

Situation in the State of Palestine

Annex II

**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 ALLEGED STATE OF PALESTINE

SECRET

**Request for Leave to Submit Observations on
Jurisdiction and Admissibility
pursuant to Rule 103(1) of the Rules of Procedure
on behalf of the Non-Governmental Organisations
UK Lawyers for Israel ("UKLFI"), B'nai B'rith UK ("BBUK"),
the International Legal Forum ("ILF") and the Jerusalem Initiative ("JI")**

Source: UK Lawyers for Israel ("UKLFI"), B'nai B'rith UK ("BBUK"), the
International Legal Forum ("ILF") and the Jerusalem Initiative ("JI")

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
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

Introduction

1. This is a Request for leave to make written observations, pursuant to Rule 103 of the Rules of Procedure, regarding the jurisdiction of the International Criminal Court (“the Court”) in Palestine and the admissibility of proposed cases against Israelis.
2. This Request is made by the following NGOs: UK Lawyers for Israel (“**UKLFI**”), B’nai B’rith UK (“**BBUK**”), the International Legal Forum (“**ILF**”) and the Jerusalem Initiative (“**JI**”). We previously made written observations on the Court’s jurisdiction in Palestine on 16 March 2020¹ pursuant to the Court’s Order of 20 February 2020.² Information about our organisations is contained in our application for leave to file those written observations of 14 February 2020.³
3. This Request is made following the Court’s Order of 27 June 2024⁴ which set a deadline of 12 July 2024 for submitting any other Requests for leave to make observations under Rule 103. In line with Rule 103 and that Order, we understand that it is not necessary or appropriate for the request to set out the proposed observations in full, but we endeavour below to indicate the nature of our proposed observations so as to enable the Court to make an appropriate decision on the Request.
4. This Request is filed as “Secret” *ex abundante cautela*, but the Court is invited to reclassify it as public in line with its Order of 27 June 2024 relating to the UK’s Request to provide observations.
5. It is appropriate to mention here that the above organisations intend to submit a separate Request under Rule 103 to make written observations regarding the existence of serious factual inaccuracies and the omission of highly relevant information and evidence in the Prosecutor’s Applications for warrants for the arrest of Israeli leaders, as appear from the Prosecutor’s public statement purporting to summarise and justify the grounds of these Applications.⁵

¹ ICC-01/18-92 https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2020_01055.PDF; Annex ICC-01/18-92-Anx https://www.icc-cpi.int/sites/default/files/RelatedRecords/CR2020_01056.PDF

² ICC-01/18-63 https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2020_00610.PDF

³ ICC-01/18-31 https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2020_00466.PDF

⁴ ICC-01/18-173-Red <https://www.icc-cpi.int/court-record/icc-01/18-173-red>

⁵ [https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state#:~:text=1\)\(k\).-My%20Office%20submits%20that%20the%20war%20crimes%20alleged%20in%20these,Armed%20Groups\)%20running%20in%20parallel.](https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state#:~:text=1)(k).-My%20Office%20submits%20that%20the%20war%20crimes%20alleged%20in%20these,Armed%20Groups)%20running%20in%20parallel.)

Jurisdiction

6. We note the UK's Request for leave to submit written observations pursuant to Rule 103 dated 10 June 2024.⁶ We respectfully agree with the UK that the Court should give further consideration to the issue of territorial jurisdiction at this stage, for the reasons given by the UK and for additional reasons.
7. This further consideration is desirable for the proper determination of the case, in particular, because:
 - (a) The majority Decision of 5 February 2021⁷ expressly stated 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 ... under Article 58 of the Statute ..., the Chamber will be in a position to examine further questions of jurisdiction which may arise at that point in time.*"
 - (b) There was a strong dissent by Judge Kovacs.⁸
 - (c) Significant information has come to light since that ruling. In our respectful submission this information further undermines the reasoning of the majority Decision and assumptions on which it was based, adding to the flaws known at the time, many of which were set out in the dissent. Our proposed observations would focus on this new information. This information has been elicited by the first Applicant, UKLFI; it is therefore particularly appropriate that these Applicants should be afforded the opportunity to draw it to the attention of the Court and to make observations about it.
 - (d) The issuance of arrest warrants would have obvious implications for the liberty not only of those identified publicly as persons whose arrest is sought, but also of many other Israelis against whom arrest warrants may have been sought, or may be sought, without public disclosure. Moreover, in view of the serious inaccuracies in the grounds on which arrest warrants have been sought according to the Prosecutor's public statement,⁹ Israelis cannot assume that their innocence will

