

ADVISORY BOARD:

Elliott Abrams
Amb. Yehuda Avner
Prof. Alan Dershowitz
Tom Gross
Col. Richard Kemp CBE
Douglas Murray
Hon. Fiamma Nirenstein
Dr. Judea Pearl
Judge Abraham Sofaer
Elie Wiesel
Prof. Ruth Wisse
R. James Woolsey

PRESIDENT:

Prof. Gerald Steinberg

VIA HAND DELIVERY AND E-MAIL

His Excellency Luis Moreno-Ocampo
Prosecutor, International Criminal Court
Post Office Box 19519
2500CM The Hague
The Netherlands

October 20, 2010

RE: The Palestinian Declaration and ICC Jurisdiction

Dear Mr. Moreno-Ocampo:

Attached please find a copy of NGO Monitor's Submission to the Office of the Prosecutor (OTP) regarding the January 21, 2009, declaration of the Palestinian National Authority purporting to accept the jurisdiction of the ICC.

NGO Monitor has prepared this statement to address several aspects of the legal arguments raised by several of the submissions to the Court as well as to provide background information and context that may not be known to the OTP. We hope that this information will aid you in assessing the legality of the PNA declaration.

NGO Monitor also grants permission to the OTP to post its submission on the ICC website.

Respectfully submitted,

Anne Herzberg
Legal Advisor, NGO Monitor

**NGO Monitor Submission to the International Criminal Court Office of
the Prosecutor Regarding the “Situation in Palestine”**

October 20, 2010

Summary of the Argument

- I. The Palestinian National Authority is not a State. It does not have the competence to accede to the Rome Statute.
- II. The Position Known as the “Teleological Approach” is Nothing More than a Thinly Veiled Attempt to Change the Explicit Wording of the Rome Statute, Transforming the ICC into a Court of Universal Jurisdiction. Universal Jurisdiction for the ICC was Expressly Rejected by the Drafters of the Statute.
 - A. The “object and purpose” of the Rome Statute do not support a “teleological” interpretation of “Statehood.”
 1. The Treaty codified a system of complementarity with national courts. The ICC was never intended to supplant national jurisdiction.
 2. Article 15 does not allow the Prosecutor to open cases that do not fall within the jurisdictional pre-conditions specified in Article 12.
 3. The drafters of the Rome Statute explicitly rejected universal jurisdiction.
- III. Claims of a “Zone of Impunity” in this Case are False, Misleading, and Highly Offensive.
 - A. The Rome Statute and the UN Charter Provide Clear Mechanisms to Prevent Impunity.
 - B. Israel is Committed to the Rule of Law. Submissions Alleging a “Zone of Impunity” in Israel are False, Misleading, and Highly Offensive.

1. Israel is a “social and democratic state with rule of law.”
2. Courts around the world have repeatedly and soundly rejected the claims of Al Haq and PCHR that impugn the Israeli legal system.
3. Israel is currently conducting investigations as to whether violations of international law took place during the Gaza War.
4. A negotiated settlement between the parties will provide additional remedies for those who may have suffered wrong-doing.

IV. The PNA and its Supporters Have “Unclean Hands”. The Court should not Allow Itself to be Exploited by Those Who Brazenly Flout its Authority.

A. The PNA and its State supporters in the Arab League are Marred by “Unclean Hands.” As a Result, the PNA Declaration Must be Immediately Rejected.

1. The PNA and the members of the Arab League are some of the foremost perpetrators of international crimes and have repeatedly and openly challenged the authority of the Court with regards to the case against Sudanese President Omar al-Bashir.
2. In its declaration, the PNA represented that it would “cooperate with the Court without delay or exception” pursuant to Part 9 of the Rome Statute. It has not kept its promise.

B. Several NGO supporters of the PNA declaration are also marred by “unclean hands.”

V. The PNA Declaration and its support by NGOs is Part of the “Durban Strategy” or “War by Other Means.”

"We must ... take a decisive stance of solidarity alongside fraternal Sudan and President Omar al-Bashir."

--Remarks of Mahmoud Abbas, President of the PNA, to fellow attendee, Omar al-Bashir, at the March 30, 2009, Arab League Summit in Doha, less than one month after the ICC issued a warrant for Bashir's arrest, and only two months after the PNA purported to accept the jurisdiction of the ICC

The remarks quoted above of Palestinian National Authority President, Mahmoud Abbas, are indicative of something very wrong in today's international system. International institutions and universal human rights have been hijacked and exploited by their worst abusers in order to carry out a cynical political campaign. This campaign is not about ending "impunity for the most serious of international crimes" or fostering "justice" but rather aimed at exploiting international legal institutions in order to achieve what has yet to be accomplished on the battlefield or at the negotiating table. These tactics have been endemic at the UN Human Rights Council and the General Assembly for many years, and now, those advancing this campaign have targeted the ICC, seeking to subvert this Court and the Office of the Prosecutor in furtherance of this agenda.

In the wake of the Palestinian National Authority's (PNA) January 21, 2009, declaration purporting to accept jurisdiction of the ICC under Article 12(3) of the Rome Statute, and the numerous submissions made by academics and NGOs in furtherance of the PNA position, NGO Monitor has prepared this submission, addressing several aspects of the legal arguments raised as well as to provide background information and context that may not be known to the Office of the Prosecutor (OTP). We hope that this information will aid the OTP in assessing the legality of the PNA declaration.

NGO Monitor is a Jerusalem-based research institution that tracks the activities and campaigns as well as the funding of NGOs operating in the Arab-Israeli conflict. For more than eight years, NGO Monitor has conducted dozens of detailed and systematic research studies on the issues of NGO transparency, accountability, international law, human rights, humanitarian aid, and the laws of armed conflict. Members of NGO Monitor's Advisory Board include Elie Wiesel; Harvard Professor Alan Dershowitz; Colonel Richard Kemp, former commander of British forces in Iraq and Afghanistan; R. James Woolsey, former US Director of Central Intelligence; Member of Italian Parliament, Fiamma Nirenstein; US Jurist and former Legal Advisor to the State Department, Abraham Sofaer; Ambassador Yehuda Avner; UCLA Professor and President of the Daniel Pearl Foundation, Judea Pearl; Harvard Professor Ruth Wisse, former US government official, Elliot Abrams; Douglas Murray, Director of the Centre for Social Cohesion, best-selling author and commentator; and British journalist and international affairs commentator, Tom Gross.

After assessing the Rome Statute, the PNA declaration, and the submissions to the OTP, NGO Monitor concludes that 1) because the PNA is not a State, it does not have the competence to accede to the Rome Statute; 2) the "teleological" approach is merely an attempt to transform this Court into one of universal jurisdiction; 3) claims of a "lack of recourse" or "impunity" in this case are overstated and misleading; 4) the PNA and its supporters openly defy the authority of the Court and its objectives; and 5) the PNA declaration is a part of the "Durban Strategy" – a political campaign that uses the rhetoric of

human rights and international law in order to attack the legitimacy of the State of Israel. The Court should not allow itself to be exploited for these political ends. Therefore, the OTP should reject the PNA's declaration forthwith.

I. The Palestinian National Authority is not a State. It does not have the competence to accede to the Rome Statute.

The Palestinian National Authority has purported to accept the jurisdiction of the ICC based on Article 12(3) of the Rome Statute. The Statute is clear, however, that the Court only has jurisdiction over States. As the PNA is not a State, it cannot accede to the Rome Statute.

One of the cornerstones of international law and a *jus cogens* norm is *pacta sunt servanda* ("agreements must be kept").¹ According to law professor Mark Janis, "probably no rule better fits the definition of a norm of *jus cogens* than *pacta sunt servanda* . . . a norm that sets the very foundations of the international legal system."² This principle was restated in Article 26 of the Vienna Convention on the Law of Treaties: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."³

The principle of *pacta sunt servanda* also requires that treaties "should prima facie be enforced according to their terms."⁴ Art. 31(4) of the Vienna Convention affirms that special meaning should only be given to a term "if it is established that the parties so intended." The International Court of Justice reiterates that "to adopt an interpretation which [runs] counter to the clear meaning of the terms would not be to interpret but to revise the treaty."⁵ Furthermore, "the principles of interpretation [of the Vienna Convention] neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended."⁶

Based on these principles, "the very genesis of the [ICC] in a multilateral treaty should generate reluctance to stray from the clear precepts adopted by states after years of diplomatic effort."⁷ The language of the Rome Statute was carefully crafted after much deliberation and compromise. The jurisdictional parameters of the Court adopted by the State parties as a result of these negotiations created a system that "is based squarely on traditional modes of jurisdiction exercised by states."⁸ The Rome Treaty was never intended to "be construed as establishing a supranational institution which w[ould] interfere with the core issues of state sovereignty."⁹ The Rome Statute clearly mandates that in order for the Prosecutor to initiate an investigation and the Trial Chamber to hear a case, the crimes at

¹ BLACK'S LAW DICTIONARY

² MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW, 2d Ed. 65-66 (1993)

³ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, reprinted in 8 *I.L.M.* 679 (1969) See also the Convention Preamble which states, "Noting that the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized . . ."

⁴See Andreas F. Lowenfeld, *Lex Mercatoria: An Arbitrator's View*, 6 *ARB. INT'L* 133, 148 (1990).

⁵ THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC AND POLITICAL ANALYSIS, VOL. 2, (eds. Patrick F. J. Macrory, et. al.) citing ICJ Reports, 1950, 229.

⁶ THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC AND POLITICAL ANALYSIS, VOL. 2, (eds. Patrick F. J. Macrory, et. al.) citing ICJ Reports, 1950, 229. citing Report of the Appellate Body, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R (1998) para. 46.

⁷ Michael A. Newton, *The Quest for Constructive Complementarity*, (Vanderbilt University Law School, Public Law and Legal Theory Working Paper Number 10-16), at 5, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1585402.

⁸ Gerhard Hafner, et. al, *A Response to the American View as Presented by Ruth Wedgwood*, 10 *EUR. J. INT'L L.* 109, 117

⁹ *Id.* at 123

issue must fall within the jurisdiction of the Court. Those jurisdictional criteria are measured by statehood.

Article 12 sets out the preconditions necessary for the Court to exercise its jurisdiction:

Article 12
Preconditions to the exercise of jurisdiction

1. **A State** which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.

2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following **States** are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

(a) **The State** on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;

(b) **The State** of which the person accused of the crime is a national.

3. If the acceptance of **a State** which is not a Party to this Statute is required under paragraph 2, **that State** may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting **State** shall cooperate with the Court without any delay or exception in accordance with Part 9.

(emphasis added). As explained by Gerhard Hafner, member of the Austrian delegation to the Rome Conference and member of the International Law Commission, “Article 12 is rooted in classical bases of jurisdiction that are undisputed in international law.” He further notes that the “Statute’s jurisdictional authority derives exclusively from the undisputed jurisdictional authority of states.”¹⁰ As a result, he says, “problems of *pacta tertiis* [a treaty binds the parties and only the parties; it does not create obligations or rights for a third state] do not arise, since the Statute does not impose legal obligations on non-state parties.”¹¹

In its January 21, 2009 declaration, Ali Khashan, Minister of Justice for the “Government of Palestine”/“Palestinian National Authority” (PNA), represented that

In conformity with Article 12, paragraph 3 of the Statute of the International Criminal Court, the Government of Palestine hereby recognizes the jurisdiction of the Court for the purpose of identifying, prosecuting and judging the authors and

¹⁰ *Id.* at 117.

¹¹ *Id.*

accomplices of acts committed on the territory of Palestine since 1 July 2002.¹²

In addition to “recognizing the jurisdiction of the Court,” the PNA also declared that it would “cooperate with the Court **without delay or exception**, in conformity with Chapter IX of the Statute”¹³ (emphasis added).

The PNA declaration does not satisfy the conditions specified in Article 12 because it has not yet achieved the status of statehood, nor does it possess the power to transfer jurisdiction to the court. Several submissions to the Court have briefed in great detail as to why this is the case and NGO Monitor will not repeat these arguments here. Rather, NGO Monitor joins in the legal analysis proffered by these organizations and individuals as they most accurately reflect existing international law.¹⁴ In support of these analyses, we note several additional points that the OTP should take into consideration:

- To find that non-State entities, like the PNA, are encompassed within the meaning of term “State” as used by the Rome Statute would require an amendment to the Treaty. This power is solely granted to the ICC Assembly of State Parties (ASP), the legislative organ responsible for oversight of the Court and composed of “representatives of the **States** that have ratified and acceded to the Rome Statute.” (See articles 112, 121) Under Article 121(1) proposed amendments must be submitted to the UN Secretary General. Article 121(3) mandates that adoption of those amendments “require a two-thirds majority of States Parties.” Neither the Prosecutor nor the Court possesses the power to change the language of the Statute.¹⁵
- It is clear that the Assembly of State Parties does not view non-state actors as falling within the meaning of the term “State”. The ASP delineates several categories of actors that may interact with the ICC. These are: “States Parties,” “Observer States,” “Invited States,” “Entities,” “Intergovernmental organizations,” “Other entities,” and “Nongovernmental Organizations”.¹⁶

¹² Declaration of the Palestinian National Authority, dated January 21, 2009.

¹³ *Id.*

¹⁴ See Dore Gold, *Discussion on Whether the Declaration Lodged by the Palestinian Authority Meets Statutory Requirements: Historical and Diplomatic Considerations*, (Jerusalem Center for Public Affairs), Oct. 10, 2010; *Legal Memorandum in Response to the Al-haq Brief and Opposing the Palestinian Authority’s Attempt to Accede to ICC Jurisdiction* (European Centre for Law and Justice (ECLJ)), October 5, 2010; Law Review Article Responding to Professor John Quigley’s Article on Palestinian Statehood Previously Filed with ICC (European Centre for Law and Justice (ECLJ)), Oct. 3, 2010; David Davenport, Kenneth Anderson, Samuel Estreicher, Eugene Kontorovich, Julian G. Ku, and Abraham D. Sofaer, *The Palestinian Declaration and ICC jurisdiction*, (Nov. 19 2009); *Legal Memorandum opposing accession to ICC jurisdiction by Non-State entities* (European Centre for Law and Justice (ECLJ)), Sept. 9, 2009; *Opinion in the matter of the jurisdiction of the ICC with regard to the Declaration of the Palestinian authority* (The International Association of Jewish Lawyers and Jurists) Sept 9 2009; Daniel Benoliel and Ronen Perry, *Israel, Palestine and the ICC* (Nov 5 2009); and Yael Ronen, *ICC Jurisdiction over Acts Committed in the Gaza Strip: Art. 12(3) of the ICC Statute and Non-state Entities*, 8 J. INT’L CRIMINAL JUSTICE 8 (2010).

