

Situation in the State of Palestine

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 Nicolas Guillou
Judge Reine Alapini-Gansou

SITUATION IN PALESTINE

Public Document

**Request by Civil Society Organizations for Leave to Submit Written Observations
Pursuant to Rule 103**

Source: Open Society Justice Initiative
European Center for Constitutional and Human Rights
REDRESS Trust
Human Rights Watch
Amnesty International

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 Kingdom	Amicus Curiae

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I. INTRODUCTION

1. The Open Society Justice Initiative (the 'Justice Initiative'), the European Center for Constitutional and Human Rights ('ECCHR'), the REDRESS Trust ('REDRESS'), Human Rights Watch ('HRW'), and Amnesty International (collectively, the 'Applicants') hereby respectfully apply for leave to file an amicus curiae submission pursuant to rule 103(1) of the Rules of Procedure and Evidence (the 'Rules') governing the International Criminal Court (the 'ICC' or the 'Court').

II. PROCEDURAL HISTORY

2. On 5 February 2021, Pre-Trial Chamber I (the 'Chamber') decided, by majority, that the Court could exercise its criminal 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').¹

3. On 3 March 2021, the Prosecutor announced the opening of the investigation.²

4. On 20 May 2024, the Prosecutor publicly announced that his Office had filed applications for arrest warrants for crimes committed from at least 7 October 2023 for three Hamas leaders (Yahya SINWAR, Mohammed Diab Ibrahim AL-MASRI, Ismail HANIYEH) and two senior Israeli officials (Benjamin NETANYAHU and Yoav GALLANT) (the 'Arrest Warrant Applications').³

5. On 10 June 2024, the United Kingdom filed a request to provide written amicus curiae observations under rule 103(1) of the Rules (the 'Request').⁴

¹ *Situation in the State of Palestine*, 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.

² 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>.

³ 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.

⁴ *Situation in the State of Palestine*, Pre-Trial Chamber I, "Request by the United Kingdom for Leave to Submit Written Observations Pursuant to Rule 103," 10 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 relabeled ICC-01/18-171-Anx.

6. On 27 June 2024, Pre-Trial Chamber I authorized the United Kingdom to file amicus curiae observations by 12 July 2024. In that order, the Chamber set the same deadline for any other requests for leave to make observations (the 'Order').⁵

7. On 4 July 2024, Pre-Trial Chamber I extended the time limit for the United Kingdom's submission until 26 July 2024.⁶

III. APPLICABLE LAW

8. Rule 103(1) of the Rules allows the Chamber to grant leave for amicus curiae submissions 'on any issue that the Chamber deems appropriate' when 'it considers it desirable for the proper determination of the case.'

9. In its Order, 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' but that its decision is not intended as an 'open call.' It further states that it intends '[t]o limit the impact of this procedure on the expeditiousness of the present stage of the proceedings.'⁷ In such spirit and to minimize delay of these proceedings, the Applicants have joined in a common application.

10. As outlined by the Court's jurisprudence, the Chamber may exercise its discretion on whether to allow a rule 103(1) submission by considering the 'affiliation, expertise and experience' of the applicants⁸ and whether the submission may assist the Chamber 'in the proper determination of the case'⁹ given the 'nature and complexity

⁵ *Situation in the State of Palestine*, 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 *Situation in the State of Palestine*, Pre-Trial Chamber I, "Decision on the 'Request by the United Kingdom for Extension of Time Limit'," 4 July 2024, ICC-01/18-178.

⁷ Order at para. 6.

⁸ *Situation in the State of Palestine*, Pre-Trial Chamber I, "Decision on Applications for Leave to File Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence," 20 February 2020, ICC-01/18, para. 56.

⁹ See, e.g., *Prosecutor v. Thomas Lubanga Dyilo*, "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,'" 22 April 2008, ICC-01/04/01/06-1289, para. 8.

of the issues at stake.’¹⁰ Indeed, the United Kingdom’s Request raises issues about how the Court derives its authority and its ability to exercise jurisdiction over nationals of non-States Parties when there exist potentially conflicting contractual agreements with states. Consideration of the United Kingdom’s observations may create significant precedent on these questions and the issue of proper legal standing to raise jurisdictional challenges. The Applicants do not intend to repeat prior submissions and will directly address the issues raised with distinct or complementary perspectives.

