity and thus all charges alleged against Israeli nationals are inadmissible before the ICC by the Rome Statute's own terms.

As was noted earlier in Part I, the ECLJ submits that each of the reasons cited in Part I is sufficient *in and of itself* to preclude the ICC from exercising jurisdiction over any issues arising between Israelis and Palestinians. We further submit below that, because the State of Israel is both willing and able to investigate and prosecute its own nationals (*when the evidence so warrants*), the requirements of complementarity are also fully met. Accordingly, Palestinian claims against Israeli nationals are inadmissible before the ICC.

I. THE PRINCIPLE OF COMPLEMENTARITY IS THE LINCHPIN OF THE ROME STATUTE

The Rome Statute reads that "the Court shall determine that a case is inadmissible where," *inter alia*, "[t]he case is being *investigated or prosecuted* by a State which has jurisdiction over it" or "[t]he case *has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned*"[2]. If a State has met either of these criteria, then the ICC may only assert its jurisdiction when there is actual proof that the state is unable or unwilling genuinely to investigate or prosecute the alleged violations of international law[3]. This high bar of admissibility is intentional, as the establishment of the ICC was only possible because of assurances that it would not interfere with state sovereignty[4].

The principle of complementarity was central to five years of drafting and negotiations regarding the creation of the ICC and was essential to securing the votes of 120 nations in favour of adopting the Rome Statute[5]. In December of 1989, the United Nations General Assembly requested that the International Law Commission (ILC) "address the question of establishing an international criminal court"[6]. In response, the ILC's 1990 report to the General Assembly contained significant discussion of the advantages and disadvantages of the possible establishment of such a court[7]. In 1994, the ILC adopted its final draft statute for an international criminal court and recommended that the General Assembly convene a conference of delegates to negotiate a treaty to establish such a court[8].

Subsequently, the General Assembly established the *Ad Hoc* Committee on the Establishment of an International Criminal Court (*Ad Hoc* Committee) to consider major substantive and administrative issues arising from the draft statute and to consider

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[2]Rome Statute of the International Criminal Court art. 17, 17 July 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute] (emphasis added).
[3]*Id.*
[4]*See* JO STIGEN, THE RELATIONSHIP BETWEEN THE INTERNATIONAL CRIMINAL COURT AND NATIONAL JURISDICTION 69 (2008).
[5]*Id.*
[6]G.A. Res. 44/39, ¶ 1 (4 Dec. 1989).
[7]Int'l Law Comm'n, Rep. on the Work of Its Forty-Second Session, ¶¶ 116–21, U.N. Doc. A/45/10 (1990) [hereinafter Rep. on the Work of Its Forty-Second Session].
[8]Int'l Law Comm'n, Rep. to the General Assembly on the Work of Its Forty-Sixth Session, ¶¶ 90–91, U.N. Doc. A/49/10 (1994), *reprinted in* [1994] 2 Y.B. Int'l L. Comm'n 2, U.N. Doc. A/CN.4/SER.A/1994/Add.1 [hereinafter Rep. on the Work of Its Forty-Sixth Session].

arrangements for convening an international conference of delegates[9]. Following the *Ad Hoc* Committee's report, the General Assembly created the Preparatory Committee on the Establishment of an International Criminal Court (Preparatory Committee), which prepared a consolidated draft text[10]. Based on the Preparatory Committee's draft, the General Assembly convened the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome Conference)[11], which adopted the Rome Statute in 1998.

The following section will show that, at each step of drafting and negotiating what would ultimately become the Rome Statute, the principle of complementarity was of primary concern, and it was ultimately the linchpin that enabled the Statute's adoption. Thus, the principle of complementarity continues to guide the ICC's mission.

A. The ILC's 1990 Report Considered the Principle of Complementarity to Be a Necessary Means for Obtaining Widespread Acceptance by the International Community of an International Criminal Court

In 1990, the ILC presented a report to the General Assembly that detailed the advantages and disadvantages of the proposed establishment of an international criminal court[12]. In its report, the ILC recognised that "[a] major concern with respect to the establishment of such a court is its possible curtailment of national sovereignty"[13]. Additionally, the ILC asserted that proposals for an international court must take account of the danger of interfering with already existing and satisfactory judicial systems[14]. Although the ILC found that there was broad agreement regarding the desirability of an international criminal court, views regarding its structure and jurisdiction were varied[15]. According to the report, the ILC believed an international criminal court would *only* be successful if it garnered wide support from the international community, and such support would *only* materialise if the court were complementary to national courts[16]. Thus, from the very beginning, the ILC considered the establishment of an international court to fundamentally depend on the principle of complementarity.

B. The Principle of Complementarity Was Central to the Meaning and Purpose of the ILC's 1994 Draft Statute

In 1994, the ILC published its final Draft Statute for an international criminal court, structured around the principle of complementarity, and recommended that the General Assembly convene an international conference to finalise the statute and establish the court[17]. The draft's preamble stated that the statute's primary purpose was to establish an international criminal court that would "be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective"[18].

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[9]G.A. Res. 49/53, ¶ 2 (9 Dec. 1994).
[10]G.A. Res. 50/46, ¶ 2 (11 Dec. 1995).
[11]G.A. Res. 52/160, ¶ 3 (15 Dec. 1997).
[12]Rep. on the Work of Its Forty-Second Session, *supra* note 7, ¶ 119.
[13]*Id.*
[14]*Id.*
[15]*Id.* ¶ 155.
[16]*Id.* ¶ 157.
[17]Rep. on the Work of Its Forty-Sixth Session, *supra* note 8, ¶ 90.
[18]*Id.* pmbl.

The ILC's commentary on the preamble emphasised the Commission's intent for the Court to operate only "in cases where there is ***no prospect*** of those persons being duly tried in national courts"[19]. It further stressed the centrality of the principle of complementarity to the entire draft statute by stating the opinion of some delegations that, "given its importance"[,] "the preamble should be an operative article of the statute"[20].

The 1994 Draft Statute not only expressly declared the principle of complementarity in the preamble, but also outlined in detail its application in Article 35[21]. Article 35 addressed the Court's *ability to exercise* its jurisdiction—as distinct from the Court's *existence*[22]—by stating the circumstances under which "the court may . . . decide, *having regard to the purposes of this Statute set out in the preamble*, that a case before it is inadmissible"[23].

C. The Principle of Complementarity Was the Primary Concern of the *Ad Hoc* Committee's Report

In 1995, the *Ad Hoc* Committee, which the General Assembly established to review the substantive and administrative issues raised in the ILC's 1994 Draft Statute, published a report of its deliberations, which focused primarily on the issue of complementarity[24]. The first substantive issue addressed in the report was the broadly recognised belief that "the proposed court should be established as a body whose jurisdiction would complement that of national courts and existing procedures"[25]. The report described the principle of complementarity as an essential element in the establishment of an international criminal court[26].

The vast majority of delegations shared the same concerns as the original drafters, believing "that the principle of complementarity should create a strong presumption in favour of national jurisdiction"[27]. In making their argument, those delegations summarised the advantages of national judicial systems, including the minimisation of language barriers, the local availability of evidence and witnesses, and the existence of an already established context of legal rules, enforcement, and penalties[28].

The *Ad Hoc* Committee considered the principle of complementarity to be so important to the establishment of an international criminal court that it even debated the strength of specific wording in the 1994 Draft Statute referencing complementarity[29]. For example, the Draft Statute's Preamble stated: "*Emphasizing further* that such a court is intended to be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective"[30]. The delegations to the Committee

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[19] *Id.* pmbl. cmt. (1) (emphasis added).
[20] *Id.* pmbl. cmt. (4).
[21] *Id.* art. 35.
[22] *Id.*
[23] *Id.* (emphasis added).
[24] Rep. of the Ad Hoc Comm. on the Establishment of an International Criminal Court, U.N. Doc. A/50/22 (1995) [hereinafter Rep. of the Ad Hoc. Comm.].
[25] *Id.* ¶ 13.
[26] *Id.* ¶ 29.
[27] *Id.* ¶ 31.
[28] *Id.*
[29] *Id.* ¶ 42.
[30] Rep. on the Work of Its Forty-Sixth Session, *supra* note 8, pmbl.

generally disliked the words "available" and "ineffective" because they were too subjective[31]. The standard for determining the effectiveness of a national judicial system seemed to give the Court too much discretionary power to assert its jurisdiction[32].

The delegates also questioned the discretionary language regarding admissibility in Article 35 of the Draft Statute, which stated, in relevant part, that "[t]he Court *may* . . . decide . . . that a case before it is inadmissible . . ."[33]. The primary concern expressed by the delegations was that the Court should only have jurisdiction in cases where a State's approach was defective[34]. It was *not* the intended role of the Court to intervene in cases where the Court merely considered a particular State's judicial system to be less efficient or less capable than that of another State or of an international tribunal[35].

D. The Principle of Complementarity Was Central to the Creation and Adoption of the Final Draft of the Rome Statute

When the Preparatory Committee began its discussions regarding the finalisation of a statute establishing an international criminal court in 1996, there was virtual consensus that the relationship between the international court and national courts would be complementary[36]. Several states threatened to suspend negotiations on all issues if the principle of complementarity were not accepted, because of the potential of the international court to threaten national sovereignty[37]. Two years later, when the Rome Conference finalised the Preparatory Committee's draft in 1998, the successful adoption of the statute was again contingent upon the inclusion of the principle of complementarity[38].

The final draft of the Rome Statute contains six changes from the ILC's 1994 Draft Statute and the Preparatory Committee's final draft, which the negotiators made to emphasise the centrality of the principle of complementarity to the establishment and jurisdiction of the ICC.

The preamble to the 1994 Draft Statute stated that "such a court is intended to be complementary to national criminal justice systems in cases where such trial procedures may not be *available* or may be *ineffective*"[39]. The Ad Hoc Committee considered the terms "available" and "ineffective" to be too subjective and, thus, omitted them from the preamble to the final draft of the Rome Statute[40]. Instead, they settled on the terms "unwilling or unable genuinely" to investigate or prosecute, because they were considered the most objective terms[41]. The new terminology was included in Article 17 (which addresses issues of admissibility), rather than in the preamble, because some delegations felt that admissibility needed to be directly associated with the principle of complementarity[42].

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[31] Rep. of the Ad Hoc. Comm., *supra* note 24, ¶ 41.
[32] *Id.* ¶ 42.
[33] *Id.* ¶ 33.
[34] Cassese, *supra* note 3, at 674.
[35] *Id.*
[36] STIGEN, *supra* note 4, at 69.
[37] *Id.* at 70.
[38] *Id.* at 80.
[39] Rep. on the Work of Its Forty-Second Session, *supra* note 7, pmbl.
[40] Cassese, *supra* note 3, at 674.
[41] *Id.*
[42] *Id.*

The negotiators also replaced the 1994 Draft Statute's language, "[t]he Court *may* . . . decide . . . that a case is inadmissible"[43], with, "the Court *shall* determine that a case is inadmissible"[44], because the former terminology would have given the Court too much discretion to assert its jurisdiction[45].

Lastly, the Rome Conference amended the criteria by which the Court was to determine inability to investigate or prosecute in a particular case[46]. The Draft Statute stated that the Court should consider whether a partial collapse of a national judicial system resulted in the relevant State's inability to carry out criminal proceedings[47]. Some delegations considered "partial collapse" to be too low of a threshold for establishing the Court's jurisdiction[48]. The negotiators debated two alternatives—retaining the "partial collapse" standard versus replacing it with a "substantial collapse" standard—and ultimately selected the latter option as a sufficiently large hurdle to the Court's exercise of jurisdiction[49].

The complementarity principle was included in the Preamble as well as Article 1 of the Rome Statute to satisfy the concerns of those delegations that felt a need to include the principle in an operative article[50] and to satisfy those delegations that considered the first article of a statute to be emblematic of the meaning and interpretation of all subsequent articles[51]. Additionally, Article 17 states that the Court will determine the admissibility of a case, "[h]aving regard to paragraph 10 of the Preamble and article 1"[52], thereby further underscoring the fundamental importance of complementarity[53].

Basing the establishment of the Court and the admissibility of cases on the principle of complementarity shows that the delegations widely agreed that the Court should have no discretion to assert its jurisdiction over a case when the grounds for inadmissibility have been established[54]. Thus, the final structure of the Rome Statute's ***Preamble, Article 1, and Article 17 make it clear that issues of admissibility are preconditions to the exercise of the Court's jurisdiction, not mere factors to be considered at the Court's discretion***[55].

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[43]Rep. on the Work of Its Forty-Second Session, *supra* note 7, Part Three (10)(e).
[44]Rome Statute, *supra* note 2, art. 17.
[45]*See* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 674 (Antonio Cassese et al. eds., 2002). The introductory paragraph of Article 35 of the 1994 Draft Statute states that "[t]he Court may . . . decide, having regard to the purposes of this Statute set out in the preamble, that a case before it is inadmissible" under certain circumstances, Rep. on the Work of Its Forty-Sixth Session, *supra* note 8, art. 35 (emphasis added), whereas Article 17 of the Rome Statute states that the court 'shall' do so". Rome Statute, *supra* note 2, art. 17 (emphasis added).
[46]NIDAL NABIL JURDI, THE INTERNATIONAL CRIMINAL COURT AND NATIONAL COURTS 15 (2011).
[47]U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rep. of the Preparatory Committee on the Establishment of an International Criminal Court, 28 art. 15(3), U.N. Doc. A/Conf.183/13 (Vol. III), (June 15-July 17, 1998).
[48]JURDI, *supra* note 46, at 15.
[49]*Id.*
[50]*Id.* ¶ 10, at 131. Rome Statute, *supra* note 2, art. 1 (The "International Criminal Court . . . shall be complementary to national criminal jurisdictions".).
[51]*Id.*
[52]Rome Statute, *supra* note 2, art. 17.
[53]STIGEN, *supra* note 4, at 83.
[54]Rep. of the Ad Hoc Comm., *supra* note 24, at 33.
[55]Cassese, *supra* note 3, at 647.

In sum, the principle of complementarity has been intrinsic to the conversation regarding the establishment and jurisdiction of the ICC since the very beginning and has persisted to the current day. It has always been the intent that the ICC exists solely to handle cases which the national jurisdiction in question is unable or unwilling to handle[56]. Furthermore, complementarity is the linchpin of the Rome Statute and was integral to garnering the support it has received. Not only was complementarity included in the earliest drafts of the Rome Statute, it was strengthened, expanded, and emphasised at every stage of the drafting process. Evidence of the massive importance of complementarity in the final text of the Rome Statute is robust: It is featured in both the Preamble and in Article 1, and it is the essential principle underlying Article 17's admissibility test.

II. BOTH ICC PROSECUTORS TO DATE HAVE PROPOUNDED A HIGH BAR OF ADMISSIBILITY THAT FAVOURS THE PRIMACY OF A STATE'S NATIONAL COURTS

Since the Rome Statute went into force on 1 July 2002, the ICC has sat as a permanent international judicial body. Of its four organs, the OTP is most involved with establishing the means and standards for investigating matters brought before the Court. This means that the OTP is also responsible for crafting and implementing a working understanding of the Rome Statute. In this function, the OTP, particularly the Chief Prosecutor, has defined the boundaries of the principle of complementarity.

The records of the OTP relate to two aspects of complementarity: complementarity as to admissibility and positive complementarity[57]. Both were defined under the ICC's first Chief Prosecutor, Luis Moreno Ocampo[58]. His successor, Fatou Bensouda, has continued to consistently apply Mr Ocampo's definitions of complementarity in her prosecutorial strategy[59].

Complementarity as defined and applied by the OTP (and the Court, more generally), under both Mr Ocampo and Mrs Bensouda, reveals a consistent understanding of the ICC as an exceptional "court of last resort"[60], and national courts continue to bear the "primary responsibility for preventing and punishing atrocities"[61]. Moreover, the OTP has stated that "the system of complementarity is principally based on the recognition that the exercise of national criminal jurisdiction is not only a right but also a duty of States"[62].

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[56]That was not the case with either the *ad hoc* tribunal for the former Yugoslavia or the *ad hoc* tribunal for Rwanda. In both cases, although concurrent jurisdiction existed between the international tribunals and national courts, the international tribunals had primacy over national courts. *See, e.g.*, Int'l Tribunal for the Prosecution of Perss. Responsible for Serious Violations of Int'l Humanitarian L. Committed in the Territory of the Former Yugoslavia since 1991, Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 9 § 2 (Sep. 2009), http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf (stating the tribunal had primacy over national courts); Statute of the International Tribunal for Rwanda, art. 8 § 2, http://legal.un.org/avl/pdf/ha/ictr_EF.pdf (last visited 14 Apr. 2018).

[57]Off. of the Prosecutor, Prosecutorial Strategy 2009-2012, ¶¶ 16–17 (1 Feb. 2010).

[58]*Id.*

[59]Off. of the Prosecutor, Strategy Plan 2016-2018, ¶¶ 57, 101 (16 Nov. 2015).

[60]*Id.* ¶ 37.

[61]Off. of the Prosecutor, Seventh Diplomatic Briefing of the International Criminal Court: Remarks by Luis Moreno-Ocampo, Prosecutor, 7 (29 June 2006) [hereinafter Seventh Diplomatic Briefing].

[62]Off. of the Prosecutor, Paper on Some Policy Issues Before the Office of the Prosecutor, 5 (Sept. 2003) [hereinafter Paper on Policy Issues].

A. Mr Moreno Ocampo Defined Complementarity as Setting a High Bar for Admissibility and Emphasised the Primacy of Domestic National Courts

As the first Chief Prosecutor of the ICC, Mr Ocampo defined the principle of complementarity in his policy papers[63], prosecutorial strategy briefs[64], official reports to the UN[65], and diplomatic briefings to the States Parties[66]. His work characterised complementarity as serving two purposes: First, it establishes a high bar for admissibility of a case to the ICC, and second, in the case of positive complementarity, the OTP works with national domestic courts to "encourage national prosecutions"[67]. Positive complementarity serves as another stop-gap to cases appearing before the ICC, allowing the OTP to work with the State concerned by providing "capacity building or financipal or technical assistance", so as to enable the State to handle cases domestically that would otherwise fall within ICC jurisdiction[68]. Mr Ocampo's two-purpose complementarity approach remains current and is still applied today.

Mr Ocampo consistently characterised the principle of complementarity as setting a high bar for admissibility of a case to the ICC. He noted that "the complementary nature of

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[63] *See id.*

[64] *See* Off. of the Prosecutor, Prosecutorial Strategy Paper 2006-2009 (14 Sept. 2006); Prosecutorial Strategy Paper 2009-2012, *supra* note 57.

[65] *See* Off. of the Prosecutor, Rep. of the International Criminal Court for 2005-2006, U.N. Doc. A/61/217 (3 Aug. 2006); Off. of the Prosecutor, Rep. of the International Criminal Court for 2006/2007, U.N. Doc. A/62/314 (31 Aug. 2007); Off. of the Prosecutor, Rep. of the International Criminal Court to the United Nations for 2008/2009, U.N. Doc A/64/356 (17 Sept. 2009); Off. of the Prosecutor, Rep. of the International Criminal Court to the United Nations for 2010/11, U.N. Doc. A/66/309 (19 Aug. 2011).

[66] *See* Seventh Diplomatic Briefing, *supra* note 61; Off. of the Prosecutor, Ninth Diplomatic Briefing of the International Criminal Court: Remarks by Luis Moreno-Ocampo, Prosecutor (29 Mar. 2007); Off. of the Prosecutor, Twelfth Diplomatic Briefing of the International Criminal Court: Remarks by Luis Moreno-Ocampo, Prosecutor (18 Mar. 2008); Off. of the Prosecutor, Fifteenth Diplomatic Briefing of the International Criminal Court: Remarks by Fatou Bensouda, Deputy Prosecutor (7 Apr. 2009); Off. of the Prosecutor, Sixteenth Diplomatic Briefing: Remarks by Fatou Bensouda, Deputy Prosecutor (26 May 2009); Off. of the Prosecutor, 18th Diplomatic Briefing: Remarks by Luis Moreno-Ocampo (26 Apr. 2010); Off. of the Prosecutor, 19th Diplomatic Briefing: Remarks by Luis Moreno-Ocampo, Prosecutor (3 Nov. 2010); Off. of the Prosecutor, Remarks to the 20th Diplomatic Briefing: Remarks by Luis Moreno-Ocampo, Prosecutor (8 Apr. 2011); Off. of the Prosecutor, Remarks to the 21st Diplomatic Briefing: Remarks by Luis Moreno-Ocampo, Prosecutor (8 Nov. 2011).

[67] Paper on Policy Issues, *supra* note 62, at 3.

[68] *See* Prosecutorial Strategy Paper 2009-2012, *supra* note 57, at 5. The OTP provides a lengthy description of exactly what measures it will take in order to promote domestic action rather than refer a case to the ICC.

> The Office's approach includes: a) providing information collected by the Office to national judiciaries upon their request pursuant Article 93 (10), subject to the existence of a credible local system of protection for judges or witnesses and other security-related caveats; sharing databases of non-confidential materials or crime patterns; b) calling upon officials, experts and lawyers from situation countries to participate in OTP investigative and prosecutorial activities, taking into account the need for their protection; inviting them to participate in the Office's network of law enforcement agencies (LEN); sharing with them expertise and trainings on investigative techniques or questioning of vulnerable witnesses; c) providing information about the judicial work of the Office to those involved in political mediation such as UN and other special envoys, thus allowing them to support national/regional activities which complement the Office's work; and d) acting as a catalyst with development organizations and donors' conferences to promote support for relevant accountability efforts.

Id.

the Court is overriding"[69]. It "represents the express will of States Parties" to recognise States' "primary responsibility . . . [to] exercise criminal jurisdiction"[70]. Therefore, "as a general rule, the policy of the Office of the Prosecutor will be to undertake investigations *only* where there is a clear case of failure to act by the State or States concerned"[71]. In other words, "intervention by the Office must be exceptional"[72].

In this way, the ICC directly contrasts with the *ad hoc* tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR). Echoing the Rome Statute's drafters, Mr Ocampo noted that, unlike the *ad hoc* tribunals, "the ICC does not have primacy over national systems"[73]; on the contrary, the ICC is meant to be merely their complement[74]. In fact, when setting out Court policy, Mr Ocampo explicitly wrote that, in cases of concurrent jurisdiction between national systems and the ICC, "the former have priority"[75].

Additionally, Mr Ocampo characterised this high bar of admissibility as a vital practical necessity. First, "the Court is an institution with limited resources"[76]. As a result, reliance on national prosecutions is essential to plug the impunity gap[77]. Second, complementarity is "based on considerations of efficiency and effectiveness"[78]. States have the best access to evidence and witnesses as well as a means to effect arrest warrants and protect both the accused and witnesses[79]. In fact, it would require a "duplicated or triplicated budget" in order for the ICC to pursue a more active and expansive prosecutorial strategy[80].

Mr Ocampo stressed that "a case is inadmissible if a national jurisdiction genuinely carries out an investigation *or proceedings*"[81]. He noted only one exception to the primacy of national jurisdictions: when "[t]he State is unwilling or unable genuinely to carry out the investigation or prosecution"[82]. The OTP further defined "unwilling or unable" as referring to instances "where there is a *clear case of failure* to take national action" to investigate or

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[69]Paper on Policy Issues, *supra* note 62, at 2.
[70]*Id.* at 4; *see also* Prosecutorial Strategy Paper 2006-2009, *supra* note 64, at 5. "A Court based on the principle of complementarity ensures the international rule of law by creating an interdependent, mutually reinforcing international system of justice". *Id.* The Rome Statute is based on the principles of complementarity and cooperation. 18th Diplomatic Briefing, *supra* note 66, at 3; "According to the Rome Statute national states have the primary responsibility for preventing and punishing atrocities in their own territories". Seventh Diplomatic Briefing, *supra* note 61, at 7.
[71]Paper on Policy Issues, *supra* note 62, at 2; Seventh Diplomatic Briefing, *supra* note 61, at 7.
[72]Prosecutorial Strategy Paper 2006-2009, *supra* note 64, at 4; Seventh Diplomatic Briefing, *supra* note 61, at 7.
[73]Paper on Policy Issues, *supra* note 62, at 4.
[74]*Id.*
[75]*Id.*
[76]*Id.* at 3.
[77]*Id.*
[78]*Id.* at 4.
[79]*Id.*
[80]21st Diplomatic Briefing, *supra* note 66, at 4. It is unlikely that such a budget would be available, considering the constraints from the latest diplomatic briefings. Diplomatic Briefing in The Hague: Remarks by Fatou Bensouda, Prosecutor, 12–15 (9 Oct. 2017).
[81]Rep. of the International Criminal Court for 2005-2006, *supra* note 65, ¶ 31 (emphasis added); *see* Paper on Policy Issues, *supra* note 62, at 4. "The Prosecutor can proceed only where States fail to act, or are not 'genuinely' investigating or prosecuting, as described in Article 17 of the Rome Statute". *Id.*; The Office of the Prosecutor only steps in "when states fail to conduct investigations and prosecutions, or where they purport to do so but in reality are unwilling or unable to genuinely carry out proceedings". Seventh Diplomatic Briefing, *supra* note 61, at 7.
[82]Paper on Policy Issues, *supra* note 62, at 4; Rome Statute, *supra* note 2, art. 17.

prosecute crimes[83]. As an aside, even if States are unwilling or unable to investigate or prosecute and there is a clear case of failure to take action, the OTP would *still* only prosecute "the most serious crimes of concern to the international community", giving expression to the gravity and severity test for admissibility[84]. Moreover, Mr Ocampo aptly limited investigations to "those bearing the greatest responsibility for the most serious crimes", specifically, those "who ordered, financed, or otherwise organized the alleged crimes", adding a seniority standard based on complementarity for admissibility[85].

