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**International
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PRE-TRIAL CHAMBER I

Before: Judge Iulia Motoc (Presiding Judge)
Judge Reine Alapini-Gansou
Judge Nicolas Guillou

SITUATION IN PALESTINE

Public Document

Observations by ALMA – Association for the Promotion of IHL Pursuant to Rule 103

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Law (R.A. 580524882)

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Amicus Brief on the Question of the Classification of Conflict in the Situation of Palestine

1. The present *amicus* brief is respectfully submitted to the Court by ALMA – Association for the Promotion of International Humanitarian Law (‘ALMA’),¹ pursuant to the Pre-Trial Chamber's “**Decision on requests for leave to file observations pursuant to rule 103 of the Rules of Procedure and Evidence**” issued on 22 July 2024.²
2. The amicus brief will provide observations on the classification of conflict in light of the 20 May 2024 Statement of the Prosecutor regarding the applications for arrest warrants (the ‘OTP Statement’).³ The OTP Statement asserts that “the war crimes alleged in these applications were committed in the context of an international armed conflict between Israel and Palestine, and a non-international armed conflict between Israel and Hamas running in parallel.”⁴ The classification of the conflict is crucial as it directly impacts the applicable war crimes and arrest warrants that the OTP and the Court can reference, as will be demonstrated in this brief. Therefore, addressing the classification of the conflict is a key preliminary issue that the Pre-Trial Chamber must resolve.
3. ALMA contends that applying such dual classification risks undermining both the coherence of the Rome Statute and the principle of belligerent equality, which is essential to the effectiveness of international humanitarian law (IHL) as reflected in Article 8 of the Rome Statute. Through this brief, we refer to alternative approaches that preserve the coherence of the Rome Statute while aiming to ensure the fairness and effectiveness of IHL in this complex conflict.

¹ ALMA – Association for the Promotion of International Humanitarian Law (R.A. 580524882) is a registered non-profit, independent association under Israeli law. More information about ALMA, its activities, and its members can be found on its website: www.alma-ihl.org. To maintain impartiality, any ALMA members who are currently working for the Israeli Government or representing victims before the Court in the Situation of Palestine were completely excluded from the decision to submit this request, its drafting, and any other processes related to this submission.

² [ICC-01/18-249](https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state)

³ www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state

⁴ Ibid.

Observations

4. The OTP Statement was based, inter alia, on the Report of the Panel of Experts in International Law submitted to the OTP on 20 May 2024 (the ‘Expert Report’).⁵ In its report, the Panel of Experts concluded that “*The Panel agrees with the Prosecutor’s conclusion that the conflicts in Israel and Gaza comprise an international armed conflict and a non-international armed conflict running in parallel*”.⁶
5. The Expert Report provided several alternative reasons for the dual classification. Neither the report, though, nor the OTP Statement, provide detailed reasoning with regard to the question of whether the conduct in question should properly be considered as having taken place in the context of an international or non-international armed conflict. The approach of the Panel of Experts received significant criticism.⁷
6. It is our submission that such dual classification not only risks the coherency of the careful delineation of war crimes in international armed conflicts (‘IAC’) at Articles 8(2)(a) and (b), and in non-international armed conflicts (‘NIAC’) at Articles 8(2)(c)-(f), but also risks undermining the effectiveness of IHL on the battlefield by rendering it more difficult to determine which sets of IHL provisions and rules apply during the conduct of hostilities at a given time and place.
7. Although the development of customary IHL has reduced the differences between the rules applying in IAC and NIAC, there remain important differences between the two regimes.⁸ The differences between the regulation of IAC and NIAC are no less consequential in the context of international criminal law. Article 8 of the Rome Statute maintains important distinctions between the treatment of these two types of armed conflict. Accordingly, to the extent that the conduct of armed conflict in either case is to be effectively informed by

⁵ www.icc-cpi.int/sites/default/files/2024-05/240520-panel-report-eng.pdf

⁶ Ibid, Paragraph 13.

⁷ See for example David Luben, “What the ICC Prosecutor Charged – and Didn’t Charge – in Gaza Warrants”, www.justsecurity.org/95985/icc-gaza-warrant-charges; Yahli Shereshevsky, “Armed Conflict Classification in the ICC Prosecutor’s Request for Arrest Warrants – Between International Humanitarian Law and International Criminal Law”, www.justsecurity.org/96914/armed-conflict-classification-icc-palestine-situation-gaza; Yuval Shany and Amichai Cohen, “The Prosecutor’s Circumvention of Article 18 Complementarity? A Flaw in the ICC’s Palestine Investigation”, www.justsecurity.org/96296/icc-article-18-complementarity.

⁸ Pauline Lesaffre, “Double Classification of Non-Consensual State Interventions: Magic Protection or Pandora’s Box?”, 99 *International Law Studies* (2022), pp. 438-440, <https://digital-commons.usnwc.edu/ils/vol99/iss1/15>.

