

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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No.: **ICC-01/18**  
Date: **12 August 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**

**OPCV Observations on Jurisdictional Matters  
affecting the general interests of Victims**

**Source: Office of Public Counsel for Victims**

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

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All *Amici Curiae* as authorised by Pre-Trial Chamber I

**REGISTRY**

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**Registrar**

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**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
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**Other**

## I. INTRODUCTION

1. The Principal Counsel of the Office of Public Counsel for Victims (the “OPCV” or the “Office”) herewith submits observations representing the general interests of victims in the Situation in the State of Palestine.<sup>1</sup> Given the page limit set by Pre-Trial Chamber I (the “Chamber”), the submissions will focus on the irrelevance of both the Oslo Accords and any State limitations in relation to the Court’s jurisdiction over the Situation in the State of Palestine.

2. Preliminarily, the Principal Counsel conveys the Victim’s concern about the scope and transparency of the current proceedings. Entertaining submissions on admissibility of potential cases<sup>2</sup> at this stage, before the issuance of the arrest warrants, risks creating venues for States and other interested parties to circumvent the relevant statutory provisions. Victims are also concerned by the classification of certain submissions - including a deferral request allegedly submitted by the State of Israel<sup>3</sup> - which remain secret. Withholding such information impedes a full understanding of the arguments before the Chamber on a jurisdictional issue, where Victims have the right to present observations under rule 19(3) of the Rules of Procedure and Evidence (the “Rules”).

3. The Principal Counsel submits that, as already found by the Pre-Trial Chamber in its previous composition, the Oslo Accords are not applicable when determining the Court’s jurisdiction. Being bilateral political agreements, they do not supersede international law. In fact, the criminal justice system of an occupied state remains

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<sup>1</sup> See the “Decision concerning the views, concerns and general interests of victims” (Pre-Trial Chamber I), [No-ICC-01/18-256-Conf](#), 30 August 2024. A public redacted version of the decision was issued on 7 August 2024 as [No. ICC-01/18-256-Red](#) (the “Decision authorizing victims’ observations”).

<sup>2</sup> See, *inter alia*, the “Written Observations by the United States of America Pursuant to Rule 103”, [No. ICC-01/18-300](#), 6 August 2024 and the “Observations Pursuant to Rule 103(1) of the Rules of Procedure and Evidence”, [No. ICC-01/18-307](#), 7 August 2024.

<sup>3</sup> See the “Written Observations by the United States of America Pursuant to Rule 103”, *supra* note 2, para. 16.

intact, and jurisdiction is retained by the State of Palestine under international law - irrespective of any political arrangement agreed upon with the occupying power over three decades ago.

4. Moreover, in accordance with the concept of “*automatic jurisdiction*”, the Court can exercise its jurisdiction over crimes committed within a State Party’s territory without being constrained by domestic legal limitations. Any curtailment of the Court’s ability to investigate and prosecute crimes under the Statute in the occupied territories - regardless of the nationality of the alleged perpetrator(s) - would deprive Victims of the justice they deserve. Said limitation would inevitably create impunity gaps and deny redress to Victims.

## II. PROCEDURAL BACKGROUND

5. On 5 February 2021, Pre-Trial Chamber I in its previous composition issued the “Decision on the ‘Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine’” (the “Jurisdiction Decision”).<sup>4</sup>

6. On 20 May 2024, the Prosecutor publicly announced that he filed several applications before the newly constituted Chamber for warrants of arrest for Mr Yahya Sinwar, Mr Mohammed Diab Ibrahim Al-Masri (Deif), and Mr Ismail Haniyeh for war crimes and crimes against humanity allegedly committed on the territory of the State of Israel and the State of Palestine (in the Gaza strip) from at least 7 October 2023; as well as for Mr Benjamin Netanyahu and Mr Yoav Gallant for war crimes and crimes against humanity allegedly committed on the territory of the State of Palestine (in the Gaza strip) from at least 8 October 2023.<sup>5</sup>

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<sup>4</sup> See the “Decision on the ‘Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine’” (Pre-Trial Chamber I), [No. ICC-01/19-143](#), 5 February 2021 (the “Jurisdiction Decision”).

<sup>5</sup> See the “[Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for arrest warrants in the situation in the State of Palestine](#)”, 20 May 2024. Publicly available on the ICC website.