¹⁵ See also Article 39 of the Vienna Convention, *supra* note 3: (“a treaty may be amended by agreement between the parties”).

¹⁶ See, e.g., “Review Conference Handbook for Participants,” available at http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/Handbook.RC-ENG.pdf

- The ASP does not recognize “Palestine” or the PNA as a “State” and has maintained this position even after the PNA and others have pressed for its recognition as such under the Rome Statute. For instance, the official list of delegations at the ICC Review Conference of the Rome Statute, held in Kampala Uganda **from 31 May-11 June 2010**, included “State Parties to the Rome Statute of the ICC,” “Observer States,” and “States invited to be present during the work of the Conference”.¹⁷ Neither the PNA, nor “Palestine” was listed under any of these designations. Rather, “Palestine” was listed in the “Entities, intergovernmental organizations, and other entities” category.
- The June 2010 Review Conference was convened by the ASP to assess the progress of the Rome Statute, to discuss “stock issues” including “complementarity” and “peace and justice,” and to vote on amendments.¹⁸ The issues of whether “Palestine” could be considered a “State” for purposes of the statute or proposing an amendment to the Statute to allow non-State actors like the PNA to be considered “States” within the meaning of the Statute did not appear on the agenda.¹⁹ There were no proposed amendments, nor were these issues raised by the ASP.²⁰ The conference resolutions and declarations make no mention of any change in status for “Palestine” or the PNA, nor were any statutory changes announced that would allow non-State actors to accede to the Statute under Article 12(3).²¹
- Since the PNA filing on January 22, 2009, President Mahmuoud Abbas has repeatedly asserted that there is no existing State of “Palestine”. The most recent of these admissions took place in September 2010. At the opening of peace talks with Israel on September 1, in Washington, D.C., Abbas stated, “It is time that an independent Palestinian state **be established** with sovereignty side by side with the state of Israel.”²² On September 27, in his address to the United Nations General Assembly, Abbas thanked US President Barak Obama for “his deep **hope for the establishment of the independent State of Palestine** and its full membership in the United Nations.”

¹⁷ “Delegations to the Review Conference of the Rome Statute of the International Criminal Court,” RC/INF.1*, August 26, 2010, available at http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/RC-INF.1-reissued-ENG-FRA-SPA.pdf

¹⁸ Proposed amendments to the statute included changes to Articles 124 and 8 and proposing a definition for the “crime of aggression”.

¹⁹ [International Criminal Court, Review Conference to the Rome Statute \(May 11 2010\), available at http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/RC-1-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/RC-1-ENG.pdf); International Criminal Court, Review Conference to the Rome Statute (May 12 2010), available at http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/RC-1-ADD.1-ENG.pdf

²⁰ Rome Statute Amendment Proposals, (June 28 2010), available at <http://www.icc-cpi.int/Menus/ASP/ReviewConference/Rome+Statute+amendment+proposals.htm>

²¹ Resolutions and Declarations, (July 6 2010), available at <http://www.icc-cpi.int/Menus/ASP/ReviewConference/Resolutions+and+Declarations/>

²² Remarks by President Obama, President Mubarak, His Majesty King Abdullah, Prime Minister Netanyahu, and President Abbas Before Working Dinner, (Sept 1, 2010) available at <http://m.whitehouse.gov/the-press-office/2010/09/01/remarks-president-obama-president-mubarak-his-majesty-king-abdullah-prim>

- Professor John Quigley represented to the Court that “Palestine” was recognized as a State in 1988 by the Arab League.²³ Yet, even members of the League do not agree with his assessment. On September 1, 2010, for instance, Egyptian President Hosni Mubarak noted that “an independent Palestinian state is yet -- remains a dream in the conscious of the Palestinian people.” King Abdullah of Jordan remarked the international community “must spare no effort in addressing all final status issues with a view to reaching the two-state solution,” because it hasn’t yet been reached.
- One of the requirements for statehood is that of a “defined territory” – a requirement that the PNA cannot satisfy. As Al Haq for instance admits in its submission to the Court, the PNA declaration “did not further identify the ‘territory of Palestine’.” The Court, therefore, can only surmise that “such territory would presumably include Gaza and the West Bank including East Jerusalem”.²⁴ Al Haq would have the Court “delimit a particular territory over which it has jurisdiction” and presumptuously claims that such “territorial delimitation” will not “be of prejudice to the final status negotiations between Israel, the Palestinians, and the international community,” nor “indicative of the borders of a Palestinian state”. Al Haq does not explain how such a proclamation by the Court would be in keeping with the sovereign rights of Israel especially if some of the territory claimed to be “Palestinian” is actually determined to be belonging to Israel.
- Al Haq and others claim that the OTP should adopt an entirely new meaning for Article 12(3), in essence, rewrite the Statute, because “there have been several notable developments regarding [the Rome Statute’s] policy and practice that had not been countenanced during its drafting.” These developments include “self-referrals from Uganda, the Democratic Republic of the Congo and the central Africa Republic,” and the “Security Council’s referral of the situation in Darfur”.²⁵ Contrary to Al Haq’s characterization of these developments as “notable”, they are situations specifically contemplated by the drafters and codified in the Statute (See Articles 12(3) and 13(b)). Certainly, none of these examples required the OTP to **re-write** the Rome Statute for them to have effect. Pointedly, and as omitted by Al Haq, each of these situations involve referrals by **States** or conduct within recognized **State** boundaries. None of these cases involved a referral to the court by a non-state entity regarding territory that the particular entity does not even control and is not even defined!

²³ John Quigley, *Memo to the Prosecutor*, (Mar 23, 2009); *Additional Memo*, (May 20,2010), *The Palestine Declaration to the International Criminal Court: The Statehood Issue*, and *The Statehood of Palestine: law and sovereignty in the Middle East Conflict*, (May 19, 2009)

²⁴ Dr. Michael Kearney, et. al., *Al Haq Position Paper on Issues Arising from the Palestinian Authority's Submission of a Declaration to the Prosecutor of the International Criminal Court under Article 12(3) of the Rome Statute*, (Al Haq Dec 14, 2009), para. 23, available at <http://www.icc-cpi.int/NR/rdonlyres/D3C77FA6-9DEE-45B1-ACC0-B41706BB41E5/281874/OTPAIHaqpositionpapericc14December2009.pdf>, [hereinafter Al Haq Position Paper].

²⁵ Al Haq Position Paper, at paras. 17 and 18.

- Al Haq itself admits that “the existence or otherwise of a state of Palestine remains moot at best.”²⁶
- M. Cherif Bassiouni states, “I can attest to the fact that **referrals under Article 12(3) were intended to be by States only**” (emphasis added). He further acknowledges that “the Palestinian Authority’s declaration of 21 January 2009 does not claim that Palestine is a state. It is clear that if a given entity does not claim the status of statehood, that status cannot be ascribed to it, notwithstanding the existence of all necessary conditions for statehood.”²⁷

II. The Position Known as the “Teleological Approach” is Nothing More than a Thinly Veiled Attempt to Change the Explicit Wording of the Rome Statute, Transforming the ICC into a Court of Universal Jurisdiction. Universal Jurisdiction for the ICC was Expressly Rejected by the Drafters of the Statute.

Even proponents of the PNA position, like John Quigley, acknowledge that the ICC will have jurisdiction *only if* Palestine qualifies as a state.²⁸ Yet, others have claimed, most notably Al Haq and Allan Pellet, that the OTP should be “expected” to take “an expansive approach” in “interpreting the meaning of ‘state’ for the purposes of Article 12(3) of the Rome Statute.”²⁹ They claim that “because the term ‘State’ is subject to variable defining characteristics,” it “lacks and unambiguous or ‘ordinary’ meaning and should therefore be examined in light of the Statute’s object and purpose.”³⁰ According to this position, this “object and purpose” is found in the Rome Statute preamble “which affirms that ‘the most serious crimes of concern to the international community as a whole must not go unpunished.’”

These arguments are unavailing and reflect a thinly veiled attempt to transform the Court into one of universal jurisdiction. Universal Jurisdiction was explicitly rejected by the parties to the Treaty.

A. The “object and purpose” of the Rome Statute do not support a “teleological” interpretation of “Statehood”

The teleological approach argues that the term ‘State’ is ambiguous and “should therefore be examined in light of the Statute’s object and purpose” which is that “the most serious crimes of concern to the international community as a whole must not go unpunished.” This approach further claims that the “crimes over which the ICC has

²⁶ Al Haq Position Paper, “Abstract.”

²⁷ UCLA Law Forum, Comment by M. Cherif Bassiouni, October 1, 2010, *available at* <http://uclalawforum.com/forum/permalink/859>. Bassiouni concludes by saying that even though “Article 12(3) does not apply, the Prosecutor is properly seized pursuant to Article 15, and should act *proprio motu*.” As explained in the next section, this conclusion is incorrect. Although Article 15 gives certain powers to the Prosecutor to act *proprio motu*, he is still constrained by the Statute to do so only regarding situations that fall within the jurisdiction of the Court – namely, the conditions that are laid out in Article 12 and which Bassiouni himself admits are not met in this case.

²⁸ Al Haq Position Paper, at para. 3.

²⁹ Al Haq Position Paper, at para. 20.

³⁰ “Situation in Palestine,” Summary of submissions on whether the declaration lodged by the Palestinian National Authority meets statutory requirements (ICC May 3, 2010), *available at* <http://www.icc-cpi.int/NR/rdonlyres/D3C77FA6-9DEE-45B1-ACC0-B41706BB41E5/282529/PALESTINEFINAL201010112.pdf>.

jurisdiction . . . are widely recognized as being subject to universal jurisdiction.”³¹ Therefore, the Court should expansively interpret the term “State” to include non-State entities, or in other words, transform the ICC into a court of universal jurisdiction.

It should be axiomatic that if the Court does not have jurisdictional power delegated to it, it cannot adjudicate. This is true no matter how noble the intentions of those seeking to expand the power of the Court. Yet, the teleological approach would have the OTP and the Court craft new terms for the Treaty and they do not possess this power.

There is no doubt that the ICC was established to combat “impunity” because grave international crimes “threaten the peace, security and well-being of the world.” There is also no doubt that the ICC can and does play an essential role in furthering these objectives. The Court, however, was not established as the sole weapon in the battle against impunity. Rather, it is one mechanism with very specific parameters that is to be used along with many other means to promote this goal. “Unlike the ICTY and ICTR,” as noted by legal scholar Michael Newton, “the ICC does not enjoy an inherent jurisdictional superiority.”³²

1. The Treaty codified a system of complementarity with national courts. The ICC was never intended to supplant national jurisdiction.

Both those involved in the drafting of the Rome Statute and Prosecutor Moreno-Ocampo have acknowledged that the “Rome Treaty was not drafted overnight” and “that careful decisions were made” as to how the Court would exercise its jurisdiction.³³ One of the principle aspects of the Court was to create “a system of complementarity . . . whereby the Court intervenes as a last resort, when States are unable or unwilling to act.”³⁴ That the Court is to act in conjunction with national systems is repeatedly emphasized throughout the Statute. The preamble states that “effective prosecution” of “serious crimes” will be “ensured by taking measures at the national level and enhancing international cooperation.” The preamble also underlines that “the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions.”

This principle was also reiterated at the very beginning of the Treaty in Article 1:

Article 1

The Court

An International Criminal Court (‘the Court’) is hereby established. It shall be a permanent institution and **shall have the power to exercise its jurisdiction** over persons for the most serious crimes of international concern, **as referred to in this Statute, and shall be complementary to national criminal jurisdictions.** The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.

(emphasis added). According to Newton,

³¹ Al Haq Position Paper, at para. 33

³² Newton, *supra* note 7, at 15.

³³ Address by Luis Moreno-Ocampo, International Conference “Building a Future on Peace and Justice,” (June 25, 2007), available at <http://www.peace-justice-conference.info/download/speech%20moreno.pdf>

³⁴ *Id.*

The plain text of Article 1 compels the conclusion that the International Criminal Court was intended to supplement the foundation of domestic punishment for violations of international norms rather than supplant domestic prosecutions. The Statute curtails sovereign authority by displacing domestic trials only in exceptional circumstances, and includes detailed procedural guidance designed to balance sovereign enforcement against improper extensions of ICC prosecutorial power.³⁵

Newton further reiterates that, “the ICC was not created to impede domestic processes or to impose its dominance over the prosecutorial practices and priorities of states with developed systems and demonstrated adherence to the rule of law.”³⁶

2. Article 15 does not allow the Prosecutor to open cases that do not fall within the jurisdictional pre-conditions specified in Article 12.

The Pellet submission and comments made by M. Cherif Bassiouni claim that although the Court would not be able to accept the PNA declaration based on Article 12(3), the Prosecutor could do so under Article 15 of the Rome Statute. This is not the case.

Article 15 does not grant the Prosecutor unlimited power to open investigations in all circumstances. The wording of Article 15 clearly authorizes the Prosecutor only to “initiate investigations *proprio motu*” solely on “crimes **within the jurisdiction** of the Court.” Crimes that fall within the jurisdiction of the Court are laid out in Article 12. If the pre-conditions to jurisdiction specified in Article 12 are not satisfied, there is no jurisdiction and the Prosecutor may not proceed with an investigation. There is simply no basis to interpret the Statute otherwise.

The *proprio motu* power of the Prosecutor was one of the most hotly contested issues at the Rome Conference. There was a great concern that an unlimited power granted to the Prosecutor “could lead to partiality, manipulation and politicization.”³⁷ As a result, the Rome Statute’s “negotiating States turned to strengthening procedures, reducing the discretionary powers available to the Prosecutor, and setting high admissibility thresholds.” It is simply not true that the Prosecutor was granted the authority to ignore the established bases for jurisdiction in the Rome Statute when exercising his *proprio motu* powers.

3. The drafters of the Rome Statute explicitly rejected universal jurisdiction.

The ICC was never intended to be a court of universal jurisdiction, even though that is what supporters of the teleological approach wish to impose on the Court.³⁸ Indeed, the “jurisdictional regime in Rome bears no relation to universal jurisdiction . . . [and] does not exercise universal jurisdiction. Its jurisdiction is based squarely on traditional modes of

³⁵ Newton, *supra* note 7, at 1.

³⁶ *Id.* at 4.

³⁷ Rod Rastan, “The Power of the Prosecutor in Initiating Investigations,” Symposium on the International Criminal Court, February 3-4, 2007, at 5, available at <http://www.icclr.law.ubc.ca/site%20map/icc/poweroftheprosecutor.pdf>.

³⁸ The very rejection of universal jurisdiction by the drafters of the Rome Statute is proof that there is no customary international law for universal jurisdiction.

jurisdiction exercised by states.”³⁹ In other words, as explained by Prosecutor Moreno-Ocampo, the “Rome Statute defines the jurisdiction of the Court and a limited set of international crimes.”⁴⁰ Even Al Haq admits in its submission that the Rome Statute’s preamble limits the “main function of the Court to be that of combating impunity, of ensuring accountability for the Crimes **within its jurisdiction**.” (emphasis added). This is not a limitless grant of power to hear cases over every international crime.

