

May 05, 2021

Mr. Karim Asad Ahmad Khan
Office of the Prosecutor
International Criminal Court
The Hague, Kingdom of the Netherlands

Dear Mrs. Khan,

I represent **Hanna Apel, Pua Steiner and Malka Babad**, three elderly women, residing in the Jewish Quarter in the holly city of Jerusalem.

Hanna, Pua and Malka were young girls when they, together with their families and all Jewish residents of the Jewish Quarter, were forcefully deported from their homes in 1948 by the Jordanian Legion. Later, they came back to reside in the Jewish Quarter after Israel has regained control over the Jewish Quarter.

My clients are no War Criminals. They were the victims of such atrocities. Yet, the ICC pre-trial Chamber ruling has potentially deemed them as such, together with their families, their neighbors and any person who assists them to continue to reside in their homes.

We have filed an observation on their behalf in the Pre-Trial Chamber¹. Regretfully – it was completely ignored but the Majority's opinion. Thus, as you enter the position of the ICC prosecutor and come consider the issue of the "situation in Palestine", we hereby ask to bring you again their stories, the story of the Jerusalem and our legal arguments, to request you to reconsider the Prosecution's position on the issue, as whole.

We shall be thankful for your prompt reply.

Respectfully,



¹ ICC-01/18-79

Nitsana Darshan-Leitner
President, Shurat HaDin Israel Law Center

Jerusalem

1. For millennia, the Holy City of Jerusalem has been home to thousands of Jews.² Since 1830, Jewish inhabitants have constituted a majority of the city's population,³ many living in the Jewish Quarter in the Old City, in proximity to the Temple Mount, the ancient site of the Jewish King Solomon's edifice, Judaism's most sacred place.⁴
2. During the 1948 Israeli War of Independence, as Arab states surrounding Israel attacked, the Jordanian Arab Legion invaded the Jewish Quarter of Jerusalem, murdered many civilians and took remaining Jewish civilian males into captivity.⁵ The Jordanian Arab Legion destroyed the ancient Jewish Quarter and its surviving residents were deported from their homes⁶. After the 1967 Six Day War, Jews – many of these original residents of the Jewish Quarter – returned to inhabit the Jewish Quarter. **Despite the fact that the Quarter was never an area in which, prior to the 1948 war, Palestinians had ever lived, the Prosecutor has arbitrarily assigned the Jewish Quarter to the "Palestinian State".**

² Collection of Legal documents on the issue of Jerusalem can be found in: LAPIDOTH AND M. HIRSCH, *EDS.*, *THE JERUSALEM QUESTION AND ITS RESOLUTION: SELECTED DOCUMENTS* (Dordrecht, Martinus Nijhoff, and Jerusalem, The Jerusalem Institute for Israel Studies, 1994) XIX-CIX, (henceforth: Jerusalem Selected Documents).

On the history of Jerusalem in general, see e.g., YEHOASHA BEN-ARIEH, *JERUSALEM IN THE NINETEENTH CENTURY - EMERGENCE OF THE NEW CITY* (Yad Izhak Ben-Zvi, Jerusalem, and The Old City (Yad Izhak Ben Zvi, Jerusalem, and St. Martin's Press, New York, 1984); MARTIN GILBERT, *JERUSALEM: ILLUSTRATED HISTORY ATLAS* (New York, Macmillan, 1977); DAN BAHAT, *CARTA'S HISTORICAL ATLAS OF JERUSALEM* (Carta, Jerusalem (1986).

³ Ruth Lapidoth, *Jerusalem and the Peace Process*, 28 ISR. L. REV. 403

⁴ Censuses of Jewish community living in Jerusalem during the 19th century, known as the "Montefiore Censuses", can be found at: <https://www.montefioreendowment.org.uk/censuses/>.

⁵ MOTI GOLANI, *THE JEWISH QUARTER OF THE OLD CITY OF JERUSALEM IN THE WAR OF INDEPENDENCE FROM 29 NOVEMBER 1947, TO 28 MAY 1948* (1997); Shmuel Even-Or Orenstein, *A Crown for Jerusalem* JNF, 1996; Maoz Azaryahu and Arnon Golan, *Photography, Memory, and ETHNIC Cleansing: The Fate of the Jewish Quarter of Jerusalem, 1948 - John Phillips' Pictorial Record*, Israel Studies, volume 17 number 2

⁶ ORA PIKEL-TZABARI (ED.), *FROM CRISIS TO REBIRTH: THE STORY OF THE EVACUEES OF THE OLD CITY OF JERUSALEM 1948-1958* (2018). The distraction of Jewish quarter was described in the memoirs of the commander of the Jordanian Arab Legion, Colonel Abdullah el Tell's, (Cairo, 1959): "... The operations of calculated destruction were set in motion.... I knew that the Jewish Quarter was densely populated with Jews who caused their fighters a good deal of interference and difficulty.... I embarked, therefore, on the shelling of the Quarter with mortars, creating harassment and destruction.... Only four days after our entry into Jerusalem the Jewish Quarter had become their graveyard. Death and destruction reigned over it.... As the dawn of Friday, May 28, 1948, was about to break, the Jewish Quarter emerged convulsed in a black cloud - a cloud of death and agony", in Yosef Tekoah, [*Letter dated 5 March 1968 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General*](#),

3. These are the narratives of the circumstances of displacement of residents of the Old City whom we represent:
4. **Hanna Apel⁷**: Hana's family lived in the Old City of Jerusalem on HaKraim Street in a mixed Arab-Jewish neighborhood. Their once peaceful lives changed at the end of the summer in 1947, when their Arab neighbors beat and stabbed Jews who passed through the gates of the Old City and threw rocks at the buses. From that time, no resident was permitted to leave the Quarter unless absolutely necessary and Hanna could no longer attend school. Following General Assembly Resolution 181, tension in the Old City rose and the Jewish Quarter was besieged by hostile Arab forces. Hanna's family had to move to an abandoned home in the Quarter, and from then on, she lived in cramped apartments with multiple families. The Jewish families endured constant shelling by the Jordanian forces. The children helped protect their homes by filling bags of sand and boarded windows to protect from snipers. Children ran between the fortified positions delivering food. The Quarter greatly shrank in size. Residents crowded together, moving to the ground floors for shelter. As attacks on the Quarter multiplied, shopkeepers of stores from which they had previously provisions fled, and the food supply diminished. The enemy shelling of the civilians was frequent and there were many injured. In between fighting there would be short ceasefires. Quiet, however, was not long-lasting. It was always followed by more shelling. Before the British evacuated, Arab violence and terrorism increased in brutality. Many were injured and killed. There was no time for proper burials. When the British finally evacuated, the shelling multiplied, the residents cramped together, and the Quarter grew smaller still. They frequently heard Arabs boldly calling for a massacre of the Jews. On a Friday morning, as the Jordanian Legion was approaching to conquer the Old City, a delegation headed by Rabbis Mordechai Weingarten, Ben-Tzion Hazan and Yisroel Zev Mintzberg came out with the commander of the district Moshe Rusnak to surrender. The Jordanian commander, Abdullah-Tal, demanded that the Quarter be evacuated of all residents and took captive all males, including her father. One thousand and three hundred women, children, and elderly residents, left with their belongings in a convoy towards the Zion Gate. Hanna speaks of the terrifying journey

⁷ See: [Hana's detailed Testimony](#).

on their march outside the walls of the Old City, in which they left their few belongings on the way, as they were too burdensome to transport. The war continued, and her father remained in captivity. After the Six Day War, when the Old City was liberated by Israeli forces, she rushed to see her home again. According to Hanna, it was as if the Quarter had remained frozen for 19 years, awaiting its owners to return.

5. **Pua Steiner:** Pua was seven years old in 1948. She says⁸ that after the 1947 United Nation's Partition Plan, Jewish celebration was soon replaced by fear, as Arabs at the gates of the Old City would gesture to her and other Jewish residents as they passed that they would soon behead them. Three days later, Arabs burnt down the commercial center and besieged the Jewish Quarter. The British, who still had a military presence in the region would not protect them anymore. Her father was attacked and beaten by an Arab and Jewish resident remained in their homes. After Israel's Declaration of Independence, a barrage of heavy fire began. Since her family lived on the third floor of a building, and were vulnerable to the shelling, they relocated to the second, and then moved onto even lower floors. Eventually, three families were crowded into one room. She remembers that Arabs broke through the military checkpoints and came towards her family wielding knives. Eventually, the Jordanian Legion attacked, and as the Jewish defender's hold on the district was shrinking, more families fled towards the area she lived in. Two weeks later, the Quarter surrendered and all 351 soldiers and civilian males were taken into captivity by the Jordanians, including her father. The women and children were taken through the Zion Gate to the neighborhood of Katamon in West Jerusalem, where they would spend most of the war. Her father returned after nine months in captivity. They left their home without their possessions and remained impoverished. "We've lost everything," she said. They were permitted to bring one package each, but it was nearly impossible to carry a package of belongings and along with all of the children. She returned to the Old City in 1977, ten years after Jerusalem was freed by the Israeli military in the Six Day War. Although her father had been very active in the Old City community, he did not wish to return out of fear and his remaining trauma.

