

Annex

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/18

Date: 12 July 2024

PRE-TRIAL CHAMBER I

Before

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

SITUATION IN THE STATE OF PALESTINE

Public

**Request for Leave to Submit Amicus Curiae Observations by Guernica 37
Chambers (Pursuant to Rule 103 of the Rules of Procedure and Evidence)**

Source: Guernica 37 Chambers

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

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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 United Kingdom	Amicus Curiae

REGISTRY	
Registrar Mr Osvaldo Zavala Giler	Counsel Support Section
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I. INTRODUCTION

1. On 10 June 2024, the United Kingdom filed a request ("Request") pursuant to Rule 103(1) of the Rules of Procedure and Evidence of the International Criminal Court ("Rules") to provide written *amicus curiae* observations on "[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."¹

2. In the Request, the United Kingdom:

"cites a decision by the Chamber in a previous composition. According to the United Kingdom, the Chamber at the time 'did not determine the jurisdictional issues relating to the Oslo Accords [...], instead holding that "when 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'. The United Kingdom submits that the Chamber, pursuant to Article 19(1) of the Rome Statute, 'is required to make an initial determination of jurisdiction in resolving the application for arrest warrants' of which '[t]he Oslo Accords issue necessarily forms part'"²

3. On 27 June 2024, Pre-Trial Chamber I ("Chamber") of the International Criminal Court ("ICC") issued an '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' ("Order").³

4. In the Order, the Chamber concluded that:

"[g]iven the potential relevance of the issue the United Kingdom wishes to address for the Chamber's assessment, and without prejudice to any future decision by the Chamber on this matter, the Chamber considers it appropriate to authorise the United Kingdom to file written observations pursuant to rule

¹ Request by the United Kingdom for Leave to Submit Written Observations Pursuant to Rule 103, 10 June 2024, ICC-01/18-171-SECRET-Exp.

² *Ibid*, [4] (footnotes omitted).

³ ICC-01/18-173-Red 27-06-2024 1/5 PT.

103 of the Rules. These observations, which may not exceed 10 pages, shall be filed by 12 July 2024.”⁴

5. Having regard to the above position, Guernica 37 Chambers seeks leave to file submissions on the instant matter on an *amicus curiae* basis, as per Rule 103 of the Rules.

II. LEGAL/PROCEDURAL FRAMEWORK FOR REQUESTS UNDER RULE 103

6. The basis upon which an *amicus curiae* brief can be admitted by the Court in respect of a given proceedings is Rule 103(1) of the Rules, in which it is provided that:

“[a]t any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organisation or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate.”

7. In determining whether to grant leave to admit *amicus* observations submitted by an applicant, the Chamber will consider the extent to which any proposed submissions may assist it in “the proper determination of the case”⁵ and enable it to be “more fully informed...”⁶ in relation to the issue(s) under consideration. This consideration mirrors that seen in other international courts and tribunals, where submissions were granted from third parties where it was considered that they would assist the tribunal concerned to reach the correct decision.⁷ In considering the desirability of such submissions, the Appeals Chamber of the Special Court for Sierra Leone, for example, set out that:

“[t]he issue is whether it is desirable to receive such assistance, and ‘desirable’ does not mean ‘essential’ (which would be over-restrictive) nor does it have an over-permissive meaning such as ‘convenient’ or ‘interesting’. The discretion will be exercised in favour of an application where there is a real reason to believe

⁴ Order, [5].

⁵ Rule 103(1) of the Rules.

⁶ Prosecutor v. Germain Katanga, ICC-01/04-01/07, ‘Order Authorising the Submission of Observations, 7 March 2013, [12].

⁷ See, *Prosecutor v. Prlic et al*, IT-04-74-T, ‘Order Appointing an Amicus Curiae’ 3 July 2009; *Prosecutor v. Akayesu*, ICTR-96-4-T, ‘Order Granting Leave for Amicus Curiae to Appear’, 12 February 1998; and *Prosecutor v. Kallon*, SCSL-2003-07, ‘Decision on Application by the Redress Trust, Lawyers Committee for Human Rights and the International Commission of Jurists for Leave to File Amicus Curiae brief and to Present Oral Arguments’, 1 November 2003.

that written submissions, or such submissions supplemented by oral argument, will help the Court to reach the right decision on the issue before it.”⁸

8. Albeit non-exhaustive and case specific, previously considered attributes for third parties in satisfying the test as to whether they will assist in the proper determination of the case have included, for example, the fact that organisations “have been following and closely monitoring the institutional developments that have been taking place”, and have “conducted training and are working closely with the legal community” in the affected state.⁹ Further, chambers have considered that they would take “into consideration that such briefs are filed by a party, not part of the action, but one with strong interests in or views on the subject matter before the court.”¹⁰ Such interests include where the decision “...will be likely to create a precedent affecting [it] in the future” or where a “State or NGO or campaigning group may wish to have the law clarified or declared or developed in a particular way”.¹¹

III. GUERNICA 37 CHAMBERS

9. It is submitted that the organisational expertise of Guernica 37 Chambers makes it well placed to advance submissions capable of assisting the Chamber in determining the present matter. Details of Guernica 37 Chambers and its expertise are set out below.

