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His Excellency Luis Moreno-Ocampo
Prosecutor, International Criminal Court
Post Office Box 19519
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Via Email

RE: Jurisdiction and the Palestinian Declaration

Dear Mr. Moreno-Ocampo:

On November 19, 2009, I submitted a letter and memorandum to you, joined by other U.S. international law scholars, arguing that the International Criminal Court (ICC) does not have the jurisdiction to pursue the matters submitted by the Palestinian Declaration of January 21, 2009. I also participated in the NGO Forum at the Court in October, and refer you to the arguments made there.

Developments since that time serve only to reinforce our studied view that the Office of the Prosecutor should not assert jurisdiction in this matter. Please consider these recent developments, in light of established law and practice.

I. The ICC may not act upon a submission by a nonstate entity, and Palestine is not a state.

A. At this time, Palestine is not recognized as a State, and even the Palestinians themselves acknowledge that statehood is a future goal toward which they are working.

Official statements, resolutions and reports issued recently by key actors in the international community confirm that a Palestinian State has not yet come into being. Thus, a statement issued on September 21, 2010, by the Middle East Quartet (the U.N., the E.U., the U.S. and the Russian Federation) spoke of negotiations that “should lead to an agreement that ends the occupation...and results in the emergence of an independent,

democratic, contiguous and viable Palestinian State....”¹ The Council of the European Union passed a resolution on December 13, 2010, commending the Palestinian Authority in building institutions for “the future State of Palestine.”² In a Joint Press Conference held by U.S. President Barack Obama and U.K. Prime Minister David Cameron on May 25, 2011, the British Prime Minister said, “[I]n the end, the Palestinian state will only come about if the Palestinians and the Israelis can agree to it coming about.”³ Professor Omar Dajani, the former Palestinian negotiator and legal advisor, recently acknowledged, “[T]he fact that Palestinian officials are discussing declaring independence later this year confirms that even they do not presently regard Palestine as a state.”⁴

In the end, there may be differing views about the future timetable and process leading to the creation of a Palestinian State, but there is no viable argument that such a State already exists. Nor is there support in the Rome Treaty for any unique definition of statehood applicable to proceedings before the ICC. A state is a state and, absent a referral of the matter by the U.N. Security Council, the OTP should conclude that there is no jurisdiction.

B. In addition to international recognition, statehood requires satisfying the Montevideo criteria, which are not met by the situation on the ground in Gaza.

The situation on the ground indicates that key attributes of statehood have not been established. For example, in the most recent report on “Palestinian State-Building” published on April 13, 2011, by the Office of the U.N. Special Coordinator for the Middle East Peace Process, it was concluded that:

Despite the progress achieved, the key constraints to the existence and successful functioning of the institutions of a potential State of Palestine arise primarily from the persistence of occupation and the unresolved issues in the Israeli-Palestinian conflict. This, together with the continuing Palestinian divide, deprives the PA of the ability to extend its institutional authority to areas outside its reach, and of key attributes of statehood which enable a government to deliver to its people.⁵

¹ Statement by Middle East Quartet (21 September 2010), <http://www.un.org/News/Press/docs/2010/sg2162.doc.htm>.

² 17738/10 Foreign Affairs Council of 13 December 2010- Council Conclusions on the Middle East Peace Process, at 3 (Dec. 13, 2010), <http://register.consilium.europa.eu/pdf/en/10/st17/st17738.en10.pdf>.

³ Press Release, Remarks by President Obama and Prime Minister Cameron of the United Kingdom in Joint Press Conference in London, United Kingdom (May 25, 2011) (<http://www.whitehouse.gov/the-press-office/2011/05/25/remarks-president-obama-and-prime-minister-cameron-united-kingdom-joint->).

⁴ Omar M. Dajani, *September song*, FOREIGN POLICY (May 24 2011, 2:00 PM), http://mideast.foreignpolicy.com/posts/2011/05/24/september_song.

⁵ United Nations Special Coordinator for the Middle East Peace Process (UNSCO), Palestinian State-Building: A Decisive Period, Ad Hoc Liaison Committee Meeting (Apr. 13, 2011), <http://unispal.un.org/UNISPAL.nsf/47D4E277B48D9D3685256DDC00612265/19E5539F9124AB2085257870004D8264>.

