

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 IJL for Leave to Submit Observations in accordance with the “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’” issued by Pre-Trial Chamber I on 27 June 2024

Source: International Association of Jewish Lawyers and Jurists

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Applicants to participate as Amicus Curiae
International Association of Jewish Lawyers
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REGISTRY
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Mr. Osvaldo Zavala Giler

Victims Participation and Reparations
Section

I. Procedural summary

1. On 5 February 2021, PTC I issued, by a Majority, its ruling on the Court's territorial jurisdiction in Palestine pursuant to Article 19(3) of the Statute stating *inter alia* that: "when the Prosecutor submits an application for the issuance of a warrant of arrest or summons to appear under article 58 of the Statutes, 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
2. On 3 March 2021, the Prosecutor announced the opening of an investigation in the Situation in the State of Palestine (the "Situation").²
3. On 20 May 2024, the Prosecutor announced that he had applied to PTC I for warrants of arrest in the Situation pursuant to Article 58 of the Statute.³
4. On 10 June 2024, the United Kingdom submitted a request to provide observations on "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."⁴
5. On 27 June 2024, PTC I issued an order whereby it: (i) granted the United Kingdom's request; and (ii) set a deadline for the 12 July 2024 for any other requests to file *amicus* briefs pursuant to Rule 103.⁵

II. Introduction

6. The legal and factual issues arising from the Prosecutor's requests for arrest warrants in the Situation are complex.⁶ They bring into play contested legal and factual elements

¹ 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' ("Jurisdiction Decision"), 5 February 2021, para. 131.

² [Statement of ICC Prosecutor, Fatou Bensouda, respecting an investigation of the Situation in Palestine](#), 3 March 2021.

³ [Statement of ICC Prosecutor Karim A.A. Khan KC: Application for arrest warrants in the situation in the State of Palestine, 20 May 2024](#), para. 1.

⁴ ICC-01/18-171-Anx, para. 27.

⁵ ICC-01/18-173-Red.

⁶ [Statement of ICC Prosecutor Karim A.A. Khan KC: Application for arrest warrants in the situation in the State of Palestine, 20 May 2024](#).

which have, to date, not been addressed fully by the Court. When PTC I issued its decision on the Court's territorial jurisdiction pursuant to the Prosecutor's Article 19(3) Request, the Majority emphasised 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."⁷

7. In these circumstances, it is crucial, now that the Prosecutor has applied for arrest warrants, that such matters are addressed in a comprehensive way and the Pre-Trial Chamber is presented with all relevant information before reaching any decision on the Prosecutor's applications. The Pre-Trial Chamber must be in possession of all relevant information to ascertain to the level of certainty that all jurisdictional requirements under the Rome Statute are met before deciding to move forward or to refuse the applications.⁸
8. This is particularly important in a context where the Pre-Trial Chamber currently only has at its disposal the Prosecutor's position, yet it is foreseeable that the legal and factual elements of the Prosecutor's applications will be highly contested.⁹ As a consequence, given the *ex parte* nature of the Article 58 proceedings, broad participation of *amici curiae* (capable of providing specific expertise, experience, and knowledge to the Chamber) takes on particular importance.
9. The IJL has taken note of the Chamber's authorisation to the United Kingdom to submit an *amicus* Brief in the current proceedings on certain jurisdictional matters that arise from the Prosecutor's applications. The IJL respectfully submits that allowing the participation of other *amici* with relevant expertise will allow the Chamber to reach its decision on more complete information, contributing to the fairness of the process.

⁷ ICC-01/18-143 05-02-2021, para. 131.

⁸ See ICC-01/18-98-Corr, para. 8.

⁹ For instance, but not exclusively, with respect to reliance on UN statements, reports, or materials.

10. The Prosecutor's applications for arrest warrants raise multiple legal and factual issues. These include – in the context of a State with a robust and well respected system of criminal law enforcement – the admissibility of the proposed cases, as well as – in order to establish the Court's jurisdiction *ratione materiae* – issues relating to the degree of certainty that the Pre-Trial Chamber must have that the acts alleged by the Prosecutor can properly be qualified as elements of the crimes which form the subject of the applications.

