

Situation in the State of Palestine

Annex

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/18

Date: 28 June 2024

PRE-TRIAL CHAMBER I

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

SITUATION IN PALESTINE

IN THE CASE OF
THE PROSECUTOR v. BENJAMIN NETANYAHU and YOAV GALLANT

Public Document

**Application for Leave to Submit Observations as Amicus Curiae pursuant to Rule
103(1) of the Rules of Procedure and Evidence**

Source:

Professor David Chilstein

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

N/A

Legal Representatives of the Victims

N/A

Legal Representatives of the Applicants

N/A

Unrepresented Victims

N/A

Unrepresented Applicants
(Participation/Reparation)

N/A

The Office of Public Counsel for
Victims

N/A

The Office of Public Counsel for the
Defence

N/A

States' Representatives

N/A

Amicus Curiae

N/A

REGISTRY

Registrar

M. Osvaldo Zavala Giler

Counsel Support Section

N/A

Victims and Witnesses Unit

N/A

Detention Section

N/A

Victims Participation and Reparations
Section

N/A

Other

N/A

I. INTRODUCTION

1. Further to the International Criminal Court Prosecutor Karim A.A. Khan KC's applications for warrants of arrest before Pre-Trial Chamber I of the International Criminal Court ("ICC") against Benjamin Netanyahu, the Prime Minister of Israel, and Yoav Gallant, the Minister of Defence of Israel (the "**Application for Warrants of Arrest**"), Professor David Chilstein hereby respectfully submits this Application for leave to submit observations as an *amicus curiae* to assist in the determination of the Application for Warrants of Arrest¹.
2. This Application is submitted pursuant to Rule 103(1) of the Rules of Procedure and Evidence (the "**Rules**").
3. The undersigned submits that the importance of the debate, the issues at stake and the novelty of the questions raised justify the utmost caution on the part of the Pre-Trial Chamber and that it is appropriate in these circumstances for it to review the following points in depth before taking a decision on the Application for Warrants of Arrest.
4. The Pre-Trial Chamber will need to address issues relating to the process before considering the merits of the Application. These proposed submissions address the process which led the Prosecutor to apply to the Pre-Trial Chamber for the issuance of warrants of arrest against Benjamin Netanyahu, the Prime Minister of Israel, and Yoav Gallant, the Minister of Defence of Israel.
5. These observations will be limited to issues directly related to the process which led to the Application for Warrants of Arrest, namely the investigation which led to the Application and whether the arrest of Benjamin Netanyahu, the Prime Minister of Israel, the application of the complementarity principle to non-signatory of Rome Statute, and Yoav Gallant, the Minister of Defence of Israel are necessary.

II. RELEVANT EXPERTISE

6. Professor David Chilstein is a professor of criminal law at University Paris 1 Panthéon-Sorbonne. Professor Chilstein teaches criminal law and international criminal law. He is the co-head of the Sorbonne's center for legal research in criminal law. Professor Chilstein has founded the Master "*International Criminal law and white-collar*".

¹ Office of the Prosecutor, *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>

7. Professor Chilstein has significant expertise in the field of international criminal law and relevant issues related to the issuance of warrants in civil law jurisdictions. Professor Chilstein will be assisted in this filing by Me Olivier Pardo and Me Nathalie Makowski, Paris-based lawyers with extensive experience in international law.

III. ADMISSIBILITY OF AMICUS CURIAE SUBMISSIONS

8. As a preliminary, Rule 103(1) of the Rules of Procedure and Evidence provides that *“[a]t any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate.”*
9. According to related case law, *“ In deciding whether to grant the leave to an applicant to submit observations as amicus curiae, according to rule 103 of the Rules the Chamber shall evaluate whether this is ‘desirable for the proper determination of the case’”* and *“the rationale for admitting amicus curiae in the proceedings is to have the opportunity to get experts' information on relevant issues of legal interest for the proceedings in order to provide the Chamber with a contribution to the proper determination of the case”*.
10. Professor Chilstein submits that the Application is admissible at this stage since, as discussed below, the proposed submissions are directly linked to the process which led the Prosecutor to request the issuance of the arrest warrants and would assist the Pre-Trial Chamber. They are therefore desirable for the proper determination of the Prosecutor's Application.

IV. SUMMARY OF PROPOSED SUBMISSIONS

11. Professor Chilstein will clarify legally and historically relevant issues of facts and law that are raised by the Prosecutor's Application for Warrants of Arrest which bear on the issuance by the Pre-Trial Chamber of the warrants of arrest.
12. Professor Chilstein proposes to make submissions in connection with the Prosecutor's Application for Warrants of Arrest. He plans to address three points: (i) the lack of proper investigation preceding the Prosecutor's Application for Warrants of Arrest, (ii) the need for the Pre-Trial Chamber to assess whether the Prosecution complied with all necessary steps prior to the filing of the Application, and (iii) whether the arrest of

Benjamin Netanyahu, the Prime Minister of Israel, and Yoav Gallant, the Minister of Defence of Israel are necessary.

