

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

No.: **ICC-01/18**  
Date: **12 August 2024**

**PRE-TRIAL CHAMBER I**

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

**SITUATION IN THE STATE OF PALESTINE**

**Public**

**Victims' Observations pursuant to Article 68(3) of the Rome Statute**

**Source: Legal Representatives of Victims**

**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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## I. INTRODUCTION

1. The Legal Representatives of 635 Palestinian Victims (“Victims”) hereby respectfully submit observations before Pre-Trial Chamber I (‘Chamber’) pursuant to the Chamber’s decision of 7 August 2024.<sup>1</sup> The Victims are Palestinian men and women who live across the State of Palestine, including the Gaza Strip and the West Bank. They have suffered war crimes, crimes against humanity and genocide that fall within the Court’s jurisdiction. Nearly all the Victims participated in the Article 19(3) proceeding that took place in 2020 on the “Prosecutor’s request for a ruling on the Court’s territorial jurisdiction in Palestine” (‘Prosecution’s Request for Ruling on Palestine’).<sup>2</sup>

2. The Legal Representatives submit that the question of jurisdiction was firmly settled by the Chamber in its ‘Decision on the ‘Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine’, in which it decided that the Court’s territorial jurisdiction encompasses the Palestinian territory occupied by Israel since 1967 and that “arguments regarding the Oslo Agreements in the context of the present proceeding are not pertinent to the resolution of the issue under consideration”.<sup>3</sup> The Prosecutor was thereby given the green light to open an investigation into the *Situation in the State of Palestine*. The Court’s ruling plainly remains valid and there is no justifiable reason under the Statute to reconsider the matter of jurisdiction at this stage or to allow *amici curiae* to eclipse and impede the Prosecutor’s applications for warrants of arrest. Consideration of the issues raised in the ‘Request by the United Kingdom for Leave to Submit Written Observations pursuant to Rule 103’ (‘United Kingdom Request’) (albeit that it is now in effect withdrawn),<sup>4</sup> and by others who have taken advantage of the Pre-Trial Chamber’s leave to submit observations to raise a seemingly unlimited range of issues that are irrelevant and arguably obstructive at this stage, is unwarranted under the Statute.

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<sup>1</sup> Pre-Trial Chamber I, ‘Public redacted version of ‘Decision concerning the views, concerns and general interests of victims’, 30 July 2024, ICC-01/18-256-Conf’, ICC-01/18-256-Red, 7 August 2024.

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

<sup>3</sup> Prosecution’s Request for Ruling on Palestine, paragraph 129.

<sup>4</sup> ‘Request by the United Kingdom for Leave to Submit Written Observations Pursuant to Rule 103’, ICC-01/18-171, submitted on 10 June 2024 and reclassified as Public pursuant to Order ICC-01/18-173-Red dated 27 June 2024.

3. Even worse, reconsidering this matter will likely cause the Victims further harm and prolong their suffering as it will delay the course of justice. This delay will further jeopardise their safety, well-being and dignity. Communication with the Victims has been extremely challenging due to power outages, closures, movement restrictions and displacement orders but it is abundantly clear from the interactions which are possible that the current situation of the Victims, particularly those in the Gaza Strip, is unimaginably difficult and perilous. “We are struggling with death, hunger and disease. Life is hard and the war exhausted everyone”, explained one victim. He has been forced to live in a tent on a street with his children under the blazing sun. He shared that “medicine is scarce, my children are sick, I am trying to manage things, and the summer is deadly in the tents”. “Our facial features have changed, and we can no longer bear it”.<sup>5</sup> Another victim whose neighbours have all been killed, and who was in a refugee centre when the Legal Representatives were last able to contact him, no longer asked about developments at the Court and was simply not in a state of mind to hear about it as before. He does not get any news because of the power outages and relies solely on what he hears from those around him. He just needed someone to listen to his suffering and help him find some peace and comfort for himself and his family.

4. The Victims’ focus is understandably on their immediate survival. They strongly urge the International Criminal Court to share this quest and do all in its power to end the commission of such pervasive and devastating international crimes. Their urgent calls for justice to be pursued are echoed by the United Nations Mandate Holders in a March 2023 letter to the Prosecutor which, even before the assault on Gaza that followed the 7 October 2023 attack, stated that the “lack of accountability in the occupied Palestinian territory is contributing to a situation of ‘lawlessness’ [...] Expediting justice is a crucial step to end impunity and restore international law and a human rights-based order, as the last bastion to stop the spirals of violence and the risks this poses for Palestinians and Jewish-Israelis alike”.<sup>6</sup>

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<sup>5</sup> All quotes in this paragraph are unofficial translations of Arabic exchanges.