In addition to the complementary principle described above, there are several other constraints built into the Rome Statute limiting the exercise of the Court’s jurisdiction. These include “a specific gravity threshold”⁴¹ (Article 8(1)) and a “general gravity requirement” (Article 53(1)(b)) as well as the potential to discontinue an investigation “if it is not in the interests of justice” (Article 53(2)(c)).⁴² Furthermore, under Article 16, the Security Council is given the power to suspend a prosecution and “allows for indefinite renewal of the suspension period”.⁴³ The Court’s budget is also a powerful constraint on the Court which necessarily limits the number of cases that may be investigated and prosecuted. Currently, the budget is approximately € 103 million with only €28.5 million allocated to the Judiciary and the OTP.⁴⁴ Given these limited resources, it is evident the ICC was never viewed as the sole means by which international crimes may be punished.⁴⁵ Clearly, “no institution with a [€103] million annual budget can possibly provide global accountability.”⁴⁶

The objectives and jurisdictional limitations codified in the Rome Statute clearly indicate that although the ICC is viewed as an essential tool in the fight against impunity, it was not meant as an all-encompassing mechanism. Taken together, these factors do not support the conclusion that “State”, an unambiguous term, should be given a meaning that was clearly unintended by the drafters of the Treaty. And as acknowledged by Al Haq, to do so would be “different from the practice generally accepted under international law and international relations.”⁴⁷

III. Claims of a “Zone of Impunity” in this Case are False, Misleading, and Highly Offensive

Supporters of the “teleological” approach ask the OTP to engage in a wide-reaching amendment to the plain language of the Statute that was never intended by its drafters because otherwise, Palestinians will be denied “recourse to justice”. This claim is simply false.

³⁹ Hafner, *supra* note 8, at 117.

⁴⁰ “OTP response to communications received concerning Iraq,” February 9, 2006, available at http://www.icc-cpi.int/NR/rdonlyres/04D143C8-19FB-466C-AB77-4CDB2FDEBEF7/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf

⁴¹ Office of the Prosecutor, “Paper on some policy issues before the Office of the Prosecutor,” (Sept 2003).

⁴² OTP Iraq letter, *supra* note 40.

⁴³ See Hafner, *supra* note 8, at 120.

⁴⁴ Proposed Programme Budget for 2011 of the International Criminal Court, (Aug. 2, 2010) available at http://www.icc-cpi.int/iccdocs/asp_docs/ASP9/ICC-ASP-9-10-ENG.pdf

⁴⁵ Office of the Prosecutor, “Paper on some policy issues before the Office of the Prosecutor,” (Sept 2003), acknowledging that the “Court is an institution with limited resources . . . it will encourage national prosecutions, were possible . . . or work with the international community to ensure that the offenders are brought to justice by some other means.”

⁴⁶ William W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 Harv. Int’l. L. 1, (2008).

⁴⁷ Al Haq Position Paper, at para. 16.

A. The Rome Statute and the UN Charter Provide Clear Mechanisms to Prevent Impunity

The Rome Statute already provides a clear mechanism to remedy cases where there is believed to be impunity. Under Article 13(b), the Court has the power to open a case that has been referred by the Security Council. This mechanism provides a stopgap measure for alleged crimes that may not otherwise fall within the jurisdiction of the Court. The Security Council also has the power under Chapter VII of the UN Charter to “decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.” This power includes a range of options even including the use of military force.

It is important to note that “the pursuit of justice is not a zero sum game in which a successful domestic prosecution or even an investigation that does not result in criminal charges represents a setback to the authority and legitimacy of the Court.”⁴⁸ The teleological approach advances such a “zero sum” argument which does not serve the best interests of the Court. As Newton cautions, “preserving jurisdictional compatibility and cooperation rather than competition is likely to be the decisive determinant whether the ICC coexists with state sovereignty to advance the larger interests of international peace and security.”⁴⁹

B. Israel is Committed to the Rule of Law. Submissions Alleging a “Zone of Impunity” in Israel are False, Misleading, and Highly Offensive

In its submission, Al Haq claims that the Israeli government and military have allegedly made statements “to the effect that they will not be carrying out thorough investigations” regarding the Gaza War.⁵⁰ It further claims that if the Court does not accept the PNA declaration, Palestinians will be denied “recourse to justice”.⁵¹ Similarly, NGOs Fédération Internationale des ligues des Droits de l’Homme (FIDH) and the Palestinian Center for Human Rights (PCHR) have claimed that there is a “zone of impunity” in Israel whereby “not only is Israel unwilling, Israel’s judicial system is unable to investigate senior government and military officials”.⁵² These claims are false, highly offensive, and distort the Israeli judicial system. There is no “zone of impunity” in Israel.⁵³

1. Israel is a “social and democratic state with rule of law.”

⁴⁸ Newton, *supra* note 7, at 27.

⁴⁹ *Id.* at 6.

⁵⁰ Al Haq Position Paper at para. 11.

⁵¹ *Id.* at 19.

⁵² PCHR, FIDH Press Release, “Human Rights Council Defer Justice: PCHR & FIDH submit case files to International Criminal Court,” (Sept 29, 2010), *available at* http://www.pchrgaza.org/portal/en/index.php?option=com_content&view=article&id=7021:human-rights-council-defer-justice-pchr-a-fidh-submit-case-files-to-international-criminal-court-&catid=36:pchrpressreleases&Itemid=194; *See also* Palestinian Center Human Rights, “Genuinely Unwilling: An update,” (Aug. 2010) at 7-8, *available at* <http://www.pchrgaza.org/files/2010/Genuinely%20Unwilling%20-%20An%20Update.pdf>. PCHR’s allegation that “Israel’s judicial system is unable to investigate senior government and military officials,” is particularly absurd given that Israel’s former Prime Minister, Ehud Olmert, and former President, Moshe Katsav, are currently standing trial on criminal charges.

⁵³ There is overwhelming evidence and documentation available detailing due process in the Israeli justice system. This submission will only highlight a few points at this time. Should the OTP move forward and accept the PNA’s declaration, these points will be briefed in more detail.

The UN Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, defines impunity as:

The impossibility, *de jure* or *de facto*, of bringing the perpetrators of violations to account – whether in criminal, civil, administrative or disciplinary proceedings – since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims.⁵⁴

Principle 1 clarifies that impunity will occur if there is a failure by a State to

Ensur[e] that those suspected of criminal responsibility are prosecuted, tried and duly punished; to provide victims with effective remedies and to ensure that they receive reparation for the injuries suffered; to ensure the inalienable right to know the truth about violations; and to take other necessary steps to prevent a recurrence of violations."

Amnesty International USA further characterizes impunity as existing where a government refuses to “investigate crimes, by granting government officials immunity from prosecution, and/or by enacting amnesty laws to shield a person or a group of people from accountability.”⁵⁵

The Israeli justice civil and military justice systems are among the most developed in the world, in particular with regards to the application of international humanitarian and human rights law.⁵⁶ There are means for civil, criminal, administrative, and disciplinary hearings in the event such laws are violated. These systems “provide victims with effective remedies” in the where there are findings of wrongdoing and necessary measures are taken “to prevent a recurrence of violations.”⁵⁷

Commitment to the rule of law is engrained in the Israeli military justice system. In fact, recent legal scholarship has noted that Israel takes a "more extreme approach" in limiting the risk of undue influence and impartiality in its military justice system than other countries.⁵⁸ Indeed, "between the random selection of panel members, the statutory independence of judges and MAGs, and the great limitations placed on the already minimal disciplinary powers of the District Chiefs, the issue of unlawful command influence is moot in the Israeli military justice system."⁵⁹ The Cox Commission, a special commission convened in 2001 to assess the military justice system of the United States found that "in recent years, countries around the world have modernized their military justice systems, moving well beyond the framework created by the UCMJ fifty years ago. In contrast, military justice in the United States has stagnated, remaining insulated from external review and

⁵⁴ UN Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, available at <http://daccess-ods.un.org/access.nsf/Get?Open&DS=E/CN.4/2005/102/Add.1&Lang=E>

⁵⁵ Amnesty USA, “Q. what is impunity?” available at <http://www.amnestyusa.org/justice/page.php?id=1011434>

⁵⁶ See e.g., AHARON BARAK, THE JUDGE IN A DEMOCRACY, (Princeton 2006); See also Aharon Barak, “A Judge on Judging: The Role of a Supreme Court in a Democracy,” 116 Harv. L. Rev. 16 (2002).

⁵⁷ See, *id.*

⁵⁸ Lindsay Nicole Alleman, *Who is in Charge and Who Should Be? The Disciplinary Role of the Commander in Military Justice Systems*, 16 DUKE J. COMP. & INT'L L. 169, 178 (2006) .

⁵⁹ *Id.* at 180. The author employs the following definition for "unlawful command influence": "the improper interference by a superior in command with the independent judgment of a person responsible for judicial decision." citing Charles A. Shanor & L. Lynn Hogue, MILITARY LAW IN A NUTSHELL 117 (1996).

largely unchanged despite dramatic shifts in armed forces demographics, military missions, and disciplinary strategies." In making these assessments, the Commission specifically noted the influence of reform efforts in several foreign jurisdictions, including Canada and Israel.⁶⁰

There is widespread dissemination and training regarding the laws of armed conflict at all levels of the Israeli military. All military operations are vetted by the IDF legal department and twenty-four hour legal advice is available to soldiers in the field. The military justice system comprises three main bodies: the Military Advocate General's Corps, the Military Police Criminal Investigation Division, and the Military Courts.⁶¹ In addition, all decisions made by these bodies are subject to review by civilian authorities. The Israeli Attorney General may revisit decisions of the MAG regarding the opening of a criminal investigation and may order such an investigation to take place. NGOs or individual complainants may trigger this review simply by sending a letter to the Attorney General.⁶² Judgments from the Military Court of Appeals may be directly appealed to the Israeli High Court of Justice (HCJ). The HCJ can also review and reverse decisions of the MAG, the military prosecution and/or the Attorney General whether to investigate or indict alleged misconduct.⁶³ Furthermore, private individuals and NGOs may directly petition the court regarding the legality of IDF actions.

Israel's High Court of Justice is one of the most accessible courts in the world. There are few justiciability or standing limitations at the HCJ and the Court takes a very broad-minded view regarding the application of international humanitarian and human rights law.⁶⁴ In fact, the HCJ has judged thousands of petitions (many of which were brought by NGOs) relating to Palestinian rights: examining the authority of the military commander according to the standards of proportionality; restrictions on place of residence; checkpoint positioning; harm to Palestinian property due to army operations; the safeguarding of freedom of worship and the right to access to holy places; the demolition of houses; the laying of siege; the powers of the army during combat pursuant to international humanitarian law; the rights of Palestinians to food, medicine, and similar needs during combat operations; the rights of Palestinians during the arrest of terrorists; and detention and interrogation procedures.

In more than one hundred petitions, the HCJ "has examined the rights of [Palestinians] according to international humanitarian law as a result of the erection of the separation fence."⁶⁵ In addition, the court has even reviewed military operations while they were underway and even while the Israeli government was in the midst of conducting political negotiations on the very issues brought before the court.⁶⁶ Many of the NGOs that

⁶⁰ Alleman, *supra* note 56, at 173. See also Major General Menachem Finkelstein, Major Yifat Tomer, *The Israeli Military Legal System – Overview of the Current Situation and a Glimpse into the Future*, AIR FORCE L. REV., Winter 2002, 161-162.

⁶¹ Ministry of Foreign Affairs of Israel, *Gaza Operation Investigations: An Update (January 2010)* at 3-6, available at <http://www.mfa.gov.il/NR/rdonlyres/8E841A98-1755-413D-A1D2-8B30F64022BE/0/GazaOperationInvestigationsUpdate.pdf>.

⁶² See, e.g., Finkelstein & Tomer, *supra* note 59, at 163; *Gaza Operation Investigations: An Update (January 2010)* at para. 33.

⁶³ *Gaza Operation Investigations: An Update (January 2010)*, *supra* note 59, at para. 34.

⁶⁴ Barak, *supra* note 54.

⁶⁵ Remarks of Justice Aharon Barak, Brandeis University "Colloquium on Israel and International Law," January 3, 2010.

⁶⁶ See, e.g., *Physicians for Human Rights v. Prime Minister of Israel*, HCJ 201/09 and 248/09 (19 January 2009); *Almadani v. IDF Commander in Judea and Samaria*, H.C. 3451/02, available at http://elyon1.court.gov.il/files_eng/02/510/034/a06/02034510.a06.pdf.

seek to misrepresent the Israeli justice system, including PCHR and Al Haq, file dozens of cases in the Israeli courts each year, many of which are successful.⁶⁷ It is also important to reiterate, as apparently the point is lost on these organizations, that just because a litigant loses a case does not mean there was a lack of due process or that the party did not “get his day in court;” due process does not mean one has the right to win a case.

2. Courts around the world have repeatedly and soundly rejected the claims of Al Haq and PCHR that impugn the Israeli legal system.

Courts around the world have repeatedly and soundly rejected the claims of Al Haq and PCHR, remarking on the high quality of Israeli due process. In 2008, PCHR filed a lawsuit in Spain seeking the arrest of seven Israeli military officials for the targeted killing of Hamas military leader Salah Shehade – a man responsible for the murder and injury of hundreds of Israeli civilians. As part of its case strategy (and as it does to the OTP), PCHR sought to implicate the Israeli justice system. The Spanish Appeals Court wholly rejected PCHR’s claims. In its decision (attached) issued on July 9, 2009, the court highlighted that “the extensive and exhaustive documents submitted [by Israel] reveal the commencement of a series of criminal and civil proceedings well in advance of the presentation of the complaint in Spain.” As a result, the court found “it can be deduced that there has been genuine action, first on the part of the government and then on the part of the courts, to determine whether a crime may have been committed.”

The judges further rejected PCHR’s claims that Israel’s investigations of the Shehade strike were not credible and that the plaintiffs were denied due process in Israel. Instead, the court found that PCHR’s allegations “do[] not tally with the court decisions that have been handed down in the proceedings in which the parties have intervened, among them many of the parties to the complaint brought in Spain, who have made use of the rights of allegation, proof and challenge provided for by law.” Finally, the court noted that there was no “evidence of any malicious or unjustified procedural delay” by Israel and that PCHR’s “disputing the impartiality and organic and functional separation” between the Israeli Military Advocate General, Israel’s Attorney General, the government-appointed Investigation Commission “involves ignoring [Israel’s] existence [as] a social and democratic state with rule of law.”

