EUROPEAN CENTRE FOR LAW AND JUSTICE

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VIA FACSIMILE [redacted] &
OVERNIGHT DELIVERY SERVICE

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

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 2007[1]. You may recall that the ECLJ filed numerous letters and legal memoranda with the Office of the Prosecutor ("OTP") in opposition to the first attempt by the Palestinian Authority ("PA") to accede to the jurisdiction of the International Criminal Court ("ICC"). ECLJ attorneys twice visited The Hague to meet with your predecessor concerning the illegality of the first PA attempt to accede to ICC jurisdiction. Once again, we believe it necessary to comment on recent attempts by PA officials to convince the OTP to become involved in the recent, politically-fraught situation between Israel and the Palestinians.

I. THE UN GENERAL ASSEMBLY'S ADOPTION OF THE PA STATUS-CHANGE RESOLUTION DID NOT CREATE A STATE OF PALESTINE

As you know, on 29 November 2012, the UN General Assembly ("UNGA") 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 status[2]. Despite quite understandable Palestinian excitement over the UNGA vote, no *legal* change actually occurred with respect to the creation or existence of a Palestinian "State" for the following reasons:

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[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 17 Sept. 2014).

[2] 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. (17 Sept. 2014), http://unispal.un.org/unispal.nsf/47d4e277b48d9d3685256ddc00612265/435e0f0c8b2262e485257ac6004f4d63?OpenDocument.

First, under the UN Charter, the UNGA 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[3].

Hence, were the UNGA to attempt to either create or recognise a "State", its actions would be *ultra vires*. As a consequence, the recent UNGA 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 at the time, "[n]o resolution can create a state where none exists"[4]. 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 organisations as a State"[5]. 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"[6]. 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 UNGA 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 UNGA nevertheless explicitly incorporated the PA's view concerning borders, territory, and national capital of a future Palestinian "State"[7] while totally disregarding not only Israel's well-

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[3] *Member States: About UN Membership*, U.N., http://www.un.org/en/members/about.shtml (last visited 16 Sept. 2014) (emphasis added).

[4] Joe Lauria et al., *U.N. Gives Palestinians 'State' Status*, WALL ST. J. (29 Nov. 2012), http://online.wsj.com/article/SB10001424127887323751104578149193307234514.html.

[5] 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.

[6] *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.*

[7] 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. *See* Montevideo Convention on the Rights and Duties of States art. 1, 26 Dec. 1933, 49 Stat. 3097 [hereinafter Montevideo Convention], *available at* http://

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, Your Excellency will doubtless agree that, unlike members of the UNGA who are motivated by political interests, as Chief Prosecutor, Your Excellency fulfils an ***official legal function*** and, as such, you are bound to follow the ***law*** while ***disregarding all political considerations***. Accordingly, you must take into account that the four indicia of statehood set forth in the Montevideo Convention[8] are considered to reflect the *requirements for statehood* under customary international law[9], requirements that the PA has *never* met (i.e., either *before* or *after* adoption of the status change resolution by the UNGA). In light of the fact that the PA meets none of the Montevideo criteria[10], 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 UNGA 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[11] 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

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caselawofeu.com/wp-content/uploads/2013/06/Montevideo-Convention-on-the-Rights-and-Duties-of-States.pdf.

[8]Montevideo Convention, *supra* note 7. 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.

[9]*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)("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 . . . ." (internal citation omitted)); 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".).

[10]Palestine fails to meet the criteria of the Montevideo Convention for a variety of reasons. For instance, at one time or another, three political bodies have claimed 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/. Further, 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.*

[11]The Israeli-Palestinian Interim Agreement, Isr.-Palestinian Liberation Org., art. XI, 28 Sep. 1995, [hereinafter Interim Agreement], *available at* http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/THE+ISRAELI+PALESTINIAN+INTERIM+AGREEMENT.htm; Oslo Accords, Declaration of Principles on Interim Self-Government, 13 Sept. 1993, 32 I.L.M. 1525 (1993) *available at* http://www.jewishvirtuallibrary.org/jsource/Peace/dop.html.

