

Annex

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

No.: ICC-01/18

Date: 12 July 2024

PRE-TRIAL CHAMBER I

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

SITUATION IN THE STATE OF PALESTINE

Secret

**Request by the United States of America for Leave to Submit Written
Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence**

Source: The United States of America

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

The Office of the Prosecutor [REDACTED]	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
Victims Participation and Reparations Section	Other

I. INTRODUCTION

1. In response to the 27 June 2024 Order by Pre-Trial Chamber I ("Chamber"),¹ the United States of America ("Applicant") respectfully requests leave under rule 103 of the Rules of Procedure and Evidence ("Rules") to submit observations on two issues relevant to the Chamber's determination of the arrest warrant applications announced on 20 May 2024 ("Applications"):² (1) the effect of the Oslo Accords on the Court's jurisdiction in this matter; and (2) the effect of Israel's 1 May 2024 deferral request on the Prosecutor's authority to submit the Applications, absent specific authorization to resume his present investigation by this Chamber.³ The Applicant is well placed to provide observations on both issues, as described below.

2. If leave is granted, the Applicant requests 20 pages to present its written observations, which the Applicant proposes will cover both the first issue, which the United Kingdom was granted 10 pages to address, and the additional complex issue proposed above.

¹ Pre-Trial Chamber I, *Situation in the State of Palestine*, 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, [ICC-01/18-173-Red](#) ("Order on UK Request"), para. 6.

² See 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> ("Statement of ICC Prosecutor Khan").

³ The Applicant notes that nothing in this request constitutes recognition of the Court's jurisdiction in this Situation, or acceptance of the Court's jurisdiction over the United States or its current or former personnel. See, e.g., The United States Opposes the ICC Investigation into the Palestinian Situation, Press Statement, Antony J. Blinken, Secretary of State, 3 March 2021, available at <https://www.state.gov/the-united-states-opposes-the-icc-investigation-into-the-palestinian-situation/> ("March 2021 statement"); Warrant Applications by the International Criminal Court, Antony J. Blinken, Secretary of State, 20 May 2024, available at <https://www.state.gov/warrant-applications-by-the-international-criminal-court/>.

3. Finally, the Applicant requests that this filing be reclassified as “public.”⁴ Similar to the United Kingdom’s request,⁵ this request does not relate to matters that require confidential or secret treatment, including for the protection of witnesses, victims, or sensitive Court practices.

II. SUBMISSIONS

A. The proposed observations will assist the Chamber’s article 58 determination

4. The proposed observations are relevant to the Chamber’s proper determination of the Applications.⁶ The first issue directly concerns the Court’s jurisdiction in the Situation. As articulated by the United Kingdom in its rule 103 application,⁷ the question of jurisdiction is before the Chamber pursuant to articles 19(1) and 58(1)(a) of the Rome Statute. The Oslo Accords directly bear on the question of the Court’s jurisdiction over Israeli nationals, and the Chamber has recognized in its Order the issue’s potential relevance to the Chamber’s assessment of the Applications.⁸

5. If leave is granted, the Applicant will provide observations related to the jurisdictional issues under the Oslo Accords, including particularly the second of the Oslo Accords, the 1995 “Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip” (the “Interim Agreement”), and its annexed Protocol concerning Legal Affairs, in which the parties addressed in detail the jurisdictional authorities

⁴ This filing has been classified as secret based on advice from the Registry.

⁵ Order on UK Request, para. 7.

⁶ See Appeals Chamber, *Prosecutor v. al-Bashir*, Decision on the requests for leave to file observations pursuant to rule 103 of the Rules of Procedure and Evidence, the request for leave to reply and further processes in the appeal, 21 May 2018, [ICC-02/05-01/09-351](#), para. 9; Appeals Chamber, *Prosecutor v. Lubanga Dyilo*, Decision on “Motion for Leave to File Proposed Amicus Curiae Submission of the International Criminal Bar Pursuant to Rule 103 of the Rules of Procedure and Evidence,” 22 April 2008, [ICC-01/04-01/06-1289](#), paras. 7-8.

⁷ Request by the United Kingdom for Leave to Submit Written Observations Pursuant to Rule 103, 10 June 2024, [ICC-01/18-171-Anx](#), paras. 16-19.