Therefore, the principle of complementarity as defined by ***Mr Ocampo established an exceedingly high bar for admissibility of a case to the ICC***[86]. Mr Ocampo even famously declared that "the absence of trials by the ICC, as a consequence of effective functioning of national systems, would be a major success"[87].

The concept of positive complementarity as crafted by Mr Ocampo also emphasised the importance and primacy of domestic courts[88]. He stressed that the theory of positive complementarity was essential to carry out "the mandate of the court" and to maximise its impact[89]. Handled properly, the work of positive complementarity can play an essential role in implementing the "innovative model of international cooperation" created by the Rome Statute[90]. Mr Ocampo recognised that effectuating positive complementarity required reliance upon national and international networks to collect evidence, gain donor support, and work with political mediation in situation countries[91]. Because the ICC desires and encourages national institutions to investigate and prosecute crimes, Mr Ocampo noted that "supporting the capacity-building of national jurisdictions" by the Court is a "crucial task in the global struggle against impunity"[92]. These positive complementarity measures came with the caveat that the Court not get involved directly, even in the case of situation countries[93].

Thus, positive complementarity, as crafted by Mr Ocampo, emphasises the importance of domestic courts and focuses the ICC's energies on attaining his measure of success, i.e., "the absence of trials by the ICC"[94]. Therefore, both facets of the principle of complementarity as put into practice by Mr Ocampo underscore the importance of national courts and the high standard for admissibility created by the Rome Statute Preamble and Articles 1 and 17.

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[83]Paper on Policy Issues, *supra* note 62, at 5 (emphasis added).
[84]*Id.* at 6–7.
[85]21st Diplomatic Briefing, *supra* note 66, at 3–4; Prosecutorial Strategy Paper 2006-2009, *supra* note 64, at 6.
[86]*See* Prosecutorial Strategy Paper 2006-2009, *supra* note 64, at 6.
[87]Paper on Policy Issues, *supra* note 62, at 4. "[T]he effectiveness of the Court should not be measured only by the number of cases that reach the Court. On the contrary, the absence of trials by the court, as a consequence of the effective functioning of national systems, would be a major success". *See* Seventh Diplomatic Briefing, *supra* note 61, at 7.
[88]Paper on Policy Issues. *supra* note 62, at 4; Prosecutorial Strategy Paper 2006-2009, *supra* note 64, at 6.
[89]Ninth Diplomatic Briefing, *supra* note 66, at 4.
[90]Fifteenth Diplomatic Briefing, *supra* note 66, at 9.
[91]Prosecutorial Strategy Paper 2006-2009, *supra* note 64, at 5.
[92]Rep. of the International Criminal Court for 2010/11, *supra* note 65. ¶¶ 110, 122.
[93]*Id.* ¶ 122.
[94]*See supra* note 87.

B. Mrs Bensouda Also Characterises Complementarity as Establishing a High Bar of Admissibility, Thereby Underscoring the Primacy of Domestic National Jurisdictions

Current Chief Prosecutor Fatou Bensouda assumed office on 15 June 2012, having served as Deputy Prosecutor under Mr Ocampo for nine years and enjoying an intimate familiarity with the principle of complementarity and the definitions that were developed during her predecessor's tenure. Mrs Bensouda has consistently adhered to Mr Ocampo's two-pronged definition of the principle of complementarity and has demonstrated that she views it as creating a high bar for admissibility of cases to the ICC. Her briefings to the States Parties have emphasised that the key admissibility issue is "whether genuine national investigations or prosecutions" have been undertaken[95]. Only "where States *fail* to discharge their responsibilities" to conduct "genuine national investigations or prosecutions" of the perpetrators of mass crimes can the Office begin its own investigation[96]. Like her predecessor, in her report to the U.N., she explicitly characterised the ICC as the "court of last resort," placing the primary responsibility for investigation and prosecution of crimes on domestic national courts[97].

Mrs Bensouda has also furthered Mr Ocampo's vision of positive complementarity and the Court's role in encouraging national prosecutions[98]. Specifically, she prompted the Court to "encourage cooperation and assistance with a view to strengthening national proceedings"[99]. Moreover, she declared that positive complementarity deters crimes and reinforces the "sovereign rights and responsibilities of States to try their own nationals"[100]. She stressed that these rights and responsibilities "cannot be overstated"[101].

In her time as Chief Prosecutor, Mrs Bensouda has continued to interpret and apply the principle of complementarity in the same manner as her predecessor. Therefore, the principle of complementarity as applied today serves as both a tool to encourage national prosecutions and a high bar for admissibility to the ICC.

The following analysis of Israel's ability and willingness to investigate and prosecute its own nationals for alleged war crimes and crimes against humanity shows that the principle of complementarity, particularly as understood by the OTP, would render any case against Israeli nationals in the ICC inadmissible.

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[95] Off. of the Prosecutor, ICC Diplomatic Briefing: Remarks by the Prosecutor, Fatou Bensouda, 3 (17 Nov. 2014) [hereinafter 24th Diplomatic Briefing].
[96] *Id.* (emphasis added).
[97] *Id.*; Rep. of the International Criminal Court on Its Activities in 2013/14, ¶ 64, U.N. Doc A/69/150 (18 Sept. 2014); *see also* Fatou Bensouda, *Cox Center International Humanitarian Award: Reflections from the International Criminal Court Prosecutor*, 45 CASE W. RES. J. INT'L L. 505, 507 (2012).
[98] *See* 24th Diplomatic Briefing, *supra* note 95, at 3.
[99] Rep. of the International Criminal Court on Its Activities in 2013/14, *supra* note 97, ¶ 66.
[100] 24th Diplomatic Briefing, *supra* note 95, at 3.
[101] *Id.*

III. ICC PROCEEDINGS INVOLVING ISRAEL WOULD NOT BE ADMISSIBLE, BECAUSE ISRAEL IS BOTH ABLE AND WILLING GENUINELY TO INVESTIGATE AND PROSECUTE (WHEN THE EVIDENCE SO WARRANTS) ITS OWN NATIONALS FOR WAR CRIMES AND OTHER SERIOUS OFFENCES

The State of Israel's well-established justice system as well as Israel's strong record of conducting genuine investigations and prosecutions regarding claims of war crimes committed by its armed forces absolutely bars ICC proceedings against Israel and its nationals.

A. Israel Has a Robust and Transparent Justice System Genuinely Capable of Conducting Investigations and Prosecutions in Cases of Alleged War Crimes, Thus Barring the ICC from Asserting Jurisdiction Over Such Cases

Determining whether a State is able to carry out criminal proceedings in cases of alleged violations of international law is an objective, fact-based exercise[102]. Article 17 of the Rome Statute lists three factual situations that may establish a State's inability to carry out its responsibilities *vis-à-vis* investigating and prosecuting (when the evidence so warrants) Article 5 crimes: (1) "the State is unable to obtain [custody of] the accused"; (2) "the State is unable to obtain . . . the necessary evidence and testimony"; and (3) "the State is . . . unable otherwise to carry out its proceedings"[103]. These situations may be taken to indicate a State's inability to carry out criminal proceedings only if they resulted "due to a total or substantial collapse or unavailability of its national judicial system"[104].

Not only does Israel have a well-established and functioning judicial system with mechanisms for conducting and reviewing criminal investigations, but as demonstrated below, Israel also employs additional measures to ensure that charges of war crimes allegedly committed by Israel Defence Forces (IDF) personnel are adequately addressed.

In Israel (as in many developed democracies[105]), the military justice system is responsible for examining and investigating complaints regarding soldiers' alleged criminal

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[102] Off. of the Prosecutor, Policy Paper on Case Selection and Prioritisation, ¶ 21 (15 Sept. 2016).
[103] Rome Statute, *supra* note 2, art. 17.
[104] *Id.*
[105] Canada, Australia, the United States, and the United Kingdom all have similar military justice systems that investigate and prosecute those who violate military codes of conduct as well as laws of war, *see* Michael N. Schmitt, *Investigating Violations of International Law in Armed Conflict*, 2 HARV. NAT'L SEC. J. 31 (2011). Canada's system involves separate but cooperative investigative, prosecutorial, and defence posts, as well as a commission addressing military police conduct, all under the supervision of a Judge Advocate General who is outside the chain of command. *See id.* at 58. Australia's Defence Force Investigative Service handles referrals from four separate fact-finding commissions that identify criminal conduct so that it can be prosecuted by either military authorities under the Defence Force Discipline Act or in civilian courts. *Id.* at 65. While the United States' systems vary by military branch, all branches have military investigative and prosecutorial bodies governed by the Uniform Code of Military Justice and under the advice of staff civilian judge advocates, as well as the Judge Advocate General. *Id.* at 76–77. The United Kingdom's civilian-led "Service Police" has authority over all three branches of the military and operates independently of the chain of command to prosecute cases as well as refer them to civil authorities. *Id.* at 68.

conduct[106]. The Israeli military justice system consists of three main bodies: (1) the Military Advocate General's Corps (MAG Corps); (2) the Military Police Criminal Investigation Department (CID); and (3) Military Courts[107]. Each of these bodies plays a role in holding Israeli soldiers to the high standards of justice that Israel demands of itself.

1. The MAG Corps

In 1956, Israel enacted the Military Justice Law that established the Military Advocate General (MAG) Corps[108]. Israel's Minister of Defence appoints a Military Advocate General to command the MAG Corps, a corps of personnel which operates outside the regular IDF chain of command, thereby mitigating any danger of command influence being brought to bear on military legal personnel. The MAG has the authority "to order the holding of a preliminary investigation when he is of the opinion that an offense indictable by a court martial has been committed, to order the opening or closing of a criminal investigation and to order supplementary investigations to be carried out"[109]. The MAG Corps is subject only to the authority of the law in fulfilling its duty to investigate and prosecute the commission of war crimes by Israel's armed forces[110].

The MAG Prosecution Service for Operational Matters, one of four units that constitute the MAG Prosecution Service, specialises in handling incidents that occur during military operations[111]. This unit consists of military advocates who have degrees in law, have passed an officers' course as well as a specialised course for military advocates, and have received specialised professional training to handle cases of international law violations[112].

The MAG Corps obtains information regarding the alleged commission of war crimes by Israeli armed forces through two avenues[113]. First, the MAG Corps accepts complaints from outside sources, which have typically been filed by Israeli, Palestinian, and international non-governmental organisations[114]. Second, the MAG Corps requires military and police actors to file a complaint when they "know[] or [have] reasonable grounds to believe that another soldier has committed an offense"[115]. Regardless of the source, *every complaint* filed with the MAG Corps and all information obtained by the MAG Corps' own efforts suggesting possible criminal misconduct by IDF forces goes through an initial examination[116]. In that phase, the information is analysed to determine its credibility and specificity[117]. Following the initial examination, the case is referred to the MAG Corp's

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[106]The Public Commission to Examine the Maritime Incident of 31 May 2010 (The Turkel Commission), Second Report, *Israel's Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law*, 278 (Feb. 2013) [hereinafter Turkel Commission].
[107]*Id.*
[108]Menachem Finkelstein, *The Israeli Military Legal System—Overview of the Current Situation and a Glimpse into the Future*, 52 A.F. L. Rev. 138 (2002).
[109]Turkel Commission, *supra* note 106, at 281.
[110]*Id.*
[111]*Id.* at 285.
[112]*Id.*
[113]The 2014 Gaza Conflict 7 July–26 August 2014: Factual and Legal Aspects, ¶¶ 422–23 [hereinafter Gaza Report].
[114]*Id.* ¶ 422.
[115]*Id.* ¶ 423.
[116]*Id.* ¶ 424.
[117]*Id.*

criminal investigations division if the evidence "indicate[s] that the alleged wrongdoing could be criminal in nature"[118].

2. Military Police Criminal Investigation Department (CID)

Israel's Military Police, of which the CID is a component, is responsible for administering the law within IDF forces[119]. Like the MAG Corps, the CID has authority to initiate criminal investigations into allegations of the commission of war crimes by Israeli armed forces[120]. Further, the CID conducts the investigations ordered by the MAG Corps[121]. CID investigators are highly qualified, having received months of training at the Military Police Professions School in addition to ongoing training by the MAG Corps[122]. The CID possesses advanced technology and special intelligence sources on which it relies to conduct sensitive and complex investigations[123].

3. Military Court System

The third main body, the Military Court System, is the judicial branch of the military justice system[124]. Military courts have jurisdiction over offences committed by Israeli soldiers both in war and during peacetime[125]. The Military Court System is comprised of district military courts, special military courts, and the Military Court of Appeals[126]. The President of Israel appoints military court judges, who are subject to no authority but the law[127]. The judges have set term limits that can only be terminated under exceptional circumstances[128], thereby assuring their independence from outside command or political influence.

Not only does Israel's justice system contain a mechanism for investigating and prosecuting the alleged commission of war crimes by the Israeli armed forces, it also provides that civilian institutions oversee and review the conduct of military criminal proceedings[129]. In Israel, the Attorney General is the head of the legal system of the executive branch[130]. As such, the Attorney General, as a civilian, has authority to oversee decisions by the MAG and the CID[131]. The Attorney General may intervene in decisions by the MAG or CID if they are deemed to have gone beyond the military sphere or when they depart from accepted legal norms[132].

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[118] *Id.* ¶ 424.
[119] Turkel Commission, *supra* note 105, at 291.
[120] *Id.* at 294.
[121] *Id.* at 292.
[122] *Id.* at 294.
[123] *Id.* at 293.
[124] *Id.* at 295.
[125] *Id.*
[126] *Id.* at 297.
[127] *Id.* at 296.
[128] *Id.*
[129] *Id.* at 313.
[130] *Id.*
[131] *Id.*
[132] *Id. See also* Directive No. 9.1002 [update of Directive A21.869], Op. Att'y Gen. (2015), ¶ 7–9 (*available* at http://www.justice.gov.il/En/Units/AttorneyGeneral/Documents/AGDirectiveMilitaryAdvocateGeneral.pdf).

Sitting as the High Court of Justice, the Supreme Court of Israel hears petitions against all arms of government[133]. This includes petitions for review of decisions of the Attorney General, the CID, and the MAG Corps[134]. The Court has exercised judicial review over issues implicating international law even while hostilities are ongoing[135]. For example, the Court reviewed the IDF's warning procedures, targeted killing policies, and humanitarian concerns during Israel's Operation Defensive Shield in 2002 and Operation Cast Lead in 2008-2009[136]. The Court has also reviewed MAG decisions regarding the initiation of investigations in response to alleged crimes by IDF personnel[137]. According to Harvard Law Professor Alan Dershowitz, no government faced with threats comparable to those faced by Israel has "ever had a better judiciary that has held its soldiers accountable"[138].

In summary, Israel's military justice system, consisting of the MAG Corps, CID, and Military Courts, is a well-established, functioning system for obtaining information regarding the possible commission of war crimes by its armed forces, investigating that information, and prosecuting and punishing war crimes and other serious offences when the evidence so warrants. Moreover, the fact that civilian judicial and administrative institutions wholly outside of the military oversee and review military criminal proceedings provides an extra safeguard to ensure that such proceedings conform to well-established legal standards.

4. New Investigatory Mechanisms

Although Israel routinely investigates allegations of war crimes by IDF forces, as evidenced by the criminal investigations and prosecutions that followed Operation Cast Lead in 2008–09[139], its investigations were criticised by the Report of the United Nations Fact-Finding Mission on the Gaza Conflict (commonly known as the Goldstone Report, a report which was later largely retracted by its namesake, Judge Goldstone) for being too slow[140].

On 14 June 2010, in response to the Goldstone Report, the Israeli Government established an independent public commission, the "Turkel Commission", to assess whether Israel's mechanisms for investigating and prosecuting alleged war crimes were consistent with international norms[141]. Commission Members included retired Supreme Court Justice Jacob Turkel[142], Ambassador Professor Shabtai Rosenne[143], Major-General (Ret.) Amos

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[133]Turkel Commission, *supra* note 106, at 316.
[134]*Id.*
[135]*Id.* at 317.
[136]*Id.*
[137]Turkel Commission, *supra* note 106, at 318.
[138]ALAN DERSHOWITZ, TERROR TUNNELS: THE CASE FOR ISRAEL'S JUST WAR AGAINST HAMAS 81 (2014) (explaining how Israel's Supreme Court imposes constraints on Israel's military).
[139]Mitch Ginsburg, *IDF Opens Criminal Probe into 5 Cases in Wake of Gaza Op*, TIMES OF ISR. (10 Sept. 2014, 2:35 PM), http://www.timesofisrael.com/idf-to-open-criminal-probe-into-2-deadly-gaza-strikes/.
[140]H.R.C., Report of the Human Rights Council, 391 ¶ 1820, U.N. Doc. A/HRC/12/48 (25 Sept. 2009). Even if the 50 investigations mentioned above were considered "slow", Section III of this brief shows that the OTP has never initiated a formal investigation based on the reason that the national proceedings were "too slow". In other words, the speed of investigative and legal proceedings has never been interpreted as evidence of a country's unwillingness or inability to investigate or prosecute.
[141]Turkel Commission, *supra* note 106, at 17 ¶ 4.
[142]Jacob Turkel is a former Israeli Supreme Court justice who served from 1995 until his retirement in 2005. He was appointed to the Be'er Sheva Magistrate's Court in 1967. His judicial career began in 1973 when he was appointed to the District Court in Be'er Sheva. *Turkel, Jacob*, VERSA OPINIONS OF THE SUP. CT. OF ISR., http://versa.cardozo.yu.edu/justices/turkel-jacob (last visited 5 May 2018).

Horev[144], Ambassador Reuven Merhav[145], and Professor Miguel Deutch[146]. To ensure transparency, the Turkel Commission included two Foreign Observers, Lord David Trimble (United Kingdom)[147] and Brigadier General (Ret.) Kenneth Watkin, Q.C. (Canada)[148]. The Commission also sought assistance from two Special Consultants, Professor Dr. Wolff Heintschel von Heinegg (Germany)[149] and Professor Michael Schmitt (United Kingdom/U.S.A.)[150].

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[143]Shabtai Rosenne was born in London and served as part of the Royal Air Force during World War II. He served as a legal adviser to the Israeli Foreign Ministry from 1948 until 1967. In 1949, he worked as part of the conferences that resulted in the 1949 armistice between Israel and its neighbours. In 1955, he represented Israel before the International Court of Justice regarding a passenger plane shot down by the Bulgarian air force. He later wrote a significant work on the ICJ and represented Israel at the United Nations from 1967 until 1974. His experience earned him great respect in the international community and he earned several awards as a result. He died on 21 September 2010. *Shabtai Rosenne*, TELEGRAPH (8 Nov. 2010, 6:21 PM), https://www.telegraph.co.uk/news/obituaries/law-obituaries/8118314/Shabtai-Rosenne.html.

[144]Major-General (Ret.) Amos Horev is a nuclear scientist and military expert. In 1973, he became the first Israeli-born president of Technion. Additionally, he served as the Chief Scientist for the IDF. He has also held positions in numerous companies and government-linked organisations. In 2011, he won the Israel Defense Prize for his lifelong dedication to serving the state of Israel. Chana Ya'ar, *Retired Maj.-Gen. Amos Horev Awarded Israel Defense Prize*, ARUTZ SHEVA 7 (6 July 2011, 1:24 PM), https://www.israelnationalnews.com/News/News.aspx/145477.

[145]Reuven Merhav is a fellow at the International Dialogue Initiative. His career consisted of a variety of positions within the Israeli Security and Intelligence community as well as the Foreign Service. As the director for the Israeli Ministry of Foreign Affairs, he participated in the 1989 Taba agreements and in planning "Operation Solomon", an Israeli operation that airlifted over 14,000 Jews from Ethiopia in 1991. Since his retirement, he has served on a variety of public boards. *Reuvan Merhav*, IDI, http://www.internationaldialogueinitiative.com/our-team/reuven-merhav/ (last visited 4 May 2018).

[146]Professor Miguel Deutch received his LL.B. from Tel Aviv University, where he is currently a professor specialising in property law, contract law, commercial law, and intellectual property law. He also holds a Ph.D from The Hebrew University of Jerusalem. Professor Deutch has written eleven books, is an arbitrator for commercial disputes, and has served in numerous committees for the Israeli Ministry of Justice. Furthermore, he is the Director of the Israeli Institute for Continuing Legal Studies and is President of the Disciplinary Tribunal at Tel Aviv University. Prof. Miguel Deutch, THE BUCHMANN FAULTY OF LAW, https://en-law.tau.ac.il/profile/deutchm.

[147]Lord David Trimble received his honours degree in law from Queen's University, Belfast, Northern Ireland, in 1968. In 1969, he became a member of the Northern Ireland Bar and lecturer at Queen's University, Belfast, where he eventually became a senior lecturer and the Head of the Department for Commercial and Property Law. He entered politics in 1975 and became the leader of the Ulster Unionist Party, led the talks between the United Kingdom and the Irish governments that resulted in the Belfast Agreement of 1998, and was elected First Minister in the New Northern Ireland Assembly. He won the Nobel Peace Prize in 1998 for his efforts to resolve the Northern Ireland conflict. Currently, he is a member of the House of Lords in the British Parliament. *David Trimble-Biographical*, NOBEL PRIZE (16 Oct. 1998), https://www.nobelprize.org/nobel_prizes/peace/laureates/1998/trimble-bio.html.

[148]Brigadier-General (Ret'd) Kenneth Watkin, QC received his undergraduate degree from the Royal Military College of Canada in 1976. He later received his LL.B in 1980 and his LL.M. in 1990 from Queen's University, Kingston, Ontario, Canada. He served thirty-three years in the Canadian Forces with four of those years acting as Judge Advocate General. He also served as a legal advisor in the 1993 investigation regarding the Canadian Airborne Regiment Battle Group's activities in Somalia. Similarly, he appeared before the International Criminal Tribunal for Rwanda in 2004 following his involvement in international inquiries regarding the Rwandan Genocide. He has received numerous accolades: appointment to the Order of Military Merit in 2002, the Lieber Society Military Prize of the American Society of International Law in 2008, and the Canadian Bar Association (CBA) President's Award in 2010. He has also been a Visiting Fellow at the Human Rights Program at Harvard and was appointed as Queen's Counsel in 2006. *Brigadier-General (Ret'd) Kenneth Watkin, QC*, PENN LAW, https://www.law.upenn.edu/live/files/3812-watkin-short.

[149]Professor Dr. Wolff Heintschel von Heinegg is currently the Chair of Public Law at Europa-Universität Viadrina in Frankfurt, Germany, where he previously was the Dean of the Law Faculty from 2004-2008 and Vice-President from 2008-2012. He has also been Senior Fellow of the Cooperative Cyber Defence Centre of Excellence since 2013 and part of the Council of the International Institute of Humanitarian Law since 2007. As

In making its report, the Commission relied on rules of international humanitarian law, international human rights law, international criminal law, laws of State responsibility, and Israeli constitutional and administrative law[151]. ***The Commission's Report found that Israel's mechanisms for examining and investigating alleged criminal misconduct by the IDF generally complied with international law and were on par with the mechanisms of other democratic countries, including Australia, Canada, Germany, the Netherlands, the United Kingdom, and the United States***[152]. Additionally, the Report made several recommendations designed to strengthen Israel's mechanisms, such as the establishment of a permanent fact-finding mechanism to help expedite investigations[153].

Israel put the Commission's recommendation regarding a permanent fact-finding mechanism into effect during Operation Protective Edge in 2014[154]. In the course of that operation, Israel activated the General Staff Mechanism for Fact-Finding Assessments (FFA Mechanism), a permanent institution independent from the MAG Corps composed of senior officers, led by a Major-General, outside the chain of command of the operation in question, that determines facts regarding "Exceptional Incidents" that occurred during military operations[155]. After allegations of criminal misconduct by the IDF undergo an initial examination to determine their credibility and completeness, the MAG can refer "Exceptional Incidents" that do not raise a *prima facie* suspicion of criminal conduct to the FFA Mechanism for further fact-finding[156]. FFA findings are referred back to the MAG to review and make a final determination regarding the necessity of initiating criminal proceedings[157].