⁸ Her story, on the fall and evacuation of the Jewish Quarter, witnessed through the eyes of a young girl, is found in: PUAH STEINER, FOREVER MY JERUSALEM (1987). also: [Pua's detailed testimony](#).

6. **Malka Babad**⁹: Malka was born and raised in the Jewish Quarter, where her grandfather established the Yeshiva (Center for Jewish learning) Porat Yosef and attended a Jewish school there. She relates that prior to 1947, life alongside the Arabs was quite fine, but then following the UN Partition vote - Arab riots against them began. They remained isolated in the Quarter and the main passageway, the Jaffa Gate was closed, barring entry and exit. Her father was a Mohel (a ritual circumcizer) and was invited to perform a circumcision outside the walls of the Old City. After he left for the ceremony, he was barred from return to his home. Malka's mother, recovering from surgery in a nearby hospital, was also unable to return. Thus, Malka and her six young siblings remained home alone. Eventually, their grandparents from the neighboring Chabad Street in the Quarter were able to arrive to watch over them. When the shelling and gunshots began, they called upon all the residents to assist. Her Malka and her sister Naomi prepared bandages and medication for the wounded. Their food supply was sparse. Every family received one loaf of bread. Despite the difficult conditions, she explains that she "was not willing to surrender." Every day, her father stood outside the gate, but those who were permitted to enter were only the porters who brought in food. Her father would send through messages with them. One day, a messenger snuck her and her sister out of the Quarter on a bread truck, to western Jerusalem. When the Jewish Quarter surrendered, all the men were taken as prisoners and the women and children were transferred to the Katamon neighborhood, where she was reunited with her family. Out of fear and trauma, they preferred to stay together with multiple families in a single apartment. After the war her parents continued to live in Katamon and did so the remainder of their lives, but Malka returned to live in the Jewish Quarter in 1977. Five of her children were born there.

Observation A3: Addressing the Prosecutors Factual and Historical Background

7. Before addressing specific issues arising from the factual and historical background brought by the Prosecutor¹⁰ a more general methodological comment is required; the

⁹ See: [Malka's detailed testimony](#).

¹⁰ Prosecutor's request, Para 46 etc.

Prosecutor's heavy reliance on 'factual' information provided by bodies, organizations and persons, dedicated to the promotion of Palestinians interests and by politically oriented organizations, with an inherent political leaning against the State of Israel, results in a completely unbalanced and distorted depiction of the conflict and the adoption of a false Palestinian narrative as its sources. We respectfully refer the Chamber to the Prosecutor's duty to conduct an independent and impartial legal analysis to resolve a critical legal question¹¹. Such cannot be achieved by reliance on politically oriented bodies and their resolutions or relying on highly controversial academic sources which, instead of presenting a comprehensive narrative or examining different viewpoints and competing schools of thought' - presents what appears to be a polemic of Palestinian victimhood.

8. Thus, a breakdown of the factual and historical background demonstrates not only a clearly inaccurate factual background, but a completely distorted one as well. The historians who have reviewed this presentation have found not only critical errors and misrepresentations of almost all relevant facts, **but a sophisticated diminution of Jewish and Israeli rights, claims and narratives in relation to these territories.**
9. This is done in several ways. The most blatant is the complete **disregard** of key facts which either contradict and undermine the Palestinian narrative or which support Israeli claims. Two examples of this are, of course, the issue of the **affected communities**, including the circumstances of their displacement which are totally omitted, together with any reference to the existence of other Jewish communities which were displaced in 1948 from the area subject to the Prosecutor's request. Another, is the fact that issue of **Palestinian terror attacks**, taking the lives of tens of thousands of Israelis, is simply non-existent in the Prosecutor's historical description. In fact, the word "terror" appears only once, and it is placed in an irrelevant footnote.
10. In addition, historical facts that are mentioned in the Prosecutor's request come in the form of tainted details and selective reading. Here are some examples:
11. **The Balfour Declaration** (Art. 46) is presented in an improper manner and the referral to Palestinian right of self-determination is simply out of context; **First**, the Prosecutor quickly ties this declaration with assurances to Arab independence in the region. But

¹¹ Rome Statute, Art. 42.

although Great Britain had agreed to establish of an Arab state in an undefined area in Middle East/Fertile Crescent, it was definitely not in the territory of Palestine. As a matter of fact, the territories of Palestine were excluded from the territories allocated to the Arabs.¹² This fact found further reassurance in the Feisal - Weizmann Agreement.¹³ **Second**, the Prosecutor's referral to the *civil and religious* rights "of non-Jewish communities" guaranteed by the Declaration, only proves that it was not *national rights* of self-determination promised to these communities. These national rights were granted to Jews, in the whole territory of Palestine. This fact was echoed in the League of Nations' Charter of the British Mandate in Palestine (July 24, 1922), according to which "The Mandatory shall be responsible for placing the country under such political, administrative and economic conditions as will secure *the establishment of the Jewish National Home* [our emphasis], as laid down in the preamble... and also for safeguarding the civil and religious rights of all the inhabitants of Palestine, irrespective of race and religion".¹⁴

¹² According to the 1915 letter of Sir Henry McMahon, British High Commissioner in Cairo, to Sharif Hussein Ibn Ali of Mecca, "The two districts of Mersina and Alexandretta and portions of [greater] Syria lying to the west of the districts of **Damascus** [our emphasis], Homs, Hama and Aleppo cannot be said to be purely Arab, and should be excluded from the limits demanded". Sir Henry McMahon to Sharif Hussein ibn Ali (October 24, 1915), quoted in WALTER LAQUER AND DAN SCHEUFTAN (EDS.), *THE ISRAEL-ARAB READER*, 8th edition, 11 (2016). A detailed discussion and refuting of Arab claims as to the relevance of this letter to Palestine, see: Isaiah Friedmann, *The McMahon—Hussein Correspondence and the Question of Palestine*, 5 *Journal of Contemporary History* 83 (1970).

¹³ According to the agreement, signed on January 3, 1919, "His Royal Highness the Emir Feisal, representing and acting on behalf of the Arab Kingdom of Hejaz, and Dr. Chaim Weizmann, representing and acting on behalf of the Zionist Organization, mindful of the racial kinship and ancient bonds existing between the Arabs and the Jewish people [...] have agreed upon the following Articles: Article I) The Arab State [as promised by the British] and Palestine in all their relations and undertakings shall be controlled by the most cordial goodwill and understanding [...] Article II) [...] the definite borders between the Arab State and Palestine shall be determined by a Commission to be agreed upon by the parties hereto. Article III) In the establishment of the Constitution and Administration of Palestine all such measures shall be adopted as will afford the fullest guarantees for carrying into effect the British Government's Declaration of the 2nd of November, 1917 [i.e. the Balfour Declaration]. Article IV) All necessary measures shall be taken to encourage and stimulate immigration of Jews into Palestine on a large scale, and as quickly as possible to settle Jewish immigrants upon the land through closer settlement and intensive cultivation of the soil. In taking such measures the Arab peasant and tenant farmers shall be protected in their rights, and shall be assisted in forwarding their economic development."

¹⁴ *The Israel-Arab Reader*, p. 31. To make sure that the Palestinian civil and religious rights were indeed respected, they were allowed to vote for the municipalities and to run state religious institutions, such as the Supreme Muslim Council that overlooked the Muslim religious assets in Palestine. The Palestinian leadership however repeatedly rejected British offers to participate in the political institutional arena as long as the Balfour Declaration sets the legal basis of the Mandate (Rashid Khalidi, *The Iron Cage* (Boston: Beacon Press, 2006), 31-63). The fact that no Arab state in the territory of Palestine was planned at this time can be seen from the fact that the British Peel Commission plan (July 1937), to divide Palestine

12. **The "response" of the Arab side to the Partition Plan:** Here, the brutal, violent and fiery reaction of Arabs was downgraded in the Prosecutor's request into the word "response". By using this vague language, the request attempts to downplay both Palestinian and Pan-Arab fierce and complete rejection of UNGA Resolution 181, as reflected in *numerous announcements and overt threats to resolve the "problem" by force – annihilating the Jewish presence in Palestine*¹⁵. The word "response" is again later employed by the Prosecutor to also describe the break in the first stage of the War of Independence, thus justifying/diminishing brutal initiation of violence against Jewish civilians by Palestinians¹⁶
13. **The 1948 War of Independence** – continuing the line of understatement, the Prosecutor writes that “Fighting between the newly proclaimed state of Israel and its Arab neighbors led to the second phase of the Arab-Israeli war following the invasion of the Arab armies”. The Prosecutor's description of the circumstances which the 1948 War have unfolded is completely incorrect, both chronologically and factually and falsely portrays Israel as the ultimate aggressor. **First**, again, clever writing puts forward "Fighting between" to the "following" of the invasion. But the facts are clear and could have been easily written: "the state of Israel was attacked by Arab States, which invaded into its territory a day after it proclaimed independence and extended its hands in peace to its Arab neighbors".¹⁷ This distorted presentation of facts by the

between Jewish and Arab states: even at this time, the territory which was offered to the Arabs was not supposed by any means to become a Palestinian State, but rather be annexed to Trans-Jordan ([Anglo-American Committee of Inquiry - Appendix IV](#)).

