

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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PRE-TRIAL CHAMBER I

Before: Judge Iulia Motoc (Presiding Judge)
Judge Reine Alapini-Gansou
Judge Nicolas Guillou

SITUATION IN PALESTINE

Public Document

**Views, Concerns and General Interests of Victims of the October 7 Attack under Article
68(3)**

Source: Yael Vias Gvirsman

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

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- [REDACTED from “Public redacted version of ‘Decision concerning the views, concerns and general interests of victims’, 30 July 2024, ICC-01/18-256-Conf”]

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Victim Representative of over 270 victims of Hamas and other Palestinian militias and accomplices attack launched on October 7, 2023, and considering taking and captivating hostages and their treatment in the Gaza Strip a continuous crime directly related to the attack, hereby respectfully communicates victim views and concerns under Article 68(3) of the Statute, pursuant to PTCI's *Public redacted version of 'Decision concerning the views, concerns and general interests of victims', 30 July 2024, ICC-01/18-256-Conf*,¹ whereby the PTC I invites in para, 9 of its Decision: “...persons who were previously designated by (potential) victims as their legal representatives, either in victims' application forms or in powers of attorney received by the Victims Participation and Reparations Sections of the Court, in the Situation in the State of Palestine, ... who have not done so thus far, [and who] wish to submit observations under article 68(3) of the Statute at this stage of the proceedings, ... may do so in accordance with the instructions set out at paragraph 7 of the present decision.”

Represented Victims' views, concerns and general interests of the victims herein represented center on the Court's jurisdiction at this stage of the procedure, victims' right to access to justice, and the need for justice to be done and to be seen to be done under the highest situation-aware approach, in an ostensibly politicized context Situation that calls for particular prudence, in preserving victims' rights not only when deciding WHETHER the Court and its organs will exercise its mandate but also in determining HOW this mandate will be carried out.

I. PROCEDURAL BACKGROUND

1. On 22 May 2018, Palestine submitted to the Prosecutor a letter of referral under articles 13 and 14 of the Statute, requesting the Prosecutor “*to investigate, in accordance with the temporal jurisdiction of the Court, past, ongoing and future crimes within the court's jurisdiction, committed in all parts of the territory of the State of Palestine*”.²

2. On 13 July 2018, the PTCI in its previous composition issued ‘Decision on Information and Outreach for the Victims of the Situation’³ where it underlined that “*for*

¹ ICC-01/18-256-Red 07-08-2024

² See Annex I to Presidency, Decision assigning the situation in the State of Palestine to Pre-Trial Chamber I (“Assignment Decision”), 24 May 2018, ICC-01/18-1-AnxI, p. 8 para.9.

³ ICC-01/18-2.

the Court to be able to properly fulfil its mandate, it is imperative that its role and activities are properly understood and accessible, particularly to the victims of situations and cases before the Court. Outreach and public information activities in situation countries are quintessential to foster support, public understanding and confidence in the work of the Court. At the same time, they enable the Court to better understand the concerns and expectations of victims, so that it can respond more effectively and clarify, where necessary, any misconceptions.”⁴The PTCI further recalled Article 21(3) of the Statute and relevant human rights instruments, whereby the application and interpretation of the law must be “*without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status*”.⁵

3. On 5 February 2021, the PTCI issued its ‘Decision on the ‘Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine’⁶ Judge Péter Kovács dissenting, whereby “*in view of [Palestine’s] accession... Palestine is a ‘State’ for the purposes of article 12(2)(a) of the Statute*”.⁷
4. On 20 May 2024, the ICC Prosecutor issued a statement⁸ [herein ‘the Prosecutor’s Statement’], declaring the “*on the basis of evidence collected and examined by my Office, I have reasonable grounds to believe that Yahya SINWAR (Head of the Islamic Resistance Movement (“‘‘Hamass’’’) in the Gaza Strip), Mohammed Diab Ibrahim AL-MASRI, more commonly known as DEIF (Commander-in-Chief of the military wing of Hamas, known as the Al-Qassam Brigades), and Ismail HANIYEH (Head of Hamas Political Bureau) bear criminal responsibility for [a list of] war crimes and crimes against humanity committed on the territory of Israel and the State of Palestine (in the Gaza strip) from at least 7 October...’’*”.⁹ The Office of the Prosecutor submitted that the “*...crimes against humanity charged were part of a widespread and systematic attack against the civilian population of Israel by Hamas and other armed groups pursuant to organisational policies. Some of these crimes, in our assessment, continue to this day.*”¹⁰ In the ‘same breath’, the Prosecutor stated

