

Annex

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/18**

Date: **11 July 2024**

PRE-TRIAL CHAMBER I

Before:

**Judge Iulia Motoc, Presiding Judge
Judge Reine Adélaïde Sophie Alapini-Gansou
Judge Nicolas Guillou**

SITUATION IN THE STATE OF PALESTINE

Public

**Request by the Centre for Israel and Jewish Affairs for Leave to Submit Written
Observations (amicus curiae observations)
Pursuant to Rule 103 of the Rules of Procedure and Evidence**

Source: Centre for Israel and Jewish Affairs

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 Victims	Legal Representatives of Applicants
Unrepresented Victims	Unrepresented Applicants (Participation / Reparation)
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I. INTRODUCTION

1. On May 20, 2024, the Prosecutor announced that he had submitted applications for arrest warrants in the Palestine Situation under article 58 of the Statute¹. The Prosecutor's announcement specified that arrest warrants had been requested for Yahya Sinwar, Mohammed Diab Ibrahim Al-Masri, Ismail Haniyah, Benjamin Netanyahu, and Yoav Gallant. The statement also included additional information such as the specific charges, the relevant time frame and locations, and the alleged responsibilities of the individuals involved.

2. In its 27 June 2024 decision, the Pre-Trial Chamber 1 indicated that entities that may wish to file requests to submit observations must do so by 12 July 2024².

3. Therefore, the Centre for Israel and Jewish Affairs (hereafter "CIJA") seeks permission under Rule 103 of the *Rules of Procedure and Evidence* to submit written observations to aid the Pre-Trial Chamber I in addressing outstanding substantive issues and other considerations.

II. APPLICABLE LAW

4. Rule 103(1) of the Rules provides that:

At any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate.

5. The Court's consistent jurisprudence has established that the application of Rule 103 is discretionary³. The main criterion is whether the requested observations are beneficial for properly resolving the case⁴, which must be assessed on a case-by-case basis⁵. It is the

¹ Statement of ICC Prosecutor Karim A.A. Khan KC: *Applications for arrest warrants in the situation in the State of Palestine (Prosecutor's Statement)*, 20 May 2024, available at <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state>

² ICC-01/18-173, Pre-Trial Chamber I, *Order deciding on the United Kingdom's request to provide observations pursuant to Rule 103(1) of the Rules of Procedure and Evidence, and setting deadlines for any other requests for leave to file amicus curiae observations*, 27 June 2024, para. 6.

³ ICC-01/04-01/06-1289, Appeals Chamber, *Decision on "Motion for Leave to File Proposed Amicus Curiae Submission of the International Criminal Bar Pursuant to Rule 103 of the Rules of Procedure and Evidence"*, 23 April 2008, para. 8.

⁴ *Ibid.*, para. 9.

⁵ ICC-01/04-373, Pre-Trial Chamber I, *Decision on the Request submitted pursuant to rule 103(1) of the Rules of Procedure and Evidence*, 17 August 2007, para. 3.

applicant's responsibility to show that the requested observations could help the Chamber⁶. The nature and complexity of the issues are important factors in determining whether it is advantageous to receive written observations⁷. We respectfully argue that CIJA can bring such observations to the attention of the Chamber given the particular context of the case.

6. Furthermore, as will be detailed below, CIJA has a direct interest in submitting observations, given that the decision from the Court will have a direct impact on the Jewish community of Canada.

III. SUBMISSIONS

a. The Applicant

7. CIJA is a non-profit corporation incorporated under the laws of Canada. It is the successor organization of, among others, the Canadian Jewish Congress ("CJC") and the Canada-Israel Committee ("CIC").

8. CIJA is the advocacy agent of Jewish Federations across Canada. It represents more than 150,000 Canadian Jews through local Jewish Federations as well as non-federated Jewish communities from coast-to-coast. CIJA is a non-partisan, not-for profit organization that protects Jewish life in Canada. Among other things, CIJA: (i) fights antisemitism in all of its forms; (ii) promotes community security; and (iii) educates Canadians about the integral role that the State of Israel plays in Jewish life⁸.

