

Situation in the State of Palestine

Annex

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/18
Date: 11 July 2024

PRE-TRIAL CHAMBER I

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

SITUATION IN PALESTINE

Secret

**Request of United States Senator Lindsey O. Graham for Leave to Submit Written
Observations Pursuant to Rule 103**

Source: United States Senator Lindsey O. Graham

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 the Victims	Legal Representatives of the Applicants
Unrepresented Victims	Unrepresented Applicants (Participation/Reparation)
The Office of Public Counsel for Victims	The Office of Public Counsel for the Defence
States' Representatives	Amicus Curiae

REGISTRY	
Registrar Mr. Osvaldo Zavala Giler	Counsel Support Section
Victims and Witnesses Unit	Detention Section
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I. Introduction

1. The majority of Pre-Trial Chamber I ('the Chamber') previously concluded on 5 February 2021 that the Court had sufficient jurisdiction for the Prosecutor to initiate an investigation under article 53 of alleged crimes in Gaza and the West Bank, including East Jerusalem.

2. In its 5 February 2021 Decision, the Chamber emphasized that:

[T]he 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.

3. The circumstances contemplated by the Chamber's 5 February 2021 Decision have now materialized—the Prosecutor has submitted applications for the issuance of warrants of arrest under article 58 for Israeli nationals.
4. Consistent with the Chamber's 5 February 2021 Decision, as well as the Court's independent obligation under article 19(1) to 'satisfy itself that it has jurisdiction in any case brought before it,' the Chamber must now assess the outstanding questions of jurisdiction and admissibility in determining the application for arrest warrants.
5. United States Senator Lindsey O. Graham rejects the Court's assertion of jurisdiction over this matter and the conclusion reached by the majority of the Chamber in the 5 February 2021 Decision. Nevertheless, given the gravity of the issue and the importance of a resolution that reinforces the rule of law and promotes international stability, Senator Graham requests leave pursuant to Rule 103(1) of the Rules of Procedure and Evidence to assist the Chamber in

examining its jurisdiction and issues of admissibility prior to the determination of the application for arrest warrants.

II. Applicable Law

6. Rule of Procedure and Evidence 103(1) provides that:

At 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.

7. This Chamber has previously exercised its discretion in this proceeding and found written observations on the question of jurisdiction desirable.¹

III. Procedural History

8. On 22 January 2020, the Prosecution submitted a 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine' seeking 'a jurisdictional ruling under article 19(3) to confirm that the scope of the Court's territorial jurisdiction in Palestine comprises the West Bank, including East Jerusalem, and Gaza.'² In this Request, the Prosecutor acknowledged that 'Palestine does not have full control' over the area and 'its borders are disputed.'³

9. On 5 February 2021, the Chamber released a 'Decision on the "Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine,"' finding that the International Criminal Court's territorial jurisdiction 'extends to the territories occupied by Israel since 1967,

¹ ICC-01/18-63, Pre-Trial Chamber I, Decision on Applications for Leave to File Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence, 20 February 2020, paras. 49, 53-56.

² ICC-01/18-12, Office of the Prosecutor, Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine, 22 January 2020, para. 18.

³ Ibid., para. 5.

namely Gaza and the West Bank, including East Jerusalem.⁴ In that Decision, the Chamber briefly addressed the Oslo Accords issue (concerning whether Palestine may delegate criminal jurisdiction over Israeli nationals that it does not itself possess), but found that it did not need to resolve the issue to settle the question of territorial jurisdiction.⁵ The Decision emphasized that its conclusions were limited to that stage of the proceedings, explicitly providing that '[w]hen 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.'⁶

10. Judge Kovács partly dissented from the majority in the 5 February 2021 Decision, finding that the Court would lack jurisdiction over Israeli nationals without an article 12(3) declaration by Israel accepting such jurisdiction.⁷ The partial dissent's reasoning emphasized the importance of the Oslo Accords, stating that 'the Oslo Accords could be the key to adequately answering the question presented by the Prosecutor concerning the geographical scope of the Court's jurisdiction.'⁸

11. On 20 May 2024, the Prosecutor announced that he had filed applications for warrants of arrest in the Situation in Palestine.⁹ The announcement alleges that Yahya Sinwar, Mohammed Diab Ibrahim Al-Masri, Ismail Haniyeh, Benjamin Netanyahu, and Yoav Gallant bear criminal responsibility for war crimes and crimes against humanity.