⁴ ICC-01/18-2, para 7 [emphasis added], based on ICC-ASP, “Strategic Plan for Outreach of the International Criminal Court”, 29 September 2006, ICC-ASP/5/12, https://www.icc-cpi.int/NR/rdonlyres/FB4C75CF-FD15-4B06-B1E3-E22618FB404C/185051/ICCASP512_English1.pdf, paras 1-3 (last accessed on 3 July 2018).

⁵ ICC-01/18-2, para 9.

⁶ ICC-01/18-143

⁷ ICC-01/18-143, para. 112.

⁸ See ICC Prosecutor Khan on application for arrest warrants in the situation in the State of Palestine, available at <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state>

⁹ Ibid.

¹⁰ Ibid.

he intended to request arrest warrants against PM of Israel Benjamin Netanyahu and Minister of Defense of Israel, Yoav Gallant.¹¹

5. On 10 June 2024, the United Kingdom filed a request to provide written *amicus curiae* observations under rule 103(1) of the Rules of Procedure and Evidence (the ‘Rules’)¹² based on the Oslo Accords and the *Nemo dat quod non habet* rule, no one gives what they do not have.¹³

6. On 27 June 2024, the Chamber granted the request by the United Kingdom,¹⁴ and further indicated that other requests for leave to file *amicus curiae* observations, if any, shall be filed by 12 July 2024.¹⁵

7. On 11 July 2024, the Office of Public Counsel for Victims (‘OPCV’) filed a request to appear before the Chamber pursuant to regulation 81(4) of the Regulations of the Court (the ‘Regulations’), submitting that the general interests of victims are affected by the present proceedings, and requesting to be allowed to submit written observations.¹⁶

8. On 12 July 2024, the Office of the Public Counsel for Defence (the ‘OPCD’) filed the OPCD Submissions, on namely that, its observations ‘can provide a necessary defence rights-focused perspective that would otherwise be lacking in the range of submissions to be heard by the Pre-Trial Chamber’.¹⁷ On 9 August 2024, the PTC I granted the OPCD request.¹⁸

9. On 7 August 2024, the PTC I issued *Public redacted version of ‘Decision concerning the views, concerns and general interests of victims’, 30 July 2024, ICC-01/18-256-Conf*,¹⁹ giving leave to *persons who were previously designated by (potential) victims as their legal representatives, either in victims’ application forms or in powers of*

¹¹ Ibid.

¹² Request by the United Kingdom for Leave to Submit Written Observations Pursuant to Rule 103, ICC-01/18-171-SECRET-Exp-Anx (reclassified as public on 27 June 2024, ICC-01/18-171-Anx).

¹³ Ibid. para 10. Or as phrased in continental legal systems, *nemo plus iuris transferre potest quam ipse habet and pacta tertiis nec nocent, nec prosunt*.

¹⁴ 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, ICC-01/18-173-SECRET (‘Order’) (public redacted version issued on the same date, ICC-01/18-173-Red). See also Decision on the ‘Request by the United Kingdom for Extension of Time Limit’, 4 July 2024, ICC-01/18-178.

¹⁵ Order para. 6.

¹⁶ OPCV Request to appear before the Chamber pursuant to regulation 81(4) of the Regulations of the Court, ICC-01/18-185-SECRET (the ‘OPCV Request’), paras 4, 21-24, 25. See also email from OPCV of 24 July 2024, at 14:31, requesting the OPCV Request to be reclassified as public.

¹⁷ ICC-01/18-201-SECRET, para. 4.

¹⁸ ICC-01/18-325.

¹⁹ ICC-01/18-256-Red..

attorney, ... who have not done so thus far,” to submit observations under article 68(3) of the Statute at this stage of the proceedings.

