

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/18

Date: 12 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

The Khan al-Ahmar Victims' Observations

Source: Liesbeth Zegveld, Counsel

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

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I. INTRODUCTION

1. Liesbeth Zegveld ('Counsel') respectfully submits her observations on behalf of a large group of victims in the Situation in the State of Palestine ('Palestine'), specifically children, women and men from Khan al-Ahmar village, in the West Bank ('Victims'), pursuant to the Pre-Trial Chamber I's ('Pre Trial Chamber') "Order setting the procedure and the schedule for the submission of observations".¹ It is submitted that for the purpose of the present proceedings, a request for a ruling under Article 19(3) of the Rome Statute ('Statute'), it is not required to submit proof or details regarding the precise number of victims or the mandate of representation of Counsel.²
2. In the Order of 28 January 2020, the Pre-Trial Chamber invited Palestine and victims in the Situation in Palestine to submit written observations on the "Prosecution's request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine".³ It held that such observations shall be limited to the question of the scope of the International Criminal Court's ('ICC' and 'Court') territorial jurisdiction in the Situation in Palestine and whether the territory over which the ICC may exercise its jurisdiction under Article 12(2)(a) of the Statute comprises the West Bank, including East Jerusalem, and Gaza.⁴

II. BACKGROUND

3. On 29 November 2012, the UN General Assembly adopted Resolution 69/17 which "accord[ed] to Palestine non-member observer State status in the United Nations" and "*reaffirm*[ed] the right of the Palestinian people to self-determination and to independence in their State of Palestine on the Palestinian territory occupied since 1967".⁵

¹ Order setting the procedure and the schedule for the submission of observations, [ICC-01/18-14](#) ('Order').

² This is not required under Article 19(3) of the Statute, nor is there any guidance or requirements set out in the Order of 28 January 2020, as to the conditions under which victims can be represented by counsel at this stage of proceedings. A form-free acceptance of representation best ensures victims access to justice, as explicitly provided for in Article 19(3). However, Counsel is open to further guidance by the Chamber, if this is considered necessary.

³ Prosecution's request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine, 22 January 2020, [ICC-01/18-12](#) ('Prosecution Request').

⁴ [Order](#), para. 13; [Prosecution Request](#), para. 220.

⁵ UN General Assembly, [A/RES/67/19](#), Status of Palestine in the United Nations ('67/19 Resolution').

4. On 1 January 2015, Palestine lodged a declaration under Article 12(3) of the Statute, accepting the jurisdiction of the ICC over alleged crimes committed “in the occupied Palestinian territory, including east Jerusalem, since June 13 2014”.
5. On 2 January 2015, Palestine acceded to the Rome Statute by depositing its instruments of accession with the UN Secretary-General. The same took note of the accession of Palestine on 6 January 2015 and informed that “[t]he Statute will enter into force for the State of Palestine on 1 April 2015”.⁶
6. On 16 January 2015, the Prosecution opened a preliminary examination into the Situation in Palestine.⁷
7. On 22 May 2018, Palestine submitted to the Prosecution a referral of the Situation in Palestine under Articles 13(a) and 14 of the Statute. Specifically, the letter of referral requests the Prosecution “to investigate, in accordance with the temporal jurisdiction of the Court, past, ongoing and future crimes within the court’s jurisdiction, committed in all parts of the territory of the State of Palestine”.⁸ The letter further notes that “[t]he State of Palestine comprises the Palestinian Territory occupied in 1967 by Israel, as defined by the 1949 Armistice Line, and includes the West Bank, including East Jerusalem, and the Gaza Strip”.⁹
8. On 13 September 2018, the European Parliament passed a resolution on “[t]hreat of demolition of Khan al-Ahmar and other Bedouin villages” and warned that “the demolition of Khan al-Ahmar and the forcible transfer of its residents would constitute a grave breach of international humanitarian law”.¹⁰
9. On 17 October 2018, the Prosecution expressed its concerns regarding the planned eviction of the Bedouin community of Khan al-Ahmar, in the West Bank. It further noted that “[e]vacuation by force now appears imminent, and with it the prospects for further escalations and violence”

⁶ Press Release: The State of Palestine accedes to the Rome Statute, 7 January 2015, [ICC-ASP-20150107-PR1082](#).

