

Annex

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: ICC-01/18
Date: **12 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

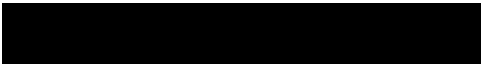
Public

**Request to provide *amicus curiae* observations pursuant to Rule 103(1) of the
Rules of Procedure and Evidence.**

Source: Prof Sascha Dominik Dov Bachman
Dr Deborah Mayersen
Prof Gregory Rose
Dr Colin Rubenstein AM

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

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Counsel for the Defence

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(Participation / Reparation)

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Amicus Curiae

The competent authorities of the:
The State of Palestine,
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the People's Republic of Bangladesh,
the Plurinational State of Bolivia,
the Union of the Comoros,
the Republic of Djibouti,
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I. INTRODUCTION

1. The Applicants request leave to submit *amicus curiae* observations, pursuant to paragraph 6 of the Order of the International Criminal Court ("ICC") Pre-Trial Chamber I, dated 27 June 2024 ("the 27 June 2024 Order").
2. Paragraph 6 of the 27 June 2024 Order decided that "Whilst the following must not be understood as an open call by the Chamber for *amicus curiae* submissions, the Chamber acknowledges that the Request, and the Chamber's decision to grant the United Kingdom leave to file observations, may result in other requests to submit observations. To limit the impact of this procedure on the expeditiousness of the present stage of the proceedings, the Chamber indicates already in the present decision that any such requests pursuant to rule 103(1) of the Rules must also be received by 12 July 2024."
3. Pursuant to Rule 103(1) of the Rules of Procedure and Evidence, the Applicants accordingly request leave to submit observations on outstanding questions of jurisdiction, as well as on other preliminary matters of admissibility and grounds for arrest, in accordance with the 27 June 2024 Order.

II. THE APPLICANTS AND THEIR EXPERTISE

4. The applicants make this application in their personal capacities and Dr Colin Rubenstein does so also on behalf of the Australia/Israel & Jewish Affairs Council. The applicants' individual expertise qualifies them to make *amicus curiae* observations that may assist the Chamber in addressing the important and complex issues raised by the Prosecutor's application for arrest warrants for the Prime Minister and Defence Minister of the State of Israel. All the applicants are from Australia and work in their areas of expertise in Australian universities and in a national thinktank.

5. **Prof Sascha Dov Bachmann** is a Professor in Law at the University of Canberra. He is Extraordinary Reader (Docent) in War Studies at the Swedish Defence University (FHS) Stockholm and a Fellow at NATO SHAPE, Hybrid War and Lawfare Pacific – ACO Office of Legal Affairs. Prof Bachmann is also a Research Fellow at The Security Institute for Governance and Leadership in Africa, Faculty of Military Science, Stellenbosch University, and is a Fellow of The Higher Education Academy (UK). He has published more than 80 academic articles in leading journals on various topics of international criminal law, human rights law and human security.
6. **Dr Deborah Mayersen** is a Senior Lecturer in International and Political Studies at the University of New South Wales Canberra at the Australian Defence Force Academy. Her research expertise is in the field of genocide studies, including the responsibility to protect and genocide prevention. Her publications include *On the Path to Genocide: Armenia and Rwanda Reexamined* (Berghahn Books, 2014), and the edited volumes *A Cultural History of Genocide in the Modern World* (Bloomsbury, 2021), *The United Nations and Genocide* (Palgrave Macmillan, 2016) and *Genocide and Mass Atrocities in Asia: Legacies and Prevention* (with Annie Pohlman, Routledge, 2013). She has previously taught courses on the Arab-Israeli conflict at The University of Melbourne.
7. **Prof Gregory Rose** is Professor of Law at the University of Wollongong. He is the author of four books including *Detention of Non-State Actors: The Future Law* (2014, Routledge) on detention in transnational military operations, and *Following the Proceeds of Environmental Crime: Forests, Fish and Filthy Lucre* (2016, Martinus Nijhoff) and of 140 publications including many international law journal articles. He has taught international law for 30 years at the University of London, University of New South Wales and the University of Wollongong. He was responsible for international criminal law matters in the Legal Office of the Australian Department of Foreign Affairs and Trade, 1994-97.

8. **Dr Colin Rubenstein** is the Executive Director of the Australia/Israel & Jewish Affairs Council, providing research, commentary and analysis on matters of Middle East policy and law. He lectured in political science specialising in Middle East politics and public policy at Melbourne universities for 30 years and, in 2001, was awarded an Australian Centenary Medal, which acknowledges those who contributed to the success of Australia's first hundred years as a federal nation, and in 2006 he was awarded the Member of the Order of Australia (AM).

