

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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

Date: **12 July 2024**

THE PRE-TRIAL CHAMBER

Before:

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

SITUATION IN PALESTINE

PUBLIC

Request for Leave to Submit Written Observations

Pursuant to Rule 103

Source: *Amicus Curiae* Jerusalem Institute of Justice

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



REGISTRY

Amicus Curiae

Registrar

Mr. Osvaldo Zavala Giler

Victims and Witnesses Unit Detention Section

Victims Participation and Reparations Section

Other

Introduction

1. The Jerusalem Institute of Justice requests leave to submit observations on the basis of the Court's Order on 27 June 2024, pursuant to Rule 103 of the ICC Rules of Procedure, which states that "[a]t any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case [...] grant leave to a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate." This request is also submitted in accordance with the Order deciding on the United Kingdom's request to provide observations.¹
2. If leave is granted, the Jerusalem Institute of Justice seeks to assist the Court in examining unresolved matters of jurisdiction and statehood which this Chamber identified in its 2021 decision. This includes whether the Court can exercise jurisdiction over Israeli nationals pursuant to the established in the Oslo Accords.

Expertise

3. The Jerusalem Institute of Justice (JIJ) is an Israeli legal and research institute with United Nations Economic and Social Council Consultative Status, with a mission to pursue justice, promote freedom, and advance human rights in Israel and the Middle East.
4. JIJ promotes the applicability of international law to current situations, including counter-terrorism operations such as the Israel-Hamas war, and the complex challenges to the concepts of sovereignty and self-determination posed by the Israeli-Palestinian conflict. JIJ's educational programs include internships for law students studying international human rights and humanitarian law, webinars featuring testimony by experts on the laws of armed conflict,² and the publication of specialized reports documenting human rights abuses experienced by both Israeli and Palestinian victims.

¹ 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, ICC-01/18-173-Red, 27 June 2024, para. 6.

² Richemond-Barak, Daphne & Rosenzweig, Ido (21 November 2023) *Between Conflict and Compliance - The Laws of War in the Israel-Hamas Hostilities* [Video file] <https://www.youtube.com/watch?v=nKiah5uZFNy>.

5. JIJ has regularly engaged with the Office of the Prosecutor (OTP) since 2017, providing reports, survivor testimonies, and detailed documentation of gross human rights abuses perpetrated by the leaders of the Palestinian Authority,³ Hamas, and other terror organizations against the Palestinian people. As documented by JIJ prior to the October 7th massacre, Hamas' crimes include the use of child soldiers,⁴ the abuse of civilians as human shields, the use of torture,⁵ indoctrination of children,⁶ and extrajudicial executions of Palestinians who are rumored to serve as "collaborators" with Israel. Additionally, JIJ regularly engages with the UN organs, including the UN Human Rights Council, the UN Human Rights Committee, and the UN Commission on the Status of Women.
6. Within Israel, JIJ provides free legal aid to survivors of terrorism, human trafficking, and religious discrimination, advancing their rights within the Israeli legal system. Since the October 7th massacre, JIJ has been retained as counsel by 130 families internally displaced within Israel by Hamas' atrocities, and 20 survivors of the October 7th massacre. JIJ represents survivors from the Nova Festival and the kibbutz communities near the Gaza border. On behalf of these clients, JIJ is preparing to submit forensic and photographic evidence, along with detailed witness statements to the OTP on a confidential basis. JIJ's ongoing engagement with the OTP supports its mandate to investigate and prosecute Rome Statute crimes, and the victims' urgent demands for recognition, justice, accountability, and restitution.

³ Crimes against Humanity committed by the Palestinian Authority against Palestinian citizens in the West Bank, 5 June 2019, Jerusalem Institute of Justice. <https://jij.org/wp-content/uploads/2019/06/52-PalestinianTestimonies.pdf>; The Responsibility of Mahmoud Abbas for Crimes against Humanity committed against the Palestinian people in the West Bank, 20 February 2019, Jerusalem Institute of Justice. <https://jij.org/wp-content/uploads/2019/03/Communication-to-OTP-ICC-MAHMOUD-ABBAS-1.pdf>.