⁷ Press Release: The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine, 16 January 2015, [ICC-OTP-20150116-PR1083](#).

⁸ Annex I to Decision assigning the situation in the State of Palestine to Pre-Trial Chamber I, [ICC-01/18-1-AnxI](#) (‘State of Palestine Referral’), p. 5, para. 9.

⁹ [State of Palestine Referral](#), p. 5, footnote 4.

¹⁰ European Parliament resolution of 13 September 2018 on the threat of demolition of Khan al-Ahmar and other Bedouin villages ([2018/2849\(RSP\)](#)), H 2.

and that “extensive destruction of property without military necessity and population transfers in an occupied territory constitute war crimes under the Rome Statute”.¹¹

10. On 5 December 2018, the Prosecution filed its ‘Report on Preliminary Examination Activities 2018’, reiterating its concerns in relation to the planned eviction of the Bedouin community of Khan al-Ahmar.¹²
11. On 22 January 2020, the Prosecution filed the Prosecution Request noting, *inter alia*, that it “is satisfied that there is a reasonable basis to initiate an investigation into the situation in Palestine, pursuant to article 53(1) of the Statute”. Further, it noted that “it considers that the Court’s territorial jurisdiction extends to the Palestinian territory occupied by Israel during the Six-Day War in June 1967, namely the West Bank, including East Jerusalem, and Gaza”.¹³

III. SUBMISSIONS

A. The Khan al-Ahmar Victims’ Standing and Scope of Their Participation pursuant to Article 19(3) of the Statute

12. Having regard to Articles 19(3) and 68(3) of the Statute, Rule 93 of the Rules of Procedure and Evidence (‘RPE’) and the Pre-Trial Chamber’s Order, it is respectfully submitted that the Khan al-Ahmar Victims have standing to submit their observations.
13. The Khan al-Ahmar Victims should be permitted to exercise their right to be heard and file their observations by virtue of Article 19(3). The scope of the right to submit observations for victims has not been further specified in Article 19(3). However, it is submitted that this right should in practice be meaningful and effective and based on the broadest possible jurisdiction and possible future investigations; to that end, any current and future developments, especially crimes that may have not yet been committed, but for which there is a reasonable basis to believe they can be committed in the future,¹⁴ can be taken into account as a relevant factor to determine the scope of victims’ participation for the specific purpose of proceedings ex-Article 19(3).¹⁵ In this regard,

¹¹ Press Release: [Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, regarding the Situation in Palestine](#), 17 October 2018.

¹² [Prosecution, Report on Preliminary Examination Activities \(2018\)](#), p. 69, paras 282-284.

¹³ [Prosecution Request](#), paras 2-3.

¹⁴ [Prosecution Request](#), para. 95.

¹⁵ See Decision on Information and Outreach for the Victims of the Situation, [ICC-01/18-2](#), p. 10.

it should be noted that in the present Situation in Palestine a determination of jurisdiction is, in case of a positive outcome, likely to be followed by lengthy period of investigation.

14. It is submitted that the aforementioned advocated scope of the right for victims participation can be read together with Article 68(3) of the Statute, referring to ‘victims’ whose personal interests are affected. Alternatively, Rule 93 of the RPE provides the Pre-Trial Chamber with a broad discretion “to accept observations presented by victims on any issue and at any stage of the proceedings, whenever the Chamber finds it appropriate”.¹⁶
15. Khan al-Ahmar is a Palestinian village located in the West Bank. The Bedouin community of Khan al-Ahmar is surrounded by rapidly expanding Israeli settlements, which, as recently vowed by Benjamin Netanyahu, are to be annexed by the State of Israel¹⁷ and further inhabited by Israeli settlers.¹⁸ Moreover, as part of the ‘Area C’ in the occupied West Bank, the families of Khan al-Ahmar face, *inter alia*, imminent forcible displacement, resulting in grave and irreparable harm.¹⁹
16. The Victims’ rights and personal interests are thus directly affected by the Prosecution Request. The recognition and protection of these rights and interests depends on the Pre-Trial Chamber’s confirmation of the Court’s territorial jurisdiction in Palestine, comprising the West Bank, including East Jerusalem, and Gaza (‘Occupied Palestinian Territory’). Hence, the Khan al-Ahmar Victims’ observations can assist the Pre-Trial Chamber in proper determination of the issue.

