To Mr. Avihai Mandelblitt
Attorney General

Subject: The Status of the West Bank under International Law

It is with regret that we, as legal scholars and practitioners, write publicly to air our disagreement with colleagues and friends.

On June 10-11, 2020, a number of our colleagues published an open letter (http://opiniojuris.org/2020/06/11/an-open-letter-to-the-israeli-government-condemning-annexation/) to Israel's Prime Minister and other senior Israeli officials warning of international violence and criminal prosecutions should the democratically elected government of Israel, in coordination with the United States, implement its proposal to apply the law, jurisdiction and administration of Israel to parts of the West Bank that are expected to stay under Israel's permanent sovereignty in the event of an Israeli-Palestinian peace agreement.

We signatories hold various opinions on the wisdom of the proposal, but we all agree that whatever decision Israel's unity left-right government ultimately makes will come after months of vigorous public debate, and elections in which the proposed policy was very much an issue. The misleading or inaccurate nature of many of the statements in the open letter does not help that debate.

Unfortunately, the open letter misrepresents both the doctrines of international law that bear on the Israeli-American proposal, and the factual and historical background that must guide any attempt to apply that law.

The open letter presents a variety of legal claims said to be incontrovertible—even bedrock rules of international law—though in reality, they are highly controversial. For instance, the open letter presents one view of the concept of self-determination and its relationship to statehood and territorial sovereignty, but the open letter fails to acknowledge that the subjects remain highly contested. Certainly, there is no universal agreement that a claim of self-determination entails a right to future statehood and territorial sovereignty, let alone that self-determination is legally equivalent to statehood and attendant territorial sovereignty.

Likewise, the open letter presents a particular dogma about "annexation" of territory and military conquest, while the legal world embraces many other views. A fairly large degree of consensus has developed for the claim that the unlawful use of force (or perhaps any use of force) cannot serve as the basis for a claim of territorial sovereignty based on conquest, but there is no agreement or even precedent supporting the letter's assertion that the use of force nullifies all alternative legal grounds for claiming sovereignty.

Indeed, there are few claims of general international law made in the open letter that are not contested, whether they concern the interplay between territorial sovereignty and the application of the rules of belligerent occupation, or the legal status of pronouncements from the UN General Assembly and the Security Council. The views expressed in the open letter are legitimate, and in some cases popular; but, so too, are the contrary views dismissed and ignored by the open letter.

Even more troubling is the letter's attempt to prejudice application of the controversial legal doctrines by presenting a selective and misleading view of a complex and disputed factual background and history.

The most striking omission of the open letter is its attempt to summarize Israel's relation to the West Bank in the statement that the "West Bank was taken by force [by Israel] in 1967." There have been several decades of treaties and agreements between Israel and its neighbors (Jordan and the PLO) that relate to Israel's continued jurisdiction and legal authority over most of the West Bank. Contrary to the open letter's insinuations that Israel's Supreme Court has forbidden Israel to apply its law to West Bank territory ("annexing" in the terminology of the open letter) by using the laws of belligerent occupation and that the government of Israel has legally pledged not to apply its laws without a security justification, Israel has long claimed, not without reason, that it has independent and legitimate legal claims to the West Bank.

Even as many Israeli governments have sought territorial compromise, they have asserted the superiority of Israel's sovereign claims. Israeli law authorizes any government of Israel to apply Israel's law, jurisdiction and administration to any part of the former Mandatory territory, and Israel's government did just that to East Jerusalem in 1967, just weeks after capturing the territory from Jordan. No Israeli court has ever denied that legal authority or questioned the legality of Israel's decision regarding East Jerusalem. Just days ago, Israel's Supreme Court reaffirmed in HCJ 1308/17 Village of Silwad v. the Knesset (2020) that it considers the West Bank to be subject to rules of belligerent occupation only because "until today, Israel's government has not exercised its authority established in the Law and Administration Ordinance 5708-1949 to apply the law, jurisdiction and administration of the state on the territory of [the West Bank]."

Contrary to the claim of the open letter, the sovereign status of the West Bank has long been contested. Alongside the school of thought that holds that a "State of Palestine" holds sovereignty over the territory of the West Bank, or that a Palestinian right of self-determination gives the Palestinian people the legal equivalent of territorial sovereignty, there is also a school of thought that contends that Israel has lawful sovereignty to the West Bank, due to *uti possidetis juris*, or lawful possession of territory without a rival state claimant, or succession to a Jewish claim of self-determination established as a matter of *lex specialis* in the Mandate of Palestine. Additionally, many scholars assert intermediate positions, viewing both Israel (or the Jewish people) and the Palestinians as having lawful grounds for asserting rights. Indeed, there is no small amount of irony in the open letter's treating of the boundaries of the West Bank territory as sacrosanct even though they were established by Transjordan's use of military force in 1948 and its subsequent purported annexation of Samaria and Judea which it renamed the "West Bank"—actions generally considered to have been unlawful.

Under the circumstances, it is misleading and prejudicial to insist, as the open letter does, that Israel's proposed extension of law, jurisdiction, and administration is identical to a "unilateral annexation of [] part of this territory [that] would violate [a] fundamental norm ... [and] entail consequences of international wrongfulness." It is illegitimate and intellectually dishonest to predetermine the lawfulness of a policy by simply ignoring one side's claims. If Israel's actions in changing the governing structure of part of the West Bank are exercises of right, they can hardly be described as "annexation" of territory of another state or violations of fundamental norms.

The letter threatens "individual criminal sanctions" for Israelis involved in this decision, a clear reference to the current ICC inquiry into Israeli settlements. In tying the threatened criminal sanctions to "annexation," the open letter suggests that the sanctions will not ensue if Israel avoids "annexation." Yet, many have predicted that the ICC inquiry will result in criminal charges even if Israel does not apply its law, and several signatories of the open letter have called for such charges. By failing to acknowledge this, the open letter makes the reference to "criminal liability" seem more like a political scare tactic than legal advice.

We are certain that many of our colleagues who signed the open letter inadvertently overlooked the flaws of the text to which they attached their names. It is time to reconsider. It behooves legal scholars not to contribute to the politicization and weaponization of international law.

Signed: (affiliations are for identification purposes only)

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