<sup>6</sup> *Amicus Curiae* Submission by the United Nations Mandate Holders of the Human Rights Council, ICC-01/18-320, 6 August 2024, paragraph 20.

5. The Victims had long expressed their dismay and profound disappointment at the slow pace of progress in the *Situation in the State of Palestine* at the Court and simply wanted it to do its job. They cannot understand the apparent disconnect between the purpose and aspirations of the Court and its lack of action in response to Palestinian suffering. Now, more than ever, they look to the Court to act swiftly and decisively.

## II. SUBMISSIONS

### A. The legal basis and procedural timeliness of the Chamber's consideration of the United Kingdom's Request (now withdrawn)

6. As emphasised above, consideration of the issues raised in the United Kingdom Request (which it has since withdrawn),<sup>7</sup> and by other *amici curiae* who have taken advantage of the opportunity to raise a seemingly unlimited range of issues that are irrelevant at this stage, is unwarranted under the Statute. The Statute contains a clear framework for challenges to jurisdiction in Article 19. The Victims submit that the United Kingdom Request under Rule 103 of the Rules of Procedure and Evidence ('Rules') does not fall within any of these provisions, nor do any of the other submissions challenging jurisdiction filed under Rule 103.

7. The Statute sets out the framework for challenges to the Court's jurisdiction. Article 19(2) provides that an accused or person for whom an arrest warrant or a summons to appear *has been issued* (emphasis added) under Article 58 (sub-paragraph (a)), or a State that has jurisdiction over a case or from which acceptance of jurisdiction is required under Article 12 (sub-paragraphs (b) and (c)), may challenge jurisdiction, the only limitation being that such a challenge may be made only once (paragraph 4) other than in exceptional circumstances. Article 19 does not provide for any others to submit challenges to jurisdiction. As the State of Palestine put it in its observations: "The Court cannot do through the backdoor of Rule 103 what is not permitted by the text of the Rome Statute itself".<sup>8</sup>

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<sup>7</sup> 'Request by the United Kingdom for Leave to Submit Written Observations Pursuant to Rule 103', ICC-01/18-171, submitted on 10 June 2024 and reclassified as Public pursuant to Order ICC-01/18-173-Red dated 27 June 2024.

<sup>8</sup> The State of Palestine, 'Observations of the State of Palestine to the Pre-Trial Chamber I pursuant to Rule 103 of the Rules of Procedure and Evidence', ICC-01/18-291, 6 August 2024, page 5.

8. After conducting investigations in the *Situation in the State of Palestine*, the Prosecutor announced that he had moved to request the Chamber to issue arrest warrants against five individuals, including two Israeli nationals, and that all the requirements of Article 58(1) were satisfied: he had reasonable grounds to believe that persons have committed crimes within the jurisdiction of the Court and their arrest appears necessary.<sup>9</sup> The specific role of the Pre-Trial Chamber is to examine the Prosecutor's request and satisfy itself that the requirements of Article 58(1) have indeed been met.

9. By virtue of Article 19(1), the Chamber's task includes satisfying itself that the Court has jurisdiction. This has been done already; the question of jurisdiction, including the specific issue relating to the Oslo Accords raised by the United Kingdom, was fully argued in the proceedings in 2021. Indeed, as part of that proceeding and pursuant to an order of this Chamber,<sup>10</sup> the Victims submitted comprehensive observations to this Pre-Trial Chamber on the territorial jurisdiction of the Court, including on the Oslo Accords.<sup>11</sup> This issue has been addressed and dealt with by the Chamber and that, as stated by Chile and Mexico, should be the end of the matter.<sup>12</sup>

10. The United Kingdom Request (now withdrawn), and some *amici curiae* in their observations, present the Pre-Trial Chamber's findings in paragraphs 127 to 131 of its decision on jurisdiction as deferring until the Article 58 stage its determination on the impact on the Court's jurisdiction, if any, of the Oslo Accords. This is not an accurate representation of what the Chamber held. The Chamber held that "these issues *may* be raised by interested States based on article 19 of the Statute.", and that at the Article 58 stage or if a State or suspect submits a challenge under article 19(2) (at any stage prior to or at the commencement of the trial, in

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<sup>9</sup> Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for arrest warrants in the situation in the State of Palestine, 20 May 2024.

<sup>10</sup> Order setting the procedure and the schedule for the submission of observations, ICC-01/18, 28 January 2020.

