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Dear Mr Khan

### **Situation in Palestine – Ruling on Jurisdiction**

UK Lawyers for Israel (UKLFI) are an association of lawyers who support Israel and seek the proper application of laws in matters relating to Israel.

May we first congratulate you on your appointment as Prosecutor of the International Criminal Court and wish you success in this position.

We are writing with regard to the ruling of the Court's Pre-Trial Chamber I of 5 February 2021 on the Court's territorial jurisdiction in Palestine. As you are already aware, the dissenting Opinion of Judge Kovács (ICC-01/18-143-Anx1) strongly disputed the majority decision. He found

*“neither the Majority's approach nor its reasoning appropriate in answering the question before this Chamber, and in my view, they have no legal basis in the Rome Statute, and even less so, in public international law”* (para 3).

Amongst other deficiencies, Judge Kovács noted that the majority misquoted Article 12(2) of the Rome Statute (the primary provision the Court had to interpret) by omitting some of its words and thereby altering its natural meaning (paragraphs 55-58).

The purpose of this letter is to draw your attention to an additional inaccuracy in the majority decision and to invite you to consider whether you might have a responsibility to draw this inaccuracy to the Chamber's attention and seek a further ruling under

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Article 19(3) of the Rome Statute before taking any further steps in respect of this situation.

Paragraph 100 of the majority decision (ICC-01/18-143) states:

*“The United Nations Secretary-General circulated Palestine’s instrument of accession among the States Parties before accepting it and no State Party, except for Canada, manifested any opposition at the time. Palestine’s accession was subsequently accepted by the United Nations Secretary-General on 6 January 2015 ... ”*

This is not correct: the Secretary-General did not circulate Palestine’s purported instrument of accession to States Parties between receiving it on 2 January 2015 and accepting it on or before 6 January 2015, when he circulated a notice of accession.

We attach copies of correspondence with the Registrar of the Court, the UK Foreign Office and the Treaty Section of the UN Office of Legal Affairs, confirming that neither the Court nor the UK Foreign Office have copies of Palestine’s instrument of accession, and that it was not circulated prior to acceptance or subsequently.

Nor has any evidence been published that the UN Secretary General or UN staff discussed with States Parties whether to accept Palestine’s instrument of accession between its submission on Friday, 2 January 2015, and the notice of the accession on 6 January 2015. It seems unlikely that meaningful consultation could have taken place in this short period over a weekend.

This further factual error is of some significance, since the majority appear to have thought that the Secretary General gave States Parties an opportunity to comment on the instrument before he accepted it and that they should be taken to have agreed to its acceptance because they did not then object.

There is a real difference between not objecting if invited to comment before an act (the situation which the majority believed to be the case) and not challenging an act after it has been done (the actual situation). It is substantially more difficult to infer an implicit agreement in the latter case than the former.

The materiality of this point is underlined by paragraph 101 of the majority decision, which observes:

*“The Chamber notes that, in the context of the present proceedings, seven States Parties submitted observations on the Prosecutor’s Request as amici curiae thereby arguing that Palestine cannot be considered a State for the purposes of article 12(2)(a) of the Statute, namely the Czech Republic, Austria, Australia, Hungary, Germany, Brazil and Uganda. However, it should be noted that these States*

*remained silent during the accession process and that none of them challenged Palestine's accession before the Assembly of State Parties at that time or later.*" (emphasis added)

The majority thus appear to have attached some weight to the fact that these States did not take the supposed opportunity, which the majority erroneously thought they had, to object to the UN Secretary General accepting the purported instrument of succession before he accepted it.

The previous Prosecutor may have unwittingly contributed to the majority's mistaken assumption, since paragraph 131 of her Request for the ruling of 22 January 2020 (ICC-01/18-12) stated:

*"On 2 January 2015, Palestine deposited with the UN Secretary-General its instrument of accession to the Rome Statute. At least one ICC State Party (Canada) lodged an objection and noted that the UN Secretary-General has a 'technical and administrative role [as] Depositary', and that 'it is for States Parties to a treaty, [...], to make their own determination with respect to any legal issues raised by instruments circulated by a [D]epositary'."*

This may have been read as saying that no event intervened between the deposit of the (purported) instrument of accession and Canada's objection, whereas Canada's objection on 23 January 2015 followed the UN Secretary General's acceptance of the deposit and circulation of the notice of accession on 6 January 2015.

Paragraph 71 of the Code of Conduct for the Office of the Prosecutor states:

*"Without prejudice to the standards of conduct applicable to all Staff members, those representing the Prosecutor at hearings before the Chambers of the Court shall, in particular: ....*

*(g) not deceive or knowingly mislead the Court, judge, counsel, or the Registry and take all necessary steps to correct an error or inaccuracy as soon as possible after it has been discovered"* (emphasis added)

This refers to hearings, but we submit that a similar obligation must apply in relation to written statements in accordance with the general requirements of integrity and honesty, expressed for example in paragraph 20(c) of the same Code.

Although we think that the previous Prosecutor may have unwittingly contributed to the error identified above in the majority decision, we would argue that the requirement to take all necessary steps to correct an error or inaccuracy also extends to errors and inaccuracies to which the Office of the Prosecutor did not contribute.

In these circumstances, we would respectfully invite you to consider whether it is now incumbent on you to draw the additional inaccuracy identified above to the attention of Pre-Trial Chamber I and possibly seek a further ruling as to jurisdiction under Article 19(3) of the Rome Statute in the light of this correction.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Jonathan Turner', written over a horizontal line.

Jonathan Turner  
Chief Executive