

Annex

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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No.: ICC-01/18
Date: 12 July 2024

PRE-TRIAL CHAMBER I

Before: Judge Iulia Motoc Title
Judge Nicolas Guillou Title
Judge Reine Alapini-Gansou Title

SITUATION IN THE STATE OF PALESTINE

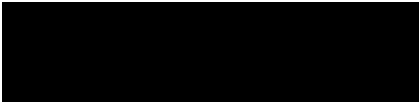
**IN THE CASE OF
*THE PROSECUTOR v.***

Public Document

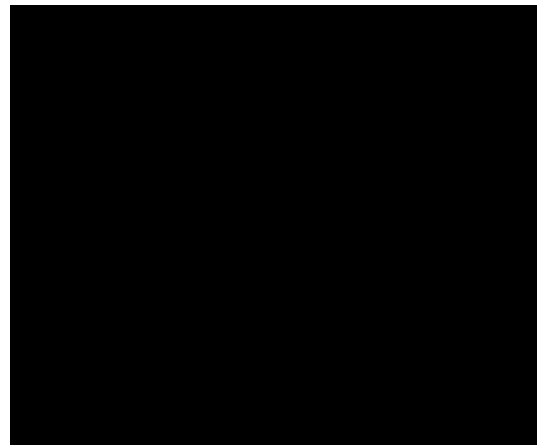
**Request of the Legal Representatives of Victims for Leave to Submit Written
Observations Pursuant to Rule 103**

Source: Raji Sourani, Chantal Meloni, Triestino Mariniello

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
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**


**The Office of Public Counsel for the
Defence**

States' Representatives
The legal representatives of the State of
Palestine
The legal representatives of the United
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I. INTRODUCTION

1. On 22 January 2020, Pre-Trial Chamber I (the 'Chamber') was invested by the Office of the Prosecutor ('OTP') with a request to clarify the territorial scope of the International Criminal Court's (the 'Court') jurisdiction in the Situation in Palestine.¹ On that occasion, the Victims and their Legal Representatives were invited by the Chamber to submit their observations.²
2. In accordance with the decision of the Chamber, written observations on behalf of the Victims were submitted in the proceedings, including by the undersigned Legal Representatives of the Victims ('LRVs'), on 16 March 2020.³ The Chamber's following Decision of 5 February 2021 was notified to each LRVs, as indicated in the cover page of the decision itself.⁴
3. In light of these circumstances, and in accordance with this Chamber's Order of 27 June 2024,⁵ the undersigned LRVs respectfully request leave to submit written observations on behalf of the over one hundred Victims they represent ('Gaza Victims'),⁶ whose very own lives are under imminent risk of irreparable harm as we write.

¹ Office of the Prosecutor, Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine, 22 January 2020, ICC-01/18-12 ('OTP Request, 2020').

² Pre-Trial Chamber I, Order setting the procedure and the schedule for the submission of observations, ICC-01/18-14, 28 January 2020, ('PTC Order, 2020'), para. 13.

³ Situation in the State of Palestine, Raji Sourani, Chantal Meloni and Triestino Mariniello, Submission on Behalf of Palestinian Victims Residents of the Gaza Strip with confidential Annex, 16 March 2020, ICC-01/18-112 17-03-2020.

⁴ [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', 5 February 2021, ICC-01/18-143 ('PTC Decision on Jurisdiction, 2021').

⁵ Pre-Trial Chamber I, Public redacted version of '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, ICC-01/18-173-Red.

⁶ The powers of attorney have been on file with this honourable Chamber since 2020.

