

Annex

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/18**
Date: **12 July 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

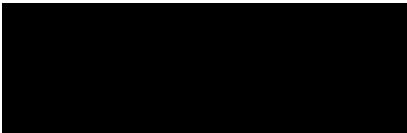
Public

**Request by The Hague Initiative for International Cooperation (*thinc.*) for Leave
to Submit Written Observations Pursuant to Rule 103 (1)**

Source: The Hague Initiative for International Cooperation (*thinc.*)

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

The Office of the Prosecutor



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Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

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Victims Participation and Reparations
Section

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I. Introduction

1. The applicant, The Hague Initiative for International Cooperation ("*thinc.*"), an NGO based in the Netherlands, hereby respectfully requests leave to file written observations pursuant to Article 103 (1) of the Rules of Procedure and Evidence ("the Rules") as per the Court's Order of 27 June 2014 ("the Order").

II. Procedural Background

2. The Order granted the United Kingdom's request for leave to submit written observations on "jurisdictional issues relating to the Oslo Accords" pursuant to Article 103 of the Rules of 10 June 2014.
3. Additionally, the Order stated "the Chamber's decision to grant the United Kingdom leave to file observations may result in other requests to submit observations". Any such requests pursuant to rule 103 (1) of the Rules must also be received by 12 July 2024.
4. The Order, however, does not specify that the issues to be raised in such requests must be limited to jurisdictional issues relating to the Oslo Accords. Consequently, applicants may also address other issues relevant at this procedural stage.

III. Admissibility of the Request

5. Rule 103 (1) provides a Chamber with the authority to accept amicus curiae on any issue the Chambers deems appropriate. It is in the Chamber's discretion to grant leave if it "considers it desirable for the proper determination of the case". Pursuant to rule 103 applications can be submitted either by states, organizations, or individuals interested in addressing issues of relevance to the proceedings.

6. *thinc.* intends to provide submissions that can assist the Chamber in determining unique and complex matters in international law and practice related to the matter under consideration before the Pre-Trial Chamber, to wit, the Prosecutor's request for arrest warrants regarding the "Situation in Palestine".

IV. Nature and Expertise of the Applicant

7. The applicant, *thinc.*, is an NGO based in the Netherlands. Through research, education and advocacy, *thinc.* seeks to promote peace and security in the Middle East based on the fair application of law, cooperation and mutual respect. *thinc.* was founded in 2017 and has a legal team composed of lawyers and Fellows specialized in public international law, European law, transnational crime, international litigation and arbitration. It also counts on an advisory board primarily composed of international jurists and academics from Europe, North America, and Asia. Their publications on international law issues relating to the Middle East are highly regarded. *thinc.* provides analysis to EU parliamentarians and EU External Legal Services on legal issues pertaining to the countering of international terrorism and remains at the forefront of issues concerning the designation of terrorist organizations by the European Union. It is represented in this application by Prof. Robbie Sabel, Dr. Matthijs de Blois, Andrew Tucker and Alessandro Spinillo.
8. **Prof. Robbie Sabel** Ph.D. is Professor of International Law, Faculty of Law Hebrew University Jerusalem; Member of the Permanent Court of Arbitration; Former Legal Adviser in Israel Ministry of Foreign Affairs; Agent for Israel, Taba arbitration with Egypt; Member of delegation, peace talks with Egypt, Jordan and Palestinians. He is a Visiting Professor at Georgetown and George Washington Universities, New York Law School, Queen Mary's

College London, Tel Aviv University, and IDC Herzliya. His publications include *Procedure in International Conferences* (Cambridge University Press, 3rd edition 2018), which was awarded the American Society of International Law annual award for merit, and *International Law and the Arab-Israeli Conflict* (Cambridge, 2022).

9. **Dr. Matthijs de Blois** has an LLM from Utrecht University and a PhD from the University of Leiden. He was Assistant Professor in the universities of Leiden and Utrecht. He is the author of many articles on international and EU law, including journal articles and book chapters on the legal status of the Mandate for Palestine. He is co-author of the book *Israel on Trial* (2018).
10. **Andrew Tucker** has an LLB from Melbourne University and a BCL from Oxford University. He has been a Senior Fellow at the University of Melbourne and was a senior research fellow at the TMC Asser Institute in The Hague. He practised EU and international law in Melbourne, London and Amsterdam for 20 years. He is currently Director of *thinc*. He has published many journal articles on international law and EU law and is the co-author of the books *Israel on Trial* (2018) and *Two States for Two Peoples?* (2023).
11. **Alessandro Spinillo** is a lawyer admitted in Spain and Argentina. He practiced in Buenos Aires, Madrid and London. He has recently joined *thinc* as a full-time legal advisor. He focuses on international litigation and arbitration, international public law, business and human rights, universal jurisdiction for war crimes, extraterritorial application of United States statutes like the FCPA and RICO. He is co-author of the leading title *International Arbitration in Latin America* (2003 Kluwer-Le Hague).

