

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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PRE-TRIAL CHAMBER I

Before

**Judge Peter Kovacs, Presiding Judge
Judge Marc Pierre Perrin de Brichambaut
Judge Reine Alapini-Ganso**

Amicus Curiae submissions pursuant to rule 103(1) of the Rules of Procedure and Evidence on the 'Prosecutions Request for a Ruling on Jurisdiction under Article 19(3) of the Statute'

Public

**Amicus Curiae Observations by Guernica 37 International Justice Chambers and
Professor Kevin Jon Heller (pursuant to Rule 103 of the Rules)**

Source: Guernica 37 International Justice Chambers

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

The Office of the Prosecutor

Fatou Bensouda, Prosecutor
Mr James Stewart

Counsel for the Defence

Legal Representatives of the Victims

[1 name per team maximum]

Legal Representatives of the Applicants

[1 name per team maximum]

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the
Defence**

Mr Xavier-Jean Keita

States' Representatives

The competent authorities of the
State of Palestine

Amicus Curiae

REGISTRY

Registrar

M. Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Mr Philipp Ambach, Chief

Other

1. Introduction

- 1.1. On 22 January 2020, the Chamber received the 'Prosecution request pursuant to Article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine.
- 1.2. On 28 January 2020, the Pre-Trial Chamber I issued an 'Order setting the procedure and the schedule for the submission of observations' (the 'Order').
- 1.3. On 20 February 2020, the Pre-Trial Chamber issued its 'Decision on Application for Leave to File Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence.
- 1.4. In granting Guernica 37 International Justice Chambers, and other applicants, leave, the Pre-Trial Chamber ordered at paragraph (d) that "*all amici curiae that their observations shall be limited to the question of jurisdiction set forth in paragraph 220 of the Prosecutor's Request*".
- 1.5. Accordingly, these submissions focus on paragraph 220 of the Prosecutor's request, namely:

"The Prosecution respectfully requests Pre-Trial Chamber I to rule of 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 1292)(a) comprises the West Bank, including Jerusalem, and Gaza".¹

¹ https://www.icc-cpi.int/CourtRecords/CR2020_00161.PDF

2. ICC Territorial Jurisdiction

- 2.1. The principle at the heart of the jurisdictional issues in this situation is that of ‘territorial’ jurisdiction, the premise being that the ICC has jurisdiction over crimes committed on the territory of State Parties to the Rome Statute,² regardless of the nationality of the alleged or actual offender.
- 2.2. Per the question posed by the Office of the Prosecutor (the ‘OTP’); however, the issues to be determined are whether Palestine can be considered a State and, if so, what constitutes its territory for the purposes of any investigation.
- 2.3. At this outset therefore, it would be appropriate to highlight that there is no requirement that the territorial jurisdiction conferred upon the Court by virtue of accession to the Rome Statute be limited to that territory over which a State can be said to exercise ‘effective control’.
- 2.4. The position in terms of Cyprus is illustrative, in that, the Court has jurisdiction over ‘Northern Cyprus’, despite it being subject to Turkish occupation since 1974 because the State has ratified the Rome Statute.³
- 2.5. Further, we would highlight the position of the OTP when applying for authorisation to commence an investigation concerning the 2008 conflict in Georgia, where she noted the lack of international recognition of South Ossetia

² https://www.icc-cpi.int/nr/rdonlyres/ca9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf at Article 12(2)(a)

³ Noting that Turkey is a ‘non-member’ State.

as an independent State and considered it to be within the territory of Georgia, despite it no longer being under Georgia's effective control.⁴

2.6. The Chamber on that occasion, in delivering its judgment noting:

*“The Chamber agrees with the submission of the Prosecutor (Request, para.54) that South Ossetia is to be considered as part of Georgia, as it is generally not considered an independent State and is not a Member State of the United Nations”.*⁵

2.7. Further, and as highlighted by the request of the OTP:

*“A number of resolutions adopted by the UN General Assembly (UNGA) since 2009 refer to South Ossetia as part of Georgia”.*⁶

2.8. It is further worthy of note that there are other States whose territory is not disputed, even though important parts of that territory are not under their effective control, for instance:

a) Guantanamo in Cuba, which is leased to the United States; and

⁴ https://www.icc-cpi.int/CourtRecords/CR2015_19375.PDF at paragraph 54.