⁴ The Responsibility of Ismail Haniyeh for War Crimes committed against Palestinian children in the Gaza Strip from June 13, 2014 through August, 2018, 13 September 2018, Jerusalem Institute of Justice. <https://jij.org/wp-content/uploads/2018/11/Militarization-of-Children-Communication-to-the-ICC-Jerusalem-Institute-of-Justice.pdf>.

⁵ The Responsibility of Ismail Haniyeh for crimes against humanity committed against the Palestinian population in the Gaza Strip from June 2014 through July 2018, 24 July 2019, Jerusalem Institute of Justice. <https://jij.org/wp-content/uploads/2019/10/Communication-to-the-ICC-Ismail-Haniyeh-Crimes-Against-Humanity.pdf>.

⁶ Submission for the Renewal of the Policy Paper on Crimes Against or Affecting Children, 6 January 2023, Jerusalem Institute of Justice. <https://jij.org/wp-content/uploads/2023/06/JIJ-Submission-for-the-renewal-of-the-policy-paper-on-crimes-against-or-affecting-children.pdf>.

Summary of Observations

7. If granted leave by the Chamber, the Jerusalem Institute of Justice would submit its observations on a number of issues, including *inter alia*, the following:

The Oslo Accords

8. In its decision on the Prosecution request pursuant to article 19(3), the Pre-Trial Chamber noted that the Oslo Accords contain “a number of clauses limiting the scope of the jurisdiction of the ‘Palestinian Interim Self-Government Authority’.”⁷ While exposing the different interpretations and arguments that can be drawn in relation to the Oslo Accords, the Chamber concluded that resolution of this matter was not necessary at such a preliminary phase of the proceedings.⁸
9. Moreover, in the same decision, the Chamber concluded that “when the prosecutor submits an application for the issuance of a warrant of arrest [...] the Chamber will be in a position to examine further questions of jurisdiction which may arise at that point in time.”⁹ That point in time has arrived, as the Prosecutor has requested the issuance of arrest warrants for two Israeli nationals, Prime Minister Benjamin Netanyahu and Defense Minister Yoav Gallant.
10. JIJ will argue that the Oslo Accords remain in force, both as a matter of law and fact, and that the State of Israel and the Palestinian Liberation Organization (PLO) continue adhering to the fundamental framework of their bilateral agreement. The Oslo Accords lawfully prohibit the PLO, a non-state actor, from transacting foreign relations, or from exercising criminal jurisdiction over Israeli nationals.
11. According to the 1995 Interim Agreement between Israel and the Palestine Liberation Organization (PLO), “[t]he territorial and functional jurisdiction of the [Palestinian Interim

⁷ 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. 125.

⁸ *Id.* para. 129.

⁹ *Id.* para. 131.

Self-Government Authority] will apply to all persons, except for Israelis.”¹⁰ More specifically, Annex IV of the Interim Agreement, stipulates that the “criminal jurisdiction of the [Palestinian] Council covers all offenses committed by Palestinians and/or **non-Israelis** in the [areas A and B of the West Bank and the Gaza Strip].”¹¹

12. The Oslo Accords marked a significant advancement of the Palestinian people’s right to self-determination and autonomy in governance, and were witnessed by representatives of the United States, Egypt, Jordan, Norway, Russia, and the European Union. Article 31 of the Vienna Convention on the Law of Treaties stipulates that the provisions of this bilateral agreement must either precede or be harmonized with the multilateral Rome Statute. This view was supported in the partially dissenting opinion of Judge Kovács.¹²
13. If granted leave, JIJ will address the applicability of the Oslo Accords and the impediments that it poses to the Court’s exercise of jurisdiction in this Situation and on the issuance of arrest warrants for two Israeli nationals.

Classification of the Conflict and Statehood

14. In his request for arrest warrants, the Prosecutor classifies the current conflict as both an IAC and a Non-International Armed Conflict (NIAC), running in parallel. Several issues arise from such classification. Firstly, simultaneous existence of both NIAC and IAC has been interpreted to exist when a state is involved in an armed conflict with another state and a non-state armed group.¹³ In the current situation, the Israeli army is involved in a conflict with Hamas, an armed group which, although being the de facto authority in the Gaza Strip, is not recognized as the legitimate representative of a state.

¹⁰ *Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip*, Israel and Palestine Liberation Organization, 28 September 1995, Art. XVII(2)(c) [*Interim Agreement*].