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 parties[12]. 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[13].

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[14]. Accordingly, final resolution of the issues between Palestinians and Israelis, including the issue of Palestinian statehood (and all that that entails), awaits final determination *via bilateral negotiations* as set forth in UN Security Council resolutions. As such, the UNGA action has meaning only insofar as it deals with how the UN and its agencies will treat the PA at the UN, thereby precluding ICC jurisdiction.

Fourth, Jews have a legitimate, *continuing* right to settle throughout Palestine, based on the Mandate for Palestine[15], which was sanctioned in international law in the 1920s *and which has yet to be superseded*[16], thereby establishing an internationally recognised, legally cognisable, Israeli counterclaim to Palestinian claims. As such, the territory that Palestinian Arabs claim to be theirs is, in reality, *disputed* territory whose ownership must be determined via negotiations between the parties (as had already been

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[12]S.C. Res. 242, S/RES/242 (22 Nov. 1967). Note that the phrase "from territories" does not say "the" or "all the" territories, because it was determined that territorial adjustments would be necessary. That was also true of the phrase "secure and recognised boundaries", which suggested that boundary adjustments would be required, since, prior to 1967, the armistice lines did not constitute secure boundaries.

[13]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, 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)).

[14]S.C. Res. 338, S/Res/338 (22 Oct. 1973).

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

[16]*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").

agreed to by both Israelis and Palestinians[17]). *Territory that has never constituted a state, that remains disputed to this day and whose final status is yet to be resolved, cannot form the basis of a state*. Pending such a resolution, the PA remains legally a non-State entity, incapable of acceding to ICC jurisdiction.

II. ASSUMING, ARGUENDO, THAT THE PA BECAME A STATE VIA THE UNGA STATUS-CHANGE RESOLUTION, THE PA'S OPTIONS UNDER THE ROME STATUTE WOULD STILL BE SEVERELY LIMITED

Even if one were to assume, *for sake of argument*, that a Palestinian "State" actually came into existence by virtue of the UNGA's adoption of the PA's status-change resolution[18] (an assumption clearly refuted by both the requirements of customary international law as set forth in the Montevideo Convention statehood criteria[19] as well as by statements by Palestinian leaders themselves—PA Prime Minister Fayyad, for example, stated that the UNGA resolution was merely "powerful *symbolism*"[20]), the actions of the newly created Palestinian "State" would be limited as follows:

First, the UNGA resolution would confirm, at a minimum, that no Palestinian "State" existed prior to the adoption of that resolution. That conclusion fully accords with the 2012 opinion of the OTP issued by your predecessor who declined to recognise the PA's initial attempt to accede to ICC jurisdiction because it was not a "State". Statements by key Palestinian leaders have also confirmed that fact. PA President Mahmoud Abbas, for example, noted that the adoption of the UNGA resolution constituted Palestine's "birth certificate"[21]. Moreover, upon his return from the UN to Ramallah, President Abbas tellingly declared: "We *now* have a state"[22].

Second, since no Palestinian "State" had existed until the UNGA resolution was adopted on 29 November 2012, the January 2009 Declaration by the PA purporting to accede to ICC jurisdiction was a legal nullity *at the time it was lodged*. As such, that Declaration was void *ab initio* and cannot now be resurrected for OTP review, since it was improperly and unlawfully lodged by a non-State entity at the time. Hence, absent a

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[17]Trilateral Statement on the Middle East Peace Summit at Camp David, 25 July 2000, [hereinafter Trilateral Statement], *available at* http://2001-2009.state.gov/p/nea/rls/22698.htm; Interim Agreement, *supra* note 11, at art. XI.