III. Expertise

11. The International Association of Jewish Lawyers and Jurists (IJL),¹⁰ a UN-ECOSOC special consultative accredited NGO, was founded in 1969 by, amongst others, the Nobel Prize laureate René Cassin of France, who was the driving force behind the UN commission that drew up the Universal Declaration of Human Rights of 1948. The IJL was established to promote human rights and international cooperation based on the rule of law, including the prevention of and accountability for war crimes, crimes against humanity and genocide, and combating all forms of racism, anti-Semitism, Holocaust denial, and the negation of the State of Israel. The IJL membership comprises judges, lawyers, and academic jurists, spanning over 25 countries, and is widely recognised as a leading international organisation in the fields of human rights and international law. Due to its special consultative status at the UN, for over 20 years the IJL has attended sessions of, and delivered statements to, UN and related committees monitoring human rights such as the Human Rights Council and the Office of the High Commissioner for Human Rights. The IJL has brought and participated in human rights related legal proceedings before international tribunals as well as national courts.
12. On 10 February 2015, the IJL communicated its concerns that the Prosecutor's opening of a preliminary examination in this situation prejudged crucial issues of Palestinian capacity to delegate jurisdiction to the ICC, as well as giving rise to concerns with respect to temporal jurisdiction. Already then, the IJL emphasised the complexity of the issues and its concerns that the OTP's preliminary examination was contingent on a contentious approach to Palestinian statehood.

¹⁰ Formerly known by the acronym IAJLJ.

13. On 14 February 2020, the IJL submitted a request to submit an Amicus Request in the Palestine Situation¹¹ following the Prosecution “request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine”.¹² This request was accepted on the 20 February 2020¹³ and the IJL submitted its brief on 16 March 2020.¹⁴
14. Hila Kugler Ramot is the Chief Executive Officer (CEO) of the IJL. Prior to assuming her current position, Adv. Kugler Ramot served for 15 years at the Israeli Office of the Deputy Attorney General (International Law). During her tenure at the Office of the Deputy Attorney General, Adv. Kugler Ramot provided legal counsel on issues concerning the law of armed conflict, human rights law, and international criminal law.
15. Dr Dov Jacobs and Joshua Kern practise international criminal law from 9BR Chambers in London. Dov Jacobs is on the List of Counsel at the ICC and Joshua Kern is an ICC registered assistant to counsel. 9BR Chambers has been at the forefront of many of the most significant developments at the ICC and at the international criminal tribunals in the past 20 years. Dov Jacobs is currently instructed as Counsel at the ICC and the MICT, and he is Associate Counsel on the Said defence team. He has recognised professional and academic expertise in matters relating to ICC jurisdiction. Joshua Kern is a Barrister and acted as assistant to Steven Kay KC and Gillian Higgins on the Uhuru Kenyatta defence team. He has been widely published on legal aspects pertaining to the Israeli-Palestinian conflict.¹⁵ Both, with Steven Kay KC, submitted communications to the OTP during its preliminary examination of this situation.¹⁶

¹¹ ICC-01/18-34.

¹² ICC-01/18-12.

¹³ ICC-01/18-63.

¹⁴ See ICC-01/18-98-Corr (in which the IJL observed, firstly, there was uncertainty as to the valid accession of Palestine to the Rome Statute; secondly, uncertainty as to the consequences of Palestinian accession even if it was valid; thirdly, there is no Palestinian territory over which any functional State of Palestine possesses the exclusive, plenary jurisdiction or authority to be in a position to delegate criminal jurisdiction to the ICC; and, fourthly, because the OTP has not sought authorisation to open an investigation under Article 15 for the period preceding Palestine’s purported accession to the Rome Statute, the ICC is barred from exercising jurisdiction for that period).

¹⁵ See, e.g. J. Kern and A. Herzberg, [The OTP’s expert panel in the Situation in the State of Palestine: Additional safeguard or hostage to fortune?](#), EJIL Talk, 7 June 2024; J. Kern, [Uncomfortable truths: how HRW errs in its definition of “Israeli apartheid”, what is missing, and what are the implications?](#), EJIL Talk, 7 July 2021.