⁵ https://www.icc-cpi.int/CourtRecords/CR2016_00608.PDF at paragraph 6

⁶ https://www.icc-cpi.int/CourtRecords/CR2015_19375.PDF at paragraph 54. In particular, the OTP refers to the fact that The UN General Assembly passed different Resolutions on the “Status of internally displaced persons and refugees from Abkhazia, Georgia, and the Tskhinvali region/South Ossetia, Georgia” in which it recognizes “the right of return of all internally displaced persons and refugees and their descendants, regardless of ethnicity, to their homes throughout Georgia, including in Abkhazia and the Tskhinvali region/South Ossetia” (sometime only referred to as “South Ossetia”, emphasis added). See UNGA Resolutions A/RES/63/307 (30 September 2009), A/RES/64/296 (13 October 2010), A/RES/65/287 (25 August 2011), A/RES/66/283 (12 July 2012), A/RES/67/268 (23 August 2013), A/RES/68/274 (10 June 2014), A/RES/69/286 (25 June 2015).

b) The 'Syrian Golan' which has been subject to Israeli occupation since 1967.⁷

2.9. It must therefore be accepted that 'effective control' is not a pre-requisite to the ICC being able to exercise jurisdiction over a State's territory, a point of distinct relevance for the purposes of the situation in Palestine.

2.10. The issue of jurisdiction and Palestine has been the subject of OTP consideration previously.

2.11. On 21 January 2009, the Minister of Justice of the Palestinian Authority signed a declaration pursuant to Article 12(3), in the aftermath of an Israeli military campaign in Gaza.⁸

2.12. Upon receipt of the declaration, a broad consultation was undertaken by the OTP on the subject of whether Palestine was a state for the purposes of Article 12(3) and, as a consequence, whether it was entitled to make the declaration under Article 12(3).

2.13. In April of 2012, the Prosecutor referred to Article 125 of the Rome Statute, whereby 'all States' may ratify or accede to the Statute.

2.14. Further, he went on to note that where there was any doubt as to whether a State or entity was a 'State' for the purposes of the Rome Statute, the practice

⁷ Both issues unlikely to be considered by the ICC on the basis that no relevant parties are States Party to the Rome Statute.

⁸ <https://www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279777/20090122PalestinianDeclaration2.pdf>

of the Secretary-General was to consult the General Assembly of the United Nations.

- 2.15. The Prosecutor took the position that the relevant authority to determine the scope of 'State' within the meaning of Article 12 lay, *"in the first instance, with the United Nations Secretary General, who, in case of doubt, will defer to the guidance of General Assembly. The Assembly of State Parties of the Rome Statute could also in due course decide to address the matter in accordance with Article 112(2)(g) of the Statute"*.⁹
- 2.16. On 29 November 2012, the UNGA granted 'non-member observer State' status to the State of Palestine.¹⁰
- 2.17. This resolution was adopted by 138 States in favour, with 9 against and 41 abstentions.
- 2.18. The submission on this point, therefore, is that the UNGA resolution did not transform Palestine into a 'State', but rather recognised that Palestine already was a 'State', when the UNGA adopted the resolution in November 2012.
- 2.19. Therefore, as Palestine was a State in November 2012, the fact that it currently has a lack of effective control over certain parts of its territory is irrelevant to the Court's jurisdiction.

⁹ Office of the Prosecutor, *Situation in Palestine*, 3 April 2012, para. 5; Office of the Prosecution, Report on Preliminary Examination Activities 2012, November 2012, paras. 196-203.