B. The Khan al-Ahmar Victims’ Observations

17. The Khan al-Ahmar Victims agree with the Prosecution, as well as the Palestine’s Referral,²⁰ that the Court can exercise its jurisdiction under Article 12(2)(a) for crimes committed at the territory of Palestine, including the Occupied Palestinian Territory.²¹

¹⁶ *Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Decision on the “Application pursuant to Article 119(1) of the Rome Statute” and other related requests, 14 February 2019, [ICC-01/13-89](#), para. 20; *Situation in Bangladesh/Myanmar*, Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute”, 6 September 2018, [ICC-RoC46\(3\)-01/18-37](#), paras 20-21; Outreach Decision, para. 10 and footnote 17.

¹⁷ AP News, [Netanyahu renews West Bank annexation vow ahead of elections](#), 21 January 2020.

¹⁸ The Israeli Information Center for Human Rights in the Occupied Territories, [Settlements](#), 16 January 2019; see also [Prosecution Request](#), para. 88.

¹⁹ The Israel’s Supreme Court approved the demolition of Khan al-Ahmar, see [here](#) and [here](#); see below, para. 24.

²⁰ [State of Palestine Referral](#), para. 9.

²¹ [Prosecution Request](#), paras 3, 11, 17, 18, 44, 102, 182, 189, 190-192, 216-217, and 219.

18. In support of its position, the Prosecution demonstrated that it is satisfied that the following key legal issues are firmly established: i) Palestine is a State for the purposes of Article 12(2)(a), on the grounds of its status as a State Party to the Statute²² and, *in the alternative*, applicable principles and rules of international law;²³ and ii) the Court’s territorial jurisdiction over Palestine encompasses the Occupied Palestinian Territory.²⁴
19. For the additional reasons that follow, the Counsel avers that Palestine is a State for the purposes of Article 12(2)(a) and that the Court has territorial jurisdiction over Palestine, including the Occupied Palestinian Territory:
- i) Palestine’s statehood for the purposes of the Statute is a settled matter. Its status as an ICC State Party must be read in the context of the relevant proceedings before this Court and not in *abstract* or based on political considerations. On 6 January 2015, the UN Secretary-General took notice of Palestine’s accession to the Statute and confirmed that “[t]he Statute will enter into force for the State of Palestine on 1 April 2015”.²⁵ At this point, by virtue of his responsibility,²⁶ the UN Secretary-General confirmed the status of Palestine as an ICC State Party. Moreover, no challenge was raised as to the territorial boundaries of Palestine in this process, thereby recognising that the Court can exercise its jurisdiction over Palestine, including the Occupied Palestinian Territory.²⁷ In sum, Palestine is a State for the purposes of Article 12(2)(a) and as correctly observed by the Prosecution “in the ICC context it would contradict the principle of effectiveness to permit an entity to agree to the terms of the Rome Statute and thereby join the Court, to

²² [Prosecution Request](#), paras 103-135.

²³ [Prosecution Request](#), paras 136-182.

²⁴ [Prosecution Request](#), paras 190-217.

²⁵ Press Release: The State of Palestine accedes to the Rome Statute, 7 January 2015, [ICC-ASP-20150107-PR1082](#). In addition, it is important to add that on 1 January 2015, the State of Palestine lodged a declaration under Article 12(3), accepting the jurisdiction of the ICC over alleged crimes committed “in the occupied Palestinian territory, including east Jerusalem, since 13 June 2014.