An appeal filed by PCHR and Adalah (an NGO that has also lobbied the OTP) was dismissed on April 13, 2010, by the Spanish Supreme Court, finding that the appellate decision was a “well grounded and reasoned response.” The court also emphasized that Israel’s investigation into the Shehade operation was “substantive and genuine,” wholly rejecting PCHR’s and Adalah’s attack on the credibility of the Israeli justice system.⁶⁸

Al Haq has also tried to impugn the Israeli justice system in foreign courts. Al Haq filed a case in Canada in 2008, claiming the Israeli HCJ was unwilling to adjudicate claims related to Israel’s Security Barrier or international humanitarian law. As in Spain, the Canadian court rejected Al Haq’s complaint, concluding that the plaintiffs were engaging in

⁶⁷ *The curriculum vitae* of Adalah’s Director even describes several cases where Adalah has secured relief for Palestinian litigants in Israeli courts.

⁶⁸ As part of its campaign, in February 2010, PCHR issued a 36-page report entitled, “Genuinely Unwilling,” claiming that “Israel is unwilling to and that the Israeli system is incapable of conducting independent, credible investigations in conformity with international standards,” *supra* note 50.

“inappropriate forum shopping.”⁶⁹ The court highlighted that a “review of the evidence simply does not bear out [the] preconception” made by plaintiffs’ that the HCJ was “unwilling to adjudicate on a politically sensitive matter.”⁷⁰ Moreover, the court found that the plaintiffs simply chose a Quebec forum to “avoid the necessity of . . . proving [their case] before the HCJ ... thus ensuring for themselves a juridical advantage based on a merely superficial connection of the Action with Quebec.”⁷¹ (See decision attached). On August 11, 2010, the Court of Appeal issued a decision affirming the lower court’s dismissal finding plaintiffs’ claims regarding Israel’s HCJ to be “devoid of merit.” (Decision attached)

US Courts have also rejected claims attacking Israel’s legal system. In a 2005 case filed by the New York-based Center for Constitutional Rights⁷² regarding an Israeli military operation in Lebanon, the US D.C. Circuit Court of Appeals, affirming the dismissal of a lower court, found that the plaintiffs could point to “no case where similar high-level decisions on military tactics and strategy during a modern military operation have been held to constitute torture or extrajudicial killing under international law.”⁷³ The Southern District Court of New York has similarly found that there was no evidence “to support that mass indictment of a democratic nation’s judicial system. . . . Indeed, readers of newspapers are aware of the fact that Israeli courts are entirely capable of making judgments displeasing to those in high civil or military authority.”⁷⁴ The European Court of Human Rights also frequently relies on Israeli precedent in its case law.⁷⁵

It should be pointed out that contrary to the claims of Al Haq and PCHR accusing Israel of “war crimes” and “crimes against humanity”, it is far from clear that any such violations have occurred.⁷⁶ In 2009, Al Haq filed a lawsuit in the UK to seek a judicially imposed arms ban on Israel as well as a declaration that Israel had committed violations of international law during the Gaza War. UK Justice Pill dismissed Al Haq’s suit, stressing that “this is not a case in which the breach of international law is plain and acknowledged or where it is . . . clear to the court.” Pill also criticized Al Haq’s citation to the International Court of Justice’s opinion on Israel’s Security Barrier as a legal precedent for judging Israeli actions in Gaza.⁷⁷ He noted that, “the Wall Opinion considers different issues and there has

⁶⁹ See September 18, 2009 decision of Justice Paul Cullen at para. 327 in *Bil’in Village Council v. Green Park Int’l, et.al.*

⁷⁰ *Id.*

⁷¹ *Id.* at para. 326.

⁷² PCHR partnered with CCR in two other US cases involving Israel (*Matar v. Dichter* and *Corrie v. Caterpillar*). These cases, too, were dismissed by the Courts.

⁷³ *Belhas v. Ya’alon*, “Opinion,” February 15, 2008, at 6, available at

<http://www.ccrjustice.org/files/Decision%20in%20Belhas%20v%20Ya’alon%202.15.08.pdf>.

⁷⁴ *Sussman v. Bank of Israel*, 801 F. Supp. 1068, 29-30 (S.D.N.Y. 1992).

⁷⁵ See e.g., *Neulinger and Shruk v. Switzerland*, Eur. Ct. H.R., no. 41615/07 (July 6,

2010) (Relied on Israeli family law precedent to ascertain child custody rights: “Similarly, the Israeli Supreme Court found that a custody agreement between parents contained a mutual consultation clause for major changes and

unusual events, which implicitly included decisions on the residence of the child); *Case of I. v. the United Kingdom*, Eur. Ct. H.R., no. 25680/94 (July 11, 2002) (court cited Israel’s recognition of gender re-assignment when reaching a conclusion); *Case of Evans v. the United Kingdom*, Eur. Ct. H.R., no. 6339/05 (Apr 10, 2007) (court cited as precedent the Israeli case *Nachmani v. Nachmani* (50(4) P.D. 661 (Isr)); *Lustig-Prean and Beckett v United Kingdom*, Eur. Ct. H.R., nos. 31417/96 and 32377/96 (Dec 27, 1999) (court relied on observations that Israel permitted homosexuals to join their armed forces and ultimately struck down the ban.)

⁷⁶ Not one of the many reports submitted by Al Haq, PCHR, FIDH, and others to the Court have shown the requisite *mens rea* to prove their allegations against Israel.

⁷⁷ Al Haq does the same in its submission to the ICC.

been no authoritative judgment upon Operation Cast Lead.”⁷⁸ Justice Cranston echoed Pill’s remarks stating that “the [ICJ opinion] is not directly applicable to Gaza”. (Decision attached).

3. Israel is currently conducting investigations as to whether violations of international law took place during the Gaza War.

Israel has launched credible investigations to determine whether violations of international law occurred during the Gaza War. For instance, the Military Advocate General has initiated more than 150 investigations and the Military Police Criminal Investigative Division has opened 47 criminal investigations.⁷⁹ It has issued indictments, conducted trials, and convicted in cases where wrongdoing was found. Disciplinary actions of high ranking officials have occurred, including the disciplining of a brigadier general and a colonel. Additional trials and disciplinary actions may take place depending on the outcome of on-going investigations. As has been noted by Prosecutor Moreno-Ocampo, the determining factor as to whether “war crimes” have occurred does not rest simply on the fact that civilian deaths have occurred, as tragic as those deaths may be. Moreover, just because an investigation of a civilian death does not end with the issuance of an indictment, it does not mean that the investigation was inadequate or did not conform to due process standards.

4. A negotiated settlement between the parties will provide additional remedies for those who may have suffered wrong-doing.

In addition to the strong investigatory and justice mechanisms available in Israel, there are several other means by which potential victims may achieve redress for crimes that may have been committed. Despite attempts by some (described below) to simplistically portray the Arab-Israel conflict as one of Palestinian victimization and Israeli oppression, the conflict at its heart is a territorial dispute between two peoples each with valid legal claims. The hope is that via a negotiated agreement between the parties to the conflict, these claims can be resolved. Within the context of such an agreement, there will likely be remedies to address various aspects of the dispute such as land swaps and monetary compensation for Palestinian and Jewish refugees displaced by the wars in 1948 and 1967. This agreement will also likely include remedies for other wrongs claimed by the parties.

As has been extensively documented by Israel, it has conducted and is conducting investigations regarding potential violations of law occurring during the Gaza War.⁸⁰ Any claims that there is a “zone of impunity” in Israel such that it would justify a re-writing of the Rome Statute, as advocated by Al Haq, PCHR and others, must be rejected.

IV. The PNA and its Supporters Have “Unclean Hands”. The Court should not Allow Itself to be Exploited by Those Who Brazenly Flout its Authority.

⁷⁸ *Al Haq v. UK Secretaries of State*, Decision of Justices Pill and Cranston, July 27, 2009.

⁷⁹ *Gaza Operation Investigations: Second Update (July 2010)*, at para. 10, available at <http://www.mfa.gov.il/NR/rdonlyres/1483B296-7439-4217-933C-653CD19CE859/0/GazaUpdateJuly2010.pdf>.

⁸⁰ Regarding allegations of delay by Israel in conducting investigations, there has been no undue delay. For comparison, it has taken the OTP nearly two years to determine the relatively simple legal issue whether the PNA is a State according to Article 12(3) of the Rome Statute. As of May 2010, the PNA itself had yet to submit its own final analysis to the Court. It is therefore not unreasonable that investigations over complex military operations, may take many months or even years, especially when evidence and witnesses are within the control of a hostile entity such as they are in Hamas’ controlled Gaza.

A. The PNA and its State supporters in the Arab League are Marred by “Unclean Hands.” As a Result, the PNA Declaration Must be Immediately Rejected.

The PNA and its State supporters in the Arab League⁸¹ request that the Court accept the PNA’s declaration. They do this even though the declaration is not authorized by the Rome Statute and its acceptance would have far reaching political consequences not only for the Middle East peace process, but also for the credibility of the ICC. Yet, the PNA and the Arab League are marred by “unclean hands” based on their lack of commitment to the rule of law and human rights and their brazen defiance of the Court’s authority. The Court should not reward such conduct.

1. The PNA and the members of the Arab League are some of the foremost perpetrators of international crimes and have repeatedly and openly challenged the authority of the Court with regards to the case against Sudanese President Omar al-Bashir.

Under the ancient legal principle of *nemo auditur propriam turpitudine allegans* or the “clean hands” doctrine, someone who has acted wrongly, either morally or legally, should not be helped by a court when complaining about the actions of someone else.⁸² The International Court of Justice further explains that one of the fundamental principles governing international relationships “is that a party which disowns or does not fulfill its own obligations cannot be recognized as retaining the rights it claims to derive from the relationship.”⁸³

As discussed above, the ICC Preamble recognizes that “during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity” and that “such grave crimes threaten the peace, security and well-being of the world.” It reiterates that such crimes “must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation”. Far from adhering to such principles, however, the PNA and the Arab League are among their foremost violators. According to the NGO Freedom House, no members of the Arab League can be considered “Free” countries. Only four out of the twenty two members of the League are ranked “Partly Free” and the other eighteen members are ranked “Not Free”.⁸⁴

Systematic and shocking violations of international human rights and humanitarian law occur on a daily basis. These abuses include slavery in Mauritania; gender and religious apartheid in Saudi Arabia; indiscriminate attacks on the civilian populations by the governments of Sudan, Somalia, Yemen, Algeria, Syria, Iraq, as well as by the Palestinian National Authority; incitement to genocide in Sudan, Syria, and by the PNA; and lack of judicial due process and serious limitations to outright denial of the rights of freedom of expression, religion, and assembly by all League members. These practices are as far as can be from upholding the principles and objectives promoted by the Court.

⁸¹ The Arab League met with Prosecutor Moreno-Ocampo on several occasions in support of the PNA declaration.

⁸² The ‘Lectric Law Library, <http://www.lectlaw.com/def/c202.htm>.

⁸³ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding the Security Council Resolution 276, 1971 I.C.J. 16, 46 (Advisory Opinion).

⁸⁴ See Freedom House, www.freedomhouse.org.

Even more disturbingly, however, the PNA and the Arab League brazenly and repeatedly defy the authority of the Court regarding the indictment and arrest warrant issued against Sudanese President Omar al-Bashir. The following are just some examples of this outrageous conduct:

- On March 30, 2009, Bashir attended the Arab League Summit in Doha less than one month after the Court issued a warrant for his arrest. "An independent group called the Doha Center for Media Freedom condemned Mr. Bashir's participation in the summit meeting and said that it was hypocritical for Arabs to want Israel to be investigated for its actions in Gaza" and then "complain about it if a friendly country is involved."⁸⁵
- Muammar al-Qaddafi, Libya's president and chair of the African Union, labeled the Bashir arrest-warrant an act of "first-world terrorism."⁸⁶
- Arab League Secretary General, Amr Moussa, said that League member states would "continue our efforts to halt the implementation of the warrant."⁸⁷
- In March 2009, representatives of Bahrain's political society met with Bashir to show solidarity with him against his arrest warrant.⁸⁸
- "Official: Jordan sides with Arabs on possible ICC arrest warrant against Sudanese president."⁸⁹
- Syrian President Bashar al-Assad rejected the ICC's move against Bashir, considering it as an attempt to blackmail Sudan and interfere in its internal affairs.⁹⁰
- Yemeni President Ali Abdullah Saleh stressed his country's refusal to execute the ICC warrant.⁹¹
- At the Doha Summit, PNA President Abbas stated, "We must ... take a decisive stance of solidarity alongside fraternal Sudan and President Omar al-Bashir."
- In August of 2009, Mahmoud Abbas visited Bashir in Sudan.⁹²

⁸⁵ Michael Slackman, et. al., *Often Split, Arab Leaders Unite for Sudan's Chief*, N.Y. TIMES, Mar. 30, 2009, at A5.

⁸⁶ *Bashir in Qatar for Summit*, THE NATION (KENYA), Mar. 29, 2009, available at <http://www.nation.co.ke/News/africa/-/1066/554430/-/13q0tcez/-/index.html>.

⁸⁷ Slackman, *supra* note 85, at A5.

⁸⁸ *Members of Bahraini Political Society to Meet Bashir Today*, KHALEEJ TIMES, Mar. 15 2009, available at http://www.khaleejtimes.com/DisplayArticleNew.asp?col=§ion=middleeast&xfile=data/middleeast/2009/March/middleeast_March269.xml.

⁸⁹ *Official: Jordan sides with Arabs on possible ICC arrest warrant against Sudanese president*, TREND, Mar. 4, 2009, available at <http://en.trend.az/news/world/wnews/1434341.html>.

⁹⁰ *Syria rejects ICC's move against Sudan president*, PEOPLE'S DAILY ONLINE, July 23 2008, available at <http://english.people.com.cn/90001/90777/90853/6456412.html>.

⁹¹ *Yemenis President Stresses Refusal of ICC Decision against Sudanese President*, CRIENGLISH.COM, Mar. 3, 2009, available at <http://english.cri.cn/6966/2009/03/10/2041s462171.htm>.

- 2. In its declaration, the PNA represented that it would “cooperate with the Court without delay or exception” pursuant to Part 9 of the Rome Statute. It has not kept its promise.**

The inexcusable conduct surrounding the Bashir arrest warrant is even more shocking in the case of the PNA. In its declaration, the PNA represented to the Court that it agreed to “recognize[e] the jurisdiction of the Court,” and to “cooperate with the Court without delay or exception, in conformity with Chapter IX of the Statute.” On January 23, 2009, the Registrar of the Court wrote to the PNA acknowledging receipt of its declaration and informed it that its acceptance of the Court’s jurisdiction obligated it to “the provisions of Part 9 and any rules thereunder.”⁹³ Part IX of the Rome Statute mandates many duties on States accepting the Court’s jurisdiction including:

Article 86

General obligation to cooperate

States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.