7. On 10 June 2024, the United Kingdom filed a request to provide written *amicus curiae* observations on “*whether the Court can exercise jurisdiction over Israeli nationals, in circumstances where Palestine cannot exercise criminal jurisdiction over Israeli nationals pursuant to the Oslo Accords*” and related sub-issues.<sup>6</sup>
8. On 27 June 2024, the Chamber issued a public redacted version of its Order authorising the United Kingdom to file written observations pursuant to rule 103 of the Rules by 12 July 2024 - subsequently extended to 26 July 2024<sup>7</sup> - and setting the same deadline for any other request for leave to make observations under rule 103 of the Rules.<sup>8</sup>
9. On 11 July 2024, the Principal Counsel of the OPCV filed a request to appear before the Chamber pursuant to regulation 81(4) of the Regulations of the Court.<sup>9</sup>
10. On 22 July 2024, the Chamber issued a decision authorizing the filing of *amicus curiae* observations.<sup>10</sup>
11. On 30 July 2024, the Chamber authorized the OPCV to file written submissions by no later than 12 August 2024.<sup>11</sup>

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<sup>6</sup> See the “Request by the United Kingdom for Leave to Submit Written Observations Pursuant to Rule 103”, No. ICC-01/18-171-SECRET-Exp-Anx, 10 June 2024, para. 27. Pursuant to Order ICC-01/18-173-Red dated 27 June 2024, this document was reclassified as Public, [No. ICC-01/18-171-Anx](#).

<sup>7</sup> See the “Decision on the ‘Request by the United Kingdom for Extension of Time Limit’” (Pre-Trial Chamber I), [No. ICC-01/18-178](#), 4 July 2024.

<sup>8</sup> See the “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” (Pre-Trial Chamber I), [No. ICC-01/18-173-Red](#), 27 June 2024.

<sup>9</sup> See the “OPCV Request to appear before the Chamber pursuant to regulation 81(4) of the Regulations of the Court”, No. ICC-01/18-185-SECRET, 11 July 2024. Pursuant to Order ICC-01/18-256-Conf dated 30 July 2024, this document was reclassified as Public, [No. ICC-01/18-185](#).

<sup>10</sup> See the “Decision on requests for leave to file observations pursuant to rule 103 of the Rules of Procedure and Evidence” (Pre-Trial Chamber I), [No. ICC-01/18-249](#), 22 July 2024.

<sup>11</sup> See the [Decision authorizing victims’ observations](#), *supra* note 1, para. 8.

### III. SUBMISSIONS

#### 1. The Oslo Accords are irrelevant for the exercise of the Court's jurisdiction

12. The Oslo Accords are irrelevant to determining the Court's jurisdiction. The Principal Counsel recalls that the Majority of the Chamber previously found that said Accords are not pertinent to the question of whether the Court may exercise jurisdiction over crimes committed on the territory of the State of Palestine.<sup>12</sup> Since they are political agreements, they do not supersede international law. In fact - as ruled by the Appeals Chamber in the Situation in Afghanistan - bilateral agreements concerning the exercise of domestic criminal jurisdiction are irrelevant to the Court's jurisdiction.<sup>13</sup> The Appeals Chamber reached said conclusion noting that - although Afghanistan may have restricted its enforcement jurisdiction over U.S. nationals through a bilateral agreement - this did not affect the Court's jurisdiction over U.S. nationals in Afghanistan.<sup>14</sup> The same reasoning applies, *mutatis mutandis*, to the Court's jurisdiction over Israeli nationals for crimes allegedly committed in Palestine.

13. In addition, as also noted in the Jurisdiction Decision, the purpose of the Oslo Accords was to establish temporary practical arrangements for administering Gaza and the West Bank and they form part of the then active political process for achieving lasting peace.<sup>15</sup> They must be understood in their context and against a background of decades long occupation and uprisings. Furthermore, the Oslo process has effectively stalled and land annexations in the West Bank, Hamas rule in Gaza and Israeli disengagement from the Gaza strip put their overall status in question at the very least.

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<sup>12</sup> See the [Jurisdiction Decision](#), *supra* note 4, para. 124.

<sup>13</sup> See the "Judgment on the Appeal against the Decision on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan" (Appeals Chamber), [No. ICC-02/17-138 OA4](#), 5 March 2020, para. 44.

<sup>14</sup> *Ibid.*

<sup>15</sup> See the [Jurisdiction Decision](#), *supra* note 4, para. 125.