Thus, Israel's mechanisms for investigating alleged war crimes by IDF forces, which were already found to be in compliance with international standards, have been strengthened beyond that required by internationally accepted norms.

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part of his work on the Council, he helped create the San Remo Manual on International Law Applicable to Armed Conflicts at Sea. He was also a professor at the University of Augsburg and has been a visiting professor at universities in Russia, Kazakhstan, Cuba, and France. Furthermore, he was the Charles H. Stockton Professor of International Law at the U.S. Naval War College from 2003-2004 and 2012-2013. Lastly, he has helped develop handbooks for the German Navy. *Prof Dr. Wolff Heintschel von Heinegg*, GCSP, https://www.gcsp.ch/News-Knowledge/Experts/Guest-Experts/Heintschel-von-Heinegg-Prof-Dr-Wolff-Heintschel-von-Heinegg.

[150]Professor Michael Schmitt received his J.D. from University of Texas, his LL.M. from Yale University, and his D.Litt from Durham University (UK). He served in the United States Air Force for twenty years as a Judge Advocate General (JAG) and has since been a visiting scholar and professor as well as served on a variety of boards and societies. Currently, he is Professor of Public International Law at Exeter Law School, Charles H. Stockston Professor at the U.S. Naval War College, and Francis Lieber Distinguished Scholar at the Lieber Institute of the U.S. Military Academy at West Point. He is also a Senior Fellow and researcher for NATO Cyber Defence Centre of Excellence and Hebrew University, respectively. *Professor Michael Schmitt*, UNIVERSITY OF EXETER, https://socialsciences.exeter.ac.uk/law/staff/mschmitt/.

[151]Turkel Commission, *supra* note 106, at 39.

[152]*Id.* at 49.

[153]*Id.* at 462.

[154]*Id.* at 166.

[155]Gaza Report, *supra* note 113, ¶ 424.

[156]*Id.* ¶¶ 424–25.

[157]*Id.* ¶ 431

B. The State of Israel Willingly and Genuinely Investigates All War Crimes Allegations Against IDF Forces, Thereby Rendering Proceedings Against Israeli Nationals Inadmissible Before the ICC

Article 17 of the Rome Statute provides three criteria to consider in determining the unwillingness of a state to investigate and prosecute international crimes: (1) whether the state is shielding the accused from criminal responsibility; (2) whether criminal proceedings are unjustifiably delayed; and (3) whether criminal proceedings are conducted impartially[158]. Here too, the principle of complementarity creates a high threshold for a case's admissibility before the ICC.

The operation of Israel's military justice system clearly satisfies the demands of "willingness" and "genuineness", thereby barring proceedings before the ICC. This is borne out, for example, by Israel's handling of complaints relating to the 2008–09 Gaza Conflict (Operation Cast Lead) and the 2014 Gaza Conflict (Operation Protective Edge).

1. Investigations and Legal Proceedings Regarding Operation Cast Lead

Following Operation Cast Lead, the IDF engaged in an extensive effort to investigate allegations of Law of Armed Conflict violations by Israeli forces. To this end, the IDF Chief of the General Staff authorised five teams to conduct field investigations into various categories of allegations[159]. Each of the teams was led by a Colonel "who [was] not directly in the chain of command for the operations in question"[160]. The IDF also conducted field investigations into more than 60 additional specific incidents[161]. As of July 2010, the IDF had conducted investigations into a total of 150 incidents[162]. This included 47 criminal investigations by the Military Police CID[163].

In general, the investigative teams found that, through Operation Cast Lead, the IDF acted in accordance with the Law of Armed Conflict[164]. In situations where IDF soldiers violated the law, the IDF sought appropriate punishments, including criminal indictments[165]. In less severe cases where soldiers acted negligently, disciplinary charges were sought[166]. Finally, in cases resulting in civilian casualties, but where no breaches of international law had occurred, the MAG made recommendations to the IDF where appropriate, with a view to minimising such casualties in future conflicts[167].

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[158] *See* Rome Statute, *supra* note 2, art. 17.
[159] The Operation in Gaza: Factual and Legal Aspects, ¶ 318, at 119 (July 2009).
[160] *Id.*
[161] *Id.* ¶ 321, at 120.
[162] Gaza Operation Investigations: Second Update, ¶ 17 (July 2010).
[163] *Id.* ¶ 23.
[164] *Id.* ¶ 146.
[165] *See id.* ¶¶ 46, 42, 102.
[166] *See id.* ¶ 60.
[167] *See id.* ¶¶ 66, 96, 107, 149.

2. Investigations and Legal Proceedings Regarding Operation Protective Edge

During and after Operation Protective Edge in 2014, Israel implemented the recommendations of the Turkel Commission and utilised the FFA Mechanism to ensure prompt clarification of facts necessary for the MAG to decide whether to order a criminal investigation into any incident[168]. Since the operation concluded, the MAG Corps released five reports that include facts and figures, details of process, summaries of investigation findings, and decisions related to individual investigations[169].

According to the last update published in 2016[170], the MAG received approximately 500 complaints regarding some 360 different incidents[171]. The MAG opened 24 criminal investigations without requesting further factual examination by the FFA Mechanism[172]. These investigations resulted in three indictments while 13 cases were closed without criminal or disciplinary proceedings[173]. The remaining investigations were still ongoing[174]. Of the above mentioned 500 complaints, 360 complaints regarding 220 exceptional incidents were given to the FFA Mechanism for further fact finding, seven of which resulted in criminal investigations[175]. Where criminal investigations were not deemed necessary, "the MAG recommended reviewing operational methods in order to assess whether any changes should be made"[176].

3. Israel Has Also Investigated and Prosecuted Alleged Violations Attributed to IDF Forces Since 2014

Even as legal proceedings related to Operation Protective Edge continue, Israel has addressed violations allegedly committed in subsequent IDF operations. A prominent example came in March 2016 when an IDF soldier was accused of shooting and killing an already-"neutralised" Palestinian attacker who had stabbed another member of the soldier's brigade[177]. IDF commanders conducted an initial field investigation and "found this to be a

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[168] *See* Turkel Commission, *supra* note 106, at 462.

[169] *See e.g.*, Press Release, IDF MAG Corps, Operation Protective Edge: Investigation of Exceptional Incidents – Update 3 (22 Mar. 2015), http://mfa.gov.il/MFA/ForeignPolicy/IsraelGaza2014/Pages/Operation-Protective-Edge-Investigation-of-exceptional-incidents-Update-3.aspx; Press Release, IDF MAG Corps, Operation Protective Edge: Investigation of Exceptional Incidents – Update 4 (11 June 2015), http://mfa.gov.il/MFA/ForeignPolicy/IsraelGaza2014/Pages/Operation-Protective-Edge-Investigation-of-exceptional-incidents-Update-4.aspx; Press Release, IDF Mag Corps, Decisions of the IDF Military Advocate General Regarding Exceptional Incidents During Operation 'Protective Edge'--Update No. 5 (24 Aug. 2016), https://www.imra.org.il/story.php3?id=71311.

[170] IDF MAG Corps, Update 5, *supra* note 169.

[171] *Id.*

[172] *Id.*

[173] *Id.*

[174] *Id.*

[175] *Id.*

[176] *Id.*

[177] *Name of Soldier Accused of Manslaughter in Hebron Shooting Released*, JERUSALEM POST (18 Apr. 2016, 4:21 PM), http://www.jpost.com/Breaking-News/Name-of-soldier-accused-of-manslaughter-in-Hebron-shooting-released-451598; Judah Ari Gross et al., *Soldier Moderately Hurt in Hebron Stabbing; Attackers Killed*. TIMES OF ISR. (24 Mar. 2016, 8:47 AM), http://www.timesofisrael.com/israeli-soldier-stabbed-moderately-injured-in-hebron/.

very grave incident that contravenes the IDF's values and what is expected of its soldiers and commanders"[178].

The case was referred to the CID and the soldier was promptly arrested[179]. The CID's investigation noted inconsistencies in the soldier's story and investigators determined the incident was the result of the soldier's "twisted ideology"[180]. MAG prosecutors charged the soldier with manslaughter[181]. Commenting on the case, prosecutors summarised the position of the Israeli government: "If the defendant had shot in good faith, in a situation of genuine danger, with intent of quashing the danger, the army and law would have stood by his side", but "[t]he illegality of the shooting screams from afar, a scream that cannot be stifled"[182]. The District Military Court agreed and unanimously convicted the soldier on 4 January 2017 and sentenced him to imprisonment and demotion[183]. The soldier appealed to the Military Court of Appeals, but his appeal was rejected[184].

It is noteworthy that, although significant political and public pressure was brought to bear upon IDF legal authorities to cease the investigation and prosecution, the proceedings went ahead unabated.

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The foregoing describes the process employed by the Israeli justice system in response to war crimes allegations against its nationals. It easily qualifies as a thorough, objective, professional, and independent domestic legal process that bars ICC proceedings under the principle of complementarity: "The [ICC] does not exist to usurp the powers of a law-abiding State that is genuinely fulfilling its obligations under international criminal law; it exists to circumvent the shielding of criminals by States"[185]. ***As clearly shown in the examples provided, Israel affords alleged war criminals no shield—and accordingly is itself shielded from the ICC's exercise of jurisdiction by the Rome Statute's own terms.***

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[178]Elior Levy et al., *WATCH: IDF Soldier Shoots Neutralized Terrorist in the Head*, YNETNEWS (24 Mar. 2016, 8:26 PM), https://www.ynetnews.com/articles/0,7340,L-4782563,00.html.

[179]*Id.*

[180]Ben Bryant, *Exclusive: Leaked IDF Report States Soldier Who Shot Palestinian Attacker Driven by 'Twisted Ideology'*, VICE NEWS (28 Apr. 2016, 9:50 AM), https://news.vice.com/article/exclusive-leaked-idf-report-states-soldier-who-shot-palestinian-attacker-driven-by-twisted-ideology-1.

[181]Gili Cohen, *Soldier Who Shot Subdued Palestinian Assailant in Hebron to Be Charged with Manslaughter*, HAARETZ (14 Apr. 2016, 11:58 AM), https://www.haaretz.com/israel-news/.premium-1.71437.

[182]Gili Cohen, *Hebron Shooter's Lies Are Enough to Destroy His Defense, Says IDF Prosecution*, HAARETZ (7 Nov. 2016, 10:33 PM), https://www.haaretz.com/israel-news/.premium-1.751584.

[183]Yoav Zitun & Yonatan Baniyeh, *Sgt. Elor Azaria Convicted of Manslaughter After Hebron Shooting*, YNETNEWS (4 Jan. 2017, 11:42 AM), https://www.ynetnews.com/articles/0,7340,L-4902894,00.html.

[184]Isabel Kershner, *Israel Court Rejects Appeal for Elor Azaria, Soldier Who Shot Wounded Assailant*, N.Y. TIMES (30 July 2017), https://www.nytimes.com/2017/07/30/world/middleeast/israel-elor-azaria-benjamin-netanyahu.html.

[185]Ronli Sifris, *Weighing Judicial Independence against Judicial Accountability: Do the Scales of the International Criminal Court Balance?*, 8 CHI.-KENT J. INT'L & COMP. L. 88, 107 (2008).

IV. OTP ACTION & JURISPRUDENCE IN PRIOR SITUATIONS REQUIRE THAT THE ICC ABIDE BY ITS COMPLEMENTARITY & ADMISSIBILITY RULES WITH RESPECT TO ISRAEL AS IT DOES WITH OTHER STATES

The OTP's past practice regarding complementarity shows that, regardless of how a case/situation is referred to it, whether through a self-referral to investigate and prosecute a State Party's own nationals, a Security Council referral, a State Party Communication against nationals of another State, or by the OTP's own initiative, it must pass the high bar of admissibility. A case is not admissible if the State that has jurisdiction over the crimes and persons involved is willing and able genuinely to investigate or prosecute alleged crimes.

The OTP has expressly stated that preliminary examinations involve, *inter alia*, analysing whether "there are *no* genuine investigations or prosecutions for the . . . crimes at the national level"[186]. Even a cursory study limited to preliminary investigations conducted by the OTP reveals that, while evaluating admissibility, the OTP abides by its stated procedures and relies upon positive complementarity, giving deference to the efforts of national courts rather than automatically or quickly referring a case to the ICC.

Of the situations referred to the ICC, only those self-referred by State Parties against their own nationals permit an assumption that the State in question is either unable or unwilling to bring the perpetrators to justice. A self-referral, by its very nature, means the government is either unable or unwilling to investigate or prosecute the alleged crimes. Yet, even in such cases, as shown below, the OTP does not disregard the admissibility analysis and independently considers evidence to determine whether the self-referring State is unable or unwilling to prosecute the alleged crimes.

Further, even situations referred by the UN Security Council must undergo complementarity and admissibility analysis. While some scholars believe that a referral by the Security Council alone is sufficient to waive any complementarity challenges[187], the OTP's practice in Darfur and Libya supports the contrary conclusion. Additionally, in the Darfur situation, the Report of the International Commission of Inquiry on Darfur to the Secretary-General clearly stated that *complementarity does not become inapplicable in the case of Security Council referrals*[188].

The following few examples of the OTP's practice show how much time, degree of correspondence and communication, and overall effort is dedicated to evaluating admissibility to overcome complementarity concerns. ***Israel must be treated no differently.***

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[186] *About Office of the Prosecutor*, INT'L CRIM. CT., https://www.icc-cpi.int/about/otp (last visited 1 May 2018) (emphasis added).

[187] Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the international Criminal Court*, 167 Mil. L. Rev. 20, 49–50 (2001).

[188] Report of the International Commission of Inquiry on Darfur to the Secretary-General, 152–53 ¶ 607, (25 Jan. 2005).

A. UN Security Council Referrals

1. Darfur, Sudan

In March 2005, the UN Security Council (UNSC) adopted Resolution 1593, referring the situation in Darfur, Sudan, a region of the non-party State, Sudan, to the OTP. The importance of the complementarity and admissibility analysis is shown by the fact that, even though the Report of the International Commission of Inquiry on Darfur to the Secretary-General had concluded that the "Sudanese courts [were] unable and unwilling to prosecute and try the alleged offenders"[189], the OTP nonetheless conducted its own extensive and thorough admissibility analysis[190].

The First Report of the Prosecutor stated that "[t]he admissibility assessment is an on-going assessment that relates to the specific cases to be prosecuted by the Court. Once investigations have been carried out, and specific cases selected, the OTP *will assess whether or not those cases are being, or have been, the subject of genuine national investigations or prosecutions*"[191].

The following paragraph in the OTP's report is of vital importance:

> In mid-June 2005, after the decision by the Prosecutor to start an investigation, the Government of Sudan provided the OTP with information relating to the establishment of a new specialised tribunal to deal with some individuals considered to have been responsible for crimes committed in Darfur. As part of the on-going admissibility assessment the OTP will follow the work of the tribunal in order to determine whether it is investigating, or has investigated or prosecuted, the cases of relevance to the ICC, and whether any such proceedings meet the standards of genuineness as defined by article 17 of the Rome Statute[192].

Notably, even though the situation had been referred by the UNSC, allowing the ICC to exercise jurisdiction, the OTP did not think the situation was admissible *ipso facto* without conducting an admissibility analysis under Article 17 of the Rome Statute.

More recently, even after the formal investigation had been justified and warrants issued against the alleged criminals, the OTP continued to recognise the complementarity principle. The Twenty-First Report of the Prosecutor stated that "Sudan . . . has the primary responsibility and is fully able to implement the warrants [issued by the ICC], consistent with its sovereign authority. It has consistently refused to do so. At the same time, it has also failed to provide any meaningful measure of justice at the national level"[193].

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[189] *Id.* at 144 ¶ 568.
[190] Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593 (2005), 3–4, (29 June 2005).
[191] *Id.* at 4 (emphasis added).
[192] *Id.*
[193] Off. of the Prosecutor, Twenty-First Report Pursuant to Paragraph 8 of UN Security Council Resolution (UNSCR) 1593, ¶ 13, (29 June 2015).

What this case shows is that, while the UN Security Council referral allowed the ICC to exercise jurisdiction in the Darfur situation, even that exercise of jurisdiction was predicated on an independent OTP admissibility analysis due to the importance and applicability of complementarity.

2. Libya

In 2011, the OTP proceeded to an investigation in Libya[194] based on a referral by the UN Security Council on 26 February 2011[195]. Yet again, even though the situation had been referred to the ICC by the UNSC, the OTP performed the admissibility analysis to determine that "the statutory criteria for the opening of an investigation . . . had been met"[196]. The OTP's preliminary examination report stated that "the [OTP] had not found any genuine national investigation or prosecution of the persons or conduct that would be the subject matter of the cases it would investigate"[197].

However, in a related case against Abdullah Al-Senussi where Libya *had* taken "concrete and progressive steps" to investigate and prosecute the defendant, the Pre-Trial Chamber I noted that, since Libya was conducting domestic proceedings by competent authorities, showing that Libya was willing and able genuinely to carry out the investigation, that particular case was inadmissible due to the principle of complementarity[198].

The Court's decision in Libya's situation strengthens the complementarity principle even further than the Darfur situation. Not only, as in the Darfur situation, does it stand for a rule that a UNSC referral does not override complementarity and admissibility determination, but even if the case has moved forward after an initial finding of admissibility due to lack of national ability and willingness to investigate or prosecute, the Court would surrender jurisdiction if later evidence shows initiation of national proceedings.

Accordingly, the principle of complementarity demands the same degree of deference towards Israeli national legal proceedings, proceedings which easily meet (and arguably exceed) internationally accepted standards of thoroughness and fairness.

B. Self-Referrals

A self-referral by its very nature suggests that the referring government has determined that its judicial system is either unable or unwilling to investigate or prosecute the alleged crimes. Yet, the following cases show that even in cases of self-referral where the OTP could logically assume the government's lack of ability and willingness to investigate or

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[194] Off. of the Prosecutor, Report on Preliminary Examination Activities, ¶ 117 (13 Dec. 2011) [hereinafter Report on Preliminary Examination Activities 2011].

[195] *Id.*

[196] *Id.* ¶ 118.

[197] *Id.*

[198] Press Release, Off. of the Prosecutor, ICC Pre-Trial Chamber I Decides that the Al-Senussi Case Is to Proceed in Libya and Is Inadmissible before the ICC, ICC Press Release ICC-CPI-20131011-PR953 (11 Oct. 2013); *see also Libya: ICC Judges Reject Sanussi Appeal: Court Rules Ex-Intelligence Chief Can Be Tried at Home*, HUM. RTS. WATCH (24 July 2014, 9:24 AM), https://www.hrw.org/news/2014/07/24/libya-icc-judges-reject-sanussi-appeal (noting complementarity ruling came even though Libya had "inability to gain control over all detainees in militia-run facilities", abused some detainees, and failed to give some of them lawyers or "judicial reviews of their cases".).

prosecute, the OTP nonetheless carries out the admissibility assessment due to complementarity concerns.

1. Uganda

Uganda is a State Party to the Rome Statute. In December 2003, President Yoweri Museveni referred the situation concerning the Lord's Resistance Army (LRA) to the OTP[199]. Almost a decade after the arrest warrant had been issued against him, Dominic Ongwen, a Brigade Commander in the LRA, surrendered[200]. Due to the time elapsed since the self-referral in 2003, initial comments by some Ugandan officials at the time of his surrender indicated that they had the ability and will to prosecute Ongwen in Uganda[201]. Nonetheless, the Ugandan government did not withdraw the self-referral. Instead, it cooperated with the ICC and transferred Ongwen to The Hague[202].

In light of the Court's understanding of complementarity, as reflected in Libya's situation, had the Ugandan government withdrawn the self-referral and expressed a desire to adjudicate the matter in domestic courts, there would have been no barrier to its doing so.

2. Central African Republic (CAR)

The CAR government had referred two separate situations to the OTP. The first referral was made in December 2004. The 2007 report of the OTP on the Situation in the CAR states that, "[p]rior to opening the investigation, the OTP conducted a thorough analysis of available information and determined that the jurisdiction, admissibility and interests of justice requirements of the Rome Statute were satisfied"[203]. In the admissibility analysis, the report stated that

> [t]he ICC is a court of last resort, and may initiate cases only where: (i) there has not been any national investigation or prosecution of the case; or (ii) there is, or has been, such an investigation or prosecution, but the state is unwilling or unable genuinely to carry out the investigation or prosecution[204].

While the CAR government's referral was filed in December 2004, it was not until after the government had concluded its national investigations *and* the Cour de Cassation had released its decision that the OTP began its own formal investigations[205]. In its admissibility

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[199]Press Release, Off. of the Prosecutor, ICC – President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC, ICC Press Release ICC-20040129-44 (29 Jan. 2004).
[200]*LRA's Dominic Ongwen 'Capture': Seleka Rebels Want $5m Reward*, BBC (9 Jan. 2015), http://www.bbc.com/news/world-africa-30743647.
[201]Risdel Kasasira, *Uganda Says It Wants to Try Rebel Leader Who Surrendered*, PHILA. TRIB. (12 Jan. 2015), http://www.phillytrib.com/ap/international/uganda-says-it-wants-to-try-rebel-leader-who-surrendered/article_c740cfdb-30b2-5540-b329-89e9ec96ae33.html.
[202]Jeffrey Gettieman, *Senior Rebel from Uganda to Be Moved to The Hague*, N.Y. TIMES (13 Jan. 2015), https://www.nytimes.com/2015/01/14/world/africa/ugandan-rebel-commander-to-be-tried-at-international-criminal-court.html.
[203]Off. of the Prosecutor, Background: Situation in the Central African Republic, 1, ICC-OPT-BN-20070522-220-A_EN (22 May 2007).
[204]*Id.* at 2.
[205]*Id.* at 3.

analysis, the OTP relied on the national court's findings that the "national authorities were unable to carry out the necessary criminal proceedings"[206].

Notably, despite CAR's prior self-referral, *the OTP avoided formal involvement until every domestic means of rendering justice had been exhausted, the requirements for complementarity had been fully pursued, and the country's highest criminal court had concluded that the national judicial system was unable to adjudicate the matter.* ***Only then*** did formal investigations by the OTP begin.

The CAR authorities referred the second situation to the OTP in May 2014[207]. The OTP yet again performed the complementarity analysis and assessed admissibility[208]. The OTP's preliminary examination report stated that "the [CAR] prosecutors and police generally lack the capacity and security to conduct investigations and apprehend and detain suspects"[209]. It also stated that "the referral from the CAR authorities indicated that the national judicial system is not able to conduct the necessary investigations and prosecutions successfully"[210].

3. Mali

The government of Mali self-referred the situation regarding crimes committed since January 2012 in the context of two internal armed conflicts, one related to armed groups seizing Northern Mali and the other related to a *coup d'état* by a military junta[211]. The OTP performed the complementarity and admissibility analysis and stated in its Article 53(1) Report on the Situation in Mali that "Malian authorities . . . informed the [OTP] that Malian courts were . . . unable to prosecute crimes allegedly committed by armed groups in Mali"[212]. The report further stated that "[a]part from a special administrative commission of inquiry . . . no judicial proceedings have been instituted"[213] in Mali. The OTP's 2013 preliminary examination report stated that "no national proceedings were pending in Mali or any other State against those most responsible for the most serious crimes committed in Mali"[214].

* * * * *

The situations in Uganda, CAR, and Mali show that, even in cases of self-referral, the OTP did not simply accept the respective governments' apparent unwillingness or inability to investigate or prosecute alleged war criminals. Instead, the OTP performed its own complementarity and admissibility analysis—*albeit* not as rigorously as in other situations due to the very nature of a self-referral—and determined that the national authorities were *in fact* unable or unwilling to initiate proceedings domestically.

In the abovementioned situations, the Rome Statute's core principle of complementarity placed the right to prosecute squarely in the hands of the States in

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[206] *Id.*
[207] Off. of the Prosecutor, Report on Preliminary Examination Activities 2014, ¶ 216 (2 Dec. 2014).
[208] *Id.*
[209] *Id.* ¶ 207.
[210] *Id.* ¶ 208.
[211] Off. of the Prosecutor, Situation in Mali: Article 53(1) Report, ¶ 25 (16 Jan. 2013).
[212] *Id.* ¶ 137.
[213] *Id.* ¶ 138.
[214] Off. of the Prosecutor, Report on Preliminary Examination Activities 2013, ¶ 232 (Nov. 2013).

question—States that had ratified the Rome Statute. If such deference was owed to nations that had assented to the jurisdiction of the ICC, then an even greater degree of deference should be owed to a State like Israel that has not assented to ICC jurisdiction. Disregarding the investigations and prosecutions conducted by Israel—a State that has consistently and persistently objected to ICC jurisdiction and which has a judicial system with standards that are far higher than those that would be required of it under any complementarity analysis[215]—would not only be inconsistent with the principle of complementarity—it would be a perversion of the Rule of Law.

