

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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PRE-TRIAL CHAMBER I

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

SITUATION IN THE STATE OF PALESTINE

Public Document

Amicus Curiae Observations by Civil Society Organizations Pursuant to Rule 103

Source: Open Society Justice Initiative
European Center for Constitutional and Human Rights
REDRESS Trust
Human Rights Watch
Amnesty International

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

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I. INTRODUCTION

1. The Open Society Justice Initiative, the European Center for Constitutional and Human Rights, the REDRESS Trust, Human Rights Watch, and Amnesty International (collectively, the ‘*Amici*’) hereby submit observations pursuant to rule 103(1) of the Rules of Procedure and Evidence (the ‘Rules’) and Pre-Trial Chamber I (the ‘Chamber’)’s ‘Decision on requests for leave to file observations pursuant to rule 103 of the Rules of Procedure and Evidence.’¹

2. These proceedings were triggered by the ‘Request by the United Kingdom for Leave to Submit Written Observations Pursuant to Rule 103’ (the ‘UK Request’),² which the United Kingdom (the ‘UK’) has since reportedly withdrawn.³ The *Amici* respectfully submit that any withdrawal by the UK should bring the present rule 103 proceedings to a close and that the Chamber need not consider further observations. Given the extraordinary nature of rule 103 proceedings, substitution is neither contemplated by the Rules or practice, nor is it desirable. Permission for others to file did not grant a standalone right to take over proceedings initiated by the UK. However, if the Chamber remains inclined to maintain the current rule 103 proceedings, the *Amici* note that the UK Request was narrowly focused on issues arising from the Oslo Accords.⁴ The current proceedings should therefore be similarly narrowly focused and not lead to reconsideration of other issues that had been decided by the Chamber in its ‘Decision on the ‘Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine’’ (the ‘Jurisdiction Decision’).⁵ The following observations are submitted should the Chamber decide to maintain the current proceedings.

II. LACK OF LEGAL STANDING TO CHALLENGE THE JURISDICTION OF THE COURT OR ADMISSIBILITY OF THE CASE

A. The Chamber Had Not Solicited Observations Pursuant to Rule 58(2) to Satisfy Itself of Its Own Jurisdiction or Determine Admissibility under Article 19(1)

¹ Decision on requests for leave to file observations pursuant to rule 103 of the Rules of Procedure and Evidence, 22 July 2024, ICC-01/18-249, para. 11.

² Request by the United Kingdom for Leave to Submit Written Observations Pursuant to Rule 103, 10 June 2024, ICC-01/18-171-Anx (‘UK Request’).

³ *Britain drops its challenge to ICC arrest warrants for Israeli leaders*, The Guardian, 26 July 2024, available at <<https://www.theguardian.com/law/article/2024/jul/26/britain-drops-challenge-icc-arrest-warrants-israeli-leaders-netanyahu-gallant>>. The *Amici* note also that, according to the public record of the case, the UK has not filed its observations due on 26 July 2024 in accordance with Chamber’s Decision on the ‘Request by the United Kingdom for Extension of Time Limit,’ 4 July 2024, ICC-01/18-178.

⁴ The term ‘Oslo Accords’ in this filing refers to the Interim Agreement on the West Bank and the Gaza Strip, 28 September 1995, UN Doc. A/51/889, S/1997/357 (1997) (‘Oslo II’).

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

3. Under article 19(1), the Court has an inherent power of *Kompetenz-Kompetenz* to satisfy itself of its own jurisdiction,⁶ including making ‘an initial determination on whether the case against [the accused] fall[s] within the jurisdiction of the Court’ before issuing an arrest warrant.⁷ Rule 58(2) gives the Chamber discretion to decide on appropriate measures for the proper conduct of proceedings, such as whether to solicit written observations, when it acts under article 19. Although the UK had purported to base its request on article 19(1),⁸ the Chamber had not invoked this provision prior to the UK Request.