1. Whether the Pre-Trial Chamber is in a position to rely on evidence collected in a proper investigation

13. Article 58(1) of the Rome Statute provides that “*At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person...*” (our emphasis).
14. Regulation 53(1) of the Regulations of the Office of the Prosecutor provides that “[i]n preparing an application for a warrant of arrest or summons to appear in a potential case, pursuant to article 58, the Office shall clearly identify the crime(s) and mode(s) of liability alleged, based on solid factual and evidentiary foundations”².
15. In addition, Article 54(3)(c) of the Rome Statute provides that the Prosecutor shall “[i]n order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally” (our emphasis)
16. The Pre-Trial Chamber has ruled that “*It is for the Prosecutor to plead the specific crimes he believes to be proven and it is for the Chamber only to evaluate whether his allegations are substantiated to the relevant evidentiary standard. Specificity in pleading an application for a warrant of arrest is also essential for the Chamber to be properly informed why its authority to deprive a person of his or her liberty should be exercised. Therefore, if the Prosecutor's Application falls short of the proper level of specificity, the Chamber will not effectuate its authority*”³.
17. Yet, in light of the alleged violations of the Rome Statute listed in the Prosecutor’s application including the alleged crime of intentional starvation, and the timing of the Prosecutor’s Application, Professor Chilstein submits that the application could not have been “*based on solid factual and evidentiary foundations*”.
18. The issue that the Pre-Trial Chamber will need to address is whether the Application is based on a thorough and complete investigation. The Pre-Trial Chamber will therefore need to determine whether the prosecution conducted a proper investigation. It is to be

² Regulations of the Office of the Prosecutor, reg. 53(1).

³ ICC-01/04, Decision on the Prosecutor’s Application under Article 58 dated 31 May 2012.

noted that the Office of the Prosecutor's resources are largely dedicated to the Situation in Ukraine and the lack of sufficient funding has adversely affected the OTP's ability to adequately investigate cases.

19. The Pre-Trial Chamber will need to assess whether the OTP had the resources, time and adequate staffing including investigators to determine that the OTP has conducted a proper *and actual* investigation that could satisfy the requirements of Article 58.
20. By way of example, Prosecutor Khan appointed Andrew Cayley to oversee the ICC's investigation into alleged war crimes in the Palestinian territories on 11 March 2024, that is merely two months before the Prosecutor issued the Application.
21. No proper investigation could have been conducted on such a limited time period even more so that for insurance purposes no UN or ICC investigators can enter war zones.
22. In his statement of 20 May 2024, Prosecutor Khan held in support of his allegations that Benjamin Netanyahu and Yoav Gallant allegedly bore responsibility for starvation of civilians that "*the evidence we have collected, including interviews with survivors and eyewitnesses, authenticated video, photo and audio material, satellite imagery and statements from the alleged perpetrator group, shows that Israel has intentionally and systematically deprived the civilian population in all parts of Gaza of objects indispensable to human survival.*"
23. Even if Prosecutor Khan submitted evidence collected directly by his Office in support of his Application, such evidence under the circumstances is neither conclusive nor compelling as it lacks actual and proper investigations on the ground:
 - The Prosecutor was unable to cross-check the information or verify the origin and authenticity of the documents.
 - The Prosecutor did not contextualize the information received using elements that he himself had found and he was therefore unable to interpret them correctly.
24. It follows from the above that most of the elements on which the prosecutor has based his application must have been obtained through other sources (UN, NGOs...) which cast some doubts on the reliability and impartiality of the investigation and therefore

may fall short of the standard set forth in Article 54(3)(c) of the Rome Statute and Regulation 53(1) of the Regulations of the Office of the Prosecutor⁴.

25. In other words, the Pre-Trial Chamber is asked to make its assessment on a file that is incomplete, and which may include factual inaccuracies and methodological errors.
26. The undersigned appreciates that an investigation concerning the State of Palestine has been ongoing for several years. The undersigned nevertheless submits that the investigation which led to the Application was triggered by alleged crimes against humanity which would have been committed by the Israeli governmental apparatus since 7 October 2023. It is questionable that an actual investigation could reasonably have been conducted on the alleged charges by the Israeli forces since 7 October 2023. Yet, according to his statement of 20 May 2024, Prosecutor Khan indicates that the OTP has collected evidence showing an alleged arbitrary restriction of transfer of essential supplies, cutting off cross-border water-pipelines from Israel to Gaza and cutting off and hindering electricity supplies. The fact that the investigation was not conducted directly by the OTP seems to have resulted in significant inaccuracies and misinterpretation of the situation.
27. Indeed, recent reports conclude of the lack of starvation in Gaza and underline that Israelian authorities did not deny humanitarian relief supplies and did not deliberately target civilians in conflict. The allegations that Israel is “*causing starvation as a method of war including the denial of humanitarian relief supplies [and] deliberately targeting civilians in conflict*,” are strongly disputed. Notably, in a recent report, Columbia University Professors Awi Federgruen and Ran Kivetz have analysed available data and conducted research whose “*findings demonstrate that sufficient amounts of food are being supplied into Gaza*”⁵ The Pre-Trial Chamber will need to assess whether the investigations were conducted in accordance with the Policy Paper on Preliminary Examinations which provides at para. 33 “[t]he Office also seeks to ensure that, in the

⁴ See also the Policy Paper on Preliminary Examinations, at para. 31: “*As information evaluated at the preliminary examination stage is largely obtained from external sources, rather than through the Office’s own evidencegathering powers, (which are only available at the investigation stage), the Office pays particular attention to the assessment of the reliability of the source and the credibility of the information*” (footnote omitted.)