* * * * *

The following cases that involve neither Security Council referrals nor self-referrals also show how the OTP strives to abide by the statutory requirements of complementarity and admissibility.

C. *Proprio Motu*, *Ad Hoc*, and Other Situations

1. Nigeria

Nigeria became a State Party to the Rome Statute in September 2001. After receiving communications under Article 15 of the Rome Statute regarding crimes committed in the Niger Delta, the Middle-Belt States in the context of armed conflict between Boko Haram and Nigerian security forces, the OTP began preliminary examination in November 2010[216]. Since then, the OTP has been engaged in an ongoing admissibility assessment.

According to the OTP's 2017 report on the preliminary examinations, the OTP received limited information from the Nigerian Attorney-General[217]. The OTP noted that the information received "mostly relates to proceedings targeted at low-level Boko Haram members rather than its leadership. A limited number of case files appears to relate to the alleged killings and injuries of civilians by Boko Haram"[218]. The report further noted that, "[w]ith respect to crimes allegedly committed by the Nigerian security forces[,] information available to date only relates to some extent to the two potential cases identified by the [OTP]"[219]. The OTP also found information regarding "delayed trials" and "deaths in custody" that the OTP considered constituted "a denial of the detainees' right to a fair trial"[220].

Yet, even though the admissibility determination has been going on for about seven years and despite evidence of delayed trials, deaths in custody, and a denial of the detainees' right to a fair trial, the OTP nonetheless decided ***not to initiate a formal investigation, based on information that the national government had taken some measures***[221].

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[215] *See supra* Section III.

[216] *Preliminary Examination: Nigeria*, INT'L CRIM. CT., https://www.icc-cpi.int/nigeria (last visited 8 May 2018).

[217] Off. of the Prosecutor, Report on Preliminary Examination Activities 2017, ¶¶ 216, 218 (4 Dec. 2017).

[218] *Id.* ¶ 216.

[219] *Id.* ¶ 218.

[220] *Id.* ¶ 220.

[221] *Id.* ¶¶ 207, 226, 228. Also see previous years' reports, *e.g.*, Off. of the Prosecutor, Report on Preliminary Examination Activities 2013, ¶¶ 220–22 (Nov. 2013); Report on Preliminary Examination Activities 2014, *supra* note 207, ¶¶ 182–83.

2. Colombia

Colombia became a State Party to the Rome Statue in August 2002. The OTP began a preliminary examination in June 2004 pursuant to Article 15 of the Rome Statute. Since the beginning of the preliminary examination, the OTP had noted that, even though the Court had jurisdiction over crimes committed since November 2002, "the Court may exercise jurisdiction over war crimes committed since 1 November 2009 *only*, in accordance with Colombia's declaration pursuant to article 124 of the Statute"[222].

The OTP's 2011 report noted that "the Office will continue to examine the situation and national proceedings . . . in accordance with its positive approach to complementarity"[223]. In 2012, the report stated that "the Office does not at this stage consider the ***delays*** in reaching a conclusion to [the national] criminal proceedings necessarily indicate a lack of willingness or ability"[224]. As to the proceedings in which the Colombian authorities convicted defendants *in absentia*, the report stated that "the [OTP] has no reason at this stage to doubt the genuineness of [national] proceedings"[225]. The preliminary investigation continued into 2014 due to concerns over the genuineness of investigations into rape and sexual assault cases[226].

More recently, the 2017 report noted that, while "it appears that the Colombian authorities have instituted proceedings against 17 of the 29 commanders, . . . there is conflicting information about the status of some of the reported cases"[227]. The OTP further noted that "it had not received detailed information from the Colombian authorities on cases being reportedly investigated and on whether concrete and progressive investigate [sic] steps have been or are being taken"[228]. Nonetheless, the OTP decided not to request initiation of a formal investigation from the Pre-Trial Chamber but rather "continue[d] to engage with the Colombian authorities to seek additional details and clarifications on any concrete and progressive steps and prosecutorial activities undertaken"[229].

3. Guinea

Guinea became a State Party to the Rome Statute in July 2003 and "has been under preliminary examination since 14 October 2009"[230]. On 20 October 2009, the Minister of Foreign Affairs visited the OTP and assured the then-Deputy Prosecutor Mrs Bensouda that the Guinean authorities were able and willing to investigate and prosecute the alleged

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[222]Report on Preliminary Examination Activities 2017, *supra* note 210, ¶ 123. Article 124 of the Rome Statute allows State Parties to declare, at the time of becoming a party, "that, for a period of seven years after the entry into force of th[e] Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory". Rome Statute, *supra* note 2, art. 124.

[223]Report on Preliminary Examination Activities 2011, *supra* note 194, ¶ 85.

[224]Off. of the Prosecutor, Report on Preliminary Examination Activities 2012, ¶ 111 (Nov. 2012) (emphasis added).

[225]*Id.* ¶ 109.

[226]Report on Preliminary Examination Activities 2014, *supra* note 207, ¶ 123.

[227]Report on Preliminary Examination Activities 2017, *supra* note 217, ¶ 135.

[228]*Id.*

[229]*Id.*

[230]*Id.* ¶ 156.

crimes[231]. Instead of proceeding with formal investigation, Mrs Bensouda told the Minister: "Guinea is a State Party, the Court is your Court, working together we will ensure that there will be no impunity for the crimes committed"[232]. Confirming that "Guinea had the primary responsibility to conduct proceedings", the OTP requested the Minister to provide information regarding national investigations and prosecutions[233].

Over the course of eight years, the OTP has noted the degree to which the Guinean authorities worked to carry out criminal investigations and prosecutions[234]. These measures included the appointment of judges and the investigation focused on those who were identified by the UN as most responsible for the most grievous crimes[235].

Despite the admittedly "fairly slow, steady pace" of the investigations[236], in 2012, the OTP's report concluded that "the facts do not support a finding of admissibility"[237]. By 2014, the report concluded that, due to the domestic national efforts, "the [preliminary] investigation will soon be terminated"[238]. In 2017, the OTP noted that the national investigations had been completed, but stated that "[w]hile this commendable effort should pave the way for the effective holding of a [national] trial in 2018, the [OTP] will continue to closely examine any potential obstacle to genuine accountability"[239].

As shown in Section II, the standard of Israeli domestic investigations and prosecutions clearly exceeds those of Guinea or any other country the OTP is monitoring.

4. Georgia

Georgia ratified the Rome Statute in September 2003. In January 2016, Pre-Trial Chamber I granted the Prosecutor's request to open an investigation regarding alleged crimes committed in the context of an international armed conflict between 1 July and 10 October 2008[240].

In its admissibility analysis, the OTP's 2011 report emphasised a letter from the Russian Embassy declaring that "factors create an obstacle to genuine advancement in the national investigation of the criminal case, preventing the possibility to properly bring to justice alleged perpetrators"[241]. The Georgian government also informed the OTP about the

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[231] *See* Press Release, Off. of the Prosecutor, Guinea Minister Visits the ICC – Prosecutor Requests Information on National Investigations into 28 September Violence, ICC Press Release (21 Oct. 2009) https://www.icc-cpi.int/Pages/item.aspx?name=pr468.
[232] *Id.*
[233] *Id.*
[234] Report on Preliminary Examination Activities 2011, *supra* note 194, ¶ 114; Report on Preliminary Examination Activities 2012, *supra* note 224, ¶¶ 152–58, 160–61, 163; Report on Preliminary Examination Activities 2013, *supra* note 221, ¶¶ 191–95, 200; Report on Preliminary Examination Activities 2014, *supra* note 207, ¶ 162–64, 39–40.
[235] Report on Preliminary Examination Activities 2011, *supra* note 194, ¶ 114; Report on Preliminary Examination Activities 2012, *supra* note 224, ¶ 154.
[236] Report on Preliminary Examination Activities 2012, *supra* note 224, ¶ 155.
[237] *Id.* ¶ 158.
[238] Report on Preliminary Examination Activities 2014, *supra* note 207, ¶ 170.
[239] Report on Preliminary Examination Activities 2017, *supra* note 217, ¶ 39.
[240] *Georgia: Situation and Georgia*, INT'L CRIM. CT., https://www.icc-cpi.int/georgia (last visited 8 May 2018).
[241] Report on Preliminary Examination Activities 2011, *supra* note 194, ¶ 101.

national proceedings being conducted. As such, the OTP *continued* to monitor the situation and provide support rather than simply take the case immediately.

In 2012, the OTP noted that, while "both Georgia and Russia appear to be conducting relevant national investigations," "neither investigation has yielded any results"[242]. Both governments continued to cite the other's lack of cooperation[243]. Despite neither investigation returning any results nearly four years after the alleged crimes had been committed, the OTP continued to seek "clarification as to whether the respective national investigations have halted"[244].

In 2013, the OTP "pursued dialogue with national authorities . . . with the aim to assess and encourage genuine national proceedings by Georgia and Russia"[245]. In 2014, the OTP noted "significant delays" and "limited progress" in investigations. It stated that "more than six years after the end of the armed conflict, no alleged perpetrator has been prosecuted, nor has there been any decision not to prosecute the persons concerned as a result of the[] investigations"[246]. Nonetheless, the OTP decided to not request authorisation from the Pre-Trial Chamber to investigate[247].

In 2015, the OTP noted that "national proceedings in Georgia have stalled, with the Government confirming to the Prosecut[or] that domestic proceedings for the alleged [crimes] have been indefinitely suspended"[248]. With respect to proceedings in Russia, the OTP noted that "no concrete and progressive steps have been taken in Russia to ascertain the criminal responsibility of those involved in the alleged crimes"[249]. Based on the information that domestic proceedings had been ***indefinitely suspended***, "the [OTP finally] requested the Pre-Trial Chamber to authorise the commencement of an investigation"[250].

5. Afghanistan

Afghanistan became a State Party to the Rome Statute in February 2003. The OTP began a preliminary examination of the situation in Afghanistan in 2007 pursuant to Article 15 of the Rome Statue.

In 2017, after continuously analysing the situation regarding national measures taken to investigate or prosecute alleged crimes, the OTP concluded that no investigations or prosecutions were being conducted[251]. Based on the assessment of admissibility over the course of 10 years, the OTP requested Pre-Trial Chamber III to authorise the commencement of an investigation into the situation in Afghanistan[252].

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[242] Report on Preliminary Examination Activities 2012, *supra* note 224, ¶ 135.
[243] *Id.* ¶¶ 133, 136.
[244] *Id.* ¶ 140.
[245] Report on Preliminary Examination Activities 2013, *supra* note 221, ¶ 171.
[246] Report on Preliminary Examination Activities 2014, *supra* note 207, ¶ 154.
[247] *Id.*
[248] Off. of the Prosecutor, Report on Preliminary Examination Activities Report (2015), ¶ 255 (12 Nov. 2015).
[249] *Id.* ¶ 256.
[250] *Id.*
[251] Off. of the Prosecutor, Report on Preliminary Examination Activities report 2017, ¶ 261, 271 (4 Dec. 2017).
[252] *Id.* ¶ 280.

The OTP's past practice demonstrates three things. ***First***, the OTP continues to consistently apply a cautious approach to complementarity and admissibility in all cases, including self-referrals and UNSC referrals. ***Second***, the OTP continues its pattern of only requesting formal investigation once the national authorities demonstrate an utter lack of ability or will to investigate or prosecute. ***Third***, these cases together demonstrate how hard it is for a case to meet the high standard of admissibility set by the principle of complementarity as well as the extent to which the OTP will go to use positive complementarity before initiating a formal investigation.

In every single instance in which the OTP proceeded with full investigation, there were absolutely no ongoing or anticipated national proceedings. *None of the characteristics shared by the situations that proceeded to full investigations are to be found in the Israeli case*[253]. As demonstrated in Section II, Israel has a well-developed and functioning judicial system with a long, distinguished history of bringing criminals to justice, thereby demonstrating both the ability and the will to investigate alleged violations and, when the evidence so supports, to bring suspects to trial.

Not only has Israel exercised this capacity for decades, it had even begun investigating and prosecuting cases related to Operation Protective Edge before any allegations were considered at the ICC[254], as one would expect from a modern, democratic country committed to the Rule of Law. ***The diligence and careful deferential steps taken by the OTP over years in the situations involving the countries mentioned above dictate that the same amount of diligence be taken and deference be shown to the Israeli legal system.***

To ignore the Court's complementarity precedents and the make-up, history, and functioning of Israel's national judicial system would in effect be to hold Israel to a completely unique standard. **Requiring of Israel what is not required of the Statute's States Parties would constitute a gross miscarriage of justice and a violation of the Rule of Law. This would be compounded considering that Israel has never consented to ICC jurisdiction.** ***Moreover, it would confirm the fears expressed by the United States, Israel, and others that the ICC was indeed prone to politicisation.***

Therefore, even a cursory preliminary examination should lead the OTP to conclude that Israel's situation is wholly inadmissible, based on strong precedent for a high bar for admissibility as well as the requirement of granting deference to—*and positive complementarity and patience with*—the national court system.

CONCLUSION

The principle of complementarity sets a high threshold for the ICC to assert its jurisdiction in a case. This is consistent with the view of the drafters of the Rome Statute, who envisioned a court that would serve only as a last resort in cases where there was no prospect of those accused of violating international law being investigated or prosecuted. Not only has Israel clearly demonstrated that it is willing and able to conduct thorough, transparent investigations of war crimes allegations against its soldiers and to initiate criminal

[253] *See supra* Section III for a more detailed discussion of Israel's functioning criminal justice system and history of investigating and prosecuting alleged war crimes.
[254] *Id.*

proceedings in response to such allegations when the evidence so warrants, ***it has done so repeatedly, consistently, and conscientiously***.

It behooves the Court to see the situation in question for what it really is. The attempts to haul Israelis before the Court are part of a brazen and transparent campaign by the Palestinian leadership and its supporters to abuse processes at the ICC in order to advance their well-known political agenda. It is *precisely* the type of situation that so many delegates to the Rome Conference were afraid of.

If offences against the Law of Armed Conflict have been committed by Israeli troops, no entity is more able and willing to investigate and prosecute such offences than the legal system of the State of Israel itself. The ongoing investigations and resulting legal proceedings, all of which preceded any ICC involvement, are proof that this is so. For all of these reasons, and under any understanding of complementarity, in theory and as applied, at any level of examination or inquiry, the ICC is precluded from proceeding against Israeli nationals in these matters.

Your Excellency, should you or your staff have any questions that we might be able to answer, we are happy to do so.

Respectfully submitted,

Jay Alan Sekulow
Chief Counsel

Robert W. Ash
Senior Counsel

TAB A

EUROPEAN CENTRE FOR LAW AND JUSTICE

7 February 2018

VIA OVERNIGHT DELIVERY SERVICE
& FIRST CLASS MAIL

HE Fatou Bensouda
Prosecutor, International Criminal Court
Post Office Box 19519
2500 CM, The Hague
The Netherlands

RE: THE ISSUE OF ICC JURISDICTION: FACTUAL AND LEGAL ANALYSIS TO ASSIST THE PROSECUTOR IN DETERMINING WHETHER THE INTERNATIONAL CRIMINAL COURT MAY LAWFULLY ASSERT ITS JURISDICTION OVER NATIONALS OF THE STATE OF ISRAEL, A NON-CONSENTING, NON-PARTY STATE TO THE ROME STATUTE (PART 1)

Your Excellency:

By way of introduction, the European Centre for Law and Justice (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[1]. As you will doubtless recall, the ECLJ has filed numerous documents with the OTP in the past to assist the ICC Prosecutor and the OTP staff in resolving contentious issues before you.

Like the International Criminal Court (ICC), the ECLJ is committed to the principle of bringing to justice those who commit the world's most serious crimes. At the same time, the ECLJ seeks to ensure that such undertakings be accomplished wholly in accordance with the Rule of Law. These same goals are echoed within the Preamble of the Rome Statute. In other words, in legal proceedings, the desire for justice does not—*and, indeed, must not*—justify unlawful or questionable means to achieve otherwise desirable ends. The ECLJ submits this legal brief to assist the Office of the Prosecutor (OTP) in carrying out its preliminary assessment of the situation involving alleged Article 5 violations vis-à-vis the State of Israel.

We at the ECLJ are encouraged by the progress that has been made as reflected in the OTP's latest status report on ongoing preliminary examinations[2], but we are dismayed that clear-cut legal arguments before the OTP regarding Israel have still not put an end to the

[1] *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 29 Jan. 2018).
[2] OFFICE OF THE PROSECUTOR, REPORT ON PRELIMINARY EXAMINATION ACTIVITIES (2017), ¶¶ 51–78 (4 Dec. 2017), https://www.icc-cpi.int/itemsDocuments/2017-PE-rep/2017-otp-rep-PE_ENG.pdf.

CENTRE EUROPÉEN POUR LA JUSTICE ET LES DROITS DE L'HOMME
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investigation. We ask that the OTP recall that lawful jurisdiction is the *sine qua non* of the Rule of Law that both authorises and legitimises a court's decisions. Any court lacking lawful jurisdiction over an accused is impotent to act on any matter brought before it regarding such accused (save only to acknowledge its lack of jurisdiction over the accused and to release the accused, if he/she is in custody).

In this legal brief, we contest the notion that the ICC may lawfully exercise jurisdiction over nationals of the non-Party State of Israel. Doing so without Israel's explicit consent thereto is a violation of the intent of the convening parties to the Rome Conference, the Rome Statute itself, and Customary International Law.

The ECLJ submits that the ICC lacks jurisdiction over the nationals of *all* non-consenting, third-party States that have declined to accede to the Rome Statute. And, specifically concerning Israel, the ICC lacks jurisdiction *inter alia* for the reasons listed and discussed below. The ECLJ further submits that each of the following reasons is individually sufficient to establish that the ICC lacks jurisdiction over Israeli nationals. Taken together—*since they all apply simultaneously to the State of Israel*—the following reasons overwhelmingly establish that the ICC lacks any and all jurisdiction over Israeli nationals.

- **First**, applying the terms of a treaty like the Rome Statute to the nationals of a non-consenting, non-party State like Israel violates the customary international law principle that no State is bound by the terms of a treaty to which it has not acceded, and any treaty term that purports to extend jurisdiction of such treaty over the nationals of non-consenting, non-party States is *ultra vires* and void *ab initio vis-à-vis* nationals of such States. At a minimum, the said treaty should be interpreted and applied in such a way that respects this fundamental principle;

- **Second**, according to the customary international law principle *uti possidetis juris*, when the State of Israel came into existence upon the departure of the British from Palestine in May 1948, Israel inherited ownership of, *and sovereignty over*, the entirety of the territory of the former Mandate for Palestine lying between the Jordan rift valley and the Mediterranean Sea, thereby (1) becoming the sole legitimate sovereign over all such territory, (2) extinguishing all competing claims thereto, and (3) as a non-party State to the Rome Statute, negating any ICC jurisdiction over its nationals and territory alleged by others who speciously claim title to the land or portions thereof;

- **Third**, the entity which has brought the charges against Israel, the so-called "State of Palestine", fails to meet the criteria to constitute a "State" under customary international law and is, thereby, precluded by the explicit terms of the Rome Statute from being able to accede to ICC jurisdiction and refer situations to the Court;

- **Fourth**, investigating Israeli nationals based on Palestinian allegations would unlawfully violate Article 98 of the Rome Statute, would reward the PA's strategy of using the ICC as a political weapon in the Palestinian struggle against Israel, and would entrench the Palestinian Authority's clear-cut breach of a number of agreements that the Palestinians entered into freely with Israel, agreements whose terms, *inter alia*, (1) negate all jurisdiction by PA officials over Israeli nationals; (2) significantly circumscribe the capacity of the PA to enter into international

agreements; (3) designate the specific means to be used—*to wit, bilateral negotiations between the parties*—to resolve outstanding issues like determining the boundaries of a future "State of Palestine", the future status of so-called "settlements", the future status of Jerusalem, as well as the ultimate disposition of "Palestinian refugees"; and (4) expressly prohibit the parties from taking unilateral steps to change the status of the West Bank and Gaza Strip pending the outcome of permanent status negotiations; and

- **Fifth**, the State of Israel has one of the most independent, sophisticated, effective, and just legal systems in the world today, employing jurists who have proven themselves not only able but also willing to investigate and, *if the evidence so warrants*[3], to try Israeli nationals who appear to have committed war crimes or crimes against humanity, thereby precluding admissibility of ICC proceedings against Israeli nationals, this in accordance with the Rome Statute principle of "complementarity"[4]. With respect to this latter point, we wish to emphasise the following: First, because Israel is a non-consenting, non-party State to the Rome Statute, under customary international law, the ICC has no lawful jurisdiction over Israel and its nationals irrespective of the effectiveness of the Israeli judicial system. Second, as a non-consenting, non-party State to the Rome Statute, Israel is under no obligation to prove to the OTP or anyone else that its judicial system fully meets the ICC's complementarity criteria (since such criteria do not—*and indeed cannot*—bind a non-party State without its consent). Nonetheless, *we submit that an unbiased analysis of the Israeli judicial system should convince even the most skeptical that the conditions of complementarity are fully met by Israel's legal system and its handling of suspected violations by Israeli nationals.*

Our memo on the Israeli judicial system and how it easily satisfies the requirements of complementarity as understood in the Rome Statute will be submitted to your office in a separate filing.

As noted earlier, the ECLJ submits that each of the reasons cited above is sufficient *in and of itself* to preclude the ICC from exercising jurisdiction over any issues arising between Israelis and Palestinians. We further submit that the foregoing reasons taken together overwhelmingly establish that the ICC is precluded from exercising jurisdiction over Israeli

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[3]It must be noted at the outset that any Israeli soldier accused of crimes by Palestinians or anyone else also enjoys the full panoply of rights that accrue to any criminal accused, to wit, the right to the presumption of innocence, the right to remain silent, the right to counsel, the right to confront one's accusers, and so on, as well as the right to have each element of the charged offence or offences proven beyond a reasonable doubt before guilt is established. It must also be recognised that wartime situations are inherently confusing and stressful, requiring split-second decision-making regarding whether to shoot or refrain from shooting. Mistakes inevitably happen in wartime, yet mistakes are not crimes. Further, urban warfare is among the most difficult situations for soldiers because of the constricted nature of the battlefield as well as the presence of large numbers of civilians. It also happens to be the favoured battleground for the Palestinians in the Gaza Strip. Finally, one must keep in mind that battlefields do not readily lend themselves to the timely collection of relevant evidence of crimes, making significantly more difficult the proving of an accused's guilt beyond a reasonable doubt. In other words, taken together, one cannot judge the efficacy of the Israeli judicial system based solely or primarily on the number of trials held and convictions obtained.

[4]The issue of complementarity does not, strictly speaking, involve "jurisdiction". Rather, it is described in the Rome Statute as an issue of "admissibility". Nonetheless, however it is described, if States are able and willing to investigate and prosecute (when the evidence so warrants) accuseds for Article 5 crimes, the ICC is precluded from intervening. *See, e.g.*, Rome Statute of the International Criminal Court pmbl. cl.10, art. 1, 5, 17 July 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute].

nationals. The first four reasons above will be discussed *seriatim* below, whereas, as indicated *supra*, the discussion of complementarity will be submitted to your office at a later date in a separate brief.

I. PRINCIPLES OF LAW WHICH PRECLUDE ICC JURISDICTION OVER THE STATE OF ISRAEL AND ITS NATIONALS

A. General Principles of International Law Applicable in This Matter

International law can be defined as "the system of rules, principles, and processes intended to govern relations at the interstate level, including the relations among states, organizations, and individuals"[5]. Article 38 of the Statute of the International Court of Justice (ICJ) lists three primary and several secondary sources of international law[6]. The three primary sources are: (1) "international conventions . . . establishing *rules expressly recognized by the contesting states*"[7] (commonly referred to as "conventional international law" and binding on the parties to the respective convention or treaty); (2) "international custom, as evidence of a general practice accepted as law"[8] (commonly referred to a "customary international law" and generally binding on all nations); and (3) "the general principles of law recognized by civilized nations"[9]. Secondary sources of international law include "judicial decisions," "teaching of the most highly qualified publicists of the various nations,"[10]

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[5]MARY ELLEN O'CONNELL ET AL., THE INTERNATIONAL LEGAL SYSTEM: CASES AND MATERIALS 3 (6th ed. 2010).

