

Original: **English**No.: **ICC-01/18**
Date: **6 August 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***Amicus curiae* observations submitted pursuant to Rule 103(1) of the Rules of
Procedure and Evidence.**Source:** **Prof Sascha Dominik Dov Bachman**
Dr Deborah Mayersen
Prof Gregory Rose
Dr Colin Rubenstein AM

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

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**Unrepresented Applicants
(Participation / Reparation)**

**The Office of Public Counsel for
Victims**

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

States' Representatives

The competent authorities of the:
The State of Palestine,
The Republic of South Africa,
the People's Republic of Bangladesh,
the Plurinational State of Bolivia,
the Union of the Comoros,
the Republic of Djibouti,
the United State of Mexico, and
Chile.

Amicus Curiae

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REGISTRY

Dr Deborah Mayersen, Professor Gregory Rose and Dr Colin Rubenstein; US Senator Lindsey O. Graham; Lawyers for Palestinian Human Rights; Israel Bar Association; Czech Republic; International Centre of Justice for Palestinians and the Centre for Human Rights Law (SOAS University of London); Jerusalem Institute of Justice; Chile and Mexico; Centre for European Legal Studies on Macro-Crime (MACROCRIMES); Dr Robert Heinsch and Dr Giulia Pinzauti; The Hague Initiative for International Cooperation; ICJ Norway and Defend International Law; UN Special Rapporteurs and Working Groups; the United States of America; Professor Neve Gordon; Al-Quds Human Rights Clinic and Al-Quds University; the League of Arab States; L'association des Juristes pour le respect du droit international and la Fédération internationale pour les droits humains; University Network for Human Rights, the International Human Rights Clinic, Boston University School of Law, the International Human Rights Clinic, Cornell Law School and the Lowenstein Human Rights Project, Yale Law School; Professor Richard Falk and Professor Michael Lynk; Professor Adil Ahmad Haque; Open Society Justice Initiative, European Center for Constitutional and Human Rights, REDRESS Trust, Human Rights Watch and Amnesty International; Republic of Colombia; Hostages and Missing Families Forum and the Raoul Wallenberg Centre for Human Rights; Addameer Prisoner Support and Human Rights Association; International Association of Jewish Lawyers and Jurists; Kingdom of Spain; UK Lawyers for Israel, B'nai B'rith UK, the

International Legal Forum, the Jerusalem Initiative and the Simon Wiesenthal Centre; International Commission of Jurists (ICJ); The Palestinian Association for Human Rights (Witness); Guernica 37 Chambers; the Federative Republic of Brazil; ALMA – Association for the Promotion of International Humanitarian Law; Ireland; Avocats pour la Justice au Proche-Orient (AJPO); Federal Republic of Germany; Dr Shahd Hammouri; Al-Haq Law in the Service of Mankind (Al-Haq), Al-Mezan Center for Human Rights (Al-Mezan) and the Palestinian Center for Human Rights (PCHR); République Démocratique du Congo; Arpit Batra; South Africa, Bangladesh, Bolivia, Comoros, and Djibouti.

Registrar

Oswaldo Zavala Giler

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Public Information and Outreach Section

I. INTRODUCTION

1. On 5 February 2021, International Criminal Court (“ICC”) Pre-Trial Chamber 1 held that the ICC Office of the Prosecutor (“OTP”) had jurisdiction to conduct an investigation in case ICC-01/18 (“the PTC1 Order of 2021”). The Chamber acknowledged that it did not determine all jurisdictional issues but that “[w]hen 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”.¹
2. On 22 July 2024, requests for leave to file observations pursuant to rule 103 of the Rules of Procedure and Evidence were granted by Pre-Trial Chamber I to *amici curiae* Prof Sascha Dominik Dov Bachman, Dr Deborah Mayersen, Prof Gregory Rose and Dr Colin Rubenstein AM (the latter on behalf of the Australia/Israel and Jewish Affairs Council² who hereby submit these observations. In these observations, we address the matters raised in our request concerning lack of jurisdiction, inadmissibility due to failure to apply the fundamental ICC rule of complementarity, and lack of reasonable grounds for arrest warrants due to failures to prove a tenable evidentiary basis for them. Furthermore, a reasonable apprehension of bias arising from the conduct of the OTP is noted.