¹⁵ This rejectionist line was manifested, for example in the speech delivered by Jamal Husseini, Chairman of the Palestine Arab Delegation, to the United Nations' General Assembly's Committee on Palestine, on September 29, 1947 (on the eve of the voting on the Partition Resolution in the General Assembly). According to Husseini, "The Zionist claims over Palestine to which the Jewish position in the diaspora and their political influence in the capitals of the world gave undue support, have no moral or legal basis [...] The Balfour Declaration that contradicts the covenant of the League of Nations [...] is an immoral, unjust and an illegal promise [...] Great Britain, therefore, has given a pledge that was null and void ab initio. Old Shylock's bond has been reproduced by Great Britain on the political stage, with the difference that the victim was not the debtor. As Shylock could not carve out his pound of flesh from the body of his debtor without spilling his blood, so Great Britain cannot fulfill her promise to the Jews without destroying Arab rights".

¹⁶ Prosecutor's Request, art. 47.

¹⁷ State of Israel, [Proclamation of Independence](#), May 14 1948, "We extend our hand in peace and neighborliness to all the neighboring states and their people, and invite them to cooperate with the independent Jewish nation for the common good of all". A day later, on May 15 1948, the armies of Egypt, Jordan, Iraq and Syria had invaded the former territory of Mandate Palestine and thus started the second phase of the war

Prosecutor continues with the false impression created as to the timing of the termination of the Mandate and Israel's Proclamation of Independence, which contrary to the impression created by the request, was made effective only at the termination of the Mandate and not before and had no effect on its termination¹⁸ **Second**, the request fails to mention that at this early stage, in the first months of 1948 and long before the British withdrawal, Arab League forces known as the "Arab Liberation Army" (ALA) had already infiltrated into Palestine and fought alongside the Palestinians against the Jewish community¹⁹.

14. **The elimination of Jewish Presence in all Arab controlled areas** – while addressing the undisputed flight of Palestinians from Israeli territories, which circumstances are indeed under controversy, the Prosecutor's request ignores the fact that – *contrary to the fact many Arabs have remained in the State of Israel - not even a single Jew was allowed to remain in his home on Palestinian/Arab controlled land. These territories became wholly Judenrein.*
15. In fact, at the beginning of the hostilities, when Palestinian militias were still operational, they had driven out Jewish population from neighborhoods such as Shimon Hatzadik (and later from the Old City's Jewish Quarter) in Jerusalem or frontier neighborhoods in Jaffa that were in predominantly Arab areas, or adjacent to them. The number of Israeli Jewish refugees throughout the war is estimated at 60,000, many of whom lost their homes permanently and could never return.²⁰ This ethnic cleansing of the Jewish populations is completely ignored.
16. **The 1967 Six Day War** – avoiding references to the circumstances, where it suits the Prosecutor's line of reasoning, the Prosecutor proceeds directly from 1949 to June 1967, asserting without any preface that "In June 1967, Israeli forces seized control of the West Bank including East Jerusalem, Gaza, the Golan Heights and the Sinai Peninsula following the Six-Day War with Egypt, Jordan and Syria, and placed the

¹⁸ The Prosecutor writes: "On 14 May 1948, Israel declared its independence. The Mandate immediately terminated with formal British withdrawal from the area". The Israeli Proclamation of independence writes: "We declare that, **with effect from the moment of the termination of the Mandate being tonight**, the eve of Sabbath, the 6th Iyar, 5708 (15th May, 1948) ...", *id.*

¹⁹ See: "Arab Liberation Army", in KRISTIAN COATES ULRICHSEN, A DICTIONARY OF POLITICS IN THE MIDDLE EAST (2018)

²⁰ See e.g. Nurit Cohen Levinivsky, *The Evacuation of Noncombatant Population in 1948: Three Kibutzim as a Case Study*, *Journal of Israeli History* 26, 1 (2007), pp. 1-34.

territories under Israeli occupation”, thus portraying Israel (again) as an ultimate aggressor.

17. Ignoring the chain of events which led to the 1967 War serves to illustrate how biased this request really is - Dramatic events which were so instrumental at the time are simply not being reckoned with: The blockade of the Tiran Straits in the Red Sea against Israeli shipping (years after the illegal closure of the Suez Canal), the entry of the Egyptian army into the Sinai Peninsula *en masse* and the deportation of the United Nations Emergency Force, that was stationed in the Sinai since 1956 is missing, let alone the belligerent rhetorical speeches of Egyptian President Nasser, such as his addressing of the Egyptian National Assembly: “But now the time has come - and I have already said in the past that we will decide the time and place and not allow them to decide - we must be ready for triumph and not for a recurrence of the 1948 comedies. We shall triumph, God willing. Preparations have already been made. We are now ready to confront Israel [...] We are now ready to deal with the entire Palestine question”.²¹
18. **Resolution 242** – This is a clear example, of both a selective reading and blatant disregard of historic outcomes which do not support the current Palestinian narrative.: While the Prosecutor's request draws upon only certain selected articles of UN Security Council Resolution 242 which call for the Israeli withdrawal from captured territory and a just settlement of the refugees problem, it fails to emphasize that these were conditionally placed for achieving peace and the “Termination of all claims or states of belligerency and respect for and acknowledgment of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force” (Article 2). Moreover, the request deliberately ignores the Arab League’s – another proud *amicus curiae* in these proceeding – resolution in Khartoum (September 1, 1967) known as “the Three No’s” rejecting 1) peace with Israel; 2) recognizing Israel and 3) negotiating with the Jewish State.²² In other words, the request unequivocally describes Israel as an ultimate anti-peace player and ignores both deeds

²¹ Ibid, May 29, 1967, *The Israel-Arab Reader*, note 21, 102-103.

²² [Security Council Resolution 242](#) (1967)

and documented statements of the Arab parties who refused to recognize Israel's right to exist and to conclude a peace treaty with it. It also fails to mention the Israeli Government's Resolution of June 19, 1967, which provides that: "Israel proposes concluding Peace with Egypt and Syria, based on the international borders and Israel's security needs."²³

19. **Palestinian Terror and the redeployment in the West Bank** (Art. 74) - "Nonetheless", writes the Prosecutor, "further Israeli redeployments from the West Bank halted". As in other observations in the request, this assertion simply ignores both facts and context: Failing to comply with their obligations under the Oslo Accords to refrain from incitement and bloodshed and to collect all illegal arms and explosives²⁴, Israel was struck in the mid-1990 by a massive wave of Palestinian Terror, and particularly by suicide bombing attacks in the heart of Israel that killed dozens of Israelis in each attack and wounded hundreds.²⁵ In other words, the focus of the Prosecutor fails to provide a valid description and understanding of basic facts and circumstances in the period under review and ignores Palestinian breaches of their obligations.
20. **The Security Barrier:** It is one thing to address the issue of the legality of the security Barrier, but completely another to bluntly disregard any Israeli suffering while doing so. "[A]ccording to Israel", writes the Prosecutor, "the barrier was built for security reasons". By 2004, as Israel concluded the first parts of the barrier (along the northern part of the West Bank) the number of Israeli victims of Palestinian terror in the 'second Intifada' since September 2000 (a wave of Palestinian terror which the Prosecutor again omits), was approximately 1000 fatalities and more than 5000 wounded, most

²³ [Israel Peace Initiative after 1967](#) (Hebrew).

²⁴ In his exchange of letters with Prime Minister Yitzhak Rabin on September 9, 1993, Chairman Yasser Arafat wrote, "the PLO renounces the use of terrorism and other acts of violence and will assume responsibility over all PLO elements and personnel in order to assure their compliance, prevent violations and discipline violators." ([Israel-PLO Recognition-Exchange of Letters between PM Rabin and Chairman Arafat Sept 9 1993](#)). [The Interim Agreement \(Oslo 2\) of September 28, 1995 \(Article XXII\)](#) states that Israel and the PA "shall seek to foster mutual understanding and tolerance and shall accordingly abstain from incitement, including hostile propaganda, against each other and, without derogating from the principle of freedom of expression, shall take legal measures to prevent such incitement by any organizations, groups or individuals within their jurisdiction."