Article 89

Surrender of persons to the Court

1. The Court may transmit a request for the arrest and surrender of a person, together with the material supporting the request outlined in article 91, to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person. States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender.

The PNA cannot possibly expect to receive the benefit of the Court to open cases against Israelis, when it is engaging in such flagrant disregard for its obligations under the Rome Statute -- obligations to which the PNA expressly agreed. This is especially true in this case, where acceptance of the PNA’s declaration is not within the terms of the Rome Statute and would require considerable legal acrobatics to effectuate, greatly implicating the credibility of the Court. The relationship with the Court is reciprocal. There is no reason why the Court should go out of its way to accommodate the demands of a non-State entity, to which it owes no obligation, all the more so when that entity has no respect for the Court’s objectives and authority. The OTP should not be a victim to such blatant manipulation. As Prosecutor Moreno-Ocampo himself has stated,

It is the lack of enforcement of the Court’s decisions which is the real threat to enduring Peace. Allowed to remain at large, the criminals exposed are continuing to threaten the victims, those who took tremendous risks to tell their stories; allowed to

⁹² Mahmoud Abbas Visits His Comrade, Omar al-Bashir, THE NEW REPUBLIC, (Aug. 20, 2009) , *available at* <http://www.tnr.com/blog/the-spine/mahmoud-abbas-visits-his-comrade-omar-al-bashir>.

⁹³ Letter of Silvana Arbia to Ali Khashan, Jan. 23, 2009.

remain at large, the criminals ask for immunity under one form or another as a condition to stopping the violence. They threaten to attack more victims. I call this extortion, I call it blackmail. We cannot yield.⁹⁴

B. Several NGO supporters of the PNA declaration are also marred by “unclean hands”.

Al Haq has claimed that the ICC must accept the PNA declaration because the “Palestinian community [] can no longer tolerate the impunity which for so long has characterized Israel’s military assaults in the occupied Palestinian territory.” PCHR demands that “the Office of the Prosecutor expedite the decision regarding the International Criminal Court’s jurisdiction over crimes committed in Palestine, and prevent the establishment of an effective zone of impunity.” The OTP should reject these assertions given that these organizations are also marred by “unclean hands”.

Although these groups claim to combat impunity and advocate for human rights, they have done little to no campaigning aimed at preventing Palestinian impunity for attacks on Israeli civilians. Al Haq’s and PCHR’s publications routinely erase the context of terrorism, instead making wildly exaggerated claims against Israel. Moreover, these organizations rarely, if ever, condemn the suicide bombings, shootings, stabbings, car bombings, kidnappings, rocket and mortar attacks that have been carried out by Palestinians, killing and injuring thousands of Israelis. Not only do they not condemn these attacks, these groups go so far as to claim they are legal acts of “resistance”.

For instance, Shawan Jabarin, Al Haq’s General Director, complained that after 9/11, “the United States succeeded in establishing linkages between legitimate resistance against occupation and terrorism.”⁹⁵ Al-Haq’s former General Director, Randa Siniora also stated, “Although resistance against occupation and its arbitrary practices is legitimate under international law, and these acts are considered a part of the Palestinian people’s resistance and struggle against occupation in order to achieve their right to liberation and independence, the occupation forces call it ‘terrorism’ or ‘destructive acts.’”⁹⁶

Notably, Jabarin has been linked to the Popular Front for the Liberation of Palestine terror organization.⁹⁷ In 1985, Jabarin was convicted for recruiting members on behalf of the PFLP.⁹⁸ Jabarin was also found guilty of arranging PFLP training outside Israel, and was sentenced by Israeli courts to twenty-four months imprisonment, of which he served nine. In

⁹⁴ Address by Luis Moreno-Ocampo, International Conference “Building a Future on Peace and Justice,” (June 25, 2007), available at <http://www.peace-justice-conference.info/download/speech%20moreno.pdf>

⁹⁵ Al-Haq, “‘Legal’ Cover for Illegitimate Practices: Arbitrary Arrests and Prison Conditions of Palestinian Political Prisoners in Israeli Prisons and Detention Centers,” Apr. 2003. available at <http://www.alhaq.org/etemplate.php?id=47>

⁹⁶ *Id.*

⁹⁷ Ministry of Justice (Israel) Letter re: Shawan Jabarin, (May 3, 2009), available at <http://www.justice.gov.il/NR/rdonlyres/5E0C9689-FF5F-4C37-AA0A-C7D8B9E7F886/14706/%D7%A9%D7%95%D7%95%D7%90%D7%9F%D7%92%D7%90%D7%91%D7%A8%D7%99%D7%9F3509.pdf>.

⁹⁸ See *Shawan Rateb Abdulla Jabarin v. the Commander of Israel Defense Forces in the West Bank* (H.C.J 5182/07 , (June 22, 2007).

1994, he again was arrested for continued involvement with the PFLP.⁹⁹ For similar reasons, Jordan denied Jabarin entry in 2003.¹⁰⁰ At his hearings regarding the travel restrictions, the Israeli HCJ noted that Jabarin “is among the senior activists of the terrorist organisation, The Popular Front for the Liberation of Palestine.”¹⁰¹ It also stated that

[Jabarin] is apparently active as a Dr. Jekyll and Mr. Hyde, in part of his hours of activity he is the director of a human rights organization, and in another part he is an activist in a terrorist organization which does not shy away from acts of murder and attempted murder, which have nothing to do with rights, and, on the contrary, deny the most basic right of all, the most fundamental of fundamental rights, without which there are no other rights – the right to life.¹⁰²

A 2009 decision by the HCJ found that “material pointing to [Jabarin’s] involvement in the activity of terrorist entities is concrete and reliable.”¹⁰³

The Gaza-based PCHR also frequently labels attacks on Israeli civilians as “resistance,” and generally only condemns Palestinian bombings or rocket attacks if they fail to reach their intended civilian targets in Israel, instead injuring Palestinians.¹⁰⁴ In PCHR’s terms, “resistance groups” should not engage in the “misuse of weapons” [i.e. inflict intentional or negligent harm on Palestinians rather than restricting attacks to Israelis].¹⁰⁵ PCHR rejects Israel’s right to exist as a Jewish state¹⁰⁶ and is against normalization with the country.¹⁰⁷

⁹⁹ Shravanti Reddy, et. al., *Palestinian human rights activist Sha'wan Jabarin continues his work despite obstacles*, (Al Haq), available at

http://asp.alhaq.org/zalhaq/site/eDocs/txtDocs/News%20Items/news_270303.htm.

¹⁰⁰ Conditions and challenges experienced by human rights defenders in carrying out their work, (FIDH Observatory 2003), available at <http://www.fidh.org/IMG/pdf/il395a.pdf>.

¹⁰¹ HCJ, 2008.

¹⁰² HCJ, June 2007.

¹⁰³ HCJ 1520/09: *Shawan Rateb Abdullah Jabarin v. The Commander of IDF Forces in the West Bank*. Unofficial translation prepared by Al-Haq available at

<http://www.alhaq.org/pdfs/Shawan-abarin-v.pdf>. NGO Monitor's analysis available at <http://blog.ngo-monitor.org/other-ngos/human-rights-watch/oops-guess-we-forgot-tomention-that-stuff-about-the-pflp/>

¹⁰⁴ See, e.g., PCHR, “6 Palestinians, Including 4 Children, Injured in Gaza Due to Misuse of Weapons,” December 23, 2008, available at <http://www.pchrgaza.org/files/weapon/english/2008/report44.html>

¹⁰⁵ See, e.g., PCHR, “Explosion Kills One Man, Injures Five in Gaza,” Feb. 4, 2010, available at http://www.pchrgaza.org/portal/en/index.php?option=com_content&view=article&id=5978:explosion-kills-one-man-and-injures-five-in-gaza-&catid=61:field-update-security-chaos-&Itemid=211; “4 Civilians Wounded in Incidents of Misuse of Weapons in the Gaza Strip,” Mar. 4, 2010, available at http://www.pchrgaza.org/portal/en/index.php?option=com_content&view=article&id=6215:4-civilians-wounded-in-incidents-of-misuse-of-weapons-in-the-gaza-strip-&catid=61:field-update-security-chaos-&Itemid=211

¹⁰⁶ See, e.g., PCHR, “Symposium entitled “60 Years of the Nakba: Palestinian People’s Rights....to where?” Feb. 28, 2008, available at

http://www.pchrgaza.org/portal/en/index.php?option=com_content&view=article&id=1356:symposium-entitled-60-years-of-the-nakba-palestinian-peoples-rightsto-where&catid=134:pchr-news-from-other-years

¹⁰⁷ PCHR is a signatory to the Palestinian NGO Code of Conduct which rejects “any normalization activities with the occupier, neither at the political-security nor the cultural or developmental levels. No endeavor would be carried out if it undermines the inalienable Palestinian rights of establishing statehood and the return of the refugees to their original homes.” See NGO Monitor, “A Clouded EU Presidency: Swedish Funding for NGO

Both organizations are leaders in the NGO movement to bring universal jurisdiction cases against Israelis and those doing business with Israel. PCHR has sought arrest warrants against Israeli military and political officials in New Zealand, Spain, Switzerland and the Netherlands. Both PCHR and Al Haq have tried to do so in the UK. In addition, they have filed civil suits in Canada, the UK, and the US. As a result of these one-sided politically motivated tactics and to prevent further abuse of national legal systems, Spain has amended its universal jurisdiction laws and the UK is in the process of doing so. Al Haq was reprimanded in Canada for filing suit without properly notifying and receiving approval from the Attorney General in violation of Canadian law.¹⁰⁸ Consistent with their promotion of “resistance” language, these organizations have never filed cases against Palestinian leaders, Hamas, Islamic Jihad, or their state sponsors, Iran and Syria, to obtain justice for Israeli victims. For more information on this issue, see Anne Herzberg, “NGO ‘Lawfare’: Exploitation of Courts in the Arab-Israeli Conflict.” (Attached).

Given the failure of these organizations to campaign on behalf of Israeli victims of Palestinian crimes and their use of highly charged rhetoric that appears to condone such activity, the OTP should not be a party to their one-sided immoral political agenda.

V. The PNA Declaration and its support by NGOs is Part of the “Durban Strategy” or “War by Other Means.”¹⁰⁹

In assessing whether to open an investigation, the OTP frequently relies on “open source” material including information from NGOs like Human Rights Watch and Amnesty International.¹¹⁰ Many of these organizations have heavily lobbied the OTP to accept the PNA’s declaration. The activity of these groups must be seen, however, in a political context. As a result, NGO Monitor believes the following information is essential background for the OTP and the Court to take into account in order to properly assess NGO reports and communications.

For more than 60 years, the State of Israel has been subjected to violence, warfare, and a relentless campaign of terror attacks deliberately targeting civilians. Thousands have been murdered and injured in suicide bombings, mass shootings, stabbings, rocket attacks, car bombs, kidnappings, and hijackings. Today, these attacks are spearheaded by states, including Iran and Syria, and terror organizations – Hamas, Islamic Jihad, Hezbollah, Fatah’s Al Aksa Martyrs Brigades, the PFLP, and even Al Qaeda. They not only outwardly reject the existence of a Jewish state within any borders, but their ideology is marred by overt antisemitism and calls for genocide of the Jewish people. Unfortunately, many so-called Palestinian moderates and supporters also refuse to recognize Israel as a Jewish state, and seek to reverse the November 1947 UN decision calling for two states, which was accepted by the Jewish nation, and rejected by the Arabs.

Rejectionism,” June 29, 2009, available at http://www.ngo-monitor.org/article/a_clouded_eu_presidency_swedish_funding_for_radical_ngos

¹⁰⁸ See Decision of Justice Cullen in *Bil’in Village Council v. Green Park Int’l, Inc., Green Mount Int’l, Inc. and Annette LaRoche*, (Sept. 18, 2009), at para. 318 (the court noted that the plaintiffs had sought the benefit of Canadian statutes, yet had failed to implead the Attorney General or seek his authorization for the case which those laws required).

¹⁰⁹ Gerald M. Steinberg, “The UN, the ICJ and the Separation Barrier: War by Other Means” *Israel Law Review*, (38:1-2, 2005)

¹¹⁰ OTP Iraq Letter, *supra* note 40, at 2;

This hard power terror war is accompanied by a soft power political war – also known as the “weaponization” of human rights -- aimed at delegitimizing and demonizing the State of Israel. The PNA declaration, backed by the Arab League, must be seen in context of this political campaign. Acting in conjunction with the PNA and the Arab League are several civil society or nongovernmental organizations (NGOs) that claim to support universal human rights and humanitarian goals. Palestinian advocacy groups like PCHR and Al Haq are key players and have been joined by many powerful organizations; organizations whose budgets and influence rival that of large multinational corporations -- including Amnesty International, Human Rights Watch, and Oxfam.

The origins of the NGO campaign to attack Israel’s legitimacy can be traced to the NGO Forum of the 2001 UN World Conference Against Racism in Durban, South Africa.¹¹¹ At the conference, officials from 1,500 NGOs gathered, issuing a resolution singling out Israel as “a racist, apartheid state” and labeling “Israel’s brand of apartheid as a crime against humanity.” These NGOs accused Israel of the “systematic perpetration of racist crimes including war crimes, acts of genocide and ethnic cleansing” and called upon the “international community to impose a policy of complete and total isolation of Israel as an apartheid state.” The conference also revived the 1975 UN General Assembly declaration that “Zionism is racism.” Although this very bigoted declaration was repealed in 1991, NGOs resuscitated both the tactic and the canard at the Durban conference in order to attack Jewish self-determination and self-defense rights. This singling out of Israel is a form of incitement and in itself is an expression of racism

The strategy of transforming Israel into a pariah state – the “Durban Strategy”-- involves promoting boycott, divestment, and sanctions campaigns; lawfare, where Israeli officials and corporations and States doing business with Israel are harassed around the world with lawsuits that exploit universal jurisdiction statutes; and lobbying and campaigning at international institutions such as the UN, the EU, the International Court of Justice and the International Criminal Court, targeting Israel. Many of the organizations involved in the “Durban Strategy” openly acknowledge their agenda. For instance, the anti-Israel Boycott National Committee, including many of the NGOs who have been actively lobbying the OTP, writes in a 2008 strategy document: “Based on the call by the 2001 NGO Forum of the WCAR in Durban . . . over 170 Palestinian unions, associations, NGOs and their networks . . . launched a **strategic call for a comprehensive BDS Campaign.**”¹¹² Similarly, the Director of the NGO, Adalah, has urged pro-Palestinian activists to portray Israel as an “inherent undemocratic state” and to “use that as part of campaigning internationally.”¹¹³

NGOs carrying out the Durban Strategy invest millions into publications, public relations blitzes, and lobbying efforts utilizing the rhetoric of human rights and international law to single out Israel as their ultimate violator and abuser. By couching political attacks in these terms, NGOs seek to create a veneer of credibility and expertise, thereby increasing international pressure against Israel. Since the 2001 Durban conference, this process has played itself out on many occasions – Jenin in 2002, the International Court of Justice’s case

¹¹¹ NGO Forum at Durban Conference 2001, NGO Monitor, available at http://www.ngo-monitor.org/article/ngo_forum_at_durban_conference.