[6]Statute of the International Court of Justice, art. 38, 26 June 1945, U.S.T.S. 993 [hereinafter ICJ Statute]. *See also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 (AM. LAW. INST. 1986) [hereinafter RESTATEMENT], for sources of international law:

> (1) A rule of international law is one that has been accepted as such by the international community of states
> (a) in the form of customary law;
> (b) by international agreement; or
> (c) by derivation from general principles common to major legal systems of the world.
> (2) Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.
> (3) International agreements create law for the states parties thereto . . . .
> (4) General principles common to the major legal systems . . . may be invoked as supplementary rules of international law where appropriate.

Id.

[7]ICJ Statute, *supra* note 6, art. 38(1)(a) (emphasis added). Note especially the phrase, "establishing rules expressly recognized by the contesting states". Such rules need not be recognised by states which are *not* parties to the convention. Some jurists question whether treaties should even be considered as a source of international law. Sir Gerald Fitzmaurice, for example, has opined that "'treaties are no more a source of law than an ordinary private law contract that creates rights and obligations . . . . In itself, the treaty and "the law" it contains only applies to the parties to it'". INTERNATIONAL LAW: CASES AND MATERIALS 95 (Louis Henkin ed., 3d ed. 1993) [hereinafter HENKIN] (quoting Gerald Fitzmaurice, *Some Problems Regarding the Formal Sources of International Law*, *in* SYMBOLAE VERZIJL 153, 157–58 (Frederik M. van Asbeck et al. eds., 1958)).

[8]ICJ Statute, *supra* note 6, art. 38(1)(b). "The view of most international lawyers is that customary law is not a form of tacit treaty but an independent form of law; and that, when a custom satisfying the definition in Article 38 is established, it constitutes a general rule of international law which, subject to one reservation, applies to every state". HENKIN, *supra* note 7, at 87. That "one reservation" applies to the State which, "while the custom is in process of formation, unambiguously and persistently registers its objection to the recognition of the practice as law". *Id.*

[9]ICJ Statute, *supra* note 6, art. 38(1)(c); *see also* O'CONNELL, *supra* note 5, at 60. These include common principles of law and justice reflected in the legal systems of civilised states.

[10]ICJ Statute, *supra* note 6, art. 38(1)(d). Louis Henkin aptly notes that "[t]he place of the writer in international law has always been more important than in municipal legal systems. The basic systematisation of international law is largely the work of publicists, from Grotius and Gentilis onwards. . . . In the [civil law] systems reference

(commonly referred to as *opinio juris*) as well as principles of equity and fairness[11]. In this section, we will focus primarily on the relationship and interaction between conventional international law and customary international law as they apply to: (1) the Rome Statute; (2) the International Criminal Court (ICC), a specific creation of the Rome Statute; and (3) nationals of non-consenting, non-party States.

Conventional international law is found in conventions, treaties, and similar negotiated agreements between and among States as well as agreements between States and other international actors (like the United Nations or NATO), and it is binding on the parties to such agreements[12]. Accordingly, conventional international law is a consent-based legal regime.

Customary international law, on the other hand, is law based on custom that develops over an extended period of time and is considered binding on all States[13]. Although it is not necessarily *written* law, customary international law is nonetheless considered "law" because States generally comply with its requirements because they believe that they have a legal obligation to do so[14].

It is a foundational principle of customary international law that a State that has not become a party to a treaty or other international convention is not bound by the terms of such treaty or convention[15]. Accordingly, principles of customary international law constitute the default provisions governing the relationship between States, and they will always supersede contrary provisions of conventional international law as far as States not party to the respective convention are concerned. In other words, a non-party State to an international convention is not bound by the terms of such convention *without its consent*. As such, in general (and absent an intervening, bilateral agreement between them that modifies custom), *the relations between a State Party to a convention and a non-party State to that same convention are governed solely by customary international law related to resolving the matter between them*. Recognition of this principle is key when determining the legal reach of an

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to textbook writers and commentators is a normal practice, as the perusal of any collection of decisions of the German, Swiss or other European Supreme Courts will show". HENKIN, *supra* note 7, at 123.

[11] HENKIN, *supra* note 7, at 123.

[12] "Every treaty in force is binding upon *the parties to it* and must be performed *by them* in good faith". Vienna Convention on the Law of Treaties art. 26, 23 May 1969, 1155 U.N.T.S. 331 (emphasis added).

[13] There is one notable exception. A State may exempt itself from an international custom if that State is a persistent objector during the period that the custom develops. Curtis A. Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L.J. 202, 211 (2010). Additionally, customary law is frequently incorporated into treaties, thereby making it also binding as *conventional law* for the States Parties to the respective treaty.

[14] In that sense, customary international law differs from customary usage (such as ceremonial salutes between warships at sea or exempting diplomatic vehicles from certain parking regulations), since States recognise no legal obligation to do the latter:

> The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts, is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.

North Sea Continental Shelf (Ger. v. Den.), Judgement, 1969 I.C.J. 3, ¶ 77 (20 Feb.).

[15] *See, e.g.*, Vienna Convention, *supra* note 12, art. 34. There can be an exception here, too. Principles enshrined in treaties may evolve into custom over time if non-party States to the respective treaty begin to conform their activities to such principles because they believe that they have a legal obligation to do so. North Sea Continental Shelf, 1969 I.C.J. at 41, ¶ 71.

institution like the International Criminal Court (ICC), an institution created pursuant to the Rome Statute[16], a treaty to which a significant number of important States have not acceded (such as, the United States of America, the People's Republic of China, Russia, India, Pakistan, Israel, Iran, and Egypt, to name but a few[17]).

The Rome Statute exists solely because its States Parties (i.e., States that have signed and ratified the treaty) have negotiated and/or agreed to its terms. In certain circumstances, the Statute purports to permit the ICC to exercise jurisdiction over the nationals of non-consenting, non-party States[18]. *The grant of such jurisdiction violates customary international law*[19]. Indeed, this issue was one of the points of contention during the drafting of the Rome Statute, and ***many key State players in the international community were uncomfortable with a treaty which contravened international legal norms by purporting to bring within its scope nationals of otherwise non-consenting States***[20].

Despite the fact that the Rome Statute contains a provision that violates customary international law by subjecting nationals of non-consenting, non-party States to the terms of a treaty to which they have not acceded, attempts to bring nationals of such States before the ICC for investigation and possible trial—*via that very provision*—are ongoing. In 2009, for example, despite the fact that Israel was not a State Party to the Rome Statute, the Palestinian Authority (PA) submitted a declaration to the ICC Registrar, in which it purported to accede to the Rome Statute pursuant to Article 12(3)[21]. It did so in an attempt to bring Israeli soldiers and government officials within ICC jurisdiction, *inter alia*, for alleged Article 5 crimes committed in the Gaza Strip during the 2008–09 Israeli military incursion known as "Operation Cast Lead"[22]. More recently, the Union of the Comoros filed a referral with the ICC Prosecutor, requesting that the Office of the Prosecutor (OTP) investigate and the ICC (ultimately) try Israeli soldiers for their alleged Article 5 violations during the 2010 boarding of the Mavi Marmara, at the time a Comoros-flagged vessel, which was attempting to breach

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[16]Rome Statute, *supra* note 4. As of 29 Jan. 2018, 123 States have acceded to the Statute. *Chapter XVIII*, United Nations Treaty Collection, https://treaties.un.org/Pages/ShowMTDSGDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no=XVIII-10&chapter=18&lang=en (last visited 29 January 2018).

[17]*See The States Parties to the Rome Statute*, INT'L CRIMINAL. CT., https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last visited 29 Jan. 2018). Note that among the non-acceding States are the four most populous States in the world (i.e., China, India, the United States, and Indonesia). *Country Comparison: Population*, CENT. INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/rankorder/2119rank.html. As such, approximately one-half of the world's population lives in countries that have rejected the Rome Statute and ICC jurisdiction. Note, further, that many States in volatile regions of the world have also declined to accede to the Statute (e.g., Israel, Iran, Egypt, and Pakistan). *The States Parties to the Rome Statute*, *supra*.

[18]*See* Rome Statute, *supra* note 4, art. 12(2)(a) (authorizing the ICC to exercise jurisdiction even when only one State involved is a party to the Rome Statute or has accepted jurisdiction under paragraph 3).

[19]*Supra* note 15.

[20]*See generally* David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12 (1999).

[21]Article 12(3) permits a non-party "State" to accede to ICC jurisdiction by lodging a declaration with the ICC Registrar, *see* Rome Statute, *supra* note 4, art. 12(3), which the PA attempted to do, *see infra* note 22, even though it was not a State.

[22]Minister of Justice Ali Khashan, *Declaration Recognizing the Jurisdiction of the International Criminal Court*, PALESTINIAN NAT'L AUTH. (29 Jan. 2009), http://www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279777/20090122PalestinianDeclaration2.pdf. The ICC Office of the Prosecutor subsequently rejected this declaration because it recognised that the PA was not a State for purposes of the Rome Statute. Statement, Office of the Prosecutor, International Criminal Court, Situation in Palestine (3 Apr. 2012), https://www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf.

Israel's naval blockade of the Gaza Strip[23]. And, more recently still, Palestinian officials have once again sought to accede to the ICC in order to bring Israeli soldiers and government officials before the ICC to answer for alleged crimes committed during the 2014 Israeli military operation in the Gaza Strip called "Operation Protective Edge"[24].

Nonetheless, irrespective of the truthfulness or falsity of the allegations of criminal wrongdoing in the above examples, the ICC is not the proper forum when nationals of a non-consenting, non-party State to the Rome Statute, like Israel, are involved, absent such State's express grant of its consent thereto, consent which Israel has not granted (as is its right as a sovereign State).

B. Despite the Rome Statute's Stated Goal of Ensuring that the Perpetrators of the Most Serious International Crimes Not Go Unpunished[25], the ICC is Nonetheless a Court of *Limited* Jurisdiction

The ICC is, by the Rome Statute's own terms, a court of limited, not plenary, jurisdiction. ICC jurisdiction is expressly limited in a number of significant ways (*each of which, in some measure, works against the actual achievement of the Statute's stated goal of ensuring that the perpetrators of the most serious international crimes are brought to justice for their crimes*[26]). Accordingly, teleological arguments made to justify the expansion of ICC authority to investigate and try nationals of non-consenting, non-party States by claiming such expansion is required to ensure that perpetrators of the most serious crimes do not go unpunished ring especially hollow—*especially in light of the fact that the Statute allows nationals of States Parties to evade prosecution in certain circumstances denied to nationals of non-party States* (discussed more fully *infra*).

Among the explicit limitations on ICC jurisdiction are the following:

(1) The Rome Statute only permits "States"[27] to accede to ICC jurisdiction[28].

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[23]Referral of the Union of the Comoros with Respect to the 31 May 2010 Israeli Raid on the Humanitarian Aid Flotilla Bound for Gaza Strip to the International Criminal Court (May 14, 2013), http://www.icc-cpi.int/iccdocs/otp/Referral-from-Comoros.pdf.

[24]*See, e.g.*, William Booth, *Palestinians Press International Criminal Court to Charge Israel*, WASH. POST (25 June 2015), https://www.washingtonpost.com/world/middle_east/palestinians-press-international-criminal-court-to-charge-israel-with-war-crimes/2015/06/25/c0c85306-19d1-11e5-bed8-1093ee58dad0_story.html. The ECLJ submits that the OTP erred as a matter of law in allowing Palestine to accede to the ICC's jurisdiction based on the UN General Assembly's agreeing to change Palestine's status *at the UN* from "Entity" with observer status to "Non-member State" with observer status. Under the UN Charter, when Member States act collectively as part of the General Assembly, they are bound by the terms governing that body. Those terms limit the General Assembly to making "recommendations". *See, e.g.*, U.N. Charter arts. 10–14. Hence, the General Assembly could not create or recognise in any way, shape or form a Palestinian "State". Accordingly, no Palestinian "State" came into existence by the General Assembly's action.

[25]Rome Statute, *supra* note 4, pmbl. cls. 4–5.

[26]*Id.*

[27]The term "State", in UN and international practice, especially when capitalised, refers to recognised, sovereign nation-states. *See, e.g.*, G.A. Res. 25/2625, Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (24 Oct. 1970); LOUIS HENKIN, INTERNATIONAL LAW: POLITICS, VALUES AND FUNCTIONS 29–30 (1990); EMMERICH DE VATTEL, 3 THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW APPLIED TO THE CONDUCT AND TO THE AFFAIRS OF NATIONS AND OF SOVEREIGNS 3–6, 11 (Charles G. Fenwick trans., Carnegie Inst. of Wash. 1916) (1758).

[28]*See, e.g.*, Rome Statute, *supra* note 4, art. 12 (limiting accession to "States"); *id.* art. 14 (limiting referral of situations to "States"); *id.* art. 112 (limiting membership in Assembly of States Parties to "States"); *id.* art. 125 (limiting accession to the Statute to "States"). Moreover, Professor Otto Triffterer noted in his Commentary on

(2) The Statute limits ICC jurisdiction to the finite list of crimes found in Article 5: the crime of genocide, crimes against humanity, war crimes, and the crime of aggression[29]. The Statute further limits the ICC's jurisdiction over war crimes to those committed as "part of a plan or policy or as part of a large-scale commission of such crimes"[30]. Finally, "the Court shall determine that a case is inadmissible where . . . [t]he case is not of sufficient gravity to justify further action by the Court"[31].

(3) The Statute limits ICC jurisdiction by time. The ICC Prosecutor, for example, may only investigate and try crimes committed *after* the treaty came into force.[32] In addition to the time limit regarding when the treaty came into force, ICC jurisdiction may be deferred by the UN Security Council acting under Chapter VII of the UN Charter for an indefinite number of successive twelve-month periods[33]. Further, each State upon acceding to the Statute may declare that the treaty shall not apply to its territory or nationals regarding war crimes for up to seven years from the respective State's date of accession[34].

(4) The Statute permits ICC jurisdiction to be limited by a State Party's explicit rejection of the definition of aggression, once adopted, or of amendments to the other listed crimes[35]. Were a State Party to reject the definition of aggression or any amendment to other listed crimes, it would not be answerable for the crime of aggression or for the amended crimes. In the case of rejecting amendments to already listed crimes, the State Party would remain answerable, but only for the crimes as originally defined in the Statute[36].

(5) The Statute precludes prosecution of persons who may have committed Article 5 crimes when under the age of eighteen[37].

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the Rome Conference that, "[i]n accordance with normal modern practice for multilateral treaties, the [Rome] Statute [was] open for signature by all *States*". OTTO TRIFFTERER & KAI AMBOS, COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 1287 (1999) (emphasis added). The only exception would be a referral by the UN Security Council acting under Chapter VII of the UN Charter of a situation to the ICC. The Security Council alone has authority to refer a non-State entity to the ICC (as it did, for example, with respect to the Darfur region of Sudan). S.C. Res. 1593 (Mar. 31, 2005).

[29]Rome Statute, *supra* note 4, art. 5. Note that, with respect to the crime of aggression, "Article 121(5) gives States Parties the choice either to accept or not to accept any amendment to Article 5. This means that a State Party may exclude the jurisdiction of the Court with regard to the crime of aggression even when this crime should have been defined and accepted by seven-eighths of the States Parties as required by Article 121(4)". Hans-Peter Kaul, *Preconditions to the Exercise of Jurisdiction*, *in* 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, 583, 605 (Antonio Cassese et al. eds., 2002).

[30]Rome Statute, *supra* note 4, art. 8.

[31]*Id.* art. 17(1)(d).

[32]*Id.* art. 11. *See also id. art. 8bis* (regarding crime of aggression).

[33]*Id.* art. 16.

[34]*Id.* art. 124.

[35]*Id.* arts. 5(2),121(5). The definition of "aggression" was agreed to at the 2010 Kampala Review Conference in Uganda. It is to take effect in a State one year after it is adopted by thirty States Parties and after a decision made by the required majority of States on a date after 1 January 2017. International Criminal Court RC/Res.6, The Crime of Aggression (11 June 2010), https://treaties.un.org/doc/source/docs/RC-Res.6-ENG.pdf.

[36]Here again, States Parties to the Rome Statute could free themselves of jurisdiction from certain crimes, while non-party States could not. *One wonders how and from what source of law the States that negotiated the Rome Statute could impose harsher terms on nationals of States not a party to the Statute than on their own nationals.*

[37]Rome Statute, *supra* note 4, art. 26.

(6) The Statute precludes trials *in absentia*[38].

(7) The Statute limits the admissibility of ICC prosecutions to situations where national courts are either unwilling or unable to try and punish perpetrators for Article 5 crimes[39]. In other words, where national courts are willing and able to try and punish accused perpetrators, the ICC lacks the ability to act. This reflects the concept of "complementarity". According to Luis Moreno-Ocampo, the ICC's first Prosecutor, the ideal situation would be for the ICC never to have to try a case[40].

(8) The Statute precludes ICC jurisdiction to try alleged Article 5 perpetrators who are not nationals of a State Party to the Statute *and* who commit the crime in the territory of a non-Party State[41]. This generally reflects the consent-based nature of treaties.

As noted in (3) and (4) above, despite its stated goal of ensuring that perpetrators of Article 5 crimes are to be brought to justice, in reality, the Rome Statute expressly permits nationals of *its own States Parties* to evade prosecution for certain crimes in certain circumstances, ***while not extending the same benefit to nationals of non-party States.*** Hence, while application of the Statute's terms is permitted to vary among States Parties, nationals of non-party States are strictly subject to the Statute's terms, without exceptions and with immediate effect. ***We submit that this is an absurd and, therefore, untenable outcome.*** Specifically, Article 12(2)(a) states that the ICC may exercise jurisdiction over alleged perpetrators of Article 5 crimes committed on the territory of a State Party, *irrespective of the nationality of the accused*[42]. Such language purports to provide that nationals of non-consenting, non-party States may be brought before the ICC. Yet, the Rome Statute allows nationals *of its own States Parties* to evade ICC jurisdiction in certain instances[43] while

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[38] *Id.* art. 63.

[39] *Id.* pmbl. cl. 10; *Id.* art. 1.

[40] *See Global Leaders– Luis Moreno Ocampo*, INT'L BAR ASS'N (1 Feb. 2013), http://www.ibanet.org/Article/Detail.aspx?ArticleUid=81213dcf-0911-4141-ad29-a486f9b03d37.

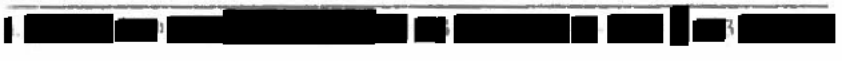
[41] Rome Statute, *supra* note 4, art. 12 (expressly delineating when the ICC may exercise jurisdiction, which does not include third-party nationals committing Article 5 crimes on third-party States' territory); *see also* Kaul, *supra* note 29, at 583, 612.

[42] Article 12(2) of the Rome Statute reads, in pertinent part, as follows:

> 2. In the case of article 13 [deals with Exercise of Jurisdiction], paragraph (a) or (c), the 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 in accordance with paragraph 3:
>
> (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft ....

Rome Statute, *supra* note 4, art. 12(2)(a). Note that Article 12(2)(a) applies irrespective of the nationality of the perpetrator of the crime. Accordingly, nationals of non-party States are subject to ICC prosecution according to the Rome Statute. Note further that a non-party State may accede to ICC jurisdiction pursuant to Article 12(3).

[43] Such as by allowing newly acceding States to defer ICC jurisdiction over their nationals and territories for war crimes for up to seven years, *Id.* art. 124, as well as by allowing States Parties to reject the definition of aggression (once adopted) or future amendments to other listed crimes, *id.* art. 121(5). ***None of this is allowed to non-consenting, non-party States. Instead, their nationals are liable to be tried for war crimes without any option of delay in application of such provisions. Further, whereas States Parties can reject the definition of the crime of aggression (and, thus, avoid its application to their nationals) as well as reject any definitional changes to existing crimes, non-consenting, third-party States do not have that option. Hence, the Rome Statute not only violates the third-party State's rights to reject the treaty altogether, it punishes the third-party***



simultaneously claiming the right of the ICC to try *non-party State nationals* for such crimes. ***In other words, under the Rome Statute, accused nationals of a State that has rejected the Rome Statute altogether have fewer rights and protections than the nationals of States that agreed to be bound by the Statute in the first place***[44]. ***That is a perverse and wholly unreasonable result in any legal system.*** *One wonders how the States that negotiated the Rome Statute could conceive that this accords with the Rule of Law, fundamental fairness, and principles of equity.* We submit that Article 12(2)(a) does not so accord, is wholly unlawful under customary international law, and, hence, is *ultra vires*.

A further issue is that language in the Rome Statute regarding the various Article 5 crimes reads as follows: "*For the purpose of this Statute*, [named crime] means . . ."[45]. To the extent that the meaning and/or elements of a specified Article 5 crime differ from descriptions and/or elements of similar crimes *as they currently exist in customary international law or other binding international conventions* (*like the Geneva Conventions of 1949*), the ICC claims the right to try accused nationals from non-consenting, third-party States for newly created "crimes" that may not actually exist under customary international law or applicable conventions. A prime example would be the language of the crime bearing on "settlements". The previous prohibition on "deporting and transferring" civilians into occupied territory[46] was changed at Arab insistence to also prohibit "indirect" transfer, thereby creating an entirely new offence, "which was designed to make a war crime out of voluntary and free movement of Jews into [the West Bank]"[47]. ***We submit that such a change to the traditional definition cannot be applied to Israel or any other non-consenting State without that State's prior consent.***

C. Article 12(2)(a) of the Rome Statute Which Asserts ICC Jurisdiction Over Nationals of Non-Consenting, Non-Party States Defies International Law and is, Therefore, *Ultra Vires*

The incorporation of Article 12(2)(a) into the Rome Statute stands in defiance of customary international law, to the extent that it concerns the nationals of non-consenting, non-party States. In support of this contention, we offer the following three points:

- **First**, Article 12(2)(a) disregards the well-established principle in customary international law requiring a State's consent in order for a treaty to bind that State's nationals.

- **Second**, other international tribunals have recognised and affirmed the consent-based nature of international law.

State by holding its nationals to a more stringent standard than it requires of the nationals of the States Parties themselves. That not only violates customary international law, it also violates common sense and rules of equity.

[44] JENNIFER ELSEA, INTERNATIONAL CRIMINAL COURT: OVERVIEW AND SELECTED LEGAL ISSUES 13, 13 n.68 (Cong. Research Serv. 2002) [hereinafter CRS REPORT] (noting that the ICC appears to have broader jurisdiction over war crimes committed by non-party nationals than by nationals of States Parties to the Statute).

[45] *See, e.g.*, Rome Statute, *supra* note 4, arts. 6, 7, 8.2 (emphasis added).

[46] Geneva Convention Relative to the Treatment of Prisoners of War art. 51, 12 Aug. 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

[47] Eugene Kontorovich, *Politicizing the International Criminal Court*, JERUSALEM CTR. FOR PUB. AFF., http://jcpa.org/politicizing_the_international_criminal_court/ (last visited 30 Jan. 2018).

- **Third, asserting the existence of "universal jurisdiction" over Article 5 crimes (as some do[48] in order to ensnare nationals of non-party States) does not automatically or necessarily mean that the ICC, a court created by only a portion of the world community, may exercise lawful jurisdiction over the nationals of a non-consenting, non-party State from the world community at large[49].**

When the government of a State exercises its sovereign will regarding the acceptance or rejection of a convention or treaty, the officials of that State are, in fact, acting as agents on behalf of that State's *nationals*[50]. We must recognise, for example, that the territorial entities we call "Nigeria" or "Jordan" or "Canada" do not—and, indeed, *cannot*—"do" anything. Only persons from such entities—to wit, "Nigerians" and "Jordanians" and "Canadians"—can act. Further, we cannot haul "Nigeria" or "Jordan" or "Canada" before the bar of any court; we can only haul "Nigerians" and "Jordanians" and "Canadians" before such a court. Accordingly, when one says that the State of Israel or the United States of America or the People's Republic of China "refuses to accede" to a treaty like the Rome Statute, what one is *really* saying is that actual persons—*the leaders of those States acting on behalf of their respective nationals*—are refusing to place their respective "States" (meaning *their respective nationals* and *territories*) under the authority, or within the jurisdiction, of a court created by other States pursuant to such treaty.

Thus, when international law states that "[a] treaty does not create either obligations or rights for a third *State* without its consent"[51], it is, in reality, referring to obligations and rights on the part of the third State's *nationals*. To paraphrase, a treaty does not create either obligations or rights for the *nationals* of a third-party State without the consent *of that State as embodied by its authorised representatives*. In truth, all actual *actors* in international law are real persons[52], and all decisions in international law affect real persons. Hence, when it is asserted that the purpose of the ICC is to punish "individuals" not "States"[53], although that is a *literally true* statement, it is, nonetheless, wholly banal, since it is impossible to punish

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[48] *See, e.g.*, Dapo Akande, *The Jurisdiction of the International Court over Nationals of Non-Parties: Legal Basis and Limits*, 1 J. INT'L CRIM. JUST. 618, 626 (2003).