⁸ Order on UK Request, para. 5.

transferred from Israel to the emerging Palestinian self-governing entity created and endowed with authorities through the Oslo Accords.⁹ The texts demonstrate that the Oslo Accords preserved in Israel exclusive criminal jurisdiction over acts committed by Israeli nationals. Therefore, even putting aside other issues, such as whether the “State of Palestine” is capable of acceding to the Rome Statute,¹⁰ the Palestinians could not have delegated jurisdiction that they have never had over Israeli nationals to the Court.

6. The second issue is equally relevant to the Chamber’s consideration of the Applications. Based on information available to the Applicant,¹¹ on 1 May 2024, Israel requested deferral of the investigation after receiving requests from the Prosecutor regarding a new alleged crime base relating to Hamas’s brutal attack on 7 October 2023 and the ensuing crisis in Gaza. Consistent with article 18(2) and past practice in other situations,¹² the Prosecutor should have deferred his investigation or taken steps

⁹ Declaration of Principles on Interim Self-Government Arrangements, 13 September 1993, U.N. Doc. A/48/486-S/26560 (11 October 1993), available at <https://undocs.org/A/48/486>; Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, 28 September 1995 U.N. Doc. A/51/889-S/1997/357 (5 May 1997), available at <https://undocs.org/A/51/889> and <https://www.un.org/unispal/document/auto-insert-185434/>.

¹⁰ While cognizant of the Pre-Trial Chamber’s limited finding that “Palestine ... is a ‘State’ for the purposes of article 12(2)(a) of the Statute” (see Pre-Trial Chamber I, *Situation in the State of Palestine*, Decision on the ‘Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine,’ 5 February 2021, [ICC-01/18-143](#), para. 112), the United States maintains that the Palestinians do not qualify as a sovereign State and, therefore, are not qualified to obtain membership as a State in or participate as a State in, or delegate jurisdiction to, the Court. See March 2021 statement.

¹¹ Israel has shared the referenced letter of 1 May 2024 with the Applicant. If the letter is not already in the Court’s records, the Applicant can seek Israel’s consent to provide it to the Court.

¹² See *Situation in the Islamic Republic of Afghanistan*, Notification on status of the Islamic Republic of Afghanistan’s article 18(2) deferral request, 16 April 2021, [ICC-02/17-142](#), paras. 2-3 (notifying Pre-Trial Chamber II of “relevant communications” the Prosecution had with Afghanistan in the context of its deferral request “[i]n order to keep the Chamber informed, and to be transparent with its analysis of the Deferral Request”; noting that it had requested Afghanistan to lift confidentiality constraints to material; explaining the Prosecution’s assessment process, including as to “whether certain aspects of its intended investigation could be deferred”; and noting its commitment to remain engaged with Afghanistan authorities and its agreement to an “in-person meeting to discuss a number of pending issues”); *Situation in the Republic of the Philippines*, Notification of the Republic of the Philippines’ deferral request under article 18(2), 18 November 2021, [ICC-01/21-14](#), paras. 1-2 (notifying Pre-Trial Chamber I of the Prosecution’s receipt of a deferral request from the Republic of the Philippines and

to seek authorization from this Chamber to continue the investigation.¹³

7. There are important questions about the propriety of the Applications in the present investigation given the pending, unadjudicated deferral request. Article 58(1) 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” if certain preconditions are met. Article 58(1) presumes that the relevant investigation has not been deferred or is not the subject of a pending deferral request. In this regard, the Court’s legal texts do not afford the Prosecutor the authority to unilaterally adjudicate deferral requests; instead, the authority to authorize an investigation following a deferral request resides with the Pre-Trial Chamber upon an application by the Prosecutor.¹⁴