II. LACK OF JURISDICTION

3. Article 19(1) of the Rome Statute requires that the Court satisfy itself that it has jurisdiction in any case brought before it. Questions concerning the sovereign status of Palestine flow into complex subsets of questions including the nature of any of Palestinian sovereignty, its limitations under agreements entered into by Palestinian representatives, and the applicability of the Rome Statute in Gaza.

¹ 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,” para. 131 (5 Feb. 2021).

² ICC-01/18-14, 22 July 2024.

4. The PTC1 Order of 2021 left open the question of whether Palestine is to be regarded under international law as a full-fledged independent State, and also left open questions of jurisdiction raised by limitations under agreements entered into by Palestinian representatives, which include, *inter alia*, questions of jurisdiction over Israelis *in personam*.
5. The pertinent agreements are the Oslo Accords, entered into by the Palestine Liberation Organisation (“PLO”) with the State of Israel in 1993³ and 1995.⁴ Both Israel and the PLO had legal capacity to sign the agreements, although the PLO was not a full subject of international law. Insurrectional movements regarded as belligerents have the capacity under international law to conclude treaties.⁵ The PLO was not coerced or under the effective functional control of Israel but sought to obtain political advantages through the Oslo Accords.
6. Although the Oslo Accords are not a formal treaty between States, they are legally binding pursuant to Article 3 of the *Vienna Convention on the Law of Treaties*, which applies to international agreements concluded between States and other subjects of international law.⁶ The Oslo Accords remain legally binding⁷ as neither side has terminated them. Indeed, the Palestinian Authority explicitly reaffirmed them as recently as 19 March 2023.⁸ Moreover, abrogation by one party cannot retrospectively harm another party’s prior existing rights.⁹ Nor can benefit flow to the Palestinian Authority from breaches by it of its obligations under the Oslo

³ *Declaration of Principles on Interim Self-Government Arrangements: Israel-Palestine Liberation Organisation* (13 September 1993) UNGA A/48/486 S/26560.

⁴ *Israeli Palestinian Interim Agreement on the West Bank and the Gaza Strip* (28 September 1995) (“Oslo II Agreement”), formally witnessed by USA, Russia, EU, Egypt, Jordan and Norway and registered on the official record of the Gen Assembly and the Security Council. UN GA A/51/889, UNSC S/1997/357.

⁵ Groups known as national liberation movements have the capacity to conclude treaties: O Corten and P Klein (editors) *The Vienna Convention on the Law of Treaties Commentary, Volume 1*, (Oxford UP 2011) 75.

⁶ P. Malanzuk “Some Basic Aspects of the Agreements between Israel and the PLO from the Perspective of International Law” (1996) *European Jnl Int Law* 485-500, 489. G. Watson *The Oslo Accords Internet Law and the Israeli-Palestinian Peace Agreements* (Oxford UP 2000) 101-2. R. Sabel *International Law and the Arab-Israeli Conflict* (Cambridge UP 2022) 272-75.

⁷ M. Cormier *The Jurisdiction of the International Criminal Court over Nationals of Non-States Parties* (Cambridge University Press 2020) 111.

⁸ International Communiqué from the March 19 meeting in Sharm El Sheikh <https://www.state.gov/joint-communicue-from-the-march-19-meeting-in-sharm-el-sheikh/>

⁹ E. Benvenisti “The Israeli-Palestinian Declaration of Principles: A Framework for Future Settlement” (1993) *Euro Jnl Int Law* 4:4, 542-555, 545.

Accords, *ex turpi causa non oritur actio*. Accordingly, no entity can breach an agreement and thereby obtain sovereignty or jurisdiction that it did not already have. The rules of the *Vienna Convention* bind its Parties pursuant to Article 3(c).