²⁶ Article 125(2) of the Statute notes that “[t]his Statute is subject to ratification, acceptance or approval by signatory States. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations”; see also Article 2 of the Statute noting that “[t]he Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Court on its behalf”. In this context, see Article 5, 1(a) of [the Negotiated Relationship Agreement between the International Criminal Court and the United Nations](#), which holds that “[t]he Secretary General shall: (i) Transmit to the Court information on developments related to the Statute which are relevant to the Court, including information on communications received by the Secretary-General in the capacity of depositary of the Statute or depositary of any other agreements which related to the exercise by the Court of its jurisdiction”.

²⁷ In [Resolution 67/19](#), the UNGA held that the Palestine’s observer mission at the United Nations was that of a State. Resolution 67/19’s wide international consensus on the statehood of the Palestine, extending to the Occupied Palestinian Territory, thus provides a clear basis that the Court’s territorial jurisdiction over the State of Palestine, at the time of its accession to the Statute, included the Occupied Palestinian Territory.

then later negate the natural consequences of its membership—the exercise of the Court’s jurisdiction in accordance with the Statute”.²⁸

- ii) Article 12(2)(a) must be interpreted in light of the Statute’s object and purpose to put an end to impunity for atrocious crimes. Under the Vienna Convention on the Law of Treaties, object and purpose of a treaty are a primary source of interpretation.²⁹ Thus, the primary way to interpret Article 12(2)(a) is to read it in good faith and in light of its object and purpose: the State Parties, *inter alia*, “[a]ffirm[ed] that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured”, and they were “determined to put an end to impunity for the perpetrators of these crimes and thus contribute to the prevention of such crimes”.³⁰ Accordingly, in determining the issue of Court’s territorial jurisdiction in Palestine, the Pre-Trial Chamber is bound to interpret Article 12(2)(a) consistent with prevention, effective prosecution and punishment of grave crimes arising out of the hostilities and Israel’s illegal settlement activities in the Occupied Palestinian Territory.³¹
- iii) According to Article 21(3) of the Statute, the Court must interpret and apply the applicable law under the Statute—including Article 12(2)(a)’s criteria—consistently with internationally recognised human rights.³² In this case, the Pre-Trial Chamber’s decision on the Prosecution’s request can have a significant impact on the Khan al-Ahmar Victims’ rights, triggering the applicability of Article 21(3). Specifically, if the Pre-Trial Chamber denies the Court’s jurisdiction over the Palestine’s territory, including the Occupied Palestinian Territory, no criminal investigations will take place. Not opening an

²⁸ [Prosecution Request](#), para. 105.

²⁹ [Vienna Convention on the Law of Treaties](#), 1155 UNTS 18232, 23 May 1969, Article 31(1): “General rule of interpretation. 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.

³⁰ [Preamble of the Statute](#), p.1; see also *Situation in Afghanistan*, Separate opinion of Judge Luz del Carmen Ibáñez Carranza to the Judgment on the appeal against the decision of Pre-Trial Chamber II on the authorization of an investigation into the situation in the Islamic Republic of Afghanistan, [ICC-02/17-138-Anx-Corr](#), para. 7(iii).

³¹ [Prosecution Request](#), paras 93-102.

³² *Lubanga*, Judgment on the Appeal of Mr. Thomas Lubanga against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006, [ICC-01/04-01/06-772](#), para. 37: the Appeals Chamber found that “[a]rticle 21(3) of the Statute stipulates that the law applicable under the Statute must be interpreted as well as applied in accordance with internationally recognized human rights. Human rights underpin the Statute; every aspect of it, including the exercise of the jurisdiction of the Court. Its provisions must be interpreted and more importantly applied in accordance with internationally recognized human rights [...]”. See also *Gaddafi*, Judge Perrin de Brichambaut Separate Concurring Opinion, [ICC-01/11-01/11-662-Anx](#), para. 112: “[t]his obligation of consistency with human rights does not only concern the textual base—the primary sources of the Court—but rather all law that has been identified as applicable to the preceding subparagraphs of article 21 of the Statute”.

investigation, for the alleged and imminent grave crimes, “affects [V]ictims’ rights to access to justice, effective remedies, redress and all further rights that would unfold in an investigation, eventual prosecution, convictions and awards for reparations”.³³ In sum, the Pre-Trial Chamber is required to sustain a statutory interpretation of Article 12(2)(a)’s criteria consistent with the aforesaid rights;³⁴ to that end, the Court’s jurisdiction over the Palestine’s territory, including the Occupied Palestinian Territory, must be confirmed.