²⁵ Israeli Foreign Ministry, ["Suicide and Other Bombing Attacks in Israel Since the Declaration of Principles \(Sept 1993\)"](#)

of them civilians (70%) who were murdered in Palestinian suicide attacks.²⁶ The construction of the barrier has had clearly positive effects in pre-empting suicidal terror acts against Israelis and significantly reduced the toll of dead and wounded civilians as a result of the barrier.²⁷

21. **Hamas Coup in Gaza** - While dealing with Palestinian matters - contexts, timeline and description of processes – the request is **meticulously** detailed, deviating from the narrow legal focus to provide more details and context (except where such information does not serve the Prosecutor's case). Regrettably, as shown above in numerous cases, when it concerns Israel, such empathy let alone providing essential explanatory context and facts, are completely ignored. The request reiterates these prejudiced differences of approach even within Article 80, describing in length Israel's restrictions on the Gaza Strip, but does not mention that this has preceded years of a continuous barrage of rockets on Israeli communities (towns and villages) and other hostile actions perpetrated by Hamas and other Jihadi organizations in the Gaza Strip since 2001.²⁸ This article is also an example of abundant factual mistakes: for example, it claims that “even after the disengagement from Gaza, Israel continued to control its borders”, while in fact Israel since the disengagement had forfeited control over the Gaza-Egypt border, which has been controlled by Egypt since then.²⁹ Also, it is mentioned that “The land borders with Israel are fenced off”, but the request fails to mention that the fence follows strictly the 1949 Armistice line, in accord with the 2005 Israeli re-deployment outside of the Gaza Strip (“disengagement”).³⁰ Perhaps the most distorted description here relates to the Hamas terrorist organization taking over Gaza by brute force in June 2007 (following its political dismissal from power by the PA), known also as “the Palestinian Civil War”, during which hundreds of Palestinians were executed by Hamas, and thousands were wounded.³¹ The request describes this bloody

²⁶ ["Terrorism Against Israel: Comprehensive Listing of Fatalities \(September 1993 - Present\)"](#) Jewish Virtual Library:

²⁷ [James Reynolds, *Israeli City Says Barrier is 'Working'*](#), Middle East Correspondent, *BBC News*, 14 September 2004:

²⁸ [Israeli Defence Forces, "Rocket Attacks on Israel from the Gaza Strip \[2001-2014\]"](#); Human Rights Watch, ["Gaza: Palestinian Rockets Unlawfully Targeted Israeli Civilians"](#) December 24, 2012.

²⁹ See: [Debate on the Knesset on the formation of agreement between Israel and Egypt regarding Israeli redeployment from the Gaza-Egypt border](#), 5 July 2007 [Hebrew].

³⁰ Israeli Ministry of Foreign Affairs, [Revised Disengagement Plan](#).

³¹ see: JONATHAN SCHANZER, *HAMAS VS. FATAH: THE STRUGGLE FOR PALESTINE* (2008).

coup as follows: “However, Hamas leaders refused to acknowledge their dismissal and have continued to exercise control in the Gaza Strip.”³²

22. The selective and misleading presentation of the facts, meant to portray Israel as the ultimate aggressor can be also found in the manner in which UNSC 1860 is referred to³³; The “grave concerns at the escalation and humanitarian situation” and the need for a "ceasefire leading to the full withdrawal of Israeli forces from Gaza" are in no way a recognition of the Security Council in an Israeli state of permanent occupation in Gaza. The context was Operation Cast Lead (December 27, 2007 - January 17, 2008), which aimed to stop Hamas’ missile attacks on Israeli civilian communities.³⁴ Thus, manipulation the wording of this resolution – written in a specific (temporal) context – to strengthen an argument of (permanent) occupation of Gaza.
23. **To conclude**, the request is based on an unbalanced presentation which consistently ignores factual context and reasoning when it comes to Israel. Whether it is Israel’s ability to uphold its responsibilities according the Oslo Accords or its reactions to Palestinian/Arab aggression, ranging from the 1948 War through the suicide bombing attacks of the mid-1990s, to the bloody and murderous Second Intifada that the request does not mention even once. Instead, the request devotes numerous pages to citing international decisions against Israel as if these were a product of pure and objective non-political considerations, or a proof of its guilt and not a result of the traditional anti-Israeli political constellation in the United Nations. Unfortunately, the request does not apply the same standard when it comes to explaining the Palestinian/ Arab situation and internal context that are sufficiently overviewed. A doubled-standard and biased approach on the Israeli-Palestinian conflict cannot contribute to the Court, or anyone else for that matter, to provide a better understanding of such a complicated conflict.

B. Legal observations

Observation B1: The legality of the return of the affected communities to their homes

³² Prosecutor request, para. 80.

³³ [UNSC Resolution 1860](#) (2009), Prosecutor's request, Art 82.

³⁴ Ethan Bronner, [“Hamas Shifts from Rockets to Culture War”](#), *New York Times*, July 23, 2009.

24. We have elaborated in our factual observations, presenting the stories of individuals and viable communities, who were living peacefully, featuring normal community lives, including schools, social activity, commercial interactions and religious practice - all ending abruptly and brutally in massacres and illegal deportations.
25. UNGA Resolution 181 did not intend to eliminate the presence of Jewish communities in areas subject both to the sovereignty of the Arab State nor the area subject to the "*corpus separandum*". In fact, the special committee on Palestine's report, which was adopted in this resolution, specifically referred to fact that "The wide diffusion of both Arabs and Jews throughout Palestine makes it almost inevitable that, in any solution, there will be an ethnic minority element in the population", and therefore recommended setting of guaranties respecting Human Rights and "Full protection for the rights and interests of minorities"³⁵.
26. More importantly, loss of the right of the **affected communities** to live in their homes cannot rise from the illegal and forceful deportation of these communities by the Occupying Power of Jordan in 1948 and/or by Palestinian irregulars. Such forceful deportation is illegal under Article 49 to the Fourth Geneva Convention³⁶, according to which "Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive". We note, that such deportation and forcible transfer of the Jewish population would even constitute today a Crime Against Humanity under Article 7 to the Rome Statute³⁷. **Therefore, once Israel has regained control of this area and the circumstances enabled the safe return of the Affected communities to their homes – their return cannot be deemed illegal under International Law.**

Observation B2: The Effects of the Requested Ruling on the Affected Communities

27. In her request, the Prosecutor argues, that the right to self-determination and the position of the international community "should be considered pertinent to its

³⁵ United Nations Special committee on Palestine, Report to the General Assembly, Recommendations VII, A/364, 3 September 1947.

³⁶ Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287, art. 49 [Fourth Geneva Convention]

³⁷ Rome Statute, Art 7.

assessment of the scope of the Court's own competence", although "the Pre-Trial Chamber need not, in this context, attempt to establish the holder of a valid title over the Occupied Palestinian Territory"³⁸

28. We believe that the Prosecutor errs on both counts - when regarding 'statehood' as the only form of the right of self-determination under International Law³⁹ and when contending that the Court's ruling shall not have an effect outside these proceedings.
29. **But even if we follow the Prosecutor's line of reasoning, then the Palestinian right to self-determination should not be the *only* right which the court should take into account: On the other side of the exact same coin, lay the effects of such recognition on other communities that inhabit the very same territory, such as the affected communities.**
30. Recalling the legitimate return of the **affected communities** to their homes, we believe the Chamber should be aware of the devastating consequences of the requested ruling on their lives, either if such recognition is solely "for the purpose of the Rome statute", or if Palestine's "statehood" is to be generally recognized by the court, according to the Prosecutor's alternative argument. **The Court will literally victimize the affected communities, once again – either by driving them from their homes or putting their lives in grave danger.**
31. The Palestinian Authority's refuses to acknowledge any rights of the **affected communities**. The Palestinian Authority President Mahmud Abbas has made it clear, that "In a final resolution, we would not see the presence of a single Israeli - civilian or soldier - on our lands."⁴⁰ This Palestinian position, completely rejects the rights of the **affected communities**, has been repeated many times, as Chief Palestinian Negotiator Saeb Erekat put it: "No settler will be allowed to stay in the Palestinian state, not even a single one, because settlements are illegal and the presence of the

³⁸ Prosecutor's request, part C.1, para 196.)

³⁹ JAMES CRAWFORD, BROWNIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 131 (9th ed. 2019): "Means of achieving self-determination include the formation of a new state secession, association in a federal state, or autonomy or assimilation in a unitary (nonfederal) state."

