

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 3 October 2024

PRE-TRIAL CHAMBER I

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

SITUATION IN THE STATE OF PALESTINE

Public Document

**Professor David Chilstein's Observations as Amicus Curiae pursuant to Rule
103(1) of the Rules of Procedure and Evidence**

Source:

Professor David Chilstein

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

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Legal Representatives of the Victims

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Unrepresented Victims

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I. INTRODUCTION

1. Further to the Pre-Trial Chamber's directions in its Decision on requests for leave to file observations pursuant to rule 103 of the Rules of Procedure and Evidence, Professor David Chilstein hereby submits his observations as *amicus curiae* pursuant to Rule 103(1) of the Rules of Procedure and Evidence (the "**Rules**").
2. These observations address the process which led the International Criminal Court's Prosecutor to apply to the Pre-Trial Chamber for the issuance of warrants of arrest against Benjamin Netanyahu, the Prime Minister of Israel, and Yoav Gallant, the Minister of Defence of Israel, namely the investigation which led to the Application and whether the arrest of Benjamin Netanyahu, the Prime Minister of Israel, the application of the complementarity principle to non-signatory of Rome Statute, and Yoav Gallant, the Minister of Defence of Israel are necessary. These observations are accompanied by exhibits **DC-1** to **DC-7**.

II. RELEVANT EXPERTISE

3. Professor David Chilstein is a professor of criminal law at University Paris 1 Panthéon-Sorbonne. Professor Chilstein teaches criminal law and international criminal law. He is the co-head of the Sorbonne's center for legal research in criminal law. Professor Chilstein has founded the Master "*International Criminal law and white-collar*".
4. Professor Chilstein has significant expertise in the field of international criminal law and relevant issues related to the issuance of warrants in civil law jurisdictions. Professor Chilstein will be assisted in this filing by Me Olivier Pardo and Me Nathalie Makowski of OPLUS, Paris-based lawyers with extensive experience in international law.

III. PROFESSOR CHILSTEIN'S OBSERVATIONS

5. Professor Chilstein will clarify legally and historically relevant issues of facts and law that are raised by Prosecutor Khan's Application for Warrants of Arrest which bear on the issuance by the Pre-Trial Chamber of the warrants of arrest.
6. Professor Chilstein makes the following submissions in connection with the Prosecutor's Application for Warrants of Arrest: (i) the lack of proper investigation preceding the Prosecutor's Application for Warrants of Arrest, (ii) the need for the Pre-Trial Chamber to assess whether the Prosecution complied with all necessary steps prior

to the filing of the Application, and (iii) whether the arrest of Benjamin Netanyahu, the Prime Minister of Israel, and Yoav Gallant, the Minister of Defence of Israel are necessary.

1. Whether the Pre-Trial Chamber is in a position to rely on evidence collected in a proper investigation

7. Article 58(1) of the Rome Statute provides that “*At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person...*” (our emphasis).
8. Regulation 53(1) of the Regulations of the Office of the Prosecutor provides that “[i]n preparing an application for a warrant of arrest or summons to appear in a potential case, pursuant to article 58, the Office shall clearly identify the crime(s) and mode(s) of liability alleged, based on solid factual and evidentiary foundations”¹.
9. In addition, Article 54(3)(c) of the Rome Statute provides that the Prosecutor shall “[i]n order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally” (our emphasis)
10. The Pre-Trial Chamber has ruled that “*It is for the Prosecutor to plead the specific crimes he believes to be proven and it is for the Chamber only to evaluate whether his allegations are substantiated to the relevant evidentiary standard. Specificity in pleading an application for a warrant of arrest is also essential for the Chamber to be properly informed why its authority to deprive a person of his or her liberty should be exercised. Therefore, if the Prosecutor's Application falls short of the proper level of specificity, the Chamber will not effectuate its authority*”².
11. Yet, in light of the alleged violations of the Rome Statute listed in the Prosecutor’s Application including the alleged crime of intentional starvation, and the timing of the Prosecutor’s Application, Professor Chilstein submits that the application could not have been “*based on solid factual and evidentiary foundations*”.
12. The issue that the Pre-Trial Chamber will need to address is whether the Application is based on a thorough and complete investigation. The Pre-Trial Chamber will therefore

¹ Regulations of the Office of the Prosecutor, reg. 53(1).

