

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

No.: ICC-01/18  
Date: 16 March 2020

**PRE-TRIAL CHAMBER I**

**Before:** Judge Péter Kovács, Presiding Judge  
Judge Marc Perrin de Brichambaut  
Judge Reine Adélaïde Sophie Alapini-Gansou

**SITUATION IN THE STATE OF PALESTINE**

**Public Redacted Version**

**Victims' Observations on the Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine**

**Source:** Legal Representative of Persecution Victims, Katherine Gallagher

**Document to be notified in accordance with regulation 31 of the *Regulations of the******Court to:*****The Office of the Prosecutor**

Fatou Bensouda, Prosecutor

James Stewart, Deputy Prosecutor

**Counsel for the Defence****Legal Representatives of the Victims**

Katherine Gallagher

**Legal Representatives of the Applicants****Unrepresented Victims****Unrepresented Applicants  
(Participation/Reparation)****The Office of Public Counsel for  
Victims**

Paolina Massidda

**The Office of Public Counsel for the  
Defence****States' Representatives**The competent authorities of the  
State of Palestine**Amicus Curiae**

-Professor John Quigley

-Guernica 37 International Justice  
Chambers

-The European Centre for Law and Justice

-Professor Hatem Bazian

-The Touro Institute on Human Rights and  
the Holocaust

-The Czech Republic

-The Israel Bar Association

-Professor Richard Falk

-The Organization of Islamic Cooperation

-The Lawfare Project, the Institute for NGO  
Research, Palestinian Media Watch, and the  
Jerusalem Center for Public Affairs

-My AQSA Foundation

-Professor Eyal Benvenisti

-The Federal Republic of Germany

-Australia

-UK Lawyers for Israel, B'nai B'rith UK, the  
International Legal Forum, the Jerusalem  
Initiative and the Simon Wiesenthal Centre

-The Palestinian Bar Association

-Prof. Laurie Blank, *et al.*-The International Association of Jewish  
Lawyers and Jurists**REGISTRY**

- Professor Asem Khalil and Assistant Professor Halla Shoaibi
- Shurat Hadin–Israel Law Center
- Todd F. Buchwald and Stephen J. Rapp
- Intellectum Scientific Society
- The International Commission of Jurists
- Drs. Robert Heinsch and Giulia Pinzauti
- The Republic of Austria
- The International Association of Democratic Lawyers
- The Office of Public Counsel for the Defence
- The Hon. Professor Robert Badinter, *et al.*
- The Palestinian Center for Human Rights, Al-Haq Law in the Service of Mankind, Al-Mezan Center for Human Rights and Aldameer Association for Human Rights
- The Federative Republic of Brazil
- Professor Malcolm N. Shaw
- Hungary
- Ambassador Dennis Ross
- The International Federation for Human Rights, No Peace Without Justice, Women’s Initiatives for Gender Justice and REDRESS
- Professor William Schabas
- International-Lawyers.org
- The League of Arab States
- Me Yael Vias Gvirsman
- The Popular Conference for Palestinians Abroad
- The Israel Forever Foundation
- Dr. Frank Romano
- Dr. Uri Weiss
- The Republic of Uganda

---

**Registrar**  
Peter Lewis

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations Section**  
Philipp Ambach

**Other**

*“Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that shock the conscience of humanity,*

...

*Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes”*

- *Preamble to the Rome Statute of the International Criminal Court*

## I. INTRODUCTION.

1. In accordance with the Order issued by Pre-Trial Chamber I (“Pre-Trial Chamber”) of the International Criminal Court (“ICC” or “Court”) of 28 January 2020,<sup>1</sup> the Victims, as defined in paragraph 4 *infra*, submit these written observations on the Request, and specifically on the question of the scope of Court’s territorial jurisdiction in the situation in Palestine set forth in paragraph 220 therein.<sup>2</sup> The Victims welcome the opportunity to share with the Court their perspective on this question, while also placing this technical question in the larger context of the long quest for justice and accountability by Palestinian victims of serious violations of international law. The Victims stand ready to provide additional observations, in writing or orally through their legal representative, should the Pre-Trial Chamber consider further elaboration or clarification of any matter raised herein of assistance.

2. In sum, the Victims respectfully submit that the Pre-Trial Chamber should dismiss the Request as unnecessary and premature, thereby permitting the Prosecution to commence an investigation into the Situation in Palestine without any further delay, as she has found that, pursuant to article 53(1) of the Statute, there exists a reasonable basis to do so, and that such investigation would serve the

---

<sup>1</sup> [Order setting the procedure and the schedule for the submission of observations](#), 28 Jan. 2020, ICC-01/18-14 (“Order”).

<sup>2</sup> [Prosecution request pursuant to article 19\(3\) for a ruling on the Court’s territorial jurisdiction in Palestine](#), 22 Jan. 2020, ICC-01/18-12 (“Request”), para. 220. Paragraph 220 provides, in relevant part, “The Prosecution respectfully requests Pre-Trial Chamber I to rule *on the scope of the Court’s territorial jurisdiction* in the situation of Palestine and *to confirm that the “territory” over which the Court may exercise its jurisdiction* under article 12(2)(a) comprises the West Bank, including East Jerusalem, and Gaza.” (emphasis added).

interests of justice.<sup>3</sup> Alternatively, the Pre-Trial Chamber should confirm that, as the Prosecutor established,<sup>4</sup> the ICC has jurisdiction over the territory of the State of Palestine, as a Member State of the Court since 1 April 2015 and which has vested the ICC with jurisdiction over crimes committed on its territory or by its nationals since 13 June 2014,<sup>5</sup> and that such territory is recognized by the international community to comprise the Gaza Strip and West Bank, including East Jerusalem, i.e., the territory occupied by Israel since June 1967 or “the occupied Palestinian territory.” *See infra* Sections B and C. Such a conclusion is mandated by a plain reading of the Rome Statute and Rules of the Court as well as the legislative history of relevant provisions, supported by Court precedent, and aligns fully with the object and purpose of the ICC. Moreover, such a conclusion accords with the obligation of the State of Palestine to provide a remedy for serious violations of international law that occur on its territory and/or are committed by or against its nationals. *See infra* Section D.

3. To date, the Victims have received no remedy and no accountability for the intentional and severe deprivation of their fundamental rights – a denial of rights that is predicated on their national identity as Palestinians, which constitutes *inter alia* the crime against humanity of persecution. They fully support the immediate opening of an investigation by the Office of the Prosecutor of the Court – a court of last resort – into the crimes that have been committed on the territory of the State of Palestine, including the war crimes and crimes against humanity to which each has been subjected by Israeli civilian and military officials.<sup>6</sup> The Victims have long sought

---

<sup>3</sup> Request, paras. 2, 93-97. The Prosecutor concluded that the preconditions for the exercise of jurisdiction were satisfied under article 12 because Palestine is an ICC State Party. *Ibid.*, at para. 101.

<sup>4</sup> *See* Request, paras. 2-3, 5, 190-192, 219-220.

<sup>5</sup> Secretary-General of the United Nations, [‘Rome Statute of the International Criminal Court, Rome, 17 July 1998, State of Palestine: Accession.’](#) 6 Jan. 2015, Reference: C.N.13.2015.TreatiesXVIII.10 (Depositary Notification); [Declaration Accepting the Jurisdiction of the International Criminal Court](#), Mahmoud Abbas, President of the State of Palestine, 31 Dec. 2014; [Referral by the State of Palestine Pursuant to Articles 13\(a\) and 14 of the Rome Statute](#), 15 May 2018, PAL180515-Ref.