II. PROCEDURAL HISTORY

4. On 22 January 2020, 5 years after Palestine's ratification of the Rome Statute and 11 years after Palestine's first acceptance of the Court's jurisdiction under Article 12(3) of the Statute, Prosecutor Bensouda closed the Preliminary Examination. The Prosecutor found that there was a "reasonable basis to believe that war crimes have been or are being committed in the West Bank, including East Jerusalem, and the Gaza Strip."⁷
5. Nevertheless, the Prosecutor requested the Chamber to confirm the scope of the "Court's territorial jurisdiction in Palestine".⁸ The State of Israel anticipated the Request with its own observations, published by the Office of the Attorney General on 20 December 2019.⁹
6. On 28 January 2020, the Chamber issued a decision inviting "Palestine and Victims in the Situation in the State of Palestine to submit written observations" limited to the question of jurisdiction set forth in the Prosecutor's Request.¹⁰ The Chamber, pursuant to Rule 103 of the Rules of Procedure and Evidence ('RPE'), also invited "States, organisations and/or persons to submit observations on the question of jurisdiction".¹¹ The invitation resulted in the submission of observations from 54 different stakeholders, including 8 States, 2 international organisations, 33 academics and NGOs, as well as observations on behalf of Victims submitted by 11 groups of LRVs.
7. On 5 February 2021, in line with the Prosecutor's conclusions, the Chamber confirmed that the Court has jurisdiction in the Situation in the State of Palestine and that the territorial scope of the jurisdiction extends to Gaza and the West Bank, including East Jerusalem (the 'Jurisdiction Decision').¹² As a consequence,

⁷ OTP Request, 2020, para. 2.

⁸ OTP Request, 2020, para. 18.

⁹ State of Israel, Office of the Attorney General, *The International Criminal Court's Lack of Jurisdiction over the So-Called "Situation in Palestine"*, 20 December 2019.

¹⁰ PTC Order, 2020, para. 13.

¹¹ PTC Order, 2020, para. 15.

¹² PTC Decision on Jurisdiction, 2021, para. 118.

on 3 March 2021, Prosecutor Bensouda swiftly announced the opening of the investigation.¹³

8. On 20 May 2024, Prosecutor Khan announced that his Office had filed applications for arrest warrants for crimes committed in the Situation Palestine for three members of Hamas – Yahya SINWAR, Mohammed Diab Ibrahim AL-MASRI, Ismail HANIYEH – and two Israeli officials – the Prime Minister Benjamin NETANYAHU and the Defence Minister Yoav GALLANT – (the 'Arrest Warrant Applications').¹⁴
9. On 10 June 2024, the United Kingdom (UK) filed a request to provide written *amicus curiae* observations under Rule 103(1) of the Rules (the 'Request').¹⁵
10. On 27 June 2024, the Chamber authorized the UK to file *amicus curiae* observations by 12 July 2024 (the 'Order').¹⁶ In the same Order, the Chamber set the same deadline for any other requests for leave to make submissions. On 4 July 2024, the Chamber extended the time limit for the UK's submission until 26 July 2024.¹⁷

III. PROPOSED OBSERVATIONS

11. At the outset, on behalf of the Gaza Victims, the LRVs wish to stress that any delay in the proceedings before the Court exacerbates the Victims' ongoing

¹³ Statement of ICC Prosecutor, Fatou Bensouda, respecting an investigation of the Situation in Palestine, 3 March 2021. Available at: <https://www.icc-cpi.int/news/statement-icc-prosecutor-fatou-bensouda-respecting-investigation-situation-palestine>

¹⁴ Statement of ICC Prosecutor Karim A. A. Khan KC: Applications for arrest warrants in the situation in the State of Palestine, 20 May 2024. Available at: <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state>. The applications themselves have not been made public.

¹⁵ Situation in the State of Palestine, the United Kingdom, Request by the United Kingdom for Leave to Submit Written Observations Pursuant to Rule 103, 11 June 2024, ICC-01/18- 171-SECRET-Exp-Anx. The request, initially filed as secret ex parte, was reclassified as public on 27 June 2024 and relabelled ICC-01/18-171-Anx.

¹⁶ ICC-01/18-173-Red.

¹⁷ Pre-Trial Chamber I, Decision on the 'Request by the United Kingdom for Extension of Time Limit', 4 July 2024, ICC-01/18-178.

suffering, obstructs accountability, and unjustifiably delays justice for over two million people who are trapped in Gaza and at imminent risk of losing their life.

