

Annex

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/18
Date: 11 July 2024

PRE-TRIAL CHAMBER I

Before: Judge Iulia Antoanella Motoc, Presiding Judge
Judge Reine Adélaïde Sophie Alapini-Gansou
Judge Nicolas Guillou

SITUATION IN THE STATE OF PALESTINE

PUBLIC

**Application for Leave to Submit Observations on the Prosecutor's Request
in accordance with the Chamber's Order of 27 June 2024
on behalf of the Non-Governmental Organisations:
The Jerusalem Center for Public Affairs, the Institute for NGO Research**

Source: The Jerusalem Center for Public Affairs
The Institute for NGO Research

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

The Office of the Prosecutor	Counsel for the Defence
Legal Representatives of the Victims	Legal Representatives of the Applicants
Unrepresented Victims	Unrepresented Applicants
The Office of Public Counsel for Victims	The Office of Public Counsel for the Defence
States' Representatives United Kingdom	Amicus Curiae
REGISTRY	
Registrar Mr Osvaldo Zavala Giler	Counsel Support Section
Victims and Witnesses Unit	Detention Section
Victims Participation and Reparations Section	Other

1. In accordance with paragraph 6 of the Chamber's Order of 27 June 2024 setting the procedure and the schedule for the submission of observations (the "Order"), and pursuant to rule 103 of the Rules and paragraph e) of the Order, the undersigned Organisations associated with this request seek leave to submit written observations on the question of jurisdiction set forth in Paragraphs 4-5 of the Chamber's Order with respect to the so-called "Situation in Palestine."
2. The undersigned Organisations filed an application for leave to file observations on 14 February 2020 and were recognized by the PTC as amici curiae on 20 February 2020.¹ We reiterate our affiliation and expertise below.

I. Details of Affiliation and Expertise

A. Jerusalem Center For Public Affairs

3. The Jerusalem Center for Public Affairs ("JCPA") is a leading independent research institute specializing in public diplomacy and foreign policy. Founded in 1976, the Center has produced hundreds of studies and initiatives by leading experts on a wide range of strategic topics, many of which addressed issues at the heart of Israeli-Palestinian conflict. The Center is headed by Dr. Dan Diker.
4. The following experts would contribute to JCPA's filing with the Pre-Trial Chamber:
 - a. Ambassador (ret') Alan Baker served as the Legal Adviser to Israel's Foreign ministry and Israel's ambassador to Canada. He participated in the negotiation and drafting of all the various agreements and documents within the Middle East peace process, inter alia, as a senior legal adviser in the negotiations between Israel and the PLO on the Oslo Accords 1991-1995 **He represented Israel in the negotiation and drafting of the Rome Statute** on the International Criminal Court and was Israel's representative to the Sixth (Legal) Committee of the UN General Assembly. Ambassador Baker has served as a senior lawyer in the Office of Legal Affairs of the UN. He presently serves as the director of the Institute for Contemporary Affairs and International Law program at JCPA.
 - b. Lt. Col. (res) Maurice Hirsch served in a number of senior positions in the Israel Defense Force's Military Advocate General's Corps., including Assistant to the Legal Advisor to Judea and Samaria on criminal issues; Head of the Appeals

¹ https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2020_00610.PDF

Department in the Military Prosecution for Judea, Samaria and the Gaza Strip; Deputy Head of the Military Prosecution for Judea, Samaria and the Gaza Strip; and ultimately as the Head of the Military Prosecution for Judea and Samaria. During his military service, Hirsch dealt extensively with questions relating to the Oslo Accords, with specific expertise on criminal and security related issues. Hirsch is the JCPA Director of the Initiative for Palestinian Authority Accountability and Reform. In the proceedings before the PTC in February 2020, Hirsch contributed to the submission of Palestinian Media Watch.