<sup>6</sup> *See* [Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19\(3\) of the Statute.”](#) 6 Sept. 2018, ICC-RoC46(3)-01/18-37 (“[Bangladesh/Myanmar Jurisdictional Ruling](#)”), paras. 86-88 (recalling the “profound impact and detrimental effect that the length of time between the occurrence of crimes and the moment it is presented at trial can have” and the requirement upon the Court to respect “the rights of victims to know the truth, to have access to justice and to request



homeland – by Israeli authorities, for which there has been no genuine investigation or prosecution. Each of these individuals has been subjected to denial of their fundamental rights because of their identity as Palestinian by and through the implementation of policies and practices of the Israeli civilian and military authorities, and/or the acts or omissions of Israeli citizens living in the occupied Palestinian territory, particularly in relation to the settlement enterprise in the occupied Palestinian territory. Specifically, the Victims have been denied *inter alia* the right to life; the right to health; the right to be free from torture and/or cruel inhuman, or degrading treatment; the right to family and family unity; freedom of movement; the right to pursue a livelihood; the freedom of association, assembly, expression and the right to protest; the right to practice their religion freely and without interference; right to citizenship; and right to property. As such, each person has been the victim of persecution, a crime against humanity, under article 7(1)(h),<sup>9</sup> among other crimes included in the Statute over which the Court has jurisdiction.

6. The Victims emphasize two points: (i) if the investigation proceeds, the Prosecution will identify a number of violations under articles 7 and 8 of the Statute to which each has been subjected; that persecution is named here in no way suggests that the Victims have not been subjected to other crimes against humanity and/or to

---

<sup>9</sup> See also art. 7(2)(g) of the Statute. Persecution, as an extreme form of discrimination used to particularly repugnant ends, has been called “one of the most vicious of all crimes against humanity,” because it “nourishes its roots in the negation of the principle of equality of all human beings.” *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-T, Judgment, 14 Jan. 2000, para. 568, para. 751. Persecution has been described as “the quintessential international crime on some definitions, or at the very least the quintessential crime against humanity,” as it cuts “to the heart of what it is to be human” by targeting “the combination of a person’s very individuality and his or her ability to associate and identify with others.” H. Brady, R. Liss, “The Evolution of Persecution as a Crime Against Humanity,” in Morten Bergsmo et al. (eds.), *Historical Origins of International Law*, Vol. 3 (Torkel Opsahl Academic EPublishers, 2015), p. 554.

As Pre-Trial Chamber III recently affirmed, “Fundamental rights may include a variety of rights, whether derogable or not, such as the right to life, the right not to be subjected to torture or cruel, inhuman or degrading treatment, freedom of expression, freedom of assembly and association and the right to education.” Situation in the People’s Republic of Bangladesh/ Republic of the Union of Myanmar, [Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar](#), ICC-01/19-27, 14 Nov. 2019 (“[Bangladesh/Myanmar Article 15 Decision](#)”), para. 101. See also *ibid.*, para. 103 (for the purposes of defining a group facing discrimination, “the perception of the group by the perpetrator as well as the perception and self-identification of the victims may be considered”).

war crime, including crimes identified in paragraphs 94-100 of the Request; and (ii) the Victims are but a small sample of victims in the Situation of Palestine, and the Victims are confident that if the investigation proceeds, a significant number of victims, who have been subjected to criminal conduct under article 5 of the Statute that occurred in whole or in part across all parts of the territory of the State of Palestine, will seek to participate in these proceedings and stand to ready to assist the Prosecutor and the Court during the investigation and case stages.

7. The following provides more detail of the harms suffered by Victims and for which an investigation by the Prosecution of the ICC is warranted. It is noted that a number of Victims at this stage wish to be identified by a pseudonym and wish to provide a description of their case at a high level of generality to avoid possible identification. This decision is due to a well-founded fear of retribution taken against them, their family members and/or community by Israeli authorities for their participation in these proceedings. This fear is grounded in their prior experience with Israeli authorities as well as the well-documented campaign by Israeli officials as well as the United States to discourage Palestinian engagement with the ICC and threats of punishment against those who do participate in the ICC proceedings.<sup>10</sup> **The**

---

<sup>10</sup> N. Landau, [Netanyahu Calls to Impose Sanctions Against International Criminal Court](#), *Haaretz*, 21 Jan. 2020 (quoting Israeli Prime Minister Benjamin Netanyahu as saying, “[t]he U.S. government under President Trump has spoken forcefully against the ICC for this travesty... and I urge all your viewers to do the same and ask for concrete actions, sanctions, against the international court. Its officials, its prosecutors, everyone”); L. Sverdlov, [Israeli lawmakers respond to ICC: Diplomatic terror, political decision](#), *JPost*, 22 Dec. 2019 (quoting Israel’s ambassador to the United Nations Danny Dannon calling the Prosecutor’s actions “diplomatic terror,” and saying “[w]e will act in the coming weeks to activate pressure so that the issue doesn’t develop into a suit. This is an additional attempt to put out a libel and harm the State of Israel ...”); [Israel’s Retaliatory Seizure of Tax: A War Crime to Punish ICC Membership](#), *Al Haq*, 1 Apr. 2015; J. Hansler, [US denying visas to International Criminal Court staff](#), *CNN*, 15 Mar. 2019 (US Secretary of State Mike Pompeo announcing travel restrictions to “persons who take or have taken action to request or further [ICC] investigation” into war crimes and crimes against humanity committed in Afghanistan); O. Bowcott, O. Holmes, and E. Durkin, [John Bolton threatens war crimes court with sanctions in virulent attack](#), *The Guardian*, 10 Sept. 2018 (US National Security Advisor John Bolton threatens retaliation if ICC opens investigation into Israel or the U.S., stating “[t]he United States will use any means necessary to protect our citizens and those of our allies from unjust prosecution by this illegitimate court.”); P. Beaumont, [Palestinian president signs up to join international criminal court](#), *The Guardian*, 31 Dec. 2014. See also [Complaint Against the United States of America: Interference with Judicial Proceedings at the International Criminal Court](#), Letter from the Center for Constitutional Rights to U.N. Special Rapporteur on the Independence of Judges and Lawyers (Diego García-Sayán), 5 June 2019 (documenting statements made against the ICC and threatened actions if it proceeded with investigations involving U.S. or Israeli citizens).



**Victims request that the Pre-Trial Chamber take the campaign of threats and intimidation by Israeli officials and their supporters under advisement, and consider taking any action it deems appropriate to ensure the safety and security of victims, witnesses and other interlocutors in these proceedings.<sup>11</sup>**

(i) The Named Victims.