² DC-1, ICC-01/04, Decision on the Prosecutor’s Application under Article 58 dated 31 May 2012.

need to determine whether the prosecution conducted a proper investigation. It is to be noted that the Office of the Prosecutor's resources are largely dedicated to the Situation in Ukraine and the lack of sufficient funding has adversely affected the OTP's ability to adequately investigate cases.

13. The Pre-Trial Chamber will need to assess whether the OTP had the resources, time and adequate staffing including investigators to determine that the OTP has conducted a proper *and actual* investigation that could satisfy the requirements of Article 58.
14. By way of example, Prosecutor Khan appointed Andrew Cayley to oversee the ICC's investigation into alleged war crimes in the Palestinian territories on 11 March 2024, that is merely two months before the Prosecutor issued the Application.
15. No proper investigation could have been conducted on such a limited time period even more so that for insurance purposes no UN or ICC investigators can enter war zones.
16. In his statement of 20 May 2024, Prosecutor Khan held in support of his allegations that Benjamin Netanyahu and Yoav Gallant allegedly bore responsibility for starvation of civilians that *"the evidence we have collected, including interviews with survivors and eyewitnesses, authenticated video, photo and audio material, satellite imagery and statements from the alleged perpetrator group, shows that Israel has intentionally and systematically deprived the civilian population in all parts of Gaza of objects indispensable to human survival."*
17. Even if Prosecutor Khan submitted evidence collected directly by his Office in support of his Application, such evidence under the circumstances is neither conclusive nor compelling as it lacks actual and proper investigations on the ground:
 - The Prosecutor was unable to cross-check the information or verify the origin and authenticity of the documents.
 - The Prosecutor did not contextualize the information received using elements that he himself had found and he was therefore unable to interpret them correctly.
18. It follows from the above that most of the elements on which the prosecutor has based his application must have been obtained through other sources (UN, NGOs...) which cast some doubts on the reliability and impartiality of the investigation and therefore

may fall short of the standard set forth in Article 54(3)(c) of the Rome Statute and Regulation 53(1) of the Regulations of the Office of the Prosecutor³.

19. In other words, the Pre-Trial Chamber is asked to make its assessment on a file that is incomplete, and which may include factual inaccuracies and methodological errors.
20. The undersigned appreciates that an investigation concerning the State of Palestine has been ongoing for several years. The undersigned nevertheless submits that the investigation which led to the Application was triggered by alleged crimes against humanity which would have been committed by the Israeli governmental apparatus since 7 October 2023. It is questionable that an actual investigation could reasonably have been conducted on the alleged charges by the Israeli forces since 7 October 2023. Yet, according to his statement of 20 May 2024, Prosecutor Khan indicates that the OTP has collected evidence showing an alleged arbitrary restriction of transfer of essential supplies, cutting off cross-border water-pipelines from Israel to Gaza and cutting off and hindering electricity supplies. The fact that the investigation was not conducted directly by the OTP seems to have resulted in significant inaccuracies and misinterpretation of the situation.
21. It appears from data publicly available that the aid put forward by the State of Israel toward minimizing civilian harm in Gaza was underestimated during the investigations. It is submitted that the Pre-Trial Chamber will need to address whether the efforts conducted by the Coordinator of Government Activities in the Territories (“COGAT”), the dedicated military unit, responsible for routine co-ordination with international organizations in Gaza were appropriately ascertained in the investigation. The COGAT website provides a comprehensive overview of all aid deliveries into Gaza since 8 October 2023⁴. By way of example, and as set forth in the verbatim record of the hearing conducted before the International Court of Justice on January 12, 2024, in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, COGAT has facilitated the entry of aid into Gaza in coordination with the United Nations and other international

³ See also the Policy Paper on Preliminary Examinations, at para. 31: “*As information evaluated at the preliminary examination stage is largely obtained from external sources, rather than through the Office’s own evidence gathering powers, (which are only available at the investigation stage), the Office pays particular attention to the assessment of the reliability of the source and the credibility of the information*” (footnote omitted.)