4. While the Court has inherent powers under article 19(1), such powers must be carefully interpreted and should not be triggered by procedures in rule 103 that bypass other provisions in the Rome Statute or the Rules. As the Appeals Chamber has found, the Chamber’s ‘broad discretion over the conduct of proceedings [...] is not unlimited’ and ‘has to be exercised in conjunction with other legal provisions.’⁹ The contrary would create a dangerous precedent, whereby states and other entities could abuse rule 103(1) to circumvent standing. As the Appeals Chamber has held: ‘The law does not readily condone to be done through the back door something it forbids to be done through the front door.’¹⁰

B. Article 19(2) Provides that Only the Accused and ‘Interested States’ Have Legal Standing to Raise Jurisdictional or Admissibility Challenges

5. While the UK Request does not refer to article 19(2), the UK and other *amici* who may be introducing jurisdictional or admissibility arguments through rule 103(1) observations must meet the article 19(2) requirements to do so.

6. The Court has made clear that, in addition to the accused or a person for whom a warrant of arrest or a summons to appear has been issued,¹¹ only ‘interested States’ can bring article 19(2) challenges. In the *Afghanistan* situation, the Appeals Chamber found that ‘interested States’ could raise issues with respect to ‘certain agreements entered into between the United States and Afghanistan’ ‘should the circumstances require.’¹² Similarly, in its Jurisdiction

⁶ Hall, Christopher Keith and Nsereko, Daniel D. Ntanda and Ventura, Manuel J., *Article 19: Challenges to the Jurisdiction of the Court or the Admissibility of a Case* (31 May, 2015), in Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition (Munich/Oxford/Baden-Baden, C.H. Beck/Hart Publishing/Nomos, 2016), pp. 849-898 (internal citations omitted).

⁷ *Situation in the Democratic Republic of Congo*, Decision on the Prosecutor's Application for Warrants of Arrest, Article 58, 10 February 2006, ICC-01/04-520-Anx2, para. 18.

⁸ UK Request at para. 3.

⁹ *The Prosecutor v Gbagbo*, Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I on jurisdiction and stay of the proceedings, 12 December 2012, ICC-02/11-01/11-321, para. 39.

¹⁰ *The Prosecutor v Al Bashir*, Judgment in the Jordan Referral re Al-Bashir Appeal, 6 May 2019, ICC-02/05-01/09-397, para. 4.

¹¹ Article 19(2)(a).

¹² *Situation in Afghanistan*, Judgment on the appeal against the decision on the authorization of an investigation into the situation in the Islamic Republic of Afghanistan, 5 March 2020, ICC-02/17-138, para. 44.

Decision, the Chamber underscored that ‘arguments regarding the Oslo Agreements [...] may be raised by interested States based on article 19 of the Statute.’¹³

7. The plain language of article 19(2)(b) concerning an ‘investigating or prosecuting State’ ‘can only include those States that have vested their courts with jurisdiction under national law over the relevant case’¹⁴ and that have taken steps to investigate or prosecute the same conduct.¹⁵ This is confirmed by the provision’s drafting history: it is ‘narrower and more precise’ than the definition used in prior versions of the Statute.¹⁶ The UK and other states granted leave as *amici* do not appear to be investigating or prosecuting the cases that are subject to the arrest warrant applications announced by the Prosecutor on May 20, 2024 (‘Arrest Warrant Applications’).¹⁷

8. Similarly, the reference in article 19(2)(c) to a State whose ‘acceptance of jurisdiction is required under article 12’ implies a state on whose territory the crimes were committed or whose nationals might be accused of the crimes.¹⁸ In this respect, out of those states authorized to make amicus submissions only the State of Palestine appears to have standing to bring a challenge under article 19(2)(c).

III. THE OSLO ACCORDS ARE IRRELEVANT TO A DECISION ON THE ARREST WARRANT APPLICATIONS

9. In its Jurisdiction Decision, the Chamber decided that the Court had territorial jurisdiction over Gaza and the West Bank, including East Jerusalem.¹⁹ The International Court of Justice (the ‘ICJ’) recently found that the Occupied Palestinian Territory ‘constitutes a single territorial unit,’ ‘which encompasses the West Bank, East Jerusalem and the Gaza Strip.’²⁰ The ICJ added that the Gaza Strip remains occupied, even after Israel’s 2005 withdrawal and ‘more so since’ 7 October 2023.²¹ The current conflict thus has no bearing on the Court’s territorial

¹³ Jurisdiction Decision at para. 129.

¹⁴ Hall et al. at para. 26.

¹⁵ *The Prosecutor v Ruto et al.*, Judgement on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute,’ 30 August 2011, ICC-01/09-01/11-307, para. 40.

¹⁶ Hall et al. at para. 26 and n. 85.