12. Notably, the over one hundred Victims here represented already survived and suffered for the atrocious crimes committed within the context of major military operations in 2014, 2018, 2021¹⁸ as well as for the suffocating blockade continuously imposed on Gaza since 2007 by Israel, as the occupying power.. As stressed by Secretary General of the United Nations, this unlawful blockade amounts to a collective punishment of the Gaza population.¹⁹ The Israeli closure, or siege, is depriving Gaza Victims of their fundamental human rights and can constitute the crime of persecution, as noted by the UN Fact Finding Mission on the Gaza Conflict of 2009.²⁰

13. The same people, already pluri-victimized, are currently trapped in an unspeakable situation and exposed every moment to the very imminent and concrete risk of death: As recognized by the Prosecutor, Palestinians in Gaza are living under a total siege, constantly bombed, repeatedly displaced, intentionally subject to starvation and collective punishment.²¹ The UN Office for the Coordination of Humanitarian Affairs (OCHA) has recently estimated that 96% of the population in Gaza is projected to face crisis or worse levels of food insecurity, 495,000 of which are assessed at catastrophic levels.²² While the official number of casualties amounts to 37,953, medical experts have calculated that including "indirect deaths" – i.e. deaths occurring in the coming months

¹⁸ So called IDF Military Operations Pillar of Defense in 2012, Protective Edge in 2014, Guardian of the Walls in 2021 and the military repression of the so-called Great March of Return in 2018.

¹⁹ Report of the Secretary General, "Human rights situation in the Occupied Palestinian Territory, including East Jerusalem" (2015) UN Doc A/HRC/28/45.

²⁰ General Assembly, Report of the United Nations Fact-Finding Mission on the Gaza Conflict, 25 September 2009, A/HRC/12/48, par. 1936.

²¹ Statement of ICC Prosecutor Karim A. A. Khan KC: Applications for arrest warrants in the situation in the State of Palestine, 20 May 2024.

²² UN OCHA, Reported impact snapshot | Gaza Strip (10 July 2024).

and years, due to the conflict – the death toll is expected to reach 186.000 deaths or more, equal to 7.9% of the population of the Strip.²³

14. On behalf of hundreds of Palestinian individual Victims residing in the Gaza Strip, the proposed observations seek to assist the Chamber's deliberation by underscoring that:

- i. Under no circumstances, the Oslo Accords alter Palestine's prescriptive jurisdiction, but they are only confined to affect Palestine's capability to enforce the jurisdiction domestically:
 1. Arguing the contrary would be in breach of the Fourth Geneva Convention ('GC IV') and contradict the Oslo Accords themselves;
 2. The Court has already clearly established that bilateral agreement by which States waive jurisdiction over certain individuals are not relevant to the Court.
- ii. The theory of delegation has no basis in the Rome Statute. The accession of Palestine to the Court is by itself sufficient to activate the Rome Statute *in toto*, including the jurisdictional powers of the Court. This clearly emerges from:
 1. The textual interpretation of Articles 5, 11 and 12 of the Statute, which establish the jurisdiction of the Court;
 2. The object and purpose of the Statute, which would be frustrated if the Court were prevented from intervening in cases where States are unable to do so due to lack of jurisdiction *ratione personae* or *ratione materiae*;

²³ Rasha Khatib, Martin McKee, Salim Yusuf, "Counting the dead in Gaza: difficult but essential", *The Lancet*, 5 July 2024. Available at: <https://www.thelancet.com/action/showPdf?pii=S0140-6736%2824%2901169-3>

3. The interpretation of the Preparatory Works to the Rome Statute, in light of the intentions manifested by States in the establishment of the Court;

iii. The UK Request shall not become a *de facto* challenge of jurisdiction, which according to Article 19(2)(b) of the Statute can be proposed exclusively by States having jurisdiction over a case.