II. SUBMISSIONS

10. The present observations are filed PUBLIC as they do not contain any confidential information. Submissions are limited to the issue of Jurisdiction and HOW ICC mandate should be exercised considering the ostensibly political context.
11. The Undersigned Legal Representative of Victims (LRV) represents at least 265 victims²⁰ of atrocities committed by Hamas and other Palestinian militias on and since October 7, 2023. Victims include survivors, those murdered and their families; and hostages and their families. Represented Victims relate to at least 12 different crime bases (location of commission of crimes), within the framework of October 7 attack, including the on-going crimes of hostage taking, enforced disappearance and the treatment of those kept unlawfully captive in the Gaza Strip. At the time of filing the present observations, the majority of victims remain Internally Displaced in Israel, in circumstances directly linked with the October 7 Attack(s) that has caused (the foreseeable), bloody escalation in the Gaza Strip and on all of Israel’s borders, North and South and that is threatening to bring even more millions of civilians under the scourge of war.
12. Due to the fact hostages’ lives are under immediate threat, little or no information will be shared in this public submission on relevant Represented Victims.²¹
13. Notwithstanding this fact, Represented Victims count at least 133 women, 132 men, of which at least 40 are older persons aged 65 and above. Represented Victims include at least 37 children of which 20 are of a very young age (below 12). Children represented are either those who survived with their families after long hours of agony and harm to their mental and physical integrity, survivors who were orphaned during Hamas attack; or children who are directly affected by the crimes of hostage-taking and enforced disappearance.
14. Victim Observations under Article 68(3) of the Statute will relate to the following issues:, jurisdiction at this stage of the procedure, victim's right to access to justice and the need for justice to be done and seen to be done, especially taking into consideration the ostensibly politicized context of the Palestine Situation. Notably, the views, concerns and general

²⁰ 44 other victims turned to the Undersigned and their requests are pending, at the time of writing.

²¹ A recent alarming medical report will be communicated with the Prosecution *ex parte* and providing guidance by the Court, to the Court in this stage of the procedure.

interests expressed will be limited in scope seeing the high volume of submissions and the need not to repeat arguments made by other participants so as not to unduly burden the Court.

1. The question of jurisdiction at the stage of issuing an arrest warrant

15. Currently, the only decision in Situation Palestine relating to jurisdiction is PTC I's (previous composition) 'Decision on the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine'²² Judge Péter Kovács dissenting, whereby "*in view of [Palestine's] accession... Palestine is a 'State' for the purposes of article 12(2)(a) of the Statute*" [herein 'PTCI territorial jurisdiction Decision'].²³
16. As of rule, the stage of issuing an arrest warrant occurs *ex parte* only in the presence of the Prosecutor. The current proceedings mark an additional 'first' in that many other participants are given leave to file their observations. While the Undersigned LRV is fully cognisant of the issues at hand and the need to advance with caution, allowing the expression of views of amici or other entities that may be affected by the procedure, permitting approximately 70 observations is strenuous on the Court and on the Victims.
17. Notwithstanding this fact, the Undersigned wishes to express how highly appreciated it is, that in opening the procedure in this way, the PTC I was diligent to do so fairly and equally to all stakeholders, most of all to victims, namely by its Decision of 30 July 2024.²⁴
18. It is of the interest of Victims that jurisdiction is based on solid grounds and that generally, the Situation and future Cases comply with applicable law and case law of the Court. Managing expectations of affected individuals and the relevant populations is also in the interests of the Court. There is no advantage in moving forward unless jurisdiction and other conditions to exercising the Court's jurisdiction are met.
19. With this in mind, 'for conduct to fall within the jurisdiction of the Court, it must: (i) fall within the category of crimes set out in article 5 and defined in articles 6 to 8 bis of the Statute (jurisdiction *ratione materiae*); (ii) fulfil the temporal conditions specified in article 11 of the Statute (jurisdiction *ratione temporis*); and (iii) meet one of the two requirements contained in article 12(2) of the Statute (jurisdiction *ratione loci* or *ratione personae*)'.²⁵

²² ICC-01/18-143

²³ ICC-01/18-143, para. 112.

²⁴ ICC-01/18-256-Red [Redacted version published 7 August 2024].