Article 8 (and associated breaches subject to punishment consistent with the principle of *nulla poena sine lege certa*), it is critical for care to be taken in application of the relevant provisions. It is trite, for example, to note that there is a range of conduct – including use of human shields,⁹ intentionally directing attacks against civilian objects,¹⁰ disproportionate attacks,¹¹ and intentionally using starvation of civilians as a method of warfare¹² – that may constitute a war crime under the Rome Statute in the context of IAC, but not NIAC. The converse is also the case in some instances: the NIAC criminalization of recruiting child soldiers (Article 8(2)(e)(vii)) is broader than that in IAC (Article 8(2)(b)(xxvi)), for example.¹³

8. In its previous rulings, the Court has recognized the parallel existence of IAC and NIAC in the same territory. For example in the Lubanga Trial Judgement, the Court held that “[i]n situations where conflicts of a different nature take place on a single territory, it is necessary to consider whether the criminal acts under consideration were committed as part of an international or a non-international conflict”.¹⁴ Similarly, in the Ntaganda case the Trial Judgment referred to the parallel existence of IAC and NIAC in the context of belligerent occupation.¹⁵ However, in neither of those cases was the Court actually required to apply that concept,¹⁶ and the notion of parallel application remained in *obiter dictum*.

⁹ Article 8(2)(b)(xxiii)

¹⁰ Article 8(2)(b)(ii)

¹¹ Article 8(2)(b)(iv)

¹² Article 8(2)(b)(xxv)

¹³ See for example Rogier Bartels, “The Classification of Armed Conflicts by International Criminal Courts and Tribunals”, *International Criminal Law Review*, 20(4), https://brill.com/view/journals/icla/20/4/article-p595_595.xml; Dapo Akande, “Classification of Armed Conflicts: Relevant Legal Concepts” in Elisabeth Wilmschurst (ed), *International Law and the Classification of Conflicts* (OUP 2012) chapter 3.

¹⁴ *Lubanga Trial Judgment*, ICC-01/04-02/06, para 551, available at: www.icc-cpi.int/sites/default/files/CourtRecords/CR2019_03568.PDF, para. 551.

¹⁵ *Ntaganda Trial Judgment*, icc-01/04-02/06, para. 728

¹⁶ The Trial Judgment concluded that the crimes in question in those cases were all committed in the context of a non-international armed conflict (NIAC), notwithstanding the status of the Ituri region as being under belligerent occupation.

9. As part of a vigorous discussion including various positions on this subject,¹⁷ the parallel approach finds some support in academic writing.¹⁸ However, the implications of this approach for classifying conduct in hostilities under Article 8 remain complex. Some of the complications derived from the parallel approach include questions of attributing the acts in question to the relevant conflict and thus the violated law (IAC or NIAC) in order to determine the criminality of the conduct.¹⁹ Other complications relate to ensuring that all parties are aware of the applicable law and sub-issues like the necessity to obtain state-based consent in order to apply IAC or NIAC.²⁰
10. The International Committee of the Red Cross (‘ICRC’) has also acknowledged parallel application (as part of a “fragmented approach”).²¹ According to that approach, the applicable rules of IHL in any given instance are to be determined by “*examining each bilateral relationship between belligerents separately in light of the facts on the ground.*”²² As observed by Ferraro, this approach “*results in a legal outcome more consistent with the reality of the conflict on the ground...it takes better account of the nature of the parties to the conflict and their ability to implement the relevant provisions of IHL... [and] tends to preserve the coherence of the legal system established under IHL.*”²³ Centrally in the present instance, the ICRC’s proposed approach also precludes the application of the law of IAC to a conflict between a State and a non-state armed group, as contrary to the plain language of the Geneva Conventions regime.

¹⁷ See for example Dapo Akande, “Classification of Armed Conflict” in Ben Saul and Dapo Akande (eds.) *The Oxford Guide to International Humanitarian Law* (2020), Chapter 2; Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors* (2010) 93-94; Geoffrey Corn, “Hamdan, Lebanon, and the Regulation of Armed Hostilities: The Need to Recognize a Hybrid Category of Armed Conflict”, (2006) 40 *Vanderbilt J Transn’l L* 295; Kenneth Watkin, “The ICRC Updated Commentaries: Reconciling Form and Substance, Part II”, www.justsecurity.org/32608/icrc-updated-commentaries-reconciling-form-substance-part-ii; Lesaffre, supra 8.

¹⁸ See for example Bartels, supra 13; Akande, Classification of Armed Conflicts, supra 13; Shereshevsky, supra 7.

¹⁹ Bartels, supra 13 (emphasis added).

²⁰ Akande, Classification of Armed Conflicts, supra 13. See also Lesaffre, supra 17 p. 429.