9. As the advocacy agent of the Jewish Federations of Canada, CIJA acts as the advocacy agent of: the Atlantic Jewish Council; the Calgary Jewish Federation; the Jewish Federation of Edmonton; the Hamilton Jewish Federation; the Jewish Federation of Ottawa; the Jewish Federation of Victoria and Vancouver Island Society; the Jewish Federation of Winnipeg; the London Jewish Federation (Ontario); Federation CJA (the Montreal Jewish Federation); UJA

⁶ ICC-02/04-01/05-342, Pre-Trial Chamber II, *Decision on application for leave to submit observations under Rule 103 dated 7 November 2008*, 10 November 2008, para. 12.

⁷ ICC-02/17-43, Pre-Trial Chamber II, *Decision on the 'Request for Leave to File Amicus Curiae Submissions on Behalf of Human Rights Organizations in Afghanistan' (ICC-02/17-35) and on the 'Request to appear before the Chamber pursuant to regulation 81(4)(b) of the Regulations of the Court' (ICC-02/17-39)*, 12 June 2019, para. 7.

⁸ This is accessible at <https://cija.ca/about-us/frequently-asked-questions/>.

Federation of Greater Toronto (the Toronto Jewish Federation); the United Israel Appeal of Canada; and the Jewish Federation of Vancouver and the Windsor Jewish Federation.

10. CIJA is an entirely Canadian organization. CIJA's core funding comes from Jewish Federations through Jewish Federations of Canada-UIA (JFC-UIA), which reflects the support of approximately 200,000 Federation-affiliated donors in Jewish communities across the country. Additional funds are raised from individual Canadian donors. While CIJA has received Canadian government funding for specific programs or activities, CIJA, for its core funding, does not receive funding from any government.

11. CIJA and its predecessors have made, and continue to make, submissions—both orally and in writing—to various government officials, courts, bodies and agencies regarding issues within its mandate. In fact, it is part of CIJA's mandate to seek status in matters that may affect the Jewish community of Canada.

CIJA as a Human Rights Organization

12. CIJA devotes significant efforts to protecting and defending human rights. As a human rights organization, CIJA is dedicated to fighting antisemitism and bigotry in all its forms. It is regularly consulted by different levels of governments on issues pertaining to human rights. Together with its American, Australian, British, French, German and Argentinian counterparts, CIJA met with the United Nations Secretary General António Guterres in March 2024 to discuss among other things the alarming rise in antisemitism, particularly since October 7 2023⁹.

Antisemitism

13. CIJA has substantial expertise on issues pertaining to antisemitism in Canada and internationally.

⁹ See *Leaders of the J7 Task Force Meet with U.N. Secretary General on Sidelines of ADL's Never Is Now Summit*, 7 March 2024, https://www.adl.org/resources/press-release/leaders-j7-task-force-meet-un-secretary-general-sidelines-adls-never-now?gad_source=1&gclid=CjwKCAjwkIm0BhBxEiwAwT1AXHYEsJqkiegZsX_ZABRM0Ar-qzrxlEPjg6deSzBGmUMLTBSywWiy7BoCgyIOAvD_BwE&gclsrc=aw.ds

14. CIJA is regularly called upon to offer its expertise on matters pertaining to antisemitism by all levels of government across the country.

15. Outside of Canada, CIJA is regularly invited to attend, participate in and present at major conferences on antisemitism. By way of example, CIJA participated in the 2016 High Level Forum on Global Antisemitism organized by the permanent missions of Canada, the United States and Israel, as well as the European Delegation to the United Nations, on September 7, 2016. Major international bodies such as the Organisation for Economic Co-operation and Development and the United Nations frequently consult CIJA in connection with studies on antisemitism. For instance, the United Nations' Special Rapporteur on freedom of religion or belief consulted CIJA in connection with a report released on September 23, 2019.¹⁰

CIJA Has Extensive Experience Assisting Courts

16. CIJA's predecessor, CJC, and then CIJA itself sought and obtained leave to participate in a variety of court cases over the years involving issues associated with antisemitism, racism, discrimination, and protection of human rights and minorities going back to 1945.

