

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

**Application for leave to file written observations
pursuant to Rule 103 of the Rules of Procedure and Evidence**

Source: Hostages and Missing Families Forum
Raoul Wallenberg Centre for Human Rights

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)

The Office of Public Counsel for
Victims

The Office of Public Counsel for the
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Amicus Curiae

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Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations
Section

Public Information and Outreach
Section

I. INTRODUCTION

1. This is a request by the Hostages and Missing Families Forum ("**the Hostages Forum**") and the Raoul Wallenberg Centre for Human Rights ("**the RWCHR**"),¹ pursuant to the "Order deciding on the United Kingdom's request to provide observations pursuant to Rule 103(1) ... and setting deadlines for any other requests for leave to file *amicus curiae* observations"² of 27 June 2024 ("**Amicus Curiae Leave Order**"), for leave to file written submissions as *amicus curiae* on whether the Court can exercise jurisdiction over Israeli nationals ("**Amicus Leave Request**").
2. This Amicus Leave Request, and the written submissions sought to be filed should leave be granted, are intended to assist the Court in ruling on the Prosecution's Article 58 Application for the issuance of arrest warrants for senior Israeli leaders, namely Benjamin Netanyahu and Yoav Gallant of 20 May 2024³ ("**Prosecution Article 58 Application**").

II. THE UNIQUE PERSPECTIVE OF THE HOSTAGES FORUM IN SEEKING LEAVE TO FILE WRITTEN SUBMISSIONS AS AMICUS CURIAE

3. Pre-Trial Chamber I will be well aware of the heinous crimes which were committed by Hamas and other Palestinian terrorist groups on 7 October 2023, many of which are continuing to this day. These crimes, which include the murder of approximately 1,200 people and the taking of 251 hostages, are the subject of an additional Prosecution Article 58 Application of 20 May 2024 seeking the issuance of arrest warrants for three senior Hamas leaders, namely Yahya Sinwar, Mohammed Deif and Ismail Haniyeh.⁴ The Forum has played a critical role in assisting the Prosecution to substantiate its Article 58 Application relating

¹ The Forum and the RWCHR are grateful to their counsel, Michelle Butler of Matrix Chambers in London, for drafting this Amicus Curiae Leave Request.

² ICC-01/18-173-Red.

³ ICC OTP, "Statement of the 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>

⁴ *Ibid.*

to Hamas leaders. Together with the RWCHR, it submitted a dossier of over 1400 pages of documentary and electronic evidence meticulously detailing these crimes to the Prosecutor's Office in February 2024 through the Article 15 communication procedure.⁵ Moreover, the Forum has provided legal assistance to released hostages, family members of hostages and other victims of the 7 October 2023 attacks in order to facilitate them giving eyewitness accounts to investigators in the Prosecutor's office.

4. The Hostages Forum is an Israeli organisation which was formed by the families of the abductees in the immediate hours following the 7 October 2023 attacks, and was registered as an Association (*Amuta*) on 15 October 2023. It is the apex institutional body representing the interests of the hostages and their families locally, regionally and globally and serves to drive forward domestic and international efforts to bring the hostages and the missing home. The Forum has devised highly effective public relations campaigns in more than 30 cities around the world and engages consistently in powerful diplomatic and media advocacy work in order to maintain international pressure to release the hostages.
5. The Forum's work is both holistic and dynamic in nature, as it seeks to provide for the needs of the hostages and their families in every possible way and to adapt to their changing situations over time. To this end, the Forum offers released hostages and their families, as well as the family members of hostages who remain in Gaza, medical, psychological, social, financial and support, practical help with accommodation and other urgent needs, and professional advice across a number of fields, including assistance with legal representation before a range of domestic and international fora. The Forum's General Assembly is comprised of

⁵ See for example: 'Families of Israeli Hostages Head to International Court to Urge the Prosecution of Hamas Leaders', Haaretz, 14 February 2024, <https://www.haaretz.com/israel-news/2024-02-14/ty-article/families-of-israeli-hostages-visit-icc-to-urge-the-arrest-of-hamas-leaders/0000018d-a716-d9a5-afdd-b75f72590000>

See also : Israeli hostage families fly to The Hague to press ICC to investigate Hamas, Reuters, 14 February 2024, <https://www.reuters.com/world/middle-east/israeli-victims-oct-7-press-icc-investigate-hamas-2024-02-14/>

representatives of hostages families members as well as public representatives, the latter serve also as the Executive Board of the Forum. The Forum's work is carried out by a small Secretariat and a large number of volunteers, including an array of extremely eminent professionals in their respective fields.