⁴ **DC-2**, excerpt from COGAT website, available at <https://gaza-aid-data.gov.il/main/>.

organizations and has worked to “reinforce and strengthen medical services”, notably by “establishing four field hospitals in Gaza... and two floating hospitals”.⁵

22. Recent reports conclude of the lack of starvation in Gaza and underline that Israelian authorities did not deny humanitarian relief supplies and did not deliberately target civilians in conflict. The allegations that Israel is “causing starvation as a method of war including the denial of humanitarian relief supplies [and] deliberately targeting civilians in conflict,” are strongly disputed. Notably, in a recent report, Columbia University Professors Awi Federgruen and Ran Kivetz have analysed available data and conducted research whose “findings demonstrate that sufficient amounts of food are being supplied into Gaza”⁶. In the same vein, the Institute for National Security Studies has issued a report evidencing that UN reports on hunger in Gaza present a distorted picture as they relied on incomplete UNRWA data and failed to verify the figures⁷.
23. The Pre-Trial Chamber will need to assess whether the investigations were conducted in accordance with the Policy Paper on Preliminary Examinations which provides at para. 33 “[t]he Office also seeks to ensure that, in the interests of fairness, objectivity and thoroughness, all relevant parties are given the opportunity to provide information to the Office”⁸.
24. Under the circumstances, the undersigned submits that the Pre-Trial Chamber will have a duty to review the evidence provided in support of the Application and draw adverse inferences of the lack of actual investigation directed by the OTP. The Pre-Trial Chamber will need to assess whether the prosecution investigated “incriminating and exonerating circumstances equally”.

⁵ **DC-3**, 12 January 2024 hearing, Verbatim Record, ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, para. 59.

⁶ **DC-4**, Seth J. Frankman, “Experts: ICC, UN blamed Israel for a famine that never happened in Gaza – exclusive”, the Jerusalem Post, 18 June 2024 (available at <https://www.jpost.com/israel-hamas-war/article-806735#806735>).

⁷ **DC-5**, Dr. Tammy Caner, “The Misleading Reports of the UN Over Famine in Gaza”, 24 July 2024, INSS, available at <https://www.inss.org.il/publication/un-hunger-reports/>.

⁸ Policy Paper on Preliminary Examination, para. 33.

2. The need for the Pre-Trial Chamber to assess whether the Prosecution complied with all necessary steps before submitting the Application

25. While the Court has established that it has jurisdiction on the Situation in Palestine, the Pre-Trial Chamber will need to address whether the Court can proceed with the issuance of warrants of arrest against officials of a State that is not a party to the Rome Statute.
26. Further considerations should also be given to the application of the principle of complementarity which require that the Prosecutor and the Court defer to national investigative authorities who are willing and able to investigate and prosecute.
27. The principle of complementarity, by virtue of which the jurisdiction of the International Criminal Court is exercised only if national judicial systems do not exercise theirs, is considered to be the cornerstone of the Rome Statute and of the Court's operation. This is affirmed in the Preamble: "*the International Criminal Court [...] shall be complementary to national criminal jurisdictions*" and is reiterated in Article 1 of the Statute.
28. Its scope is broad; it concerns both States parties and non-member States. This point is not disputed and can be inferred in particular from Article 18(1) of the Statute, which provides that the notification required of the Prosecutor when he has opened or intends to open an investigation - an obligation whose purpose is to implement the principle of complementarity - is addressed to "*all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned.*"
29. In Professor's Chilstein's view, it should be added that, as regards non-member States, the principle of complementarity would need to be applied all the more rigorously since the Court's jurisdiction is legally founded on a treaty to which they are not a party, even though it relates to facts falling within their sovereign jurisdiction. The subsidiarity of its jurisdiction, as far as they are concerned, is all the more necessary and it will therefore be necessary to ensure the strictest compliance with the conditions for its implementation.
30. In the present case, the question arises as to whether the Prosecutor's application to issue arrest warrants for Mr Nathanyahu, Prime Minister of Israel, and his Defence Minister, Mr Yoav Gallant, for war crimes and crimes against humanity which he claims were

committed *on or after 8 October 2023*, complies with the principle of complementarity as provided for and organised by the Statute.