7. In not being regarded as a full-fledged independent State by the PTC1 Order of 2021 or by all members of the UN, Palestine is exceptional among parties to the Rome Statute.¹⁰ International law does not create, invoke or give sovereign powers. Rather, States already have the powers inherent in sovereignty. Instead, international law delimits State powers, in accordance with State consent.¹¹ Thus, the Rome Statute cannot bestow sovereignty on the Palestinian Authority. Nor can the latter delegate to the OTP authorities that it never had, *nemo dat quod non habet*. The ICC has recognised that its jurisdiction is to be exercised in the same circumstances allowed under the respective legal systems of its States Parties.¹²
8. Some have argued that it is the Palestinian people who possess delegable plenary prescriptive jurisdiction, and that Israel does not – as it is an occupying power in the territory.¹³ However, this argument misleads. First, the question before the Court is about what jurisdiction Palestine has and can delegate, – not about Israel’s jurisdiction.¹⁴ Second, sovereignty over the territory is disputed and in abeyance pending resolution of the conflict over it.¹⁵ Third, although a people can have a right to self-determination that could be fulfilled through creation of a sovereign state, not all peoples have sovereign states and Palestine was not considered by the ICC to be a sovereign state. Fourth, delegation of plenary prescriptive jurisdiction

¹⁰ See dissenting judgement Pres. Peter Kovacs 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 Feb. 2021).

¹¹ *SS Lotus* case (France v Turkey), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

¹² *Bangladesh/Myanmar, Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute*, ICC-RoC46(3)-01/18-37, para. 70 (6 Sept. 2018).

¹³ ICC-01/18-262, Observations Pursuant to Rule 103 (Robert Heinsch and Giulia Pinzauti), 2.8.24, para 20.

¹⁴ Furthermore, this argument misrepresents the law of belligerent occupation, under which an Occupying Power is required to restore and ensure public order and safety – including by enacting and enforcing penal legislation (see Hague Regulations, article 43; Fourth Geneva Convention, articles 64 and 66). Under the law of belligerent occupation, the Occupying Power need not be proved or considered sovereign over the territory to hold and to exercise these powers, nor to transfer these authorities in accordance with law.

¹⁵ The Attorney General of Israel, "The International Criminal Court’s Lack of Jurisdiction Over the So-called “Situation In Palestine”", 20 December, 2019, paras 27-32.

to the Court by the purported state of Palestine has as its prerequisite fully fledged sovereignty and statehood under international law.

9. In relation to the jurisdiction of the Court over conduct specifically in the Gaza region, the Hamas Government was in power in Gaza at the time of ratification of the Rome Statute by the Palestinian Authority. Since forcefully taking over in 2007, it governs independently, conducts its own foreign and military policy, remains in power and has not since consented to the application of the Rome Statute to it in Gaza. The status of the Rome Statute in Gaza region is consequently uncertain. Nevertheless, assuming that Hamas would not be considered by the ICC to be a legitimate sovereign, then Hamas armed attacks on Israel from Gaza are those of a non-State armed group. Article 8.2 paragraphs (a) and (b) of the Rome Statute concerning war crimes in international armed conflict then do not apply to Hamas hostilities. Starvation as method of war is a crime under Article 8.2(a)(xxv) that applies to international but not to non-international armed conflicts. Thus, the Prosecutor's allegation of starvation as a method of warfare is legally misconceived, (as well as a fabrication as demonstrated below).
10. Furthermore, an OTP hypothesis of parallel-running armed conflicts between Hamas and Israel (legally classified as non-international) and between Palestine and Israel (classified as international), with different legal classifications applying to each, is untenable. Its insuperable factual challenges and legal obstacles include the dubious status of Palestine, of Gaza, of the thesis under international law, as well as the inseparability of the conflict which is a multi-faceted complex but a single continuum, and consequent prejudicial differentiated treatment of one of the parties to the same conflict. In view of the controversial nature of this hypothesis, the Court should be guided by the principles of *in dubio pro reo*. In cases of legal uncertainty, the Court must default to the legal position that would benefit the defense, in accordance with the presumption of innocence.