8. If leave is granted, the Applicant will provide observations related to the operation of article 18(2) in the current context, as described above and when the Prosecutor has initiated a wholly new line of inquiry regarding a new alleged crime base that a State would not have been in the position to respond to at the time of initial notification of the original investigation.¹⁵ This issue not only is important for the

informing the Chamber that the Prosecution would request additional information from the Philippines as necessary “to assess the scope and effect of the Deferral Request, and to determine whether to apply to the Pre-Trial Chamber, under article 18(2) of the statute, for authorisation to continue investigating”); and *Situation in the Bolivarian Republic of Venezuela I*, Notification on the status of article 18 notifications in the Situation in the Bolivarian Republic of Venezuela I, 17 January 2022, [ICC-02/18-16](#), paras. 6-7 (informing Pre-Trial Chamber I regarding an extension the Prosecution granted Venezuela “[i]n a spirit of cooperation, dialogue and fairness . . . to inform the Court of its investigation within the meaning of article 18(2)” and explaining that such extension was necessary given, *inter alia*, “unsuccessful attempts by the Prosecution to meet in person with the Venezuelan authorities to discuss relevant procedural matters” and “to allow sufficient time, in the light of existing schedules, for the Prosecutor to travel to Venezuela before the expiry period and, as intended in December 2021, to engage in a meaningful dialogue with the Venezuelan Government on issues of admissibility with a view to assessing, among others, the scope and need for recourse to possible article 18 proceedings”).

¹³ The Applicant is not aware of any notification by the Prosecutor to the Chamber of Israel’s request, or any adjudication of the request by the Chamber.

¹⁴ See, e.g., article 18(2), Rome Statute; rules 54-56, Rules of Procedure and Evidence.

¹⁵ See Situation in Palestine | Summary of Preliminary Examination Findings, 3 March 2021, paras. 2, 4, and 5, available at <https://www.icc-cpi.int/itemsDocuments/210303-office-of-the-prosecutor-palestine->

Chamber's determination of the Applications, but also relates to a core provision of the Statute that has significant implications for the role of the Court, and for States Parties and non-States Parties alike.

9. The Applicant respectfully submits to the Chamber that resolution of both issues at this stage is necessary for the proper determination of the Applications.

B. The Applicant is well placed to submit observations on the proposed issues

10. The Applicant is well placed to provide observations on both issues. First, the Applicant can offer meaningful observations regarding the interpretation and effect of the Oslo Accords. The Applicant has been involved as a third-party facilitator, mediator, and witness working with the Israelis and Palestinians on numerous initiatives to resolve the Israeli-Palestinian conflict, including the Oslo Accords. In particular, not only the Declaration of Principles on Interim Self-Government

[summary-findings-eng.pdf](#) (identifying, in relation to Israeli nationals, alleged war crimes by members of the Israel Defense Forces (IDF) "in the context of the 2014 hostilities in Gaza"; alleged war crimes "in the context of Israel's occupation of the West Bank, including East Jerusalem"; and alleged crimes "in relation to the use by members of the IDF of non-lethal and lethal means against persons participating in demonstrations beginning in March 2018 near the border fence between the Gaza Strip and Israel"); Referral by the State of Palestine Pursuant to Articles 13(a) and 14 of the Rome Statute, 15 May 2018, available at https://www.icc-cpi.int/itemsDocuments/2018-05-22_ref-palestine.pdf (specifically identifying alleged crimes within the jurisdiction of the court "related to the Israeli settlement regime"). Cf. Referral of the Situation in Palestine, 17 November 2023, available at <https://www.icc-cpi.int/sites/default/files/2023-11/ICC-Referral-Palestine-Final-17-November-2023.pdf> (referring to "evidence of continuing commission of the crimes detailed in the Referral by the State of Palestine, dated 15 May 2018" and positing that "in recent weeks, some of the same crimes appear to have continued to be committed and additional crimes appear to have been committed within the jurisdictional scope of the Court," citing alleged crimes in the context of the current crisis in Gaza, including "knowingly and intentionally causing starvation and inhumane conditions to be endured by the population of the Gaza Strip"); Referral by the Governments of the Republic of Chile and the United Mexican States, 18 January 2024, available at https://www.icc-cpi.int/sites/default/files/2024-01/2024-01-18-Referral_Chile_Mexico.pdf (citing grave concerns "at the latest escalation of violence, including against civilians, and the ongoing commission of crimes under the jurisdiction of the Court, not limited to, but particularly, starting with the attack of 7 October 2023 conducted by Hamas militants and the subsequent hostilities in occupied Palestinian territory, including indiscriminate and disproportionate military operations of Israel against civilians in Gaza" and requesting "the Prosecutor to investigate the situation to determine whether one or more specific persons should be charged with the commission of such crimes"); and Statement of ICC Prosecutor Khan (announcing applications of arrest warrants for alleged crimes committed on 7 October 2023 and the ensuing crisis in Gaza).