31. The Prosecutor's Application poses a particular problem in the light of Article 18(1), which imposes on the Prosecutor, "*where he has initiated an investigation under Articles 13(c) and 15*", a prior obligation to notify the States concerned, enabling them, where appropriate, to assert the priority of their jurisdiction.
32. However, this notification procedure was not implemented for acts committed on or after 8 October 2023 and for which the Application for arrest warrants was made. The justification put forward was that these acts were likely to relate to the investigation opened by Prosecutor Fatou Bensouda on 3 March 2021, which "*covers crimes within the jurisdiction of the Court allegedly committed in the situation [of Palestine] since 13 June 2014*"⁹. Thus, on the grounds that an investigation was opened in 2021 for acts that the Office of the Prosecutor states had been the subject of a "*thorough preliminary examination [...] [for] more than five years*"¹⁰, the new charges based on completely separate acts committed in an entirely new context of war following the attack perpetrated by Hamas on 7 October 2023 did not have to be notified to Israel as they related to the ongoing investigation.
33. In Professor Chilstein's view, this legal analysis is highly questionable and insufficient in this case to meet the obligation set out in Article 18 of the Statute for the following reasons :
 - First, a general and vague notification of the facts under investigation makes it impossible for the State concerned "*to satisfy the complementarity principle*" by showing that "*its investigations and proceedings also sufficiently mirror the content of the article 18(1) notification, by which the Prosecution notified the concerned State of the opening of an investigation, and its scope*"¹¹.
 - Second, the factual period to which the investigation relates cannot be indefinite in time, particularly when it relates to future facts. This lack of delimitation seems difficult to reconcile with the obligation under Article 18.1 to notify not only the existence of the investigation, but also its "*scope*"¹². It also leads to such a dilution

⁹ **DC-6**, "Statement by ICC Prosecutor Fatou Bensouda on an investigation into the situation in Palestine", on the ICC website, 3 March 2021.

¹⁰ *Ibid.*

¹¹ **DC-7**, ICC-01/21 OA, Appeals Chamber, Judgment on the appeal of the Republic of the Philippines against Pre-Trial Chamber I's "Authorisation pursuant to article 18(2) of the Statute to resume the investigation", § 86.

¹² *Ibid.*

of the subject matter of the investigation that it necessarily undermines the principle of complementarity.

- Third, such an analysis is implicitly based on the *theory of continuing offences*, which is inapplicable in the present case. Indeed, the only theoretical possibility that would justify that the acts of which Israel was accused *after 8 October 2023* would be linked to the investigation initiated in March 2021 is to unify them, considering the latter as the criminal continuation of the former. But this analysis is inadequate and unconvincing. Continuing offences presuppose an extension in time of their material constituent element. They necessarily concern identical crimes whose material element is likely to extend over time. However, this is not the case here; although the acts committed after 8 October fall within the same context as those covered by the investigation opened in 2021, they cannot in any way be considered, from the point of view of their materiality, as a continuation of them. In fact, they are substantially different. The extension in time of the *contextual element* of international crimes is completely alien to the theory of continuing offences.
- Fourth, there can be no question of linking the acts committed after 8 October to the investigation opened in 2021 on the basis of the *theory of indivisibility*. On the one hand, the existence of a link of indivisibility, even if proven, cannot justify a partial notification of the facts covered by the investigation and likely to give rise to a subsequent criminal conviction. Here again, such an approach undermines the principle of complementarity and, ultimately, the rights of the defence. Secondly, and more importantly, it does not appear that the acts committed after 8 October, in reaction to the Hamas terrorist attack, are in any way inseparable from those covered by the 2001 investigation. While they may be part of the same context (armed conflict), they are in no way mutually dependent in such a way that the existence of one would be inconceivable without the existence of the other.

34. Further to this analysis, it appears that the acts alleged against Israel from 8 October cannot in any way be linked to those covered by the investigation opened by the Prosecutor in March 2021, and that they should therefore, pursuant to Article 18(1) of the Statute, have been subjected to a separate notification, in order to satisfy the effective implementation of the principle of complementarity.

35. It should be added that the applicability of Article 18 cannot be challenged on the grounds that Israel would be entitled to invoke the principle of complementarity under Article 19. Article 18 was designed precisely to enable the principle of complementarity to be fully exercised at the initial stage of the proceedings, as a counterbalance to the Prosecutor's right to open an investigation *proprio motu*. Preventing its application on the grounds that it might be possible to invoke it at a later stage amounts in reality to

depriving Article 18 of its substance and thus upsetting the balance intended by the drafters of the Rome Statute.

