

Pursuant to Pre-Trial Chamber I 's Order ICC-01/18-418 dated 11.04.2025, this document is reclassified as Public
Document registered as submitted by Amicus Curiae, however the correct name of the situation is Situation in the State of Palestine

Situation in the State of Palestine

Annex I

Pursuant to Pre-Trial Chamber I 's Order ICC-01/18-418 dated 11.04.2025, this document is reclassified as Public

Document registered as submitted by Amicus Curiae, however the correct name of the situation is Situation in the State of Palestine

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/18
Date: 10 July 2024

PRE-TRIAL CHAMBER I

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

SITUATION IN PALESTINE

Confidential, with Confidential Annexes A & B

**Request for Access to the Application for Arrest Warrants for Benjamin
Netanyahu and Yoav Gallant**

Source: The State of Israel

Pursuant to Pre-Trial Chamber I 's Order ICC-01/18-418 dated 11.04.2025, this document is reclassified as Public
Document registered as submitted by Amicus Curiae, however the correct name of the situation is Situation in the State of Palestine

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. The State of Israel, through the Office of the Attorney General of Israel ("Israel"), requests access on a confidential basis to the Article 58 application for arrest warrants against senior Israeli officials filed by the Prosecutor of the International Criminal Court ("Prosecutor") on 20 May 2024. Israel seeks this access so that it is able, if it deems it appropriate, to exercise the rights accorded to it under the Rome Statute, including under Article 19(2)(c), to challenge the Court's jurisdiction in the present case.
2. Israel is a State not party to the Rome Statute and its principled position is that the Court lacks jurisdiction in the present case. Israel is contemplating challenging the Court's jurisdiction, including territorial, personal and subject-matter jurisdiction. Israel's ability to make such a challenge effectively depends on access to the precise basis for the Prosecutor's Article 58 application.
3. Given the manifest jurisdictional issues present in this case, the Pre-Trial Chamber should refrain from being "satisfied" that the crimes alleged in relation to senior Israeli officials are "within the jurisdiction of the Court" without having given Israel the opportunity to address these issues.¹
4. Israel agrees, on a voluntary basis, to be bound by any conditions of confidentiality, and/or to accept any redactions to the Article 58 application, as may be deemed appropriate by the Pre-Trial Chamber.
5. The purpose for which Israel seeks access to the Article 58 application is to be in a position to offer submissions in relation to the issue of an assertion of jurisdiction by the Court that directly impacts on Israel's sovereignty. Israel may also wish to make submissions on issues of admissibility, which likewise requires access to any representations that may have been made in the Article

¹ Rome Statute, Article 58(1) (all further references to "article" are to the Rome Statute).

58 application, including concerning communications between Israel and the Office of the Prosecutor.

6. This request is made without prejudice to Israel's position regarding the Court's lack of jurisdiction, as well as other issues that Israel may choose to bring before the Pre-Trial Chamber in challenging the validity of the Prosecutor's Article 58 application.

II. CONFIDENTIALITY

7. Pursuant to Regulation 23 *bis* (2) of the Regulations of the Court, this filing is classified as confidential as it pertains to a filing that bears the same classification. Nevertheless, given the extent to which the Prosecutor has referred publicly to that filing, Israel has no objection to this filing, including its annexes, being made public.

III. PROCEDURAL HISTORY

8. On 5 February 2021, Pre-Trial Chamber I issued a "Decision on the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine'".² This Decision held, by a majority, that "Palestine qualifies as '[t]he State on the territory of which the conduct in question occurred' for the purposes of article 12(2)(a)" in respect of an investigation contemplated by the Prosecutor.³
9. On 20 May 2024, the Prosecutor made a highly publicised video address and gave interviews to prominent media outlets announcing that he had filed a confidential and *ex parte* application under Article 58 for the arrest of the Prime Minister of Israel, Mr. Benjamin Netanyahu, and Israel's Minister of Defence,

² Decision on the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine, ICC-01/18-143, 5 February 2021 ("Jurisdiction Decision").

³ ICC-01/18-143, p. 60.

Mr. Yoav Gallant. The Prosecutor chose to make public certain details regarding his application.