A. The organisation

10. Guernica 37 Chambers is an innovative organisation specializing in transnational litigation enforcing human rights and international criminal norms in national courts. Our international structure provides a diverse team of lawyers from Europe, the United Kingdom and the United States of America with proven professional experience building legal accountability strategies around the globe drawn upon direct experience in multiple national jurisdictions and international bodies.

⁸ *Prosecutor v. Morris Kallon*, SCSL-2003-07, ‘Decision on Application by the Redress Trust, Lawyers Committee for Human Rights and the International Commission of Jurists for Leave to File Amicus Curiae brief and to Present Oral Arguments’, 1 November 2003, [5].

⁹ *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11, ‘Decision on the “Application by Lawyers for Justice in Libya and the Redress Trust for Leave to Submit Observations pursuant to Rule 103 of the Rules of Procedure and Evidence”’ 18 May 2012, [4].

¹⁰ *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15, ‘Application by Child Soldiers International for Leave to Submit an Amicus Curiae Brief Pursuant to Rule 103 of the Rules of Procedure and Evidence’ 24 November 2016, [12].

¹¹ *Prosecutor v. Kallon*, SCSL-2003-07, ‘Decision on Application by the Redress Trust, Lawyers Committee for Human Rights and the International Commission of Jurists for Leave to File Amicus Curiae brief and to Present Oral Arguments’, 1 November 2003, at [4].

11. Members of Chambers provide highly technical legal services assisting individuals, civil society groups, businesses and government institutions to further transitional justice, defend human rights, enforce international criminal law and international norms. Our work seeks to transform societies assisting them to achieve equity, justice and lasting security. Through its members, Chambers has the notion of accountability as a key mechanism at its core. Members use the law to transform societies emerging from conflict to achieve peace, justice and security. Chambers provides legal representation and advisory services to victims, civil society groups, businesses, and governments to further transitional justice, defend human rights, enforce international norms and international criminal law.
12. Guernica 37 is part of the wider Guernica Group, an international initiative that brings together experienced litigators, investigators and other professionals who work to bring perpetrators of international crimes and grave human rights violations to justice; seize their ill-gotten assets for the benefit of their victims; and strengthen systems of accountability, truth-telling, reparation, and non-recurrence. Working in country and in partnership with affected communities, we offer a range of highly specialized skills to achieve accountability. The Group, which comprises Guernica 37 Chambers in London, G37 Despacho Internacional in Madrid, and The Guernica Centre for International Justice in San Francisco, supports transitional justice processes by partnering with national actors in identifying alternative jurisdictions to initiate legal actions that seek to impact the relevant country encouraging domestic accountability with transformative effects.

B. Members involved in proposed *amicus* brief

13. The proposed amicus brief will be led by Mr. Toby Cadman and Ms. Almudena Bernabeu, both of whom are co-founders of Guernica 37 Chambers and the Guernica Group.
14. Toby Cadman is an established international law specialist in the areas of international criminal and humanitarian law, international terrorism, international commercial law, arbitration, anti-corruption, extradition and mutual legal assistance, and human rights law. Domestically, he is an extradition specialist, acting for the prosecution and defence advising and representing individuals, requesting judicial authorities, and governments in extradition proceedings both at first instance hearings and extradition appeals in the UK High Court, Supreme Court and European Court of Human Rights. Internationally, Toby has acted in numerous matters before international courts and tribunals, including before the ICC, the Kosovo Specialist Chambers, the International Criminal Tribunal for the Former Yugoslavia, the International Crimes Tribunal Bangladesh, the European Court of Human Rights, the Bosnian War Crimes Chamber, the UN Human Rights Committee, and the

African Commission on Human and Peoples Rights. He has provided expert evidence and statements in parliamentary, legal, and arbitration proceedings in the United Kingdom, European Parliament, United Nations, United States Congress, ICSID, LCIA and World Bank in a number of conflict and post-conflict situations across the globe.