IV. THE APPLICANTS

11. The Applicants are well-regarded international civil society organizations with expertise in international criminal law, experience in investigations and litigation of international crimes before different domestic tribunals and extensive engagement with the ICC. Some have previously filed amicus curiae submissions in ICC proceedings. Members of staff of some of the Applicants have litigated before the ICC in various capacities including as former members of the Office of the Prosecutor and in the legal representation of victims. In addition, each of these organizations has long engaged in support for accountability for international crimes worldwide, including crimes committed in the context of the Situation of the State of Palestine.

12. **The Justice Initiative** is a program of the Open Society Foundations that pursues and supports strategic human rights litigation and legal advocacy in national, regional and international tribunals. Since its establishment in 2003, the Justice Initiative has litigated before the following forums among others: the European Court of Human Rights (‘ECtHR’); the Inter-American Commission and Inter-American Court of Human Rights; the African Commission and African Court on Human and Peoples’ Rights (‘ACHPR’); the Economic Community of West African States Court of Justice; the Court of Justice of the European Union; United Nations (‘UN’) treaty bodies (Committee on the Elimination of Racial Discrimination, Human Rights

¹⁰ *Situation in the Islamic Republic of Afghanistan*, Pre-Trial Chamber II, “Decision on the ‘Request for Leave to File Amicus Curiae Submissions on Behalf of Human Rights Organizations in Afghanistan’,” 12 June 2019, ICC-02/17-43, para. 7.

Committee, Committee on Torture, etc.); and UN special procedures (Working Group on Arbitrary Detention, Working Group on Enforced or Involuntary Disappearance, etc.).

13. **ECCHR** is a Berlin-based non-governmental organization ('NGO') focusing on ensuring international criminal accountability and protecting human rights. Since 2007, ECCHR has participated in legal proceedings concerning international criminal law, either as complainant, plaintiff, party, expert or amicus, before the ICC as well as national courts in Germany, Colombia, the Philippines, Argentina, France, and Spain, amongst several others and before the ECtHR and UN treaty bodies and special procedures.

14. **REDRESS** is an international NGO with a mandate to seek justice and reparation for victims of torture and related international crimes. It has over 30 years' expertise in advocating for the rights of victims to gain both access to the courts and redress for their suffering, in over 50 countries worldwide. REDRESS has extensive experience in representing victims before national, regional, and international courts and tribunals, as well as UN treaty bodies and special procedures. REDRESS has regularly been granted leave to intervene in cases before the Court, the ACHPR, the ECtHR, the Special Court for Sierra Leone, and the Extraordinary Chambers in the Courts of Cambodia.

15. **HRW** is an international NGO dedicated to protecting the human rights of people around the world. HRW works to document and report on rights violations in some 100 countries. It uses its research to inform advocacy towards governments, armed groups and businesses, pushing them to change or enforce their laws, policies and practices. HRW has championed meaningful justice for victims and survivors of serious international crimes and due process for accused. Its staff include experts on international humanitarian law, international criminal law, and international human rights law. Through this work, HRW has developed a deep knowledge of the ICC, other international tribunals, and national courts. HRW has advanced innovative and practical pathways to overcome roadblocks to credible justice, working to build the political momentum and state cooperation to support a range of accountability efforts.

16. **Amnesty International** has extensive knowledge and expertise in international human rights law having worked for more than 50 years documenting and campaigning against human rights violations and abuses around the world. Its expertise has been recognized by numerous international and national courts, which have permitted the organization to submit amicus curiae briefs to assist in resolving significant questions of international law, including previous such submissions at the ICC. It has Special Consultative Status to the Economic and Social Council of the United Nations, among others. Amnesty International has documented crimes under international law committed in the Occupied Palestinian Territory for decades, as well as the impunity that has prevailed denying justice to victims.

V. PROPOSED SUBMISSIONS

17. If granted leave, the Applicants will expand on the following observations.

A. Procedural Observations

18. The Applicants intend to provide observations as to why the United Kingdom and other states who may be granted leave to file rule 103(1) observations, who do not fall within the scope of article 19(2), do not have legal standing to challenge the ICC's jurisdiction in relation to the Arrest Warrant Applications.