17. Among the other proceedings in which the CJC or CIJA was granted the right to participate are the following:

- (a) *Ontario Human Rights Commission et al. v. Simpson-Sears Ltd.* (1985, Supreme Court of Canada);
- (b) *Bhinder et al. v. C.N.R. Co.* (1985, Supreme Court of Canada);
- (c) *Zylberberg et al. v. The Director of Education of the Sudbury Board of Education* (1988, Divisional Court of the Supreme Court of Ontario and the Court of Appeal for Ontario);
- (d) *Reference Re Bill 30, An Act to Amend the Education Act (Ont.)* (1987, Court of Appeal for Ontario and Supreme Court of Canada);
- (e) *Alberta Human Rights Commission v. Central Alberta Dairy Pool* (1990, Supreme Court of Canada);
- (f) *Canadian Civil Liberties Association v. Minister of Education* (1990, Court of Appeal for Ontario);
- (g) *Taylor v. Canada (Human Rights Commission)* (1990, Supreme Court of Canada);

¹⁰ The report is accessible at https://www.ohchr.org/Documents/Issues/Religion/A_74_47921ADV.pdf.

- (h) *R. v. Keegstra* (1990, Supreme Court of Canada);
- (i) *R. v. Smith and Andrews* (1990, Supreme Court of Canada);
- (j) *R. v. Zundel* (1992, Supreme Court of Canada);
- (k) *Kane v. Church of Jesus Christ Christian Aryan Nations* (1992, Board of Inquiry under Alberta's Individual Rights Protection Act);
- (l) *Ross v. Board of School Trustees District No. 15* (1996, Supreme Court of Canada);
- (m) *Beutel v. Ross* (1999, New Brunswick Court of Appeal);
- (n) *Citron v. Zundel* (1997-2002, Canadian Human Rights Tribunal);
- (o) *R. v. Krymowski* (2005, Supreme Court of Canada—s. 319 of the *Criminal Code*);
- (p) *Warman v. Lemire* (2006, Canadian Human Rights Tribunal); and
- (q) *Saskatchewan (Human Rights Commission) v. Whatcott* (2013, Supreme Court of Canada).
- (r) *University of Toronto v. Doe et al.* CV-24-00720977 (2024, Ontario Superior Court of Justice)

18. Given the current rise of antisemitism CIJA created a legal task force which serves Canadians facing antisemitism. To date this task force has launched two legal proceedings, one against a Canadian union (Public Service Alliance of Canada)¹¹ and one against Toronto Metropolitan University¹² and are evaluating others¹³.

b. Unique circumstances of the situation which warrant for written observations from CIJA on outstanding substantive issues and other considerations are desirable for the proper determination of the case.

19. CIJA wishes to submit that both the sharp rise in antisemitism flowing from the current Hamas-Israel conflict in Canada and elsewhere and the importance of Israel for Jews around the world are to be considered in evaluating the relevance of our observations.

¹¹ See CIJA, *Unionized Jewish Employees Taking PSAC – Canada's Largest Federal Public Service Union – To Canadian Human Rights Commission*, 9 February 2024,

https://www.cija.ca/press_release_unionized_jewish_employees_taking_psac_canada_s_largest_federal_public_service_union_to_canadian_human_rights_commission

¹² See CIJA, *TMU Student Suing University for Fostering Poisoned Antisemitic Environment*, 25 April 2024, https://www.cija.ca/tmu_student_suing_university_for_fostering_poisoned_antisemitic_environment

¹³ See CIJA, *Lawyers prepare legal action against schools across Canada over rising antisemitism*, 24 January 2024, https://www.cija.ca/lawyers_prepare_legal_action_against_schools_across_canada_over_rising_antisemitism_the_globe_and_mail

20. Since the October 7 attacks by Hamas and the resulting Israel-Hamas war, Jews around the world have been subjected to severe antisemitic attacks. In Canada, police services have reported dramatic rise in incident numbers since October 7: 131 antisemitic hate incidents in Montreal between October 7 2023 and January 30 2024, according to police; antisemitic incidents more than doubled in Toronto, reports of antisemitism also increased more than twofold in Halifax, Edmonton and Calgary in Alberta saw a rise to 45 from 25 the year before, in Ottawa incidents targeting Jews accounting for one out of every five incidents (Ottawa Jewish population numbers just 15,000 in a city of one million); in Vancouver there were more antisemitic hate crimes after Oct. 7 2023 than in all of 2022, which the city's police department attributed to the Israel-Hamas conflict¹⁴.