¹⁷ Statement of ICC Prosecutor Karim A. A. Khan KC: Applications for arrest warrants in the situation in the State of Palestine, 20 May 2024, available at <<https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state>>.

¹⁸ Hall et al. at para. 28.

¹⁹ Jurisdiction Decision at para. 118.

²⁰ International Court of Justice, *Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion*, 19 July 2024 (‘ICJ 2024 Advisory Opinion’), at para. 78.

²¹ *Ibid* at paras. 93-94.

jurisdiction. Nor do the circumstances require the Chamber to make an initial determination that the case is admissible before issuing arrest warrants.²²

A. Arrest Warrant Applications Are Not a Pre-Condition for Re-Examining Jurisdiction

10. In the request giving rise to the current proceeding, the UK selectively cited paragraph 131 of the Jurisdiction Decision to suggest that the application for arrest warrants was a ‘pre-condition’ after which the Chamber ‘will [emphasis added] ‘examine further questions of jurisdiction.’²³ However, the Chamber *did not* indicate in its Jurisdiction Decision that it would *necessarily* do so at this juncture. Rather, the Chamber stated that upon an article 58 application or in the event of an article 19(2) challenge, the Chamber ‘will be in a position to examine further questions of jurisdiction which *may* arise at that point in time [emphasis added].’²⁴ Crucially, paragraph 131 of the Jurisdiction Decision must be read in line with articles 17, 18, and 19 and should not be interpreted as suggesting procedures beyond the Statute’s provisions.

11. Applications for arrest warrants should not be considered a ‘pre-condition’ to further examine questions of jurisdiction beyond the Chamber’s regular consideration of such issues under article 58. Furthermore, states or other entities should not be permitted to inappropriately [re-]litigate or [re-]submit observations pursuant to rule 103(1) where such matters have already been resolved by the Jurisdiction Decision.

B. The Chamber Need Not Address the Oslo Accords to Satisfy Itself of Its Jurisdiction in the Context of an Article 58 Determination

12. The conditions for a Chamber’s determination under article 58 are limited and need not extend to consideration of the Oslo Accords. Previous article 58 determinations have consistently applied a three-criteria test of jurisdiction, assessing (i) jurisdiction *ratione materiae*, (ii) jurisdiction *ratione temporis*, and (iii) whether one of the alternative criteria of article 12 of the Statute is satisfied, namely that the crime was committed on the territory of a State Party or by a national of a State Party.²⁵

²² *Situation in the Democratic Republic of Congo*, Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled ‘Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58’, 12 July 2006, ICC-01-04-169-US-Exp, paras. 1, 40-53.

²³ UK Request at paras. 1, 10, 19.

²⁴ Jurisdiction Decision at para. 131.

²⁵ *The Prosecutor v Mbarushimana*, Decision on the Prosecutor’s Application under Article 58, 13 July 2012, ICC-01/04-01/12-1-Red, para. 10; *The Prosecutor v Germain Katanga*, Warrant of arrest for Germain Katanga, 2 July 2017, ICC-01/04-01/07-1-tENG, para. 14; *The Prosecutor v Jean-Pierre Bemba Gombo*, Decision on the Prosecutor’s Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, 12 June 2008, ICC-01/05-01/08-14-tENG, para. 12; *The Prosecutor v Alfred Yekatom*, Warrant of Arrest for Alfred Yekatom, 17 November 2018, ICC-01/14-01/18-1-Red, para. 4. See also Hall and Ryngaert in Triffterer, *Article 58*, at 3; Hall et al. in Triffterer, *Article 19*, at 5.

13. Given that the Court previously confirmed territorial jurisdiction in its Jurisdiction Decision, for the purposes of issuing an arrest warrant, the Chamber need only satisfy itself that one of article 12's criteria is fulfilled: whether the crimes have been committed on the territory of Palestine and whether they are within the authorized scope of the Prosecutor's investigation.²⁶ The Oslo Accords do not inform the Court on either of these criteria.

IV. THE OSLO ACCORDS DO NOT PREVENT THE ICC FROM EXERCISING JURISDICTION IN THIS SITUATION

14. The UK's Request, which gave rise to these proceedings, indicated that the UK wished to address '[w]hether the Court can exercise jurisdiction over Israeli nationals, in circumstances where Palestine cannot exercise criminal jurisdiction over nationals pursuant to the Oslo Accords.'²⁷ This suggests a misguided argument that the ICC's jurisdiction derives from the 'delegation' of jurisdiction by States Parties and that it is limited by the legal rule *nemo dat quod non habet* ('no one can give what he does not already have').

