



13 December 2012

**VIA FACSIMILE (31-70-515-8555) &
OVERNIGHT DELIVERY SERVICE**

H.E. Fatou Bensouda
Prosecutor, International Criminal Court

RE: The Palestinians' Attempt to Accede to ICC Jurisdiction

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 2007¹. You may recall that the ECLJ filed numerous letters and legal memoranda with the Office of the Prosecutor ("OTP") opposing the first attempt by the Palestinian Authority ("PA") to accede to jurisdiction of the International Criminal Court ("ICC"). ECLJ attorneys twice visited The Hague to meet with your esteemed predecessor concerning the illegality of the first PA attempt to accede to ICC jurisdiction.

**REVIEW OF RECENT PA ATTEMPTS TO BE RECOGNISED AS A
"STATE"**

As you are no doubt aware, the PA lodged its first Section 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, your predecessor as 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 constitute a "State"². Your predecessor 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'

¹Consultative Status for the European Centre for Law and Justice, U.N. DEPT ECON. & SOC. AFF., <http://esango.un.org/civilsociety/consultativeStatusSummary.do?profileCode=3010> (last visited 2 Nov. 2012).

²INT'L CRIMINAL COURT, SITUATION IN PALESTINE available at <http://www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf> [hereinafter SITUATION IN PALESTINE].

under article 12(3) which would be at variance with that established for the purpose of article 12(1)”³.

You will also doubtless recall that approximately one year ago the PA sought to achieve statehood recognition and admission to the United Nations by, in essence, wholly disregarding previous agreements (made under the auspices of the international community) to negotiate such issues with Israel⁴ and appealing directly to the UN Security Council⁵ (“Security Council”). That effort failed.

This year, the PA adopted a different approach and sought to achieve a change in its status at the UN via the UN General Assembly (“General Assembly”). That attempt succeeded. On 29 November 2012, the General Assembly agreed to change the PA’s status *at the UN* from an “Entity” enjoying Observer status to that of a “Non-member State” with Observer status⁶.

LEGAL EFFECT OF THE GENERAL ASSEMBLY’S ADOPTION OF THE PA RESOLUTION

The General Assembly is essentially a *political* body subject to the political interests, prejudices, and popular causes *du jour* common to such bodies when considering matters brought before them. As such, *as a political body*, the General Assembly seldom, if ever, delves into the detailed legal implications or requirements of international law when enacting its resolutions. The ICC, on the other hand, is a *judicial* body that is bound to delve into and comply with the requirements of international law as well as by the explicit terms set forth in the Rome Statute. Accordingly, the ICC, as a *judicial* body, must studiously avoid political considerations and must make decisions based *solely* on international law.

Under the Rome Statute, for example, the ICC has jurisdiction only in the following five specific “situations”⁷:

- (1) Where the alleged Article 5 crimes⁸ were committed on the territory of a State Party to the Statute (or on an aircraft or vessel registered in that State)⁹;

³*Id.*

⁴The “Oslo Accords” & “Interim Agreement” (collectively, the “Interim Agreements”). Israeli Palestinian Interim Agreement on the West Bank and the Gaza Strip, 28 Sept. 1995, 36 I.L.M. 551 (1997) [hereinafter Interim Agreement] *available at* http://www.knesset.gov.il/process/docs/heskemb_eng.htm; Oslo Accords, Declaration of Principles on Interim Self-Government, 13 Sept. 1993, 32 I.L.M. 1525 (1993) [hereinafter Oslo Accords] *available at* <http://www.jewishvirtuallibrary.org/jsource/Peace/dop.html>.

⁵U.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).

⁶U.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. (30 Nov. 2012), <http://unispal.un.org/unispal.nsf/47d4e277b48d9d3685256ddc00612265/435e0f0c8b2262e485257ac6004f4d63?OpenDocument>.

⁷The Rome Statute refers to both “situations” and “crimes”. *See, e.g.*, Rome Statute of the International Criminal Court, arts. 13(a)–(b), 14(1) [hereinafter Rome Statute]. 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.

⁸*See* Rome Statute, *supra* note 7 and accompanying text.