20. The consequences of not confirming the Court’s jurisdiction over the territory of Palestine, including the Occupied Palestinian Territory, would be devastating for the Court’s legitimacy. They would impermissibly negate the Palestine’s ICC membership, contradict the object and purpose of the Statute to end impunity as well as violate the applicable Victims’ rights under Article 21(3). Put differently, justice at the ICC would be contingent on political interests of a limited number of States.³⁵ The only way to avoid such scenario is confirming the Prosecution’s request.
21. The Counsel is also aware of the contrary views on this matter. However, it is necessary to note that some of these views appear highly political, anachronistic and pay no attention to the international community’s responsibility for recognition and protection of all peoples’ equal rights to justice.³⁶ Such views, disregarding the Court’s *raison d’être*, are a matter of serious concern for the Victims.
22. Additionally, the Prosecution’s request for a ruling on the Court’s territorial jurisdiction is prompted by its conclusion that there is a reasonable basis to open investigation into the Situation in Palestine under Article 53(1). In particular, the Prosecution has identified that the crimes arising out of the Israel’s occupation and settlement regime in the Occupied Palestinian Territory fall within the ambit of its investigation. In this regard, the Prosecution concluded, *inter alia*, that:

³³ See *Situation in Afghanistan*, Dissenting Opinion of Judge Luz del Carmen Ibáñez Carranza to the Majority’s decision dismissing as inadmissible the victims’ appeals against the decision rejecting the authorization of an investigation into the situation in Afghanistan, [ICC-02/17-137-Anx](#), para. 25. The human rights to access to justice and to an effective remedy have been internationally recognised in a number of international and regional instruments: Article 2(3) of the [International Covenant on Civil and Political Rights](#), Article 7(1) of the [African Charter on Human and Peoples Rights](#); Articles 8 and 25(1) of the [American Convention on Human Rights](#) and Articles 6 and 13 of the [European Convention of Human Rights](#).

³⁴ See *Situation in Afghanistan*, Amicus Curiae Observations by Kate Mackintosh and Göran Sluiter, [ICC-02/17-117](#): The observations suggest relevant framework and methodology for applying internationally recognized human rights in the context of the ICC, including rights to criminal investigation and effective remedies.

³⁵ Middle East Monitor: [Israel mobilises support in The Hague: Germany after Czech Republic](#), 15 February 2020.

³⁶ See e.g. Germany Application, [ICC-01/18-19](#); Czechia Application, [ICC-01/18-22](#); Australia Application, [ICC-01/18-30](#); Austria Application, [ICC-01/18-42](#); Brazil Application, [ICC-01/18-47](#); Hungary Application, [ICC-01/18-49](#); Uganda Application, [ICC-01/18-62](#); [Memorandum by the Office of the Attorney General of the State of Israel](#).

there is a reasonable basis to believe that in the context of Israel's occupation of the West Bank, including East Jerusalem, members of the Israel authorities have committed war crimes under article 8(2)(b)(viii) in relation, *inter alia*, to the transfer of Israel civilians into the West Bank since 13 June 2014. The Prosecution has further concluded that the potential case(s) that would likely arise from an investigation of these alleged crimes would be admissible pursuant to article 17(1)(a)-(d) of the Statute.³⁷