⁴⁰ Stuart Winer, [*Abbas pledges: There will be no Israelis in Palestine*](#), *times of Israel* July 30, 2013; Daniel Halper, [*Palestinian Leader's 'Final Resolution' Pledge: Not 'a Single Israeli — Civilian or Soldier — on Our Lands'*](#), *Washington Examiner*, July 30, 2013; Attila Somfalvi, [*Israeli official: Palestine should allow settlers*](#), *YNET*, (January 26, 2014)

settlers on the occupied lands is illegal"⁴¹ The complete rejection of the legitimacy of the presence of the **affected communities** assures that their rights shall not be respected by the PA, and it raises concerns both as to the **legal protection** under International Humanitarian Law and the Rome Statute and as to **actual imminent threat** to the lives and welfare of these communities.

32. From the legal point of view, even if only an *ad hoc* recognition will be granted by the Court, the **affected communities** shall be subject of an insufficient and sometimes vague legal protection under International Humanitarian Law or any other applicable legal regime. It would become a legal anomaly - they may have the right to return, but no concrete protection guaranteed to them (for example, such as under Occupation Law); They may live there, but any support they may require would be deemed illegal. Finally, Considering the tragic circumstances of their first displacement, if they are harmed, would a International Armed Conflict or a Non International Armed conflict regime apply?⁴² or would an Armed Conflict framework be relevant, at all?⁴³
33. These legal concerns are not theoretical: An imminent threat to the lives of the communities is posed by the Palestinian Authority's expressed policy of delegitimization of Jewish presence (both in the West Bank and in Israel), the incitement and demonization of Jewish settlers and glorification of their murderers: SHD has recently brought before the Prosecutor ample evidence of this conduct by Palestinian Authority officials⁴⁴;
34. For example, the Palestinian Authority Ministry of Education's instructional materials incite its students to violence directed specifically at Jews and Israelis. Islam is falsely presented as a deeply anti-Semitic religion. Youths in Palestinian Authority schools are falsely taught that Islam condemns Jews to a status of perpetual inferiority. For

⁴¹ Raphael Ahren and Marissa Newman, [Sources in PMO slam PA for saying no settlers can stay in 'Palestine'](#) *The Times of Israel*, 27 January 2014, at:

⁴² On the effects of the change in the nature of the conflict on protected persons, see: Siobhan Wills, *The Obligations Due to Former Protected Persons in Conflicts That Have Ceased to Be International: The People's Mujahedin Organization of Iran*, 15 J. Conflict & Sec. L. 117 (2010); Marco Sassòli and Laura M. Olson, *Prosecutor v. Tadić (Judgement)*. Case No. IT-94-a-A. 38 ILM 1518 (1999), 94 The American Journal of International Law 571 (Jul., 2000),

⁴³ In this case, Article 8 in the Rome Statute will not apply.

⁴⁴ Our letter to the Prosecutor, dated Jan. 1 2020, Our second letter Dated Nov. 25 2019, our additional letter from Jan 19 2020(OTP-CR-79/20

example, a 6th grade textbook currently in use by the Palestinians teaches that the Prophet Mohamed commanded his followers “to learn the language of the Jews in order to be safe from their cheating.”⁴⁵ An 11th grade text in Islamic Education declares that “God has prepared for [the Jews] and those perpetrating corruption (mufsidin) a painful torture.”⁴⁶ A 12th grade textbook declares that “the Jews' greedy ambitions in Palestine stem from their religious beliefs....”⁴⁷

35. This sub-human and perfidious status of Jews in Palestinian Authority textbooks is presented as a **justification for acts of violence against them**. According to Palestinian Authority educational materials, “Muslim countries today badly need Jihad and Jihad fighters in order to liberate the usurped land, evict the usurping Jews from the Muslim’s land in Palestine.”⁴⁸ Far from being a spiritual struggle, “jihad is the making of an effort in fighting the unbelievers in the battlefield” that involves definite acts of violence.⁴⁹ Jihad is a duty of the schoolchild. “The Muslim nation should be bent on constantly preparing for Jihad, as it is a Jihadic nation. The construction of the Muslim state’s military power is not merely for defensive preparation [purposes]. It is rather a definite matter so that it will be easier for the [Muslim] state to perform what God has imposed on it...”⁵⁰. This small sampling of materials contained in Palestinian Authority books indicates a deliberate effort to incite jihad attacks against Jews and Israelis because of their mere status as Jews and Israelis.
36. This indoctrination for hatred further receives encouragement by religious figures in the PA, adding a support for this indoctrination. According to Palestinian Authority Chief Cleric, Mufti Muhammad Hussein, “Palestine in its entirety is a revolution... continuing today, and until the End of Days. The reliable Hadith... says ‘The Hour [of

⁴⁵ Institute for Monitoring Peace and Cultural Education in School Education, Israel, the West, Women and the Environment in Palestinian Textbooks, 2011, *citing* History of the Arabs and Muslims, 133.

⁴⁶ *Id. citing* Islamic Education, Grade 11, Part 1 14-15 (2010).

⁴⁷ *Id. citing The Muslim World at Present*, 105 (1996).

⁴⁸ *Id. citing Religious Subjects for Grade 8, Unit 3: Noble Prophetic Hadith*, 12.

⁴⁹ *Id.*

⁵⁰ *Id. citing Islamic Systems* 183 (1996). A recent research on PA textbooks, which includes many examples taken from these books, shows that the educational system in PA territories is characterized by delegitimization, demonization and indoctrination to violent fight instead of a call for peace. Upon these principles, a distorted historical narrative is progressed, which leaves no room for peace: Arnon Groiss, Roni Shaked, [*Schoolbooks of the Palestinian Authority: The Attitude to Jews, to Israel and to Peace*](#) (Hebrew).

Resurrection] will not come until you fight the Jews. The Jew will hide behind stones or trees. Then the stones or trees will call: 'Oh Muslim, servant of Allah, there is a Jew behind me, come and kill him.'"⁵¹ This sort of sentiment, endorsed by the highest religious figure of the Palestinian Authority, and replete in the Palestinian Authority's educational materials, proves that when those students and former students act to "wage jihad," they do so with the intent of killing or injuring as many Jews, Israelis or both as possible, on the basis of their religion, ethnicity, and/or nationality and of destroying these groups as such.

37. The incitement against Israelis and Jews does not end in the Palestinian Authority's textbooks, however: it is further endorsed by a policy of the glorification of murderers of Israelis, which includes - amongst others - Official PA and PLO Ceremonies and receptions commemorating martyrs and inciting terrorist acts⁵², the naming of streets, squares and institutions for terrorists and the adulation and elevated social status provided to terrorists' families.⁵³
38. This ethos is also officially endorsed by the Palestinians 'pay to slay' scheme, condemned by many nations,⁵⁴ through which the Palestinian Authority provides financial incentives for war crimes. Payments payed to all Palestinian terrorists including Hamas members offer substantial *ex-ante* financial rewards for the commission of war crimes. Furthermore, this is *de facto* financial incitement to kill Jews and Israelis, as such. This criminal scheme is regulated officially by the PA, on a large scale, extending over many decades. Its most substantial beneficiaries are the vilest of all; mass murderers of hundreds of innocent women and children. These payments revictimize the families of victims who must watch these murderers payed

⁵¹ Palestinian Authority Television, Jan. 9, 2012.

⁵² See for example: The Meir Amit Intelligence and Terrorism Information Center, Legitimizing Terrorism: Mahmoud Abbas and other senior Fatah and Palestinian Authority figures honor terrorists involved in killing Israelis, November 22, 2018, at: <https://www.terrorism-info.org.il/en/legitimizing-terrorism-mahmoud-abbas-and-other-senior-fatah-and-palestinian-authority-figures-honor-terrorists-involved-in-killing-israelis/>; The Meir Amit Intelligence and Terrorism Information Center, https://www.terrorism-info.org.il/app/uploads/2018/12/H_313_18.pdf

⁵³ See for example: Kershner, Isabel, *Palestinians Honor a Figure Reviled in Israel as a Terrorist*, The New York Times, 11 Mar. 2010; Reuters, Haaretz, [Palestinians Honor Fatah Terrorist, despite Israel's Protests](#), Jan. 11, 2018.

⁵⁴ States that either halted PA aid or expressed their concern of the 'pay to slay' scheme include: The Netherlands, Australia, the United States, Norway, Great Britain.

for killing their loved ones.⁵⁵ They preclude any measure of closure to these tragic families.

39. **Thus, we believe that the Court should refrain from a recognition of the 'state' which, *inter alia*, deprives other legitimate inhabitants of the same territory, of their rights and even puts them in great peril.** Recalling the tragic circumstances in which these affected communities were first displaced from their homes, any ruling that may put them at the mercy of "the state of Palestine" will pose a clear danger for their lives.