14. More than 30 years after the signing of Oslo I, the peace settlement envisioned has not materialized. The Oslo Accords might still constitute key documents which regulate aspects of relations between the State of Israel and the State of Palestine. However, such agreements between an occupied State and its occupier are not relevant to the Court's determination of its jurisdiction over crimes under the Statute. Not only does international humanitarian law dictate that occupation is a temporary situation responding to military necessity,<sup>16</sup> it also prohibits the transfer of sovereignty to the occupying power.<sup>17</sup> Moreover, the fact that the Palestine Liberation Organization that negotiated the Oslo Accords agreed to *temporarily* not exercising jurisdiction over Israeli nationals is a consequence of the political context, not a conscious legal choice that should bind the State of Palestine in the context of its acceptance of the Court's jurisdiction.<sup>18</sup>

15. International humanitarian law provisions uphold the criminal justice system of the occupied state,<sup>19</sup> reinforcing that the State of Palestine retains its inherent jurisdiction irrespective of the Oslo Accords, and of the reality of on-going annexations and disregard for the very terms of said Accords.<sup>20</sup>

16. The Chamber already considered the matter of the "*functional jurisdiction*" of the Palestinian Interim Authority over Palestinians and Non-Israelis only and at the exclusion of Area C contained in Oslo II.<sup>21</sup> It rightly decided that its own enquiry and determination as to whether the Court can exercise jurisdiction over crimes under the

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<sup>16</sup> See ICJ, "[Advisory Opinion on the Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem](#)", 19 July 2024, paras. 105-107.

<sup>17</sup> *Idem*, para. 108.

<sup>18</sup> See the United Nations Secretary General, Depository Notification, [C.N.13.2015.TREATIES-XVIII.10](#), 6 January 2015.

<sup>19</sup> See [article 64](#) of the Fourth Geneva Convention.

<sup>20</sup> For an overview of recent annexations and transfer of sovereignty see e.g. [Annexation Legislation Database - Yesh Din \(yesh-din.org\)](#).

<sup>21</sup> See the [Jurisdiction Decision](#), *supra* note 4, para. 125.

Statute committed on the territory of the State of Palestine was not affected by the provision.<sup>22</sup>

17. In this regard, the Principal Counsel concurs with Professor Schabas's recent submissions that the decision by States to refrain from fully exercising their criminal jurisdiction to the extent permitted by international law, does not negate their inherent jurisdiction.<sup>23</sup> A State *de facto* inability, or decision, not to prosecute certain crimes under the Statute does not prevent it from delegating jurisdiction to international tribunals like the Court. Quite to the contrary. Accepting the jurisdiction of the Court is the choice of any State Party to end impunity and to submit to the Court's jurisdiction the investigation and prosecution of crimes under the Statute committed on its territory, whenever it is itself unable or unwilling to do so.

18. During the negotiations of the Statute, the concept of "*automatic jurisdiction*" was widely accepted - implying that the Court can exercise its jurisdiction over crimes committed within a State Party's territory without being constrained by domestic legal limitations.<sup>24</sup>

## **2. The Court's jurisdiction cannot be restricted by domestic enforcement limitations**

19. The Court derives its competence from the State adherence to the Statute, not from equivalent domestic jurisdictional capacities. Accession to the Statute entails the commitment by member States to accept the Court's jurisdiction over crimes committed on its *territory*, as set out in article 12(2)(a).<sup>25</sup> Reservations are not foreseen or allowed, as stipulated in article 120 of the Statute. Practical considerations, such as

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<sup>22</sup> *Idem*, paras. 125-129.

<sup>23</sup> See the "*Amicus curiae* observations of Prof. William Schabas pursuant to Rule 103", [No. ICC-01/18-257](#), 30 July 2024, para. 9.

<sup>24</sup> See the *Summary of the Record of the 29<sup>th</sup> Meeting of 9 June 1998*, [UN Doc. A/CONF.183/C.1/SR.29](#), 20 November 1998, pp. 2-5, 9-12, 14. See also, *Summary of the Records of the Plenary Meetings*, [UN Doc. A/CONF.183/SR.1](#), 15 June – 17 July 1998, p. 89 *et seq.*

<sup>25</sup> See AMBOS (K.), *Rome Statute of the International Criminal Court: Article-by-Article Commentary*, C.H. Beck, 2022, 3<sup>rd</sup> edition, p. 1882.



*de facto* ability of a State to enforce its criminal jurisdiction may only be pertinent considerations when admissibility of a specific case is being assessed.<sup>26</sup> They are not relevant when jurisdiction is the issue at hand. In fact, the State's ability to investigate and prosecute is a case-by-case assessment and no 'category' or 'class' of prospective suspects can *a priori* be excluded based on characteristics such as nationality.