21. The disinformation that is being circulated against Israel in addition to some drawing moral equivalence between the Israel Defense Forces and Hamas contribute to the sharp rise of antisemitism we are witnessing. This is of great concern to members of the Jewish community in Canada who since October 7 have been gravely impacted by an acute rise in antisemitism directly linked to this issue.

22. Furthermore, it is critically important to understand that the overwhelming majority of the Canadian Jewish community have a historical, emotional, religious, cultural and/or ethnic connection to Israel. Israel embodies the yearning and right of Jews to self-determination—as a Jewish people—in our ancestral homeland. It is an integral part of the shared ancestry and ethnicity of Jews.

23. Indeed, an in-depth study of the Canadian Jewish community conducted jointly and released by the University of Toronto, York University and the Environics Institute in 2018 found that Canadian Jews have a strong connection to Israel. The Final Report issued in connection with the study concluded that: "Israel is a central focus for Jews across the diaspora, and this survey reveals this to be especially so for Jews in this country. Almost half (48%) of Jews in Canada say they are very emotionally attached to Israel, with another three in ten (31%) somewhat attached, and only one in five feeling not very (11%) or not at all (8%)

¹⁴ See Global News, *Investigation: The antisemitism that Oct. 7 unleashed in Canada*, 20 February 2024, <https://globalnews.ca/news/10294929/antisemitism-canada-since-oct-7/>

attached emotionally”¹⁵. More recently, a new survey conducted by Robert Brym (professor of sociology and S.D. Clark Chair in Sociology at the University of Toronto) found that 91 percent of Canadian Jews believe Israel has the right to exist as a Jewish state, and only 3 percent said that Israel does not have the right to exist as a Jewish state¹⁶.

24. As a result of all the above, we believe that the decision from the Court will affect the Jewish community of Canada, hence our request to submit observations.

25. As detailed below we are requesting to make observations in connection to jurisdiction, complementarity and the interests of justice.

c. The Nature and Content of the Rule 103 Observations

26. CIJA acknowledges the Court's clear guidance that permission must be obtained before making substantive observations under Rule 103. Consequently, the substantive observations are not fully detailed in the request for permission./

27. However, to assist the Court in deciding on this application, if permitted to submit observations, CIJA intends to make submissions on the following issues:

28. **Whether the Court can assert jurisdiction over Israeli nationals in situations where, according to the Oslo Accords, Palestine cannot exercise criminal jurisdiction over Israeli nationals.** On February 5, 2021, during its decision on territorial jurisdiction concerning the situation in Palestine, the majority of Pre-Trial Chamber I did not address the jurisdictional issues related to the Oslo Accords. Instead, they stated that these issues would be examined when the Prosecutor submits an application for an arrest warrant or summons under article 58 of the Statute, or if a State or suspect challenges under article 19(2) of the Statute¹⁷.

¹⁵ The Final Report is accessible at https://www.environicsinstitute.org/docs/default-source/project-documents/2018-survey-of-jews-in-canada/2018-survey-of-jews-in-canada---final-report.pdf?sfvrsn=2994ef6_2.

¹⁶ Robert Brym, *Jews and Israel 2024 Survey: Ten Further Insights*, 30 May 2024, available at: Canadian Jewish Studies Journal, https://cjs.journals.yorku.ca/index.php/cjs/jewsandisrael2024#_ftn8

¹⁷ ICC-01/18-143, Pre-Trial Chamber I, *Decision on the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine'* ("Jurisdiction Decision"), 5 February 2021, para. 131.

29. The Prosecutor has now submitted applications for arrest warrants under article 58 of the Statute, including against Israeli nationals, which brings the unresolved Oslo Accords issue into focus. In line with the Jurisdiction Decision and under Articles 19(1) and 58 of the Statute, these additional jurisdictional questions must be considered when evaluating the applications for arrest warrants.

30. We therefore wish to offer observations as to whether the Court can assert jurisdiction over Israeli nationals in situations where, according to the Oslo Accords, Palestine cannot exercise criminal jurisdiction over Israeli nationals.

31. **Whether the Court can hear the matter given the Complementarity principle.** In his 20 May 2024 Statement the Prosecutor stated:

"I also wish to emphasise that the principle of complementarity, which is at the heart of the Rome Statute, will continue to be assessed by my Office as we take action in relation to the above-listed alleged crimes and alleged perpetrators and move forward with other lines of inquiry. Complementarity, however, requires a deferral to national authorities only when they engage in independent and impartial judicial processes that do not shield suspects and are not a sham."¹⁸ (our underline).