8. Victim ██████████ was ██████ years old when he was shot by Israeli forces in the right knee on ██████████ 2018 near the border fence in the North Gaza District while peacefully participating in the Great March of Return protests. ██████████ ██████████ was denied a medical permit to exit Gaza for necessary medical treatment and subsequently had to have his leg amputated.<sup>12</sup>

9. Victim ██████████ was shot on ██████████ 2014, his ██████████ birthday, on his family's property ██████████. ██████████ ██████████ was approximately 500 meters from the separation fence when he was shot by Israeli forces in the spine. He is a paraplegic as a result of the shooting.<sup>13</sup>

10. Victim ██████████, a ██████ year-old farmer, was shot and killed by Israeli forces in ██████████, Khan Younis District, while working his farm on ██████████ 2018. He was approximately 200 metres from the border fence at the time he was shot on the right side of his body. He suffered internal wounds and bleeding from the gunshot and died the same day. No family members have worked the land since he was killed out of fear for their lives. ██████████ was married to ██████████ and together they had five children, the youngest of whom is ██████████.<sup>14</sup>

---

<sup>11</sup> [Rome Statute](#), article 68: Protection of the victims and witnesses and their participation in the proceedings. *See also* Rome Statute, art. 70(1); *The Prosecutor v. Frances Kirimimuthaura and Uhuru Muigai Kenyatta*, [Decision on the protocol concerning the handling of confidential information and contacts of a party with witnesses whom the opposing party intends to call](#), ICC-01/09-02/11-469, 24 Aug. 2012.

<sup>12</sup> ██████████  
██████████  
██████████.

<sup>13</sup> ██████████  
██████████  
██████████.

<sup>14</sup> ██████████  
██████████.

11. Victim ██████████, a █████-year-old farmer from the Khan Younis District, was killed by Israeli artillery fire on 30 March 2018 at ██████████. He was working on a farm, approximately 700 metres from the separation fence, at the time of the incident. The same day, crowds gathered near the separation fence to mark Land Day and participate in the 'Great March of Return' protests. ██████████ was the breadwinner for the family, and leaves behind his wife ██████████, who is raising their ██████████ children alone, as well as his father ██████████ and other family members.<sup>15</sup>

12. Victim ██████████, a Palestinian from Gaza, is a student who was denied an exit permit to attend university in the West Bank, which has programs not available to him in Gaza. He is also a student at ██████████ ██████████, and was denied exit permits to participate in professional and cultural opportunities through the ██████████ branches in the West Bank, including East Jerusalem.

13. Victim ██████████ is a Palestinian living in a refugee camp in the West Bank. His son ██████████ was killed by Israeli forces on ██████████ 2014 in the refugee camp in West Bank.

14. Victim ██████████ is a Palestinian human rights researcher from ██████████ in the West Bank. On ██████████ 2016, his █████-year old brother, ██████████, who has Downs-Syndrome, was shot and killed by Israeli forces, causing severe mental pain to ██████████ and his family. Their request for an investigation has gone unanswered.

15. Victim ██████████ is a █████-year old Palestinian from the ██████████ Governate, West Bank. Her son, ██████████, who has Downs-Syndrome, was shot and killed by Israeli forces on ██████████ 2016. ██████████ is suffering from the loss of her son. The family's request for an investigation has gone unanswered.

---

<sup>15</sup> ██████████  
██████████  
██████████.

16. Victim ██████████ is a Palestinian from the West Bank. His ██████-year old son ██████ was killed by the Israeli forces on ██████ 2019 and his body was withheld from the family. ██████ has since been buried in an unknown grave in the so-called “cemeteries of numbers.” (*e.g.*, right to life; right to family; right to be free from cruel treatment).

17. Victim ██████████’s son ██████ was shot by Israeli forces in May 2018 during the Great March of Return, and died as a result of his wounds. ██████ had been denied an exit permit to be treated at the hospital in East Jerusalem for which he had a medical referral and which had the necessary medical equipment and capabilities to treat his injuries (*e.g.*, right to life; right to family; right to health; right to assembly, association and expression).<sup>16</sup>

18. Victim ██████████ is a Palestinian from the West Bank whose son was killed in mid-2016 by Israeli forces. The body has been withheld from the entire family, causing pain to his mother, wife, son and all other family members. (*e.g.*, right to family; right to be free from cruel treatment).

19. Victim ██████████, a Palestinian born in Jordan who resides in ██████, West Bank, with their spouse and children. The Israeli authorities have refused her application for a Palestinian identity card, and **she** is therefore unable to travel outside ██████. ██████ is unable to see her parents, siblings and other relatives who live in Jordan and, although Palestinian, are prohibited by Israel from traveling to Palestine. (*e.g.*, right to citizenship; freedom of movement; right to family unity and reunification).

20. Victim ██████████ is a Palestinian from the West Bank whose brother was shot and killed by Israeli forces in mid-2016. Despite their efforts, ██████’s body has still not been released to his family, causing further suffering. (*e.g.*, right to family; right to be free from cruel treatment).

(ii) The Pseudonymous Victims.

---

<sup>16</sup> ██████████.

21. **Victim A**, a Palestinian from Gaza, was denied an exit permit to receive urgent and needed medical care after being shot by Israeli authorities. The denial of medical care resulted in the amputation of a limb. (e.g., right to health; right to be free from cruel treatment).

22. **Victim B**, is a British citizen of Palestinian descent, who, after two days of intensive and abusive questioning including about Palestinian family members/friends and detention, was denied entry to Palestine in 2015 by Israeli authorities who refused entry at Ben Gurion airport thereby denying this person access to the occupied Palestinian territory, deported this person and banned return for a number of years. **Victim B** is the child of a Palestinian expelled from Palestine in 1948; has resided in the West Bank for a number of years; and regularly visited East Jerusalem, including Al-Aqsa mosque and other sites holy to Muslims. **Victim B** considers Palestine as their “homeland,” has family, friends and community there, all of which are now inaccessible. **Victim B** said that “what we all fear as diaspora Palestinians [is] the denial of access to Palestine” and describes this reality as “absolutely devastating” and feels like “a door has closed” with “no clear recourse that doesn’t entail risk.” (e.g., right to family; right to practice religion; right to home/homeland; freedom of movement; right to be free from cruel treatment).<sup>17</sup>

23. **Victim C**, a Palestinian from East Jerusalem, travelled to Gaza to following his mother’s death in 2015, and since 2017, his applications to return to Jerusalem have been denied by the Israeli authorities. (e.g., freedom of movement; right to home/homeland).

24. **Victim D**, a Palestinian from Gaza who is married to a Palestinian from Hebron in the West Bank, returned to Gaza in August 2016 to visit his dying mother, and since 2017, his applications to exit Gaza so he could return to live with his wife

---

<sup>17</sup> See [Bangladesh/Myanmar Article 15 Decision](#), paras. 36, 66-70; [Bangladesh/Myanmar Jurisdictional Ruling](#), para. 77 (noting that preventing a person from returning to his or her own country causes ‘great suffering, or serious injury [...] to mental [...] health’ and “the anguish of persons uprooted from their own homes and forced to leave their country is deepened,” affirmed that “no one may be arbitrarily deprive of the right to enter one’s own country”).

and children in Hebron have been denied. (*e.g.*, right to family; freedom of movement).

25. Since 2017, **Victim E**, a Palestinian Christian from Gaza, has been denied permits to travel to Bethlehem in the West Bank to celebrate Christmas. (*e.g.*, right to practice religion; freedom of movement).

26. **Victim F**, a Palestinian doctor from Gaza, has his exit permits to attend special professional training in East Jerusalem regularly delayed or denied. Furthermore, he is not allowed to travel to inside the West Bank, in Israel or abroad for additional training. (*e.g.*, right to travel; right to a livelihood).