B. The Institute for NGO Research

5. The Institute for NGO Research (the “Institute”), an NGO in special consultative status with UN ECOSOC since 2013, is a research and policy organization located in Jerusalem, Israel. Founded in 2001, the Institute provides research and policy recommendations relating to the legal, political, and historical issues of the Arab-Israeli conflict.²
6. The Institute works with legal and academic experts to carry out its work and is active in UN frameworks, the European Parliament and Commission, international organizations, and with domestic governments around the world. Members of the Institute have written extensively on the issues of international criminal justice, universal jurisdiction, best practices for fact finding investigations and UN reporting mechanisms, good governance, transparency, and accountability.³

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Members of NGO Monitor's Advisory Board include Elliott Abrams, Senior Fellow for Middle Eastern Studies at the Council on Foreign Relations; former Canadian Ambassador to Israel, Amb. Vivian Bercovici; Michal Cotler-Wunsh, former member of Knesset for the Blue and White Party and Israel's Special Envoy for Combatting Antisemitism; Hon. Michael Danby, MP, senior member of the Australian Labor Party; Harvard Professor Prof. Alan Dershowitz; Canadian Senator, Hon. Linda Frum; best-selling author and commentator and British journalist and international affairs commentator, Tom Gross; Bonnie Glick, former Deputy Administrator and Chief Operating Officer of USAID; Colonel Richard Kemp, former commander of British forces in Iraq and Afghanistan; Douglas Murray, Director of the Centre for Social Cohesion, best-selling author and commentator; former Member of Italian Parliament, Hon. Fiamma Nirenstein, UCLA Professor and President of the Daniel Pearl Foundation, Prof. Judea Pearl; US Jurist and former Legal Advisor to the State Department Judge Abraham Sofaer; Dr. Einat Wilf, former member of Knesset with the Israel Labor Party and advisor to Shimon Peres; Harvard Professor Prof. Ruth Wisse; R. James Woolsey, former US Director of Central Intelligence; and retired Israeli Supreme Court Justice, Justice Elyakim Rubinstein.

³ Our work has been published in several books and many academic journals including: *Best Practices for Human Rights and Humanitarian NGO Fact-finding* (Brill 2012); the *Israel Law Review*, *International Criminal Law Review*, *International Journal of Human Rights*, *Global Governance*, *Israel Yearbook on Human Rights*, *Israel Journal of Foreign Affairs*, *Georgetown Journal of Human Rights*, and *Middle East Quarterly*.

7. The Institute participated during the deliberation process conducted by the Office of the Prosecutor in light of the 2009 attempt by the Palestinian Authority to join the Court as a State party.⁴ The Institute has also corresponded with the OTP regarding its use of social media to aid its investigations. This correspondence was incorporated into an academic study published in 2012 in the *Israel Law Review*.⁵
8. The following experts would contribute to the Institute's filing with the Pre-Trial Chamber:
 - a. Professor Gerald Steinberg is founder and president of the Institute for NGO Research and Professor Emeritus of Political Studies at Bar Ilan University. He is the founder of the Program on Conflict Management and Negotiation at Bar Ilan University. His research focuses on the changing nature of power in international relations, as reflected in Middle East Diplomacy and Security, international law and the politics of human rights. He is the author of many publications. He is the co-author of *Menachem Begin and the Israel-Egypt Peace Process: Between Ideology and Political Realism* published by University of Indiana Press in 2019.
 - b. Anne Herzberg is the Legal Advisor and UN Liaison to the Institute for NGO Research. She is a graduate of Oberlin College and Columbia University Law School, where she was named a James Kent Scholar. Prior to joining the Institute in 2006, she worked as a litigator at the law firms of Winston & Strawn and Shearman & Sterling in New York. Her pro bono work included projects for the International Criminal Court for Rwanda, and obtaining refugee status for a survivor of the armed conflict in the DRC. Her publications on international

⁴ For instance, the Institute participated in an NGO Roundtable convened by the OTP at the ICC in October 2010 and filed a brief on 20 October 2010 analyzing the jurisdictional issues (<https://www.icc-cpi.int/nr/rdonlyres/d3c77fa6-9dee-45b1-acc0-b41706bb41e5/282590/otp2010000035614ngomonitorsubmissiontootp201012.pdf>); and contributed to the on-line ICC Legal Forum established by the OTP in partnership with UCLA Law School. <https://iccforum.com/forum/permalink/7/905>