(i) The Oslo Accords do not alter Palestine's prescriptive jurisdiction

15. In their Request, the UK questions "[w]hether the Court can exercise jurisdiction over Israeli nationals, in circumstances where Palestine cannot exercise criminal jurisdiction over Israeli nationals pursuant to the Oslo Accords".²⁴ The Request suggests that the question should be answered in the negative, in observance of the *nemo dat quod non habet* principle, which would prevent Palestine from delegating jurisdictional power that it does not have to the Court. In the proposed observations, the undersigned LRVs support the claim that the UK's interpretation of the impact of the Oslo Accords on the jurisdiction of the Court is wrong and misleading.

16. As extensively discussed by some *amici curiae* back in 2020, the Oslo Accords solely and partially transferred the Palestinian Authority's "ability to exercise enforcement jurisdiction to Israel, thereby retaining its ability to exercise prescriptive jurisdiction over the entire OPT, regardless of nationality".²⁵ These Accords were intended as temporary measures to delineate administrative and security arrangements, and they do not constitute a final settlement of jurisdictional or territorial disputes.

17. The Accords themselves state that "[n]either Party shall be deemed, by virtue of having entered into this Agreement, to have renounced or waived any of its

²⁴ ICC-01/18-171-Anx., para. 27.

²⁵ Robert Heinsch and Giulia Pinzauti, Submission Pursuant to Rule 103 (Robert Heinsch & Giulia Pinzauti), 16 March 2020, ICC-01/18-107, para. 63.

existing rights, claims or positions".²⁶ Even where this was not explicitly specified by the text of the agreements, this would hold true in light of the applicable international law. Pursuant to Article 64, GC IV, the domestic jurisdiction of the occupying power does not apply in the occupied territory. According to Article 7 thereof: "No special agreement shall adversely affect the situation of protected persons, as defined by the present Convention, nor restrict the rights which it confers upon them".

18. Moreover, as it has been highlighted, in light of Article 47, GC IV, the Oslo Accords cannot:

"purport to have the effect of depriving protected persons in the occupied Palestinian territory of their intransgressible rights under international humanitarian law, nor restrict the right and duty of the Palestinian authorities to exercise their jurisdiction fully in respect of the grave breaches of Geneva Convention IV, whatever legal effects the Oslo Accords may have in respect of everyday crimes."²⁷

19. Out of any ambiguity, the irrelevance of bilateral agreements altering the enforcement of jurisdiction has been confirmed by this Court in the Afghanistan situation, where the Appeals Chamber clarified that the Court is not bound by bilateral agreements where a State waives its right to enforce jurisdiction over crimes allegedly committed by foreigners on its territory.²⁸ This precedent reinforces the argument that the Oslo Accords cannot limit the jurisdiction of the ICC.

20. It is therefore undisputable that the State of Palestine maintains prescriptive jurisdiction with regards to all international crimes under the jurisdiction of the Court committed over the entirety of the Occupied Palestinian Territory

²⁶ Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (Oslo II), 28 September 1995, Article XXXI(6).

²⁷ Vera Gowlland-Debbas, "Note on the Legal Effects of Palestine's Declaration Under Article 12(3) of the ICC Statute", in *Is There a Court for Gaza? A Test Bench for International Justice*, eds. Chantal Meloni and Gianni Tognoni (T.M.C. Asser Press, 2012), 524.

²⁸ Appeals Chamber, Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan, 5 March 2020, ICC-02/17-138, para. 44.

(‘OPT’), which, as established by this Chamber, corresponds to Gaza and the West Bank, including East Jerusalem.²⁹

(ii) The accession of Palestine to the Rome Statute and the jurisdictional powers of the Court

21. By lodging two *ad hoc* declarations under Article 12(3) of the Statute first and, ultimately, by becoming a Party to the Rome Statute, the State of Palestine accepted the ICC’s jurisdiction, conferring upon this Court the power to adjudicate all crimes within its jurisdiction committed throughout the OPT.
22. As this Chamber had the occasion to clarify with regards to the territorial scope of jurisdiction in the Situation in Palestine:

“By becoming a State Party, Palestine has agreed to subject itself to the terms of the Statute and, as such, all the provisions therein shall be applied to it in the same manner than to any other State Party. Based on the principle of the effectiveness, it would indeed be contradictory to allow an entity to accede to the Statute and become a State Party, but to limit the Statute’s inherent effects over it.”³⁰

Therefore, since Palestine acceded to the Rome Statute, the Court has jurisdiction over the crimes committed in the Palestinian territory regardless of any possible interim agreement regulating administrative or security aspects.