III. INADMISSIBILITY

11. Article 1 of the Rome Statute stipulates that the jurisdiction of the Court shall be complementary to national criminal jurisdictions. Article 17(1)(a) requires the Court to determine that a case is inadmissible where the case is already being investigated or prosecuted by a State which has jurisdiction over it, unless that State is itself unwilling or unable genuinely to carry out the investigation or prosecution. Complementarity is a fundamental principle for the Court. The point here is that the OTP has not allowed Israel, the primary jurisdiction, a reasonable opportunity to investigate the alleged crimes. Any omission by the OTP to demonstrate that Israel is unwilling or is unable is fatal to admissibility in this case.
12. None of the criteria for unwillingness set out in Article 17(2) of the Rome Statute could have been established by the OTP. Israel has the ability to conduct its own independent investigations. Israel's Attorney General has called for a Commission of Inquiry to investigate the government's actions and policies, and the establishment of a Commission is currently a matter under discussion (including the proper time for establishing it, since the war is still ongoing). The Supreme Court exercises rigorous judicial oversight during the current conflict, including ongoing oversight regarding delivery of humanitarian aid to Gaza, and Israel's judiciary has a world-renowned record of trials prosecuting even Israel's Prime Ministers, including the current Prime Minister. Although Israel is in the midst of an armed conflict launched by Hamas within the past nine months, it has in fact already embarked upon these investigations and inquiries into allegations of crimes, wrongdoing and command failures by its armed forces and national government and has committed to conduct prosecutions where appropriate.
13. This commitment is highlighted by the aftermath of an accidental strike on a three-car night convoy of World Central Kitchen ("WCK") staff on 1 April 2024. In that case, an investigation by a dedicated, independent body within the Israel Defence Forces ("IDF") concluded that commanders had ordered the strike after wrongly

concluding that aid trucks were being commandeered by armed Hamas terrorists. An independent Australian field investigation of the incident produced findings concurring with those of the IDF.¹⁶ It found that “actions in dismissing two officers from their positions and reprimanding three others was timely and appears appropriate to the situation. Of note, while the outcomes may be similar to what could occur in Australia, these command measures were taken very quickly” to hold those responsible to account.¹⁷ The Australian Special Adviser provided an independent assessment of Israel’s willingness to investigate and prosecute within its own legal system and pointed out Israel’s “acceptance of accountability”. These facts alone are sufficient to refute the Prosecutor’s premise of unwillingness to impose accountability as a precondition to admissibility pursuant to Article 17(2).

14. The OTP has brought a request for the issue of arrest warrants prematurely. The OTP did not engage genuinely with the Israeli Government to inquire as to Israel’s domestic investigations and independent accountability mechanisms, and did not allow Israel sufficient time, taking into account the circumstances of the ongoing intensive war, to conduct its own national proceedings. This failure to recognise and to implement the fundamental principle of complementarity is inconsistent with the OTP’s own policy on complementarity and cooperation. Moreover, it is inconsistent with the OTP’s own past practice that involved lengthy engagements with others, such as Guinea or Colombia, which extended over many years.

IV. GROUNDS FOR ARREST

¹⁶ Special Adviser Public Report on The Government of Israel’s Response to the IDF Attack on World Central Kitchen Aid Workers in Gaza on Monday 1 April 2024; <https://www.dfat.gov.au/publications/international-relations/special-adviser-public-report-government-israels-response-idf-attack-world-central-kitchen-aid-workers-gaza-monday-1-april-2024>; ; Ben Packham ‘Mark Binskin report backs Israel’s findings on World Central Kitchen drone strike’ *The Australian*, 17 July 2024; <https://www.theaustralian.com.au/nation/politics/binskin-report-backs-israels-findings-on-world-central-kitchen-drone-strike/news-story/3e2f5bfae1c4784e845503a6fa8e23b6> .

