

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/18
Date: 08 October 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

Secret, EX PARTE, only available to the State of Israel and the Prosecution

Corrected version of "Reply to the 'Prosecution Response to Israel's Request for Access to the Application for Arrest Warrants for Benjamin Netanyahu and Yoav Gallant' (ICC-01/18-248-SECRET-Exp)" dated 19 august 2024, ICC-01/18-343-Secret-Exp

Source: The State of Israel

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

The Office of the Prosecutor



Counsel for the Defence

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants
(Participation / Reparation)

The Office of Public Counsel for
Victims

The Office of Public Counsel for the
Defence

States' Representatives
Office of the Attorney General of Israel

Amicus Curiae

REGISTRY

Registrar
Mr. Osvaldo Zavala Giler

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations
Section

Public Information and Outreach
Section

I. INTRODUCTION

1. Israel respectfully submits, following the Pre-Trial Chamber's authorization,¹ this reply to the "Prosecution Response to Israel's 'Request for Access to the Application for Arrest Warrants for Benjamin Netanyahu and Yoav Gallant.'"²

II. CONFIDENTIALITY

2. Pursuant to Regulation 23 *bis* (2) of the Regulations of the Court, this filing is classified as secret and *ex parte* only available to the Prosecution and the State of Israel as it pertains to a filing that bears the same classification. Israel has no objection to this filing being reclassified as public in due course.³

III. SUBMISSIONS

- (i) *First Issue: Whether the Pre-Trial Chamber must, in deciding the Access Request, resolve either the standing to file or the merits of any jurisdictional and/or admissibility submissions that may subsequently be presented by Israel*
3. The Prosecution offers extensive arguments purporting to show that the Access Request must be denied because: (i) Israel does not have standing to raise jurisdictional or admissibility issues at the article 58 stage of proceedings;⁴ or (ii) even if it does, that any such claims would fail on the merits.⁵ On this basis, the Prosecution asserts that the Access Request "lacks any merit" and should be dismissed.

¹ Decision on Israel's request for leave [to] reply, ICC-01/18-342-SECRET, 14 August 2024.

² ICC-01/18-248-SECRET-Exp., 22 July 2024 ("Response"). See Request for Access to the Application for Arrest Warrants for Benjamin Netanyahu and Yoav Gallant, ICC-01/18-187-SECRET-Exp-Anx1 ("Access Request").

³ This filing is without prejudice to Israel's position regarding the Court's lack of jurisdiction in respect of the above-captioned Situation, or to Israel's status as a State not Party to the Rome Statute. In addition, the caption "Situation in the State of Palestine" on the cover page reflects the name assigned to this Situation by the Court, and is without prejudice to Israel's position that "Palestine" is not a State.

⁴ Response, paras. 11-13 (no standing in Statute to challenge jurisdiction), 14 (previous proceedings preclude standing), 15 (previous jurisdiction decision did not include an invitation for jurisdictional issues upon arrest warrants being sought), 19 ("Chamber itself not mandated to assess complementarity when seised of an article 58 application"), 20 (deferral request out of time). All references to "article" in this Reply are to the ICC Statute.

⁵ Response, 16-17 (no reasons justifying reconsideration), 20 (deferral request insufficient in content), 21-22 (justifying sufficiency of article 18(1) notice in relation to arrest warrants sought).

4. Israel acknowledges, as submitted in the Access Request,⁶ that disclosure of the Prosecution's arrest warrant application is sought for the purpose of potentially litigating issues of jurisdiction and admissibility at the earliest opportunity. This does not mean that Israel is required to demonstrate that it will prevail in that subsequent litigation. On the contrary, issues of standing and the merits can be addressed only in that subsequent litigation, which will necessarily include references to the very information sought in the Access Request. An access request requires only a showing by the applicant that the information sought is relevant to the vindication of certain legal interests.⁷ The Access Request more than adequately substantiates the legal interests at stake and establishes the relevance of the material sought.
5. The Prosecution's submissions appear to be an attempt to persuade the Chamber that there are no jurisdictional or complementarity issues that require any consideration at all or, still worse, to invite the Chamber to make premature rulings on these matters merely based on the Access Request. The Pre-Trial Chamber should not and need not rule on these issues in the context of the Access Request because they have not been, need not be, and cannot be fully litigated in the context of a request for access to information. Two examples demonstrate the insufficiency of the submissions received and the danger of error.
6. First, in respect of jurisdiction, the Prosecution posits that the reference to a "case" in the chapeau language of article 19(2) supports the interpretation that no jurisdictional challenge is permitted until there has been a decision on an article 58

⁶ Access Request, paras. 2, 13.