23. More generally, and beyond the specific situation at stake, it shall be noted that State Parties do not delegate or transfer their jurisdiction to the Court, but rather “confer upon” or “accept” the jurisdiction of the Court,³¹ in order for it to adjudicate cases that in most instances lie beyond the capacity of their national systems. Multiple arguments support this understanding.
24. Firstly, this conclusion is suggested by the plain reading of the Rome Statute. Articles 5, 11 and 12 of the Statute, which explicitly rule the jurisdictional

²⁹ PTC Decision on Jurisdiction, 2021, para. 118.

³⁰ Ibid., para. 102.

³¹ Leila N. Sadat, “The Conferred Jurisdiction of the International Criminal Court” (2023), 99 *Notre Dame L. Rev.* 552.

powers of the Court. Notably, Article 12(2) affirms that the Court may exercise “its” jurisdiction if the crimes defined under Article 5 occur within the territory of a State Party. Therefore, jurisdiction is treated as pertaining to the Court as an independent institution with international legal personality.³²

25. Secondly, a different understanding would be contrary to the scope and purpose of the Rome Statute and would frustrate the very function of the Court. Affirming that States can only “transfer” the jurisdiction they can effectively exercise would impede the prosecution of international crimes under the jurisdiction of the Court in all those cases where the domestic legislation does not envisage their investigation and punishment. On the contrary, pursuant to the principle of complementarity, it is precisely in these cases that the Court shall intervene.

26. If the jurisdiction conferred to the Court represented a mere delegation of domestic criminal jurisdiction, the ICC would not be able, for example, to prosecute State officials that enjoy immunity under international customary law. On the contrary, it is a fundamental principle in the activity of the Court, that “[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person”.³³ In the Al-Bashir case, some States argued that Heads of States could be turned over to the ICC only where their State of nationality provided a waiver of their immunity, as the Court could not exercise jurisdiction where States had no power to delegate it. The Appeals Chamber rejected this view, in light of the “different character of an international court when compared with domestic jurisdictions”.³⁴

³² Adil Haque, The International Criminal Court’s Jurisdiction in Palestine and the Oslo Accords Issue, Just Security, 9 July 2024. Available at: <https://www.justsecurity.org/97584/israel-palestine-icc-oslo-accords/>; Sadat, “The Conferred Jurisdiction of the International Criminal Court”, 554.

³³ Art. 27(2), Rome Statute.

³⁴ Sadat, “The Conferred Jurisdiction of the International Criminal Court”, 593.

27. Thirdly, in the drafting stages of the Rome Statute, the “overwhelming majority of states during the negotiations accepted the idea of ‘automatic jurisdiction’”.³⁵ The ratification of the Rome Statute automatically enables the Court to exercise jurisdiction over the crimes under Article 5 of the Statute. It is significant that, when questions of complementarity arise, “it is the Court, not the State in question, that has the final word on whether the ICC will relinquish its jurisdiction”.³⁶

(iii) The UK Request shall not become a *de facto* challenge of jurisdiction.

28. With regards to the UK Request, the Victims note with great concern that Rule 103 RPE risks being used as a *de facto* challenge to the Court’s jurisdiction in the Situation. More specifically, according to Article 19(2)(b) of the Statute, challenges to the jurisdiction of the Court may be presented by a State “which has jurisdiction over a case”. Therefore, it is clear that the UK does not have legal standing in these proceedings to challenge the jurisdiction of the Court.