⁶ ICC-01/18-171-Anx <https://www.icc-cpi.int/sites/default/files/RelatedRecords/0902ebd180892e1f.pdf>

⁷ ICC-01/18-143 https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_01165.PDF

⁸ ICC-01/18-143-Anx1 https://www.icc-cpi.int/sites/default/files/RelatedRecords/CR2021_01167.PDF

⁹ <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state>

avoid the risk of arrest under warrants issued on the basis of false information. As well as constituting a serious injustice, the resulting restriction on the ability of many Israelis to travel to most countries without fear of arrest could even have significant adverse impacts on the world economy, science, medicine, and other important fields, given (i) that a large proportion of the Israel Defense Forces is formed of conscripts and reservists who, when not serving, are active participants in industry, academia, medicine and so on; and (ii) the very significant contributions made by Israelis to these fields on a global scale.

8. The majority Decision was based on the Secretary General's acceptance of the deposit of an instrument of accession of Palestine to the Rome Statute. It attached weight to the supposed fact that the Secretary General circulated this instrument among the States Parties before accepting it and that none manifested any opposition, except Canada.¹⁰ On this view, the existence, content and circulation of the instrument were surely important.
9. Since the Decision of 5 February 2021, the following information has come to light:
 - (a) The UN Secretary-General did not circulate any purported instrument of accession of Palestine to the Rome Statute among the States Parties before accepting it.¹¹ The third sentence of paragraph 100 of the majority Decision is wrong and should not have been relied upon in the second sentence of paragraph 101. This undermines the argument, on which the majority Decision appears to be based, that all States Parties must be taken to have agreed to the accession of Palestine as a State Party.
 - (b) The UN Secretary-General has not circulated a purported instrument of accession of Palestine to the Rome Statute at any time to States Parties. He merely communicated to States Parties on Tuesday, 6 January 2015 that Palestine's accession was (allegedly) effected on Friday, 2 January 2015.¹²

¹⁰ ICC-01/18-143 https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_01165.PDF paras 95-103

¹¹ UN Depositary Notification Reference C.N.13.2015

<https://treaties.un.org/doc/Publication/CN/2015/CN.13.2015-Eng.pdf>, Annex p.3; letter from UK Foreign, Commonwealth & Development Office to Jonathan Turner, 15 March 2021 (Annex p.6); email from David Nanopoulos (Chief of the Treaty Section, UN Office of Legal Affairs) to Jonathan Turner of 19 March 2021 (Annex p.10)

¹² Ibid.

- (c) Neither the Court¹³ nor the UK¹⁴ nor, we presume, other States Parties have seen any instrument of Palestine's claimed accession to the Rome Statute.
- (d) However, it can be inferred from the content of the UN Secretary General's communication, combined with the UN Secretary General's practice, that if there was any instrument, it did not contain any statement as to the territory to which it applied, nor any reference to UNGA Resolution 67/19 or any other UN resolution. If there had been any such statement, it would (we are informed) have been included in the Secretary General's communication, but no such statement was included.¹⁵ This further undermines the conclusion of the majority Decision that, for the purpose of defining the Court's territorial jurisdiction, the territory of the deemed "State of Palestine" must be taken to be that referred to in UNGA Resolution 67/19.
10. Alternative bases for determining the territory of the deemed State of Palestine for the purpose of defining the Court's territorial jurisdiction are also highly problematic, as we would seek to explain in our proposed observations. Although the purported instrument of accession, on which the majority Decision is based, has not been produced, it seems unlikely that it was made by those in control of the Gaza Strip at the time, i.e. the terrorist organisation, Hamas. On the other hand, if the instrument was made by Palestinian officials in the West Bank, they were not in control of the Gaza Strip and were not in a position to represent the people of the Gaza Strip, where there had been no elections since 2006.
11. In any case, we would respectfully submit that the whole framework of the majority Decision is erroneous and should be reconsidered. As Judge Kovacs stated, the majority Decision was based on an abridgment of the terms of Article 12(2) of the Rome Statute that distorted its meaning¹⁶ and did not comply with Articles 31 and 32 of the Vienna Convention on the Law of Treaties.¹⁷ On any reasonable interpretation of the full text of Article 12(2) of the Rome Statute in accordance with Article 31 of the Vienna Convention, the precondition in the first part of its Article 12(2)(a) is only satisfied where