⁷ This standard is reflected in the analogous context of requests by a party for access to confidential material – including Prosecution submissions classified as confidential – from another case: *Ntaganda*, Order on Defence access to confidential material in the Lubanga case, ICC-01/04-02/06-806, 1 September 2015, para. 11 ("the Requested Material may have relevance to the Defence and may assist in its analysis of the material it has received from the Prosecution to date"); *Semanza*, Decision on a Request for Access and Review, MICT-13-36-R (Appeals Chamber), 9 April 2018, para. 8 ("such material must be identified or described by its general nature and a legitimate forensic purpose must be demonstrated in order to obtain it. Consideration must be given to the relevance of the material sought [...] [and] must establish that this material is likely to assist its case materially, or that there is at least a good chance that it would.")

application. This presumes that a “case” begins only once an arrest warrant has been issued and not before. Yet this is directly contradicted by previous caselaw affirming that there is a “case” upon submission of the request for an arrest warrant.⁸ Further, the precondition in article 19(2)(a) that a “warrant of arrest or a summons to appear has been issued” lends no support to the Prosecution’s interpretation;⁹ on the contrary, the exclusion of this requirement from article 19(2)(c) suggest that, *a contrario*, States are permitted to challenge jurisdiction prior to the issuing of an arrest warrant. Likewise, the chapeau of article 19(2) refers to “[c]hallenges to the admissibility of a case”, whereas “challenges to the jurisdiction of the Court” are not so qualified.

7. Second, in respect of admissibility, the Prosecution asserts that a Chamber is “not mandated to assess complementarity when seised of an article 58 application.”¹⁰ Yet that assertion is corrected by footnotes 37 and 38 of the Prosecution’s own Response. Pre-Trial Chambers do have the discretion – and therefore are “mandated”,¹¹ albeit not required – to consider matters of admissibility within the context of an article 58(1) request.¹² Indeed, Pre-Trial Chambers have in the past sought and received further information from the Prosecutor on issues of admissibility in order to assist

⁸ *Lubanga*, Decision on the Prosecutor’s Application for a warrant of arrest, Article 58, ICC-01/04-01/06-1-Corr-Red, 10 February 2006, para. 18 (“it is the Chamber’s view that an initial determination on whether the case against Mr Thomas Lubanga Dyilo falls within the jurisdiction of the Court and is admissible is a prerequisite to the issuance of a warrant of arrest for him”); *Ahmad Harun & Ali Kushayb*, Decision on the Prosecution Application under Article 58(7) of the Statute, ICC-02/05-01/20-17, 27 April 2007, para. 13; *Mokom*, Version publique expurgée du « Mandat d’arrêt délivré contre Maxime Jeoffroy Eli Mokom Gawaka » (ICC-01/14-01/22-2-US-Exp), ICC-01/14-01/22-2-Red, 22 March 2022, para. 3; Situation in Uganda, Decision on the Prosecutor’s Application for Warrants of Arrest under Article 58, ICC-02/04-01/05-1-US-Exp, 8 July 2005, p. 2.

⁹ *Contra* Response, para. 11.

¹⁰ Response, para. 19.

¹¹ *Contra* Response para. 19.

¹² See e.g. *Bemba*, Decision on the Prosecutor’s Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-14-tENG, 10 June 2008, para. 20 (“Moreover, article 19(1) of the Statute confers upon the Chamber a discretionary power to examine the admissibility of a case when it has received an application filed under article 58 of the Statute. The exercise of such a discretionary power will depend on the circumstances of the case, with due consideration for the interests of person(s) concerned.”)

them in making an initial determination on admissibility when deciding on requests for warrants of arrest.¹³

8. These examples demonstrate how inappropriate it would be to litigate issues of standing to file submissions on issues of jurisdiction or admissibility, let alone the more factually-intensive issues pertaining to the merits of such prospective filings, in the present stage. The Access Request sufficiently substantiates the legal interests at stake, and the litigation that will be presented, to justify the disclosure requested. Nothing more is needed, and ruling on any other matters would be wholly inappropriate.