¹⁷ AJIN Staff, *Special advisor: Israel’s response ‘timely and appropriate’* *AJN*, 02/08/2024 <https://www.australianjewishnews.com/special-advisor-israels-response-timely-and-appropriate/>

15. Article 58 of the Rome Statute requires that a warrant shall be issued if a Pre-Trial Chamber is satisfied that there are reasonable grounds to believe that a crime was committed, and that the arrest of the suspect is necessary. In this case, there are no reasonable grounds to support the request brought by the OTP and the issue of arrest warrants is thus unnecessary. Although the Prosecutor's applications for the issue of arrest warrants have not been published, the Prosecutor made a public statement about them on 20 May 2024 ("the Prosecutor's statement") and our observations are based upon the grounds enunciated therein. We observe that the Prosecutor's assertions are unsupported by verifiable facts. It appears that the data on which the statement is presumably based are manipulated and falsified.
16. Alleged Famine: Aside from the inapplicability to non-international armed conflict of Article 8.2(a)(xxv) of the Rome Statute, there are no reasonable grounds to believe that the alleged crime of use of starvation as a method of warfare has occurred. If the allegations were based on the UN FEWS NET Report of 18 March 2024,¹⁸ that Report was superseded by the Review by the Famine Review Committee ("FRC") of May 2024, published on 4 June 2024,¹⁹ and the FRC Report on the Gaza Strip for June 2024 published on 25 June 2024.²⁰ The latter Reports found that the former had been based on significant under-reporting of foodstuffs entering the Gaza Strip and concluded that the former claims of "famine" were not supportable.²¹ Indeed, the 4 June report estimated that 75-157% of calorie needs of Gazans were being delivered via humanitarian aid (pp. 4-5).

¹⁸ FEWS NET, *Gaza Strip Targeted Analysis*, 18/3/2024 https://fews.net/sites/default/files/2024-03/Gaza%20Targeted-Analysis-03182024-Final_0.pdf

¹⁹ IPC, *Famine Review Committee: Review of the Famine Early Warning Systems Network (FEWS NET) IPCC-compatible Analysis for the Northern Governorates of the Gaza Strip / Conclusions and Recommendations / May 2024*, 4/6/2024
https://www.ipcinfo.org/fileadmin/user_upload/ipcinfo/docs/documents/IPC_Famine_Review_Committee_Report_FEWS_NET_Gaza_4June2024.pdf

²⁰ IPC, *Famine Review Committee: Gaza Strip, June 2024 / Conclusions and Recommendations*, 25/6/2024
https://www.ipcinfo.org/fileadmin/user_upload/ipcinfo/docs/IPC_Famine_Review_Committee_Report_Gaza_June2024.pdf

²¹ IPC, *Famine Review Committee: Review of the Famine Early Warning Systems Network (FEWS NET) IPCC-compatible Analysis for the Northern Governorates of the Gaza Strip / Conclusions and Recommendations / May 2024*, 4/6/2024

17. Alleged malnutrition deaths: The June 25 Report shows malnutrition close to the baseline 4% prevalence rate in Gaza before the war.²² Although according to the Hamas-run Ministry of Health, 34 deaths since the beginning of the current war have been caused by starvation,²³ yet all the published cases have been children suffering from serious prior conditions, such as cystic fibrosis or cerebral palsy.²⁴ Based on the pre-war birth and infant mortality rates, around 1000 infants would have died in Gaza even if there had not been war.²⁵
18. The Prosecutor's statement also made assertions concerning alleged Israeli closing of border crossings, blocking of essential food and medicine, shutting of water pipelines, electricity and fuel, and alleged deliberate attacks on civilians and aid workers. These assertions are clearly without basis.
19. The Statement alleges that Israel imposed "a total siege over Gaza, that involved completely closing the three border crossing points, Rafah, Kerem Shalom and Erez, from 8 October 2023 for extended periods". However, the facts show no siege: (a) The Rafah crossing between the Gaza Strip and Egypt (not Israel) was not under any Israeli control between 8 October 2023 and 6 May 2024. It has been closed by Egypt since 7 May 2024 despite Israel's willingness to open it on the Gaza Strip side.²⁶ (b) The

https://www.ipcinfo.org/fileadmin/user_upload/ipcinfo/docs/documents/IPC_Famine_Review_Committee_Report_FEWS_NET_Gaza_4June2024.pdf p.1, Table 1

²² Global Nutrition Cluster, *Nutrition Vulnerability and Situation Analysis /Gaza / February 2024*

<https://www.nutritioncluster.net/sites/nutritioncluster.com/files/2024-02/GAZA-Nutrition-vulnerability-and-SitAn-v7.pdf#page=8> p.4