27. **Victim G**, a 60-year old Palestinian from Gaza whose Palestinian sister is a citizen of Israel, had been denied the ability to travel from Gaza to Israel to see her sick sister since mid-2016, and her sister, as an Israel-id holder, cannot travel to Gaza. (*e.g.*, right to family; freedom of movement).

### III. VICTIMS' OBSERVATIONS: SUBMISSIONS

28. Notwithstanding their Preliminary Remarks in Section III(A), the Victims fully endorse the reasoning put forward by the Prosecution in the Request in paragraphs *inter alia* 101-135, and alternatively in paragraphs 137-181, as a basis for the Pre-Trial Chamber to confirm that the Court is both empowered to and, when seized with a State referral and a finding that a reasonable basis exists to proceed with an investigation under article 53(1) of the Statute, mandated to exercise jurisdiction over the territory of the State of Palestine, to wit, the West Bank, including East Jerusalem, and Gaza. The Victims offer the following observations as relevant to requested ruling on the scope of territorial jurisdiction set forth in paragraph 220 of the Request.

#### *A. Preliminary Matter: The application by the Prosecution is premature.*

29. At the outset, the Victims submit that the Request is unnecessary and misconceived, and otherwise premature, and that the Pre-Trial Chamber should dismiss it. If such a request regarding the scope of the Court's territorial jurisdiction – or a challenge thereto – is to be made, it should be lodged at the case stage, and not at

the preliminary examination or investigation stage. Notably, there has never been such a request (or challenge) in other situations or investigations, including in the context of investigations involving areas under occupation by a non-Member State or involving “buffer zones” and administrative boundary lines,<sup>18</sup> and no such ruling is required for an investigation to proceed.<sup>19</sup> Indeed, rather than promoting judicial efficiency, consideration of the Request under article 19(3), *in abstracto*, does not prevent a State or an accused from raising challenges to the jurisdiction of the Court based on arguments regarding the territorial scope of Palestine *at the appropriate time*, namely the case stage, meaning that the Chambers will need to address layers of questions, moving from the abstract to the specifics of a case.<sup>20</sup>

30. Moreover, addressing the question *in abstracto* runs the risk of converting the question from a legal one, i.e., whether alleged criminal conduct satisfies the territorial, temporal and subject-matter jurisdiction requirements of the Statute, into a political one. In this regard the Victims observe the applications to appear as *amicus curiae* by *inter alia* a number of Member States of the ICC to opine *not* on the scope of the Court’s territorial jurisdiction in the situation of Palestine, *but rather* on the question of whether Palestine is or should be recognized as a “State,” demonstrating the imprudence of addressing the Request at this stage.<sup>21</sup>

---

<sup>18</sup> See [Georgia Article 15 Decision](#), paras. 9-22, 27, 29-32, 41.

<sup>19</sup> Likewise, there was no such question raised when the preliminary examination was announced five years ago nor throughout the many years that the Prosecution examined – and confirmed – that *inter alia* the jurisdictional requirements (temporal, either territorial or personal, and material) of the Court were satisfied.

<sup>20</sup> The Office of the Public Counsel for the Defense has expressed concerns about binding an accused to a predetermination on territorial jurisdiction by the Pre-Trial Chamber. See [Request to Submit Amicus Curiae Submissions Pursuant to Rule 103 and Regulation of the Court 77\(4\)\(c\)](#), 14 Feb. 2020, ICC-01/18-44.

<sup>21</sup> See [Czech Republic](#), ICC-01/18-22, para. 3 (asserting that “the issue of statehood of Palestine should be addressed” as it is “closely linked” to question of Court’s jurisdiction) *but see* [Czech Republic Observations](#), ICC-01/18-69, para. 3 (“The question of the Palestinian statehood is of key relevance for the interpretation and application of Article 12 of the Rome Statute”); [Australia](#), para. 5(a) (seeking to provide as relevant argument that *inter alia* “Australia does not recognize the ‘State of Palestine’ and does not have any relationship with the ‘State of Palestine’ under the Rome Statute”); [Austria](#), paras. 3-4 (seeking to provide as relevant argument that despite voting in favour of Palestine’s status as a non-member observer state, asserts that Austria has not recognized Palestine as a “sovereign state”). See also [Germany](#), ICC-01/18-29. (It is recalled that Germany and the Czech Republic, among other States, supported vesting the Court with “universal jurisdiction” over article 5 crimes during the ICC

31. The current stage of proceedings is such that the Prosecutor has determined that “there is a reasonable basis to initiate an investigation into the situation in Palestine, pursuant to article 53(1) of the Statute,”<sup>22</sup> following her opening of a preliminary examination on 16 January 2015 and the referral of the Situation by the State of Palestine on 22 May 2018. The status is thus one of a situation moving from a preliminary examination to an investigation; as of yet, there are no concrete cases, and indeed, whether there will be rests on the results of the investigation. Accordingly, the Prosecutor asks the Pre-Trial Chamber to opine on whether the Court can exercise jurisdiction *in abstracto* – an exercise that in effect calls for an advisory opinion.<sup>23</sup> It is only when the contours of a specific case, with the location of criminal conduct specified, that the Pre-Trial Chamber can determine whether crimes within the jurisdiction of the Court have been committed in whole or in part on the territory of a State which has accepted the jurisdiction of the Court, i.e., a State Party. Art. 12(1) and (2)(a). *See infra* Section B.

32. Article 19 of the Statute sets out the framework for challenges to the jurisdiction of the Court or the admissibility “of a case.” Notably, as the title of this article states clearly, challenges are to be made to a concrete “case” and not to a Situation as a whole.<sup>24</sup> As this Chamber previously found in relation to the

---

negotiations. *See, e.g.*, Eve La Haye, The Jurisdiction of the International Criminal Court: Controversies over the Preconditions for Exercising its Jurisdiction, *Netherlands International Law Review*, XLVI: 1-25 at 5 & n.15 (1999) Indeed, Brazil’s conclusion that an investigation into crimes committed on the territory of the State of Palestine would not serve “the interests of justice” ([Brazil](#), ICC-01/18-47, para. 10) is the *precise* definition of political interference that the drafters warned about when they limited this assessment to one made only by the Prosecutor and only in the negative. *See* “[The Interests of Justice – where does that come from? Part I](#),” Gilbert Bitti, EJIL:Talk! 13 Aug. 2019.

<sup>22</sup> Request, para. 2.

<sup>23</sup> The Victims consider that Judge Perrin de Brichambaut’s admonitions against rendering a ruling at the pre-preliminary examination stage regarding deportation in the context of Myanmar/Bangladesh apply with equal force to this juncture of proceedings in the Situation of the State of Palestine. *See* [Partially Dissenting Opinion of Judge Marc Perrin de Brichambaut](#), ICC-RoC46(3)-01/18-37-Anx, para. 4 (“Partially Dissenting Opinion of Judge Perrin de Brichambaut”) (noting that answering the Prosecutor’s jurisdictional question based on “imprecise and selective” submissions “would be an exercise is speculation tantamount to delivering a *de facto* advisory opinion”).