(ii) *Second Issue: Whether the amicus curiae proceedings authorized by the Pre-Trial Chamber are relevant to, or preclude, the standing to file the Access Request*

9. The Response argues that in light of the Pre-Trial Chamber's decision to entertain *amicus curiae* submissions, Israel's Access Request "thus falls outside the only procedural mechanism potentially available at this stage to permit such interventions."¹⁴
10. The Prosecution's argument is flawed. The Pre-Trial Chamber's decision to entertain *amicus curiae* submissions pursuant to rule 103 of the Rules of Procedure and Evidence¹⁵ does not impact, let alone foreclose, the statutory grounds upon which Israel may present jurisdictional and admissibility submissions. Unlike an *amici*, Israel (even as a State not Party to the Rome Statute) has vital statutory rights and

¹³ *Bemba*, Decision Requesting Additional Information in respect of the Prosecutor's Application for Warrant of Arrest under Article 58, ICC-01/05-14-US-Exp, 21 May 2008; *Bemba*, Prosecutor's Submission on Further Information and Materials, ICC-01/05-16-US-Exp, 27 May 2008, Annex 6-B ; *Ahmad Harun & Ali Kushayb*, Decision on the Prosecution Application under Article 58(7) of the Statute, ICC-02/05-01/07-1-Corr, para. 22 referring to an *ex parte* hearing on 8 March 2007 in which "the Chamber sought additional information ... relating to the national investigation."

¹⁴ Response, para. 6.

¹⁵ 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', ICC-01/18-173-Red, 27 June 2024 ("First *Amicus* Decision"); Decision on requests for leave to file observations pursuant to rule 103, ICC-01/18-249, 22 July 2024 ("Second *Amicus* Decision").

interests arising, *inter alia*, under articles 18(2), 19(2) and 19(5). These statutory rights, moreover, which include foundational issues of jurisdiction and admissibility, manifestly could not be litigated within the framework of an *amicus* submission limited to ten pages.

11. If of any relevance at all, the Pre-Trial Chamber's authorization of the *amicus curiae* submissions contradicts the Prosecution's position that the Prosecution alone can be heard by the Pre-Trial Chamber at the present stage.¹⁶ It is for the Pre-Trial Chamber, not the Prosecution, to determine the procedure most appropriate in the circumstances given its obligation to "satisfy itself that it has jurisdiction in any case brought before it,"¹⁷ as well as its discretion in appropriate circumstances to "examine the admissibility of a case."¹⁸
12. As discussed above, Israel's standing to make these submissions is a matter to be addressed if and when those filings are made. The Pre-Trial Chamber's decision to hear *amicus* submissions does not impact upon the statutory grounds upon which Israel may make those submissions; on the contrary, the Pre-Trial Chamber's decision to authorise those *amicus* submissions only affirms the importance of the issues at stake¹⁹ and the need for views to be heard other than those of the Prosecutor, including from Israel on the basis of separate statutory provisions.

Respectfully submitted:

Dr. Gilad Noam, Office of the Attorney-General of Israel

Dated 08 October 2024, at Jerusalem, Israel.

¹⁶ Response, para. 7.

¹⁷ *Bemba*, Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-14-tENG, 10 June 2008, para. 11.

¹⁸ *Id.* paras. 20-21; *Bemba*, Decision Requesting Additional Information in respect of the Prosecutor's Application for Warrant of Arrest under Article 58, ICC-01/05-14-US-Exp, 21 May 2008; *Bemba*, Prosecutor's Submission on Further Information and Materials, ICC-01/05-16-US-Exp, 27 May 2008, Annex 6-B.

¹⁹ First *Amicus* Decision, para. 5 ("[g]iven the potential relevance of the issues the United Kingdom wishes to address for the Chamber's assessment [...] the Chamber considers is appropriate to authorize the United Kingdom to file written observations"); Second *Amicus* Decision, para. 10 ("the Chamber has evaluated the requests received to assess whether the observation proposed are desirable for the proper determination of the case.")