V. The United Kingdom's request for leave of 10 June 2024

12. This request noted that, on 20 May 2024, the Prosecutor announced that he had requested arrest warrants in the Situation in Palestine pursuant Article 58 of the Statute. The Prosecutor applied for arrest warrants against Yahya Sinwar, Mohammed Diab Ibrahim Al-Masri (commonly known as Mohammed Deif), Ismail Haniyah, Prime Minister Benjamin Netanyahu, and Defense Minister Yoav Gallant.
13. The UK request turned particular attention to the Chamber's "Ruling on the Court's Territorial Jurisdiction in Palestine" made on 5 February 2021, focusing on paragraphs 126, 129 and 131. The United Kingdom's request stated:

"The majority of the Pre-Trial Chamber noted that certain victims and amici curiae had submitted that in accordance with the principle *nemo dat quod non habet*, the Oslo Accords meant that Palestine could not have delegated part of its jurisdiction to the Court. The majority held that the resolution of the Oslo Accords issue was not "pertinent to the resolution of the issue under consideration", namely territorial jurisdiction. However, the majority of Pre-Trial Chamber I made it clear that its decision did not foreclose future arguments on the Oslo Accords, at the appropriate time. The Jurisdiction Decision expressly stated 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"¹

14. On this basis, the United Kingdom maintains that the outstanding issue of the Oslo Accords must now be addressed.

VI. Specific issues to be addressed if leave is granted

15. The applicant submits that the "Request by the United Kingdom for Leave to Submit Written Observations Pursuant to Rule 103", dated 10 June 2024,

¹ United Kingdom Request, para 10.

accurately identifies an outstanding question on jurisdiction to be examined and decided by the Court at this stage. The question posed is as follows:

“Whether the Court can exercise jurisdiction over Israeli nationals, in circumstances where Palestine cannot exercise criminal jurisdiction over Israeli nationals pursuant to the Oslo Accords.”

16. Further, the applicant notes that issues that may be subject of a Rule 103 request in the context of an application by the Prosecutor for issuance of arrest warrants in the Situation in Palestine are not limited to those specified by the UK. In the Ruling on 5 February 2021 the Chamber explicitly stated that, in the context of an application by the Prosecutor for the issuance of a warrant of arrest, the Chamber “will be in a position to examine *further questions of jurisdiction which may arise at that point in time.*”

“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.*” (Emphasis added)

17. To assist the Court in determining the relevant legal questions arising in the context of an application for the issuance of a warrant of arrest, the applicant indicates that, if permission is granted, its observations would include analysis of the following issues:

- i. The Oslo Accords are binding international instruments under public international law.
- ii. The Oslo Accords remain the only valid, agreed, legal source of authority for the division of control, powers, and responsibilities between the Palestinians and Israel over the territories.

- iii. The Oslo Accords were negotiated at arm's length between the parties, with the mediation of Norway and the United States. Contrary to the Prosecutor's suggestion, Israel did not obtain Palestinian assent through undue pressure or by taking advantage of an alleged inferiority of the Palestinian negotiators who as "protected persons under occupation are not in a sufficiently independent state of mind to fully appreciate the implication of a renunciation of their rights under the Convention [the Geneva Conventions]".²
- iv. The provision in The Oslo Accord II-Protocol Concerning Legal Affairs that reads "**Israel has sole criminal jurisdiction over the following offences: "... b. offences committed in the Territory by Israelis**" remains fully valid and enforceable.
- v. The provision above conforms to international law and does not violate peremptory rights of Palestinians. Furthermore, the provision also conforms to the well-known Lotus case rendered by the Permanent Court of International Justice.
- vi. The *nemo dat quod non habet* rule, which asserts that Palestine cannot transfer its criminal jurisdiction over Israeli nationals because it never had it, remains perfectly valid under the circumstances. The Prosecutor's attempts to circumvent the rule by distinguishing between "jurisdiction to prescribe" and "jurisdiction to enforce" lack substance and are artificial.³
- vii. The Oslo Accords conform to international law and do not undermine the right to self-determination of the Palestinian people, particularly in the light of Article 21 of the Rome Statute. The Prosecutor's arguments to the contrary lack substance and involve a complete and unprecedented subversion of international law.⁴

² Prosecutor's Request Pursuant to Article 19 (3) for a Ruling on the Court's Territorial Jurisdiction in Palestine of 22 January 2020, para 188.

³ *Ibid* para. 184

⁴ *Ibid* para 187

- viii. Palestine does not qualify as a State for the purposes of determining the Court's jurisdiction to issue arrest warrants in relation to the crimes alleged by the Prosecutor to have been committed.
- ix. The Prosecutor's request for the issuance of warrants of arrest is, at the very least, premature.

VII. Proviso

18. The references herein made to the United Kingdom's Request for Leave to Submit Written Observations, dated 10 June 2024, are made solely for references purposes. If the United Kingdom, for any reason, decides to withdraw its request, the applicant submits that its own request should stand independently.

VIII. Relief Sought

19. The applicant *thinc.* therefore respectfully requests permission to submit written observations pursuant to Rule 103 (1).

Respectfully submitted:



Andrew Tucker, on behalf of *thinc.*

Dated this 12th day of July 2024.