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**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/18
Date: 10 June 2024

PRE-TRIAL CHAMBER I

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

SITUATION IN PALESTINE

Secret

**Request by the United Kingdom for Leave to Submit Written Observations
Pursuant to Rule 103**

Source: The United Kingdom

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

Court to:

The Office of the Prosecutor

Karim A.A. Khan KC
Nazhat Shameen Khan

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 Representative

Amicus Curiae Applicants

REGISTRY

Registrar

Mr. Osvaldo Zavala Giler

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Introduction

1. On 5 February 2021, in the course of its ruling on territorial jurisdiction in the situation in Palestine, the majority of Pre-Trial Chamber I did not determine the jurisdictional issues relating to the Oslo Accords ('the Oslo Accords issue'), instead holding 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" (underlining added).¹
2. The Prosecutor has now submitted applications for the issuance of warrants of arrest under article 58 of the Statute, including in relation to Israeli nationals which would be directly affected by the outstanding Oslo Accords issue.
3. In accordance with the Jurisdiction Decision, and pursuant to Articles 19(1) and 58 of the Statute, the outstanding further questions of jurisdiction must now be addressed in determining the application for arrest warrants. The United Kingdom seeks leave pursuant to Rule 103 of the Rules of Procedure and Evidence ('Rules') to submit written observations to assist Pre-Trial Chamber I in examining these further questions of jurisdiction, specifically regarding the effect of the Oslo Accords on the jurisdiction of the International Criminal Court ("Court").
4. The United Kingdom has been advised to classify this Request as secret in order to comply with a decision of the Pre-Trial Chamber. Nothing in this Request needs to be kept secret. As set out below, the United Kingdom requests that it be reclassified as public.

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.

II. Applicable Law

5. Rule 103(1) of the Rules provides that:

At any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate.

6. The consistent jurisprudence of the Court has been that the application of Rule 103 is discretionary.² The key test is whether the requested observations are desirable for the proper determination of the case,³ which is a matter which must be decided on a case-by-case basis.⁴ The burden is on the applicant to demonstrate that the requested observations may assist the Chamber.⁵ The nature and complexity of the issues are relevant factors in assessing whether it is desirable to receive written observations.⁶

III. Procedural History

7. On 22 January 2020, the Prosecutor filed the Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine.⁷ Recognising the "unique history and circumstances of the Occupied Palestinian

² ICC-01/04-01/06-1289, Appeals Chamber, 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", 23 April 2008, para. 8.

³ *Ibid.*, para. 9.

⁴ ICC-01/04-373, Pre-Trial Chamber I, Decision on the Request submitted pursuant to rule 103(1) of the Rules of Procedure and Evidence, 17 August 2007, para. 3.

⁵ ICC-02/04-01/05-342, Pre-Trial Chamber II, Decision on application for leave to submit observations under Rule 103 dated 7 November 2008, 10 November 2008, para. 12.

⁶ ICC-02/17-43, Pre-Trial Chamber II, Decision on the 'Request for Leave to File Amicus Curiae Submissions on Behalf of Human Rights Organizations in Afghanistan' (ICC-02/17-35) and on the 'Request to appear before the Chamber pursuant to regulation 81(4)(b) of the Regulations of the Court' (ICC-02/17-39), 12 June 2019, para. 7.

⁷ ICC-01/18-12, Prosecution, Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine ('Prosecution Request'), 22 January 2020.

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Territory”, and the desirability of an early ruling on matters of jurisdiction, the Prosecution sought a ruling on the scope of the Court’s territorial jurisdiction.⁸ The Prosecution Request addressed the Oslo Accords issue.⁹ It further anticipated that Rule 103 observations on relevant issues would be beneficial both to assist the Chamber in its determination and to endow the decision with greater legitimacy.¹⁰

8. On 20 February 2020, Pre-Trial Chamber I issued its Decision on Applications for Leave to File Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence, which permitted around 42 States, organisations or persons to submit written observations on the Prosecution Request.¹¹
9. On 5 February 2021, Pre-Trial Chamber I issued the Jurisdiction Decision which determined, by majority, that Palestine qualifies as ‘[t]he State on the territory of which the conduct in question occurred’ for the purposes of article 12(2)(a) of the Statute and that the Court’s territorial jurisdiction in the Situation in Palestine extends to the territories occupied by Israel since 1967, namely Gaza and the West Bank, including East Jerusalem.¹²
10. 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.¹³ 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.¹⁴ However, the majority of Pre-Trial Chamber I made it

⁸ Ibid., para. 5, 6.