[18]This would have to be the case, since the former ICC Prosecutor found that no such state had existed when the PA had filed its Declaration attempting to accede to ICC jurisdiction in January 2009.

[19]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". Montevideo Convention, *supra* note 7, at art. 1. *See also supra* note 9 (showing that the Montevideo treaty criteria for establishing statehood have become part of customary international law).

[20]*Now What? The State Of Palestinian Statehood*, ALL THINGS CONSIDERED (1 Dec. 2012), http://www.npr.org/2012/12/01/166313016/the-state-of-palestinian-statehood (interviewing PA Prime Minister Salam Fayyad) (emphasis added). "Symbolism", no matter how "powerful", is not the same as actual statehood.

[21]*General Assembly Votes Overwhelmingly to Accord Palestine 'Non-member Observer State' Status in United Nations*, U.N. GEN. ASSEMBLY, http://www.un.org/News/Press/docs//2012/ga11317.doc.htm (last visited 16 Dec. 2014).

[22]Joel Greenburg, *Abbas Returns Home to Hero's Welcome, but Faces Fresh Punishment from Israel*, WASH. POST (2 Dec. 2012), http://www.washingtonpost.com/world/middle_east/abbas-returns-home-to-heros-welcome-but-faces-fresh-punishment-from-israel/2012/12/02/0a1a2352-3caa-11e2-ae43-cf491b837f7b_story.html (emphasis added).

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subsequent declaration to accede to ICC jurisdiction, the OTP cannot rely on the 2009 Declaration for anything.

Third, any subsequent declaration filed by Palestinian representatives with the ICC pursuant to Article 12(3) or any other applicable article *cannot confer jurisdiction on the ICC for alleged crimes or situations occurring prior to* 29 November 2012, since the declaring "State" did not exist prior to that date and, hence, could not convey authority it did not then possess over events that occurred prior to its coming into existence on territories over which it had neither title nor possession[23]. The exact same problem about title and possession continues to exist, since the UNGA resolution did not change a single fact on the ground, and the PA does not now exercise—*and never has exercised*—sovereignty over any portion of the former territory of the Mandate for Palestine[24].

Fourth, again, *assuming arguendo* that a Palestinian "State" now exists (which both law and facts refute), a number of unresolved issues between Israelis and Palestinians and among the Palestinians themselves present obstacles to ICC involvement. For example, there remain serious and vexing questions regarding over what territory the new "State" exercises—*or has the right to exercise*—sovereign control so as to be able to convey whatever jurisdiction it possesses to the ICC. As between Israelis and Palestinians, among other matters[25], the location of internationally recognised borders and the ultimate territorial extent of both Israel and a State of Palestine remain to be determined. Moreover, a multitude of issues remain to be resolved among the Palestinians themselves, particularly since two distinct and rival Palestinian factions have been exercising some degree of control over different parts of the land that the Palestinian "State" claims for itself[26]. Hence, it is unclear which Palestinian entity (if any) has the legal authority to lodge a declaration with the ICC, in relation to which territory or territories and how that is to be determined, by whom and on what legal basis, especially since, to date, no Palestinian "State" with internationally recognised borders has ever existed.

Fifth, even if a Palestinian "State" now exists pursuant to the UNGA resolution (which both law and facts refute), the PA is nonetheless still bound by the terms of agreements it freely entered into with Israel, including, for example, the terms of the 1995 Israeli-Palestinian Interim Agreement. The 1995 Agreement expressly provides that Palestinian authorities will have no criminal jurisdiction whatsoever over Israeli citizens[27]. Accordingly, a Palestinian "State", *if one exists*, lacks the capacity to empower the ICC with criminal jurisdiction over Israelis, since it cannot confer on a third party

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[23]The issue of which territory or territories the Palestinian "State" possesses also remains problematic. Since both Palestinians *and* Israelis have legitimate claims to the same territory, such territory is, at best, disputed. *See* Trilateral Statement, *supra* note 17; *British Mandate for Palestine*, 3 League of Nations O.J. 1007 (1922). How, then, can the ICC be expected to know *with any assurance* over which territory it has been given jurisdiction? Even the PA's 2009 Declaration merely mentioned "Palestinian territory", without defining for the Court what such territory entailed. G.A. Res. 67/19, at 1–2, U.N. Doc. A/RES/67/19 (29 Nov. 2012).