III. THE EXPERTISE OF THE RWCHR AND ITS CHAIR, PROFESSOR IRWIN COTLER, IN SEEKING LEAVE TO FILE WRITTEN SUBMISSIONS AS AMICUS CURIAE

6. The Canada-based RWCHR is an international consortium of parliamentarians, scholars, jurists, human rights defenders, NGOs, and students united in the pursuit of justice, inspired by Raoul Wallenberg's humanitarian legacy.
7. Like the Forum, the RWCHR has been providing invaluable support to the hostages and their family members since 7 October 2023. Together with the Forum, the RWCHR submitted a dossier of over 1400 pages of documentary and electronic evidence meticulously detailing these crimes to the Prosecutor's Office in February 2024 through the Article 15 communication procedure.⁶ The RWCHR has also facilitated released hostages, family members of hostages and other victims of the 7 October 2023 attacks to give their eyewitness accounts to the OTP. The RWCHR has additionally used its legal expertise to scaffold other accountability measures for the hostages around the world, including by seeking the imposition of targeted sanctions against individual Hamas members.

RWCHR's Chair - Professor Irwin Cotler

8. The Chair of the RWCHR is Professor Irwin Cotler, an Emeritus Professor of Law at McGill University, former Minister of Justice and Attorney General of Canada

⁶ See for example: RWCHR Files Landmark Brief at International Criminal Court, Diplomat Magazine, 15 February 2024, <https://diplomatmagazine.eu/2024/02/15/rwchr-files-landmark-brief-at-international-criminal-court/>

See also: "Canada-based Raoul Wallenberg Centre for Human Rights Files Landmark 1000+ Page Brief at International Criminal Court on Behalf of Hamas Hostages", 13 February 2024, <https://www.raoulwallenbergcentre.org/en/press-releases/2024-02-13>

and long-time Member of Parliament, an international human rights lawyer and defender of political prisoners worldwide.

9. Professor Cotler has been a long-time supporter of the ICC. In 1995 he was appointed as Special Advisor on the ICC to the Foreign Minister of Canada. In 1998 he attended the founding of the ICC Statute on behalf of NGO "Rights and Democracy". In 2000, when elected to Parliament he co-sponsored the Crimes against Humanity and War Crimes Act of 2000 (the implementing legislation for the ICC in Canada). In 2002, he chaired the first ever Consultative Assembly of Parliamentarians for the ICC and the Rule of Law. As Minister of Justice and Attorney-General, he initiated the first prosecution of an international crime under the Canadian implementing legislation and made the promotion of the ICC a priority initiative for the Canadian Government. In 2017 he was appointed by the Secretary-General of the Organisation of American States to the Panel of Independent International Experts to determine whether crimes against humanity may have been committed in Venezuela. In 2018, the conclusion of the Panel of Independent Experts that there is a reasonable basis to believe that such crimes had been committed in Venezuela was relied upon as the primary evidence in support of the first ever multi-state referral of a situation to the ICC Prosecutor.
10. Professor Cotler was granted leave by Pre-Trial Chamber I, in a previous composition, to submit written submissions as an *amicus curiae* on jurisdiction more generally in relation to the Prosecutor's then consideration of whether to open an investigation in the Situation in Palestine.⁷ The reasoning in the submission that he co-authored with other eminent *amici*, namely Professor Robert Badinter, Professor David Crane, Professor Jean-Francois Gaudreault-DesBiens, Lord David Pannick KC and Professor Guglielmo Verdirame KC⁸ noted

⁷ Situation in Palestine, Decision on Applications for leave to file observations pursuant to rule 103 of the Rules of Procedure and Evidence, 20 February 2020, ICC-01/18-63.