- (2) Where the person accused of committing Article 5 crimes is a national of a State Party to the Statute¹⁰;
- (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 *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 Statute¹¹;
- (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 Statute¹²; 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 Charter¹³.

Article 12 of the Rome Statute sets forth plain and irreducible “[p]reconditions to the exercise of jurisdiction” by the Court¹⁴. It states unequivocally that acceptance of the Court’s jurisdiction is limited to “States”¹⁵. According to Mahnouch 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”¹⁶. 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 situations¹⁷.

Article 125 of the Statute notes that only a “State” is eligible for “[s]ignature, ratification, acceptance, approval or accession” to the Rome Statute¹⁸. Article 12 speaks of “acceptance” of the jurisdiction of the Court, and, in particular, Article 12(3) invites

⁹*Id.* at art. 12(2)(a).

¹⁰*Id.* at art. 12(2)(b).

¹¹*Id.* at art. 12(2)(a), 12(3).

¹²*Id.* at art. 12(2)(b), 12(3).

¹³*Id.* at 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 Hans-Peter Kaul, *Preconditions to the Exercise of Jurisdiction*, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 583, 612 (Antonio Cassese et al. eds., 2002).

¹⁴Rome Statute, *supra* note 7, at art. 12.

¹⁵Article 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 on the Law of Treaties, art. 31(1), 23 May 1969, 1155 U.N.T.S. 331. 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”], available at http://avalon.yale.edu/20th_century/intam03.asp.

¹⁶Mahnouch 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 7, at art. 12(2).

¹⁷See Rome Statute, *supra* note 7, at arts. 11(2), 12(3).

¹⁸*Id.* at art. 125.

the retrospective “acceptance” of jurisdiction by a non-Party *State*¹⁹. 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*”²⁰.

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:

- (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 15²¹.

Hence, 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”²². Consequently, unless Palestine is currently a “State” or the UN Security Council has referred the matter under Chapter VII of the UN Charter, the ICC may not entertain any further PA Declarations. *The key issue, then, is whether a Palestinian “State” currently exists.*

THE ADOPTION OF THE PA RESOLUTION BY THE UN GENERAL ASSEMBLY SIMPLY DETERMINED THAT, HENCEFORTH, AT THE UN, THE UN WOULD DEAL WITH “PALESTINE” AS A “NON-MEMBER STATE” RATHER THAN AS AN “ENTITY”

Despite quite understandable Palestinian excitement over the recent General Assembly vote which changed the PA’s status at the UN from “Entity” with Observer status to “Non-Member State” with Observer status, no *legal* 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 recognize 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

¹⁹*Id.* at art. 12(3).

²⁰OTTO TRIFFTERER & KAI AMBOS, COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 1287 (1999) (emphasis added).

²¹Rome Statute, *supra* note 7, at art. 13 (emphasis added).

²²*Id.* at art. 13(b).

State nor a Government, and therefore does not possess any authority to recognize either a State or a Government²³.

Hence, were the General Assembly to attempt to either create or recognise a “State”, its actions would be *ultra vires*. As a consequence, the recent General Assembly decision to change the PA’s status at the UN was, *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.

As U.S. Representative Susan Rice correctly noted, “[n]o resolution can create a state where none exists”²⁴. A similar sentiment was expressed by the Representative from Georgia: “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”²⁵. Similarly, the Finnish 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”²⁶. In reality, the recently adopted resolution merely gives 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 is incapable of acceding to ICC jurisdiction.

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 capital of a future Palestinian “State”²⁷ 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.

²³*Member States: About UN Membership*, U.N., <http://www.un.org/en/members/about.shtml> (last visited 11 Dec. 2012) (emphasis added).

²⁴Joe Lauria et al., *U.N. Gives Palestinians ‘State’ Status*, WALL ST. J. (29 Nov. 2012), <http://online.wsj.com/article/SB10001424127887323751104578149193307234514.html>

²⁵See 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), <http://www.un.org/News/Press/docs/2012/ga11317.doc.htm>.

²⁶*Id.* Moreover, the United Kingdom’s representative 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”. *Id.* Germany’s representative expressed similar concern by stating that Palestinian statehood could only be achieved through “direct negotiations”. *Id.*

²⁷We 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 15.