⁵ Seth J. Frankman, “Experts: ICC, UN blamed Israel for a famine that never happened in Gaza – exclusive”, the Jerusalem Post, 18 June 2024 (available at <https://www.jpost.com/israel-hamas-war/article-806735#806735>).

interests of fairness, objectivity and thoroughness, all relevant parties are given the opportunity to provide information to the Office”⁶.

28. Under the circumstances, the undersigned submits that the Pre-Trial Chamber will have a duty to review the evidence provided in support of the Application and draw adverse inferences of the lack of actual investigation directed by the OTP. The Pre-Trial Chamber will need to assess whether the prosecution investigated “*incriminating and exonerating circumstances equally*”.

2. The need for the Pre-Trial Chamber to assess whether the Prosecution complied with all necessary steps before submitting the Application

29. While the Court has established that it has jurisdiction on the Situation in Palestine, the Pre-Trial Chamber will need to address whether the Court can proceed with the issuance of warrants of arrest against officials of a State that is not a party to the Rome Statute.
30. Further considerations should also be given to the application of the principle of complementarity which require that the Prosecutor and the Court defer to national investigative authorities who are willing and able to investigate and prosecute.
31. In this respect, the undersigned proposes to further develop whether the notification sent in 2021 by former Prosecutor Bensouda remains applicable given that Prosecutor Khan's application relies on an alleged investigation relating to Israel's alleged starvation crimes in connection with the eruption of current Israel-Hamas war on 7 October 2024. Undoubtedly, this new facts and alleged charges did not exist in 2021 and were not part of the notification.
32. Professor Chilstein submit that this issue needs to be explored further as the Chamber will need to assess whether the Prosecutor's application falls within the applicable legal framework of Article 58 of the Rome Statute. This issue is desirable for the proper determination by the Chamber of the Prosecutor's application.

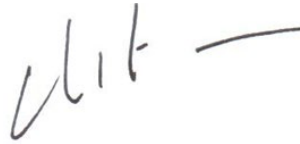
⁶ Policy Paper on Preliminary Examination, para. 33.

3. Whether the arrest of Benjamin Netanyahu, the Prime Minister of Israel, and Yoav Gallant, the Minister of Defence of Israel is necessary

33. Professor Chilstein proposes submissions on the requirements set forth in Article 58(1)(b) of the Rome Statute.
34. Article 58(1)(a) and (b) of the Rome Statute lay down the conditions which need to be met in order for the Chamber to issue or maintain a warrant of arrest. Under article 58(1)(b) of the Statute, the Pre-Trial Chamber may issue a warrant of arrest only if it is satisfied that the arrest appears necessary: (i) to ensure the person's appearance at trial; (ii) to ensure that the person does not obstruct or endanger the investigation or the court proceedings; or (iii) to prevent the person from continuing with the commission of the crime.
35. In the same statement, Prosecutor Khan filed indistinctively applications for warrants of arrest against Hamas leaders and two members of the Israeli government. In this respect, Professor Chilstein further submits that the Pre-Trial Chamber should examine whether compliance with Article 58 of the Rome Statute would have required that the different situation between Israeli leaders and Hamas leaders be reflected in two separate applications with distinctive features.
36. Professor Chilstein submits that Prosecutor Khan's decision to apply for warrants of arrest for both Hamas leaders (namely Yahya Sinwar, Mohammed Diab Ibrahim Al-Masri, and Ismail Haniyeh) and members of the government of Israel (namely Benjamin Netanyahu and Yoav Gallant) in the same application is highly questionable. For purposes of meeting the conditions set forth in article 58(1)(b), their situation should be distinguished.
37. While the risk of absconding concerning the Hamas leaders is by hypothesis high, the same is not true for officials of the State of Israel, a democracy endowed with one of the best judicial systems in the world.
38. Professor Chilstein's proposed submissions are aimed at assisting the Chamber in assessing if the criteria set forth in Article 58(1)(b) of the Rome Statute are met in the present case, notably with respect to any risk of absconding.

V. CONCLUSION

39. For the foregoing reasons and in light of his affiliation, expertise and experience, Professor Chilstein respectfully requests that the Pre-Trial Chamber I grant him leave to make the proposed submissions in accordance with Rule 103 of the Court's Rules of Procedure and Evidence. Professor Chilstein submits that these submissions are desirable for the proper determination of the Prosecutor's Application for Warrants of Arrest and will assist the Chamber in its deliberation of the Prosecutor's Application



Professor David Chilstein

Dated this 28 June 2024

At Paris, France