⁸ Situation in Palestine, Observations on the question of jurisdiction pursuant to Rule 103 by Professor Robert Badinter, Professor David Crane, Professor Jean-Francois Gaudreault-DesBiens, Lord David Pannick KC and Professor Guglielmo Verdirame KC, 16 March 2020, ICC-01/18-97.

by the Pre-Trial Chamber in its 5 February 2021 Decision⁹ and has been subsequently referred to with approval in at least one academic commentary on the Pre-Trial Chamber's Decision.¹⁰

**IV. THE REASONS WHY IT WOULD BE DESIRABLE FOR THE FORUM
AND THE RWCHR TO BE GRANTED LEAVE TO MAKE AMICUS
CURIAE SUBMISSIONS IN THIS CASE**

11. The Pre-Trial Chamber has already acknowledged the potential relevance of the jurisdictional issues relating to the Oslo Accords for the Chamber's assessment of jurisdiction as it now arises in the context of a determination of an application for the issuance of warrants of arrest pursuant to Article 58 of the Statute.¹¹ The Forum and the RWCHR agree with this assessment and submit that resolution of this issue now would be desirable as it would avoid the risk of an arrest warrant being issued when relevant legal bases for jurisdiction may be lacking.

12. Indeed, the Forum and the RWCHR note that:

- a. the Pre-Trial Chamber, as previously composed, did not make a determination on the nature and effect of the Oslo Accords and their impact on jurisdiction in its 5 February 2021 Decision as it was only called upon to adjudicate territorial jurisdiction;¹² and
- b. the Oslo Accords issue is a live matter before the Pre-Trial Chamber on the Prosecutor's application for arrest warrants as Article 19(1) of the Statute provides, in part, that "[t]he Court shall satisfy itself that it has jurisdiction in any case brought before it".¹³

⁹ Situation in Palestine, Decision on the Prosecution's request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine, 5 February 2021, ICC-01/18-143, para 51.

¹⁰ See for example: Roy Schondorf and Gilad Noam, Comments on the 'Decision of the Prosecution Request pursuant to Article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine', *Israel Yearbook on Human Rights*, October 2021 Special Supplement, pp. 165-196 at pages 179, 184 and 188-189.

¹¹ Order Deciding on the UK'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, para 5.

¹² Situation in Palestine, Request by the United Kingdom for leave to submit written observations pursuant to Rule 103, 10 June 2024, ICC-01/18-173-Red, paras 10, 18.

¹³ Ibid, ICC-01/18-173-Red, para 17.

13. The Forum, as the focal point representing all of the hostages and their families, has a unique perspective on the nature and effect of the Oslo Accords and their impact on criminal jurisdiction in this case. Whether or not the ICC may exercise jurisdiction over Israeli nationals in this case forms a critical part of the backdrop to the ongoing negotiations to secure a hostage deal in which the Forum is currently actively engaged. Granting the Forum leave to provide the requested observations as an *amicus curiae* would therefore be desirable for the proper determination of the case¹⁴ as its Article 103 observations will assist the Pre-Trial Chamber¹⁵ in determining the Prosecution's Article 58 application by deepening its understanding of the impact that the Court's exercise of jurisdiction with respect to Israeli leaders would have on the prospects of success for obtaining a release deal.
14. It would also be desirable for the RWCHR, as a body with a longstanding track record of assisting victims to secure justice and accountability, including with respect to multiple situations under investigation at the ICC, to be granted leave to submit written submissions on whether the ICC may exercise jurisdiction over Israeli nationals in this case. Given Professor Cotler's background as a former Minister of Justice, Attorney-General, Special Advisor on the ICC, and eminent jurist, it is submitted that receipt of the RWCHR's views (proffered on behalf of Professor Cotler) as to the complex nature and effect of the Oslo Accords and their impact on criminal jurisdiction in this unique case is desirable as they will assist the three honourable judges of this Pre-Trial Chamber in making their determination.¹⁶

¹⁴ 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. 9.

¹⁵ 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.

¹⁶ 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.