<sup>11</sup> Victims' observations on the Prosecutor's Request for a ruling on the Court's territorial jurisdiction in Palestine, ICC-01/18, 16 March 2020.

<sup>12</sup> 'Written observations of Chile and Mexico pursuant to Rule 103(1) of the Rules of Procedure and Evidence', ICC-01/18-284, 6 August 2024, paragraph 8.

accordance with Article 19(4) 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).<sup>13</sup>

11. It is important to put these findings into context. Firstly, this is merely a restatement of the relevant provisions in the Statute regarding at what stages, and by whom, challenges to jurisdiction of the Court may be made, emphasising that they can only be made by those authorised under Article 19(2) at appropriate later stages of the proceedings. Secondly, it would appear from the text accompanying the above extracts from the decision under Article 19(3), which focuses on Articles 97 and 98 of the Statute (falling under Part 9 of the Statute, titled ‘International Cooperation and Judicial Assistance’) that the reason the Chamber considered it more appropriate to consider the relevance of the Oslo Accords at the stage when arrest warrants were being considered was because it regarded this as a matter relating more to cooperation and execution that may arise at that stage, than one that went to the question of whether the Court had jurisdiction as such.

12. Indeed, if the Oslo Accords have any effect *at all*, it may be 1) on cooperation only, and 2) in relation to the parties that signed the agreements. There is a clear distinction between the effect, if any, of bilateral agreements on the execution of requests by the Court and State cooperation under Chapter 9 of the Statute on the one hand, and the exercise of the Court’s jurisdiction on the other. Pre-Trial Chamber II, when considering whether to authorise an investigation in the *Situation in the Islamic Republic of Afghanistan*, had to consider whether an agreement between the International Security Assistance Force under which United States forces operated and the Interim Administration of Afghanistan, which purported to reserve exclusive criminal jurisdiction to the sending State’s national courts, barred the Court from prosecuting United States personnel. The Chamber considered the matter to fall under Article 98(2) of the Statute, relating to arrest and surrender of individuals, and held that it did not deprive the Court of jurisdiction over such persons where the Court’s jurisdiction was already established under Articles 11 and 12.<sup>14</sup>

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<sup>13</sup> 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’, ICC-01/18-143, 5 February 2021, paragraphs 129 and 131.

<sup>14</sup> Pre-Trial Chamber II, ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan’, ICC-02/17-33, 12 April 2019, paragraph 59.

13. The Legal Representatives reiterate that the issue raised by the United Kingdom (but since withdrawn) and others does not prevent and must not delay the issuing of warrants of arrest under Article 58 of the Statute. The United Kingdom itself declined to submit the observations it had requested to make, with the country's new government correctly, in the Victims' view, stating that it would not pursue this route, and that based on its firm belief in the rule of law and separation of powers, this is a matter for the Court alone to decide on.<sup>15</sup> The United Kingdom has now properly adopted the correct approach as a matter of law. It is submitted that the Court should follow the same path and proceed expeditiously to issue the arrest warrants.

14. Whether the Court can exercise jurisdiction over Israelis will severely affect the interests of all the Victims, since the outcome will have an immediate and decisive impact on whether the Court will be able to exercise its mandate over serious crimes committed in Palestine. If the Court were to rule that it cannot exercise jurisdiction over Israeli nationals for crimes they commit in the territory of the State of Palestine, in circumstances where Palestine cannot exercise criminal jurisdiction over them, then Palestinians in both the Gaza Strip and the West Bank will certainly not be able to enjoy their rights to truth, justice, and reparation.

15. In conclusion, the Chamber has already satisfied itself that it has jurisdiction as part of its consideration of the Prosecutor's request to issue arrest warrants and this is ample basis for it to proceed to examine the applications for arrest warrants and to expeditiously issue them, once satisfied the statutory requirements have been met. It is therefore not evident to the Victims why the Chamber would require specific expertise on the issue by way of *amicus curiae* at this stage to satisfy itself that the Court has jurisdiction when it had already received voluminous observations in 2021 and determined the matter.<sup>16</sup>

## **B. The Oslo Accords do not affect the exercise of the Court's jurisdiction over Israeli nationals**

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<sup>15</sup> Spokesperson for Prime Minister Sir Keir Starmer, reported in several media outlets on 26 July 2024, such as K.Stacey, 'Britain drops its challenge to ICC arrest warrants for Israeli leaders', The Guardian, 26 July 2024.