⁴ ICC-01/18-143, Pre-Trial Chamber I, Decision on the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine,' 05 February 2021, para. 118.

⁵ Ibid., paras. 124-129.

⁶ Ibid., para. 131.

⁷ ICC-01/18-143-Anx1, Pre-Trial Chamber I, Judge Péter Kovács' Partly Dissenting Opinion, 05 February 2021, paras. 371, 374.

⁸ Ibid., para. 320.

⁹ Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for arrest warrants in the situation in Palestine, 20 May 2024, available at <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state>.

12. On 10 June 2024, the United Kingdom filed a request to provide written *amicus curiae* observations on '[w]hether the Court can exercise jurisdiction over Israeli nationals, in circumstances where Palestine cannot exercise criminal jurisdiction over Israeli nationals pursuant to the Oslo Accords.'¹⁰

13. On 27 June 2024, the Chamber granted the United Kingdom's Rule 103(1) Request and indicated that other requests for leave to file *amicus curiae* observations shall be filed by 12 July 2024.¹¹

IV. Submissions

a. The Applicant

14. Senator Graham is a member of the United States Senate, the upper chamber of the United States Congress. Senator Graham is the Ranking Member of the United States Senate Committee on the Judiciary, which has broad jurisdiction over federal criminal law as it extends internationally, measures relating to legal claims, and judicial proceedings, among many other things.

15. Among other powers, the United States Congress has the constitutional authority to legislate,¹² to appropriate funds of the United States,¹³ and to declare war.¹⁴ In addition, the United States Senate has the sole constitutional authority to ratify treaties and confirm ambassadors.¹⁵

16. As Ranking Member of the Senate Judiciary Committee, Senator Graham is integrally involved with protecting and advancing the rule of law, and ensuring

¹⁰ ICC-01/18-171-SECRET-Exp-Anx, Request by the United Kingdom for Leave to Submit Written Observations Pursuant to Rule 103, 10 June 2024, para. 27 (reclassified as public on 27 June 2024, ICC-01/18-171-Anx).

¹¹ ICC-01/18-173-Red, Pre-Trial Chamber I, 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,' 27 June 2024, paras. 5-6.

¹² U.S. Const. art. I, § 1.

¹³ U.S. Const. art. I, § 8, cl. 1., art. I, § 9, cl. 7.

¹⁴ U.S. Const. art. I, § 8, cl. 11.

¹⁵ U.S. Const. art. II, § 2, cl. 2.

the proper exercise of jurisdiction by domestic courts, as well as foreign tribunals that may impact American citizens or allies.

17. The United States has taken a leading international role in responding to the atrocities committed by Hamas on 7 October 2023 and the resulting conflict. Senator Graham has been personally involved in this response through his activities as a member of Congress as well as his engagement with stakeholders domestically and internationally.

18. Members of the United States Congress have a strong interest in advancing the rule of law while protecting American citizens and allies from the unlawful exercise of purported jurisdiction by international bodies. For example, with Senator Graham's support, Congress recently amended the United States Code to facilitate investigations and prosecutions within the jurisdiction of the International Criminal Court related to the Situation in Ukraine.¹⁶ On the other hand, Congress has passed legislation to protect the citizens of the United States from the unlawful exercise of jurisdiction by foreign tribunals¹⁷ and is considering whether other legislation is necessary.

19. As a sitting United States Senator and the Ranking Member of the Judiciary Committee, Senator Graham is interested in the lawful conduct of international bodies and is actively engaged in legislative efforts to promote the rule of law while protecting American citizens and allies from the unlawful exercise of purported jurisdiction.

b. Written observations on issues of jurisdiction and complementarity are desirable for the proper determination of the case

20. For the reasons stated in the 10 June 2024 request by the United Kingdom for leave to submit written observations, the question of jurisdiction is an open

¹⁶ Act of Dec. 29, 2022, Pub. L. No. 117-328, 136 Stat. 5092 (codified at 22 U.S.C. § 7423(h)).