¹⁶ S. Kay KC and J. Kern, [The principle of complementarity and the preliminary examination of a potential settlements case: A Response to the OTP’s Report on Preliminary Examination Activities 2018](#), 1 March 2019. S. Kay QC and J. Kern, [Corrected Version of Preconditions to the exercise of jurisdiction under Article 12 of the Rome Statute](#), 3 July 2019. S. Kay QC and J. Kern, [Preconditions to the exercise of jurisdiction over nationals of non-States Parties, 19 August 2019](#). D. Jacobs, Methodological challenges relating to the use of third-party Human Rights Fact-Finding in Preliminary Examinations, 27 May 2019.

IV. Summary of observations

The scope of the Situation

16. The IJL requests leave to submit observations on whether the Prosecutor's requests for arrest warrants fall within the scope of the currently opened investigation in the Situation in the State of Palestine, opened on 3 March 2021.
17. More specifically, the IJL would observe that the requests do not fall within the factual and temporal scope of the investigation opened by the Prosecutor in March 2021.
18. Factually, the requests arise from a context which constitutes a different factual background from the one underlying the investigation that is currently open. Indeed, the "situation" that concerns us today is not the situation of Palestine as defined by the Prosecutor in its decision to open an investigation in March 2021, but it is a new "situation" triggered by the events of 7 October 2023. This is apparent from the OTP's press release which sets 7 October 2023 as the starting date for the temporal scope of the current application for arrest warrants.¹⁷ The IJL will rely on the Court's legal framework regarding the definition of a situation,¹⁸ as well as policy papers issued by the office of the Prosecutor,¹⁹ to demonstrate that situations are defined by strict parameters which define the confines within which the Prosecutor can proceed.
19. Temporally, the IJL would observe that the nature of the decision to open an investigation at the ICC is necessarily backwards looking. It follows that the situation opened on 3 March 2021 does not confer authority on the Prosecutor to request the issuance of arrest warrants for events which have not been the object of a preliminary examination, which is the prior procedural requirement under the Rome Statute. The IJL would observe that the temporal scope of an investigation is contingent on there being "information available to the Prosecutor" that provides "a reasonable basis to believe that a crime within the jurisdiction of the Court *has been or is being committed*" (Article 53(1)(a) of the Rome

¹⁷ [Statement of ICC Prosecutor Karim A.A. Khan KC: Application for arrest warrants in the situation in the State of Palestine, 20 May 2024](#), para. 1.

¹⁸ ICC-01/04-101-tEN-Corr, para. 65.

¹⁹ [OTP's Policy Paper on Preliminary Examinations](#), November 2013; [Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening a new Preliminary Examination in Central African Republic](#), 7 February 2014.

Statute), i.e. that the alleged crime is complete or is ongoing at the time that the investigation is opened. This interpretation is further supported by analogy within the context of Article 15 Pre-Trial Chamber authorisations to open an investigation initiated by the Prosecutor *proprio motu*.

20. Any other interpretation of the Rome Statute would grant the Prosecutor unlimited authority to initiate open-ended, and indefinite, investigations, without needing to demonstrate that prior appropriate legal and factual analysis has been undertaken and fundamental jurisdictional requirements are met.

The effects of the Oslo Accords on the capacity of the ICC to exercise jurisdiction

21. The IJL would observe that the Oslo Accords are a part of the mutually agreed, and internationally endorsed, legal framework for resolving the Israeli-Palestinian conflict. The Interim Agreement clarifies that the Palestinian Authority has no jurisdiction over Israelis in any sphere, including the sphere of criminal jurisdiction.²⁰ The legal fact that Israel “has” (as opposed to “shall exercise”) such jurisdiction confirms that Israel remains the sole plenary authority with jurisdiction to prescribe criminal law over Israelis in the West Bank, Gaza Strip, and East Jerusalem.
22. This allocation of authority has been implemented on the ground for almost 30 years by both sides. Without prejudice to questions arising from the legality of Palestine’s