A. The ICC Does Not Derive Its Jurisdiction from Delegation

15. The ICC's jurisdiction is not the result of 'delegation' or 'transfer' by States Parties of their jurisdiction.²⁸ Pursuant to article 12(1) of the Rome Statute, states parties *accept* the jurisdiction of the Court. In the present situation, Palestine is a state party, and has therefore accepted the Court's jurisdiction, which cannot be limited by the Oslo Accords. The Court's jurisdiction is 'a unified regime established by statute.'²⁹ 'Based on the principle of effectiveness, it would indeed be contrary to the Statute to allow an entity to accede to the Statute and become a State Party, but to limit the Statute's inherent effects over it.'³⁰ Accepting that the Court's jurisdiction can be limited by national laws or bilateral accords would be to misconceive the nature of Rome Statute basis for jurisdiction and would set a dangerous precedent whereby states could conclude bilateral agreements to trump the Court's jurisdiction.

²⁶ *Prosecutor v Mbarushimana*, Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana, 29 September 2010, ICC-01/04-01/10-1, para. 4.

²⁷ UK Request at para. 27(i).

²⁸ Leila Nadya Sadat, *The Conferred Jurisdiction of the International Criminal Court*, 99 *Notre Dame L. Rev.* 549 (2024), at pp. 552-53; *see also* Haque, *Just Security*.

²⁹ Adil Ahmad Haque, "The International Criminal Court's Jurisdiction in Palestine and the 'Oslo Accords Issue,'" *Just Security*, 9 July 2024, available at <<https://www.justsecurity.org/97584/israel-palestine-icc-oslo-accords/>>.

³⁰ Jurisdiction Decision at para. 102. 'Indeed a State party cannot accept the Court's jurisdiction or its exercise in part, that is, over some individuals, territory or crimes but not others,' *see* Haque, *Just Security*.

16. The Court enforces the *ius puniendi* of the international community with respect to crimes within its jurisdiction.³¹ The negotiations of the Rome Statute built on the international community's prior experience setting up international criminal tribunals³² and vested the Court with 'inherent jurisdiction' over core crimes.³³ The ICC also has independent legal personality as an international organization³⁴ and has an 'autonomous will' distinct from its members.³⁵

17. Indeed, cases may arise in which the Court can exercise its jurisdiction even though a State Party cannot exercise its own jurisdiction.³⁶ For example, 'the Court does not have to establish the existence of matching legislation at the national level before its jurisdiction can be exercised in a particular case.'³⁷ Such a requirement would go against the rationale of complementarity and create impunity gaps.

18. The Court's jurisprudence confirms that its jurisdiction is not based on delegation. In deciding on jurisdiction over high-ranking officials in the *Al-Bashir* case, the Appeals Chamber rejected a sovereigntist (or delegation) approach, finding that immunities do not apply before international courts since they 'act on behalf of the international community as a whole.'³⁸ The Court's decision in the *Bangladesh/Myanmar* situation noted that 'when States delegate authority to an international organisation they transfer all the powers necessary to achieve the purpose for which the authority was granted to the organisation.'³⁹ While the decision refers to 'delegation' and 'transfer,' a contextual reading of that decision confirms that 'States Parties conferred authority upon the Court to exercise [...] criminal jurisdiction accepted under international law.'⁴⁰

³¹ Claus Kreß, *Article 98: Cooperation with Respect to Waiver of Immunity and Consent to Surrender*, in *ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: ARTICLE-BY-ARTICLE COMMENTARY* 2585, 2649 (Kai Ambos ed., 4th ed. 2022). See also Carsten Stahn, *Response: The ICC, Pre-existing Jurisdictional Treaty Regimes, and the Limits of the Nemo Dat Quod Non Habet Doctrine—A Reply to Michael Newton*, 49 *Vand. J. Transnat'l L.* 443, 447 (2016).