[24]Despite the current Fatah-Hamas "unity" government, Hamas still dominates and governs the Gaza Strip. It is the only Palestinian entity to approach exercising sovereignty over any land in Palestine.

[25]Numerous issues remain unresolved, such as the status of certain Israeli settlements, location of final borders, control and ownership of Jerusalem, and the rights of Palestinian refugees.

[26]Despite periodic attempts to form unity governments, such efforts have not proven durable over time. Hence, one can expect to encounter split governments in the future.

[27]Interim Agreement, *supra* note 11, at art. XVII(1)(a).

authority which it does not possess. Hence, the effect of any new Article 12(3) declaration by the Palestinians would extend ICC jurisdiction to alleged crimes committed on "Palestinian territory" (as yet undefined) by *non-Israeli citizens only*.

III. EVEN ASSUMING, ARGUENDO, THAT THE PA BECAME A STATE VIA THE UNGA RESOLUTION AND ACCEDED TO THE ROME STATUTE, BECAUSE ISRAEL IS NOT A PARTY TO THE ROME STATUTE, THE ICC WOULD VIOLATE CUSTOMARY INTERNATIONAL LAW TO BRING ISRAELI NATIONALS WITHIN ITS JURISDICTION

Under international law, a country which has not become a party to a treaty or other international convention is not bound by the terms of such treaty or convention[28]. This principle limits the ICC in the following ways:

First, Israel is not a State Party to the Rome Statute and, hence, is not—*and cannot be*—lawfully bound by the Rome Statute's terms or obligations without its express consent. Nor, under customary international law, may Israel be compelled to subject itself to the reach of the Rome Statute. Despite arguments that the Rome Statute is aimed at punishing *individuals* who commit the crimes set forth in Article 5 of the Rome Statute, and not governments, such arguments are, in fact, legally specious. When the government of a state exercises its sovereign authority regarding the acceptance or rejection of a treaty, the officials of that state are acting as organs of that state. Hence, when Israel or the United States or the People's Republic of China refuses to assent to a treaty like the Rome Statute, each is refusing to place its respective territory ***and people*** within the jurisdiction of such treaty. *Moreover, since the ICC itself is the creation of a group of like-minded sovereign states, the ICC is subordinate in authority to all sovereign states. Accordingly, ICC officials may not, on their own volition, assert ICC jurisdiction over a third-party, sovereign State which has not freely consented thereto. For the ICC to do so would violate international law, thereby delegitimizing the court.* As such, the creation of a group of sovereigns may not judge, or assert jurisdiction over, a third-party sovereign—including individuals acting on the latter's behalf—without the third-party sovereign's express consent thereto.

Second, the principle enshrined in the Vienna Convention on the Law of Treaties[29] has been taken even further by international tribunals. The ICJ Statute, for example, specifically requires that parties consent to its jurisdiction before the ICJ will adjudicate a matter[30]. 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 United States of America)* ("*Monetary Gold*")[31]. 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[32]. When the war ended, both

[28] *See, e.g.*, Vienna Convention on the Law of Treaties, art. 34, 23 May 1969, 1155 U.N.T.S. 331.
[29] *See id.*
[30] Statute of the International Court of Justice arts. 34(1), 36(2)–(3), 26 June 1945, 59 Stat. 1031, 33 U.N.T.S. 993.
[31] Monetary Gold Case (It. v. Fr., U.K., & U.S.), 1954 I.C.J. 19.
[32] *Id.*

Albania and Italy claimed the gold and submitted competing claims to international arbitration[33].