32. If permitted to submit, we intend to offer observations on articles 17 and 53 of the Rome Statute. Given the core importance of the complementarity principle, statements and actions taken by Attorney General Gali Baharav-Miara and State Attorney Amit Aisman and their respective agencies,¹⁹ the independence of Israel's judiciary, their track-record of holding perpetrators of crimes accountable, it is crucial to examine the decision of the arrest warrant from the angle of pre-emptive, preclusive and prejudicial process.

33. The appearance of or actual non respect of the principle of complementarity could have grave consequences on the Court's standing. As a long-time advocate of the Court and international justice, we believe that this outstanding jurisdictional issue should be resolved

¹⁸ Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for arrest warrants in the situation in the State of Palestine (Prosecutor's Statement'), 20 May 2024, available at <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state>

¹⁹ Times of Israel, AG, state attorney: 'No foundation' to ICC prosecutor's bid to arrest Israeli leaders, 22 May 2024, <https://www.timesofisrael.com/ag-state-attorney-no-foundation-to-icc-prosecutors-bid-to-arrest-israeli-leaders/>

at this early stage by the Pre-Trial Chamber. Addressing this matter now serves the interests of the Court as a whole, as well as the involved parties and international community, ensuring that all proceedings are based on a solid jurisdictional foundation.

34. **Whether the arrest warrant is in the interest of justice.** CIJA request to submit observations on whether there were sufficient grounds to issue an arrest warrant against Israeli Prime Minister Benjamin Netanyahu and Israel's Minister of Defense Yoav Gallant and if it is in the interest of justice. CIJA's observations would include the following:

- (a) Observations with regards to pre-emptive, preclusive and prejudicial process, including in light of article 54 (3) of the Rome Statute and the possibility for arrangements or agreement to facilitate the cooperation of a State.

The multiple statements made by Israeli officials saying they were preparing to host ICC officials must be examined²⁰.

Cooperation is a guiding principle. The relevance of meeting with Israeli officials to better understand the judicial and legal overseeing over the conduct of the war against Hamas, including Israeli policy on humanitarian aid to Gaza, are a key issue in evaluating the notion of "intentionally" under article 8 of the Rome Statute at the stage of the Prosecutor's determination as to whether there is reasonable basis to proceed or not.

- (b) Observations with regards to article 53 of the Statute which mandates the Prosecutor to consider whether initiating an investigation serves the interests of justice, taking into account the gravity of the crime, the interests of victims, and other considerations.

In the Pre-Trial Chamber II decision of April 2019 regarding the Situation in the Islamic Republic of Afghanistan, the Chamber decided that it was not in the interests of justice to proceed with an investigation, highlighting the

²⁰ Times of Israel, *ICC prosecutor canceled fact-finding visit to region on same day he requested arrest warrants*, 5 July 2024, https://www.timesofisrael.com/liveblog_entry/icc-prosecutor-canceled-fact-finding-visit-to-region-on-same-day-he-requested-arrest-warrants/

complexities and challenges associated with the context and the limited prospects for successful investigations and prosecutions²¹. While the decision was overturned on appeal, we respectfully argue that this precedent underscores the need for the Court to carefully consider the broader implications of pursuing cases that may not meet the threshold of serving the interests of justice. The Court's mandate, which is to address the most serious crimes of international concern – if the state under suspicion is unwilling or unable genuinely to carry out the investigation or prosecution – is clear. Acting outside this mandate would risk politicizing the Court, thereby eroding its credibility.

IV. Relief Requested

35. CIJA respectfully seeks permission to submit written observations under Rule 103 on the aforementioned issues.

Respectfully submitted:



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Vice-President, External Affairs & General Counsel
for the Centre of Israel and Jewish Affairs
(Member of Barreau du Québec and of Law Society
of Ontario)

Emmanuelle Amar, LL. M.
Director, Policy and Research (Quebec) for
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Dated this 11 day of July 2024.

At Ottawa, Canada

²¹ ICC-02/17-33, Pre-Trial Chamber II, *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan*, 12 April 2019.