[49] Note that the ICC was never intended to be a court of universal jurisdiction, but rather a court of limited jurisdiction as circumscribed by the Rome Statute. If the ICC purported to have universal jurisdiction, there would not be a requirement for a nexus to States Parties (territorial or personal). Thus, universal jurisdiction cannot be used as a catchall for claiming jurisdiction over non-nationals in defiance of international law principles.

[50] The Rome Statute claims the right to subject the nationals of third-party States who commit (or are alleged to have committed) Article 5 crimes in the territory of a State Party to the Rome Statute to investigation and/or trial by the ICC. Rome Statute, *supra* note 4, art. 12(2)(a). Yet, such a claim violates the right of that individual as determined by his State of nationality not to be transferred to and tried by a Court whose jurisdiction was created pursuant to a convention that his State of nationality rejected. *See* Vienna Convention, *supra* note 12, art. 34. That does *not* mean that such an individual is not subject to investigation and trial; he may be investigated and tried by the courts of the State on whose territory he allegedly committed the crime. *What is prohibited is his being turned over to a Court created by a treaty to which his State of nationality has refused to accede and, hence, does not recognise.*

[51] Vienna Convention, *supra* note 12, art. 34 (emphasis added). Article 34 simply incorporates the customary law principle into the treaty. This is a common practice, and doing so does not remove the principle from customary international law, although it does make it part of binding conventional law for those States which are a party to the treaty which incorporates the customary law principle.

[52] Even corporations, which enjoy legal "personality" and possess "nationality", act through real persons (to wit, their corporate officers and boards of directors), and, if "punished", it is real persons who pay the penalty (i.e., officers, directors, and shareholders).

[53] *See, e.g.*, CRS REPORT, *supra* note 44, at 5.

"States" as such. One can only punish individual persons in or from such States[54]. ***Accordingly, the "punish individuals, not States" argument is, in reality, a contrived argument that seeks to sidestep the inconvenient strictures of contrary customary international law in order to permit the ICC to bring within its jurisdictional reach otherwise unreachable persons.***

When "States" (meaning *the authorised representatives of the people in those States*) get together to negotiate a treaty, they are free to modify the application of customary international law principles *amongst themselves as they see fit pertaining to their respective nationals and territories* (provided that the agreement does not violate a *jus cogens* norm). This constitutes agreement based on mutual consent. Yet, such an agreement to modify customary international law *amongst the States Parties* to a treaty like the Rome Statute does not, and indeed cannot, change the law that applies to "States" (meaning *nationals* and *territories* of such States) that choose *not* to accede to the treaty. Such an imposition is not consent-based, and *no sovereign may lawfully impose a treaty-based burden on another sovereign without the latter's consent.* Neither may a creation or an agent of such sovereign or group of sovereigns (like the ICC) impose such a treaty-based burden on a third-party sovereign without the latter's consent.

In the final analysis, *a principle of customary international law takes precedence over a contrary principle contained in a treaty with respect to those States (meaning their respective nationals and territories) that are not parties to that treaty.* Hence, the fact that States Parties to the Rome Statute have agreed *amongst themselves* that the ICC shall have jurisdiction over the *nationals* of *non-consenting, non-party States* who are alleged to have committed an Article 5 crime on the soil of a State Party[55] does not—*and lawfully may not*—override the non-consenting, non-party State's sovereign rights under customary international law *not to be bound* in any way by the terms of a treaty to which it is not a party[56]. ***Accordingly, if no individual State or group of like-minded States may lawfully compel a third-party State to be bound by terms of a treaty to which the latter has not acceded, neither may a subordinate creation or agent of such individual State or group of States (such as the OTP, the ICC or a panel of ICC judges) lawfully do so.***

Each State Party to the Rome Statute has freely yielded part of its national sovereignty to the ICC, a specific creation of that treaty. As such, officials at the ICC—*not a sovereign entity itself*—have been granted authority to compel the States Parties, all of which *are* sovereign entities, to yield to the will of the ICC in certain circumstances as laid out in the Rome Statute. ICC officials have no such authority with respect to non-consenting, non-party States (meaning their *nationals* and *territories*)[57], in spite of what the Rome Statute may say, since States Parties to the Rome Statute lack the authority themselves to encroach upon the

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[54]For example, the sanctions regime aimed at "Iran" actually targets and punishes, not only the Iranian officials who may have been designated by name, but all other Iranians as well, irrespective of their roles and responsibilities for the Iranian nuclear program. The same is true of the U.S. sanctions regime against "Cuba"; it is individual Cubans who suffer as a result of the sanctions, not the entity "Cuba" *per se*.

[55]Rome Statute, *supra* note 4, art. 12(2)(a).

[56]Once again, that does not mean that the national from the third-party State may not be tried for the alleged offense. He may be tried in the courts of the State in which the alleged crime took place, pursuant to that State's law and legal procedures. What customary international law prohibits is the transfer of jurisdiction over the accused to the ICC, a court created by a treaty to which the non-consenting, third-party State has not acceded.

[57]*See, e.g.*, CRS REPORT, *supra* note 44, at 21 n.111 (noting that State practice does not support the assertion that universal jurisdiction over war crimes has reached the level of customary law binding all States).

rights of non-party States vis-à-vis the nationals and territories of those States[58]. That the Rome Statute purports to grant such authority[59] is a legal overreach in violation of customary international law. Such overreach is both *ultra vires* and *void ab initio*.

Accordingly, notwithstanding explicit language to the contrary in the Rome Statute, neither the ICC Prosecutor nor any ICC judge possesses any *lawful* authority to violate customary international law by asserting jurisdiction over a non-party State's nationals. As such, *neither the ICC Prosecutor nor any ICC judge may lawfully apply the provision of the Rome Statute (to wit, Article 12(2)(a)) that purports to compel nationals of non-consenting, non-party States to submit to ICC jurisdiction for alleged Article 5 crimes committed on the soil of a State Party to the Rome Statute*[60]. Were either to do so, he or she would be acting in clear violation of customary international law. In truth, such a decision would undermine the Rule of Law—ironically, the very value that the ICC Prosecutor or ICC judge would be claiming to uphold.

Further, given the numerous exceptions to jurisdiction already written into the Rome Statute that, by their nature, deny a remedy to victims of unspeakable crimes (see generally Section I.B., *supra*), the argument frequently raised that failure to allow the ICC to exercise jurisdiction pursuant to Article 12(2)(a) would leave victims of Article 5 crimes without a remedy is disingenuous in the extreme. It also fails to acknowledge that the national courts of States Parties to the Rome Statute have concurrent jurisdiction over Article 5 crimes and that the UN Security Council can refer situations to the OTP for investigation, as recognised under Article 13(b) of the Rome Statute and pursuant to its authority under Chapter VII of the UN Charter.

D. Other International Courts Recognise and Have Rightly Affirmed the Consent-Based Limitation to Their Jurisdiction Under Customary International Law

The principle of customary international law that "[a]n international agreement does not create either obligations or rights for a third-party state without its consent"[61] is well-established and has been recognised by other international courts. In fact, this principle has been expanded upon by international tribunals.

The Statute of the International Court of Justice (ICJ), for example, specifically requires that parties consent to its jurisdiction before the ICJ will adjudicate a matter[62]. The ICJ's case law has affirmed this principle throughout its history. The first time the ICJ had cause to make such a determination came in the 1954 case, *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and*

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[58] *See supra* note 15.

[59] *See* Rome Statute, *supra* note 4, art. 12(2)(a).

[60] Even when the UN Security Council, acting under Chapter VII of the UN Charter, refers a situation concerning a non-party State's nationals to the ICC Prosecutor, the Council is acting under its authority as found in the UN Charter, not on any article found in the Rome Statute, since the Council (as a non-State entity) is not—and cannot be—a party to the Rome Statute. Further, compliance by the third-party State is based on its being a party to the UN Charter (which obligates it to obey certain Security Council decisions), not on any obligation that it owes to the Rome Statute or any right claimed by ICC officials. When the Security Council refers a situation to the ICC Prosecutor regarding a non-party State to the Rome Statute, the Council is, in effect, *incorporating by reference* the appropriate provisions of the Rome Statute into its decision, thereby obligating the UN Member State to comply with those provisions.

[61] *See* Vienna Convention, *supra* note 12, art. 34; RESTATEMENT, *supra* note 6, § 324(1).

[62] ICJ Statute, *supra* note 6, arts. 34(1), 36(2)–(3).

United States of America) ("*Monetary Gold*")[63]. That case centred around an incident that occurred in 1943, in the midst of World War II, when the German Army removed a large amount of gold from Rome[64]. When the war ended, both Albania and Italy claimed the gold and submitted competing claims to international arbitration[65].

While waiting for the outcome of the arbitration proceeding, the governments of France, the United Kingdom, and the United States signed an agreement to hold the gold in escrow in the United Kingdom so that it could retain the gold "in partial satisfaction of the [j]udgment in the Corfu Channel case"[66] in the event that the gold was found to belong to Albania. After the arbitrator found in favour of Albania, Italy filed an action with the ICJ against France, the United Kingdom, and the United States. In its application, Italy argued (1) that France, the United Kingdom, and the United States should deliver the gold to Italy, and (2) that its right to the gold superseded the United Kingdom's right to partial satisfaction of damages sustained during the Corfu Channel incident[67].

Before proceeding to the merits of Italy's first claim, the ICJ stated that it "must [first] examine whether . . . jurisdiction [conferred by Italy, France, the United Kingdom, and the United States] is co-extensive with the task entrusted to it"[68]. As mentioned above, however, integral to this dispute was the claim of Albania—an unnamed party—to the gold. Indeed, the ICJ stated that, "[i]n order . . . to determine whether Italy is entitled to receive the gold, it is necessary to determine whether Albania has committed any international wrong against Italy, and whether she is under an obligation to pay compensation to [Italy]; and, if so, to determine also the amount of compensation"[69]. Therefore, the ICJ held that it "cannot decide such a dispute without the consent of Albania"[70]. The ICJ's explanation of that ruling is particularly telling: "To adjudicate upon the international responsibility of Albania without her consent would run counter to a *well-established principle of international law* embodied in the [ICJ's] Statute, namely, that the [ICJ] can only exercise jurisdiction over a State with its consent"[71]. That well-established principle remains a vital part of customary international law to this day.

In a more recent case concerning East Timor, the ICJ once again applied the principle that an international tribunal cannot decide a case involving the legal rights of a third party without that party's consent[72]. In 1989, Australia, understanding that the island of East Timor was under Indonesian control, signed a treaty with Indonesia regarding use of East Timor's continental shelf[73]. Yet, Portugal, which had controlled East Timor exclusively from the sixteenth century until 1975[74], claimed that any treaty executed without its consent was invalid[75]. Thus, "the fundamental question in the . . . case [wa]s ultimately whether, in 1989, the power to conclude a treaty on behalf of East Timor in relation to its continental shelf lay

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[63]Monetary Gold Removed from Rome in 1943 (It. v. Fr., U.K., & U.S.), Judgment, 1954 I.C.J. 19 (15 June).
[64]*Id.* at 19.
[65]*Id.*
[66]*Id.* at 21.
[67]*Id.* at 22. The ICJ found that a provision in the agreement signed by France, the United Kingdom, and the United States amounted to acceptance of ICJ jurisdiction; therefore, it had been duly authorised by all named parties to adjudicate the matter. *See id.* at 31.
[68]*Id.* at 31.
[69]*Id.* at 32.
[70]*Id.*
[71]*Id.* (emphasis added).
[72]East Timor (Port. v. Austl.), Judgment, 1995 I.C.J. 90 (30 June).
[73]*Id.* at 101–02.
[74]*See id.* at 95–96.
[75]*Id.* at 94–95.

with Portugal or with Indonesia"[76]. Like the *Monetary Gold* case, in which the ICJ refused to make a legal determination that would affect the legal rights of a non-consenting third party (Albania), the ICJ in the *East Timor* case refused to rule because Indonesia had not accepted its jurisdiction[77]. It further refined the *Monetary Gold* standard by stating that the necessity of determining third-party rights did not necessarily preclude it from exercising jurisdiction[78]. However, when a State's "rights and obligations . . . constitute the very subject-matter of . . . a judgment", the ICJ may not exercise jurisdiction without that State's consent[79].

The ICJ is not the only international tribunal that has upheld the *Monetary Gold* principle. The Permanent Court of Arbitration (PCA) in The Hague, The Netherlands, applied this principle in its 2001 decision, *Larsen v. Hawaiian Kingdom*[80]. In that case, Larsen refused to pay fines associated with traffic citations[81]. Instead of registering his automobile as required by state law, Larsen argued that as a citizen of the Hawaiian Kingdom, he was not subject to U.S. law[82] and that Hawaii was in violation of its obligations under an 1849 treaty between the Hawaiian Kingdom and the United States by allowing U.S. municipal law to govern[83]. The PCA held that because the interests of the United States were "a necessary foundation for the decision between the parties", it could not rule on the dispute at hand[84]. Moreover, even though both parties to the arbitration proceeding argued that the *Monetary Gold* principle should apply only to ICJ proceedings, *the PCA held that the principle must be applied by all international tribunals*, stating that,

> [a]lthough there is no doctrine of binding precedent in international law, it is only in the most compelling circumstances that a tribunal charged with the application of international law and governed by that law should depart from a principle laid down in a long line of decisions of the International Court of Justice[85].

Indeed, "[t]he *principle of consent in international law* would be violated if [the PCA] were to make a decision at the core of which was a determination of the legality or illegality of the conduct of a non-party"[86]. ***The ICC, as an international tribunal bound by international law, must likewise refrain from invoking jurisdiction to determine the relative rights of nationals of non-consenting, non-party States as well as the legality or illegality of the non-party State's conduct.*** Note that determining the relative rights of nationals of the non-consenting, non-party State of Israel as well as the legality or illegality of Israel's actions is exactly what the Palestinians are seeking to do by referring their allegations to the ICC. This is a clear violation of the principle of consent in international law and must be refused.

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[76] *Id.* at 102.
[77] *Id.* at 105.
[78] *Id.* at 104.
[79] *Id.* at 105. Such would be the case with Israel concerning Operation Cast Lead, the enforcement of the naval blockade of the Gaza Strip, and Operation Protective Edge, since those matters implicate Israel's inherent right to self-defence in a situation of armed conflict.
[80] *Larsen v. Hawaiian Kingdom*, Award, (Perm. Ct. Arb. 2001), https://pcacases.com/web/sendAttach/123.
[81] *Larsen v. Hawaiian Kingdom, Memorial of Lance Paul Larsen*, ¶¶ 48–52 (Perm. Ct. Arb. 2000), http://www.alohaquest.com/arbitration/memorial_larsen.htm.
[82] *Id.* ¶ 47.
[83] *Larsen v. Hawaiian Kingdom*, Award, ¶ 2.3.
[84] *Id.* ¶ 11.23.
[85] *Id.* ¶ 11.21.
[86] *Id.* ¶ 11.20 (emphasis added).

As in the *East Timor* case and *Larsen v. Hawaiian Kingdom*, where the ICJ and PCA, respectively, refused to exercise jurisdiction *because third-party rights constituted the very subject matter of the proceedings*, the ICC must refuse to exercise jurisdiction over *nationals of non-consenting, non-party States*. Such action would directly contravene the well-established customary international legal principle articulated in the *Monetary Gold* case and subsequently—both in the ICJ and in other international tribunals—that an *international tribunal may not determine the legal rights of a third-party State without its consent if such rights go to the very subject matter of the proceedings*. Because the ICC is an international tribunal akin to the ICJ and the PCA, the ICC should be bound by the *Monetary Gold* principle in accordance with customary international law. In short, absent a referral by the UN Security Council under Chapter VII of the UN Charter, the ICC must decline to exercise jurisdiction over nationals of non-consenting, non-party States.

E. Asserting the Existence of "Universal Jurisdiction" Over Article 5 Crimes Does Not Automatically or Necessarily Require that Nationals of a Non-Consenting, Non-Party State Must Submit to the Jurisdiction of a Court, Like the ICC, Established by Other Sovereigns and Not Recognised by the Non-Consenting State

Some argue that the ICC may investigate and try nationals of non-consenting, non-party States under the principle of universality[87]. That argument is built upon a number of assumptions, some of which appear to be highly questionable when applied to non-consenting, third-party States. For example, "[t]he universality approach starts from the assumption that, under current international law, all States may exercise universal jurisdiction over these core crimes [i.e., Article 5 crimes]"[88]. The first assumption is followed by the argument "that States must be entitled to do collectively what they have the power to do individually"[89]. The argument that States may do collectively what each may do individually is reasonable—*up to a point. A problem arises when that argument is interpreted to suggest that mutual agreement amongst a select group of States can create legal obligations for non-consenting States outside that group. Such an assertion violates the sovereign rights of the States not a party to the agreement. As such, mutual agreement amongst a number of States does not affect in any way the rights of States not a party to such agreement*. From the foregoing statements, the argument continues as follows:

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[87] *See, e.g.*, Akande, *supra* note 48, at 626 (arguing that "it would be extraordinary and incoherent if the rule permitting prosecution of crimes against the [world's] collective interest by individual states . . . simultaneously prevented those states from acting collectively in the prosecution of these crimes" and further that collective action "should be encouraged"). There is nothing fundamentally wrong with encouraging collective action against such crimes. States Parties to the Rome Statute are free, *amongst themselves*, to resort to the ICC as they see fit. Further, other States that agree with what the Rome Statute provides are free to accede to the Statute and accept its terms. ***Where Akande and other proponents of the ICC go astray is by attempting to force—contrary to Customary International Law—the terms of the Rome Statute on States that do not agree with its terms as is their sovereign right under international law.*** This is especially true where the treaty redefines what constitutes a crime, thereby creating a new offence that did not exist before.

[88] Kaul, *supra* note 29, at 583, 587. *But see* CRS REPORT, *supra* note 44, at 21 n.111 (noting that State practice does not support the assertion that universal jurisdiction over war crimes has reached the level of customary law binding all States). ***Further, to the extent that the definitions and/or elements of crimes in the Rome Statute differ from similarly named and/or defined crimes found in customary international law or other treaties (like the Hague or Geneva Conventions), they are in reality "new" crimes, not binding on third-party States.***

[89] Kaul, *supra* note 29, at 583, 587.

> Therefore, States may agree to confer this individual power on a judicial entity they have established and sustain together and which acts on their behalf[90]. Thus a State which becomes a party to the Statute thereby accepts jurisdiction with respect to the international core crimes. *As a consequence, no particular State—be it State Party or non-State Party—must give its specific consent to the exercise of this jurisdiction in a given case.* This, in essence, is the regime that follows from an approach based on the principle of universal jurisdiction[91].

The first sentence in the above quotation is legally valid. The second sentence actually overstates the reach of the ICC even with respect to States Parties. For example, although the States Parties to the Rome Statute all agreed to accept jurisdiction of the ICC *in certain circumstances*, they nonetheless incorporated a not insignificant number of exceptions to jurisdiction (as laid out in detail in Section I.B., *supra*), including the concept of complementarity, which serves as a means of absolutely precluding ICC jurisdiction in favour of national courts. Hence, States Parties' acceptance of ICC jurisdiction with respect to Article 5 crimes is intentionally not automatic[92]. The portion of the foregoing quotation in *italics* is only partly correct vis-à-vis non-party States and is, in fact, a *non-sequitur* as stated. Whilst it is true that a non-party State need not give its consent to the exercise of jurisdiction *in some cases* (to wit, cases having nothing whatsoever to do with the non-party State), *it is not true with respect to a case involving that State's nationals or other interests.* Under customary international law, a *non-universal* treaty (i.e., a treaty to which only part of the international community has acceded) that creates a court that claims universal jurisdiction over a host of offenses does not, *and cannot*, bind a non-consenting, non-party State[93]. To assert otherwise is neither logical nor lawful.

Moreover, even if one were to accept the fact that "all States may exercise universal jurisdiction" over certain crimes, that does not mean that one must also accept that the court created by and agreed-to by *some States* (to wit, the Rome Statute's States Parties) must bind non-consenting, third-party States. ***Accepting the principle of "universal jurisdiction" most assuredly does not automatically—or necessarily—mean that one must also agree that a non-consenting, non-party State to a specific treaty has no say about whether its nationals have to submit themselves to the jurisdiction of a court like the ICC, a court agreed to and established in a treaty negotiated by other States.*** That is simply a *non-sequitur*. Such "other States" have no authority to decide such matters for a non-party State, and doing so violates the objecting State's rights under international law to appeal to another sovereign on behalf of its nationals when they are being tried by the other sovereign's courts[94]. Further, under the

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[90] *Id.* In the case of the Rome Statute, the "States" to which Kaul refers are the States Parties to the Statute. The States Parties are a large, but finite, group of States. That finite group of States created the ICC (the "judicial entity" referred to in the sentence) which they sustain together and which acts on their behalf.

[91] *Id.* (emphasis added).

[92] *See* Section I.B., *supra*.

[93] *See* Vienna Convention, *supra* note 12, art. 34.

[94] It is clearly recognised in customary international law that a national of one State may be tried by another State's courts for criminal acts committed on the latter State's soil. That is well-settled and not controversial. In such a case, leaders of the accused's State of nationality may deal on an equal basis with leaders of the State whose courts are trying the accused. Means developed over time exist for the accused's State to monitor the trial and, if necessary, to appeal to and seek redress from the trying State's leaders. That right is violated when an accused is tried by a court whose jurisdiction is not recognised by the accused's State of nationality and whose very creation was rejected by that State. State-to-State relations are of ancient vintage and have been the means to resolve interstate issues for millennia. The ICC is a newcomer on the world scene and does not enjoy developed relations with many of the world's states. Moreover, to whom would the sovereign of an objecting third-party State appeal on behalf of its nationals in the case of the ICC? The ICC Prosecutor is answerable to no

Rome Statute, some offences have been redefined, thereby creating new offences previously unknown. Such redefinitions may not be lawfully imposed on non-consenting States. *It is also doubtful that such redefined offences fall into the category of offences subject to "universal jurisdiction" since they were created and agreed to solely by States Parties to the Statute and not by the world community at large.*

Universal jurisdiction does not inevitably lead to the conclusion that nationals of non-consenting, non-party States are triable either by a court created pursuant to a treaty like the Rome Statute or for new offences previously unknown in international law[95]. The inherent *sovereignty* of the non-consenting, non-party *State* takes precedence over *other States'* grant of authority to such a court. **In short, a *non-sovereign entity* like the ICC has no authority under customary international law to assert jurisdiction over nationals of a non-consenting, non-party, *sovereign State*.**

II. PURSUANT TO *UTI POSSIDETIS JURIS*, UPON BRITAIN'S DEPARTURE FROM PALESTINE IN MAY 1948, THE STATE OF ISRAEL BECAME THE SOLE LEGITIMATE TITLE HOLDER AND SOVEREIGN OVER ALL TERRITORY OF THE MANDATE FOR PALESTINE LYING BETWEEN THE MEDITERRANEAN SEA AND THE JORDAN RIFT VALLEY

A. *Uti Possidetis Juris* is the Customary International Law Principle That Determines Who Accedes to Sovereignty Over Territory Previously Ruled by a Colonial or Mandatory Power

Uti possidetis juris is the customary international law doctrine that serves to determine the borders of newly emerging states. This doctrine evolved during the period of decolonisation in Latin America and is generally accepted today as the customary international law principle that applies in establishing the borders of newly emerging states[96]. "Simply stated, *uti possidetis* [*juris*] provides that states emerging from decolonization shall presumptively inherit the colonial administrative borders that they held at the time of independence"[97]. The principle is no longer limited to situations of decolonisation. *Uti possidetis juris* now applies "to all cases where the borders of new states have to be determined, and not just in its original context of decolonization"[98]. It has been applied, for example, to states emerging from former mandates[99] (including the Middle East Mandates created out of the former Ottoman territories) as well as to the break-up of previously existing states, like Yugoslavia[100], Czechoslovakia[101], and the Soviet Union[102]. As the International

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foreign sovereign and need not deal with an objecting third-party sovereign, rendering that sovereign impotent to fulfill its sovereign duty *vis-à-vis* its own nationals.

[95]Further, in the specific case of the Palestinians, under the Oslo Accords, the Palestinians have no criminal jurisdiction over Israelis. Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, Annex 4, arts. 1.2, 2.2, 2.3, 2.6, 2.7, 28 Sept. 1995, [hereinafter Israeli-Palestinian Interim Agreement] http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/the%20israelipalestinian%20interim%20agreement.aspx. Accordingly, they cannot cede to the ICC jurisdiction they do not possess in the first place.