³² In this respect, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia confirmed, based on the idea of 'incidental' or 'inherent' jurisdiction, that the establishment of the Tribunal entailed the creation of an autonomous judicial organ and a new 'self-contained system,' Sadat at pp. 564-65, citing Int'l Crim. Trib. for the Former Yugoslavia, Tadić Interlocutory Appeal, Case No. IT-94-1-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paras. 11, 38. This built on the precedent of the International Military Tribunal for Nuremberg and the Nuremberg Principles, which 'reaffirmed that the international community had the right to create law as a matter of prescriptive jurisdiction' and establish the 'direct' enforcement of international criminal law', see Sadat at p. 563-64, citing M. Cherif Bassiouni, *INTRODUCTION TO INTERNATIONAL CRIMINAL LAW* 418 (2003), pp. 5, 18-21.

³³ Sadat at pp. 567-68.

³⁴ Rome Statute, article 4(1); see also Sadat at pp. 571-72.

³⁵ Sadat at pp. 573-77.

³⁶ *Ibid* at p. 582.

³⁷ Stahn at pp. 448-49, citing Rod Rastan, *The Jurisdictional Scope of Situations Before the International Criminal Court*, 23 *Crim. L. F.* 1, 20 (2012).

³⁸ Sadat at pp. 593-94, citing ICC-02/05-01/09-397, para. 115. See also International Court of Justice, *Democratic Republic of the Congo v Belgium*, 14 February 2002, para 61.

³⁹ *Situation in Bangladesh/Myanmar*, Decision Pursuant to Article 12 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, 14 November 2017, ICC-01/19-27, para. 60.

⁴⁰ Sadat at p. 597.

B. *The Oslo Accords Do Not Limit the ICC's Jurisdiction*

19. Even if *arguendo*, the Court considered that the Oslo Accords were relevant to the jurisdiction of the Court (they are not), the Court should distinguish between a state's prescriptive jurisdiction (a state's right under international law to make law and criminalize conduct) and enforcement jurisdiction (a state's coercive, compliance, or custodial power).⁴¹

20. Prescriptive jurisdiction cannot be limited by bilateral agreements, even where a state undertakes not to exercise *its* domestic enforcement jurisdiction in given circumstances.⁴² As such, even if (as several commentators suggest) the Oslo Accords might be relevant to the State of Palestine's *enforcement* jurisdiction over Israeli nationals on its territory,⁴³ 'they did not strip Palestinians of their inherent jurisdiction over the [territory of the State of Palestine].'⁴⁴

21. Any potential conflicting international obligations between the Rome Statute and bilateral agreements, such as an undertaking not to *enforce* jurisdiction under Status of Forces Agreements (SOFAs) or the Oslo Accords, would be covered by Article 98(2) of the Rome Statute. Notably, article 98(2) refers to 'requests for surrender' *not* the issuance of arrest warrants.

22. In discussing the Oslo Accords, the Jurisdiction Decision acknowledged the distinction between jurisdiction and cooperation, referring explicitly to article 98 and the above rationale: 'The inclusion of [articles 97 and 98] appear[s] to indicate that the drafters expressly sought to accommodate any obligations of a State Party under international law that may conflict with its obligations under the Statute.'⁴⁵

23. The Jurisdiction Decision went on to refer to the Court's jurisprudence in the *Afghanistan* situation on the effect of SOFAs, in which the Appeals Chamber distinguished between article 19 jurisdictional challenges and articles 97 and 98 safeguards.⁴⁶ In the *Afghanistan* situation, the Pre-Trial Chamber also recognized the irrelevance of SOFAs to

⁴¹ Roger O'Keefe, "Quid," Not "Quantum": A Comment on "How the International Criminal Court Threatens Treaty Norms," 49 Vand. L. Rev. 433 (2021), at p. 436; *see also* Stahn at pp. 446, 450-52; Yassir Al-Khudayri, "Are the Oslo Accords Still Valid? For the ICC and Palestine, It Should Not Matter," *Opinio Juris*, 6 October 2020, available at <<https://opiniojuris.org/2020/06/10/are-the-oslo-accords-still-valid-for-the-icc-and-palestine-it-should-not-matter/>>; Ahmed Abofoul, "The Oslo Accords and the International Criminal Court's Jurisdiction in the Situation in the State of Palestine," *Opinio Juris*, 28 July 2020, available at <<https://opiniojuris.org/2020/07/28/the-oslo-accords-and-the-international-criminal-courts-jurisdiction-in-the-situation-in-the-state-of-palestine>>.

⁴² O'Keefe at p. 438.