Moreover, one cannot forget that the four indicia of statehood set forth in the Montevideo Convention²⁸ are considered to reflect the *requirements for statehood* under customary international law²⁹, requirements that the PA has *never* met (i.e., neither *before* nor *after* adoption of the status change resolution by the General Assembly). In light of the fact that the PA meets none of the Montevideo criteria³⁰, Palestine simply cannot be a “State”, *no matter how many say that it is*. 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.

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 Israel³¹ 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, as called for in the prior agreements between them. Unless and until the PA explicitly repudiates such agreements, their terms 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 parties³². 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

²⁸Montevideo Convention, *supra* note 15. 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.* at art. 1.

²⁹See, 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”.).

³⁰Palestine 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 INSTITUTE (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.*

³¹Interim Agreement, *supra* note 4; Oslo Accords, *supra* note 4.

³²S.C. Res. 242, S/RES/242 (22 Nov. 1967).

armistice lines. That's why we didn't demand that the Israelis return to them³³.

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 neighbours³⁴. 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.

In addition, Jews have a legitimate, *continuing* right to settle throughout Palestine, based on the Mandate for Palestine³⁵, which was sanctioned in international law in the 1920s *and which has yet to be superseded*³⁶, thereby establishing a legally cognisable Israeli counterclaim to Palestinian claims. As such, much of the territory that the Palestinians claim to be theirs is, in reality, *disputed* territory whose ownership must be determined via negotiations between the parties (as had already been agreed to by both Israelis and Palestinians³⁷). In the interim, the ICC can have no jurisdiction, since the PA remains a non-State entity.

**TO DATE, THE ASSEMBLY OF STATES PARTIES TO THE ROME
STATUTE DOES NOT RECOGNISE THE PA AS A "STATE", THEREBY
PRECLUDING THE OTP'S AUTHORITY TO DO SO**

Notably, the Assembly of States Parties, the governing body of the Rome Statute (and, hence, the Prosecutor/OTP), does not recognise the PA as a "State". The PA was not credentialed as a participating "State" at the Rome Conference in 1998 that resulted in

³³BEIRUT 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, 30 March 1978 (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".); 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)).

³⁴S.C. Res. 338, S/Res/338 (22 Oct. 1973).

³⁵*See* League of Nations, Mandate for Palestine art. 6 (Dec. 1922).

³⁶*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), *available at* <http://www.icj-cij.org/docket/files/53/5595.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").

³⁷Trilateral Statement on the Middle East Peace Summit at Camp David, 25 July 2000, *available at* http://www.mfa.gov.il/MFA/MFAArchive/2000_2009/2000/7/Trilateral+Statement+on+the+Middle+East+Peace+Summ.htm; The Israeli-Palestinian Interim Agreement, Isr.-Palestinian Liberation Org., art. XI, 28 Sep. 1995, *available at* <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/THE+ISRAELI-PALESTINIAN+INTERIM+AGREEMENT.htm>.

the creation of the ICC. The official roster of “Participating States” at the Conference included the names of 163 States; it did not include the PA or Palestine as a “State”. Rather, “Palestine” was placed in the category of “Other Organisations” in the diplomatic roster of the Conference³⁸. Further, two Palestinian delegates³⁹ were listed as representing an “Organisation[]”, *not* a “State”⁴⁰. In subsequent meetings of the ICC Preparatory Commission, the PA was present in the category of “Entities, intergovernmental organisations and other bodies having received a standing invitation to participate as *observers* in the sessions and the work of the General Assembly”⁴¹.

The ICC has consistently treated the PA as an organisation and not a state. A prominent example of this took place on 13 February 2009 at the ICC States Parties meeting in New York City, where Palestine was properly grouped with “Entities, intergovernmental organisations, and other entities”⁴². Such a classification binds the ICC Prosecutor (since the OTP is a created office under the Rome Statute, which, in turn, is governed by the Assembly of States Parties)⁴³. Further, when recently queried about the current status of Palestine vis-à-vis the ICC, the ICC Public Affairs Unit confirmed that Palestine is not currently a State Party to the Rome Statute and that it has no “representative” at the ICC⁴⁴. Moreover, *as recently as the 14-22 November 2012 session in The Hague of the Assembly of States Parties to the Rome Statute* (i.e., mere days before the recent General Assembly status change vote), Palestine continued to be listed in the category “Entities, intergovernmental organizations and other entities”⁴⁵.

