



הארגון הבינלאומי של עורכי-דין ומשפטנים יהודים (ע"ר)
THE INTERNATIONAL ASSOCIATION OF JEWISH LAWYERS AND JURISTS (R.A.)

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

February 10, 2015

By email

Re: The Palestinian Attempt to Grant the Court Jurisdiction

Dear Madam Prosecutor:

I am writing to you concerning your announcement dated January 16, 2015, on the commencement of "a preliminary examination into the situation in Palestine". I wish to address a number of serious concerns regarding this announcement.

Considering the complexity of certain issues surrounding the Palestinian attempt to accept the ICC's jurisdiction, the rapidity with which the announcement regarding the Preliminary Examination appeared was unexpected. Even more surprising was the fact that your announcement included statements that prejudice the crucial issues of Palestinian eligibility to grant the Court jurisdiction, and of the temporal scope of the Court's jurisdiction. The decision to open a Preliminary Examination and to decide these critical issues based on what is described in the announcement as "previous extensive analysis... and consultations" within your Office, without giving the concerned parties an opportunity to present their opinions, diverges from the practice established by your predecessor, Prosecutor Ocampo, and raises serious due process concerns.

It is our position that any steps advancing this Preliminary Examination would be undertaken *ultra vires*, since "Palestine" does not fulfill the criteria for statehood under international law and is therefore unable to grant the Court jurisdiction. We draw the Court's attention to Article 1 of the Montevideo Convention on the Rights and Duties of States (1933): "The state as a person of international law should possess the following qualifications: a) permanent population; b) a defined territory, c) government, and d) capacity to enter into relations with other states.

An international judicial body cannot proceed on the basis of determinations which are essentially political in nature. This is especially true in the case of a body responsible for dealing with criminal cases, with the authority to determine the fate of accused persons, such as the ICC.

It is my firm view that the statement contained in your announcement according to which UN Secretary-General Ban Ki-Moon "accepted Palestine's accession to the Rome Statute", is incorrect. The Secretary General is not authorized to reach a legal determination regarding Palestinian eligibility to grant the ICC jurisdiction. Moreover, he never purported to make a determination on this matter. In his Note to Correspondents dated January 7, 2015, made specifically in the context of the Palestinian request to join the Rome Statute, the

רחוב דניאל פריש 10, תל אביב 64731, דניאל פריש סטריט 10, תל אביב 64731
TELEPHONE: 972-3-6910673 :טלפון: 972-3-6910673 FAX: 972-3-6953855 :פקס: 972-3-6953855
IAJLJ@GOLDMAIL.NET.IL WWW.INTJEWISHLAWYERS.ORG



הארגון הבינלאומי של עורכי-דין ומשפטנים יהודים (ע"ר)
THE INTERNATIONAL ASSOCIATION OF JEWISH LAWYERS AND JURISTS (R.A.)

Secretary General stressed the purely administrative nature of his role as depositary, stating explicitly: "It is important to emphasize that it is for States to make their own determination

with respect to any legal issues raised by instruments circulated by the Secretary-General." Since the Secretary-General may not make any substantive legal determinations regarding the instruments circulated by him as depositary, this act cannot be the legal basis for any action by the OTP.

Your reliance on a decision adopted by majority in the UNGA, a political body, which merely granted the PLO the procedural designation of a non-member observer state in the UN, as signifying the decisive date for Palestinian statehood, is not merely erroneous. It also endangers the standing of the Court as an independent, non-political judicial institution.

The text of Resolution 67/19 makes it absolutely clear that it was never intended to establish a Palestinian state; on the contrary, under the Resolution a negotiated settlement is the only means of establishing a Palestinian state. The Resolution stresses the urgent need for the resumption and acceleration of negotiations within the peace process, with the goal of reaching a resolution on a number of critical matters including borders and the issue of settlements.

Your January 16th announcement gives no indication that any of the aforementioned issues were considered prior to its publication. In light of this, and in order that the OTP may remain untainted by any suspicion of actions taken *ultra vires* or of succumbing to political pressure, the preliminary examination should first and foremost conduct a thorough examination of the issue of the Palestinian Authority's eligibility to grant the Court jurisdiction.

Of course, it is critical at this early stage that the OTP refrain from making any determinations regarding the status of the disputed territories over which the Palestinians presume to grant the Court jurisdiction.

It is to be hoped that the Court will guard itself carefully against any attempts to misuse it as a means to achieve narrow political goals. Instead of allowing itself to be pulled into these issues, the Court should focus on the important tasks for which it was founded, and which it has consistently striven to achieve since its establishment - combating the mass atrocities which regrettably still occur in many places worldwide.

Yours sincerely,

Adv. Irit Kohn
President