¹⁷ See, e.g., American Service-Members' Protection Act, Pub. L. No. 107-206, 116 Stat. 899 (codified at 22 U.S.C. §§ 7421-7433).

issue that must be resolved regarding the application for arrest warrants pursuant to articles 19 and 58.¹⁸ Article 58(1)(a) requires, prior to the issuance of an arrest warrant, that the Pre-Trial Chamber satisfy itself that 'the person has committed a crime within the jurisdiction of the Court.'

21. The 5 February 2021 decision of the Chamber, as noted separately by the majority¹⁹ and the dissent,²⁰ did not settle the jurisdictional issue relating to the Oslo Accords that are now relevant.

22. In granting the United Kingdom's request for leave, the Chamber acknowledged that authorizing written observations would be appropriate to assist the Chamber. The Chamber also instructed other parties interested in submitting written observations to file requests for leave by 12 July 2024.²¹

23. The Chamber has previously found observations on the question of jurisdiction in this matter desirable at earlier stages of the proceeding.²²

24. Observations on the principle of complementarity, enshrined in paragraph 10 of the preamble of the Rome Statute and implemented through articles 17 and 18, are likewise desirable to assist the Chamber at this stage of the proceeding. Article 17(1) provides that the Court shall deem a case 'inadmissible' where it is being, or already has been, 'investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.' Article 18 contains notification and

¹⁸ ICC-01/18-171-SECRET-Exp-Anx, Request by the United Kingdom for Leave to Submit Written Observations Pursuant to Rule 103, 10 June 2024, paras. 16-25 (reclassified as public on 27 June 2024, ICC-01/18-171-Anx).

¹⁹ ICC-01/18-143, Pre-Trial Chamber I, Decision on the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine,' 05 February 2021, paras. 129, 131.

²⁰ ICC-01/18-143-Anx1, Pre-Trial Chamber I, Judge Péter Kovács' Partly Dissenting Opinion, 05 February 2021, paras. 365, 371.

²¹ ICC-01/18-173-Red, Pre-Trial Chamber I, 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,' 27 June 2024, paras. 5, 6.

²² ICC-01/18-63, Pre-Trial Chamber I, Decision on Applications for Leave to File Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence, 20 February 2020, paras. 53-56.

process requirements that are critical to respect for the principle of complementarity and due process of law.

25. The application of the principle of complementarity, a cornerstone of the Rome Statute and fundamental to the Court's exercise of jurisdiction, was not addressed in the Chamber's 5 February 2021 decision. While the Prosecutor,²³ *amici*,²⁴ and Palestine²⁵ discussed and disputed the nature and significance of complementarity, the Chamber's decision did not explicitly address it. It is now ripe for the Chamber's consideration in light of the application for arrest warrants. Chambers regularly consider issues of admissibility when assessing requests to issue warrants for arrest,²⁶ and article 17 makes clear that the principle of complementarity is a crucial element of admissibility.

c. The Nature and Content of the Rule 103 Observations

26. Senator Graham understands that the Court requires applicants to secure leave prior to making substantive observations under Rule 103.²⁷

27. To assist the Chamber in evaluating this request for leave, Senator Graham articulates the following issues on which he would provide observations:

- i. Whether the Court can assert jurisdiction over Israeli nationals given Palestine's status as a non-sovereign entity and the impact of the Oslo Accords.

²³ ICC-01/18-12, Office of the Prosecutor, Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine, 22 January 2020, paras. 180, 185.

²⁴ ICC-01/18-80, Amicus Curiae, Amicus Curiae Submissions of the Israel Bar Association, 16 March 2020, para. 17 (arguing that complementarity weighed against the Court's jurisdiction); ICC-01/18-84, Amicus Curiae, Observations of the Organisation of Islamic Cooperation in relation to the proceedings in the Situation in Palestine, 16 March 2020, paras. 65-69 (arguing that complementarity weighed in favor of the Court's jurisdiction).