²¹ Tristan Ferraro, “The ICRC’s legal position on the notion of armed conflict involving foreign intervention and on determining the IHL applicable to this type of conflict”, *International Review of the Red Cross* (2015), 97 (900), p. 1241. See also the ICRC 2016 Commentary First Geneva Convention of 1949, paras. 261-262, <https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-2/commentary/2016>.

²² Ibid, p. 1242

²³ Ferraro, supra 21, pp. 1242-1243.

11. The examples cited above recognise the potential for parallel application of the law governing IAC and NIAC in the same territory – the approach adopted in the OTP Statement and the Expert Report. None of this commentary, however, suggests that two parties to a conflict might be subject to different sets of rules in respect of acts committed in the course of that *same* conflict as implicitly suggested in the OTP Statement. Moreover, it has never been clarified how *de facto* parties to a single armed conflict might be subjected to different sets of rules.²⁴
12. Seeking to provide the Pre-Trial Chamber with further clarity on the relevant law, we have examined available *opinio juris* on the classification of transnational armed conflicts between the armed forces of a State and a non-state armed group, including States’ practical approaches towards situations of dual classifications.
13. The United States DoD Manual (2016 update) holds that when there are two conflicts going on at the same time, one between a State and another State, and another between a State and a non-state armed group, “*it may be possible to characterize parts of a conflict as international in character, while other parts of that armed conflict may be regarded as non-international in character*”.²⁵ The DOD Manual goes on to clarify, moreover, that conflicts between a State and a non-state armed group are to be classified as NIACs even if they are cross-border conflicts.²⁶
14. The Danish Military Manual similarly holds that a direct transnational conflict between a State and a non-state armed group located in a third State, even without the consent of the third State, is considered a NIAC as long as the hostilities are directed against the armed group.²⁷
15. In contrast, in 2006 the Israeli Supreme Court has referred to the conflict between Israel and terrorist organizations including Hamas as subject to the law of IAC because it “*crosses the borders of the state — whether the place where the armed conflict is occurring is subject to*

²⁴ Shereshevsky, *supra* 7.

²⁵ The United States DoD Manual (2016 update) para. 3.3.1.2

²⁶ *Ibid*, para. 17.1.1.2.

²⁷ Danish Ministry of Defence and Defence Command Denmark, Military Manual on International Law Relevant to the Danish Armed Forces in International Operations, 2016, p. 47.

a belligerent occupation or not".²⁸ However, in a later report the Israeli Government has notified that such classification (as an IAC) is not necessarily the most accurate one, and since the conflict between Israel and Palestinian organized armed groups could be considered as NIAC, Israel conducts its operations "[i]n accordance with the rules of the Law of Armed Conflict governing both international and non-international armed conflicts".²⁹

16. The OTP Statement and sought warrants indicate that the current investigation is focused on the events that took place during and following the horrific attack of 7 October 2023. As such, it is the armed conflict between Israel and Hamas, and the crimes that allegedly occurred as part of it, that is the focus of the current applications for warrants.

17. It may be argued that the Israel-Hamas conflict is not a paradigmatic case envisaged by either common Article 2 or 3 of the Geneva Conventions.³⁰ At the same time, while we do not necessarily seek to undermine the parallel co-existence approach in general, we submit that the use of dual classification with regard to the same armed conflict, the same parties, and the same conduct of hostilities risks causing confusion as to the applicable law and possibly, diminishes its efficiency. This could undermine legal certainty in respect of both Article 8 of the Rome Statute and crucial aspects of IHL, including the law governing operations in the course of an armed conflict and the associated principle of belligerent equality, which ensures that all parties in an armed conflict are bound by the same body of law, imposing the same rights, privileges, and obligations equally.³¹

18. For example, if it is accepted that Israel was an occupying force in the Gaza Strip at the time (though without prejudice to that point), the parallel approach that was referred to (but not applied) in the Ntaganda judgement would result in the applicability of the provisions

²⁸ HCJ 769/02 Public Committee Against Torture in Israel v. Government of Israel (2006), paras. 18, 21.

²⁹ The 2014 Gaza Conflict (7 July – 26 August 2014) – Factual and Legal Aspects, May 2015, para. 233 available at: www.gov.il/BlobFolder/generalpage/operation-protective-edge-full-report/en/English_Terrorism_DOCS_2014GazaConflictFullReport.pdf; This is also somewhat supported by the Israeli High Court of Justice ruling that following the Israeli withdrawal from the Gaza Strip in September 2005, the area was no longer under belligerent occupation (see HCJ 9132/07 Jaber Al-Bassiouni Ahmed and others v Prime Minister & Minister of Defence, 2008).

³⁰ Shereshevsky, *supra* 7.