¹¹² “Palestinian Civil Society Strategic Position Paper for the Durban Review Conference,” available at http://bdsmovement.net/files/English-BNC_Position_Paper-Durban_Review.pdf

¹¹³ See Diakonia, “Conference Report: Palestine/Israel: Making Monitoring Work: (Re-)Enforcing International Law in Europe,” (Sept. 2008), at 10.

against Israel's "apartheid wall" in 2004, the 2006 Lebanon War, the 2008-09 Gaza War and the Goldstone process, and the May 2010 "Free Gaza" flotilla.

These cases have followed a standard pattern: Israel is faced with a spate of terror attacks, and responds with counter measures of increasing severity in order to protect its population. NGOs immediately issue numerous condemnations, almost all against Israel, with accusations of "war crimes," "crimes against humanity," and the intentional targeting of civilians. These allegations are generally based on speculation with little to no hard evidence. The media and the international community adopt these claims at face value, rarely conducting independent verification. The UN, particularly the structurally biased Human Rights Council,¹¹⁴ engages in further condemnations, calling for international investigations and war crimes trials. NGOs are recruited to play an integral role in these processes further entrenching their influence and claims. The context of terror is completely erased, as are Israel's rights to self defense and self determination. At the same time, virulent antisemitism from Iran, Hamas and Hezbollah is completely ignored.¹¹⁵

Significantly, under the Durban Strategy, the concepts of Zionism and a Jewish state *per se* (not specific policies or territorial disputes) are the causes of Israeli "racism," "apartheid," and "occupation". As such, NGO campaigns based on the Durban Strategy meet the working definition of antisemitism developed by the EU Monitoring Centre on Racism and Xenophobia, and recommended for adoption by the UK's All-Party Parliamentary Groups Against Antisemitism. The guidelines note the following as forms of contemporary antisemitism:

- Accusing the Jews as a people, or Israel as a state, of inventing or exaggerating the Holocaust.
- Accusing Jewish citizens of being more loyal to Israel, or to the alleged priorities of Jews worldwide, than to the interests of their own nations.
- Denying the Jewish people their right to self-determination, e.g., by claiming that the existence of a State of Israel is a racist endeavor.
- Applying double standards by requiring of it a behavior not expected or demanded of any other democratic nation.
- Using the symbols and images associated with classic antisemitism (e.g., claims of Jews killing Jesus or blood libel) to characterize Israel or Israelis.
- Drawing comparisons of contemporary Israeli policy to that of the Nazis.
- Holding Jews collectively responsible for actions of the state of Israel.¹¹⁶

¹¹⁴ Close to two-thirds of the HRC membership are representatives from the Organization of the Islamic Conference and the non-aligned Movement. *See* <http://www2.ohchr.org/english/bodies/hrcouncil/membership.htm>

¹¹⁵ NGO Monitor has documented dozens, if not hundreds, of examples of these activities. *See* www.ngo-monitor.org

¹¹⁶ European Union Monitoring Center, "Working Definition of Antisemitism," *available at* <http://www.european-forum-on-antisemitism.org/working-definition-of-antisemitism/english/>.

The Durban Strategy has been particularly prevalent with regards to the Gaza War, which began after Hamas broke a cease-fire with Israel and launched “Operation Oil Stain,” sending hundreds of rockets into some of Israel’s largest population centers, including Ashkelon, Ashdod, and Be’er Sheva. The war was accompanied by obsessive media and NGO coverage: NGO Monitor tracked over 500 statements by 50 NGOs at that time. And these NGO publications repeated several themes couched in international law used by the Arab League and the OIC as the impetus for establishing the UN Human Rights Council Goldstone mission and the Arab League’s Fact Finding Mission to Gaza. These charges included allegations of continued “occupation” of Gaza, “collective punishment,” “intentional targeting of civilians,” and claims of “disproportionate” force.¹¹⁷

NGOs, the Goldstone report and the Arab League report, minimized the more than 8,000 mortar and rocket attacks of increasing severity and range directed at Israeli civilians. The role of Syria and Iran in their support of Hamas and other terror groups in Gaza was similarly ignored, as were reports regarding the commandeering by Hamas of construction materials, fuel, and humanitarian aid. Claims of mass deprivation in Gaza were highly exaggerated.¹¹⁸ Widespread accounts of “human shielding” and exploitation of civilian infrastructure by Hamas were discounted. Incitement to genocide perpetrated by Hamas and its state patrons were erased. Little to no mention was made of Gilad Shalit, the Israeli soldier kidnapped from Israeli territory and held incommunicado for more than four years in complete violation of the Geneva Conventions and international law.

In contrast to the condemnations of Israel, many international NGOs were silent on extensive human rights abuses occurring around the world during this same period such as the more than 600 civilians killed in Congo on December 29th in a conflict that has claimed more than 5 million lives, and the thousands of Muslims killed annually at the hands of other Muslims in attacks in Iraq, Pakistan, Afghanistan, Somalia, Sudan, and elsewhere. Only a couple days before the IHH flotilla confrontation, more than 120 Muslims were murdered and hundreds injured in a dual bombing and mass shooting of two mosques and a hospital in Pakistan. Yet, there were no emergency sessions at the UN Human Rights Council and comparatively little NGO and media coverage or ongoing focus.

At the outset, it should be stressed that there might indeed have been cases during the Gaza War where the IDF may have fallen short of international legal standards. However, in the dozens of NGO publications issued on the war alleging Israeli crimes, in particular those issued by Human Rights Watch and Amnesty International, little, if any, substantive factual or legal analysis was conducted.

These organizations, while understandably upset by civilian casualties, misrepresented international law accusing Israel of “war crimes” and “crimes against humanity” based on the sole fact that civilians were killed or injured. NGO reports relating to Gaza simply highlighted a few highly emotive incidents from which these organizations drew overly broad and unfounded conclusions regarding Israel’s compliance with international law. As noted, however, by the Committee appointed by the ICTY Prosecutor

¹¹⁷ Report of the United Nations Fact-Finding Mission on the Gaza Conflict. A/HRC/12/48, 75, Human Rights Council, Sept 25, 2009, <http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf>

¹¹⁸ See, e.g. Peter Hitchens, “Lattes, beach barbecues (and dodging missiles) in the world's biggest prison camp,” DAILY MAIL (UK), Oct. 11, 2010, available at <http://www.dailymail.co.uk/news/article-1319157/Gaza-Strip-Lattes-beach-bbqs-dodging-missiles-worlds-biggest-prison-camp.html?ito=feeds-newsxml#ixzz12JUoGqr> (attached).

to review alleged wrongdoing by NATO forces during the 1999 Kosovo campaign, “much of the material submitted to the Office of the Prosecutor consisted of [NGO] reports that civilians had been killed, often inviting the conclusion to be drawn that crimes had therefore been committed.” The OTP, itself, has also observed that

Under international humanitarian law and the Rome Statute, the death of civilians during an armed conflict, no matter how grave and regrettable, does not in itself constitute a war crime. International humanitarian law and the Rome Statute permit belligerents to carry out proportionate attacks against military objectives even when it is known that some civilian deaths or injuries will occur.¹¹⁹

These principles were simply ignored or distorted in NGO publications. It should also be emphasized that many NGOs claiming to report on the Gaza War minimized or even concealed that during their missions to Gaza, they were continually shadowed by Hamas officials who vetted and debriefed witnesses prior to and following interviews.

The methodological deficiencies in these publications are unfortunately not unique to Israel. A 2006 study, “The Work of Amnesty International and Human Rights Watch: Evidence from Colombia,” conducted by the Bogota-based Conflict Analysis Resource Center and the University of London, found that “both organizations have substantive problems in their handling of quantitative information.¹²⁰ Problems include failure to specify sources, unclear definitions, an erratic reporting template and a distorted portrayal of conflict dynamics.”¹²¹

Below are a few examples regarding the work of Human Rights Watch, Amnesty International, and the Palestinian Center for Human Rights in the Gaza Conflict, though NGO Monitor has detailed similar problems in much of the NGO reporting (See NGO Monitor Monograph, *The NGO Front in the Gaza War*, attached).

Human Rights Watch (HRW)¹²²

HRW’s concentration on the Arab-Israeli conflict reflects the political ideology of its officials, as well as the powerful influence of the media in setting NGO agendas. According to a study by James Ron and Howard Ramos, “watchdogs respond to media demand, and the more journalists ask about a country such as Israel, the more Human Rights Watch ... will

¹¹⁹ OTP Iraq Letter, *supra* note 40, at 5.

¹²⁰ University of London, Conflict Analysis Resource Center, “[The Work of Amnesty International and Human Rights Watch: Evidence from Colombia](http://www.ngo-monitor.org/data/images/File/evidencefromcolumbia_feb2007.pdf),” 2007, available at http://www.ngo-monitor.org/data/images/File/evidencefromcolumbia_feb2007.pdf.

¹²¹ *Id.*

¹²² Because of they claim to promote human rights, NGOs like HRW and Amnesty enjoy a “halo effect” by which journalists, academics, diplomats and other opinion makers have repeated NGO reports, without question or independent verification, thereby enhancing the political impact of biased NGO officials. Unlike government frameworks in a democratic society, NGOs are not subject to checks and balances or systematic accountability - except among their own supporters. NGO Monitor believes all organizations, especially those as powerful and well-financed as HRW and Amnesty, should be subject to scrutiny and held accountable to ethical and moral standards. No group should be beyond criticism.

respond.”¹²³ Similarly, a member of HRW’s board has commented that “We seek the limelight—that’s part of what we do. And so, Israel’s sort of like low-hanging fruit.”¹²⁴

In 2009, HRW issued nearly 100 publications, on the Arab-Israeli conflict, the vast majority on Gaza, and only 12 of these focused exclusively on Palestinian actors. Since April 2009, HRW has issued more than 40 statements lobbying for the Goldstone report dwarfing its reporting on any other abuses in the Middle East and even surpassing its coverage of the Iranian election crisis. HRW has issued only two reports on Iran since January 2009 compared to seven reports on the Gaza War alone. Its lone report on the Iranian post-election crisis is only 19 pages, compared to a total of 351 pages condemning Israel for the war.

HRW’s charges related to white phosphorus, drones, and “white flag” deaths drove a variety of NGO and media campaigns during the Gaza war and fed directly into the Goldstone Report, following the model of the “massacre” claims about Jenin in 2002 and Qana in the 2006 Lebanon war. These reports were mostly premised on speculation or false claims (“In none of the cases did Human Rights Watch find evidence that Palestinian fighters were present in the immediate area of the attack at the time.”¹²⁵) as well as charges that go beyond HRW’s research capacity (“the drone operators had the time and optical ability to determine whether they were observing civilians or combatants”).

In its report, *Rain of Fire*, HRW charged Israel with illegal use of white phosphorus munitions. This allegation depended upon the military “expertise” of Marc Garlasco – HRW’s former “senior military analyst” who resigned in February in the wake of scandal. His technical assertions were refuted by many military experts including in evidence provided to the Goldstone mission (even though that evidence was selectively applied by the mission in its report)¹²⁶ – and was supplemented with unverifiable and often inconsistent Palestinian testimony. HRW did not have knowledge of the military conditions involved, and based claims of malevolent intent and war crimes on speculations regarding alternatives that may or may not have been available and equally effective.

Another report accused Israel of “war crimes” resulting from the alleged use of Spike missiles fired from drones according to Palestinian witnesses (*Precisely Wrong*, June 2009). This report, too, was fundamentally flawed. A number of experts unconnected with HRW also immediately noted the major technical errors in the claims.¹²⁷ Robert Hewson, editor of Jane’s Air-Launched Weapons, remarked that the launch of a missile from drones, two of which were alleged to occur at night, would likely “elude the naked eye”.¹²⁸ He added that “Human Rights Watch makes a lot of claims and assumptions about weapons and drones, all of which is still fairly speculative.”¹²⁹ Colonel Richard Kemp, former head of British forces in Iraq and Afghanistan, similarly questioned Garlasco’s claims that witnesses heard drones

¹²³ James Ron and Howard Ramos, “[Statistics tell the real story of rights watchdogs and Israel](#)” *Ottawa Citizen*, October 31, 2009.

¹²⁴ Benjamin Birnbaum, *Minority Report: Human Rights Watch fights a civil war over Israel*, THE NEW REPUBLIC, Apr. 27, 2010, available at <http://www.tnr.com/article/minority-report-2>.

¹²⁵ “Precisely Wrong,” (Human Rights Watch), Jun 30, 2009, available at <http://www.hrw.org/en/node/84077/section/3>.

¹²⁶ United Nations Fact Finding Mission on the Gaza Conflict, Public Hearings (Geneva) (July 7, 2009), available at http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/docs/2009.07.07PM_Session.doc

¹²⁷ Human Rights Watch accuses Israel over Gaza drones, REUTERS, Jun. 30, 2009, available at <http://www.reuters.com/article/idUSTRE55T37A20090630>.

¹²⁸ *Id.*

¹²⁹ *Id.*

prior to the alleged attacks. Kemp noted that the five mile range of a Spike missile was enough to put it well out of earshot.¹³⁰

The single HRW report on Palestinian violations of Israeli human rights, *Rockets from Gaza*, was not published until August 6, 2009, long after media attention had subsided. The report covered no new ground and largely repeated an April 2009 publication of the International Crisis Group. Moreover, the content of the report equated Israel with Hamas, failed to condemn Hamas for the use of human shields, and blamed Israel for Hamas rocket fire from populated areas. *Rockets from Gaza* also ignored weapons smuggling into Gaza, as well as the role of Iran and Syria in supplying those weapons. In contrast to the condemnations HRW directed at Israel, its report on Hamas included no implications, and appeared to be merely an attempt to create an artificial show of “balance”.

Rockets from Gaza was followed one week later by another HRW report headlined *White Flag Deaths*, alleging that Israel deliberately killed civilians waving white flags.¹³¹ *White Flag* relied on conflicting Palestinian claims and ignored the major discrepancies in Arabic-language and international media regarding these claims.¹³² In one case, more than fourteen vastly different versions appeared in the media.¹³³ At a press conference held in Jerusalem, HRW admitted to an NGO Monitor official that it was aware of these many versions, yet this information was missing in its report. Inconsistencies include whether Hamas fighters were present at the time of the incidents; the specific details of how the incidents transpired; and the number, identity, and affiliation of casualties.