⁴³ *See, e.g.*, Stahn at p. 48; Kai Ambos, "Palestine, UN Non-Member Observer Status and ICC Jurisdiction," *EJIL:Talk!*, 6 May 2014, available at <<https://www.ejiltalk.org/palestine-un-non-member-observer-status-and-icc-jurisdiction>>; Al-Khudayri, *Opinio Juris*; Ahmed Abofoul, *Opinio Juris*.

⁴⁴ Al-Khudayri, *Opinio Juris*; *see also* Yassir Al-Khudayri, "Procedural Haze: The ICC's Jurisdiction over the Situation in Palestine," *Palestine Yearbook of Int'l Law* 20 (2019) 117-147, p. 130.

⁴⁵ Jurisdiction Decision at paras. 127-28. In this respect, Stahn notes that article 98 belongs to part 9 of the Statute governing cooperation, and therefore is not relevant to jurisdiction, *see* Stahn at p. 451.

⁴⁶ Jurisdiction Decision at para. 128 (citing ICC-02/17-138 para. 44).

jurisdiction decisions, finding that neither the nationality of the potential accused nor a SOFA between the United States and Afghanistan prevented the Court from exercising jurisdiction.⁴⁷

C. *The Fourth Geneva Convention Prevents the State of Palestine from Renouncing Criminal Jurisdiction or Peremptory Rights*

24. As the ICJ recently reiterated, ‘Israel’s powers and duties in the Occupied Palestinian Territory are governed by the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949’⁴⁸ (the ‘Fourth Geneva Convention’),⁴⁹ as well as the Hague Regulations of 1907 concerning the Laws and Customs of War on Land, which ‘have become part of customary international law.’⁵⁰

25. Under article 146(2) of the Fourth Geneva Convention, the territorial state, in this case the State of Palestine, is under an obligation to search for, try, or extradite persons suspected of committing grave breaches, regardless of their nationality.⁵¹ The Prosecutor’s Arrest Warrant Applications—as described in a public statement—unequivocally include charges that amount to ‘grave breaches.’ The Oslo Accords do not curtail these obligations.⁵² Furthermore, an argument that Palestine has renounced its jurisdiction through the Oslo Accords would also be contrary to its obligations under article 148 of the Fourth Geneva Convention.⁵³

26. In addition, with respect to Israel’s obligations as the occupying power, the ICJ has found that, under article 43 of the Hague Regulations and article 64 of the Fourth Geneva Convention, an occupying power is obliged to ‘respect the law in force in the occupied territory unless absolutely prevented from doing so.’⁵⁴ ‘[T]he law of occupation does not deprive the local population’s civilian institutions in the occupied territory of the regulatory authority that they may have. Rather, it invests in the occupying power a set of regulatory powers on an exceptional basis and on specific enumerated grounds.’⁵⁵ However, Israel has exercised its regulatory authority in the Occupied Palestinian Territory inconsistently with these obligations

⁴⁷ *Situation in the Islamic Republic of Afghanistan*, Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, 12 April 2019, ICC-02/17-33, paras. 50, 58-59.

⁴⁸ ICJ 2024 Advisory Opinion at para. 96.

⁴⁹ Both the State of Palestine and Israel are parties to the Fourth Geneva Convention.

⁵⁰ ICJ 2024 Advisory Opinion at para. 96.

⁵¹ Article 146(2) creates an ‘obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts’ or ‘hand such persons over for trial to another High Contracting Party.’

⁵² Al-Khudayri, *Opinio Juris*.

⁵³ ‘No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of [grave breaches] referred to in the preceding Article.’

⁵⁴ ICJ 2024 Advisory Opinion at para. 134.

⁵⁵ *Ibid.*

by extending its domestic jurisdiction over the occupied territory, including through the Oslo Accords.⁵⁶

27. The Oslo Accords are considered a ‘special agreement’ within the terms of article 7 of the Fourth Geneva Convention,⁵⁷ which prescribes that ‘[n]o special agreement shall adversely affect the situation of protected persons [...], nor restrict the rights which it confers upon them.’⁵⁸ The Oslo Accords reiterate that ‘[n]either Party [would] be deemed, by virtue of having entered into [them], to have renounced or waived any of its existing rights, claims or positions.’⁵⁹ As the ICJ has recently underscored, the parties to the Oslo Accords agreed to ‘exercise their powers and responsibilities pursuant to’ the Accords ‘with due regard to internationally-accepted norms and principles of human rights and the rule of law.’⁶⁰

28. Articles 8 and 47 of the Fourth Geneva Convention state further that protected persons cannot renounce or be deprived of the rights or benefits of the Convention by any ‘special agreement.’⁶¹ In taking into account article 47, the ICJ recently found that ‘the Oslo Accords cannot be understood to detract from Israel’s obligations under the pertinent rules of international law applicable in the Occupied Palestinian Territory.’⁶² Nor can the Oslo Accords extinguish the State of Palestine’s rights and obligations.