²⁵ ICC-01/18-82, Amicus Curiae, Palestine's observations in relation to the request for a ruling on the Court's territorial jurisdiction in Palestine, 16 March 2020, para. 57.

²⁶ ICC-02/11-02/11-3, Pre-Trial Chamber III, Decision on the Prosecutor's Application Pursuant to Article 58 for a warrant of arrest against Charles Blé Goudé, 06 January 2012, paras. 10-12; ICC-02/11-01/12-2-Red, Pre-Trial Chamber III, Public redacted version - Decision on the Prosecutor's Application Pursuant to Article 58 for a warrant of arrest against Simone Gbagbo, 02 March 2012, paras. 10-12; ICC-01/12-01/18-35-Red2-tENG, Pre-Trial Chamber I, Decision on the Prosecutor's Application for the Issuance of a Warrant of Arrest for Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, 22 May 2018, paras. 18-39.

²⁷ ICC-02/05-185, Pre-Trial Chamber I, Decision on Application under Rule 103, 4 February 2009, para. 6.

- ii. Whether the case against Israeli nationals is inadmissible in light of the principle of complementarity enshrined in the preamble of the Rome Statute and implemented in the Statute itself.
- iii. The importance of a cautious and proper exercise of jurisdiction, and of respect for the principle of complementarity, from the perspective of a member of the legislature of a non-party State.

28. Senator Graham reserves the right to seek permission to file observations pursuant to Rule 103(1) on other issues, at the appropriate stage in the proceedings.

V. Request for Reclassification

29. On 11 July 2024, the Registry informed Senator Graham that the Chamber has given instructions to file all documents related to the Rule 103(1) procedure as secret. Senator Graham is mindful that proceedings before the Court often require confidentiality, and that the nature of the Situation in Palestine calls for prudence. However, the elements of the Situation that warrant secrecy are not at issue in this Request. Senator Graham therefore asks that this Request be reclassified as public.

30. The legal issues addressed in this Request, specifically jurisdiction, admissibility, and the nature of the Chamber's discretion with respect to Rule 103(1) requests, are publicly known. The factual information in this Request is similarly a matter of public record. The Request contains no new information regarding sensitive matters such as the conduct at issue in the Prosecutor's requests for arrest warrants, the identities or allegations of victims, or confidential activities by relevant governments or other entities.

31. Rule 103(1) requests are regularly filed publicly. *Amici* requests and observations were filed publicly in this Situation in 2020.²⁸ The Chamber also granted the United Kingdom's request to reclassify its Rule 103(1) Request of 10 June 2024 as public.²⁹ In light of the Chamber's past practice in this Situation as well as the public's interest in access to proceedings before the Court, Senator Graham requests that this filing be reclassified as public.

VI. Relief Requested

32. Senator Graham therefore requests permission to submit written observations pursuant to Rule 103(1) on the issues identified above and further requests that this filing be reclassified as public.

33. Senator Graham also requests that, if leave is granted to submit written observations, he would be permitted to invite other United States Senators to join his observations.

Respectfully submitted,



Lindsey O. Graham

United States Senator

Dated this Thursday, 11 July 2024

At Washington, District of Columbia, United States of America

²⁸ See, e.g., ICC-01/18-13, Amicus Curiae, Request for Leave to Submit Amicus Curiae Observations by Guernica 37 International Justice Chambers (pursuant to Rule 103 of the Rules), 23 January 2020; ICC-01/18-80, Amicus Curiae, Amicus Curiae Submissions of the Israel Bar Association, 16 March 2020; ICC-01/18-84, Amicus Curiae, Observations of the Organisation of Islamic Cooperation in relation to the proceedings in the Situation in Palestine, 16 March 2020.

²⁹ ICC-01/18-173-Red, Pre-Trial Chamber I, 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,' 27 June 2024, para. 7.