¹⁰ <https://undocs.org/A/RES/67/19>

3. A State for the Purposes of International Law

- 3.1. Much of the opposition to the OTP and therefore the ICC considering the Situation in Palestine centres on whether Palestine qualifies as a 'State' for the purposes of international law.¹¹
- 3.2. Those that seek to oppose the intervention of the ICC rely, either entirely or in part, on what are referred to as the 'Montevideo Criteria'.
- 3.3. It is the position of this *Amicus* however, that the Montevideo Criteria are not necessary for the purposes of the question asked of the Pre-Trial Chamber, and accordingly we are in agreement with the OTP in this regard.
- 3.4. The salient point insofar as detractors are concerned, is Article 1 of that Convention:

"The state as a person of international law should possess the following qualifications:

(a) A permanent population;

(b) A defined territory;

(c) Government; and

*(d) Capacity to enter into relations with the other states"*¹²

¹¹ It is acknowledged that there are other objections, however, they are predominantly situation and allegation specific, and therefore, as per the order of the pre-Trial Chamber, they are not addressed here.

¹² <https://treaties.un.org/pages/showDetails.aspx?objid=0800000280166aef>

3.5. There are two points that require further consideration in respect of an objection on the basis of the Convention.

3.6. Firstly, the Convention ought to be read in terms of the context in which it was adopted: namely, with a view to Latin America seeking to protect itself from a more powerful United States. This focus is clear from a number of other Articles within the Convention, including Article 3:

“The political existence of the state is independent of recognition by the other states. Even before recognition the state has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organize itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts. The exercise of these rights has no other limitation than the exercise of the rights of other states according to international law.”¹³

3.7. The Convention therefore anticipates that other States may not be ready or willing to recognise the existence of another State and deems that position irrelevant.

3.8. In any event, it is unclear which requirement(s) of Article 1 that those other States and/or entities believe are not fulfilled. Palestine has a permanent

¹³ *Ibid*

population, it has a defined territory, it has a government, and it has the capability of entering into relations with other states.

3.9. The fact that one or more of those criteria may be frustrated to a greater or lesser extent by Israel's unlawful actions leads us to the second point on this position.

3.10. The OTP in its request to the Pre-Trial Chamber notes that "*The Montevideo criteria have been less stringently applied in cases where circumstances so warrant. This would include the recognition of a right to self-determination of peoples within a territory, and importantly, an inability to fulfil all of the criteria because of acts deemed to be illegal or invalid under international law.*"¹⁴

3.11. Without dealing with the substantive elements of the various arguments¹⁵, it is clear that Israel continues to breach international law in respect of a number of its actions and/or policies concerning the Occupied Palestinian Territory, such as the restriction on movement, the restriction on governance, and the building of settlements. It is precisely these actions that have an ongoing detrimental impact on not only civilians, but also, importantly, on the effective authority of Palestine over its territory.

¹⁴ Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine, ICC-01/18, At para. 137

¹⁵ The pre-Trial Chamber having previously ordered that submissions are to focus on the issue of jurisdiction and territory, rather than specific offences that have been committed or otherwise.

- 3.12. The argument, therefore, is that Palestine complies with the requirements for statehood as far as it is able or permitted by Israel to do.
- 3.13. It is clear that although Palestine has a territory that is recognised as such internationally, as indicated by consistent reference to the ‘Occupied Palestinian Territory’, the extent of this territory is subject to dispute.¹⁶
- 3.14. This territorial dispute does not weaken Palestine’s claim of Statehood; however, as the dispute exists only because Israel, an occupying power, has forcibly limited the authority of Palestine to specific areas within the West Bank.
- 3.15. In any event, we would echo the submission of the OTP at paragraph 191 of her request, in that “...while Palestine’s borders are disputed, undisputed territorial border are not required for the Court to exercise its jurisdiction”.¹⁷
- 3.16. Accordingly therefore, it is only the unlawful actions of Israel that have prevented Palestine from fulfilling the Montevideo criteria. That failure, it is submitted, cannot be determinative in the instant case.
- 3.17. By way of example, the comments contained within the ‘Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967’ are noted, in that “[t]he contradictions of attempting to build

¹⁶ See Part 5 of this submission re: the extent of territory deemed to be Palestinian