¹¹ *Interim Agreement*, Annex IV Article 1(a).

¹² “[T]he proper approach is, in my view, a harmonized interpretation which reflects the meaning of two treaties that are equally valid and in force, and which duly considers the rules to be implemented from each of them. In this way, both may be implemented at the same time.” ICC-01/18-143-Anx1, Judge Péter Kovács’ Partly Dissenting Opinion, 5 February 2021, para. 365-366.

¹³ When does IHL apply?, ICRC BLOG (Aug.13, 2018), <https://blogs.icrc.org/ilot/2017/08/13/when-does-ihl-apply/>.

15. Secondly, the classification of the conflict as an IAC made by the Prosecutor also raises certain concerns. The panel of experts, who supported the Prosecutor's decision to request arrest warrants, present three theories supporting an IAC classification. In their view, either, "Palestine is a State," or "Palestine and Israel are both High Contracting Parties to the 1949 Geneva Conventions," or "There is a belligerent occupation by Israel of at least some Palestinian territory."¹⁴ The first two theories are based on the assumption that Palestine is a state, therefore contradicting the Pre-Trial Chamber's position that it lacks competence to determine matters of statehood.¹⁵
16. Thirdly, the classification of this conflict as an IAC/NIAC running simultaneously, has resulted in the Prosecutor seeking to charge only Israeli leaders with alleged IAC war crimes.¹⁶ In so doing, the Prosecutor applies the norms of international humanitarian law (IHL) to this Situation in an asymmetric manner. By seeking to enforce higher burdens on only one party to the conflict, the Prosecutor unwittingly endorses Hamas' strategy of intentionally luring the Israeli military into civilian zones, and rigging the battlefield to ensure maximum harm to civilians, in pursuit of international pressure on Israel to stop pursuing its legitimate military objectives. This approach has negative implications for all sovereign states in conflict with armed terrorist organizations that intentionally violate the laws of war, seeking to draw IHL-adherent armies into complex urban warfare.
17. Moreover, one of the alleged crimes for which the Prosecutor seeks arrest warrants for Israeli leaders is "starvation," which is a crime only in the context of International Armed Conflict (IAC). The 2019 amendment of the Rome Statute, which added this crime to NIACs, was not

¹⁴ Report of the Panel of Experts in International Law, 20 May 2024, para 13. <https://www.icc-cpi.int/sites/default/files/2024-05/240520-panel-report-eng.pdf>

¹⁵ "The Court is not constitutionally competent to determine matters of statehood that would bind the international community." Decision on the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine' ICC-01/18-143, 5 February 2021, para 108.

¹⁶ Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for arrest warrants in the situation in the State of Palestine, 20 May 2024, para 4. <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state>.

ratified by Palestine. The Court may not issue arrest warrants for this alleged crime without making a determination on Palestinian statehood, which it has so far declined to do.

18. The question of Palestinian statehood has bearing not only on the exercise of this Court's jurisdiction, but also on the classification of the conflict between Israel and Hamas, and the nature of crimes that may be charged accordingly. If Palestine is a state, and the conflict taken place is seen as involving the relevant actors to be considered an IAC, then the Court may issue arrest warrants for charges arising under provisions of the Rome Statute regarding war crimes committed during international armed conflicts. If Palestine is *not* a state, as JIJ will argue, and IAC provisions do not apply, then certain provisions of the Rome Statute, including the one classifying starvation as a war crime, do not apply.

19. In addition to the above, and in connection to the matter of statehood, the Pre-Trial Chamber relied heavily on the right to self-determination of the Palestinian people, and, in that regard, on non-binding resolutions and statements to determine the territorial jurisdiction of the Court.¹⁷ If granted leave, JIJ will argue that the right of self-determination does not necessarily mandates the right to statehood. And while the Palestinians' rights may manifest in the form of a sovereign state in the future, that state's boundaries must be negotiated, as stipulated by the parties in several agreements, including the Oslo Accords. In the absence of a bilateral agreement on legal (rather than simply administrative) boundaries, this Court cannot define them unilaterally.

Respectfully submitted,



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Dated this 12th day of July, 2024
at Jerusalem, Israel

¹⁷ Jurisdiction Decision, para. 115-118 and 123.