[96]*See* Frontier Dispute (Burk. Faso v. Mali), Judgment, 1986 I.C.J. 554, 565–67 (22 Dec.).

[97]Abraham Bell & Eugene Kontorovich, *Palestine, Uti Possidetis Juris, and the Borders of Israel*, 58 ARIZ. L. REV. 633, 635 n.7 (2016).

[98]*Id.* at 635 n.8.

[99]*Id.* at 635.

[100]*Id.* at 635 n.11.

[101]*Id.* at 635 n.10.

[102]*Id.* at 635 n.9.

Court of Justice (ICJ) noted in *The Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali)*,

> the principle of *uti possidetis* [*juris*] seems to have been first invoked and applied in Spanish America, inasmuch as this was the continent which first witnessed the phenomenon of decolonization involving the formation of a number of sovereign States on territory formerly belonging to a single metropolitan State. Nevertheless the principle is not a special rule which pertains solely to one specific system of international law. *It is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs.*[103]

Accordingly, as a long-standing, well-established "general principle" of international law, *uti possidetis juris* also applied to the emergence of the State of Israel in May 1948.

As noted above, *uti possidetis juris* establishes the borders and sovereign rights of the State that emerges from a previously non-independent condition, whether from decolonisation, the termination of a Mandate, or the break-up of a previously-existing State. Sometimes—*as was the case with Israel vis-à-vis the so-called West Bank and the Gaza Strip*—the emerging State is unable at the onset of independence to exercise full control over all portions of the territory to which it has attained lawful sovereignty. For example, for 18 years, from 1949 to 1967, the West Bank and the Gaza Strip were under the belligerent military occupation of the Jordanian and the Egyptian armed forces, respectively. Notwithstanding the 18-year belligerent military occupation of Israeli territory by foreign armies, pursuant to *uti possidetis juris*, the occupied territories remained the continuing sovereign possession of the State of Israel, the only State that emerged upon the departure of the British in 1948[104]. In other words,

> where the colonial administrative lines, and the exercise of colonial authority within those lines, were clear, the lines would serve as the boundaries of the new state even where the new state did not actually possess the territory. Therefore, a state that acquired territorial sovereignty over territory through *uti possidetis juris* would not lose sovereignty simply because another state possessed and administered part of that territory[105].

B. Significance of *Uti Possidetis Juris* for Emerging States in General

The importance of *uti possidetis juris* cannot be overstated. Twentieth Century examples of the concept in practice can be seen in sub-Saharan Africa. During the colonial period in Africa, foreign powers carved up the continent, establishing arbitrary borders based on spheres of influence and taking little to no account of how such borders would affect the indigenous peoples of the continent. Accordingly, traditional tribal territories were often divided so that portions of the same tribal group actually lived in different colonies, thereby fracturing the indigenous society. Tribal members often ended up living in neighbouring colonies created by European powers speaking different languages and using different legal and administrative systems. It is hard to find anyone today willing to defend how such borders

[103] Burk. Faso v. Mali, 1986 I.C.J. at 565, ¶ 20 (emphasis added).
[104] Bell & Kontorovich, *supra* note 97, at 642 (citing Burk. Faso v. Mali, 1986 I.C.J. at 566).
[105] *Id.* Note, once again, that the principle of *uti possidetis juris* is not limited to the process of decolonisation. It also applies to the dissolution of Mandates and the break-up of previously existing States. *See supra* notes 98–103 and accompanying text.

were created, as they almost always operated against the best interests of the indigenous peoples of the region. However, as African colonies began to attain their independence, it became clear that the only way to avoid even more conflict and bloodshed than had already been experienced was to retain and recognise the existing artificial colonial borders as the international borders of the newly emerging States. In essence, as damaging as the colonial borders had been to indigenous peoples, their dissolution would have caused far more harm than adjusting and rationalising the borders could possibly achieve. Emerging African States recognised early on the dangers of trying to rationalise the colonial borders and opted to apply the principle of *uti possidetis juris* instead to the States emerging from colonialism[106].

Although such a decision seems at odds with another customary international law principle, to wit, the principle of self-determination of peoples, *uti possidetis juris* takes precedence over the principle of self-determination of peoples when the two are in conflict[107]. That point is important to remember when considering Palestinian claims to territory in the former Mandate for Palestine, since Palestinian claims are overwhelmingly premised on the principle of self-determination of peoples[108].

In addition to decolonisation in Africa, *uti possidetis juris* has also been applied to the dissolution of previously existing States like Yugoslavia and the USSR. In each case, the administrative boundaries that existed at the time the new State emerged became the new, internationally-recognised borders of the emerging State. Sadly, that process did not always happen peacefully. For example, the conflicting desires of the populations of Serbs, Croats, and Muslims in Bosnia-Herzegovina led to a bloody civil war as ethnic groups sought to sever their communities from a united Bosnia-Herzegovina to join their fellows in emerging, more ethnically pure, neighboring States, such as Serbia or Croatia. Such attempts were rejected by the international community which, pursuant to *uti possidetis juris*, did not recognise the proposed new borders. Hence, despite the civil war, the borders of Bosnia-Herzegovina remain today essentially as they were when the State achieved its independence upon the break-up of Yugoslavia[109].

Similarly, when the Soviet Union collapsed and former Soviet republics became independent, the administrative boundaries in being at the time of independence were recognised as the new international borders of the emerging States. Once again, that process did not occur without violence. For example, although the Crimean Peninsula had historically been a component part of Russia since the 1700s, when the Ukraine achieved its independence in 1991, the Crimea had been part of the Ukrainian Soviet Socialist Republic since 1954[110]. Hence, pursuant to *uti possidetis juris*, the Crimean Peninsula was allocated as part of the Ukraine upon its independence[111]. Although Russia seized the Crimea militarily in 2014, the

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[106] *African Union Border Programme (AUBP)—Uniting and Integrating Africa Through Peaceful, Open and Prosperous Borders*, AFRICAN UNION PEACE AND SECURITY (8 June 2017), http://www.peaceau.org/en/page/27-au-border-programme-aubp.

[107] Bell & Kontorovich, *supra* note 97, at 635.

[108] *Id.* at 684.

[109] STEVEN WOEHREL, BOSNIA AND HERZEGOVINA: CURRENT ISSUES AND U.S. POLICY 2 (Congressional Research Service 2013).

[110] Julie Kliegman, *Historical Claim Shows Why Crimea Matters to Russia*, PUNDITFACT (2 Mar. 2014), http://www.politifact.com/punditfact/statements/2014/mar/02/david-ignatius/historical-claim-shows-why-crimea-matters-russia/.

[111] Bell & Kontorovich, *supra* note 97, at 685.

Russian action has been condemned by the international community[112], and the Russian claim to the Peninsula has been widely rejected. According to *uti possidetis juris*, the legal boundary of the Ukraine continues to encompass the Crimean Peninsula.

In both the Bosnia-Herzegovina and Crimean Peninsula situations, appeals to the self-determination of peoples had been made by Serbs and Croats in Bosnia-Herzegovina and by Russians in the Crimea, but such appeals have been rejected[113]. *Uti possidetis juris* continues to take precedence over self-determination when the two are in conflict[114].

C. *Uti Possidetis Juris* Has Also Been Applied to the Emergence of States From the Former Ottoman Territories That Had Been Designated as Mandates by the League of Nations

Further, not only was *uti possidetis juris* the guiding principle that was applied as the States in Latin America emerged as independent States in the 19th Century, as the numerous States in Africa emerged from decolonisation in the 20th Century as well as to the States that emerged from the break-up of the former Yugoslavia, the former Czechoslovakia, and the former Soviet Union, it was also applied to the States in the Middle East that emerged from the former Mandates carved out of the former Ottoman Empire—the Mandates for Mesopotamia (Iraq), Syria (including Lebanon), and Palestine[115].

The Mandate for Mesopotamia (Iraq) was the first of the three Middle East Mandates to achieve its independence. In 1932, Iraq obtained its independence from Great Britain, the Mandatory for Mesopotamia. At the time Iraq became independent, there was an ongoing border dispute between the British Mandatory and Turkey over the oil-rich region around Mosul[116]. There were also self-determination claims raised by the Kurds for the same region[117]. Although disagreements over the border led to periodic hostilities with both Kurds and Turks while the border was being negotiated, upon Iraq's independence, pursuant to *uti possidetis juris*, the Mandatory borders as they existed when Iraq emerged as an independent State (borders which included Mosul as part of Iraq) became the internationally recognised borders of Iraq and Turkey[118]. They remain so today.

There were a number of border disagreements regarding the Syrian Mandate as well. Some focused internally on where to draw the line to delineate Lebanon from Syria[119] while another key area of dispute concerned the Hatay/Alexandretta (Hatay) region, an area lying along the eastern Mediterranean Sea and of great interest to Turkey because of the large number of ethnic Turks living there[120]. The Hatay dispute provides considerable insight into how *uti possidetis juris* functions *vis-à-vis* determination of an emerging State's borders. In 1936, France, the Mandatory for Syria, had announced that it would be giving Syria (which, at

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[112] *Ukraine Crisis: Putin Signs Russia-Crimea Treaty*, BBC NEWS (18 Mar. 2014), http://www.bbc.com/news/world-europe-26630062.
[113] *See* WOEHREL, *supra* note 109, at 4–5; Bell & Kontorovich, *supra* note 97, at 685; Brad Simpson, *Self-Determination in the Age of Putin* (21 Mar. 2014), http://foreignpolicy.com/2014/03/21/self-determination-in-the-age-of-putin/.
[114] Bell & Kontorovich, *supra* note 97, at 635.
[115] *Id.* at 647.
[116] *Id.* at 648.
[117] *Id.*
[118] *Id.* at 650.
[119] *Id.* at 653–54.
[120] *Id.* at 654.

the time, included the Hatay region) independence in a few years[121]. Then, as French concerns about Hitler grew, France became more accommodating to Turkey *vis-à-vis* Hatay and decided to cede Hatay to Turkey as a means to thwart rising German influence in the region. France's formal transfer of the region to Turkey was completed in June 1939 in clear violation of Article 4 of the Syrian Mandate that explicitly forbade placing territory from the Mandate under the control of a foreign power without the approval of the League of Nations[122]. France's decision to transfer Hatay to Turkey was criticised by the League's Mandates Commission, but the outbreak of World War II prevented the League from taking any action[123]. In April 1946, the Syrian Mandate was terminated, and Syria emerged as an independent State. Pursuant to *uti possidetis juris*, the borders of the newly independent State of Syria excluded Hatay, since that region was—*albeit in violation of the express terms of the Syrian Mandate*—no longer part of the Mandate at the emergence of the newborn State of Syria[124]. The Hatay episode is significant because, pursuant to *uti possidetis juris* and despite Syrian complaints about the illegality of the land transfer, the international community has recognised the finality of *uti possidetis juris* in determining an emerging State's borders (despite the illegality of the land transfer in question) and, hence, does not dispute Turkish sovereignty over Hatay[125].

The Mandate for Palestine likewise confirms the role played by *uti possidetis juris* in establishing an emerging State's borders. When one speaks of the "Palestinian Mandate" today, one often thinks only of the territory lying generally between the Mediterranean Sea and the Jordan rift valley. Yet, the original Mandate for Palestine also included what we know today as the Hashemite Kingdom of Jordan. Although the primary purpose of the Mandate for Palestine was to implement the terms of the Balfour Declaration in Palestine, Article 25 of the Mandate gave Great Britain the authority to limit Jewish settlement in the area of the Mandate to the east of the Jordan rift valley[126]. Britain exercised that authority in September 1922[127]. Although there was no formal split of the Mandate at that time into two separate Mandates, Britain renamed the eastern portion Transjordan and retained the name Palestine for the smaller, western portion. Britain was not authorised to divide the mandate in two[128]. Nonetheless, in 1946, Britain recognised the independence of Jordan and terminated the Mandate in the east[129]. Pursuant to *uti possidetis juris* and despite the fact that Britain had no authority to divide the Mandate into two parts, the prior administrative border between the two parts of the Mandate for Palestine became the recognised western international boundary of the emerging State of Jordan.

From 1946 to 1948, the Mandate was limited to the smaller, western portion of the original Mandate stretching from the Jordan rift valley to the Mediterranean Sea. When Britain withdrew its forces in May 1948, only one State emerged from the remaining portion of the Mandate for Palestine—the State of Israel[130]. The nascent State of Israel was immediately attacked by its Arab neighbours. The war raged into 1949, when it was ended by a series of

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[121] *Id.* at 655.
[122] Bell & Kontorovich, *supra* note 97, at 655–56.
[123] *Id.* at 656
[124] *Id.* at 656 n.147.
[125] *Id.* at 656.
[126] League of Nations, Mandate for Palestine art. 25 (Dec. 1922).
[127] Bell & Kontorovich, *supra* note 97, at 673.
[128] *Id.* at 674.
[129] *Id.*
[130] *See* Joel Beinin & Lisa Hajjar, *Primer on Palestine, Israel and the Arab-Israeli Conflict*, MIDDLE EAST RESEARCH AND INFO. PROJECT, http://www.merip.org/primer-palestine-israel-arab-israeli-conflict-new (last visited 5 Feb. 2018).

armistice agreements between Israel and various Arab neighbours[131]. Although its Arab enemies controlled the Gaza Strip and West Bank from 1949 to 1967,

> [t]he doctrine of *uti possidetis juris* . . . rejects possession as grounds for establishing title, favoring instead legal entitlement based upon prior administrative borders. And it is clear that the relevant administrative borders of Palestine at the time of Israel's independence were the boundaries of the Mandate . . . . Israel was the only state that emerged from Mandatory Palestine, and it was a state whose identity matched the contemplated Jewish homeland required of the Mandate and that fulfilled a legal Jewish claim to self-determination in the Mandatory territories. There was therefore no rival state that could lay claim to using internal Palestinian district lines as the basis for borders. . . . Thus, it would appear that *uti possidetis juris* dictates recognition of the borders of Israel as coinciding with the borders of the Mandate as of 1948[132].

Accordingly, pursuant to *uti possidetis juris*, it is Israel that inherited title to, and sovereignty over, the entirety of the remaining portion of the Mandate for Palestine. As such, Israel is the legitimate holder of title to the entirety of the territory Britain left behind in 1948.

D. Significance of *Uti Possidetis Juris* With Respect to Israel, the Palestinians, and the ICC

Applying *uti possidetis juris* to the Mandate for Palestine means that Israel, as the only State to emerge from the Mandate for Palestine upon the departure of the British Mandatory, attained sovereignty over the entirety of the territory of the Mandate within the borders as they existed on 15 May 1948 (to wit, over the entire territory between the Mediterranean Sea and the Jordan rift valley, including the so-called "West Bank" (with east Jerusalem) and the Gaza Strip). Accordingly, any and all other claimants to any territory within the borders of the Mandate as they existed on 15 May 1948 have no legitimate territorial claims.

Yet, having established Israeli sovereignty over the entirety of the Mandate's territory pursuant to *uti possidetis juris* does not mean that Israel may not acquiesce in relinquishing its sovereignty over some of its territory to allow formation of an eventual Arab Palestinian State, a goal that successive Israeli governments have agreed in principle to do via bilateral negotiations between the parties. *What it does mean, however, is that Israel, as the sovereign over all such territory, may not be compelled to yield territory for such a purpose. Nor may Israel be compelled to yield specific territory that the Palestinians may prefer or demand.*

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[131] General Armistice Agreement, Isr.-Syria, 20 Jul. 1949, https://peacemaker.un.org/sites/peacemaker.un.org/files/IL%20SY_490720_Israeli-Syrian%20General%20Armistice%20Agreement.pdf; General Armistice Agreement, Isr.-Jordan, 3 Apr. 1949, https://peacemaker.un.org/sites/peacemaker.un.org/files/IL%20JO_490403_Hashemite%20Jordan%20Kingdom-Israel%20General%20Armistice%20Agreement.pdf; General Armistice Agreement, Isr.-Leb., 23 Mar. 1949, https://peacemaker.un.org/sites/peacemaker.un.org/files/IL%20LB_490323_IsraeliLebaneseGeneralArmisticeAgreement.pdf; General Armistice Agreement, Isr.-Egypt, 24 Feb. 1949, https://peacemaker.un.org/sites/peacemaker.un.org/files/EG%20IL_490224_Egyptian-Israeli%20General%20Armistice%20Agreement.pdf.

[132] Bell & Kontorovich, *supra* note 97, at 681–82. Note that UN attempts to divide Palestine into three parts—a Jewish State, an Arab State, and an area around Jerusalem under international control—were rejected outright by the Arab States and Arab Palestinians. As such, the proposed borders never enjoyed political legitimacy and have no validity today, despite some attempts by the Palestinians to resurrect them.

Regarding notional ICC jurisdiction over Israel as requested by PA officials, given that the customary international law principle *uti possidetis juris* establishes Israel's absolute right to—*and sovereignty over*—all territory of the Mandate for Palestine as it existed in May 1948, the issues of borders of a future Palestinian State, the status of so-called "settlements", the status of Jerusalem, the issue of the so-called "refugees", etc., ***all fall outside the jurisdictional reach of the ICC, given that such issues solely concern sovereign Israeli territory and the fact that Israel is not a party to the Rome Statute.*** The fact that successive Israeli governments have agreed in principle to "resolve" such issues with the Palestinians via good-faith, bilateral negotiations does not change the fact that the ICC has no jurisdiction. Israel is sovereign over all such territory and will remain so until negotiations between the parties are concluded and the issues resolved between them. Until such time, the issues raised with the OTP by the PA all occurred on the sovereign territory of the State of Israel and outside the jurisdictional reach of the ICC. Accordingly, *the ICC lacks jurisdiction over all issues submitted by PA officials.*

III. BECAUSE NO "STATE OF PALESTINE" EXISTS TODAY AND BECAUSE NO SUCH "STATE" HAS EXISTED PREVIOUSLY, THE ROME STATUTE PRECLUDES ANY ATTEMPT BY THE PALESTINIANS TO ACCEDE TO ICC JURISDICTION

A. Prior Palestinian Attempts to Accede to ICC Jurisdiction

The Palestinian Authority (PA) lodged its first Article 12(3) Declaration seeking to accede to ICC jurisdiction in January 2009. To be successful, such an attempt had to presuppose that the PA was then a "State". In response to that attempt, the previous ICC Prosecutor correctly determined that, according to the Rome Statute's clear terms, accession to the Rome Statute was restricted to "States" and that the PA did not then constitute a "State"[133]. The previous Prosecutor also aptly noted that the "Rome Statute provides no authority for the Office of the Prosecutor to adopt a method to define the term 'State' under article 12(3) which would be at variance with that established for the purpose of article 12(1)"[134]. He then added, however, that *he* believed that confirmation of Palestinian statehood by the UN would suffice to establish Palestinian statehood for purposes of acceding to ICC jurisdiction. *As explained more fully in Section III.C. below, the ECLJ submits that this conclusion was wholly incorrect as a matter of law.*

In 2011, based on the previous Prosecutor's opinion that UN recognition would suffice for purposes of Article 12(3) accession, the PA turned to the UN Security Council[135] in a bid to achieve statehood recognition and admission to the United Nations. They did so in complete disregard of their own undertakings in previous agreements (made under the auspices of the international community) whereby such issues would be settled through negotiations with Israel[136]. That effort failed.

After failing to achieve its desired ends at the Security Council, the PA adopted a different approach and sought to achieve a change in its status designation at the UN via the UN General Assembly. That attempt succeeded. In November 2012, the General Assembly

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[133] INT'L CRIMINAL COURT, SITUATION IN PALESTINE, http://www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf.
[134] *Id.*
[135] U.N. Secretary-General, Application of Palestine for Admission to Membership in the United Nations: Note by the Secretary-General, U.N. Doc. A/66/371-S/2011/592 (23 Sept. 2011).
[136] Israeli-Palestinian Interim Agreement, *supra* note 95.

overwhelmingly agreed to change the PA's designation *at the UN* from an "Entity" enjoying Observer status to that of a "Non-member State" with Observer status[137].

B. Legal Significance and Reach of the UN General Assembly's Adoption of the PA Resolution Labelling "Palestine" as a "Non-Member *State*" With Observer Status

The General Assembly is an organ of the United Nations whose authority to act is laid out in the UN Charter, Section IV. Article 10 of the UN Charter, for example, gives the General Assembly the following powers: to "discuss any questions or any matters within the scope of the present Charter" as well as the right to "make recommendations . . . on any such questions or matters." Such functions primarily involve *discussions of policy*. Yet, according to the Charter's explicit terms, the General Assembly is not a policy-*making* body. Its authority is severely curtailed. Although it often debates and adopts resolutions on hot issues of the day, General Assembly resolutions are not legally binding, and they seldom, if ever, include detailed legal analysis or particular attention to the requirements of international law. Critically, the UNGA does not have the authority to make determinations on questions of international law.

The ICC, on the other hand, is a *judicial* body that, by its very nature, *must analyse and comply with the requirements of international law as well as by the explicit jurisdictional terms set forth in the Rome Statute.* To act pursuant to political decisions made by the UN General Assembly, *without evaluating the extent to which they comport with or divert from international law*, would convert the ICC from a judicial body into a political body, and fear of ICC politicisation was one of the primary reasons so many key States have declined to accede to the Rome Statute. Accordingly, the ICC, as a *judicial* body, must studiously avoid simply acquiescing in political decisions and must accept and apply such decisions *only* when they comport with international law.

Under the Rome Statute, for example, the ICC has jurisdiction only in the following five specific "situations"[138]:

(1) Where the alleged Article 5 crimes[139] were committed on the territory of a State Party to the Statute (or on an aircraft or vessel registered in that State)[140];
(2) Where the person accused of committing Article 5 crimes is a national of a State Party to the Statute[141];
(3) Where the alleged Article 5 crimes were committed in the territory of a *State* that is not a Party to the Statute (or on an aircraft or vessel registered in that

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[137] U.N. Gen. Assembly, Dep't of Pub. Information, *General Assembly Votes Overwhelmingly to Accord Palestine 'Non-Member Observer State' Status in United Nations*, U.N. (29 Nov. 2012) [hereinafter Dep't of Pub. Information], https://www.un.org/press/en/2012/ga11317.doc.htm.

[138] The Rome Statute refers to both "situations" and "crimes". *See, e.g.*, Rome Statute, *supra* note 4, arts. 13(a)–(b), 14(1). The term "situation" is used to guide the Prosecutor to investigate a conflict generally so that anyone who may have committed one of the "crimes" identified in Article 5 may be prosecuted, irrespective of which side he may have fought on. As such, it is conceivable that individuals from both sides of a conflict could be tried for having committed Article 5 crimes.

[139] *See* Rome Statute, *supra* note 4 and accompanying text.

[140] *Id.* art. 12(2)(a).

[141] *Id.* art. 12(2)(b).

State), and that *State* has acceded to ICC jurisdiction with respect to alleged crimes and situations in question, through the procedure set forth in Article 12(3) of the Statute[142];

(4) Where the person accused of committing Article 5 crimes is not a national of a State Party, but his *State* of nationality has accepted ICC jurisdiction with respect to alleged crimes and situations in question, through the procedure set forth in Article 12(3) of the Statute[143]; or

(5) Where a situation in which one or more of the crimes set forth in Article 5 of the Statute appear to have been committed is referred to the ICC Prosecutor by the UN Security Council, acting under Chapter VII of the UN Charter[144].

Article 12 of the Rome Statute sets forth plain and irreducible "[p]*reconditions* to the exercise of jurisdiction" by the Court[145]. It states unequivocally that acceptance of the Court's jurisdiction is limited to "States"[146]. According to Mahnoush Arsanjani, formerly with the UN Office of Legal Affairs, "Article 12 sets a broad jurisdiction for the Court in accordance with which the Court may exercise jurisdiction when it has the consent of the *State* of the territory where the crime is committed *or* the consent of the *State* of the nationality of the accused"[147]. Becoming a State Party to the Statute constitutes automatic acceptance of ICC jurisdiction for the crimes listed in Article 5, when such crimes were either committed on the State Party's territory or by one of the State Party's nationals. Further, non-Party *States* may also accede to ICC jurisdiction over their territory and nationals, either in general or for specific situations[148].

Article 125 of the Statute notes that only a "State" is eligible for "[s]ignature, ratification, acceptance, approval or accession" to the Rome Statute[149]. Article 12 speaks of "acceptance" of the jurisdiction of the Court, and, in particular, Article 12(3) invites the retrospective "acceptance" of jurisdiction by a non-Party *State*[150]. Professor Otto Triffterer noted in his Commentary on the Rome Conference that, "[i]n accordance with normal modern practice for multilateral treaties, the [ICC] Statute [was] open for signature by all *States*"[151].