- a. Although the United Kingdom's Request purports to be based on article 19(1) to support the Court's own determination of jurisdiction,¹¹ the Chamber has not invoked this provision. While article 19(1) provides that the Chamber must satisfy itself of its own jurisdiction, Rule 58(2) gives the Chamber discretion to decide 'on its own motion' what appropriate measures to take for the proper conduct of proceedings, such as whether to solicit written observations. In this case, the Chamber had not solicited such views prior to receiving the United Kingdom's Request.

¹¹ Request at para. 2.

b. Article 19(2) challenges are limited to '[a]n accused or a person for whom' an arrest warrant or summons has been issued, a 'State which has jurisdiction over a case,' or a 'State from which acceptance of jurisdiction is required under Article 12.' The Court's jurisprudence has made clear that only 'interested States' can raise such challenges.¹² While the United Kingdom has not formally sought to challenge the Court's jurisdiction under article 19(2), its Request falls under none of the above categories and the United Kingdom does not qualify as an 'interested State' in these proceedings. An amicus submission should not circumvent article 19 and rule 58 or a lack of legal standing, as this would otherwise set a dangerous precedent. The public nature of the Arrest Warrant Applications should not alter this result.

19. The Applicants would observe that the Jurisdiction Decision did not, as the United Kingdom has suggested,¹³ establish a 'pre-condition' or indicate that it would necessarily 'examine further questions' of jurisdiction under any circumstances, and certainly not in a way that would bypass the requirements of article 19(2) and rule 58.

B. Substantive Observations on the Oslo Accords

20. The United Kingdom indicates that it wishes to address '[w]hether the Court can exercise jurisdiction over Israeli nationals, in circumstances where Palestine cannot exercise criminal jurisdiction over nationals pursuant to the Oslo Accords.'¹⁴

21. The Applicants intend to provide observations on the fact that, in light of the ICC jurisdiction and in the context of an article 58 determination, the Chamber does not need to address the Oslo Accords to satisfy itself that it has jurisdiction pursuant to article 19(1).

22. While the United Kingdom has not yet filed its formal submission, the Applicants plan to make observations on the (incorrect) argument that the ICC's

¹² Jurisdiction Decision at paras. 128-129 (citing *Situation in Afghanistan*, Appeals Chamber Judgment, "Judgment on the appeal against the decision on the authorization of an investigation into the situation in the Islamic Republic of Afghanistan," 5 March 2020, ICC-02/17-138, para. 44).

¹³ Request at paras. 1, 10, 19.

¹⁴ Request at para. 27(i); see also *ibid.* at para. 18.

jurisdiction derives from the 'delegation' of jurisdiction by States Parties and the legal rule *nemo dat quod non habet* ('no one can give what he does not already have').

- a. The Applicants will address that the ICC jurisdiction is not the result of delegation by States Parties of their jurisdiction or the transfer of a subset of their sovereign powers. Rather, it will be argued that states 'confer upon' or 'accept' the jurisdiction of international courts and tribunals.¹⁵ This is confirmed by the establishment of prior international tribunals, the Rome negotiations and the ICC Statute's complementarity regime, the ICC's independent legal personality, and the Court's own jurisprudence. The Jurisdiction Decision's reasoning also recognized that Palestine's acceptance of the Court's jurisdiction cannot be limited.¹⁶
- b. Even if *arguendo* the Oslo Accords could be said to limit the Court's jurisdiction, the Applicants seek leave to provide observations on the distinction which should be made between prescriptive jurisdiction (a state's right to criminalize conduct) and enforcement jurisdiction (a state's coercive, compliance, or custodial power).¹⁷ For example, Status of Force's Agreements or other contractual arrangements with third states, concern the enforcement power of the receiving state but they do not extinguish the right to undertake criminal proceedings for the prohibited conduct on the territory.¹⁸ This bifurcation is confirmed by Article 98 of

¹⁵ Leila Nadya Sadat, *The Conferred Jurisdiction of the International Criminal Court*, 99 Notre Dame L. Rev. 549 (2024), at pp. 552-53; see also Adil Ahmad 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/>.

¹⁶ Adil Ahmad 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/>.