<sup>24</sup> Article 19: Challenges to the jurisdiction or the admissibility of a case. *See also* [Judgement on the appeal against the decision on the authorization of an investigation into the situation in the Islamic Republic of Afghanistan](#), 5 Mar. 2020, ICC-02/17-OA4-138, n. 59 (“Afghanistan Appeals Judgment”) (noting that the Prosecutor “may seek a ruling on the admissibility of a case”) (emphasis added); [Partially Dissenting Opinion of Judge Perrin de Brichambaut](#), para. 10 (emphasizing the importance of

Prosecutor's prior request for a ruling on jurisdiction over alleged deportation of the Rohingya people from the Myanmar to Bangladesh, the Prosecutor's reliance on article 19(3) to address jurisdictional questions prior to the case stage is "quite controversial" and declined to rule under that provision – a conclusion that apparently did not dissuade the Prosecution from trying such a course again.<sup>25</sup>

33. Generally, challenges to the jurisdiction of the Court or the admissibility of a case are to be made by: (a) an accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58; (b) a State which has jurisdiction over a case on the grounds that it is or has investigated or prosecuted the case; or (c) a State from which acceptance of jurisdiction is required under article 12. See art. 19(2). In the current matter, as the Prosecutor has only indicated her intention to initiate an investigation (See Request, para. 2), there is no "case" but only the Situation in the State of Palestine. Accordingly, in the matter at hand, there are not yet any accused or persons summoned to appear before the Court, nor, of course, is there a case to which a State might lodge an objection on admissibility grounds.

34. When there is a State referral, as is there is here, the Prosecution is to determine if a reasonable basis exists to warrant an investigation, and if so satisfied, proceed to investigate. Indeed, as the Appeals Chamber recently affirmed, "[i]f a situation is referred by a State Party [...], article 53(1) of the Statute places, in principle, an obligation on the Prosecutor to open an investigation."<sup>26</sup> In all other cases of State referral, the Prosecutor has proceeded straight to investigation after

---

a contextual interpretation of article 19(3), which implies that "a 'case' must be present for the article to apply"). The relevant Rules further support the conclusion that article 19(3) applies to the "case" stage. See Rule 58(2) ("When a Chamber receives a request or application raising a challenge or question concerning its jurisdiction [...] of a case in accordance with article 19, paragraph 2 or 3"); Rule 59 (1)(a) ("victims [...] in relation to the case") and 2 ("The Registrar shall provide [...] a summary of the grounds on which the jurisdiction of the Court or the admissibility of the case has been challenged").

<sup>25</sup> [Bangladesh/Myanmar Jurisdictional Ruling](#), para. 27.

<sup>26</sup> Afghanistan Appeals Judgment, para. 28.



being satisfied that a reasonable basis exists to believe that a crime within the jurisdiction of the Court has been committed.<sup>27</sup>

35. The Victims respectfully urge the Pre-Trial Chamber to dismiss the Request and decline the invitation urged by some *amici*, including apparently certain Member States, to make a determination and effectively render an advisory opinion on matters – political matters – that exceed the dominion of the Court.

36. Should the Pre-Trial Chamber consider the Request set forth in paragraph 220 on the merits, in light of the plain language of the Statute and Rules of the Court, the *travaux préparatoires*, the jurisprudence of the Court and the object and purpose of the Court, the Victims submit that the Chamber should confirm that in the situation of Palestine, the “territory” over which the Court may exercise its jurisdiction under article 12(2)(a) comprises the West Bank, including East Jerusalem, and Gaza.

***B. The State of Palestine is a State Party to the International Criminal Court, and as Such, the Court has jurisdiction over Crimes committed on its territory.***

37. The Victims fully endorse the position of the Prosecutor that, as Palestine has been a State Party to the ICC for nearly five years, the Court can exercise its jurisdiction with respect to the crimes referred to in article 5 of the Statute that have occurred or occur on the territory of Palestine, just as it could – and would – over crimes that have been committed on the territory of any of the other 122 Member States, in accordance also with article 11 and taking into account article 17. To find otherwise would not only leave Palestinian victims who have been subjected to *inter alia* war crimes and crimes against humanity that occurred on the territory of Palestine without a remedy, but call into question the entire Rome system and Court’s mandate to end impunity and prevent serious international crimes. The Pre-

---

<sup>27</sup> See, e.g., Press Release, The Office of the Prosecutor of the International Criminal Court opens its first investigation, 23 June 2004, ICC-OTP-20040623-59; [Situation in Mali: Article 53\(1\) Report](#), 16 Jan. 2013, Office of the Prosecutor, paras. 5-6. See also [Situation on Registered Vessels of Comoros, Greece and Cambodia: Article 53\(1\) Report](#), 6 Nov. 2014, Office of the Prosecutor, paras. 16-18 (finding that that the conditions were not met to open an investigation).

Trial Chamber is urged not to begin down such an ill-advised – and dangerous – path.

- (i) The State of Palestine acceded to the Rome Statute in accordance with article 125 of the Statute.

38. Article 125(3) provides, without qualification, that the Statute “shall” be open to accession by “all States.” It further provides that “[i]nstruments of accession shall be deposited with the Secretary-General of the United Nations.” In accordance with article 125, Palestine acceded to the Rome Statute on 2 January 2015 by depositing its instruments of accession with Secretary-General Ban Ki-moon.<sup>28</sup> (Palestine also lodged a declaration under article 12(3) of the Statute on 1 January 2015 accepting jurisdiction of the ICC over alleged crimes committed “in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014.”<sup>29</sup>) Palestine’s accession followed UN General Assembly Resolution 67/19, which “accord[ed] to Palestine non-member observer State status in the United Nations.”<sup>30</sup> On 1 April 2015,

---

<sup>28</sup> [‘Rome Statute of the International Criminal Court, Rome, 17 July 1998, State of Palestine: Accession,’](#) 6 Jan. 2015, Reference: C.N.13.2015.TreatiesXVIII.10 (Depositary Notification). On the same day, Palestine acceded to the [Agreement on the Privileges and Immunities of the International Criminal Court](#).

<sup>29</sup> [Declaration Accepting the Jurisdiction of the International Criminal Court, Mahmoud Abbas, President of the State of Palestine](#), 31 Dec. 2014. *See also* [Letter from Herman von Hebel \(Registrar\) to Mahmoud Abbas President of the State of Palestine](#), Ref: 2015/IOR/3496/HvH, 7 Jan. 2015 (Letter from the Registrar of the ICC informing President Abbas of Palestine of acceptance of the Article 12(3) declaration).

<sup>30</sup> UN GA Res. 67/19. *See also, ibid*, ¶ 1. (“Reaffirms the right of the Palestinian people to self-determination and to independence in their State of Palestine on the Palestinian territory occupied since 1967”). It has been observed, “the mere fact that the resolution was adopted constitutes a determination by the UN’s most representative political organ that Palestine is a state. [...] The issue of the day was statehood, not enhanced procedural rights in the political organs of the United Nations.” J. Cerone, [“Legal Implications of the UN General Assembly Vote to Accord Palestine the Status of Observer State,”](#) [2012] 16 Issue 37 American Society of International Law.

It is recalled that Switzerland was not a member of the United Nations when it signed the Rome Statute, and only became a UN Member State after the entry into force of the Rome Statute; there was never any question raised as to whether the Court could exercise jurisdiction over article 5 crimes committed on the territory, or both nationals, of Switzerland. As Cerone further observed, “As with UN membership, the issue of treaty participation is distinct from the question of statehood.”