²⁵ See for example 2019 PTC Decision in Bangladesh Situation, ICC-01/19-27, para. 40. Kenya Article 15 Decision, ICC-01/09-19-Corr, para. 39; Burundi Article 15 Decision, ICC-01/17-9Red, para. 31.

20. For as far as jurisdiction exists, it must be applied equally to all victims²⁶ who meet the necessary conditions under the Statute and Rules of Procedure and Evidence of the Court. Therefore, the only logical conclusion from PTCI territorial jurisdiction Decision is that the Court has jurisdiction *ratione personae* on perpetrators who are national of that State (Article 12(2)a of the Statute).
21. This is true while taking into account, we are at a very early stage of the procedure, where the full procedure is *ex parte*, and whereby PTCI territorial jurisdiction Decision remains unchallenged, Palestine's accession has not been challenged under article 119(2), and finally a Suspect or Accused has not exercised his/her 'special remedy', i.e. the right to challenge jurisdiction under Article 19.²⁷ In any of the latter events, the LRV reserves Victims' right to express their views, concerns and general interests and the views herein bear no prejudice to exercise this right.
22. The LRV notes nonetheless that Palestine Observations under Rule 103²⁸ expressed no reservation to the Court's exercise of jurisdiction over its' nationals, namely Yahya Sinwar.
23. In any case, the Prosecutor is not limited by a state referral in terms of the crimes, perpetrators to be investigated and prosecuted.²⁹
24. Considering the above, the LRV respectfully asks the Court to reach the only reasonable conclusion that of the Court's jurisdiction over nationals of Palestine, against whom the Prosecutor is asking the PTC I to issue arrest warrants.

1. The right of access to justice

25. The question raised by the UK in its request to file submissions under Rule 103 relates to the Oslo Accords, international agreements that are opposable also to third parties even when considering the mere fact that it is on the basis of the Oslo Accords that the Palestinian Authority (PA) was established, and otherwise, what would be the PA's 'act of birth' and right of standing in international fora, including before this Court?
26. The Oslo Accords also apply under the internal laws of Palestine. A State's internal laws are relevant to the issue of jurisdiction and have been taken into account in previous cases before the Court.³⁰ One illustration exists in the Bangladesh Situation, whereby the Court examined laws of several countries, whereby these laws expanded a State's jurisdiction to

²⁶ ICC-01/18-2, para 7.

²⁷ ICC-01/04-01/10-451, para. 11.

²⁸ ICC-01/18-291.

²⁹ ICC-01/04-01/10-451, para 27.

³⁰ Or on complementarity, Art 17-19 of the Statute.

crimes committed in other territories, as long as at least one component of the crime was committed under its territory, [or against its citizens or on the basis of another nexus].³¹

27. When deciding to exercise the Court's jurisdiction, it did so expressly after having examined valid laws in the Bangladesh legal system, under Article 21 applicable law of the Statute, whereby Article 21(c)2, of the Statute calls on the Court to take into consideration the laws of the State that would regularly exercise jurisdiction are also taken into account.³²
28. The full effect of the Oslo Accords on the Court's jurisdiction will be decided solely by the Court as it has the *competence de la competence* and on the basis of its laws and practices in previous cases before the Court, including in precedential issues; and in line with international law.
29. Lastly, the LRV deems it inappropriate to argue on questions that would limit the access to justice of other victims in the Situation. Indeed, unlike what some will contend, there is no competition between the victims and all victims are equal before the Court. This will be discussed further in the third submission.

3. Justice has to be done and has to be seen to be done

32. The five arrest warrants requested by the Prosecutor, of which two may have become void due to the alleged death of the suspects, are SEPARATE in all aspects, including because they depend on a different trier of fact, law and supporting evidence.
33. Victims of Hamas and other Palestinian militias October 7 attack(s) received the Prosecutor's Statement issued 20 May 2024, with great emotion, the importance of which is difficult to describe. Hearing the Prosecutor recognize the 'unfathomable pain through calculated cruelty and extreme callousness' by which, Hamas and other perpetrators' elective crimes were committed a crucial milestone in their journey to rebuild their lives, lives shattered in a day, and continuously so for 115 hostages and their families.
34. Regretfully, the Prosecutor announced his intention to request the arrest warrants against Prime Minister Benjamin Netanyahu and Minister of Defense, Yoav Gallant, in the 'same breath'. While the Represented Victims and the Undersigned LRV cast no doubt as to the, highest professional standards and good intentions of the Prosecutor when making this statement, surely with the view to send out a message that 'no one is above the law', and considering the alleged pressures in this ostensibly politicized Situation.