³¹ Adam Roberts, "The Equal Application of the Laws of War: A Principle under Pressure", *International Review of the Red Cross*, Vol. 90, No. 872, December 2008, <https://international-review.icrc.org/sites/default/files/irrc-872-6.pdf>.

of Article 8 of the Rome Statute relating to IAC in the context of the occupation, and those relating to NIAC in the context of the armed conflict between Israel and Hamas. Conduct would accordingly need to be associated, i.e. demonstration by the prosecutor of a sufficient nexus, with the specific applicable legal context—either occupation (IAC) or armed conflict (NIAC)—before it can be assessed under Article 8 of the Rome Statute.³²

19. This approach might seem logical and productive, as it addresses the duties of the occupying power under IAC toward the occupied territory and protected persons, and the restrictions on the conduct of hostilities under NIAC. However, a closer examination of its practicality reveals that implementing this approach on the ground can create internal conflicts between the two legal frameworks. For example, there may be issues regarding the status of civilians who are also members of a non-state armed group,³³ or the use of a siege against the non-state armed group as a method of warfare. This is especially problematic when it is practically implausible to isolate conduct attributed to each conflict.
20. If the parallel approach is adopted but applied inconsistently—for example, by interchanging the parties to the IAC and NIAC—there is a risk that conduct permitted under NIAC might be wrongly deemed prohibited based on the IAC standards, even though the conduct occurred in the context of the NIAC. This could result in legal absurdities and undermine the principle of equality between belligerents in an armed conflict. For instance, this approach might lead to a situation where Israel, but not Hamas, could theoretically be held liable for IAC-specific crimes such as using human shields (Article 8(2)(b)(xxiii)) or intentionally employing starvation of civilians as a method of warfare (Article 8(2)(b)(xxv)). Such discrepancies could arise from classifying the Israel-Hamas conflict as NIAC while considering the broader Israel-Palestine conflict as IAC, leading to the problematic result that Israel and Hamas are accountable to a different set of norms while being parties to the same conflict.

³² See for example OTP's Corrected Version of "Request for authorisation of an investigation pursuant to article 15", 13 October 2015, ICC-01/15-4, ICC-01/15-4-Corr, 16 October 2015, paras. 114 – 117, www.icc-cpi.int/court-record/icc-01/15-4-corr

³³ Lesaffre, *supra* 8, pp. 438-440

21. There are different ways to solve this problem. The Court could, for example, consider the Israel-Hamas conflict in its entirety as an IAC,³⁴ or as a NIAC (as suggested in the examples above). The advantage of these options lies in the clarity that they provide as to which IHL framework is applicable on the battlefield and in the courtroom under the Rome Statute.
22. Alternatively, the Court could consider the parallel approach and apply both frameworks to the State. However, such approach would raise some difficulties when implemented. For example, the Court would have to apply the *in dubio pro reo* principle. Moreover, as suggested by Rogier Bartels, it would also have to apply the alternative that is most advantageous for the accused,³⁵ or carefully assess individual acts by reference to the particular circumstances in which they have been carried out—the belligerent nexus—and from there determine whether such conduct should be assessed under the rules applicable to IAC or NIAC. However, as mentioned above, such alternatives risk introducing incoherence to the conduct of hostilities on the battlefield and undermining the principle of belligerent equality, as it could lead to an *ad absurdum* situation where the same conduct within the same hostilities is analysed twice—once as part of IAC and again as part of NIAC—resulting in it being considered both legal and illegal.³⁶
23. In conclusion, while recognizing the complex and multifaceted nature of the situation, we urge the Court to take into account the practical implications and potential inequities of applying a blanket dual classification to a single armed conflict involving the same parties. The approach apparently proposed by the OTP risks not just causing confusion as to the correct application of the different provisions of Article 8 of the Rome Statute, but critically also undermining legal certainty in the conduct of armed conflict, as well as the principle of belligerent equality on which IHL—and the humanitarian protection it affords—is premised. Such an approach could impair the general effectiveness of this body of rules, leading to inconsistent enforcement and unequal treatment of the parties involved. Clarity, fairness, and certainty are integral to the integrity and effectiveness of the Rome Statute, as well as the body of IHL on which its war crimes provisions rest. We respectfully submit to the Pre-Trial Chamber that these considerations should be carefully taken into account in

³⁴ Lesaffre, *supra* 8, p. 429.

³⁵ Bartels, *supra* 13, pp. 639-640.

³⁶ Lesaffre, *supra* 8, p. 433.

the present instance, ensuring that the legal framework applied is coherent, consistent, and respects the fundamental principles of IHL.

ALMA thanks the Pre-Trial Chamber for the opportunity to make these written observations.

Ido Rosenzweig

Dr. Ido Rosenzweig, Adv.

on behalf of

ALMA - Association for the Promotion of International Humanitarian Law (R.A.)

Dated this 05 August 2024

At Petach-Tikva, Israel