Palestine became a State Party to the ICC.<sup>31</sup> On 15 May 2018, Palestine referred the Situation to the ICC.<sup>32</sup>

39. The President of the Assembly of States Parties welcomed Palestine's accession to the Rome Statute, stating that "[e]ach ratification of the Rome Statute constitutes welcomed progress towards its universality."<sup>33</sup> Universal reach of the Rome Statute has been a goal throughout its existence and each new accession brings the Court closer to being able to meet its core purpose of preventing the commission of serious violations of international law, by ending impunity for the perpetrators of such crimes.<sup>34</sup>

40. It is observed that two non-member States did not share the ASP President's sentiment, namely Israel and the United States. In fact, both States sought to punish Palestine for joining 123 other States in seeking to end impunity and prevent the commission of serious international crimes by imposing economic penalties and threatening to withdraw funding to the Palestinian Authority.<sup>35</sup> Despite their objection to Palestine's accession to the ICC, it is important to recall that both States – and particularly Israel, the Occupying Power *see* Section C(ii) *infra* – were on notice that the conduct of their nationals on the territory of Palestine (the West Bank, including East Jerusalem, and Gaza) could come before the ICC.

---

<sup>31</sup> Palestine further accepted the [amendments to the crime of aggression](#) on 26 June 2016.

<sup>32</sup> [Referral by the State of Palestine Pursuant to Articles 13\(a\) and 14 of the Rome Statute](#), 15 May 2018, PAL180515-Ref

<sup>33</sup> [The State of Palestine accedes to the Rome Statute](#), Press Release, 7 Jan. 2015, ICC-ASP-20150107-PR1082.

<sup>34</sup> The current President of the ASP [recently welcome Kiribati](#) as the newest State Party to the ICC; notably, there was no qualification that accession to the ICC Statute was simply a "technicality" with no effect for either the country or the Court; to have done so, would, respectfully, make a mockery of accession to the Rome Statute and the act of becoming a State Party.

<sup>35</sup> [Palestinians formally join International Criminal Court](#), BBC, 1 Apr. 2015 (reporting that, after Palestine's accession, Israeli Prime Minister accused it of choosing "'a path of confrontation' and froze the transfer of about \$400m... in tax revenues collected on behalf of the [Palestinian Authority] between January and March,'" and US warned that it would cut aid to the PA).

41. Article 12(1) provides that when a State becomes a Party to the Rome Statute, it automatically accepts jurisdiction of the Court over article 5 crimes.<sup>36</sup>

42. As the Prosecutor explained in the Request, the term “State” has the same meaning in different parts of the Statute, including in articles 125, 12, 13 and 14.<sup>37</sup> This is the only logical conclusion as “the regulatory content of Article 12 is closely interrelated” with cornerstone provisions of the Statute governing the subject-matter of the Court (arts. 5-8), the trigger mechanisms (art. 13), complementarity (art. 17) and provisions on the entry into force of certain provisions after becoming a State Party (art. 124) – all of which flow from ratification, acceptance and accession to the Statute.<sup>38</sup> Moreover, terms in a treaty are ordinarily presumed to have the same meaning throughout the treaty, and “the context of the provision is constituted by the Rome Statute as a whole.”<sup>39</sup> If the drafters had intended “State” in article 12 to have a different meaning, they would have said so.

43. It is also important to recall that the drafters of the Rome Statute did not adopt the proposal of Germany to vest the Court with universal jurisdiction, but intended for jurisdiction under Article 12 to be based on ratification, acceptance, accession under Article 125. In other words, Article 12 *depends* on Article 125. It is therefore non-sensical to provide a different meaning to the term “State” in these two provisions.

(ii) The State of Palestine has been carrying out its obligations and functions as a Member State of the ICC since 2015.

44. Since it became a State Party, Palestine has been carrying out its functions within the Assembly of States Parties and meeting its obligations towards the Court. Palestine was elected to, and carried out its functions as a member of, the Bureau of

---

<sup>36</sup> See, e.g., H.-P. Kaul, *Preconditions to the Exercise of Jurisdiction*, at 605-606, and P. Kirsch and D. Robinson, *Referral by States Parties*, at 624, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY*, Vol. 1, A. Cassese, P. Gaeta and J. Jones (Eds.), Oxford University Press: 2002.

<sup>37</sup> Request, paras. 103-106, 112-115.

<sup>38</sup> See H.-P. Kaul, *Preconditions to the Exercise of Jurisdiction*, at 584.

<sup>39</sup> H. Lee, *Defining “State” for the purpose of the International Criminal Court: The Problem Ahead After the Palestine Decision*, 77 *University of Pittsburgh Law Review* 345, 366 (2016).

the Assembly of States Parties – a status only open to States that are a party to the Rome Statute.<sup>40</sup>

45. As a State Party, Palestine referred the Situation of Palestine, in accordance with articles 13(a) and 14 of the Statute nearly two years ago.<sup>41</sup> Referrals are only permitted by a “State Party.”

(iii) Article 12(2) of the Statute permits the Court to exercise jurisdiction on the territory of a State Party or over nationals of State Parties; both conditions are not required for the exercise of jurisdiction.

46. As has been widely recognized, the drafting of article 12(2) was one of the most contentious areas of the negotiations of the Rome Statute. Specifically, debate centered on how the jurisdiction of the Court would be triggered: would the ICC have universal jurisdiction? Would consent of the territorial state be required? Consent of the territorial state *and* the custodial state? Consent of the State of nationality of the accused?<sup>42</sup> As concluded, article 12(2) provides:

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.

47. The final text is a result of both intense debate and some measure of compromise;<sup>43</sup> it is, however, the final text which was voted upon and to which States

<sup>40</sup> [ASP - Annotated List of Items in the Provisional Agenda](#), 5-12 Dec. 2018, p. 3. *See also* Rome Statute, art. 112(1) and (3).

<sup>41</sup> [Referral by the State of Palestine Pursuant to Articles 13\(a\) and 14 of the Rome Statute](#), 15 May 2018, PAL180515-Ref.

<sup>42</sup> *See, e.g.,* “Jurisdiction of the Court,” Elizabeth Wilmschurst *in* Roy S. Lee, *The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results*, at pp. 132-193, Kluwer Law Int’l (1999).

<sup>43</sup> *See, e.g.,* O. Triffterer and K. Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Commentary on Article 12 (W. Schabas/G. Pecorella) at 673 (3rd edn., C.H. Beck, Hart, Nomos, 2016) (“Even after the Conference it retains its notoriety as one of the most controversial, if not the most controversial issues”); H.-P. Kaul, *Preconditions to the Exercise of Jurisdiction*; E. La Haye, *The Jurisdiction of the International Criminal Court: Controversies over the Preconditions for Exercising its Jurisdiction*, *Netherlands International Law Review*, XLVI: 1-25 (1999).

Parties agree when they sign, ratify and accede to the Rome Statute. As the alternate formulation for the crime of aggression makes clear – with the jurisdictional provisions that for State referrals or *proprio motu* investigations *inter alia* States Parties can opt out of accepting the Court’s jurisdiction over aggression by that State Party, and that the Court cannot exercise jurisdiction over non-States Party’s nationals or territory – States knew how to limit the Court’s jurisdiction vis-à-vis non-State Party nationals if they wanted; they wanted no such limitation for genocide, crimes against humanity and war crimes.<sup>44</sup> Non-member States – including those who objected to the text of article 12(2) – are also on notice that the Court is vested with jurisdiction over nationals of non-member States for conduct that occurs on the territory of a State Party.