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

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[142] *Id.* art. 12(2)(a), 12(3).
[143] *Id.* art. 12(2)(b), 12(3).
[144] *Id.* art. 13(b). The U.N. Security Council is the only entity that may extend the reach of the ICC beyond the territory and nationals of a State Party (or a consenting non-party "State") to the Rome Statute. *See* Kaul, *supra* note 29, at 612.
[145] Rome Statute, *supra* note 4, art. 12 (emphasis added).
[146] *Id.* Article 31(1) of the 1969 Vienna Convention on the Law of Treaties provides: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose". Vienna Convention, *supra* note 12, art. 31(1). The term "State", in international practice, refers to an entity that meets four qualifications. These qualifications are "a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states". Convention on the Rights and Duties of States art. 1, 26 Dec. 1933, 49 Stat. 3097 [hereinafter Montevideo Convention], http://avalon.yale.edu/20th_century/intam03.asp.
[147] Mahnoush H. Arsanjani, *The Rome Statute of the International Criminal Court: Exceptions to the Jurisdiction*, *in* MAURO POLITI & GIUSEPPE NESI, THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A CHALLENGE TO IMPUNITY 51 (2002) (first and third emphases added); *see also* Rome Statute, *supra* note 4, art. 12(2).
[148] *See* Rome Statute, *supra* note 4, arts. 11(2), 12(3).
[149] *Id.* art. 125.
[150] *Id.* art. 12(3).
[151] TRIFFTERER & AMBOS, *supra* note 28, at 1287 (emphasis added).

(a) A situation in which one or more of such crimes appears to have been committed is *referred to the Prosecutor by a State Party* in accordance with article 14;
(b) A situation in which one or more of such crimes appears to have been committed is *referred to the Prosecutor by the Security Council* acting under Chapter VII of the Charter of the United Nations; or
(c) The *Prosecutor has initiated an investigation* in respect of such a crime in accordance with article 15[152].

There is no provision in the Rome Statute that permits *non-State entities* to accede to ICC jurisdiction. The only provision in the Statute that can extend ICC jurisdiction to reach *non-State entities* is Article 13(b), since the UN Security Council is not constrained by any territorial or nationality limitations with respect to the referral of Article 5 crimes to the Prosecutor. The only constraint in the Statute on the Security Council is that the Council must be "acting under Chapter VII of the [UN] Charter"[153]. Consequently, unless "Palestine" is currently a "State" *in fact* or the UN Security Council has referred the matter under Chapter VII of the UN Charter, the ICC may not entertain any Palestinian Declarations. *The key issue, then, is whether a Palestinian "State" currently exists.*

C. Adoption of the PA Resolution by the UN General Assembly Did Not—*and Indeed Could Not*—Determine that "Palestine" Was a State *in Fact*; It Could Only Determine that, Henceforth, *at the UN*, the UN Would Deal With "Palestine" as It Deals With "Non-Member States" Rather Than How It Deals With Non-State "Entities"

Despite the General Assembly vote which purported to change the PA's status at the UN from "Entity" with Observer status to "Non-Member State" with Observer status, no *legal* (or actual) change actually occurred with respect to the creation or existence of a Palestinian "State" for the following reasons:

First, under the UN Charter, the General Assembly has no lawful authority whatsoever to create or recognise a "State". *The UN does not officially recognise states or declare statehood*; such actions are the responsibility of individual governments:

> 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[154].

Further, when the States of the world gather together to make decisions as members of the UN General Assembly, they are bound by the explicit terms of the UN Charter as to what they may do. Hence, were the General Assembly to attempt to either create or recognise a "State", its actions would exceed its authority under the Charter and would be *ultra vires*. As a consequence, *to have any legal meaning at all*, the General Assembly decision to change the

[152] Rome Statute, *supra* note 4, art. 13 (emphasis added).
[153] *Id.* art. 13(b).
[154] *Member States: About UN Membership*, UNITED NATIONS, http://www.un.org/en/sections/member-states/about-un-membership/index.html (last visited 31 Jan. 2018) (emphasis added).

PA's status at the UN could be, *at most*, simply an internal, administrative decision whose reach is limited to how the PA will henceforth be dealt with *at the UN*—and nothing more—*else it would be an unlawful act on the part of the General Assembly.*

As U.S. Permanent Representative Susan Rice correctly noted at the time, in response to those asserting that the General Assembly resolution did in fact convey statehood to the Palestinians, "[n]o [General Assembly] resolution can create a state where none exists"[155]. Even States that voted for the resolution stated at the time that they were not formally recognising a "State of Palestine" *per se*. For instance, the Permanent Representative from Georgia aptly stated: "*The resolution adopted today could be understood as conferring privileges and rights in line with those of Non-Member Observer States; it did not imply an automatic right for Palestine to join international organizations as a State*"[156]. Similarly, the Finnish Permanent Representative noted that "the Assembly's vote did not entail formal recognition of a Palestinian State. Finland's national position on the matter would be considered at a later date"[157]. Moreover, the States that abstained also raised clear concerns. The United Kingdom's representative, for example, expressed grave concern "about the action the Assembly had taken, saying that 'the window for a negotiated solution was rapidly closing'. Israel and Palestine must return to credible negotiations to save a two-State solution. The Palestinian leadership should, without precondition, return to the table"[158]. Germany's representative expressed similar concern by stating that Palestinian statehood could only be achieved through "direct negotiations"[159]. Hence, to conclude that the GA resolution recognised Palestinian statehood *per se* is simply incorrect.

In reality, the adopted resolution merely gave the Palestinians the *rights and privileges* of a Non-Member Observer State at the UN (like the Holy See) without actually conferring or recognising Palestinian statehood *per se*. Accordingly, the ICC continues to lack jurisdiction, since, *legally*, the PA remains a non-State entity which, by the Rome Statute's explicit language, is incapable of acceding to ICC jurisdiction.

Most troubling to the ECLJ is that it appears that the OTP was willing to accept *as binding* the political determinations of the UN General Assembly (despite clear evidence that many States voting for the status change explicitly noted that they were not voting to recognise a Palestinian "State" *per se*) while *eschewing objective indicia of statehood* found in customary international law. Without suggesting bad faith on the OTP's part, in our view, the OTP decision inexplicably acquiesced in a political decision taken by the General Assembly that clearly did not comport with well-established requirements for statehood found in customary international law.

Second, the General Assembly has no lawful authority to determine the borders, the territorial extent, or the capital city of *any* state, much less those of an entity whose very existence as a "State" is easily disproven under international law. Despite a clear lack of lawful authority to do so, the status change resolution adopted by the General Assembly nevertheless explicitly incorporated the PA's view concerning borders, territory, and national

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[155] Joe Lauria et al., *U.N. Gives Palestinians 'State' Status: Member Nations Upgrade Territories' Standing, In Diplomatic Defeat for U.S., Israel; Abbas Issues Warning on Settlements*, WALL ST. J. (29 Nov. 2012), http://online.wsj.com/article/SB10001424127887323751104578149193307234514.html.

[156] Dep't of Pub. Information, *supra* note 137 (emphasis added).

[157] *Id.*

[158] *Id.*

[159] *Id.*

capital of a future Palestinian "State"[160] while totally disregarding not only Israel's well-established counterclaims but also the explicit means—*to wit, bilateral negotiations*—previously agreed to by both Palestinians and Israelis (under the auspices of the international community) for resolving such disputes as well as explicit language in prior Security Council resolutions.

Moreover, the OTP must take cognisance that the four indicia of statehood set forth in the Montevideo Convention[161] are considered to reflect the *requirements for statehood* under customary international law[162], requirements that the PA has *never* met (i.e., either *before* or *after* adoption of the status change resolution by the General Assembly). In light of the fact that the PA fails to meet the Montevideo criteria[163], Palestine simply cannot be a "State", *no matter how many UN Member States assert that it is or would like it to be and notwithstanding the UN Secretary-General's contrary position when he forwarded the Palestinian document of accession to the ICC Registrar*. In order to be a "State", certain facts on the ground must exist; such facts are wholly lacking in the case of Palestine. Consequently, under customary international law, no Palestinian "State" currently exists, once again precluding ICC jurisdiction. That was confirmed by former PA spokesman Ghassan Khatib who aptly noted concerning Palestine, "[w]e have too many symbols of a state, what we lack is attributes of a state"[164]. This sentiment was echoed by PA Prime Minister Fayyad's assertion that the General Assembly resolution constituted "powerful *symbolism*"[165] as opposed to actual statehood.

As a judicial body, the OTP is obligated to examine the Montevideo criteria closely to determine whether a Palestinian State exists *in fact* under law. Simply accepting the General

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[160]We say "future" state for a number of reasons: First, because even PA President Mahmoud Abbas described what occurred at the General Assembly as being the "birth certificate" of Palestine, *id.*; and second, because the entity known as Palestine utterly fails to meet the four indicia of statehood recognised and required under customary international law. Montevideo Convention, *supra* note 146.

[161]Under the convention, a state "should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with other states". *Id.* art. 1.

[162]*See, e.g.*, 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".); Pamela Epstein, *Behind Closed Doors: "Autonomous Colonization" In Post United Nations Era—The Case for Western Sahara*, 15 ANN. SURV. INT'L & COMP. L. 107, 119 (2009) (internal citation omitted) ("Although the Montevideo Convention was created as a regional treaty, it has developed into customary international law and the criteria have become a touchstone for the definition of a state . . .".); Tzu-Wen Lee, *The International Legal Status of the Republic of China on Taiwan*, 1 UCLA J. INT'L L. & FOREIGN AFF. 351, 392 n.70 (1997) ("[The Montevideo] Convention is regarded as representing in general terms the criteria of statehood under customary international law".).

[163]Palestine fails to meet the criteria of the Montevideo Convention for a variety of reasons. For instance, three political bodies claim the right to control Palestine—Israel, Hamas, and the PA. In addition, the PA "is subject to the Oslo Accords, which explicitly stipulated that this body is not independent and that its actual control of the area and ability to enter into relations with other states are not absolute, but rather subject to various limitations." Amichai Cohen, *U.N. Recognition of a Palestinian State: A Legal Analysis*, THE ISRAEL DEMOCRACY INST. (29 Nov. 2012), http://en.idi.org.il/analysis/articles/un-recognition-of-a-palestinian-state-a-legal-analysis-updated/. Moreover, Palestine lacks a defined territory and a permanent population because "the location of the borders and the size of the population of the [potential] Palestinian state are at the center of a controversy that has been the subject of negotiations . . . for years". *Id.*

[164]Joshua Mitnik, *Palestinians Adopt Name to Show Off New 'State' Status*, WALL STREET J. (6. Jan. 2013), http://online.wsj.com/article/SB10001424127887323482504578225523760483386.html.

[165]*Now What? The State of Palestinian Statehood*, NPR (1 Dec. 2012), https://www.npr.org/programs/all-things-considered/2012/12/01/166261876/ (interviewing PA Prime Minister Salam Fayyad). "Symbolism", no matter how "powerful", is not the same as actual statehood.

Assembly resolution as dispositive of Palestinian statehood for purposes of acceding to ICC jurisdiction does not suffice. Moreover, wishful thinking, no matter how sincere or widely held, is insufficient to establish statehood under law.

Third, the General Assembly has no authority to set aside or supersede the terms of existing treaties, other international agreements and documents, or Security Council resolutions. Because the PA had freely entered into a series of agreements with Israel[166] whose terms explicitly ruled out "unilateral" actions, determining when a Palestinian "State" will come into existence and what territories it will encompass continues to depend on the results of direct, bilateral negotiations between Palestinian and Israeli officials (*negotiations which have not yet occurred*), as called for in the prior agreements between them. The terms of such agreements continue to bind the Palestinians.

Further, Security Council Resolution 242 (1967) anticipated territorial adjustments as part of the peace process, adjustments which were to be negotiated between the parties[167]. As Lord Caradon, the chief architect of Resolution 242, aptly noted,

> [i]t would have been wrong to demand that Israel return to its positions of June 4, 1967, because those positions were undesirable and artificial. After all, they were just the places where the soldiers of each side happened to be on the day the fighting stopped in 1948. They were just armistice lines. That's why we didn't demand that the Israelis return to them[168].

One must also recognise that UN Security Council Resolution 242 did not mention a Palestinian entity at all. Moreover, no Palestinian representative was invited to address the Security Council at the time. The reason for this was that the Palestinians were not actual actors in the ongoing events. They had no State. And no one was claiming that the areas of the former Mandate for Palestine which had been under Egyptian and Jordanian belligerent military occupation for the previous 18 years belonged to "the Palestinians". Current Palestinian territorial claims are of relatively recent vintage. Only in 1988 did the Palestinians even "declare" their independence. That was 40 years after the State of Israel came into existence and occurred while the PLO leadership was in exile in Tunisia. Despite the excitement in some circles surrounding the 1988 declaration, the PLO did not then govern one

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[166] Israeli-Palestinian Interim Agreement, *supra* note 95.

[167] S.C. Res. 242 (22 Nov. 1967).

[168] BEIRUT DAILY STAR, 12 June 1974, excerpt *reprinted in* LEONARD J. DAVIS, MYTHS AND FACTS 1985: A CONCISE RECORD OF THE ARAB-ISRAELI CONFLICT 44 (Near East Research 1984); *see also* MacNeil/Lehrer Report, (PBS television broadcast 30 Mar. 1978), https://www.pbs.org/newshour/show/the-macneil-lehrer-report-from-nov-30-1983 (Lord Caradon: "***We didn't say there should be a withdrawal to the '67 line; we did not put the 'the' in, we did not say 'all the territories' deliberately***. We all knew that the boundaries of '67 were not drawn as permanent frontiers, they were a cease-fire line of a couple of decades earlier. . . . We did not say that the '67 boundaries must be forever" (emphasis added).); Proceedings of the 64th Annual Meeting of the American Society of International Law 894–96 (1970) (Eugene Rostow:

> [T]he question remained, 'To what boundaries should Israel withdraw'? On this issue, the American position was sharply drawn, and rested on a critical provision of the Armistice Agreements of 1949. Those agreements provided in each case that the Armistice Demarcation Line 'is not to be construed in any sense as a political or territorial boundary, and is delineated without prejudice to rights, claims or positions of either party to the Armistice as regards ultimate settlement of the Palestine question'. . . . These paragraphs, *which were put into the agreements at Arab insistence*, were the legal foundation for the controversies over the wording of paragraphs 1 and 3 of Security Council Resolution 242, of November 22, 1967.

(emphasis added)).

square centimetre of territory in the former Mandate for Palestine—*and never had*; Israel governed it all.

Following the 1973 Arab-Israeli War, Security Council Resolution 338 (1973) reaffirmed that Resolution 242 was to serve as the basis for achieving a lasting peace between Israel and its Arab neighbours[169]. Accordingly, final resolution of the issues between the Palestinians and Israelis, including the issue of Palestinian statehood (and all that that entails), awaits final determination via bilateral negotiations (*which, once again, have not yet occurred*).

In addition, pursuant to *uti possidetis juris*[170] (discussed in Section II *supra*), when the British departed Palestine in May of 1948, the State that emerged upon withdrawal of the British inherited the territory bounded by the former Mandatory's administrative borders, which, in this case, included the entirety of the Mandate for Palestine west of the Jordan rift valley. Israel was the only state to emerge out of the Mandate for Palestine upon British withdrawal. Hence, pursuant to *uti possidetis juris*, Israel inherited the entirety of the territory between the Jordan rift valley and the Mediterranean Sea. Further, even quite apart from *uti possidetis juris*, the Jews have a legitimate, *continuing* right to settle throughout Palestine, based on the Mandate for Palestine[171], which was sanctioned in international law in the 1920s *and which has arguably never been superseded*[172] (at least colourably with respect to the West Bank and Gaza Strip), thereby establishing an additional, legally cognisable Israeli counterclaim to Palestinian claims. Accordingly, all of the territory that the Palestinians claim to be theirs is, *at best*, *disputed* territory whose ownership must be determined via negotiations between the parties (as had already been agreed to *in principle* by both Israelis and Palestinians[173]).

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Irrespective of any General Assembly resolution touting Palestinian "statehood", the ICC lacks jurisdiction, since the PA remains *in fact* a non-State entity, which exercises no sovereign authority over any of the territory of the former Mandate for Palestine—*and never has*. Nothing changed on the ground by virtue of the General Assembly resolution. The previous Prosecutor recognised that no state of Palestine existed when the Palestinians attempted to accede to the Rome Statute in 2009, and the situation on the ground remained unchanged following the General Assembly resolution in 2012. To assert the rise of a Palestinian "State" from the General Assembly resolution is wholly unsupported by law or fact. Moreover, it would mean that the OTP, a judicial body, would accept as binding the politically motivated decisions of some members of the General Assembly whilst eschewing objective indicia of statehood articulated under customary international law.

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[169] S.C. Res. 338 (22 Oct. 1973).
[170] *See* Section II, *supra*.
[171] *See* League of Nations, Mandate for Palestine art. 6 (Dec. 1922).
[172] *See, e.g.*, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.J.C. 53 (21 June), http://www.icj-cij.org/files/case-related/53/053-19710621-ADV-01-00-EN.pdf (noting, concerning League of Nations mandates, that "[s]ince [the Mandate's] fulfillment did not depend on the existence of the League of Nations, [it] could not be brought to an end merely because this supervisory organ ceased to exist. Nor could the right of the population to have the Territory administered in accordance with these rules depend thereon").
[173] Israeli-Palestinian Interim Agreement, *supra* note 95, art. XI.

IV. ICC JURISDICTION IS ALSO PRECLUDED PURSUANT TO TERMS OF EXISTING AGREEMENTS BETWEEN THE PALESTINIANS & ISRAEL

A. Until the Borders of a Future "State of Palestine" are Determined via Bilateral Negotiations, it is Simply Impossible to Determine Over Which Territory the ICC Might Be Able to Exercise Jurisdiction

By entertaining the current Palestinian charges about alleged Israeli crimes committed on so-called "occupied Palestinian territory", the ICC is allowing itself to be dragged into the long-standing political quagmire of the Israeli-Palestinian conflict and is being asked to predict—*before agreed-to bilateral negotiations have even been convened*—how the outstanding Israeli-Palestinian political issues—*including the issues of borders, settlements, and the status of Jerusalem*—will ultimately be resolved between the parties (as already agreed-to by the Palestinians[174]). Moreover, resolution of such *political* matters is simply outside the ability of any judicial body, including the OTP and the ICC.

It is a simple fact that determination of the borders of a future Palestinian State is required before any court can consider and resolve contentious legal issues between the parties. For example, until the ultimate borders of a future Palestinian state are determined via negotiations, there is no valid judicial means to determine whether any of the alleged offences even occurred on territory belonging to a notional "State of Palestine". Likewise, until such borders are negotiated, there is no valid judicial means to determine whether a so-called illegal "settlement" lies within notional "Palestinian territory". The same is true concerning the status of Jerusalem. Accordingly, even assuming *arguendo* that the ICC could lawfully assert jurisdiction over these matters *at some point* (which the ECLJ submits it may not do *vis-à-vis* Israel absent Israel's prior consent without violating customary international law and the Rule of Law), *legal matters* regarding such issues of dispute between Israelis and Palestinians are currently not yet ripe for judicial resolution, as the OTP must surely recognise. Accordingly, the OTP should, *as an absolute minimum*, dismiss the Palestinians' allegations as being unripe for adjudication until the parameters of a future Palestinian State are established pursuant to bilateral negotiations between the parties.

Moreover, until the boundaries of a future Palestinian State are determined via bilateral negotiations, no Palestinian State actually exists[175]. Once bilateral negotiations are completed and a Palestinian State actually comes into existence *in fact*, only then will Palestinians have sovereign authority to accede to the Rome Statute. Further, only once there is a Palestinian State *in fact* will the Palestinians be able to confer authority to the ICC. Yet, even then, ***such a future State of Palestine will be able to convey such authority only***

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[174]Israeli-Palestinian Interim Agreement, *supra* note 95, *passim* (referring repeatedly to "issues that will be negotiated in the permanent status negotiations"). Despite being the most popular game in town, even the two-state solution itself is not a foregone conclusion. Accordingly, the OTP cannot base legal decisions on a projected, hypothetical reality.

[175]The ECLJ expresses its concern once again about how the OTP determined that "Palestine" was a "State" for purposes of acceding to the Rome Statute. Rather than looking to objective, legal indicia of statehood as found in customary international law (such as, the Montevideo Convention criteria), which one would expect a judicial body to do, a "State of Palestine" was recognised based on the decision of the UN General Assembly to change the status of "Palestine" *at the UN* from "Entity" with observer status to "Non-member State" with observer status. This was done despite the fact that many UN Member States expressly stated that their votes to change the designation at the UN were not meant to signify that they recognised that "Palestine" was in fact a "State" and that absolutely nothing changed politically or otherwise on the ground in the area in question. Accordingly, we submit that the OTP made a grave error of judgement by opting for a politicised position over a legal one.

[redacted]

retroactive to the date that the State actually comes into existence, and, as of today, that date remains a future event[176]. Hence, to date, given that no Palestinian State currently exists *in fact*, the entity called "Palestine" lacks the legal competence to accede to the Rome Statute, and its allegations against Israel are wholly outside the jurisdiction of the ICC. *In light of the foregoing, that the OTP is even entertaining Palestinian allegations demeans the reputation of the OTP and regrettably casts doubt on its fidelity to the Rule of Law.*

B. Pursuant to Article 98(2) of the Rome Statute, the PA May Not Surrender Israeli Nationals to the ICC

Quite apart from the terms of previously cited agreements between the Palestinians and Israelis that explicitly disallow the PA from taking the actions that it has been taking in violation of those same agreements, the Rome Statute itself includes terms to protect the integrity of prior agreements that in effect preclude ICC jurisdiction.

Article 98(2) of the Rome Statute reads as follows:

> The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

Pursuant to the terms of the 1995 Israeli-Palestinian Interim Agreement, Palestinian officials lack all authority over Israeli nationals in all geographic areas where Israel has agreed to grant Palestinians incipient authority to rule over their fellow Palestinians[177]. Israel has retained to itself authority over all Israeli nationals as recognised and agreed to by the Palestinians. Accordingly, the PA lacks all authority over Israeli nationals and cannot convey authority it does not possess to any person or organisation. Because Israel, as a non-party State to the Rome Statute, has already rejected the Rome Statute, it is highly unlikely to consent to allowing its nationals to be surrendered to a court created by the Rome Statute, a court that it fundamentally mistrusts and believes to be politicised.

CONCLUSION

The stated goals of the Rome Statute are laudable. Ensuring that perpetrators of the most serious international crimes do not go unpunished is clearly a worthy goal with which all people of good will and conscience can agree. However, as demanded by the Rule of Law and in the interests of justice, one must only use lawful means to achieve such ends. We respectfully submit that subjecting the nationals of any non-consenting, third-party State to the Rome Statute violates customary international law; is, therefore, *ultra vires*; and makes those who attempt to do so lawbreakers themselves. We also urge the OTP to recognise the

[176]Moreover, a future Palestinian state will likely have self-imposed restrictions such as some measure of demilitarisation. There may also be some form of limited jurisdiction over Israelis as is the case today under the Oslo Accords. Right now, it is impossible to know what will be decided.
[177]Israeli-Palestinian Interim Agreement, *supra* note 95.

significance of *uti possidetis juris* as absolutely establishing Israeli sovereignty over the entirety of the territory of the Mandate for Palestine within the borders of Palestine as they existed in May 1948 when Israel emerged as the only State upon the departure of the British. We respectfully urge the OTP to recognise that the UN General Assembly wholly lacks authority to create or recognise a "State" and that the so-called "State of Palestine" so created fails to meet the basic criteria for actual statehood, thereby precluding its ability to accede to the Rome Statute and submit complaints for consideration by the OTP. Finally, we urge the OTP to recognise that the issues before it *vis-à-vis* Israel are essentially political issues not yet fit subjects for judicial resolution and violate Article 98 of the Rome Statute.

Accordingly, we strongly and respectfully urge Your Excellency, as ICC Prosecutor, to recognise every non-party State's—*including Israel's*—sovereign right to withhold permission from the ICC to assert jurisdiction over its nationals. Further, we also strongly and respectfully urge Your Excellency to discontinue ongoing investigations of every non-party State's—*including Israel's*—nationals and to direct OTP staff personnel to do the same.

And, finally, as we have done in the past, the ECLJ pledges to continue, when we deem appropriate, submitting letters and legal memoranda regarding this and related topics to assist you and the OTP as you deal with these important issues. In the coming weeks, we will send you our companion brief dealing with the issue of Complementarity and why it also precludes ICC jurisdiction over Israel and its nationals.

Respectfully submitted,

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