HRW’s reporting on Gaza was coupled with several notable scandals. In May 2009, HRW officials appeared at a fundraising dinner in Saudi Arabia including at least one member of the governing Shura Council.¹³⁴ At the dinner, HRW’s noted its need to combat “pro-Israel pressure groups” as the reason for seeking Saudi funding.¹³⁵

In September 2009, Marc Garlasco, HRW’s “senior military analyst,” responsible for authoring many of HRW’s Israel reports since 2004, was revealed to be an avid collector of Nazi memorabilia contributing more than 8,000 posts to Nazi memorabilia websites and authoring a 430-page collecting guide to Nazi-era war medals.¹³⁶ Finally, in October, HRW’s founder Robert Bernstein, wrote a devastating op-ed in the *New York Times* charging that HRW “has lost critical perspective” and “has been issuing reports on the Israeli-Arab conflict

¹³⁰ *Rockets from Gaza*, (Human Rights Watch), Aug. 6, 2009, available at <http://www.hrw.org/en/reports/2009/08/06/rockets-gaza>.

¹³¹ *White Flag Deaths*, (Human Rights Watch), Aug. 13, 2009.

¹³² *The McGirk Affair: Claims of Cold-Blooded Executions Not Credible*, (CAMERA), Feb. 4, 2009, available at http://camera.org/index.asp?x_context=2&x_outlet=62&x_article=1624; An Alternative Version of the events in HRW’s “white flages” report, NGO Monitor, (Aug. 17, 2009), available at http://www.ngo-monitor.org/article/an_alternative_version_of_the_events_in_hrw_s_white_flags_report.

¹³³ NGO Monitor, “HRW’s Credibility Gap: 14 Versions of the Abed Rabbo “White Flags” Incident, September 11, 2009, available at http://www.ngo-monitor.org/article/hrw_s_credibility_gap_versions_of_the_abed_rabbo_white_flags_incident.

¹³⁴ Focus: HRW raises funds in Saudi Arabia by demonizing Israel, NGO Monitor, (May 2009), available at http://www.ngo-monitor.org/digest_info.php?id=2450#focus.

¹³⁵ *Id.*

¹³⁶ Experts or Ideologues?: HRW’s Defense of Marc Garlasco’s Nazi Fetish, NGO Monitor, (Sept. 10, 2009), available at http://www.ngo-monitor.org/article/expert_or_ideologues_hrw_s_defense_of_marc_garlasco_s_nazi_fetish.

that are helping those who wish to turn Israel into a pariah state.”¹³⁷ Recent exposés on HRW in the *Sunday Times (UK)*¹³⁸ and *The New Republic* support these claims.¹³⁹

Amnesty International

As with HRW, Gaza was the primary focus of Amnesty’s work on Israel in 2009.¹⁴⁰ Israel is portrayed as the second worst human rights violator in the Middle East after Iran. Palestinian, Syrian, Libyan, Egyptian, and Saudi human rights violations received far less attention. In addition, Amnesty issued more in-depth reports – which have the greatest impact – on Israel than on any other country.

In July 2009, Amnesty published a report entitled “Operation ‘Cast Lead’: 22 Days of Death and Destruction,” charging Israel with “war crimes”.¹⁴¹ The 127-page publication ignored considerable evidence available to anyone with access to YouTube of Hamas operating deliberately within civilian areas to turn the population of Gaza into a mass human shield. It minimized Palestinian violations of international law, and promoted boycotts¹⁴² and lawfare¹⁴³ against Israel. The only mention of kidnapped soldier Gilad Shalit was in a footnote, underlining Amnesty’s double standards in the application of human rights norms.

The report also alleged that Israel had “wantonly” destroyed Gaza’s only flour mill in order to hamper the Palestinian food supply.¹⁴⁴ It further claimed that the mill’s “owners are adamant that the site was neither a launch pad for rockets nor a weapons cache, and the Israeli army has provided no evidence to the contrary.”¹⁴⁵ Documentary evidence released by the UN (UNITAR)¹⁴⁶ and the IDF¹⁴⁷ refuted Amnesty’s version of events clearly showing that the mill was damaged by artillery during a firefight with Hamas combatants.

¹³⁷ Robert L. Bernstein, *Rights Watchdog, Lost in the Mideast*, N.Y. TIMES, Oct. 19, 2009, at A31.

¹³⁸ Jonathan Foreman, *Nazi scandal engulfs Human Right Watch*, The Times (U.K.), Mar. 28, 2010, available at http://www.timesonline.co.uk/tol/news/world/us_and_americas/article7076462.ece.

¹³⁹ Birnbaum, *supra* note, 124.

¹⁴⁰ Moral Collapse: Amnesty International in 2009, NGO Monitor, May 26, 2010, available at http://www.ngo-monitor.org/article/human_rights_upheaval_amnesty_international_in_.

¹⁴¹ Operation Cast Lead: 22 Days of Death and Destruction, Amnesty International, (July 2009), available at <http://www.amnesty.org/en/library/asset/MDE15/015/2009/en/8f299083-9a74-4853-860f-0563725e633a/mde150152009en.pdf>.

¹⁴² Amnesty’s Gaza “Report” and call for Arms Embargo: Abolishing Israel’s Right to Self-Defense, NGO Monitor, (Feb. 25, 2009), available at http://www.ngo-monitor.org/article/amnesty_s_call_for_weapons_boycott_sentencing_israel_before_trial.

¹⁴³ Amnesty: first boycotts, now Lawfare, NGO Monitor Blog, (Mar. 16, 2009), available at <http://blog.ngo-monitor.org/other-ngos/amnesty-international/amnesty-first-boycotts-now-lawfare/>.

¹⁴⁴ Amnesty International, “22 Days of Death and Destruction,” July 2009, at 71.

¹⁴⁵ *Id.*

¹⁴⁶ UNITAR, Satellite Image Analysis in Support to the United Nations Fact Finding Mission to the Gaza Conflict, July 31, 2009, at 33, available at http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/docs/UNITAR_UNOSAT_FFMGC_31July2009.pdf. The UNITAR report notes that most of the damage found at the mill appeared to have occurred between January 16-18, 2009 (not January 10 as claimed by Amnesty) and was a result of “ground fire”, not an airstrike.

¹⁴⁷ Ministry of Foreign Affairs of Israel, *Gaza Operation Investigations: An Update (January 2010)* at 3-6, available at <http://www.mfa.gov.il/NR/rdonlyres/8E841A98-1755-413D-A1D2-8B30F64022BE/0/GazaOperationInvestigationsUpdate.pdf>; ¹⁴⁷ *Gaza Operation Investigations: Second Update (July 2010)*, at para. 10, available at <http://www.mfa.gov.il/NR/rdonlyres/1483B296-7439-4217-933C-653CD19CE859/0/GazaUpdateJuly2010.pdf>.

Amnesty has also seen its share of controversy in the past year. In February 2010, Amnesty suspended Gita Sahgal, head of its Gender Unit, for criticizing Amnesty's alliance with Moazzam Begg, an alleged supporter of the Taliban.¹⁴⁸ Its actions were condemned by author Salman Rushdie and columnist Christopher Hitchens, among others.¹⁴⁹ Hitchens called the "degeneration and politicization" of Amnesty "a moral crisis that has global implications."¹⁵⁰

In response to the criticism, Amnesty's interim Secretary General, Claudio Cordone, defended Begg, stating that "jihad in self-defence" is not "antithetical to human rights".¹⁵¹ In a statement published in the *New York Review of Books*, Sahgal remarked that the organization's "stance has laid waste to every achievement on women's equality by Amnesty International in recent years and made a mockery of the universality of rights."¹⁵²

Palestinian Center for Human Rights (PCHR)

One of the most highly contentious issues surrounding the Gaza War was the debate over Palestinian casualty claims. PCHR announced that the majority of fatalities were civilians, while the IDF estimated that "more than two-thirds of [the deaths] were Hamas members."¹⁵³ In a January 18, 2009 press conference, an unidentified senior IDF official stated, "the exact numbers are difficult to define, as Hamas intentionally conceals its losses in order to preserve its image of strength among Palestinian population." Similarly, the New York Times reported (January 10, 2009), "Hamas militants are fighting in civilian clothes; even the police have been ordered to take off their uniforms," making distinguishing combatants from civilians even more complicated.¹⁵⁴

As noted above, PCHR is a highly politicized NGO, a leader in the anti-Israel "lawfare" movement.¹⁵⁵ On January 21, 2009, PCHR alleged that there had been a total of 1,285 Palestinian deaths, among which 895 were civilians – meaning almost 70% of were civilian. These figures were repeated by the Jerusalem Post, Ha'aretz, Reuters Alertnet, and others.¹⁵⁶ PCHR's anti-Israel campaigning during war included accusations of Israeli "war crimes," "crimes against humanity," "human holocaust," "collective punishment,"

¹⁴⁸ Amnesty: Jihad in Self-Defense is Not Antithetical to Human Rights, NGO Monitor, Mar. 2010, available at http://www.ngo-monitor.org/digest_info.php?id=2871#Jihad.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ Andy McCarthy, *Amnesty International Comes out of the Closet, Endorses "Defensive Jihad,"* NATIONAL REVIEW, Apr. 3, 2010, available at <http://www.nationalreview.com/corner/197369/amnesty-international-comes-out-closet-endorses-defensive-jihad/andy-mccarthy>

¹⁵² Gita Sahgal, *A Statement by Gita Sahgal on Leaving Amnesty International*, N.Y. REV. OF BOOKS, May 13, 2010, available at <http://www.nybooks.com/articles/archives/2010/may/13/statement-gita-sahgal-leaving-amnesty-international/>.

¹⁵³ Gazan doctor says death toll inflated, Ynet News, (Jan. 22, 2009), available at <http://www.ynetnews.com/articles/0,7340,L-3660423,00.html>.

¹⁵⁴ The NGO Front in the Gaza War: Debate over Palestinian Casualties, NGO Monitor, (Jan. 27, 2009), available at http://www.ngo-monitor.org/article/gaza_war_casualty_controversy.

¹⁵⁵ NGO "Lawfare:" Exploitation of Courts in the Arab-Israeli Conflict, NGO Monitor, (Sept. 30, 2008), available at http://www.ngo-monitor.org/article/ngo_lawfare_exploitation_of_courts_in_the_israeli_arab_conflict.

¹⁵⁶ See e.g. Amira Hass, Gazans say IDF troops ignored white flags and shot at them, HAARETZ, Jan. 20, 2009, available at <http://www.haaretz.com/print-edition/news/amira-hass-gazans-say-idf-troops-ignored-white-flags-and-shot-at-them-1.268458>; "I wept," Olmert says of death of Gaza children, REUTERS, Jan. 23, 2009, available at <http://www.alertnet.org/thenews/newsdesk/LN571480.htm>.

"indiscriminate killing and continued systematic destruction of all the Palestinian institutions and civilian facilities in the Gaza Strip."

PCHR's credibility has been questioned by numerous organizations including a report by CAMERA: "PCHR includes in its civilian toll individuals identified by other sources as combatants and omits any mention of several slain senior fighters from terrorist groups. The omission of several publicized Hamas commanders should raise suspicion that other Hamas fighters have been omitted from its statistics."¹⁵⁷ CAMERA also concluded that "[a]n analysis of the fatalities by age and gender shows that the majority of civilian fatalities recorded by PCHR are males between 15 and 50 years old, the same age profile as the combatants. This should raise concern that significant numbers of combatants may have been misclassified as civilians."¹⁵⁸

In one notable example highlighting the lack of credibility in PCHR's figures on the Gaza War, the organization listed Nizar Rayan, a senior Hamas military commander, as a "civilian" and "university professor" in its casualty statistics.¹⁵⁹ Rayan and members of his family were killed in an IDF airstrike on January 1, 2009.¹⁶⁰ Rayan was involved in the planning of many deadly suicide attacks on Israel and was an architect of the Hamas takeover of Gaza in 2007. He sent his own son out on a suicide bombing mission in 2001 that killed two and wounded many.¹⁶¹ Journalist Jeffrey Goldberg called Rayan, "one of the more bellicose Hamas leaders I have known." Rayan told him in a 2007 interview that the "only reason to have a hudna is to prepare yourself for the final battle . . . Israel is an impossibility. It is an offense against God."¹⁶²

Rayan's home was part of a complex that served as a weapons storage site and command center for Hamas.¹⁶³ Prior to the attack, the IDF issued several alerts that the buildings would be targeted including specific telephone calls and warning shots "13 minutes and 9 minutes before the strike."¹⁶⁴ Other residents heeded the warnings, but Rayan and his family decided to stay. After the strike, secondary explosions were observed, confirming the presence of a weapons cache in Rayan's home.¹⁶⁵ It is not known whether the initial IDF attack or the secondary explosions caused the resulting casualties and PCHR fails to even raise that scenario as a possibility.

¹⁵⁷ Gaza Casualties: Civilian or Combatant? (CAMERA), Jan. 29, 2009, available at http://www.camera.org/index.asp?x_context=2&x_outlet=118&x_article=1603.

¹⁵⁸ *Id.*

¹⁵⁹ "The Dead in the course of the Israeli recent military offensive on the Gaza strip between 27 Dec. 2008 and 18 Jan. 2009," PCHR, (Jan. 2009), available at <http://www.pchrgaza.org/files/PressR/English/2008/list.pdf>; Cast Lead Casualty Reports IDC-Herzliya International Institute for Counter-Terrorism, (Apr. 2009), <http://www.ict.org.il/ResearchPublications/CastLeadCasualties/tabid/325/Default.aspx>.

¹⁶⁰ Top Hamas leader killed in Israeli attack, available at YouTube, <http://www.youtube.com/watch?v=6kzvzlbALI&feature=related>

¹⁶¹ Obituary: Nizar Rayyan, BBC, Jan. 1, 2009, available at <http://news.bbc.co.uk/2/hi/7807430.stm>.

¹⁶² Jeffrey Goldberg, *Nizar Rayyan of Hamas*. . . , THE ATLANTIC, Jan. 2, 2009, available at <http://www.theatlantic.com/international/archive/2009/01/nizar-rayyan-of-hamas-on-god-apos-s-hatred-of-jews/9278/>.

¹⁶³ The Operaton in Gaza, Factual and Legal Aspects, Ministry of Foreign Affairs (Israel), (Jul. 29, 2009), available at http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Hamas+war+against+Israel/Operation_Gaza_factual_and_legal_aspects_use_of_force_complaints_about_IDF_5_Aug_2009.htm#D2cii.

¹⁶⁴ *Id.*

¹⁶⁵ Israel Air Force Attack on the House of Nizar Rayan, IDF Press Releases, (Jan. 1, 2009), available at <http://dover.idf.il/IDF/English/opcast/op/press/0103.htm>.