Observation B3: The Applicable Standard of Proof and the Rights of Affected Communities

40. In light of the dramatic consequences of the requested ruling both on the **affected communities** and in many other aspects, the question further moves to the standard of proof required for such a ruling.
41. We contend that standard of proof as to jurisdiction, both on the issue of 'statehood' and the determination of its territory, is not of "reasonable basis to believe" standard of Article 53(1) of the Rome Statute for initiation an investigation, but that of Article 19(1), which sets a higher standard, according to which the Court must "satisfy itself [that] it has jurisdiction".
42. It is of no surprise that issues concerning challenges to the jurisdiction of the Court or the admissibility of a case were dedicated a separate and comprehensive framework, which applies **throughout the entire criminal process**. The legal determination of the question of jurisdiction is not dependent on multiple stages of the process. This is why Article 19(4) limits "any person or State referred to in paragraph 2" to challenge this issue "only once". It would be inconceivable, for example, that the question of jurisdiction will be ruled by different standards in respect to one person who is "an accused" and another person "for whom a warrant of arrest", but both would not be able to challenge it again, without "exceptional circumstances".
43. Furthermore, in this respect, we share the Prosecutor's concern, that "Pre-Trial and Trial Chambers must ensure, when judicial proceedings are triggered, that the Court

⁵⁵See: our letters to the Prosecutor, note 53.

has jurisdiction throughout the proceedings"⁵⁶. While the level of certainty as to **specific** questions relating to the *mens rea* or the *actus reus*, that may also be relevant to jurisdiction on a specific case may vary throughout the process (was the specific crime indeed committed in the territory subject to the jurisdiction of the Court?), the **general framework** in which the court will operate "throughout the proceedings" (is there a "State of Palestine" and what is its territory) is nondependent on the stage of the proceedings. The need to apply a uniform standard on the general framework "throughout the proceedings" is consistent also with Article 19(5), according to which states are required to "make a (*such*) challenge at the earliest opportunity"⁵⁷: it would be illogical to apply a lesser standard, just because the "opportunity" to challenge it has risen in an earlier stage, yet it would bind throughout the proceedings.

44. As the factual information relevant to this ruling already exists and it is non-dependent on the specific circumstances, there is no logic in applying different standards to such determination. This also why the Court should not postpone such a ruling, for the reasons brought by the Office of Public Counsel for the Defence⁵⁸.
45. But what would be the unified standard of proof applied in this case? In the matter of both *personal* based and *territorial* based jurisdiction under the Rome Statute, as the Court's jurisdiction is derived from on the delegation by a sovereign state of criminal jurisdiction over its territory and nationals, the question is whether – in any manner – the Court is utilizing legitimate authority is critical. The fact, that such application of powers has immediate implications on other states and communities, such as the **affected communities**, requires a higher level of certainty - even higher than a criminal domestic case, as this Court's responsibility far exceeds the internal relationship between that state and its nationals. What may satisfy a state for its own domestic procedures – may not be enough in this case. We also note, that the need to establish the nature of the conflict and the status of territory is integrated in the requirements of the *actus reus* and *mens rea* of the crimes under many of the crimes under the Rome Statute – for example, is the crime perpetrated in "occupied

⁵⁶ Prosecutor's request, para 28.

⁵⁷ Rome statute, Art. 19(5).

⁵⁸ ICC-01/18-44.

territories"? is it an International Armed Conflict or a Non International Armed conflict, etc. Thus, a higher-level of certainty is required both to the general framework the Court is applying its powers and to the requirements of crimes within the Rome Statute⁵⁹.

46. We also note, that the need to establish a level of certainty as to the existence of jurisdiction is also required by other criminal systems and international tribunals. For example, the ICJ has striven for a high level of certainty in issues regarding its jurisdiction, such as the Relevant Date and the Existence of a Dispute⁶⁰.

Observation B3 – The 'territory' of the 'State of Palestine' and the Affected Communities

47. Embedded in the erroneous argument of the existence of a "State of Palestine", lays also the issue of the territory of that state. In fact, these issues are inherently correlated and reflect on each other, as the ambiguity and uncertainty of one directly reflects on the other.
48. Yet, abandoning her own position, according to which a territory subject to the Court's jurisdiction can only consist of "the areas over which a State exercises exclusive and complete authority"⁶¹ the Prosecutor argues that the territory of "the State of Palestine" includes all "Palestinian territory occupied by Israel during the Six-Day War in June 1967, namely the West Bank, including East Jerusalem, and Gaza"⁶², and yet "the Pre-Trial Chamber need not, in this context, attempt to establish the holder of a valid title"⁶³.

⁵⁹ One possible option is that the court would apply the reasoning suggested by American Federal courts, distinguishing between the question whether the United States has jurisdiction over the site of a crime – which is a judicial question subject to the preponderance of evidence (*United States v. Bowers*, 660 F.2d 527, 531 (5th Cir. 1981), and the issue of whether the act was committed within the borders of the 'Federal enclave' - which is to be established beyond a reasonable doubt⁵⁹. In this case, the question is whether the alleged crimes have been committed within the 'Palestinian enclave', and thus must be proved beyond reasonable doubt *Government of Canal Zone v. Burjan*, 596 F.2d 690, 694 (5th Cir. 1979) *United States v. Parker*, 622 F.2d 298 (8th Cir. 1980); *United States v. Jones*, 480 F.2d at 1138.

⁶⁰ East Timor (Portugal v. Australia), Judgment, i.c.j. Reports 1995, p. 100, para. 22 ("it is **clear** that the Parties are in disagreement"); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (ii), pp. 614–616, paras. 27–33 ("Court must, however, still **ensure**);

⁶¹ Office of the Prosecutor, [Report on Preliminary Examination Activities 2019](#), 5 Dec. 2019, para. 47-48.

⁶² Prosecutor's request, Para 3.

⁶³ Prosecutor's request, para 196.

49. The Prosecutor refrains from making her own assessment of the territory subject to the Court's 'territorial' jurisdiction, as should have been required, in general, and more importantly in such a controversial or "exceptional" case, under dispute for almost a century. Instead, the Prosecutor simply relies on certain United Nation bodies and other's resolutions and statements, such as the "*Organization of Islamic Cooperation*", an organization which is inherently prejudiced to Israel's rights⁶⁴, as well as other political, biased and non-legally binding authorities.
50. Even this injustice is done in a very selective and misleading manner, as the Prosecutor chooses both to disregard Security Council Resolutions 242 (1967) and 338 (1973) - the only resolutions made by a political body that the parties accepted as binding in the course of negotiations between them, which refer to the need to achieve a solution of "secure and recognized boundaries"⁶⁵ and even the Palestinian own application as a member state, preceding resolution 67/19, according to which the "Palestinian leadership stands committed to resume negotiations on all final status issues — Jerusalem, the Palestine refugees, settlements, borders, security and water — on the basis of the internationally endorsed terms of reference, including the relevant United Nations resolutions, the Madrid principles, including the principle of land for peace, the Arab Peace Initiative and the Quartet Roadmap."⁶⁶
51. The Prosecutor further disregards more than 50 years of legal academic debate over the question of the status of the territory of the West Bank and Jerusalem, as many arguments have been set forth and different position taken as to the status of the West Bank and Jerusalem - many by prominent International Law experts.⁶⁷

⁶⁴ Prosecutor's request, para 214.

⁶⁵ S.C. Res. 242, U.N. Doc. S/RES/242, para. 1 (22 Nov. 1967); Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, 28 Sep. 1995, Preamble, para. 5.

⁶⁶ Mahmoud Abbas, [Application of Palestine for admission to membership in the United Nations](#) (Letter received on 23 September 2011 from the President of Palestine to the Secretary-General).

⁶⁷ Abraham Bell and Eugene Kontorovich, Palestine, *Uti Possidetis Juris* and the Borders of Israel (March 8, 2016). 58 Arizona Law Review 633-692 (2016); HENRY CATTAN, PALESTINE AND INTERNATIONAL LAW: LEGAL ASPECTS OF THE ARAB-ISRAELI CONFLICT 122-30 (1973); HOWARD GRIEF, THE LEGAL FOUNDATION AND BORDERS OF ISRAEL UNDER INTERNATIONAL LAW (2008); ELIHU LAUTERPACHT, JERUSALEM AND THE HOLY PLACES 5 (1968); Yehuda Z. Blum, *The Missing Reversioner Reflections on the Status of Judea and Samaria*, 3 ISR. L. REV. 279 (1968); Alan Levine, Note, *The Status of Sovereignty in East Jerusalem and the West Bank*, 5 N.Y.U. J. INT'L L. & POL. 485, 485-502 (1972); Stephen M. Schwebel, Comment, *What Weight to Conquest?*, 64 AM. J. INT'L L. 344, 344-47 (1970).