Your Excellency, as you recall, your predecessor denied the 2009 PA attempt to accede to ICC jurisdiction because the PA was not a “State”⁴⁶. Accordingly, since the Assembly of States Parties has not recognised—and *does not currently recognise*—the PA as a “State”, neither may the OTP rightfully do so.

CONCLUSION

In light of the foregoing and despite the recent adoption by the General Assembly of the PA status change resolution, the PA remains a non-State entity under customary international law, an entity legally incapable of acceding to the ICC’s jurisdiction. Accordingly, any PA attempt to accede to ICC jurisdiction must be rejected forthwith.

³⁸United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 15 June to 17 July 1998, *Official Records*, at 5, 44, U.N. Doc. A/CONF.183/13 (vol. II) (2002) [hereinafter U.N. Conference on Establishment of the ICC], *available at* http://untreaty.un.org/cod/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf.

³⁹These delegates were the PA General Delegate to Italy, Mr Nimer Hammad, and the Counselor of the Permanent Observer Mission of Palestine to the United Nations, Mr Marwan Jilani.

⁴⁰See U.N. Conference on Establishment of the ICC, *supra* note 38, at 44.

⁴¹See United Nations Preparatory Commission for the International Criminal Court, New York, 8–19 Apr. 2002, *List of Delegations*, at 10, U.N. Doc. PCNICC/2002/INF/6 (30 Apr. 2002) (emphasis added), *available at* <http://unbisnet.un.org:8080/ipac20/ipac.jsp?session=124267251TD72.61417&profile=bibga&uri=full%3D3100001~!677148~!1&booklistformat=#focus>.

⁴²See Int’l Criminal Court, Assembly of States Parties, New York, 9–13 Feb. 2009, *Delegations to the second resumption of the seventh session of the Assembly of States Parties to the Rome Statute of the International Criminal Court*, at 50, U.N. Doc. ICC-ASP/7/INF.1/Add.2 (26 Mar. 2009), *available at* http://www.icc-cpi.int/iccdocs/asp_docs/ICC-ASP-7-INF.1-Add.2.pdf.

⁴³Rome Statute, *supra* note 7, at art. 15.

⁴⁴Email from Michelle.Johnson@icc-cpi.int (5 Dec. 2012) (copy on file with ECLJ).

⁴⁵Email from Michelle.Johnson@icc-cpi.int (6 Dec. 2012) (copy on file with ECLJ).

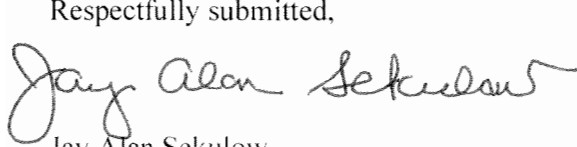
⁴⁶SITUATION IN PALESTINE, *supra* note 2.

For the OTP to permit the PA to accede to ICC jurisdiction would contravene the clear language of the Rome Statute (which limits accession to “States”) and would politicise the Court. Any involvement by the ICC in the many ongoing political controversies surrounding the issue of Palestinian statehood will undermine the standing of the Court, but especially in the eyes of those key States which have yet to join the Court because they fear the very politicisation that allowing PA accession would demonstrate. As a consequence, as Prosecutor, you must comply with the limitations placed on your office and your discretion by the Assembly of States Parties to the Rome Statute, by the Rome Statute itself as well as with the statehood requirements enshrined in customary international law and reject any forthcoming PA Declaration as improperly lodged by a non-State entity.

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Your Excellency, as we did during the PA’s prior attempt to accede to ICC jurisdiction, the ECLJ intends to submit subsequent letters and legal memoranda regarding this topic (and related topics, as appropriate) to assist you and the OTP as you deal with the issue of another attempted PA accession to ICC jurisdiction.

Respectfully submitted,

	
Jay Alan Sekulow Chief Counsel	Robert W. Ash Senior Counsel