¹³ Email from Irinka Dolidze on behalf of Peter Lewis (ICC Registrar) to Jonathan Turner of 18 February 2021 (Annex p.4)

¹⁴ Letter from UK Foreign, Commonwealth & Development Office to Jonathan Turner, 15 March 2021 (Annex p.6)

¹⁵ Emails from David Nanopoulos to Jonathan Turner of 22 and 24 March 2021 (Annex pp.8-9)

¹⁶ Partly Dissenting Opinion of Judge Kovacs ICC-01/18-143-AnxI https://www.icc-cpi.int/sites/default/files/RelatedRecords/CR2021_01167.PDF, paras 55-58

¹⁷ Ibid. paras 59-85

the conduct in question occurred on the territory of a State which is a Party to the Statute. Where these are disputed, we would respectfully submit that a determination must be made by the Court as to whether an entity is a State, whether it is a Party to the Statute, and what is its territory in accordance with applicable international law.

12. Furthermore, we would wish to observe that it is clear from the travaux préparatoires of the Rome Statute that the jurisdiction of the Court was intended to be based on delegation from the States that are parties to the Statute.¹⁸ Palestine could not delegate criminal jurisdiction over Israeli citizens that it did not have, because this was expressly excluded by Article XVII(2)c and Annex IV, Article I(2)(b) of the Oslo II Accord.¹⁹
13. We would respectfully submit that the impact of the Oslo II Accord on the Court's jurisdiction should not be dismissed on the ground that it is not part of or made under the Rome Statute, especially as Article 21(1)(b) of the Rome Statute requires the Court to apply applicable treaties where appropriate. Nor should its provisions on jurisdiction be dismissed on the basis of Article 47 of the 4th Geneva Convention, since these provisions do not deprive protected persons of the benefits of that Convention.
14. Thus, even if (contrary to our submission) the interpretation of Article 12(2) of the Rome Statute resulting from the application of Article 31 of the Vienna Convention leaves the meaning ambiguous or obscure, we would observe that the application of Article 32 of the Vienna Convention confirms the view that the Court does not have jurisdiction over Israeli citizens in respect of conduct in the Gaza Strip.
15. The suggestion in the majority Decision that the conflict between its conclusion and the Oslo II Accord can be addressed by consultations under Article 97 of the Rome Statute²⁰ is, we would argue, manifestly unsatisfactory. In the first place, it does not in any way cure the lack of jurisdiction if the preconditions of jurisdiction in Article 12 of the Statute are not satisfied. Secondly, it does not avoid violation of the rights of States that are not parties to the Rome Statute, or of their nationals - including their nationals against whom

¹⁸ Proposal by the Republic of Korea for article 6[9], 7[6] and 8[7], 18 June 1998, A/CONF.183/C.1/L.6; Observations of Prof Robert Badinter, Prof Irwin Cotler PC OC OQ, Prof David Crane, Prof Jean-Francois Gaudreault-DesBiens, Lord David Pannick KC and Prof Guglielmo Verdirame KC ICC-01/18-97 https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2020_01066.PDF paras 49-56

¹⁹ See the Observations of Ambassador Dennis Ross ICC-01/18-94 https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2020_01060.PDF, particularly paras 6-15

²⁰ ICC-01/18-143 https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_01165.PDF para 127

arrest warrants may have been sought, or may be sought, without public disclosure, as mentioned in paragraph 7(d) above.

Admissibility

16. Should leave be granted, we would respectfully submit that the Prosecutor also failed to take properly into account one of the most foundational principles upon which the Court is governed, that of complementarity.²¹ In his announcement that he was seeking arrest warrants, the Prosecutor himself even acknowledged that this principle lies “*at the heart of the Rome Statute*.”²² In short, the Court may only exercise jurisdiction in circumstances where national legal systems that have jurisdiction fail to act, or fail to do so in a genuine manner.
17. It is well established that the State of Israel has a widely respected legal system, including but not limited to the Supreme Court, the IDF Military Advocate General and the Attorney-General, that is robust, independent and capable at all times of conducting impartial investigations in good faith over alleged crimes falling within the scope of the Rome Statute. It has a demonstrated track record of holding officials at the highest levels accountable for serious crimes – including a former President²³ and a former Prime Minister.²⁴
18. Underscoring the IDF's Military Advocate General's robust independence and willingness to conduct bona fide investigations, over 70 investigations of alleged wrongdoing relating to military conduct since 7 October have already been initiated, notwithstanding the unprecedented circumstances whereby Israel remains in a state of self-defensive war against the Hamas terror group and evidence continues to be gathered in a highly challenging and complex urban warfare environment.²⁵
19. Indeed, the Prosecutor himself stated on 29th October 2023 that “*Israel has a professional and well-trained military. They have, I know, military advocate generals and a system that is intended to ensure their compliance with international humanitarian law. They*