29. At the same time, the Legal Representatives of the Gaza Victims respectfully underline the urgency of making a decision in the current proceedings. Since the 7th of October, the situation in Gaza has drastically worsened, to the point that the International Court of Justice, in the case brought by South Africa against Israel under the Convention on the Prevention and Punishment of the Crime of Genocide, issued three consecutive urgent orders for provisional measures, on the basis of an imminent risk for the population of Gaza, demanding Israel to halt any conduct that may violate the rights of the Palestinians in Gaza not to be subjected to genocide.³⁷

³⁵ Carsten Stahn, “The ICC, Pre-Existing Jurisdictional Treaty Regimes, and the limits of the Nemo Dat Quod Non Habet Doctrine” (2016) 49 *Vand J Tran L* 443, 449.

³⁶ Sadat, “The Conferred Jurisdiction of the International Criminal Court”, 99 *Notre Dame L. Rev.*, 575.

³⁷ International Court of Justice, Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Orders of 26 January 2024, 28 March 2024 and 24 May 2024.

30. Every delay in these proceedings has a dramatic effect on the ground, as every minute more people are dying in Gaza under unacceptable, inhumane circumstances and with no justice on sight: Justice delayed is justice denied.

IV. Conclusions

31. In conclusion, the Victims wish to recall the fundamental requisite that the proceedings be prompt and effective as recognized by international human rights standards, whose significance before the Court is clearly recognized by Article 21(3) of the Statute. After so many years, Gaza Victims are very concerned of any possible further delay in the proceedings and are confident that the Chamber will proceed swiftly with the decision on the issuance of the warrants of arrest, as requested by the Prosecutor on May 20th.

32. Over 15 years after Palestine's first *ad hoc* declaration under Article 12(3), Gaza Victims are still waiting for justice. Since then, Gaza has been subject to several most destructive military operations, of which the current one is the culmination. As of July 10th, 38,295 Palestinians in Gaza have been killed (32% of which children), more than 10,000 are reported missing or under the rubble, while 88,241 have been injured. 1.9 million people, amounting to 90% of the Gazan population, have been internally displaced and are now cramped in 1.5 square meter per person. 96% of the population is projected to face crisis or worse levels of food insecurity, 495,000 of which into catastrophic level. Civilian objects and infrastructures have been largely destroyed: over 60% of residential buildings and 80% of commercial facilities have been damaged, as well as 88% of school buildings and 69% of school buildings used as shelters. Out of 36 hospitals, 23 are out of service; the remaining 13 are only partially functioning.³⁸ All along and besides the military attacks, the living conditions in besieged Gaza have been deteriorating dramatically.³⁹

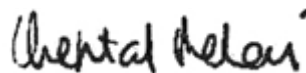
³⁸ UN OCHA, Reported impact snapshot | Gaza Strip (10 July 2024).

³⁹ See, inter alia, UN Independent Experts, UN experts declare famine has spread throughout Gaza strip, 9 July 2024, available at <https://www.ohchr.org/en/press-releases/2024/07/un-experts-declare->

33. For the foregoing reasons, the undersigned LRVs strongly submit that it is essential to permit the views and concerns of the Victims to be heard in this phase of the proceedings. Thus, the LRVs respectfully request leave to submit written observations on behalf of Gaza Victims in the current proceedings, as initiated by the UK Request and the subsequent Chamber's Order.



Raji Sourani (Counsel)



Chantal Meloni (Counsel)



Triestino Mariniello (Assistant Counsel)

on behalf of
the Palestinian Victims Residents in the Gaza Strip

Dated this 12 July 2024

Cairo - Milan - Liverpool

At [place, country]

[famine-has-spread-throughout-gaza](#)

strip#:~:text=GENEVA%20(9%20July%202024)%20%E2%80%93,of%20independent%20experts*%20said%20today; UN Secretary General, 18 March 2024, available at

<https://english.wafa.ps/Pages/Details/142566> Palestinians in Gaza are enduring horrifying levels of hunger and suffering General Assembly, Amid 'Catastrophic, Unconscionable, Shameful' Situation in Gaza, General Assembly President Underlines Need for Immediate Ceasefire, 4 March 2024, available at <https://press.un.org/en/2024/ga12585.doc.htm>