¹⁷ Roger O'Keefe, "Quid," Not "Quantum": A Comment on "How the International Criminal Court Threatens Treaty Norms," 49 Vand. L. Rev. 433 (2021), at p. 436; see also Stahn at pp. 446, 450-52; Yassir Al-Khudayri, "Are the Oslo Accords Still Valid? For the ICC and Palestine, It Should Not Matter," *Opinio Juris*, 6 October 2020, available at <https://opiniojuris.org/2020/06/10/are-the-oslo-accords-still-valid-for-the-icc-and-palestine-it-should-not-matter/>; Ahmed Abofoul, "The Oslo Accords and the International Criminal Court's Jurisdiction in the Situation in the State of Palestine," *Opinio Juris*, 28 July 2020, available at <https://opiniojuris.org/2020/07/28/the-oslo-accords-and-the-international-criminal-courts-jurisdiction-in-the-situation-in-the-state-of-palestine>.

¹⁸ O'Keefe at pp. 438-39; see also Stahn at pp. 446, 450-52.

the Rome Statute and the Court's own jurisprudence in the Afghanistan case,¹⁹ and was acknowledged in the Chamber's Jurisdiction Decision.²⁰

23. The Applicants also seek leave to file observations on the operation of the Fourth Geneva Convention, which prevents Palestine from renouncing criminal jurisdiction over their territory in favor of Israel as the occupying power. Pursuant to Article 146(2) of the Fourth Geneva Convention, Palestine is under an obligation to search for, try, or extradite persons suspected of committing grave breaches, regardless of their nationality. Notably, the Prosecutor's Arrest Warrant Applications – as described in a public statement – unequivocally include charges that amount to 'grave breaches.' The Oslo Accords do not supersede these obligations. Moreover, the Oslo Accords are considered a 'special agreement' within the terms of the Geneva Convention. Under Articles 8 and 47 of the Fourth Geneva Convention, protected persons cannot renounce or be deprived of the rights or benefits of the Convention by any agreement.²¹ The Applicants would also observe on the import of Article 43 of the Hague Regulations of 1907 concerning the Laws and Customs of War on Land.

24. Finally, the Applicants seek leave to submit observations on article 21(3) of the Rome Statute, which provides that the Court must apply and interpret the Rome Statute and its sources of law consistently with internationally recognized human rights. An interpretation of the Rome Statute's provisions on jurisdiction, as well as any consideration of issues raised by those submitting observations must adhere to article 21(3). In this regard, victims of crimes under international law committed on Palestinian territory must enjoy rights to remedy and reparation, without

¹⁹ *Situation in the Islamic Republic of Afghanistan*, Pre-Trial Chamber II, "Decision on the Prosecutor and Victims' Requests for Leave to Appeal the 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan'," 17 September 2019, ICC-02/17, paras. 50, 58-59.

²⁰ Jurisdiction Decision at paras. 127-28.

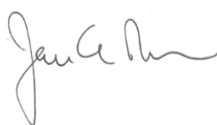
²¹ Yassir Al-Khudayri, "Are the Oslo Accords Still Valid? For the ICC and Palestine, It Should Not Matter," *Opinio Juris*, 6 October 2020, available at <https://opiniojuris.org/2020/06/10/are-the-oslo-accords-still-valid-for-the-icc-and-palestine-it-should-not-matter/>; Ahmed Abofoul, "The Oslo Accords and the International Criminal Court's Jurisdiction in the Situation in the State of Palestine," *Opinio Juris*, 28 July 2020, available at <https://opiniojuris.org/2020/07/28/the-oslo-accords-and-the-international-criminal-courts-jurisdiction-in-the-situation-in-the-state-of-palestine/>; 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 for International Justice*, pp. 523-524.

discrimination, and full access to justice. Further, accused persons and victims are entitled to effective judicial proceedings without undue delay. These fundamental rights, enshrined in multiple human rights treaties, are of utmost relevance to the Chamber's consideration of the present issues.

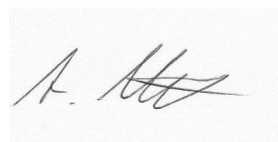
VI. CONCLUSION

25. For the foregoing reasons, the Applicants respectfully request leave to submit written observations under rule 103(1) as indicated in the Chamber's Order.

Respectfully submitted,



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Dated this 12 July 2024

At New York, United States; Berlin, Germany; and London, United Kingdom