Indeed, even the former Palestinian negotiator and legal adviser, Professor Omar Dajani, has recently acknowledged that, notwithstanding the potential flexibility of the Montevideo criteria for statehood, the PA continues to lack fundamental attributes of independence:

What the PA lacks, however, is...independence. The PA is a creature of the Oslo agreements, which sharply limit its territorial, functional, and personal jurisdiction and assign Israel overriding authority in a number of realms. Absent a formal change of status, the PA's authority continues to be subordinate both to Israel and the PLO; it does not possess the legal supremacy in the areas under its jurisdiction that is the hallmark of statehood.⁶

Even if the situation is evolving toward statehood, it has clearly not reached that stage and, in any event, the Court would be limited to looking at the situation as of the date that the PA submission (of January, 2009) seeks to activate ICC review, namely July 1, 2002. Although not controlling, press reports indicate that the ICC President himself, Judge Sang-Hyun Song, recently acknowledged this difficulty, observing that the ICC has been unable to move forward on the Palestinian submission because the Palestinian National Authority is not a fully sovereign state and therefore the Court lacks jurisdiction.⁷

II. To assert jurisdiction would embroil the Court inappropriately in political issues and controversies.

As argued in prior submissions and statements, the question of a Palestinian State is wrapped up in the political complexities and diplomatic negotiations of the Middle East peace process, which are to be decided at the political level, and not by an international criminal court. Indeed, there is continuing evidence that it is precisely the intention of the PA to utilize the Court, among other international institutions, to leverage its political position and its claim to future statehood. Professor Omar Dajani, the former legal advisor to the Palestinian negotiating team in peace talks with Israel, recently acknowledged this:

Statehood will not absolve the Palestinians of the need to negotiate with Israel regarding almost the full array of "permanent status" issues....

But it could also help to improve the Palestinians' negotiating leverage by raising the costs to Israel of perpetuating the status quo. For example,

⁶ Dajani, *September Song*, *supra* note 4.

⁷ Occupied Palestine, *Technical Problems hinder probes into situations in Palestine- International Criminal Court Chief- 24/5/2011* (May 25m 2011, 11:36 PM)
<http://occupiedpalestine.wordpress.com/2011/05/25/technical-problems-hinder-probes-into-situations-in-palestine-international-criminal-court-chief-%D8%A7%D9%84%D9%82%D9%88%D8%A7%D9%86%D9%8A%D9%86-%D9%88%D8%A7%D9%84%D8%AA%D8%B4%D8%B1%D9%8A%D8%B9/>.

it would permit Palestine to accede to the Rome Statute, enabling the International Criminal Court to exercise jurisdiction to prosecute Israel war crimes in Palestinian territory—including, under Article 8(b)(viii) of the Statute, the continuation of settlement activity. It could also help to clarify the legal framework applicable to the negotiation of sticky issues like the allocation of water resources.⁸

The Israel-Palestinian conflict is a complicated matter involving a wide array of issues such as Jerusalem, settlements, borders and allocation of shared water resources, just to name a few, that have yet to be resolved within the political and diplomatic frameworks. The Court will sustain damage to its own credibility, reputation and future effectiveness if it allows itself to become leveraged or embroiled in such matters through a jurisdictional reach. In addition, it will further complicate the resolution of these matters through the appropriate diplomatic and political processes in a way that is neither helpful nor appropriate.

A further complication is raised by the recent unity government entered into by the PA and Hamas, a terrorist organization. As President Barack Obama stated on May 22, 2011: “[T]he recent agreement between Fatah and Hamas poses an enormous obstacle to peace. No country can be expected to negotiate with a terrorist organization sworn to its destruction.”⁹ The recognition of new states in international law has long been conditioned on their commitment to peace, and the involvement of Hamas will make this an even thornier issue, again a matter in which the Court should not insert itself.

The experience of Judge Richard Goldstone in such matters is instructive. Having authored a report expressing serious concern about activities in Gaza, he has recently acknowledged that, “If I had known then what I know now, the Goldstone Report would have been a different document.”¹⁰ Again, events on the ground as they have unfolded suggest that the Court need not, and should not, invest itself in the matters complained of.