52. The perspective of the **affected communities** illustrates the anomaly of this legal attempt to assign territories to the Palestinian state 'solely' for purpose of this Court's jurisdiction while not attempting to establish – at the same time - a "valid title" on these lands: astonishingly how can the Court rule as to its own jurisdiction, over a territory under such controversy and with such devastating effects on the **affected communities**? In this sense, the "*exceptional*"⁶⁸ circumstances surrounding the controversy over Palestine and its borders, should serve not as a trigger to disregard well established principles of International Law and fuel the already existing legal and political controversy, but to act with trepidation, caution and restraint⁶⁹.

Observation B4: The Prosecutor's request ignores contradictory positions of the Palestinians on the Issue of Jerusalem

53. As the fate of the **Affected Community** in Jerusalem is being questioned, the Prosecutor laconic dismissal of the contradicting Palestinian arguments as to Jerusalem, raise more than an eyebrow, both as to her position as to Judaism's Holy City, and the entire way her assessment of the 'territorial' issue is conducted.⁷⁰
54. As reflected in numerous resolutions of United Nation organs and in the vast literature concerning this issue, there cannot be any doubt that even if there was a "State of Palestine", Jerusalem could not be considered as part of its territory. At most, the issue of Jerusalem is "unresolved" and there is a myriad of competing views on this issue⁷¹. In the words of the latest UNGA Resolution on the issue of Jerusalem in 2017: "Stressing that Jerusalem is a final status issue to be resolved through negotiations in line with relevant United Nations resolutions".⁷² We note, that under United Nation

⁶⁸ Prosecutor's request, para 146.

⁶⁹ We note, that the question of title is intrinsic to the issue of 'occupation', thus relevant to some of the alleged crimes within the prosecutor request (Prosecutor's request, para 95), as the question of title over the territory in question is interlinked with the existence a crime Art. 8(2)(b)(viii) to the Rome Statute. If the status of the territory itself is under controversy, then besides the question of Palestine's ability to delegate the territorial jurisdiction over this territory, how can the court determine if such a crime has been perpetrated?

⁷⁰ See: prosecutor's request, note 66.

⁷¹ See: for the different positions on the Issue of Jerusalem, see: Lapidoth, note,5, p. 411-416; most views, including those which do not recognize Israel sovereignty over Jerusalem, agree on the need for achieve an international agreement, accepted on relevant parties, on issue of sovereignty in Jerusalem. For example, see: Antonio Cassese, *Legal Considerations on the International Status of Jerusalem*, in PAOLA GAETA, AND SALVATORE ZAPPALÀ EDS, *THE HUMAN DIMENSION OF INTERNATIONAL LAW: SELECTED PAPERS OF ANTONIO CASSESE* 272 2009

⁷² United Nations General Assembly resolution ES-10/L.22 21 December 2017

General Assembly Resolution 181 and the Partition Plan, the area of "Jerusalem" is not limited to the Old City, but extends into Bethlehem and other locals.

55. In this respect, SHD respectfully draws the attention of the Court to the need to differentiate between the questions on the applicability of the Fourth Geneva Convention in the territory of Jerusalem and criticism raised towards Israeli conduct in this territory, and whether the 'State of Palestine' has gained sovereign rights in Jerusalem, allowing it to refer issues in this territory to the jurisdiction of the Court. These are two very distinct questions; as *even* if the Fourth Geneva Convention did apply, it would not necessarily mean that the territory belongs to Palestine and it can delegate its jurisdiction over it. For example, the ICJ has explained the applicability of the Fourth Geneva in the West Bank and Jerusalem, by the fact these territories were captured in an armed conflict between Israel and *Jordan* – two parties to the Geneva Convention⁷³. Such differentiation can also be found in Security Council Resolution 462, which addressed both the "specific status of Jerusalem" and the application of the Fourth Geneva Convention to this territory.⁷⁴
56. This differentiation is further emphasized by the contradictory nature of the Palestinian position on the issue of the sovereignty in Jerusalem; In other forums and instances, the governing authority of "Palestine" considers the "*corpus separatum*" - the Special International Regime for the City of Jerusalem under the UNGA Resolution 181,⁷⁵ to be determinative of the issue of Jerusalem and refrains from arguing that East Jerusalem is the territory of their 'state'.
57. A clear example for this can be found in the case pending before the ICJ on *Relocation of the United States Embassy to Jerusalem (Palestine v. United States of America)*⁷⁶.

⁷³ ICJ, [Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory](#), para 101. "[T]he Court considers that the Fourth Geneva Convention is applicable in any occupied territory in the event of an armed conflict arising between two or more High Contracting Parties. Israel and Jordan were parties to that Convention when the 1967-armed conflict broke out. The Court accordingly finds that that Convention is applicable in the Palestinian territories which before the conflict lay to the east of the Green Line and which, during that conflict, were occupied by Israel, there being no need for any enquiry into the precise prior status of those territories".

⁷⁴ "[United Nations Security Council resolution 476](#)" [United Nations](#). 30 June 1980.

⁷⁵ UNGA Resolution 181 (II) (1947). Also, we note that another GA resolution – RES 303, [Palestine: Question of an international regime for the Jerusalem area and the protection of the Holy Places](#) from 9 December 1949, reaffirmed the "*corpus separatum*" regime in Jerusalem (A/RES/303 (IV)). This resolution was omitted from the Prosecutor's request.

⁷⁶ See: [Palestine ICJ Application](#), 28 September 2018, paras. 4-9

In this case, the objection of Palestine to the relocation of the United States Embassy into West Jerusalem is based on an argument, according to which the Vienna Convention on Diplomatic Relations of April 18, 1961 only allows "the representational function of any diplomatic mission should be performed on the territory of *the receiving State*"⁷⁷. According to this argument, West Jerusalem does not compromise part of the "receiving state" of Israel, and thus the relocation of the embassy to this territory is in violation of "object and purpose"⁷⁸ of the Vienna Convention on Diplomatic Relations. Accepting this logic, the inevitable conclusion would be that East Jerusalem is also not part of a Palestinian state. Any other conclusion, according to which West Jerusalem is *not* part of Israel while East Jerusalem *is* part of the state of Palestine, would be both contradictory and unjust.

58. The Prosecutor's sole laconic argument in her footnote, is that "These references appear to be made in setting out the unique context of the treatment of the city of Jerusalem by the United Nations". This contradicts the Palestinian argument before the ICJ, based upon the Vienna Convention on Diplomatic Relations, relating to the issue of whether Jerusalem is in the *receiving state*. Furthermore, we refer the Court to the fact, that the Palestinian argument in the pending case before the ICJ is not the only case to reflect that Palestinian position on the issue of Jerusalem relies on the "*corpus separatum*" regime. For example, formal (and recent) Palestinian reliance on the "*corpus separatum*" regime and admittance of the fact that the legal status of Jerusalem is "Unsettled" is found in abundant formal letters and statements by the Permanent Observer of the State of Palestine to the United Nations, for example:

"Jerusalem has long-been accorded a special political and legal status, beginning with General Assembly resolution 181 (II) of 1947, in which the City was designated a *corpus separatum*, and the many resolutions thereafter ...

Mr. President,

Israel has never been recognized as sovereign over Jerusalem by any country. Its status remains unresolved, as affirmed in Security Council and General

⁷⁷ *Id.*, para 38.

⁷⁸ *Id.*, para 50.

Assembly resolutions and by its designation as a final status issue in the Middle East peace process for decades..."⁷⁹

59. The PA officials have repeated this position in further instances: in a recent United Nations supported international conference “on the issue of Jerusalem” held in Rabat in 2018, At that conference, Ziad Abuzayyad, Former Minister for Jerusalem Affairs of the Palestinian Authority presented his paper on “International law provisions applicable to the question of Jerusalem.” This paper concludes “Jerusalem is, **from the international law perspective, an area under international administration until an agreement is agreed upon between Israel and Palestine**, based upon ending the Israeli occupation of the Palestinian land, and guaranteeing the Palestinian national rights in Jerusalem as the capital of Palestine.”⁸⁰

Observation B6: The Prosecutor errs, both in arguing that Palestine can be considered as an *ad hoc* State "for the purpose" of article 12(2)(a) and in arguing that 'Palestine' is a state under General Rules of International Law

60. SHD has observed that many of the observations which were granted leave by the Chamber – some of leading experts in International Law – will focus on the erroneous

⁷⁹ [Statement by H.E. Dr. Riyad Mansour, Ambassador, Permanent Observer of the State of Palestine to the United Nations](#), United Nations Security Council, *The Situation in the Middle East, including the Palestine Question*, 8 December 2017; "...recent measures against Christian Churches attempt to severely change the status of Jerusalem and to further entrench Israel's illegal occupation of Occupied East Jerusalem and impose Jewish exclusivity over the City as a whole, **a City whose status remains that of "corpus separatum" under United Nations General Assembly Resolution 181 (II)**" Letter of Ambassador Riyad Mansour, Permanent Observer of the State of Palestine to the United Nations, [Status of Churches in Occupied East Jerusalem](#) (2 March 2018); "It is clear that this recent so-called law attempts to severely change the status of Jerusalem and to create an illegal Israeli and Jewish exclusivity over all of Jerusalem- **a city whose status remains that of "corpus separatum" under United Nations General Assembly Resolution 181 (II)**" Letter of Dr. Riyad Mansour, Ambassador, Permanent Observer, of the State of Palestine to the United Nations, [Latest unilateral and provocative Israeli measures](#) (5 January 2018); "The Security Council and General Assembly have explicitly called for the protection of the City's unique spiritual, religious and cultural dimensions and heritage. They have also repeatedly affirmed the legitimate interest of the international community as a whole in the question of Jerusalem, **which has long-been accorded a special political and legal status, beginning with General Assembly resolution 181 (II) of 1947, in which the City was designated a corpus separatum**"; Letter of Dr. Riyad Mansour, Ambassador, Permanent Observer, of the State of Palestine to the United Nations, [Letter on Guatemala's decision to transfer embassy to Jerusalem](#) (26 December 2017); a similar quote was also included in: Letter of Dr. Riyad Mansour, Ambassador, Permanent Observer, of the State of Palestine to the United Nations on [US Actions on Jerusalem – PSC](#), 6 December 2017.