¹⁷ https://www.icc-cpi.int/CourtRecords/CR2020_00161.PDF

*a sovereign economy under a prolonged occupation, without the realisation of genuine self-determination on the foreseeable horizon, have become quite apparent”.*¹⁸

3.18. Further, and again, we are in agreement with the OTP that international recognition of Palestine’s statehood remains a valid consideration.¹⁹²⁰

3.19. To this end, we refer to the 137 States with which the State of Palestine enjoys bilateral recognition.²¹

3.20. Accordingly, we would support the contention of the OTP that any shortcomings of Palestinian self-governance, perceived or actual, ought not to be fatal for the purposes of the Court’s jurisdiction, given the exceptional status of Palestine, the reasons behind any shortcomings for statehood, and the existence of significant bilateral recognition of Palestine as a State.²²

4. A State for the Purposes of the Rome Statute

4.1. In the alternative to the position advanced at Part 3, it is submitted that the arguments concerning whether Palestine is a State for the purposes of international law are not necessary for resolving the instant case.

¹⁸ <https://unispal.un.org/DPA/DPR/unispal.nsf/0/C2D85EFC99C1698785258059004EBF1B>

¹⁹ *Ibid*

²⁰ For further discussion on the relevant theories regarding Statehood, we would reference Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine, ICC-01/18, At para. 139-144.

²¹ <https://palestineun.org/about-palestine/diplomatic-relations/>

²² Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine, ICC-01/18, At para. 146.

- 4.2. The reality of the matter is that Palestine has ratified the Rome Statute and deposited its instruments of accession, acts that were immediately accepted by the Assembly of State Parties. Accordingly, Palestine has accepted the jurisdiction of the Court and conferred jurisdiction over its territory.
- 4.3. The only argument, therefore, ought to be upon the extent of the Court's territorial jurisdiction over Palestine, not concerning the existence of jurisdiction in the first instance.
- 4.4. As has been considered in Part 2 of this submission, Palestine initially made a referral to the OTP of the ICC in 2009. It is nevertheless submitted that the critical date is 2 January 2015,²³ when Palestine became a State Party to the Rome Statute following the deposit of its instruments of accession with the United Nations Secretary General, pursuant to article 125(3).²⁴
- 4.5. Critically, it does not appear that there was any objection raised at the time, symbolic or otherwise, to Palestine acceding to the Rome Statute and accepting, the jurisdiction of the Court.
- 4.6. It is respectfully submitted that the opportunity to object, was at the time of accession not after the OTP had indicated its intention to open a formal investigation into the situation in Palestine.

²³ <https://www.icc-cpi.int/Pages/item.aspx?name=pr1083>

²⁴ <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf>

- 4.7. In any event, it is respectfully submitted that the Court is not required to undertake any separate assessment of the status of Palestine, including the extent to which it satisfies the definition of ‘State’ or otherwise, in order to exercise its jurisdiction under Article 12 of the Rome Statute.
- 4.8. As per the position advanced by the OTP in its submission to the Pre-Trial Chamber,²⁵ a State that becomes a party to the Rome Statute pursuant to Article 125 “*thereby accepts the jurisdiction of the Court*”.
- 4.9. As outlined at paragraph 2.16-2.18 above, by virtue of UN General Assembly Resolution 67/19, adopted on 29 November 2012, Palestine assumed the status of a UN ‘non-member observer State’. The right and ability to accede to international treaties such as the Rome Statute was afforded to it at that moment. Accordingly, Palestine became a State Party at the moment it acceded to the Rome Statute.
- 4.10. Further, because Palestine has lawfully acceded to the Rome Statute, the Court, should adopt the position that it has jurisdiction regardless of whether there is now objection to Palestine’s statehood.
- 4.11. Article 12 of the Statute is rightly silent on this issue, and it is within Article 12 where such a provision would be found, given that it is entitled ‘Preconditions to the exercise of jurisdiction’.

²⁵ Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine, ICC-01/18, At para. 7

4.12. The drafters of the Rome Statute, and thereafter the ASP, do not appear to have considered the issue of the validity of accession or otherwise, as it was quite rightly deemed not to be an issue once a State's accession to the Statute was accepted.