Moreover, the thorough investigations conducted by Israel also lead to the same conclusion. In the 27 months that have passed since Operation Cast Lead, Israel has conducted a significant number of investigations into the allegations related to the operation. These investigations resulted in a number of criminal proceedings and disciplinary measures. In addition, many lessons learned were implemented by the Israel

⁸ Dajani, *September Song*, *supra* note 4.

⁹ President Barack Obama, Remarks by the President at the AIPAC Policy Conference 2011 (May 22, 2011), (transcript available at <http://www.whitehouse.gov/the-press-office/2011/05/22/remarks-president-aipac-policy-conference-2011>).

¹⁰ Richard Goldstone, *Reconsidering the Goldstone Report on Israel and War Crimes*, THE WASHINGTON POST (Apr. 2 2011), http://www.washingtonpost.com/opinions/reconsidering-the-goldstone-report-on-israel-and-war-crimes/2011/04/01/AFg111JC_story.html.

Defense Forces. These facts were recognized by a Committee of Independent Experts of the UN Human Rights Council.¹¹

III. The legal integrity of the Court is at risk in accepting jurisdiction of this matter.

The last place where law would countenance teleology or creative expansion is in a criminal court, where the law rightly requires that clear, bright lines be drawn and followed. Why?

* Because of the extremely serious consequences of criminal prosecution.

* Because defendants deserve to know where the lines of criminal conduct and criminal jurisdiction are drawn.

* Because criminal matters cannot be redefined to, in effect, create jurisdiction after the fact.

Professor Larry May of Vanderbilt University has written several books on the philosophy of international law, including international criminal law. He has made well the point that international criminal law, especially in its early stages of establishing systems and credibility, must err on the side of caution, not expansion, especially with regard to definitions of crimes and jurisdictional matters.¹²

Indeed this was the concern expressed by the Task Force of the American Society of International Law when it complimented the Prosecutor's jurisdictional decisions to date, but cautioned: "Yet another test for the ICC will be how it handle the declaration lodged on January 22, 2009, by the Palestinian National Authority (PNA) pursuant to Article 12(3) of the Rome Statute. . . . The matter raises issues about the authority of the Prosecutor, and of the ICC, to treat as a State an entity which is not generally recognized as a state and which is not a U.N. member."¹³

Further, noting the intention of the PA to leverage its case for statehood through the ICC, is the OTP really prepared to entertain submissions from into the grievances of the Chechens, or non-state entities in North and South Ossetia, Tibet, Sudan, Iraqi Kurdistan, and the Basque region, to name a few? Starting down this road could render the court an international arbiter of claims to statehood rather than a legitimate

¹¹ A/HRC/16/24 - Report of the Committee of independent experts in international humanitarian and human rights law established pursuant to Council resolution 13/9 (18 March 2011), http://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A.HRC.16.24_AUV.pdf.

¹² See, e.g., L. MAY AND Z. HOSKINS (EDS.), INTERNATIONAL CRIMINAL LAW AND PHILOSOPHY (CAMBRIDGE UNIV. PRESS 2010).

¹³ WILLIAM H. TAFT, PATRICIA M. WALD ET AL., U.S. POLICY TOWARD THE INTERNATIONAL CRIMINAL COURT: FURTHERING POSITIVE ENGAGEMENT, REPORT OF THE INDEPENDENT TASK FORCE OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 49 (2009), available at <http://www.asil.org/files/ASIL-08-DiscPaper2.pdf>.

international court with the stated purpose of investigating and prosecuting the gravest crimes against humanity.

CONCLUSION

The time has come to bring an end to the 27-month preliminary examination conducted by the OTP in this matter. The Court must act in accordance with its Statute and respect the clear jurisdictional provisions upon which its mandate is founded. We do not believe there is room for interpretation of the term State, and we fear that the Court may find itself embroiled in political matters. Recent instability and volatility in the Middle East reflect the importance of maintaining a Court that is credible, professional and based on international consensus. Ultimately this will also be the Court's strongest claim to its goal of universal membership, and its legitimacy to act in those cases where it does possess jurisdiction.

Respectfully Submitted

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