V. SUMMARY OF OBSERVATIONS TO BE SUBMITTED IF GRANTED
LEAVE

15. The Forum and the RWCHR are mindful of the consistent guidance of the Court that leave is required before making substantive observations pursuant to Rule 103 and therefore the substantive observations may not be set out in the request for permission.¹⁷

16. Nonetheless, in order to assist the Court in determining this Request, the Forum and the RWCHR indicate that, if permission is granted, their observations would seek to assist the Court by providing more detailed submissions on the following propositions related to the Oslo Accords:

- a. First, the *travaux préparatoires* to the ICC Statute make clear that Article 12(2)(a) is premised upon the notion of delegation-based jurisdiction by sovereign States. That is, a State may only delegate to the ICC jurisdiction over those crimes which would otherwise have fallen within the jurisdiction of their national courts.
- b. Second, a State cannot delegate more rights than it actually possesses: *nemo plus iuris transferre potest quam ipse habet*. Allowing jurisdiction in violation of this principle would amount to an inversion of the proper exercise of delegated jurisdiction.
- c. Third, the Oslo Accords expressly confirm that the limited nature of Palestinian jurisdiction in relation to Palestinians and non-Israeli nationals in the West Bank¹⁸ and the Gaza Strip derives from these bilateral agreements and was transferred by Israel. Article XVII(4)(a) clarifies that Israel holds all powers not explicitly transferred to the Palestinians by virtue of the Accords.
- d. Fourth, unless and until the parties to the Oslo Accords renounce them (at which time the powers legally transferred to the PA would expire), they

¹⁷ ICC-02/05-185, Pre-Trial Chamber I, Decision on Application under Rule 103, 4 February 2009, para. 6.

¹⁸ Apart from Area C.

continue to comprehensively set the powers which were transferred to and vested in the PA and continue to govern the relationship between Israel and Palestine to date.

- e. Fifth, interpretation of the relevant provisions in the Oslo Accords on the basis of the customary rules of treaty interpretation demonstrates that the PA did not retain a plenary right of criminal jurisdiction which it agreed not to exercise in relation to Israeli nationals.¹⁹
- f. Accordingly, it is not legally possible for Palestine to delegate criminal jurisdiction to the ICC pursuant to Article 12(2)(a) of the ICC Statute in relation to war crimes allegedly committed by Israeli nationals.²⁰

17. If granted leave, the Forum and the RWCHR would also make observations on the Prosecution's apparent failure to undertake a proper assessment as to whether or not the prosecution of Israeli leaders would be in the interests of justice as is foreseen prior to progressing to the stage of seeking arrest warrants pursuant to Article 53(2)(c) of the Rome Statute. It will be recalled that Article 53(2)(c) requires the Prosecution to assess the interests of justice prior to making a decision to initiate a prosecution and that this assessment must take into account "all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime". The Forum and the RWCHR submit that anxious consideration should have been dedicated by the ICC's Office of the Prosecutor to the issue of the fate of the hostages prior to seeking simultaneous arrest warrants against Hamas leaders and Israeli leaders. Tragically, this course of action has had an adverse impact on the progress of negotiations for the release of the remaining Israeli hostages held in Gaza whose prospects of survival worsen with each day that passes. It will be submitted that if the Prosecution had given due consideration to the current desperate plight of the remaining 116 hostages in Gaza, who have

¹⁹ And Area C.

²⁰ Or allegedly occurring in Area C.

now been held, against their will and in unimaginable conditions of detention for over 279 days, and their urgent need for a hostage release deal to be reached, his office would not have initiated a prosecution of Israeli leaders at the same time as initiating a prosecution of Hamas leaders. It is the submission of the Forum and the RWCHR that, taking into account the present situation of the hostages and their families, the prosecution of Prime Minister Netanyahu and Minister Gallant does not serve the interests of justice.

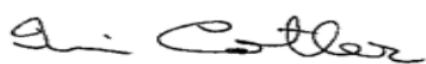
VI. CONCLUSION

18. For these reasons the Hostages Forum and the RWCHR respectfully request leave to file observations as *amicus curiae* in order to assist the Chamber in determining the Prosecution Article 58 Application.

Respectfully submitted:



Yuval Sasson
Hostages and Missing Families Forum, Israel



Professor Irwin Cotler, PC, OC, OQ, Ad.E
& Brandon Silver
Raoul Wallenberg Centre for Human Rights, Canada

Dated this 12th day of July 2024.

At London, UK.