<sup>16</sup> Pre-Trial Chambers' established jurisprudence is to resort to *amicus curiae* observations when a chamber is of the view that observations providing specific expertise are needed in particular topics. For example, Pre-Trial Chamber II, Situation in Darfur, Sudan, in the case of The Prosecutor v. Ali Muhammad Ali Abd-al-Rahman ('Ali Kushayb'), Decision on victim applications for participation, legal representation, leave to appeal and *amicus curiae* requests, ICC-02/05-01/20, 20 May 2021, paragraph 71.



16. In 2020, this Chamber invited victims to submit written observations on the Prosecutor’s Request for a Ruling on Palestine on the question of jurisdiction.<sup>17</sup> The Victims communicated their views through written observations submitted on 16 March 2020, directly addressing the question of the Oslo Accords.<sup>18</sup> The Victims will not repeat all of the arguments they have already made, but will highlight arguments that directly address and refute the contentions made by parties wrongly challenging jurisdiction.

***The Oslo Accords do not prevent the State of Palestine from accepting the Court’s jurisdiction over its territory***

17. The provisions of the Oslo Accords regulating the Palestinian Authority’s (‘PA’) exercise of criminal jurisdiction in relation to Israeli nationals only place limits on *its own* – and no other States’ - enforcement jurisdiction, meaning its authority to enforce its criminal jurisdiction. They do not affect its prescriptive jurisdiction, which is its underlying ability and right to make laws and assert jurisdiction.<sup>19</sup> In signing the Oslo Accords, the PA was undertaking not to exercise its criminal jurisdiction in certain respects, but this did not represent the surrender of its very right to entertain criminal proceedings.<sup>20</sup> Consequently, Palestine’s ability to accept the jurisdiction of the Court is unaffected. As stated by Ireland, the relevant articles of the Oslo Accords regulate the exercise of jurisdiction over criminal acts committed by Israeli nationals in occupied Palestinian territory as between Israel and the Palestine Liberation Organisation only, but cannot extinguish Palestine’s criminal jurisdiction over its territory, which is an essential incident of its sovereignty.<sup>21</sup>

***The Rome Statute applies to States Parties that do not have full or any effective control over their territory***

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<sup>17</sup> Pre-Trial Chamber I, ‘Order setting the procedure and the schedule for the submission of observations’, ICC-01/18-14, 28 January 2020, paragraph 13.

<sup>18</sup> Victims’ observations on jurisdiction, paragraphs 106-118.

<sup>19</sup> Carsten Stahn, ‘Response: The ICC, Pre-Existing Jurisdictional Treaty Regimes, and the Limits of the Nemo Non Dat Quod Non Habet Doctrine’, 49 Vanderbilt Journal of Transnational Law 443 (2021), pages 446 and 450.

<sup>20</sup> Roger O’Keefe, ‘Quid,’ not ‘Quantum’: A comment on ‘How the International Criminal Court Threatens Treaty Norms’, 49 Vanderbilt Journal of International Law 433 (2021), page 437.

<sup>21</sup> ‘Written Observations of Ireland Pursuant to Rule 103’, ICC-01/18-306, 6 August 2024, paragraph 13.

18. The Statute does not limit its territorial jurisdiction to the territory of a State Party over which the State Party exercises effective control. The Statute was intended to apply to territories under occupation, and the Court is currently exercising jurisdiction in respect of States Parties that do not have effective control over a significant part of their own territory.<sup>22</sup>

***The Oslo Accords cannot under international law deprive Palestinians of their right to self-determination***

19. In its recent Advisory Opinion the International Court of Justice ('ICJ'), in a passage cited by many *amici curiae* considering the relevance of the Oslo Accords, stated that "occupation is a temporary situation ..., and it cannot transfer title of sovereignty to the occupying Power".<sup>23</sup> Nor, the Court stated, can the existence of the Palestinian people's right to self-determination be "subject to conditions on the part of the occupying Power, in view of its character as an inalienable right".<sup>24</sup> To limit the State of Palestine's prescriptive jurisdiction would be in violation of sovereignty and the right to self-determination.<sup>25</sup>

20. The right of self-determination is a *jus cogens* norm that gives rise to *erga omnes* obligations. The Oslo Accords cannot be interpreted to have deprived the State of Palestine of its right to self-determination, including its right to accept the jurisdiction of the Court.

***The Court's jurisdiction does not rely on the delegation by States Parties of their own criminal jurisdiction***

21. The jurisdiction of the Court is not based on a delegation by each individual State Party of their respective criminal jurisdiction. Rather, as expressed by Professor Leila Sadat in an article cited by many *amici curiae*, it is "a function of their collective action at the international level, representing, in other words, a form of 'collective conferral'".<sup>26</sup> The Statute itself is clear on

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<sup>22</sup> For instance, Ukraine does not control Crimea and other areas of its territory, and Georgia does not control South Ossetia.