15. Toby advises on judicial reform, legislative drafting and institution building in Albania, Bahrain, Bangladesh, Bosnia and Herzegovina, Burma (Myanmar), Croatia, Lebanon, Macedonia, Montenegro, Syria and Tunisia. He acts for a number of clients in pro-bono matters in foreign jurisdictions, in particular concerning British nationals abroad. He advises foreign governments, law enforcement agencies, international organisations, corporations and private individuals to develop professional and transparent institutions that protect human rights, combat corruption, and reduce the threat of transborder and transnational crime and develops training curricula for law enforcement, prosecutorial and governmental agencies for the investigation of international crimes. He further offers specialist political and public affairs consultancy services advising clients how best to identify, approach and influence the key decision makers of Westminster, Washington DC, Brussels and further afield.
16. Almudena Bernabeu is an international lawyer with a long career in the fields of transitional justice and international criminal and human rights law. During her years as Transitional Justice Director at the U.S.-based organization Center for Justice & Accountability, Ms. Bernabeu successfully litigated more than a dozen civil cases brought under the Alien Tort Statute and criminal cases in Europe under the Principle of Universal Jurisdiction to assist victims to achieve truth and accountability for international crimes. She also led the investigation and prosecution of the massacre of six Jesuit priests, their housekeeper, and her daughter, by members of the Salvadoran Military High Command, an attack that marked a turning point in the Salvadoran conflict. As a result of these investigations, a U.S. Court approved the extradition of Colonel Inocente Orlando Montano to Spain to face trial. She also led the investigation and prosecution of the genocide committed against the Mayan people in Guatemala. The process before the Spanish National Court provided the victims the opportunity to tell their stories and present their "truth" about one of the darkest chapters in recent Guatemalan history. This investigation was instrumental in the conviction of the former Guatemalan dictator Efraín Rios Montt for genocide. Almudena's contribution to this important case was the subject of the documentary film entitled: "Granito: How to Nail a Dictator"

17. Almudena is a member of the Valencia and Madrid Bar Associations and the American Bar Association. She is also a practising member of the Bar of England and Wales.

C. Organisational interest and expertise in the situation in Palestine

24. Members of Guernica 37 Chambers have been involved in the situation in Palestine and the occupied Palestinian territories for over a decade. Guernica 37 members have previously filed Article 15 submissions with the Office of the Prosecutor of the ICC concerning the widespread and systematic torture of Palestinian detainees in the West Bank committed by the Palestinian Security Services. Guernica 37 Chambers also submitted a communication to the UN Special Procedures on the arbitrary detention of a human rights activist who collaborated in the investigations, and presented a written submission to the UN Independent Commission of Inquiry on alleged international crimes perpetrated by Israeli Defence Forces during Operation Protective Edge. Chambers has previously delivered bespoke training packages for Palestinian lawyers in East Jerusalem.
25. In 2020, following the submission of *amicus* briefs on the situation in Myanmar/Bangladesh,¹² Guernica 37 Chambers sought and was granted leave to submit an *amicus* brief on the Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine. Guernica 37 submitted its observations in accordance with Rule 103 of the Rules and its views were duly taken into account in the Court's Decision on the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine'.¹³

18. PURPOSE OF THE AMICUS

26. The purpose of the Guernica's *amicus curiae* brief, should leave be granted to submit it, would be to address the following broadly framed issues in respect of the instant matter:
- (i) That the Oslo Accords do not affect/limit the Court's jurisdiction because the necessary pre-conditions to the exercise of the Court's jurisdiction are met;
 - (ii) That the Oslo Accords do not affect or limit the exercise of the Court's jurisdiction because they nor any of Palestine's bilateral agreements or internal laws bind the Court in its exercise of jurisdiction; and

¹² Amicus Curiae Observations by Guernica 37 International Justice Chambers (pursuant to Rule 103 of the Rules), 18 June 2018, ICC-RoC46(3)-01/18-24 18-06-2018 1/66 EC PT.

¹³ Pre-Trial Chamber, ICC-01/18, 'Decision on the 'Prosecution Request Pursuant to Article 19(3) for a Ruling on the Court's Territorial Jurisdiction in Palestine', 5 February 2021.

- (iii) Even if the Oslo accords had legal force relevant to the Court, which is not accepted, they were an interim arrangement pending a peace agreement that, in light of Israel's refusal to negotiate such an agreement, no longer do so.

19. **CONCLUSION**

27. For the foregoing reasons, Guernica 37 Chambers asks leave to file the proposed submissions in accordance with the Chamber's Order and with Rule 103 of the Rules.



Mr. Toby Cadman,

Guernica 37 Chambers

Dated this: 12 July 2024

At London, United Kingdom



Ms Almudena Bernabeu

Guernica 37 Chambers

Dated this: 12 July 2024

At London, United Kingdom