48. Article 12(2) of the Statute states clearly that the Court can exercise its jurisdiction over the crimes enumerated in article 5 when there exists a “special link” with the crime.<sup>45</sup> The territoriality principle is one of the most widely accepted principles of international law.<sup>46</sup> The construction of article 12(2) makes clear that the exercise of the Court’s jurisdiction is *not* limited to either the territory of its Member States nor the nationals of such States; the ICC can exercise jurisdiction over the national of a State Party who commits a crime specified in article 5 of the Statute on the territory of a non-Member State when other preconditions are met, and likewise can exercise jurisdiction over nationals of non-Member States when they commit an article 5 crime on the territory of a Member State.<sup>47</sup>

49. By contrast to the debates of 1998, there is little to no discussion of article 12(2)(a) in the jurisprudence of the Court, with Trial Chambers doing a cursory assessment of whether the State on whose territory an alleged crime is to have

---

<sup>44</sup> Rome Statute, art. 15 *bis*. See also art. 15 *ter*. Compare with art. 5 and art. 12.

<sup>45</sup> See, F. Martines, *Legal Status and Powers of the Court*, at 214 in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY*, Vol. 1, A. Cassese, P. Gaeta and J. Jones (Eds.), OUP: 2002.

<sup>46</sup> See, e.g., M. Scharf, *The ICC’s Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position*, 64 *Law and Contemporary Problems* 67 (2001); [Bangladesh/Myanmar Article 15 Decision](#).

<sup>47</sup> The Court can also exercise its powers and functions on the territory of non-Member States vis-à-vis, for example, suspects who are nationals of States Parties.

occurred is a State Party.<sup>48</sup> The Victims respectfully suggest that the Pre-Trial Chamber should ground its consideration of the Request in the legal framework of the Court that *is*, rather than in the framework that some States may have preferred.

50. The criticisms against the exercise of the Court's jurisdiction over the territory of Palestine, including over non-State Party nationals who commit article 5 crimes there, echo criticisms and objections lodged by a small minority of States (including the United States and Israel) during the negotiations of the Rome Statute – criticisms that the vast majority of negotiating States rejected in 1998 when the Rome Statute was adopted by a vote of 120 to 7.<sup>49</sup> Then-U.S. Ambassador-at-Large for War Crimes, David Scheffer, cast the U.S. vote against the Statute in part because of the “concept of jurisdiction in the Statute and its application over non-States parties.”<sup>50</sup> In his recent argument before the Appeals Chamber of this Court, Scheffer revisited the argument he advanced in 1998-99 that the application of the Statute to non-party nationals somehow violated the Vienna Convention on the Law of Treaties:

I find it now a rather retrograde rationale for bailing out of the quest to end impunity for atrocity crimes. It is an argument that flies in the face of one of the most fundamental rules of criminal law, namely territorial jurisdiction, and defies common sense regarding atrocity crimes, some of which indeed have entered the realm of *jus cogens*, [...].<sup>51</sup>

51. Respectfully, the Pre-Trial Chamber should likewise reject this “retrograde” argument: it runs contrary to the plain text of the Statute and to the very object and purpose of the Court.<sup>52</sup>

52. It is recalled that article 4 of the Statute determines that the Court “shall have international legal personality” and that it “may exercise its functions and powers, as

---

<sup>48</sup> See [Bangladesh/Myanmar Article 15 Decision](#), para. 44.

<sup>49</sup> [UN Diplomatic Conference Concludes in Rome with Decision to Establish Permanent International Criminal Court](#), Press Release, 20 July 1998, L/2889.

<sup>50</sup> *Ibid* at p. 4.

<sup>51</sup> *Situation in the Islamic Republic of Afghanistan*, [Transcript of Hearing](#), 6 Dec. 2019, ICC-02/17-003-T-ENG, p. 30, lines 18-22.

<sup>52</sup> See, e.g., C. Stahn, Response: The ICC, Pre-Existing Jurisdictional Treaty Regimes, and the Limits of the Nemo Dat Quod Non Habet Doctrine – A Reply to Michael Newton, 49 *Vanderbilt Journal of Transnational Law* 443 (2016).



provided in the Statute, on the territory of any State Party [...].” Statute, art. 4(1) and (2). Since the entry into force of the Rome Statute, the ICC has exercised its treaty-making powers – one of the indicia of international legal personality and such status *erga omnes*.<sup>53</sup> In this regard, the Court’s exercise of jurisdiction over the crimes of genocide, crimes against humanity and war crimes, which themselves have achieved the status of *jus cogens* with *erga omnes* obligations, when such a crime has been committed on the territory of a State party accords with international law principles.<sup>54</sup>

***C. The Court has jurisdiction over crimes committed on the territory of the State of Palestine, which includes crimes committed, in whole or in part, in the West Bank, including East Jerusalem, and the Gaza Strip.***

- (i) The territory of the State of Palestine is comprised of the West Bank, including East Jerusalem, and the Gaza Strip.

53. The Prosecution advanced the Request because *inter alia* the borders of the Occupied Palestinian Territory “are disputed.”<sup>55</sup> While it may be true that Palestine and Israel have matters that require negotiation, and Israel “disputes” not only the existence of a State of Palestine but also the existence of the “Occupied Palestinian Territory,”<sup>56</sup> that does not mean that such territory neither exists nor that there is not a common understanding and recognition within the international community of the scope of such territory. The territory of the State of Palestine is recognized by the international community to comprise the Gaza Strip and West Bank, including East Jerusalem, i.e., the territory occupied by Israel since June 1967 or “the occupied Palestinian territory.” This is the conclusion of the International Court of Justice;<sup>57</sup> the

<sup>53</sup> The Rome Statute of the International Criminal Court: A Commentary, A. Cassese, P. Gaeta and J. Jones, Vol. I, “Legal Status and Powers of the Court,” F. Martines, pp. 207-209.

<sup>54</sup> See [Bangladesh/Myanmar Jurisdictional Ruling](#), paras. 34-49.

<sup>55</sup> Request, para. 5.

<sup>56</sup> See, e.g., Home Page, [Coordination of Government Activities in the Territories](#), (describing Israeli government agency as implementing Israeli “civilian policy within the territories of Judea and Samaria and towards the Gaza Strip”); G Ronen, [IDF Radio to Stop Saying ‘West Bank’](#), [Israelnationalnews.com](#), 17 Dec. 2011, (reporting that “IDF Radio’s commander has instructed the station’s reporters to prefer the term ‘Judea and Samaria’... to ‘the West Bank.’”);

<sup>57</sup> International Court of Justice (“ICJ”), [Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory](#), [Advisory Opinion of 9 July 2004](#) (“ICJ Wall Advisory Opinion”), [2004] ICJ Rep. 136, p. 35, para. 78.



United Nations Security Council;<sup>58</sup> the United Nations General Assembly;<sup>59</sup> United Nations organs, special procedures and treaty bodies,<sup>60</sup> as well as intergovernmental bodies<sup>61</sup>, as well as the 139 States which voted in favor of UNGA Resolution 67/19 (2012).