4.13. Further, there is no mention of the issue within Article 53²⁶ of the Statute, noting that:

“The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:

(a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;

(b) The case is or would be admissible under article 17; and

(c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

²⁶ Initiation of an Investigation

If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber.”²⁷

4.14. It is therefore our respectful submission that any argument regarding Palestinian statehood or concerning the validity of Palestine’s accession to the Rome Statute, is wholly irrelevant, and beyond the mandate of the Pre-Trial Chamber.

Treated as a State

4.15. Quite apart from whether the Pre-Trial Chamber is in a position to consider the validity of Palestine’s accession to the Rome Statute, we would draw attention to the fact that since Palestine’s ratification of the Statute, every organ of the Court as well as the Assembly of State Parties , has considered Palestine a State Party and treated it accordingly.

4.16. On 1 April 2005, in furtherance of Palestinian accession to the Rome Statute, the ICC held an event to welcome to the State of Palestine to the Court.²⁸

4.17. The event itself was attended by the President of the ASP, a number of Judges, the Deputy Prosecutor, and the Registrar of the Court.

²⁷ <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf> page 24.

²⁸ https://asp.icc-cpi.int/en_menus/asp/press%20releases/Pages/pr1103.aspx

- 4.18. The Vice-President of the Court, Kuniko Ozaki stated “[a]ccession to a treaty is, of course, just the first step. As the Rome Statute today enters into force for the State of Palestine, Palestine acquires all the rights as well as responsibilities that come with being a State Party to the Statute. These are substantive commitments, which cannot be taken lightly.”²⁹
- 4.19. The above statement made upon accession; however, is just the first in a number of events that demonstrate how Palestine has been viewed since 2015.
- 4.20. As a State Party, Palestine has paid its regularly assessed contribution to the Court since 2016. According to the most recently available report of the ASP Budget Committee (2018), Palestine has paid its contribution in full, unlike a number of other States Parties.³⁰
- 4.21. Further, in 2016, the State of Palestine ratified the Kampala amendments on the crime of aggression.³¹ In doing so, it became the 30th State Party to ratify, thus reaching the required threshold to enable the Court’s jurisdiction over the crime to be activated.³²
- 4.22. Again, therefore, Palestine has not merely sought to avail itself of the protections of the Rome Statute, it has taken a central role in the furtherance

²⁹ *Ibid*

³⁰ https://asp.icc-cpi.int/iccdocs/asp_docs/ASP17/ICC-ASP-17-15-ENG-CBF-31-Report.pdf

³¹ https://asp.icc-cpi.int/iccdocs/asp_docs/RC2010/AMENDMENTS/CN.651.2010-ENG-CoA.pdf

³² <https://www.icc-cpi.int/Pages/item.aspx?name=pr1225>

of accountability by directly contributing to the protections the Statute provides to every other State Party.

- 4.23. These are not the actions of a State whose statehood is in doubt. They are the actions of a State acting on equal footing to the other parties to the Rome Statute.
- 4.24. As a final submission concerning the Kampala amendment, it is notable that no State suggested that the Court's jurisdiction over the crime of aggression could not be activated because Palestine did not qualify as a State for purposes of the necessary 30 ratifications.
- 4.25. Accordingly, and again, Palestine has been recognised as a 'State' for the purposes of the Rome Statute.
- 4.26. In furtherance of that position, it is also of note that between 4 and 6 December 2017, during the 16th Session of the ASP, the sixth election of ICC judges took place in order to replace 1/3 of the judiciary.³³ Only State Parties are entitled to participate in judicial elections.
- 4.27. Palestine took an active part in the elections, providing further evidence that it has been treated as a State for the purposes of the Rome Statute since its accession.