While waiting for the outcome of the arbitration proceeding, the governments of France, the U.K., and the U.S. 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"[34] 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 U.K., and the U.S. In its application, Italy argued (1) that France, the U.K., and the U.S. should deliver the gold to Italy, and (2) that its right to the gold superseded the U.K.'s right to partial satisfaction of damages sustained during the Corfu Channel incident[35]. The first claim is the most relevant to the ICC's consideration of jurisdiction in the Israeli-Palestinian situation.

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"[36]. As mentioned above, however, integral to this dispute was the claim of Albania—an unnamed third 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"[37]. Therefore, the ICJ held that it "cannot decide such a dispute without the consent of Albania"[38]. 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"[39].

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[40]. In 1989, Australia, believing that the island of East Timor was under Indonesian control, signed a treaty with Indonesia regarding use of East Timor's continental shelf[41]. Yet, Portugal, which had controlled East Timor exclusively from the sixteenth century until 1975[42], claimed that any treaty executed without its consent was invalid[43]. 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

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[33] *Id.*
[34] *Id.* at 21.
[35] *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.
[36] *Id.* at 31.
[37] *Id.* at 32.
[38] *Id.*
[39] *Id.* (emphasis added).
[40] Case Concerning East Timor (Port. v. Austl.), 1995 I.C.J. 90.
[41] *Id.* at 101–02.
[42] *See id.* at 95–96.
[43] *Id.* at 94–95.

relation to its continental shelf lay with Portugal or with Indonesia"[44]. 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[45]. 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[46]. 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[47].

Third, 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*[48]. In that case, Larsen refused to pay fines associated with traffic citations[49]. 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[50] 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[51]. The PCA held that because the interests of the U.S. were "a necessary foundation for the decision between the parties", it could not rule on the dispute at hand[52]. 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[53].

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"[54]. ***The ICC, as an international tribunal bound by international law, should likewise refrain from invoking jurisdiction to determine the relative rights of a non-consenting third party, Israel.***

Any exercise of jurisdiction over the Israeli-Palestinian situation would directly contradict these well-established principles of customary international law. Of utmost importance is the fact that the treaty under which the ICC was formed, the Rome Statute,

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[44] *Id.* at 102.
[45] *Id.* at 105.
[46] *Id.* at 104.
[47] *Id.* at 105.
[48] Award in the case of *Larsen v. Hawaiian Kingdom*, 119 I.L.R. 594 (Perm. Ct. Arb. 2001) [hereinafter Award], *available at* http://www.pca-cpa.org/upload/files/LHKAward.PDF.
[49] *Larsen v. Hawaiian Kingdom, Memorial of Lance Paul Larsen*, ¶ 48–52 (Perm. Ct. Arb. 2000), *available at* http://www.alohaquest.com/arbitration/memorial_larsen.htm.
[50] *Id.* ¶ 47.
[51] Award, *supra* note 48, ¶ 2.3.
[52] *Id.* ¶ 11.23.
[53] *Id.* ¶ 11.21.
[54] *Id.* ¶ 11.20 (emphasis added).

has never been signed by Israel[55]. As such, the Rome Statute confers neither rights *nor obligations* on Israel without its consent.

Indeed, if the ICC were to exercise jurisdiction over the Israeli-Palestinian situation, Israel would be compelled (against its will) to adhere to the myriad of obligations delineated in the Rome Statute, which would constitute a direct violation of international law. For example, Israel would presumably be required to open up its investigatory and prosecutorial processes to the ICC Prosecutor so that she could determine their efficacy (e.g., so that she could determine whether she should apply the principle of complementarity and forego further prosecutions)[56]. Additionally, because the ICC would be required to analyse whether Israeli commanders properly relied on information and intelligence when making decisions to attack certain objectives, Israel would be forced to produce such informational and intelligence records[57]. Compelling such intrusive disclosure would violate Israel's sovereignty since Israel had never acceded to the treaty requiring these actions.