54. Accordingly, the Pre-Trial Chamber should confirm, in accordance with international consensus, that the territory over which the Court can exercise jurisdiction in the Situation of Palestine is the Gaza Strip and West Bank, including East Jerusalem, i.e., the territory occupied by Israel since June 1967.

(ii) Neither occupation or annexation by an Occupying Power transfers sovereignty.

55. It is well established under treaty law and customary international law that neither a state of occupation or annexation transfers sovereignty.<sup>62</sup> Israel's status as

<sup>58</sup> See, e.g., [United Nations Security Council \(UNSC\) Resolution 2334](#) (2016), 23 Dec. 2016, S/RES/2334 (2016), ¶ 1; [UNSC Resolution 242](#), 2 Nov. 1967, S/RES/242, ¶ 1.

<sup>59</sup> See, e.g., [UN General Assembly \(UNGA\) Resolution 67/19](#), 29 Nov. 2012, A/RES/67/19; [UNGA Resolution 73/19](#), 5 Dec. 2018, A/RES/73/19; UNGA. Also notable, on 10 December 2009, UNGA Resolution 64/92 (adopted by 168 votes to 6, with 4 abstentions) affirmed the applicability of the Fourth Geneva Convention to the "Occupied Palestinian Territory", while also on the same day explicitly referred to Gaza as part of the "Occupied Palestinian Territory" in a separate resolution, UNGA Resolution 64/94 (adopted by 162 votes to 9, with 5 abstentions). UNGA Res. 64/92 (10 December 2009) UN Doc A/Res/64/92; UNGA Res. 64/94 (10 December 2009) UN Doc A/Res/64/94.

<sup>60</sup> See, e.g., [Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967](#), 19 Oct. 2016, A/71/554, e.g., ¶ 41; Human Rights Council, Thirty-seventh Session, [Resolution 37/35](#), Human rights situation in the Occupied Palestinian Territory, including East Jerusalem, 23 Mar. 2018, A/HRC/RES/37/35; Human Rights Council, [Report of the detailed findings of the independent international Commission of inquiry on the protests in the Occupied Palestinian Territory](#), 18 Mar. 2019, A/HRC/40/CRP.2, ¶ 61; Human Rights Council, Report on the United Nations High Commissioner for Human Rights, [Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the occupied Syrian Golan](#), 30 Jan. 2020, A/HRC/43/67; Committee on the Elimination of Discrimination against Women, [Concluding observations on the initial report of the State of Palestine](#), 25 July 2018, CEDAW/C/PSE/CO/1, ¶ 9; European Union, [Guidelines on the eligibility of Israeli entities and their activities in the territories occupied by Israel since June 1967 for grants, prizes and financial instruments funded by the EU from 2014 onwards](#). See also Committee on the Elimination of Racial Discrimination, [Concluding observations on the combined seventeenth to nineteenth reports of Israel](#), 12 Dec. 2019, CERD/C/ISR/CO/17-19, ¶¶ 3, 4 and 9.

<sup>61</sup> See (2013/C 205/05), Official Journal of the European Union, 19 July 2013, ¶ 2; [Fifty years of occupation: Where do we go from here?](#) ICRC, 2 June 2017.

<sup>62</sup> See, e.g., 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land and Annexed Regulations, arts. 42-56; Fourth Geneva Convention. Article 4 of Additional Protocol I provides that the application of the Geneva Conventions and API "shall not affect the legal status of the Parties to the conflict. Neither the occupation of a territory nor the question of the application of the Conventions and this Protocol shall affect the legal status of the territory in question."

an Occupying Power and its claim to have annexed East Jerusalem can neither transfer sovereignty to Israel nor divest or deprive Palestine of its claim to this territory.

*D. The State of Palestine has an obligation to provide redress for serious breaches of international law, which includes ensuring a forum for accountability.*

56. As the Appeals Chamber recently reaffirmed,<sup>63</sup> the right to provide an effective remedy lies first and foremost with States.<sup>64</sup> Such a conclusion accords with the obligation of the State of Palestine to provide a remedy for serious violations of international law that occur on its territory and/or are committed by or against its nationals.<sup>65</sup> One way that States can fulfil this obligation is by acceding to the Rome Statute and becoming a State Party of the ICC.<sup>66</sup> A finding, therefore, that the State of Palestine cannot accede to the Rome Statute or that its accession is but a hollow act, would deprive the Victims – and all other Palestinians in the West Bank, including

---

<sup>63</sup> [Reasons for the Appeals Chamber’s oral decision dismissing as inadmissible the victims’ appeals against the decision rejecting the authorisation of an investigation into the situation in Afghanistan](#), 4 Mar. 2020, ICC-02/17-137, para. 23.

<sup>64</sup> See Human Rights Council, [Report of the detailed findings of the independent international Commission of inquiry on the protests in the Occupied Palestinian Territory](#), 18 Mar. 2019, A/HRC/40/CRP.2, p. 202, para. 708 (“Israeli and Palestinian authorities - both the de facto authorities in Gaza and the Palestinian Authority - have an obligation to investigate alleged violations of international human rights law and international humanitarian law. In order to meet this obligation and hold those responsible to account, Authorities should initiate a range of accountability mechanisms, including disciplinary measures; criminal proceedings; and commissions of inquiry.”); see also *Id.* at p. 218, para. 759 (“In recent years Palestine has acceded to a range of international treaties which require it to uphold obligations and to ensure accountability when its officials violate treaty provisions.”); [Decision on Information and Outreach for the Victims of the Situation](#), 13 July 2018, ICC-01/18-2, p. 5, para. 9 (noting victims’ right to a remedy for human rights violations and the Court’s duty to enable them to exercise this right). See also [Judgment on the appeal against the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan](#), 5 March 2020, ICC-02/17-138.

<sup>65</sup> See, e.g., [Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law](#), UNGA, 16 Dec. 2005 (A/RES/60/147); U.N. Human Rights Committee, General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant, 29 Mar. 2004, U.N. Doc. CCPR/C/21/Rev.1/Add.13, ¶15.

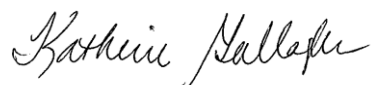
<sup>66</sup> See, e.g., U.N. Human Rights Council, Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, 7 Sept. 2015, A/HRC/30/42, ¶42 (“A basic step in the articulation of a non-recurrence policy... consists in the ratification of relevant treaties concerning gross human rights violations and serious violations of international humanitarian law”).

East Jerusalem, and Gaza, or persons without another venue in which to bring their claims – of an avenue for accountability.

#### IV. CONCLUSION

57. For the reasons set out above, the Victims request that the Pre-Trial Chamber:
- (i) Take under advisement the concerns expressed by the Victims in relation to their safety and security, and the integrity of the proceedings, as set forth in paragraph 7 above;
  - (ii) Dismiss the Request as misconceived and premature, or in the alternative,
  - (iii) Confirm that the “territory” over which the Court may exercise its jurisdiction in the Situation in the State of Palestine pursuant to article 12(2)(a) comprises the West Bank, including East Jerusalem, and Gaza.

Respectfully submitted,



---

Katherine Gallagher  
Legal Representative for Victims of Persecution

At Geneva, Switzerland

Dated this 16<sup>th</sup> day of March, 2020.