³³ https://asp.icc-cpi.int/en_menus/asp/sessions/documentation/16th-session/Pages/default.aspx

- 4.28. The following year, 2018, the State of Palestine nominated a candidate for membership of the Advisory Committee on the Nomination of Judges, a Committee composed of nationals of States Parties.³⁴
- 4.29. Following that nomination, the candidate, Dr. Ahmad Barrak, was elected as a member at the 17th Session of the ASP and will therefore serve in that position until 5 December 2021.
- 4.30. At the 16th Session of the ASP, the ASP elected the Bureau for the 17th - 19th Sessions of the Assembly. The State of Palestine was elected and will serve in the Bureau until the conclusion of the 19th Session of the ASP.³⁵
- 4.31. Paragraphs 4.19-4.32 provide five examples³⁶ of situations in which the State of Palestine was not only treated and engaged with as a legitimate State Party, but also acted accordingly, in order to further the development of the Court, its accountability efforts, and therefore international law itself.
- 4.32. The reality, therefore, is that by virtue of the State of Palestine being an active member of the ASP, and the fact that it has been treated and engaged with as such, any argument concerning whether the State of Palestine is a State for

³⁴ https://asp.icc-cpi.int/iccdocs/asp_docs/Elections/ACN2018/ACN2018-PAL-NV-ENG.pdf

³⁵ https://asp.icc-cpi.int/iccdocs/asp_docs/Bureau/ICC-ASP-2017-Bureau-07.pdf

³⁶ The examples used are those that focus on the ICC and the ASP. There are a significant number of other treaties and conventions which have been ratified by the State of Palestine, including the 'Convention Against Torture', the 'International Covenant on Civil and Political Rights', the 'Convention on the Elimination of all Forms of Discrimination Against Women', the 'International Covenant on Economic, Social and Cultural Rights etc https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=217&Lang=en there would appear to be no criticism that the State of Palestine has ratified, and therefore is bound by the obligations within the same.

purposes of the Rome Statute does not have to be addressed by the Pre-Trial Chamber.

5. What is Palestinian Territory

5.1. Having established that Palestine is a State Party to the Rome Statute, and therefore that no further consideration needs be given to the issue of whether it is a State, the remaining question is over what territory the ICC can appropriately exercise its jurisdiction.

5.2. To be sure, given the uniqueness of the situation in Palestine, there is significant debate concerning the boundaries of Palestine for the purposes of the investigation.

5.3. We would seek to group our observations in this section under two headings:

- a) That there is no requirement or need to consider the extent of territory at this stage; or in the alternative
- b) If it is determined that such territory must be defined, it should be demarcated by reference to the 1967 Green Lines.

There Is No Need to Determine the Extent of Palestinian Territory

5.4. We would respectfully submit that this is not the appropriate time for the Chamber to determine the extent of territory that can be rightly deemed Palestinian, as there is no need to make such a ruling prior to investigation commencing and any matter being formally heard by the Court.

- 5.5. It is submitted that the territorial question is one that should be determined on a case by case basis, addressed only if and when such a matter, comes before the Court in a specific case.
- 5.6. To rule specifically on the extent of Palestine's territory at this stage would inappropriately restrict the OTP's investigation.
- 5.7. At the most basic level the international community accepts that there is at least some territory that is Palestinian such as Gaza. Accordingly, there is no dispute as to whether any Palestinian territory exists. Instead the dispute is concerning the extent of that territory.
- 5.8. Having regard to the above example, there is no need for the Pre-Trial Chamber at this stage to specifically rule that the territory identified as being Gaza is Palestinian and therefore within the jurisdiction of the ICC.
- 5.9. In anticipation that the argument that Palestine is not a State because the extent of its territory is still subject to dispute, we would highlight that even if not overtly accepted by others, certain territory is demonstrably Palestinian, and thus necessarily within the Court's jurisdiction.
- 5.10. For instance, the Palestinian Authority (PA) has governed significant areas of the West Bank without controversy for many decades. Accordingly, those areas can rightly be considered Palestinian Territory.