The ICC would also be required to decide whether Israel's actions were governed under the principles of international humanitarian law *or* international human rights law. To make that determination, the ICC would be required to determine whether the Israel-Palestinian situation constituted an armed conflict[58]. Thus, the ICC would necessarily have to decide issues such as (1) the legal grounds on which Israel decided to apply armed force in the situation; (2) whether Israel employs an "occupying" force; and (3) whether Israel is entitled to the right of self-defence. *Such determinations would constitute the very subject matter of any proceedings and would directly affect Israel's legal rights as a sovereign state and a non-party to the Court.*

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 should refuse to exercise jurisdiction over the Israeli-Palestinian situation for the same reason. Moreover, any attempt to bring Israeli citizens before the ICC 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 is bound by the *Monetary Gold* principle in

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[55]*See* Int'l Criminal Court, The States Parties to the Rome Statute, http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last visited 17 Sept. 2014) (listing the current signatories to the Rome Statute by region).

[56]*See* UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, art. 18, 17 July 1998.

[57]*See id.* art. 28.

[58]Indeed, international humanitarian law ("IHL") applies only to nations during wartime. INT'L COMM. OF THE RED CROSS, INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW: SIMILARITIES AND DIFFERENCES 1 (2003), *available at* http://www.ehl.icrc.org/images/resources/pdf/ihl_and_ihrl.pdf. IHL instruments include the Geneva Conventions and their applicable protocols, while the IHRL is embodied in the International Covenants of Civil and Political Rights and on Economic, Social, and Cultural Rights as well as in the Conventions on Genocide, Racial Discrimination, Discrimination Against Women, Torture, and Rights of the Child. *Id.* at 1–2. *Because these instruments implicate different obligations depending on whether a nation is at war*, the ICC would be required to make such an initial determination in order to institute the proper standard of review and, if necessary, the proper penalty.

accordance with customary international law. In short, given that Israel is a non-party, non-consenting State vis-à-vis the Rome Statute, absent a referral by the UN Security Council under Chapter VII of the UN Charter[59], the ICC must decline to exercise jurisdiction over Israeli nationals, irrespective of any actual or claimed PA right to accede to the Rome Statute.

CONCLUSION

In light of the foregoing and despite the 29 November 2012 adoption by the UNGA 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, *no matter how many think Palestine should be a State*[60]. Accordingly, any PA attempt to accede to ICC jurisdiction must be rejected forthwith. For the OTP to permit the PA to accede to ICC jurisdiction would contravene customary international law regarding what it takes to constitute a "State", would violate the clear language of the Rome Statute (which limits accession to "States"), and would politicise the Court. Moreover, any involvement by the ICC in the many ongoing political controversies surrounding the issue of Palestinian statehood (including a Palestinian penchant to simply disregard prior agreements they solemnly entered into when they determine that the terms of such agreements are no longer convenient) will doubtless 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 Rome Statute itself as well as with the statehood requirements enshrined in customary international law and must reject any forthcoming PA Declaration as improperly lodged by a non-State entity.

Respectfully submitted,

Jay Alan Sekulow
Chief Counsel

Robert W. Ash
Senior Counsel

[59]Even if the UN Security Council were to refer the situation in Gaza to Your Excellency for investigation (as it did regarding Darfur), Israel's cooperation and compliance would be based on its membership in the United Nations and its obligations under the UN Charter to obey certain Security Council resolutions, not on any obligation whatsoever Israel is alleged to have to the Rome Statute vis-à-vis its nationals. Such a Security Council referral would, in effect, incorporate the Rome Statute's requirements by reference.

[60]Remember that the means for establishing Palestinian statehood—to wit, via bilateral negotiations between the parties—have already been agreed to by both sides. All that remains to be done is for the Palestinians to engage in good-faith negotiations.