III. INTENT OF OBSERVATIONS

9. On 5 February 2021, ICC Pre-Trial Chamber 1, by a majority of two to one in its then-composition in the case, ICC-01/18, held that the ICC Office of the Prosecutor ("OTP") had jurisdiction to conduct an investigation with a view to conducting prosecutions, following the OTP conduct of its Preliminary Examination into the Situation in Palestine ("the PTC1 Order of 2021"). The PTC1 Order of 2021 was focused on questions of ICC territorial jurisdiction pursuant to Palestinian ratification of the Rome Statute.
10. However, the PTC1 Order of 2021 did not determine all jurisdictional issues. Instead, it held that "[w]hen the Prosecutor submits an application for the issuance of a warrant of arrest or summons to appear under article 58 of the Statute, or if a State or a suspect submits a challenge under article 19(2) of the Statute, the Chamber will be in a position to examine further questions of jurisdiction which may arise at that point in time".
11. The applicants submit that, as the PTC1 Order of 2021 acknowledged that it did not resolve all pertinent questions as to jurisdiction arising under the OTP request pursuant to Article 19(3) of the Rome Statute made to the Pre-Trial Chamber in 2019, so questions of jurisdiction remain outstanding and require resolution.
12. The Prosecutor has now submitted applications for the issuance of arrest warrants under Article 58 of the Statute, including two against Israeli nationals who would

be directly affected by the outstanding questions of jurisdiction that must now be addressed as a precondition to determining the application for these arrest warrants. In addition, questions of admissibility and about the grounds of arrest immediately affect the rights of the suspects and need be dealt with at this preliminary stage.

13. The Applicants will address, if leave to submit written observations as *amicus curiae* is granted, questions concerning lack of jurisdiction, failure to apply the fundamental rule of complementarity, and the lack of both reasonable grounds and of necessity to issue arrest warrants due to failures to prove a factual evidentiary basis for them.

Lack of Jurisdiction

14. Israel is not a State Party to the Rome Statute and any jurisdiction over Israeli nationals would need to be premised on the territorial jurisdiction of other States and exercised on the territory of those other States. Article 19(1) of the Rome Statute requires that the Court satisfy itself that it has jurisdiction in any case brought before it. The PTC1 Order of 2021 did not decide questions of jurisdiction raised by the Oslo Accords, which include, *inter alia*, questions over the lack of jurisdiction over Israelis *in personam*. There was a lengthy dissent on this matter by the Presiding Judge, with the two majority judges in the PTC1 Order of 2021 then leaving open questions arising under the Oslo Accords.

Further, questions arise as to the current legal effects of the Oslo Accords and the legal consequences of possible breaches of them by the Palestinian Authority/PLO. No entity can breach an agreement and thereby obtain sovereignty or jurisdiction that it did not already have. The applicants will argue that, moreover as a matter of law, no benefit may flow to the Palestinian Authority from breaches by it of its obligations under the Oslo Accords, *ex turpi causa non oritur actio*.

15. In this context, the PTC1 Order of 2021 also left open the question of whether Palestine is regarded as a full-fledged independent State, given its failure to exhibit the attributes of a State as required in international law. The Presiding Judge opined it is not, while the two other judges on the bench instead considered that it could be treated as if a State for the purposes of the Rome Statute, as in other UN institutions. Thus, questions concerning the sovereign status of Palestine flow into a complex subset of additional jurisdictional questions concerning the jurisdiction of the Court over conduct in Gaza.
16. It is noteworthy in relation to the jurisdiction of the Court over conduct specifically in the Gaza region that the Hamas Government in power in Gaza at the time of ratification of the Rome Statute by the Palestinian Authority did not consent to that ratification, nor to the application of the Rome Statute to its territory. It broke away from the Palestinian Authority almost two decades ago, governs independently, conducts its own foreign and military policy, remains in power and doubtless does not consent to the application of the Rome Statute to it in Gaza. The binding legal status of the Rome Statute in Gaza region is consequently uncertain.
17. Moreover, if Hamas is not considered by the Court as the legitimate government of sovereign armed forces in Gaza, then Hamas armed attacks on Israel are those of a non-State armed group. Under the laws of armed conflict, its conflict with Israel is then governed by the rules of non-international armed conflicts. Thus, questions of sovereignty go to classification of the conflict and to the set of laws applicable to the armed conflict.
18. In not being regarded as a full-fledged independent State by the PTC1 Order of 2021 or by all members of the UN, Palestine is exceptional among parties to the Rome Statute. International law does not give sovereign powers to States as they have already all the powers inherent in sovereignty. Rather, international law delimits State powers, in accordance with State consent, as determined by the Permanent Court of International Justice in *The Lotus* case. Furthermore, a

government cannot delegate what it does not have, *nemo dat quod non habet*. Thus, the Palestinian Authority cannot bestow upon the OTP authorities that it never had. Our submission would describe the powers that the Palestinian Authority has under international law.