²³ David Collier, *International media and the Hamas supporting Doctors of Shifa* <https://david-collier.com/doctors-shifa-hospital/>; David Collier, *BBC Verify – a hostile land of make believe – part one* <https://david-collier.com/bbc-verify/>; David Collier, X, 2/2/24 <https://x.com/mishtal/status/1753356777150611886>

²⁴ Sebouai, Lilia, *Children 'starting to die from malnutrition' in northern Gaza as food crisis worsens*. The Telegraph, 22/2/2024 <https://www.telegraph.co.uk/global-health/terror-and-security/gaza-malnutrition-israel-war-famine-children/#:~:text=intestinal%20infections>

²⁵ CIA, *The World Factbook (2022 Archive) / Birth rate* <https://www.cia.gov/the-world-factbook/about/archives/2022/field/birth-rate/country-comparison>; CIA, *The World Factbook (2022 Archive) / Infant mortality rate* <https://www.cia.gov/the-world-factbook/about/archives/2022/field/infant-mortality-rate/>

²⁶ Reuters, *As Egypt Refuses to Open Rafah Crossing, Much-Needed Humanitarian Aid Begins to Rot in The Times of Israel*, 24/5/2024 https://www.timesofisrael.com/liveblog_entry/as-egypt-refuses-to-open-rafah-crossing-much-needed-humanitarian-aid-begins-to-rot/; Staff, *Toi, Israel, Egypt Said Moving toward Reopening Rafah Crossing Amid Us Pressure*, The Times of Israel, 30/5/2024 <https://www.timesofisrael.com/israel-egypt-said-to-agree-to-reopen-rafah-crossing-following-us-pressure/>; Reuters, *Egypt demands Israel withdraws from Rafah crossing for it to operate again, sources say*, 2/6/24 <https://www.reuters.com/world/middle-east/egypt-demands-israel-withdraws-rafah-crossing-it-operate-again-sources-say-2024-06-02/>

Kerem Shalom crossing was closed by Israel following the attacks on 7 October 2023 and the intense fighting in areas of Israel in proximity to the crossing. The crossing was reopened on 17 December 2023.²⁷ (c) The Erez pedestrian crossing (not designed or equipped to pass goods) was badly damaged²⁸ and Israel has built two new crossings dedicated to the passage of humanitarian aid, which opened on 1 May 2024²⁹ and 12 May 2024.³⁰ Furthermore, medical equipment was transferred into the Gaza Strip on 175 of the 225 days between 21 October 2023 and the end of May 2024, while food was transferred on 191 days in this period.³¹

Prior to 7 October 2023, three pipelines from Israel provided 10% of the fresh water used in the Gaza Strip³² and two of the them were damaged by the Hamas attack.³³ The pipelines were repaired by Israel which currently supplies nearly 13 litres of fresh water per person per day.³⁴ Similar damage was done by Hamas to nine of ten power lines that run from Israel to Gaza and that provide part of Gaza's mains

²⁷ COGAT, X, 11/12/2023 <https://x.com/cogatonline/status/1734295968357720408>; COGAT, X, 12/12/2023 <https://x.com/cogatonline/status/1734531403037966542>; COGAT, X, 12/12/2023 <https://x.com/cogatonline/status/1734653422882738328>. Rose, Emily, *Aid Enters Gaza through Israel's Kerem Shalom Crossing for First Time in War*. Reuters, 17/12/2023 <https://www.reuters.com/world/middle-east/aid-enters-gaza-through-israels-kerem-shalom-crossing-first-time-war-2023-12-17/>

²⁸ Fabian, Emanuel, *Israel shows major damage to Erez Crossing with Gaza following Hamas assault*, The Times of Israel, 17/10/2023 https://www.timesofisrael.com/liveblog_entry/israel-shows-major-damage-to-erez-crossing-with-gaza-following-hamas-assault/