⁸⁰ Ziad Abuzayyad, [International law provisions applicable to the question of Jerusalem](#), International Conference on the Question of Jerusalem, Rabat, 26 - 28 June 2018 (emphasis added).

nature of the Prosecutor's arguments on the issue of 'statehood' of Palestine⁸¹. Therefore, in order not to echo those observations, and although we will briefly point at the main errors in the Prosecutor's arguments, our focus will be on presenting the distorted outcomes of the requested ruling on the **affected communities**. We believe, that by presenting some of the concerns and outcomes, resulting from the suggested deviation from the general principles governing the interpretation of International Law and the rules Governing the question of Statehood, the Chamber may realize that severity of these outcomes and the need for restraint.

61. Briefly referring to the general framework relevant, we refer the court to a well-established principle, according to which "provisions conferring jurisdiction on an international tribunal or imposing criminal sanctions should be strictly interpreted".⁸²
62. We note that the interpretation of the term "state" in the Rome Statue, in which it is not defined, should be done in accordance with the customary rules of treaty interpretation reflected in the Vienna Convention on the Law of Treaties, which require that "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"⁸³. Thus, the term 'state' should be interpreted according to well-established Customary International Law concerning statehood and the criteria for statehood, as codified in The Montevideo Convention⁸⁴. Under that criteria, a sovereign Palestinian State indisputably does not exist: A "state" is neither a "quasi-state" nor can it be an *ad-hoc* state for the purposes of the Rome Statute. An entity cannot become a state merely by accession to the Rome Statute, as it would replace material criteria with technical ones: the act of accession is meant to signify the acceding entity's undertaking of various rights and obligations – with the assertion of

⁸¹ ICC-01/18-45 (Professor Robert Badinter and others), ICC-01/18-37 (Buchwald & Rapp), ICC-01/18-29 (Germany); ICC-01/18-26 (The Lawfare project and others); ICC-01/18-21 (Tuoro Institute of Human Rights and the Holocaust); ICC-01/18-22 (Czech Republic); ICC-01/18-34 (International Association of Jewish Lawyers and Jurists).

⁸² The Prosecutor v. Ferdinand Nahimana (Appeal Judgment), ICTR-99-52-A, 28 November 2007, para 313. Written in the context of Temporal Jurisdiction of the court.

⁸³ Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, art. 31(1). See: The Prosecutor v. Jean-Pierre Bemba Gombo et al., ICC-01/05-01/13, Judgment pursuant to Article 74 of the Statute, para. 17 (19 Oct. 2016).

⁸⁴ The Montevideo Convention on the Rights and Duties of States, art. 1, 26 Dec. 1933, 165 L.N.T.S. 19

criminal jurisdiction by an international tribunal. It cannot replace the material criteria for statehood. These criteria, which includes the requirement of an effective control on territory, reflect the basic principles embedded in International Law upon which the Rome Statue is based: It is the sovereignty of the state over its territory, that enables the delegation of criminal jurisdiction to the Court, in order for it to gain its criminal jurisdiction. The Palestinian Authority cannot delegate what it does not, and never has, possessed, making this case fundamentally different from the case of Georgia, referred by the Prosecutor⁸⁵, whose territorial rights and possession on areas, occupied by Russia, where previously recognized.

Observation B5: Mixing Jurisdiction with Admissibility

63. "Finally," writes the Prosecutor, "deeming Palestine to be a State for the purposes of the Rome Statute is consistent with its object and purpose, that is, "[a]ffirming that the most serious crimes of concern to the international community as a whole must not go unpunished"⁸⁶.
64. SHD respectfully notes that the question of gravity is inherently a question of *admissibility* and a policy consideration relevant to *case selection*, but it arises only **if the jurisdiction barrier is crossed**.
65. The issue of the gravity of the situation, in cases in which neither personal nor territorial jurisdiction applies, is **not left unanswered by the Rome Statue**, as the Security Council can refer such a situation to the Court⁸⁷. We note, that the Prosecutor herself has referred to this option in the case of her decision not to investigate the situation in Syrian Arab Republic⁸⁸. In that situation, relating to the same period of time relevant to the present request, the most terrible atrocities have been (and still are) committed, leaving over 400,000 dead and about 12 million displaced (and

⁸⁵ Prosecutor's request, para. 191; Decision on the Prosecutor's request for authorization of an investigation, 27 January 2016, ICC-01/15

⁸⁶ Prosecutor's request, para 180.

⁸⁷ Rome Statute, art. 13(b).

⁸⁸ [Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the alleged crimes committed by ISIS](#), 8 April 2015

counting)⁸⁹. No crime within the Rome statute was left unperpetrated, including the crime of Genocide. Yet, despite the *undisputed personal jurisdiction over thousands of ISIS combatants*, including some of ISIS' leaders⁹⁰, and despite the Prosecutor's own acknowledgment that "some of these individuals may have been involved in the commission of crimes against humanity and war crimes", the Prosecutor chose in 2015 not to open an investigation.⁹¹ As "the gravity of the crimes, the degree of responsibility of the alleged perpetrators and the potential charges"⁹² leaves no question as to which case **really** concerns the "most serious crimes of concern to the international community as a whole", it remains to wonder: if gravity considerations should indeed "bend" the rules of jurisdiction, pushing to '*case specific*' application of jurisdiction – why has the fountain of creative legal arguments, gushing from the Prosecutor's request, dried in that (most horrific) case, where a clear and *indisputable* hold of the Court's jurisdiction was available?

Concluding remarks: The Fate of the Affected Communities and the Prosecutor's Request

66. The case of the **Affected Communities**, completely disregarded by the Prosecutor, should serve as a reminder as to the tremendous complication of the situation in Palestine, one of the most complicated – if not the most complicated – conflicts in the last century. The Prosecutor essentially requests the Chamber to adjudicate issues that are at the very heart of the longstanding political dispute between Israel and the Palestinians, and which deeply touch upon the collective aspirations and narratives of each side. They are, as such, nonjusticiable by the International Criminal Court.

⁸⁹ CNN Library, [Syrian Civil War Fast Facts](#), October 11, 2019, at:

⁹⁰ The main reason brought by the prosecutor not to open an investigation was the fact that ISIS was led by Syrian and Iraqi leaders. Yet, not only that this assumption is not accurate (see for example information in: [Communication to the prosecutor of The Human Rights and Gender Justice \(HRGJ\) Clinic of the City University of New York \(CUNY\) School of Law](#), p. 61-83), but it is left to wonder whether the potential prosecution of thousands of ISIS combatants for uncountable atrocities, including Genocide, torture, murder rape is to be disregarded by the court just because their leaders were not of a member state nationality. At least, was that case not even worth a request under art. 19(3) for the court to rule, just as the case of Palestine?

⁹¹ Statement of the Prosecutor of the International Criminal Court, note 95.

⁹² Office of the prosecutor, Policy paper on case selection and prioritization 15 September 2016, p. 12

67. The fate of the **Affected communities** also illustrates that the notion of an *ad hoc* determination for the purposes of the Rome Statute, as suggested by the Prosecutor, or that such determinations can be made without prejudice to any final settlement between Israelis and Palestinians, does not survive scrutiny. Any determination that the Court has jurisdiction, as requested by the Prosecutor, would have immediate and concrete effects that are outside of the framework of the International Criminal Court.
68. The International Criminal Court is fundamentally ill-suited for such a purpose and the Chamber should therefore refuse the Prosecutor's request to determine that it has territorial jurisdiction in this case.
69. We call upon the Chamber, not to re-victimized the Communities which have been violently displaced and deem them criminals for returning to live in their ancestral homes.