Despite Rayan's status as a leader in Hamas' Qassam brigades and the weapons stockpile in his building, PCHR called Rayan's death a "heinous crime" and that its "perpetrators and their military and political leaders must be prosecuted."¹⁶⁶

As the logistical organizer for the Arab League's Gaza "Fact Finding" mission, PCHR also facilitated an interview with two of Rayan's sons, one of whom dubiously claimed, "My father couldn't imagine he would be targeted like this."¹⁶⁷ Even the Guardian noted, however, that "Rayan appeared to believe himself invincible. He refused to leave or allow his enormous family to leave their home in the Jabalia camp."¹⁶⁸

Many NGO publications formed the basis of the Arab League's and the Human Rights Council's "fact finding" missions to Gaza and these reports have also been provided to the OTP as alleged proof of Israeli "crimes" in Gaza. These missions and their resulting reports were not conducted, however, in adherence to internationally recognized fact finding standards and their findings and conclusions should be disregarded by the OTP and the Court.

Arab League "Independent Fact Finding Committee on Gaza"

The Arab League organized a "Fact Finding" Mission to Gaza in February 2009. Members of the team included John Dugard, former UN Rapporteur and anti-Israel activist¹⁶⁹ and Gonzalo Boye, a Spanish attorney representing the Palestinian Center for Human Rights in a universal jurisdiction case in Spain against Israeli officials. Boye served a 10-year prison term for ties to the Basque terror group, ETA, and for his involvement in the kidnapping of a Spanish businessman.¹⁷⁰ Paul de Waart, a Dutch academic and frequent advocate for punitive legal measures against Israel was also part of the fact-finding mission.¹⁷¹

The mission's one-sided objective was to "investigate Israeli crimes and human rights violations" and to hold "Israel legally accountable for war crimes committed by Israeli Occupation Forces in Gaza." Its report, "No Safe Place," was issued on April 30, 2009, accusing Israel of "genocide," "crimes against humanity," and "war crimes."¹⁷² Hamas

¹⁶⁶ Press Release, PCHR, IOF Offensive on the Gaza Strip Continues for the 7th Consecutive Day (Jan. 2, 2009), available at <http://www.pchrgaza.org/files/PressR/English/2009/125-2008.html>.

¹⁶⁷ See *infra* note 172.

¹⁶⁸ Trevor Mostyn, *Nizar Rayan*, THE GUARDIAN (U.K.), Jan. 3, 2009, available at <http://www.guardian.co.uk/world/2009/jan/03/obituary-nizar-rayan-hamas>.

¹⁶⁹ In addition to the Russell Tribunal, Dugard is the initiator of a report entitled, "Occupation, Colonialism, Apartheid?: A Re-assessment of Israel's Practices in the Occupied Palestinian Territories under International Law." He is also a frequent speaker at UN conferences advocating criminal trials of Israeli political and military leaders. See, e.g., NGO Monitor, "HRW plays prominent role at UN min-Durban Conference," July 30, 2009, available at http://www.ngo-monitor.org/article/hrw_plays_prominent_role_at_un_mini_durban_conference

¹⁷⁰ Soeren Kern, "Spain, Israel and War Crimes," *Pajamas Media*, Mar. 31, 2009, available at <http://pajamasmedia.com/blog/spain-israel-and-war-crimes/>; Kern, "Anti-Israel Lawfare in Europe," *Hudson New York*, June 30, 2010, available at http://www.gees.org/articulos/anti_israel_'lawfare'_in_europe_7968

¹⁷¹ "Israel and the International Law Conference," Al Zaytouna, August 25, 2009 available at <http://www.alzaytouna.net/arabic/?c=1515&a=97455>; Janet McMahon, "Hague Conference Considers Ways to Implement ICJ Ruling on Israel's Wall," Washington Report on Middle East Affairs, (Jan//Feb 2005), available at <http://www.wrmea.com/component/content/article/271-2005-january-february/8644-special-report-hague-conference-considers-ways-to-implement-icj-ruling-on-israels-wall.html>; "Gaza Accountability – Impunity," FIDH, (Sept. 15, 2009) available at <http://www.fidh.org/GAZA-Accountability-Impunity>. De Waart also participated in the Russell Tribunal - <http://www.facebook.com/group.php?gid=55119034131>.

¹⁷² See Report of the Independence Fact Finding Committee on Gaza: No Safe Place, Arab League, (Apr. 30, 2009), available at http://www.arableagueonline.org/las/picture_gallery/reportfullFINAL.pdf.

attacks on Israeli civilians were labeled “resistance activities.”¹⁷³ Recommendations called for “the formation of a team of lawyers and legal experts to consider various options to prosecute Israelis accused of committing war crimes against the Palestinian people.”¹⁷⁴ It advocated several legal channels, many of which are documented in this report, including proceedings before the ICJ under Article 9 of the Genocide Convention and the Fourth Geneva Convention, an advisory opinion by the ICJ, proceedings in US federal courts under the Alien Tort Claims Act, and Security Council referral of Israel to the ICC.¹⁷⁵ The report also advocated further NGO lawfare, “supporting legal steps and efforts made by NGOs in the field and calling upon those NGOs to coordinate their efforts with the League of Arab States.”¹⁷⁶

In reaching its findings, the report repeated many unsubstantiated claims advanced by NGOs regarding the war, including suspect casualty figures issued by PCHR,¹⁷⁷ accusations regarding the use of white phosphorous,¹⁷⁸ and conclusory allegations of indiscriminate and disproportionate use of force by the IDF.¹⁷⁹

UN Human Rights Council “Fact Finding Mission” (Goldstone)

HRW, Amnesty, PCHR and other NGOs were integral players in the Goldstone mission as well. A driving factor behind the significant NGO support of Goldstone and the HRC mission was the close ties between Goldstone and the other mission members to these same organizations. These connections were not disclosed, even though they raised serious questions regarding the ability of panel members and staff to objectively evaluate information submitted by these groups. For example, at the time of his appointment, Goldstone was an HRW board member and a good friend of HRW’s Executive Director Kenneth Roth.

Each of the mission members also had significant ties to Amnesty International. Three members – Goldstone, Hina Jilani, and Desmond Travers – signed a widely publicized March 2009 letter initiated by Amnesty, stating that “events in Gaza have shocked us to the core.” The fourth member, Christine Chinkin, who declared Israel’s actions to be a “war

¹⁷³ *Id.* at para. 212, 213.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 148-150.

¹⁷⁶ *Id.* at Given the mass abuses of human rights and atrocities committed by Arab League members (Algeria, Bahrain, Comoros, Djibouti, Egypt Iraq Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, Palestine, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, the UAE, and Yemen)– including many of the most repressive governments in the world, as well as the League’s continual sheltering of ICC indicted war criminal, Sudanese President, Omar al-Bashir, this report was nothing more than a political stunt and propaganda exercise. Collaboration by NGOs with the League, therefore, indicates severe moral failings.

¹⁷⁷ PCHR’s Gaza casualty figures, widely repeated without question by international news outlets, have been shown to be grossly inaccurate. In one case, PCHR lists Nizar Rayan as a civilian, even though he was a Hamas military leader and was storing a cache of weapons in his home at the time of his death. *See, e.g.*, AP, “Israeli War Planes Smash Home Of Top Hamas Leader,” January 1, 2009, available at <http://cbs5.com/national/hamas.israel.airstrikes.2.898239.html>; Anne Herzberg, “Nizar Rayan and NGOs: Highlighting the Lack of NGO Credibility,” NGO Monitor, available at http://www.ngo-monitor.org/article/ngo_gaza_war_myths_revisited#nizar.

¹⁷⁸ *See* Asher Fredman, “Precision-Guided or Indiscriminate? NGO Reporting on Compliance with the Laws of Armed Conflict,” *NGO Monitor Monograph Series*, June 2010, available at http://www.ngo-monitor.org/data/images/File/LOAC_web.pdf

¹⁷⁹ *See* Anne Herzberg, “NGOs Take Law of Proportionality out of Proportion,” NGO Monitor, available at http://www.ngo-monitor.org/article/ngo_gaza_war_myths_revisited#proportionality

crime” and denied Israel’s right to self-defense while the fighting in Gaza was still underway,¹⁸⁰ was previously a consultant to Amnesty International.

In May 2009, an Amnesty official provided Goldstone with a proposed outline for the report, which was largely adopted.¹⁸¹ The organization also appears to have given the mission a list of 36 incidents to investigate [all relating to alleged Israeli violations], and which became the sole focus of Goldstone’s report. These connections represent a major conflict of interest –such close ties almost ensured that information provided by these NGOs could not be objectively evaluated. Despite personal assurances to NGO Monitor and others by the mission that NGO submissions would be made publicly available on the UN’s website, they remain hidden.

In June and July, Goldstone held “public hearings” in Gaza and Geneva, where the mission cherry-picked witnesses in a process that was secret; and some individuals even testified in secret to the commission.¹⁸² The mission largely failed to ask questions designed to elicit relevant facts.

Violations of Ethical Guidelines and International Fact-Finding Standards

Both the Goldstone and Arab League missions were compromised by serious methodological defects and a failure to comply with fact-finding standards. Similarly, NGO publications, upon which these reports were largely based, also were plagued by these same problems. For instance, the Arab League, Goldstone, and the NGO “investigations” operated in clear violation of fundamental ethical standards adopted in the London-Lund Guidelines on International Human Rights Fact Finding Visits by the Human Rights Institute of the International Bar Association.¹⁸³ The guidelines specify norms for the composition of such inquiries and appropriate methodologies, including “accuracy, objectivity, transparency and credibility.”

In particular, the London-Lund guidelines state:

- Reports must be **clearly objective and properly sourced**, and the conclusions in them reached in a transparent manner. ... In making their findings the delegation should try to **verify alleged facts with an independent third party** or otherwise. Where this is not possible, it should be noted.
- **The terms of reference must not reflect any predetermined conclusions** about the situation under investigation.
- The mission’s delegation must comprise **individuals who are and are seen to be unbiased**. The NGO should be confident that the delegation members have

¹⁸⁰ UN Watch, “Request to Disqualify Prof. Christine Chinkin From UN Fact Finding Mission on the Gaza Conflict,” (Aug. 20, 2009), available at http://www.unwatch.org/atf/cf/%7B6DEB65DA-BE5B-4CAE-8056-8BF0BEDF4D17%7D/2207UN_Watch_Request_to_Disqualify_Christine_Chinkin_from_UN_Goldstone_Mission_on_Gaza,_20_August_2009.pdf.

¹⁸¹ Goldstone NGO Townhall, Geneva, May 2009.

¹⁸² The Goldstone "Fact Finding" Mission and the Role of Political NGOs, NGO Monitor, (Sept. 7, 2009), available at http://www.ngo-monitor.org/article/the_goldstone_gaza_fact_finding_committee_and_the_lund_london_guidelines_.

¹⁸³ International Human Rights Fact-Finding Guidelines, available at <http://www.factfindingguidelines.org/>

the **competence, experience and expertise** relevant to the matters pertaining to the terms of reference.¹⁸⁴

Systematic, widespread condemnation and criticism of the Goldstone process have come from across the political spectrum. University of Essex Professor, Françoise Hampson, has noted that the key problems with Goldstone were the “biased HRC mandate,” “the nature and confused conclusions reached,” and Goldstone’s faulty assumption that violations of IHL can be based solely upon result.¹⁸⁵ Hebrew University Professor Yuval Shany, who is often critical of the Israeli military, has remarked that the Goldstone report “sets a standard that no one applies and no one can meet.”¹⁸⁶ Laurie Blank, Director of Emory University Law International Humanitarian Law Clinic, found that “the Goldstone Report’s application of IHL is questionable, either because it uses the incorrect legal standard or because it applies the wrong law when more than one body of law applies.”¹⁸⁷ Judge Fausto Pocar, former President of the International Criminal Tribunal for the Former Yugoslavia, criticized¹⁸⁸ the Goldstone report for its one-sided and discriminatory call for universal jurisdiction solely against Israel.¹⁸⁹

British think tank Chatham House also issued a report regarding irregularities in the Goldstone process and concluded that among other aspects, “the Mission had given insufficient acknowledgement of the difficulty in obtaining information in a political environment dominated by Hamas,” that there was a perception of bias regarding mission members, that “the criteria employed [for selection of incidents to be investigated] should have been indicated,” and that criticisms of Hamas were “tentative.”¹⁹⁰

Based on the conflicts of interest, failure to adhere to professional methodologies, and violations of international ethical standards, the OTP should closely evaluate these reports, approach them with a critical eye, and rigorously cross-examine NGO representatives regarding the reliability of their allegations.

VI. Conclusion

In conclusion, the OTP should immediately dismiss the declaration of the PNA purporting to accept the jurisdiction of the Court. The PNA is not a State and it does not have the competence to accede to the Rome Statute. The “teleological” approach is simply a thinly veiled attempt to transform the ICC into a court of universal jurisdiction and this model was rejected by the drafters of the Rome Statute. Despite the allegations, there is no “lack of recourse” or a “zone of impunity” in this case as the Rome Statute, the UN Charter, and the

¹⁸⁴ *Id.*

¹⁸⁵ Remarks made at Hebrew University/ICRC, “Securing Compliance with IHL” Conference, November 22, 2009.

¹⁸⁶ *Id.*

¹⁸⁷ Laurie Blank, “The Application of IHL in the Goldstone Report: A Critical Commentary,” 12 Y.B OF INT’L HUMAN. L. (2009) at 2.

¹⁸⁸ Remarks made at Hebrew University/ICRC, “Securing Compliance with IHL” Conference, November 23, 2009.

¹⁸⁹ For other critiques of the Goldstone process, see Moshe Halbertal, “The Goldstone Illusion,” *The New Republic*, November 6, 2009, available at <http://www.tnr.com/article/world/the-goldstone-illusion>

¹⁹⁰ Report of an Expert Meeting which Assessed Procedural Criticisms made of the U.N. Fact-finding Mission on the Gaza Conflict (The Goldstone Report), Chatham House, (Nov. 27, 2009), available at http://www.chathamhouse.org.uk/files/15572_il271109summary.pdf.

Israeli justice system offer adequate remedies. The PNA and its supporters are marred by “unclean hands” by openly defying the authority of the Court and by failing to adhere to the Court’s principles and objectives. Finally, the PNA declaration is a part of the “Durban Strategy” – a political campaign that uses the rhetoric of human rights and international law in order to attack the legitimacy of the State of Israel. It is clear that the PNA declaration is part of a cynical political campaign. As such, the Court should not allow itself to be exploited for these political ends. Therefore, the OTP should reject the PNA’s declaration forthwith.

Respectfully Submitted,

Anne Herzberg
Legal Advisor
NGO Monitor