D. Article 21(3) Requires the Court to Interpret the Statute Consistently with Human Rights

29. An interpretation of the Rome Statute’s provisions on jurisdiction must adhere to article 21(3), which provides that the Court must apply and interpret the Rome Statute and its sources of law consistently with internationally recognized human rights. In this regard, victims of crimes under international law committed on Palestinian territory must enjoy rights to remedy

⁵⁶ *Ibid* at paras. 139-41.

⁵⁷ Valentina Azarov and Chantal Meloni, ‘Disentangling the Knots: A Comment on Ambos’ ‘Palestine-‘Non-Member Observer Status’ and ICC Jurisdiction’, *EJIL:Talk!*, 27 May 2014, available at <<https://www.ejiltalk.org/disentangling-the-knots-a-comment-on-ambos-palestine-non-member-observer-status-and-icc-jurisdiction/>>.

⁵⁸ Fourth Geneva Convention, Article 7(1). See also Al-Khudayri, *Opinio Juris*; Abofoul, *Opinio Juris*; Vera Gowlland-Debbas, ‘Note on the Legal Effects of Palestine’s Declaration Under Article 12(3) of the ICC Statute,’ in *Is there a Court for Gaza? A Test for International Justice*, pp. 523-524.

⁵⁹ Oslo II, article XXXI (6).

⁶⁰ ICJ 2024 Advisory Opinion at para. 102 (citing Oslo II Accord, article XIX).

⁶¹ Fourth Geneva Convention, Article 8 (‘Protected persons may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention’); Article 47 (‘Protected persons who are in occupied territory shall not be deprived [...] of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, [...] nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.’).

⁶² ICJ 2024 Advisory Opinion at para. 102.

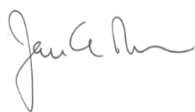
and reparation, without discrimination, and full access to justice.⁶³ Further, accused persons are entitled to effective judicial proceedings without undue delay.⁶⁴

30. If the Chamber were to restrict the access to justice of certain victims, by virtue of bilateral agreements, this would have a discriminatory effect, depriving the ICC of jurisdiction over a subset of crimes. Victims of crimes committed in places where the ICC has territorial jurisdiction, including within the same ICC situation, would then enjoy different rights to remedy before the Court. Such an approach would result in an ‘adverse distinction’ on discriminatory grounds,⁶⁵ including national origin or other status.

IV. REQUEST FOR RECLASSIFICATION

31. On 12 July 2024, the *Amici* were instructed that requests for leave under rule 103 in the current proceedings were to be treated as secret until reclassified. The *Amici*’s Request and Observations address legal issues related to legal standing and jurisdiction and do not contain any sensitive or confidential information.⁶⁶ Accordingly, the *Amici* respectfully submit that their Request be reclassified as public.

Respectfully submitted,



James A. Goldston
on behalf of
Open Society Justice Initiative



Andreas Schüller
on behalf of
European Center for Constitutional
and Human Rights (ECCHR)



Rupert Skilbeck
on behalf of
REDRESS Trust



Balkees Jarrah
on behalf of
Human Rights Watch



Mandi Mudarikwa
on behalf of
Amnesty International

Dated this 6 August 2024

At New York, United States; Berlin, Germany; and London, United Kingdom

⁶³ See *inter alia*, International Covenant on Civil and Political Rights (‘ICCPR’), article 2; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN General Assembly resolution 60/147 of 16 December 2005, UN Doc. A/RES/60/147.

⁶⁴ See *inter alia* ICCPR, article 14.

⁶⁵ *Prosecutor v Ruto and Sang*, Reasons for the Decision on Excusal from Presence at Trial under Rule 134quater, 18 February 2014, ICC-01/09-01/11-1186, para 60.

⁶⁶ See UK Request at paras. 30-31.