10. The Prosecutor noted the Pre-Trial Chamber's determination of 5 February 2021 "that the Court can exercise its criminal jurisdiction in the Situation in the State of Palestine and that the territorial scope of this jurisdiction extends to Gaza and the West Bank, including East Jerusalem".⁴
11. A central allegation of the Prosecutor's application appears to be that there was "a common plan to use starvation as a method of war [...] and other acts of violence against the Gazan civilian population."⁵ Starvation, like the other Article 8(2)(a) and (b) crimes alleged, is a crime falling within the Court's jurisdiction only when committed in international armed conflict, and the Prosecutor asserts that the conflict in Gaza is international, as well as non-international, in character.
12. The Prosecutor also released, in conjunction with his media appearances, a report by a "Panel of Experts In International Law Convened by the Prosecutor of the International Criminal Court" ("Panel of Experts").⁶ This report purports to offer further information about the Prosecutor's confidential and *ex parte* allegations, including regarding the Court's jurisdiction over the "Situation in the State of Palestine"⁷ and the classification of the conflict.⁸

⁴ ICC OTP, "Statement of the 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>

⁵*Id.*

⁶ Report of the Panel of Experts in International Law, 20 May 2024, available at: <https://www.icc-cpi.int/about/otp/special-advisers-to-the-prosecutor/panel-of-experts-in-international-law/report-of-the-panel-of-experts-in-international-law>

⁷ *Id.*, para. 10.

⁸ *E.g., id.*, paras. 32-33.

IV. SUBMISSIONS

13. Israel is contemplating challenging the Court's jurisdiction in relation to the Prosecutor's Article 58 application. Enough information has now been made public concerning the Article 58 application to know that there are serious reasons to doubt the Court's jurisdiction over the case that the Prosecutor has presented to the Pre-Trial Chamber. The Pre-Trial Chamber has itself recognised the relevance of such issues to its Article 58 deliberations by its willingness to accept *amicus curiae* submissions in relation to at least one jurisdictional issue.⁹ That said, the grounds on which Israel contemplates challenging the Court's jurisdiction require examination of the precise representations made by the Prosecutor to the Pre-Trial Chamber with respect to territorial, personal, and subject-matter jurisdiction. As noted, Israel may also wish to make submissions on matters pertaining to admissibility, which likewise require access to any relevant representations that may have been made in that regard in the Article 58 application.
14. Access should be provided now, prior to the completion of the *amicus curiae* briefing timetable or a decision being made by the Pre-Trial Chamber on the Prosecutor's Article 58 application, for several reasons.
 - a. First, the Pre-Trial Chamber is obliged under Article 19(1) to "satisfy itself that it has jurisdiction in any case brought before it." A case is defined as "specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed," and "falls

⁹ 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, para. 5 ("Given the potential relevance of the issue the United Kingdom wishes to address for the Chamber's assessment, and without prejudice to any future decision by the Chamber on this matter, the Chamber considers it appropriate to authorise the United Kingdom to file written observations pursuant to rule 103 of the Rules.")

within the jurisdiction of the Court only if the specific crimes of such a case do not exceed the legal parameters envisaged by the Statute.”¹⁰ Article 58 itself requires that the Pre-Trial Chamber find that there be reasonable grounds to believe that a crime “within the jurisdiction of the Court” has been committed.

- b. Jurisdiction is not a clear-cut issue in the present case. This is made clear by the sharply divergent opinions reflected in the Pre-Trial Chamber's preliminary decision on jurisdiction of 5 February 2021;¹¹ the Pre-Trial Chamber's recent decision to entertain *amicus curiae* submissions; and the Prosecutor's unprecedented attempt to bolster his Article 58 application by resort to an “expert panel” making pronouncements on the jurisdictional validity of the case.¹² In these circumstances, the State that would be most aggrieved by the exercise of the jurisdiction in question should be given the opportunity to be heard, as specifically provided for pursuant to Article 19(5) of the Statute.
- c. The need to see the Prosecutor's precise submissions is illustrated by his reliance on the crime of starvation, which is reportedly at the core of the case submitted to the Pre-Trial Chamber. However, the Court's jurisdiction over the crime of starvation (and over other crimes alleged to have occurred in an international armed conflict)¹³ depends on whether the Prosecutor has properly characterised the armed conflict as

¹⁰ *The Prosecutor v. Harun and Ali Kushayb*, Decision on the Prosecution Application under Article 58(7) of the Statute, ICC-02/05-01/07, 27 April 2007, para. 14. See *The Prosecutor v. Lubanga*, ICC-01/04-01/06-1-Corr-Red, para. 21.

¹¹ Jurisdiction Decision.