⁵ "IHL 2.0: Is There a Role for Social Media in Monitoring and Enforcement," 45 *Israel Law Review* 493 (2012)

criminal law, IHL, and universal jurisdiction have appeared in many prominent academic journals, international law blogs, and news outlets.⁶

II. Summary of Proposed Observations

The Oslo Accords did not establish a so-called “State of Palestine” nor did they accord to the Palestinians sovereignty or jurisdiction over territory it now claims to control.

9. The organisations seek to incorporate the Observations made to the PTC in their submission of 16 March 2020 relating to issues of jurisdiction.⁷ They also wish to address the point that the Oslo Accords bars the exercise of jurisdiction by the Court over Israeli nationals in the “Situation in Palestine”.
10. The undersigned organisations’ observations will explain how the Oslo Accords and the legal instruments required to implement them allowed only for the creation of a *limited* self-governing Palestinian body. The powers and responsibilities transferred by Israel to the PA pursuant to the Oslo Accords are limited to the daily governance of the areas placed under their control, and are all subject to the outcome of the permanent status negotiations. The PLO specifically agreed that no sovereignty was determined, granted, or denied. The Oslo Accords specifically and intentionally left certain issues, most pertinently the subjects of “borders” and “settlements”, for “permanent status negotiations”.
11. The Observations will further show that according to the Oslo Accords, Israel retained “overriding responsibility for security for the purpose of protecting Israelis and confronting the threat of terrorism” and **all** criminal jurisdiction over Israelis in **all** areas of Judea, Samaria and the Gaza Strip.
12. The Observations will further show that a “State of Palestine” has not been established, and thus it is impossible to argue that the inhabitants of the Palestinian non-state entity, hold an inherent right to prosecute offenders. Furthermore, the observations will show that while there are those, including apparently the Prosecutor, who seek to demarcate

⁶ See, e.g., “The Role of UN Documentation in Shaping Narratives at the International Criminal Court and the Implications for the Rights of the Accused,” 22 *International Criminal Law Review* 1117 (2022); “ Hamas Exploitation of Hospitals for Hostage Taking: The Legal Imperative to Investigate Aiding and Abetting of War Crimes,” *Fathom Journal*, February 2024; and with Joshua Kern, “The OTP’s expert panel in the Situation in the State of Palestine: Additional safeguard or hostage to fortune?” *EJIL:Talk!*, 7 June 2024.

⁷ <https://www.icc-cpi.int/court-record/icc-01/18-81>

and equate the boundaries of the yet to be established "Palestinian State" to the 1949 Armistice lines, the **official Palestinian leadership, including the PLO, Fatah and the PA reject this notion**. The issue of borders is an agreed-upon negotiating issue for the negotiations on the permanent status of the territories, which negotiations has yet to take place.

13. Pursuant to Article XXXI, subparagraph 7 of the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, entered into by the PLO (representing the Palestinian people) and Israel at Washington D.C. on 28 September 1995 (commonly denominated as "Oslo 2 agreement"): "Neither side shall initiate or take any step that will change the status of the West Bank and the Gaza Strip pending the outcome of the permanent status negotiations."
14. The agreement, which has been endorsed in several resolutions of the UN Security Council and General Assembly, was countersigned as witnesses by the United States, the Russian Federation, the Kingdom of Norway, the Hashemite Kingdom of Jordan and the European Union

Respectfully submitted,

Ambassador Alan Baker and Lt. Col. (res) Maurice Hirsch, on behalf of The Jerusalem Center for Public Affairs



Ambassador (ret') Alan Baker



Lt. Col. (res) Maurice Hirsch

Anne Herzberg, on behalf of The Institute for NGO Research



Dated this 11th day of July 2024

At Jerusalem, Israel