20. The question of jurisdiction *ratio personae* is addressed in article 12(2)(b) of the Statute, with the sole purpose of covering scenarios where statutory crimes may have been committed by nationals of a State Party outside of the territory of that State Party.<sup>27</sup> The absence of a specific provision to exclude nationals of non-member states who allegedly commit crimes under the Statute within the territory of a State Party suggests that such limitation is not foreseen.

21. Accepting that domestic limitations on enforcement jurisdiction could restrict the Court's competence over parts of a State's territory would compromise its very ability to investigate and prosecute crimes under the Statute and uphold justice - which is what international law, and specifically the principle of complementarity seeks to prevent. Complementarity focuses on the genuine willingness and capacity of States to conduct investigations and prosecutions, not on their enforcement capabilities. If a State is unable or unwilling to do so, the Court can intervene regardless of whether that State would have had the practical means to carry out an arrest or enforce a judgment.

22. In addition, adopting an approach that limits the Court's jurisdiction based on domestic legal capabilities would create fragmentation in international criminal law

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<sup>26</sup> See for instance, *Katanga*, oral decision of 12 June 2009, [No. ICC-01/04-01/07-T-67-ENG ET](#). Written reasons were subsequently delivered: "Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute)" (Trial Chamber II), [No. ICC-01/04-01/07-1213-tENG](#), 16 June 2009.

<sup>27</sup> The nationality basis of jurisdiction is well entrenched in the domestic law of the majority of States. By virtue of such State practice and *opinio juris* it is a permissive rule derived from international custom that establishes extraterritorial jurisdiction. See AMBOS (K.), Rome Statute of the International Criminal Court: Article-by-Article Commentary, C.H. Beck, 2022, 3<sup>rd</sup> edition, p. 1893 - referring to the *Lotus* case.

and result in impunity gaps. This is a path the Court has previously refused to take.<sup>28</sup> Ensuring the Court's ability to investigate and prosecute crimes in occupied territories, regardless of the alleged perpetrator's nationality, is crucial to preventing impunity and ensuring justice for Victims. This approach supports the Court's mandate to provide a consistent and effective legal framework for investigating and prosecuting international crimes, thus upholding the principles of international justice and human rights and ensuring a venue for the Victims to seek justice.

### 3. Victims' views and concerns

23. In her previous submissions on Court's jurisdiction in the territory of the State of Palestine, the Principal Counsel underscored the importance of honouring the obligations the Statute imposes on the Court *vis-à-vis* the Victims.<sup>29</sup> The Chamber, in its previous composition, albeit by majority, confirmed that the Court can exercise jurisdiction within the territory of the State of Palestine.<sup>30</sup> Victims posit that the matter should have ended there.

24. Raising the Oslo Accords as a limiting factor with respect to the jurisdiction *ratio personae* is an attempt to deprive Victims of recourse to justice. It is undeniably true that the State of Palestine is not able *de facto* to exercise jurisdiction in much of the occupied territory - way beyond the designated areas agreed upon in the 1990s - and that it is unable *de facto* to exercise criminal jurisdiction over Israeli nationals. However, these are political and possibly practical considerations, but no legal considerations that the Court should entertain at this stage. The Court's very existence is founded on the wish of the international community to end impunity and to answer to *de facto* domestic inabilities to investigate and prosecute the most heinous crimes.

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<sup>28</sup> See the "Decision on the Prosecutor's request for authorization of an investigation" (Pre-Trial Chamber I), [No. ICC-01/15-12](#), 27 January 2016, para. 6.

<sup>29</sup> See the "Observations on the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine' on behalf of unrepresented victims", [No. ICC-01/18-105](#), paras. 1 and 8.

<sup>30</sup> See the [Jurisdiction Decision](#), *supra* note 4, paras. 111-112.

25. Moreover, Victims underline that challenges to the Court's jurisdiction over potential cases within the Situation in the State of Palestine appear to be premature in the current circumstances, where arrest warrants are yet to be issued. According to the Statute's framework, such challenges effectively relate to the admissibility of a case and should only be considered at that stage of the proceedings.

26. Finally, given the nature of the crimes and events included in the warrants of arrest applications, Victims believe their full suffering is not yet reflected. They hope that the ongoing investigation will finally reveal the real extent of their victimisation, leading to further applications for arrest warrants and eventually opening a path for Victims to obtain the justice they have long sought.

Respectfully submitted.

A handwritten signature in black ink, reading "Paolina Massidda". The signature is written in a cursive style with a horizontal line underneath the name.

**Paolina Massidda**  
**Principal Counsel**

Dated this 12<sup>th</sup> day of August 2024

At The Hague, The Netherlands