²¹ Rome Statute, Preamble Recital 10 and Arts. 1, 17, 18 and 53

²² <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state>

²³ <https://www.bbc.co.uk/news/world-middle-east-12815941>

²⁴ <https://www.theguardian.com/world/2016/feb/15/ehud-olmert-israeli-ex-pm-19-month-prison-bribery>

²⁵ Speech of the Military Advocate General, MG Yifat Tomer-Yerushalmi, 27 May 2024, <https://www.idf.il/en/mini-sites/idf-press-releases-regarding-the-hamas-israel-war/speech-of-the-military-advocate-general-mg-yifat-tomer-yerushalmi/>

have lawyers advising on targeting decisions, and they will be under no misapprehension as to their obligations, or that they must be able to account for their actions."²⁶

20. Furthermore, a central tenet of the principle of complementarity is that the Court is to serve as a complement, not a substitute for a national legal system. Reiterating this, on 3 December 2023, following his visit to Israel, the Prosecutor stated that he stands *"ready to engage with relevant national authorities in line with the principle of complementarity at the heart of the Rome Statute."*²⁷ The Prosecutor repeated this point in his Office's April 2024 *Policy on Complementarity and Cooperation*, when he stressed *"We must also establish ourselves as a strong and effective partner for national authorities."*²⁸
21. However, instead of engaging with the relevant national authorities in Israel, which had been prepared to do so with him and even agreed to host him and his team for high-level discussions on the matter, the Prosecutor circumvented this entirely, by announcing his decision to seek the arrest warrants without prior consultation and by cancelling his arranged visit to Israel to meet Israeli officials at the very last minute.²⁹ Despite reports of this in the media, the Prosecutor has not explained the reasons for his precipitate decision and what urgency existed to make this course of action necessary, particularly given the requirements of Article 58(1)(b) of the Rome Statute. This raises some deeply troubling procedural questions³⁰ and concerns regarding violation of Article 18 of the Rome Statute.
22. Accordingly, we would contend, if granted leave, that the Prosecutor's decision to seek arrest warrants, and the manner in which he chose to do so, grossly violate the principle of complementarity; and that this should also be taken into account in the Court's consideration of the applications.

²⁶ ICC Prosecutor speaks in Cairo on the situation in Israel and Palestine, 29 October 2023

<https://www.youtube.com/watch?v=DHyxpHiM1KA>

²⁷ <https://www.icc-cpi.int/news/icc-prosecutor-karim-khan-kc-concludes-first-visit-israel-and-state-palestine-icc-prosecutor#:~:text=I%20also%20stand%20ready%20to%20engage%20with%20relevant%20national%20authorities%20in%20line%20with%20the%20principle%20of%20complementarity%20at%20the%20heart%20of%20the%20Rome%20Statute>

²⁸ <https://www.icc-cpi.int/sites/default/files/2024-04/2024-comp-policy-eng.pdf>

²⁹ 'Exclusive: ICC prosecutor opted for warrants over visit to Gaza', Reuters, 5 July 2024,

<https://www.reuters.com/world/middle-east/icc-prosecutor-opted-warrants-over-visit-gaza-2024-07-05/>

³⁰ Statement by Antony J. Blinken, US Secretary of State, 20 May 2024, <https://www.state.gov/warrant-applications-by-the-international-criminal-court/>

Request

23. We respectfully request leave to make observations on jurisdiction and admissibility in line with the points made above.

Respectfully submitted by



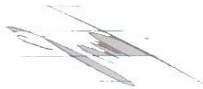
Jonathan Turner, Chief Executive, on behalf of UK Lawyers for Israel (“**UKLFI**”),



Jeremy Havardi, on behalf of B’nai B’rith UK (“**BBUK**”) Bureau of International Affairs,



Arsen Ostrovsky, on behalf of the International Legal Forum (“**ILF**”)



Elias Zariana, on behalf of the Jerusalem Initiative (“**JI**”) and

Dated this 12th day of July 2024

At London, Tel Aviv and Jerusalem