23. The Counsel agrees with the Prosecution and adds that the Israel's settlement policy has not only been executed through the commission of crimes falling within the ICC's jurisdiction but also in the face of international community's condemnation of the policy as illegal.³⁸ Therefore, having their lives and personal interests affected by continuation, intensification and recurrence of such crimes, the Khan al-Ahmar families are 'Victims' for the purpose of the Statute. This entitles them to have their fundamental rights recognised and protected under the Statute,³⁹ and calls for the ICC to commence its investigation into the alleged crimes without further delay.
24. Beside, *inter alia*, investigating the transfer of Israeli civilians into the West Bank as war crimes, the Prosecution specified that it "will be able to expand or modify the investigation with respect to the acts identified above or other alleged acts, incidents, groups or persons and/or to adopt different legal qualifications, so long as the cases identified for prosecution are sufficiently linked to the situations".⁴⁰ The Prosecution's indication that the above war crimes do not reflect the full scope of its future investigation is of particular significance to the Khan al-Ahmar families. This is because they face an imminent and irreversible harm due to the Israel's settlement-related criminal activities, *e.g.* unlawful appropriation and demolition of their houses, forced evictions and forcible displacement from or within the Occupied Palestinian Territory.⁴¹

³⁷ [Prosecution Request](#), para. 95.

³⁸ See, *e.g.* UNGA, [A/RES/66/17](#); ICJ, [Advisory Opinion of 9 July 2014](#), para. 120; UNSC, [S/RES/2334 \(2016\)](#), see also [Prosecution Request](#), para. 88; [State of Palestine Referral](#), para. 3.

³⁹ Under Article 8(2)(b)(viii) the "transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies," is recognized as a serious violation of the laws and customs of war applicable in an international armed conflict and constitute a war crime.

⁴⁰ [Prosecution Request](#), paras 99-100.

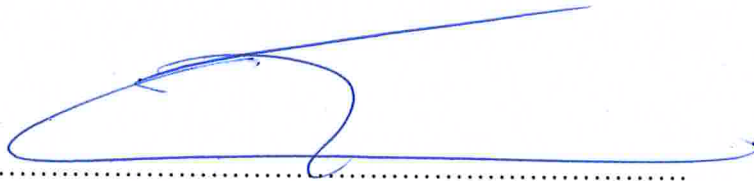
⁴¹ See above paras 9-10, and 15; see also [Prosecution's Report on Preliminary Examination Activities \(2018\)](#), para. 269: The Prosecution, *inter alia*, informs that it "has focused its analysis on alleged war crimes committed in the West Bank, including East Jerusalem, since 13 June 2014. Namely [...] Settlement-related activities have reportedly included the confiscation and appropriation of land; the planning and authorization of settlement expansions", para. 270: "Israeli authorities have reportedly continued to advance plans to relocate Bedouin and other herder communities present in and around the so-called EI area, including through the seizure and demolition of residential properties and related infrastructure", para. 271: "[t]he Office has also received information regarding other crimes allegedly committed by officials of the Israeli authorities in the West Bank, including East Jerusalem, which may fall under the purview of article 7 of the Statute on crimes against humanity. Specifically, these allegations relate to the crime of persecution, transfer and deportation of civilians, as well as, the crime of apartheid".

25. In order for the Court to be able to properly fulfil its mandate, it is imperative that the Pre-Trial Chamber confirms the ICC's territorial jurisdiction in Palestine, including the Occupied Palestinian Territory; thereby, enabling the Prosecution to immediately commence an investigation into the alleged and imminent crimes. As the Khan al-Ahmar Victims aptly put it: "denying (territorial) jurisdiction would be denying the crimes".

IV. RELIEF SOUGHT

26. For the reasons stated above, the Counsel requests, on behalf of the Victims from Khan al-Ahmar, the Pre-Trial Chamber to:
- a) **CONFIRM** that the Court has territorial jurisdiction over the State of Palestine; and
 - b) **CONFIRM** that the 'territory' over which the Court may exercise its jurisdiction under Article 12(2)(a) comprises of the West Bank, including East Jerusalem, and Gaza.

Respectfully submitted,



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Liesbeth Zegveld

On behalf of children, women and men belonging to the Bedouin Community
of Khan al-Ahmar

Dated this 12th day of March, 2020

At Amsterdam, The Netherlands