36. It should be noted in this respect that the Israeli Defence Forces (“IDF”) is gifted with a robust military system headed by the Military Advocate General (“MAG”). IDF forces are obligated to report incidents that raise suspicion for violations of the law or IDF orders. Any report (submitted by IDF forces or received otherwise), complaint, or allegation that suggests misconduct by IDF forces, undergoes an initial examination process, irrespective of its source. In case the complaint received raises *prima facie* a reasonable suspicion for criminal misconduct, a criminal investigation is launched¹³.
37. In these circumstances, it appears that the Prosecutor's request to issue arrest warrants for Mr Netanyahu, Prime Minister of Israel, and Mr Yoav Galant, Minister of Defence, was largely precipitated and is premature. Given that the unwillingness or inability of the Israeli judicial system to prosecute has not been demonstrated, that no account has been taken of the difficulty of legally assessing the operations carried out by the Israeli army in response to the terrorist attack by Hamas, or of the difficulty of implicating the senior leaders of the attacked State in wartime, the Prosecutor's position appears to us to be a clear breach of the principle of complementarity.

3. Whether the arrest of Benjamin Netanyahu, the Prime Minister of Israel, and Yoav Gallant, the Minister of Defence of Israel is necessary

38. Article 58(1)(a) and (b) of the Rome Statute lay down the conditions which need to be met in order for the Chamber to issue or maintain a warrant of arrest. Under article 58(1)(b) of the Statute, the Pre-Trial Chamber may issue a warrant of arrest only if it is satisfied that the arrest appears necessary: (i) to ensure the person's appearance at trial; (ii) to ensure that the person does not obstruct or endanger the investigation or the court proceedings; or (iii) to prevent the person from continuing with the commission of the crime.
39. In the same statement, Prosecutor Khan filed indistinctively applications for warrants of arrest against Hamas leaders and two members of the Israeli government. In this respect, Professor Chilstein further submits that the Pre-Trial Chamber should examine whether compliance with Article 58 of the Rome Statute would have required that the

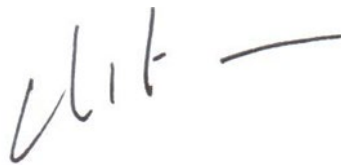
¹³ More on the examination and investigation of operational incidents can be found here: <https://www.idf.il/en/mini-sites/military-advocate-general-s-corps/addressing-alleged-misconduct-in-the-context-of-the-war-in-gaza/>

different situation between Israeli leaders and Hamas leaders be reflected in two separate applications with distinctive features.

40. Professor Chilstein submits that Prosecutor Khan's decision to apply for warrants of arrest for both Hamas leaders (namely Yahya Sinwar, Mohammed Diab Ibrahim Al-Masri, and Ismail Haniyeh) and members of the government of Israel (namely Benjamin Netanyahu and Yoav Gallant) in the same application is highly questionable. For purposes of meeting the conditions set forth in article 58(1)(b), their situation should be distinguished.
41. While the risk of absconding concerning the Hamas leaders is by hypothesis high, the same is not true for officials of the State of Israel, a democracy endowed with one of the best judicial systems in the world.
42. Professor Chilstein's submissions are aimed at assisting the Chamber in assessing if the criteria set forth in Article 58(1)(b) of the Rome Statute are met in the present case, notably with respect to any risk of absconding.

IV. CONCLUSION

43. For the foregoing reasons, Professor Chilstein respectfully submits that the Prosecutor's Application is premature and contravenes the cornerstone principle of complementarity.
44. Should the Chamber allow oral submissions on this issue, Professor Chilstein respectfully requests leave to participate.



Professor David Chilstein

Dated this 3 October 2024

At Paris, France

List of Exhibits

Annex DC-1.	ICC-01/04, Decision on the Prosecutor's Application under Article 58 dated 31 May 2012.
Annex DC-2.	Excerpt from COGAT website, available at https://gaza-aid-data.gov.il/main/ .
Annex DC-3.	12 January 2024 hearing, Verbatim Record, ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)
Annex DC-4.	Seth J. Frankman, "Experts: ICC, UN blamed Israel for a famine that never happened in Gaza – exclusive", the Jerusalem Post, 18 June 2024 (available at https://www.jpost.com/israel-hamas-war/article-806735#806735) .
Annex DC-5.	Dr. Tammy Caner, "The Misleading Reports of the UN Over Famine in Gaza", 24 July 2024, INSS, available at https://www.inss.org.il/publication/un-hunger-reports/
Annex DC-6.	"Statement by ICC Prosecutor Fatou Bensouda on an investigation into the situation in Palestine", on the ICC website, 3 March 2021.
Annex DC-7.	ICC-01/21 OA, Appeals Chamber, Judgment on the appeal of the Republic of the Philippines against Pre-Trial Chamber I's "Authorisation pursuant to article 18(2) of the Statute to resume the investigation"