³¹ See Bangladesh, PTC decision ICC-RoC46(3)-01/18-37 06-09-2018.

³² See Bangladesh, PTC decision ICC-RoC46(3)-01/18-37 06-09-2018, paras 67-68, based on Observations of the Bangladeshi Non-Governmental Representatives, ICC-RoC46(3)-01/18-21, paras 9-20 paras 106-111

35. Nevertheless, the single Prosecutor Statement created a forced and artificial symmetry between the alleged perpetrators. Certainly, there is no equivalence in fact, law or supporting evidence, nor in the nature and intention of the crimes alleged. Yahya Sinwar and his accomplices is acting with a specific intent, to cause as much death, trauma and agony to as many innocent victims and to future generations.

36. The lack of actually symmetry is obvious, especially to practitioners within and before the Court. However, justice must be done to be seen to be done. Outreach and trust building is of essence to the accomplishment of the Court's mandate. The Situation at hand is particularly complex and the trust-building process between the population in Israel and the ICC is not a self-evident one, it is a mission the Undersigned has taken upon herself in the last decade and one she is actively promoting daily with the Represented Victims and the affected population beyond.

37. While all victims are equal, all suspects and accused are not in the sense that, the Israeli suspects are an acting Head of State and acting Minister of Defense of a striving, albeit in crisis, democracy. The Hamas suspects are hiding in tunnels or are seeking safe havens in repressive regimes.

38. This brings us to two final remarks. First, if, as it was alleged by Secretary of State Blinken, the Prosecutor's Statement was issued whereas the Prosecution Investigators were boarding a plane to Israel to meet directly with the representatives of the State of Israel and the alleged suspects, than the decision to request arrest warrants and to make this decision public, seems a decision made in haste.

39. Second, *de facto* the decision to request the arrest warrants and to make the statement 'in one breath' is prejudicial to victims of Hamas and others. This is true based on the predictable reality that an arrest warrant requested against an acting Head of State, in a democracy at war, of a State that is not a State Party, was bound to raise a sensational response.

40. In fact, on the day of the Prosecutor's Statement, the Undersigned was contacted by numerous international and domestic media and press only to be asked one question: "What do you think of the Prosecutor's Statement to request the arrest warrants against PM and Minister of Defense?." If the LRV for Victims of Hamas and co. crime is not asked about arrest warrants against Hamas leaders, who is?

41. The LRV immediately initiated a communicated with the Victims she represents to underline their achievement and that they were heard and the Prosecutor believes and recognized them. It was crucial to communicate before the Victims would fall under a tsunami of media underscoring arrest warrants are asked against the PM. What we ask, is that if arrest

warrants are based in law and in fact, let them be issued, but give Hamas and co Victims ‘their moment’. If we can reach out directly to Victims we represent, over 50,000 direct victims and over 150,000 internally displaced, are more difficult to communicate with under a short span of time.

III. CONCLUSIONS

42. In light of the above, the Victims of October 7 Hamas and co. attacks request that

a. if there is jurisdiction, it be applied *rationae personae* to nationals of Palestine who bear responsibility for atrocities committed on October 7 2023, and to this day

b. that any decision issued by the Court be issued SEPARATELY in relation to arrest warrants relating to Israeli nationals- (relevant to Victims based in the Gaza Strip); and to Palestinian nationals bearing responsibility for the crimes committed against Represented Victims herein.

c. Providing guidance is provided by the Court, an alarming recent report on released hostages severe medical state, bearing on the urgent need to release all hostages still in captivity, the LRV will communicate the report *ex parte and SECRETLY* seeing it contains sensitive information relating to Victims’ privacy and dignity.



Yael Vias Gvirsman

On behalf of Victims of October 7 Attack (s)
Committed by Hamas and other Palestinian Militias

Dated this 12 August 2024

At Tel Aviv, Israel