¹² 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.

¹³ The other Article 8(2)(a) and (b) crimes reportedly alleged (namely, wilfully causing great suffering or serious injury to body or health, wilful killings of civilians and intentionally directing attacks against a civilian population) would likewise fall outside of the Court's jurisdiction.

international in character. That characterisation, in turn, hinges on the status of the Palestinian entity under international law and the nature of its relationship to the Gaza Strip, as well as on other pertinent issues. The Pre-Trial Chamber's preliminary decision on jurisdiction of 5 February 2021 clearly did not address this issue as it now arises.

- d. Second, the Pre-Trial Chamber has itself previously acknowledged the importance of receiving submissions of the kind here envisaged prior to any concrete exercise of judicial authority. Hence, the Pre-Trial Chamber recognised in its previous jurisdictional decision:

It is further opportune to emphasise that the Chamber's conclusions pertain to the current stage of the proceedings, namely the initiation of an investigation by the Prosecutor pursuant to articles 13(a), 14 and 53(1) of the Statute. When the Prosecutor submits an application for the issuance of a warrant of arrest or summons to appear under article 58 of the Statute, or if a State or a suspect submits a challenge under article 19(2) of the Statute, the Chamber will be in a position to examine further questions of jurisdiction which may arise at that point in time.¹⁴

- e. This language reflects the importance to the Pre-Trial Chamber of receiving further submissions, in particular from the relevant State, when the Article 58 application is submitted. Indeed, the Chamber foresaw that "further questions of jurisdiction" could arise in such a situation — as is now the case.
- f. Third, the Prosecutor has himself eliminated the secrecy and confidentiality of the Article 58 application by making public its existence and selected elements of its content. He has effectively extinguished *ab initio* the *ex parte* nature of the Article 58 proceedings by

¹⁴ ICC-01/18-143, para. 131 (underline added).

sharing with individuals external to the Prosecutor's office (the Panel of Experts) the products of his investigation, including sensitive evidential materials, internal legal analysis and, ultimately, the full Article 58 application prior to its filing with the Pre-Trial Chamber.¹⁵ This appears to have occurred in the absence of a statutory basis permitting the sharing of confidential information with non-Court staff and ensuring the impartiality and accountability of the individuals concerned.¹⁶ It would be illogical and indeed unfair if access to the Prosecutor's application could be granted to an "expert panel", whose conclusions have now been widely publicised in the media, without giving Israel an opportunity to review and comment on the basis according to which the Court is said to have jurisdiction over the alleged crimes.

¹⁵ The 'Report of the Panel of Experts in International Law', which has itself been made public, records that "each Panel Member was asked to assess objectively the material provided to them by the Prosecutor and to advise the Prosecutor whether it meets the relevant legal test. ... Panel members carefully reviewed each of the applications for arrest warrants, as well as underlying evidence, including witness statements, expert evidence and authenticated videos and photographs obtained by investigators. Members of the Panel also attended Evidence Review sessions at the International Criminal Court's premises in the Hague and online": see [240520-panel-report-eng.pdf \(icc-cpi.int\)](#), para. 7.

¹⁶ It should be noted that a previous "Review Committee" appointed by the ICTY Prosecutor "to assess allegations relating to the NATO bombing campaign against the Federal Republic of Yugoslavia and advise the Prosecutor whether or not there is a sufficient basis to proceed with an investigation" comprised military lawyers, military analysts, prosecuting attorneys and other experts drawn from "within her Office". This Review Committee did not involve individuals external to the OTP's office and the "main author" of this report was William Fenrick who at the time of writing the Report was a Senior Legal Officer in the ICTY's OTP.

See:

- (1) ICTY Press Release, Prosecutor's Report on the NATO bombing campaign, 13 June 2000, <https://www.icty.org/en/press/prosecutors-report-nato-bombing-campaign>;
- (2) ICTY Final Report to the Prosecutor by the Committee established to review the NATO bombing campaign against the Federal Republic of Yugoslavia, 13 June 2000, <https://www.icty.org/en/press/final-report-prosecutor-committee-established-review-nato-bombing-campaign-against-federal>;
- (3) ICC Guest Lecture by William Fenrick, 5 March 2004, 'Crimes in combat: the relationship between crimes against humanity and war crimes', page 14, <https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/E7C759C8-C5A4-4AD3-8AB5-EF6ED68AC1D4/0/Fenrick.pdf> & <https://www.icc-cpi.int/node/194070>.