Inadmissibility

19. Article 1 of the Rome Statute stipulates that the jurisdiction of the Court shall be complementary to national criminal jurisdictions. Article 17(1)(a) requires the Court to determine that a case is inadmissible where the case is already being investigated or prosecuted by a State which has jurisdiction over it, unless that State is itself unwilling or unable genuinely to carry out the investigation or prosecution. Complementarity is a fundamental principle for the Court. The point here is that the OTP has not allowed Israel, the primary jurisdiction, an opportunity to investigate the alleged crimes. Any omission by the OTP to demonstrate that Israel is unwilling or is unable is fatal to admissibility in this case.
20. None of the criteria for unwillingness set out in Article 17(2) could have been established by the OTP. Israel has the ability to conduct its own independent investigations. Israel's Attorney General has called for a Commission of Inquiry to investigate the government's actions and policies. The Supreme Court exercises rigorous judicial oversight during the current conflict, including ongoing oversight regarding delivery of humanitarian aid to Gaza, and has a world-renowned record of trials prosecuting even Israel's Prime Ministers, including the current Prime Minister. Although Israel is in the midst of an armed conflict launched by Hamas within the past nine months, it has in fact already embarked upon these investigations and inquiries into allegations of crimes, wrongdoing and command failures by its armed forces and national government and has committed to conduct prosecutions where appropriate.

21. The OTP has brought a request for the issue of arrest warrants prematurely. The OTP did not engage genuinely with the Israeli Government to inquire as to Israel's domestic investigations and independent accountability mechanisms. This failure to implement the fundamental principle of complementarity is demonstrable by its inconsistency with the OTP's own policy on complementarity and cooperation.

Grounds for Arrest

22. Article 58 of the Rome Statute requires that a warrant shall be issued if the Pre-Trial Chamber is satisfied that there are reasonable grounds to believe that an alleged crime was committed, and that the arrest of the suspect is necessary. In this case, there are no reasonable grounds to support the request brought by the OTP.
23. There are no reasonable grounds to believe that the alleged crime of use of starvation as a method of warfare has been committed. The allegations of starvation are unfounded and the allegations of the deliberate use of starvation lack any probative evidence. For example, the UN Integrated Food Security Phase Classification retracted its initial prediction of war-induced famine in Gaza, as Israel has facilitated humanitarian aid. The Hamas Government has engaged in disinformation campaigns by disseminating many demonstrable falsehoods that have the effect of supporting its war. Population health data derived from sources controlled and disseminated by the Hamas Government, then collected by UN agencies that have no independent objective data, have presumably been assembled with statements and repackaged by the OTP as evidence. The OTP allegations rely on demonstrable falsehoods and therefore no arrest warrants against Israeli suspects are necessary.

Reasonable Apprehension of Bias

24. Finally, we note a concern that is tangential to the Court's consideration of the OTP request for issuance of arrest warrants but arises from it and that concern is that

the pattern of OTP conduct gives rise to an apprehension of bias “based on the perspective of a reasonable observer,” as described by the Appellate Chamber (Decision on Request for Disqualification of the Prosecutor, *Gaddafi and Al-Senussi*).

25. The extraordinary failures of the OTP to comply with standards set out in the Rome Statute are grave and serious. Additional circumstances evident in the conduct by the OTP can be further detailed in our submission to demonstrate the need for the Court to redress failures in the administration of justice by the OTP.

IV. CONCLUSION AND APPLICATION

26. The Applicants are committed to the fair and just application of international law in the context of the Situation in Palestine currently before the Chamber and have expertise to assist the Court by means of their observations on jurisdiction, admissibility and grounds for arrest.
27. For these reasons, the Applicants respectfully request the Chamber to grant them leave to submit written observations as *amicus curiae* on the matters stated above. Pursuant to Rule 103(3), this request to submit a written observations is hereby filed with the Registrar.

Dated this 12 July 2024 at The Hague, The Netherlands, on behalf of the Applicants:



Prof Gregory Rose