²⁰ See for example Article XVII1(a) of the [Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip \(Oslo II\)](#) (“In accordance with the DOP, the jurisdiction of the Council will cover West Bank and Gaza Strip territory as a single territorial unit, except for: a. issues that will be negotiated in the permanent status negotiations: Jerusalem, settlements, specified military locations, Palestinian refugees, borders, foreign relations and Israelis”); Article 2(c) (“The territorial and functional jurisdiction of the Council will apply to all persons, except for Israelis, unless otherwise provided in this Agreement”); and Article XVII 4(b) (“To this end, the Israeli military government shall retain the necessary legislative, judicial and executive powers and responsibilities, in accordance with international law. This provision shall not derogate from Israel's applicable legislation over Israelis *in personam*”); Article I1(a) of [Annex IV](#) (“The criminal jurisdiction of the Council covers all offenses committed by Palestinians and/or non-Israelis in the Territory, subject to the provisions of this Article. For the purposes of this Annex, ‘Territory’ means West Bank territory except for Area C..., and Gaza Strip territory except for the Settlements and the Military Installation Area”); Article I2(b) of Annex IV (“Israel has sole criminal jurisdiction over...offences committed in the Territory by Israelis”); Article I4(a) of Annex IV (“In addition, and without derogating from the territorial jurisdiction of the Council, Israel has the power to arrest and to keep in custody individuals suspected of having committed offenses which fall within Israeli criminal jurisdiction as noted in paragraphs 1.c, 2 and 7 of this Article, who are present in the areas under the security responsibility of the Council, where: a. The individual is an Israeli, in accordance with Article II of this Annex”); Article I12(c) of Annex IV (“The Palestinian authorities shall not arrest Israelis or place them in custody. Israelis can identify themselves by presenting Israeli documentation”).

accession to the Rome Statute, the IJL would observe that this reality has implications with respect to the Court's material, territorial, and personal jurisdiction.

23. The IJL would propose to develop this argument by noting that any argued Palestinian capacity to delegate the exercise of criminal jurisdiction to the ICC does not currently enable the Court to exercise jurisdiction over Israelis. Indeed, notwithstanding the position of the Chamber in 2021 on Palestine being a "State for the purposes of the Rome Statute",²¹ the Chamber did not address Palestine's status as a State under general public international law, which is the relevant framework of analysis now. Palestine does not meet the requirements for statehood under public international law and, in any event, it cannot delegate an authority which it has never possessed.

International law immunities as a bar to issuing arrest warrants

24. The IJL requests leave to submit observations on the issue of whether immunities constitute a bar to the ICC issuing arrest warrants against officials of non-state Parties.
25. This is an appropriate stage of the proceedings to raise this fundamental issue. Indeed, as found by the International Court of Justice, the simple issuance of an arrest warrant in ignorance of relevant rules of immunities can constitute a violation of State sovereignty,²² as may a request for State cooperation in such circumstances.²³
26. The IJL proposes to observe that the issuance of arrest warrants, as well as any requests for State Party cooperation associated with such a case, in the current circumstances would be in violation of peremptory rules of public international law relating to immunity of State officials. The ICC is a multilateral treaty that falls under the general rules of treaty law, most notably the Vienna Convention on the Law of Treaties, that provide that a treaty has relative effect vis à vis non-signatories to a treaty. As a result, the IJL would observe that the ICC would be acting contrary to basic rules of international law in issuing

²¹ ICC-01/18-143, para. 48.

²² [International Court of Justice, Case Concerning the Arrest Warrant of 11 April 2000 \(Democratic Republic of the Congo v. Belgium\), 14 February 2002.](#)

²³ [International Court of Justice, Case Concerning Certain Questions of Mutual Assistance in Criminal Matters \(Djibouti v. France\), 4 June 2008.](#)

arrest warrants against officials of non-state Parties. The IJL would argue also that any request for cooperation from States under Chapter IX of the Rome Statute would be contrary to Article 98 of the Rome Statute because it would put States in a situation whereby, to cooperate with the ICC, they would be in violation of their public international law obligations relating to immunities.

27. The IJL would propose to elaborate on the non-applicability of the current ICC case law on immunities, notably by the Appeals Chamber,²⁴ to the extent that its presentation of the existing rules of customary law, as understood in the case law, is not applicable in the circumstances of the current requests for arrest warrants, especially in the absence of a referral under Chapter VII of the UN Charter by the UNSC.

Respectfully submitted,



.....
Hila Kugler Ramot



Dov Jacobs



Joshua Kern

Dated this 12th day of July 2024

At Tel Aviv, Israel, The Hague, Netherlands and London, England

²⁴ ICC-02/05-01/09-397-Corr.