<sup>23</sup> International Court of Justice, 'Legal Consequences arising from the policies and practices of Israel in the Occupied Palestinian Territory, including East Jerusalem', Advisory Opinion, 19 July 2024, paragraph 105.

<sup>24</sup> 'Legal Consequences arising from the policies and practices of Israel in the Occupied Palestinian Territory, paragraph 257.

<sup>25</sup> 'Written observations by South Africa, Bangladesh, Bolivia, Comoros, and Djibouti pursuant to Rule 103', ICC-01/18-309, 6 August 2024, paragraph 28.

<sup>26</sup> Leila Sadat, 'The Conferred Jurisdiction of the International Criminal Court', 99 *Notre Dame Law Review* 548 (2023), pages 557-558.

this point: Article 12 provides that States Parties “accept” the jurisdiction of the Court, there is no mention of delegation and no provisions requiring a mirroring of jurisdiction between the Court and the national jurisdiction.

22. Indeed, as many scholars and *amici curiae* point out, the implications of adopting the delegation theory would be absurd and seriously undermine the Court’s ability to fulfil its purpose of addressing impunity for the most serious crimes of concern to the international community. For instance, States Parties that have not incorporated Rome Statute crimes into their domestic law would be able to argue that the Court cannot exercise jurisdiction over those crimes because the State itself is not able to exercise jurisdiction. The very purpose of the Court is to fill gaps in accountability and to prosecute where States with jurisdiction are unable or unwilling to do so. As Professor Carsten Stahn puts it, the idea that there must be exact symmetry between the ICC jurisdiction and domestic jurisdiction goes against the rationale of complementarity.<sup>27</sup> Indeed, the State of Palestine explained to the Court that it needed to refer the Situation to the Court in order to bring about justice for crimes resulting from the unlawful occupation, which had deprived Palestine of its full ability to halt and punish these crimes.<sup>28</sup>

23. Plainly, the Statute should not, and does not, permit States to bypass the Court and avoid its jurisdiction whether by entering bilateral agreements or using other means to bring about a situation where they can claim they are unable to exercise jurisdiction, and consequently, that the Court itself is unable to do so.

***International law does not allow a State to renounce the rights of protected persons and the Oslo Accords cannot be interpreted as having such an effect***

24. The State of Palestine has acceded to the four Geneva Conventions of 1949. Article 7 of the Fourth Geneva Convention prohibits an Occupying Power from concluding any agreement which “shall adversely affect the situation of protected persons”, and Article 8 provides: “Protected persons may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention”. The ICJ, in its recent Advisory Opinion, recalled

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<sup>27</sup> Carsten Stahn, ‘Response: The ICC, Pre-Existing Jurisdictional Treaty Regimes, and the Limits of the Nemo Non Dat Quod Non Habet Doctrine’, 49 *Vanderbilt Journal of Transnational Law* 443 (2021), page 449.

<sup>28</sup> ‘Observations by the State of Palestine to the Pre-Trial Chamber I pursuant to Rule 103 of the Rules of Procedure and Evidence’, ICC-01/18-291, 6 August 2024, page 8.

that in interpreting the Oslo Accords, it is necessary to take into account Article 47 of the Fourth Geneva Convention, which provides that the protected population “shall not be deprived” of the benefits of the Convention “by any agreement concluded between the authorities of the occupied territories and the Occupying Power”.<sup>29</sup> The Oslo Accords cannot, therefore, be interpreted in a manner that adversely affects the Victims, and do not permit the State of Palestine to renounce its right to refer crimes amounting to grave breaches of the Geneva Convention for prosecution to an international court.

### III. RELIEF REQUESTED

25. For the reasons set out above, the Victims respectfully request the Chamber:

- a. To confirm that the Oslo Accords do not present any bar to the Court exercising jurisdiction over Israeli nationals, and nor do any of the other issues raised by those purportedly challenging jurisdiction; and,
- b. To proceed to decide without delay to issue the warrants of arrest requested by the Prosecutor.

Respectfully submitted on the 12 of August 2024 at The Hague and London,



Nada Kiswanson van Hooydonk



Rodney Dixon KC

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<sup>29</sup> ‘Legal Consequences arising from the policies and practices of Israel in the Occupied Palestinian Territory, paragraph 102.