Arrangements, but also the Interim Agreement, were signed in Washington, D.C., and witnessed by the United States. The United States has since continued to support and build Palestinian institutions, to engage bilaterally and multilaterally to advance the vision of Oslo, and continues to engage with both parties to facilitate discussions and implementation of agreements between them, in pursuit of a final negotiated settlement to the Israeli-Palestinian conflict. This includes the United States' enduring commitment to the creation of a Palestinian state as part of a two-state solution with Israel to ensure Palestinians and Israelis have equal measures of security, freedom, and dignity.

11. Further, the Applicant, though not a State Party to the Rome Statute, has pursued where possible a constructive relationship with the Court, including participating as an observer at sessions of the Assembly of States Parties and cooperating with the Court in specific situations. The Applicant, as a non-State Party and original drafter of article 18,¹⁶ has an important interest in the proper management of the complementarity regime of which article 18 is a part, including before applications for arrest warrants are filed with a Pre-Trial Chamber.

C. Twenty pages is requested to make the proposed submission

12. If leave to make a submission is granted, the Applicant respectfully requests being provided a maximum of 20 pages. Good cause for this request is based on the factual and legal complexity of the proposed observations. The effect of the Oslo Accords on the Court's jurisdiction is itself a complex matter that has not been briefed in the context of the application for arrest warrants.¹⁷

¹⁶ See Proposal submitted by the United States of America, Article 11 bis, Preliminary rulings regarding admissibility, UN Doc. A/AC.249/1998/WG.3/DP.2 (25 March 1998), available at <https://www.legal-tools.org/doc/fbe001/pdf>.

¹⁷ See Order on UK Request, paras. 4-5.

13. The proposed submission goes beyond that complex issue, for which the United Kingdom was allocated 10 pages,¹⁸ and deals with a separate and equally significant issue relating to whether the Chamber has been improperly seized with applications for arrest warrants in the current investigation. Additionally, this issue has implications for the Rome Statute's complementarity framework, which entails provisions drafted to protect States' legitimate interests and the legitimacy of the Court's role in the international justice landscape.

14. Finally, good cause exists given the novelty of the legal and factual issues being raised, which, in light of their significance for the proper role of the Court and States, as well as the significant procedural stage of the case, deserve to be fully and thoroughly briefed.

D. Request for reclassification

15. On 11 July 2024, the Registry advised the Applicant that the Chamber has stipulated that all filings related to the rule 103 procedure should be classified as secret. The Applicant respectfully submits that this request does not need to be secret or confidential and should be reclassified as public.

16. This request addresses issues related to the effect of the Oslo Accords and Israel's 1 May 2024 deferral request on the Chamber's consideration of the Applications. In its Order, the Chamber agreed that the United Kingdom's request and submissions relating to the effect of the Oslo Accords on the Court's jurisdiction could be filed publicly.¹⁹ In also addressing Israel's deferral request, this filing makes no submissions about victims, witnesses, or substantive evidence. The submission can be made public without disclosing any secret or confidential information.²⁰ As noted

¹⁸ Order on UK Request, para. 5.

¹⁹ Order on UK Request, para. 7.

²⁰ The Applicant understands that Israel has no objection to the letter referenced in para. 6 being made public.

above, this issue relates to the application of a core provision of the Statute with significant implications for both States Parties and non-States Parties.

III. RELIEF SOUGHT

17. The United States respectfully requests to be granted permission to submit written observations of no more than 20 pages on the proposed issues pursuant to rule 103.

18. The United States further requests that this filing be reclassified as public.

A handwritten signature in black ink, appearing to read "Richard C. Vissek", written over a horizontal line.

Mr. Richard C. Vissek
Acting Legal Adviser, U.S. Department of State
United States of America

Dated this 12th day of July 2024
At Washington, D.C. USA