- 5.11. Further, as recently as the end of January 2020, there was public confirmation of Palestine's minimum territory through the Trump administration's published 'Middle East Peace Plan'.
- 5.12. The legitimacy³⁷ or viability of the published plan does not have to be addressed here. The operative point is that the map used by the plan recognises that, at a minimum, there is at least some territory in the West Bank and Gaza that is indisputably Palestinian.
- 5.13. Much of the territory that is deemed to be Palestinian or is to be offered as part of the agreement, is considered today as Palestinian, and thus it must naturally follow that such land has previously been and is the territory of Palestine.
- 5.14. Accordingly, therefore, it is entirely disingenuous for it to be suggested that Palestine does not have any territory to call its own.
- 5.15. By way of example, territory that Palestine asserts as its territory includes Nablus, Ramallah, and Hebron. These territories are included within the peace plan proposed by the Trump administration³⁸ as Palestinian territory.
- 5.16. Even the authors of that plan, therefore - the same plan that has been heralded by the Trump administration and the Israeli government alike - accept that there is territory that is clearly Palestinian.

³⁷ For the sake of completeness, it is appropriate to highlight that the map as drawn is inherently flawed and does not take account of territory that is Palestinian, however, as noted, the viability is beyond the scope of this submission and therefore, will not be addressed further.

³⁸ <https://www.middleeasteye.net/news/revealed-trumps-deal-century-map-future-palestine-israel>

- 5.17. The prosecutor is quite aware of the dispute surrounding Palestine's territory, and can exercise her judgment accordingly when it comes to the investigation and any eventual indictment(s). It is thus unlikely that any charges brought will focus in their entirety on territory subject to dispute. There is thus no need for the Pre-Trial Chamber to determine the extent of Palestine's territory now, before the investigation has even been opened.
- 5.18. Moreover, as has been alluded to above, if the Prosecutor does bring charges against a suspect that focuses on territory whose provenance is legitimately disputed, the suspect would be free at that time, e.g. during a confirmation hearing, to challenge the Court's jurisdiction.
- 5.19. The Chamber can, as we have recently seen with regard to the situation in Afghanistan³⁹, decline to authorise an investigation into a given situation. However, there would appear to be no basis within Article 15 of the Rome Statute to seek to limit the parameters of such an investigation where permission to commence the same has been requested and granted.
- 5.20. In any event, and has already been alluded to, Article 15(4) makes clear that any decision of the Pre-Trial Chamber at this stage in terms of the investigation is made "*without prejudice*"⁴⁰ to any further determination by the Court.

³⁹ https://www.icc-cpi.int/CourtRecords/CR2019_02068.PDF

⁴⁰ *Ibid*

- 5.21. This provision allows the Pre-Trial Chamber for instance, to refuse to confirm charges prior to trial.⁴¹ In considering charges, the Chamber can specifically hear objections raised by the defence pursuant Article 61(6).
- 5.22. Accordingly, therefore, a Defendant can raise objections to the charges on an appropriate basis at the appropriate time including those on a territorial or jurisdictional issue.
- 5.23. In the alternative, if it is found by the Chamber that it can appropriately fix the boundaries of Palestine's territory at this stage in proceedings, it is respectfully submitted that it would still be premature to do so, because that would bind the hands of the OTP at an early stage and perhaps inhibit an appropriate investigation into a relevant situation.

The 1967 Green Lines

- 5.24. If the Pre-Trial Chamber finds both that it can rule on the issue at this stage and that it would be appropriate to do so, we respectfully argue that the appropriate boundaries to be adopted for the purposes of the investigation are those as per the 1967 Green Lines.
- 5.25. The international community has long regarded the borders of Palestinian territory to be those specified by the 1967 Green Line. It has thus considered the creation of settlements and/or other relevant acts within those borders to

⁴¹ *Ibid* at Article 61

be the actions of an occupying power. Reference is made here to UN General Assembly (UNGA) Resolution 37/86 (1982) in which the Assembly:

“3. Demande[d], in conformity with the fundamental principles of the inadmissibility of the acquisition of territory by force, that Israel should withdraw completely and unconditionally from all the Palestinian and other Arab territories occupied since June 1967, including Jerusalem, with all property and services intact[.]”.⁴²

5.26. Further, and as alluded to at paragraph 198 of the OTP submission, the UNGA in May 2004 affirmed:

“the status of the Palestinian territory occupied since 1967, including East Jerusalem, remains one of military occupation”.⁴³

5.27. The fact that such territory is subject occupation does not change its status for the purposes of the ICC because that territory, despite being subject to occupation, can be appropriately be treated as Palestinian and thus within the Court’s jurisdiction.