- g. Fourth, while it is well-established that “[t]he application of the Prosecutor under Article 58 of the Statute and the decision of the Pre-Trial Chamber are submitted and issued *ex parte*,” this rule arises from the principle that “the person whose arrest/appearance is sought does not have standing to make submissions on the merits of the application.”¹⁷
- h. However, the position of Israel is readily distinguished from that of a person whose arrest / appearance is sought in relation to which “no role, actual or potential, is provided or anticipated for the person named in the Prosecutor’s application under article 58 of the Statute”.¹⁸ Israel is not seeking to “fully participate” in the Article 58 proceedings. The purpose for which Israel seeks access to the Article 58 application is to be in a position to offer submissions in relation to a potential exercise of jurisdiction by the Court that directly impacts on Israel’s sovereignty.
- i. Fifth, granting access to the Article 58 application will have no impact on the expeditiousness of proceedings. Indeed, litigating jurisdictional issues at this stage will ensure that an arrest warrant is not based on a jurisdictional error and overreach, which could have prejudicial consequences that might not be easily remedied.
15. Israel also wishes to examine any representations that may have been made by the Prosecution to the Pre-Trial Chamber concerning admissibility, including as to any correspondence and discussions between the Office of the Prosecutor and Israel, particularly in light of various public statements recently made by the Prosecutor as to the extent and nature of Israel’s engagement with the Office

¹⁷ Chambers Practice Manual, Seventh Edition, para. 3. Situation in the Republic of Kenya, Decision on the ‘Application for leave to participate in the proceedings before the Pre-trial Chamber relating to the Prosecutor’s application under Article 58(7)’, 11 February 2011, ICC-01/09-42, 11 February 2011, at paras. 3 and 23.

¹⁸ *Id.*, at para. 18.

of the Prosecutor. Issues of admissibility may be considered by a Pre-Trial Chamber prior to the issuance of an arrest warrant particularly where there are grounds to believe that admissibility is a live issue.¹⁹ The issue *is* a live one in this case, as reflected in an exchange of correspondence between Israel and the Prosecutor of the Court in May of this year, in which Israel sought a deferral of the investigation.²⁰ Israel also needs to be in a position to make submissions as to whether adequate and proper notice has been provided as to the scope of the investigation of the hostilities that broke out on 7 October 2023, to which the arrest warrants purportedly relate.

V. CONCLUSION AND RELIEF SOUGHT

16. Israel requests access to the Article 58 application for arrest warrants against senior Israeli officials filed by the Prosecutor on 20 May 2024. Israel seeks this information so that it is able, if it deems it appropriate, to exercise its right to challenge the Court's jurisdiction over the case pursuant to Article 19(2)(c) of the Rome Statute.²¹
17. Israel also seeks access to any representations that may have been made in the Article 58 application concerning admissibility, including communications between Israel and the Office of the Prosecutor. Israel seeks this information so that it may also be in a position to make submissions on matters pertaining to admissibility, if it deems it appropriate.

¹⁹ See e.g. *The Prosecutor v. Katanga*, ICC-01/04-01/07-4, 6 July 2007, para. 19; *The Prosecutor v. Lubanga*, ICC-01/04-01/06-Corr-Red, 17 March 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"); *The Prosecutor v. Bemba*, ICC-01/05-01/08-14-tENG, 17 July 2008, paras. 20-21.

²⁰ See Annex A, Letter from the Ambassador of Israel in the Netherlands to the Office of the Prosecutor, 1 May 2024; Annex B, Letter from the Office of the Prosecutor to the Ambassador of Israel in the Netherlands, 7 May 2024.

²¹ This request for access to the Article 58 application is not to be construed as limiting any arguments that Israel may wish to make regarding jurisdiction and / or admissibility. Israel reserves its right to challenge these matters pursuant to Article 19 of the Rome Statute.

Pursuant to Pre-Trial Chamber I 's Order ICC-01/18-418 dated 11.04.2025, this document is reclassified as Public
Document registered as submitted by Amicus Curiae, however the correct name of the situation is Situation in the State of Palestine

18. Resolution of these issues on an *ex parte* basis does not favour sound judicial decision-making; is not appropriate given the importance of the issues to be decided; and serves no purpose given the wide publicity given to the Article 58 application by the Prosecutor himself.

Respectfully submitted:



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

Dated 10 July 2024

At Jerusalem, Israel.