²⁹ Bachner, Michael, et al, *Israel opens Erez crossing to Gaza aid for first time as Blinken tours border*, The Times of Israel, 1/5/2024 <https://www.timesofisrael.com/israel-opens-erez-crossing-to-gaza-aid-for-first-time-as-blinken-tours-border/>; COGAT, X, 12/5/2024 <https://x.com/cogatonline/status/1789686967589843327>; Fabian, Emanuel. *Israel opens 3rd crossing into northern Gaza to 'increase aid routes' during war*, The Times of Israel, 12/5/2024

³⁰ <https://www.timesofisrael.com/israel-opens-3rd-crossing-into-northern-gaza-to-increase-aid-routes-during-war/>

³¹ "Humanitarian Aid" posted at <https://govextra.gov.il/cogat/humanitarian-efforts/home/#:~:text=Since%20the%20start%20of%20the,Strip>

³² IDF, *Daily Recap: Hamas - Israel War October 29th, 2023 (19:30) - Day 23* <https://www.idf.il/en/mini-sites/idf-recaps-daily-summaries-of-the-hamas-israel-war/hamas-war-daily-recaps/daily-recap-hamas-israel-war-october-29th-2023-19-30-day-23/>; EFE, *Israel partially restores water supply to Gaza*, 16/10/2023 <https://efe.com/en/latest-news/2023-10-16/israel-partially-restores-water-supply-to-gaza/>; Sharon, Jeremy, *Israel reopens second of three water pipelines into Gaza*, The Times of Israel, 29/10/2023 <https://www.timesofisrael.com/israel-reopens-second-of-three-water-pipelines-into-gaza/>

³³ IDF, *Daily Recap: Hamas - Israel War October 29th, 2023 (19:30) - Day 23* <https://www.idf.il/en/mini-sites/idf-recaps-daily-summaries-of-the-hamas-israel-war/hamas-war-daily-recaps/daily-recap-hamas-israel-war-october-29th-2023-19-30-day-23/>

³⁴ "Humanitarian Aid" posted at <https://govextra.gov.il/cogat/humanitarian-efforts/home/#:~:text=Since%20the%20start%20of%20the,Strip>

electricity. Israel recently reestablished a powerline to the Gaza desalination plant,³⁵ despite diversion by Hamas of that electricity for its military uses.

V. CONCLUSION

20. The *amici curia* are committed to the fair and just application of international law in the context of the Situation in Palestine currently before the Chamber but are concerned that the pattern of OTP conduct gives rise to an apprehension of prosecutorial bias “based on the perspective of a reasonable observer.”³⁶ The Rome Statute requires that the Prosecutor shall “investigate incriminating and exonerating circumstances equally”³⁷ and that ‘neither the Prosecutor nor a Deputy Prosecutor shall participate in any matter in which their impartiality might reasonably be doubted on any ground’.³⁸ For example, the Prosecutor appointed a “panel of experts in international law” that had no legal basis in the Rome Statute,³⁹ a majority of whom were known for their anti-Israel legal views and none for countervailing views. The many failures in the impartial administration of justice by the OTP in this case might be recommended by the Pre-Trial Chamber for consideration and redress by the Appellate Chamber.
21. Pursuant to Rule 103(3), these *amicus curiae* observations are hereby filed with the Registrar for the consideration of the Pre-Trial Chamber.

Dated 6 August 2024 at The Hague, The Netherlands, on behalf of the Applicants:



Prof Gregory Rose

³⁵ I24 News, *IDF confirms i24NEWS report: Electricity to be transferred to Gaza for desalination*, 2/6/2024 <https://www.i24news.tv/en/news/middle-east/palestinian-territories/artc-idf-confirms-i24news-report-electricity-to-be-transferred-to-gaza-for-desalination>

³⁶ ICC Appellate Chamber (Decision on Request for Disqualification of the Prosecutor) *Gaddafi and Al-Senussi*.

³⁷ Rome Statute Article 54(1)(a).

³⁸ Rome Statute Article 42.7.

³⁹ N.M. Feder, ‘ICC Prosecutor Tapped External Panel to Review Evidence: Is That Even Allowed?’, *Lawfare*, 9/7/2024: <https://www.lawfaremedia.org/article/icc-prosecutor-tapped-external-panel-to-review-evidence--is-that-evenallowed>