5.28. Further, the International Court of Justice (ICJ) found in the ‘Wall’ Advisory Opinion that Israel’s construction of the security barrier in a manner that deviated from the 1967 Green Line *“severely impede[d] the exercise by the*

⁴² <https://undocs.org/en/a/res/37/86> Part E

⁴³ <https://undocs.org/en/a/res/58/292>

Palestinian people of its right to self-determination” constituting “a breach of Israel’s obligation to respect that right”.^{44 45}

- 5.29. Other institutions have also referred to the 1967 Green Line as establishing the correct borders of Palestine, including the European Council⁴⁶, the European Parliament⁴⁷, the African Union⁴⁸, and the Organisation of Islamic Cooperation.⁴⁹
- 5.30. It would therefore be appropriate for the Pre-Trial Chamber to adopt the 1967 Green Line as the territorial boundary of Palestine for the purposes of the Prosecutor’s investigation.
- 5.31. The fact that any previous ‘peace negotiations’, including the US proposal in 2020, might differ from the 1967 Green Line does not prevent the Pre-Trial Chamber from finding that the Green Line is correct. Although an alternative position might have been advanced, no agreement concerning territory has been enacted, and thus the boundaries advocated by those agreements are irrelevant for the purposes of the Pre-Trial Chamber’s jurisdictional analysis.

⁴⁴ *Ibid* at paras. 122; see also https://www.icc-cpi.int/CourtRecords/CR2020_00161.PDF at para. 210.

⁴⁵ See [ICJ Wall Advisory Opinion](#), para. 118 (“As regards the principle of the right of peoples to self-determination, the Court observes that the existence of a ‘Palestinian people’ is no longer in issue. Such existence has moreover been recognized by Israel in the exchange of letters of 9 September 1993 between Mr. Yasser Arafat, President of the [PLO] and Mr. Yitzhak Rabin, Israeli Prime Minister [...]”). See also paras. 149, 155. See https://www.icc-cpi.int/CourtRecords/CR2020_00161.PDF submission of the Prosecutor at paragraph 210

⁴⁶ https://www.icc-cpi.int/CourtRecords/CR2020_00161.PDF at para.212

⁴⁷ *Ibid*

⁴⁸ *Ibid* at para. 213

⁴⁹ *Ibid* at para. 214

6. Conclusion

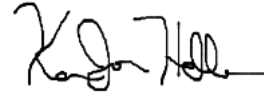
- 6.1. The arguments advanced at this stage are based on two alternative limbs.
- 6.2. The primary position of this submission is that there is no requirement nor need for the Pre-Trial Chamber to rule on the questions being asked of it at this time.
- 6.3. The submission's secondary position is that any such ruling would be premature at the investigatory stage of proceedings.
- 6.4. In any event, the salient conclusion for the purposes of the Pre-Trial Chamber, is that:
- a) Palestine is a State for the purposes of the Rome Statute, and therefore, the ICC has jurisdiction over international crimes committed on the territory of Palestine; and
 - b) The territory of Palestine for the purposes of any investigation, if fixed, should be determined by reference to the boundaries that have been recognized internationally, namely those established by the 1967 Green Lines.



Mr. Toby Cadman,
Guernica 37 International Justice Chambers
Dated this 16 day of March 2020
At London, United Kingdom



Ms. Almudena Bernabeu
Guernica 37 international Justice Chambers
Dated this 16 day of March 2020
At San Francisco, United States of American



Mr. Carl Buckley
Guernica 37 International Justice Chambers
Dated this 16 day of March 2020
At London, United Kingdom

Prof. Kevin Jon Heller
Associate Professor of International Law
University of Amsterdam
Dated this 16 day of 2020
At Amsterdam, The Netherlands