⁹ Ibid., paras. 183-189.

¹⁰ Ibid., para.6.

¹¹ ICC-01/18-63, Pre-Trial Chamber I, Decision on Applications for Leave to File Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence, 20 February 2020, paras. 53-56.

¹² Jurisdiction Decision, disposition.

¹³ Jurisdiction Decision, para. 126.

¹⁴ Jurisdiction Decision, para. 129.

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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”.¹⁵

11. In a partially dissenting opinion, Judge Kovacs relied on the Oslo Accords issue to give a different answer from the majority on the issue of territorial jurisdiction.¹⁶ The answer offered by Judge Kovacs would have led to materially different outcomes regarding jurisdiction in that, absent any Article 12(3) declaration, it would have precluded the ICC having jurisdiction over Israeli nationals.¹⁷
12. On 20 May 2024, the Prosecutor announced that he had made applications for arrest warrants in the Situation in Palestine pursuant to article 58 of the Statute.¹⁸ The Prosecutor’s statement indicated that he had applied for arrest warrants against Yahya Sinwar, Mohammed Diab Ibrahim Al-Masri, Ismail Haniyah, Benjamin Netanyahu and Yoav Gallant. It provides further details including identifying the charges, the relevant time period and locations, and the alleged modes of responsibility.

IV. Submissions

a. The Applicant

¹⁵ Jurisdiction Decision, para. 131.

¹⁶ Jurisdiction Decision, Annex 1, paras. 372-374.

¹⁷ Jurisdiction Decision, Annex 1, para. 374.

¹⁸ Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for arrest warrants in the situation in the State of Palestine (Prosecutor’s Statement’), 20 May 2024, available at <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state>

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13. The United Kingdom is a long-standing State Party of the International Criminal Court. The United Kingdom signed the Rome Statute on 30 November 1998 and deposited its instrument of ratification of the Rome Statute on 4 October 2001.
14. The United Kingdom has always made clear its commitment to international criminal justice. On 17 July 2018, for instance, the Secretary of State for Foreign and Commonwealth Affairs stated that “support for international criminal justice is a fundamental part of the UK’s foreign policy”.¹⁹ This commitment has resulted in tangible support being offered by the United Kingdom to the Court, over and above the United Kingdom’s regular annual financial contribution. On 20 March 2023, the United Kingdom hosted a major conference which focussed on encouraging further support for war crimes investigations, in advance of which the United Kingdom committed additional resources and support to the Court.²⁰ More recently, on 25 March 2024, the United Kingdom announced an additional voluntary contribution to the Court’s Special Fund for Security.²¹
15. The United Kingdom takes this opportunity to re-iterate its support for the independence and impartiality of the Court. Indeed, it is as a long-standing supporter of the Court and of international justice that the United Kingdom believes that the outstanding jurisdictional issue should be addressed at this early stage by the Pre-Trial Chamber. It is in the interests not only of the Court as a whole, but also of the States and communities involved, that any arrest warrants proceed on a solid jurisdictional basis”.²² It is in order to ensure that arrest warrants are not issued without a solid jurisdictional basis that the United

¹⁹ <https://questions-statements.parliament.uk/written-statements/detail/2018-07-17/HCWS864>

²⁰ <https://www.gov.uk/government/news/london-hosts-major-international-war-crimes-meeting-as-uk-boosts-support-for-international-criminal-court>

²¹ <https://www.gov.uk/government/news/uk-donation-to-the-international-criminal-courts-special-fund-for-security-will-help-to-protect-the-court-from-future-cyber-attacks#:~:text=Outside%20of%20our%20annual%20contribution,Trust%20Fund%20for%20Family%20Visits>

²² See, *mutatis mutandis*, Prosecution Request, para. 6.

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Kingdom seeks permission to file observations on the Oslo Accords issue at this stage of the proceedings.

b. In the unique circumstances of this situation, written observations on outstanding jurisdictional issues are desirable for the proper determination of the case

16. The United Kingdom respectfully submits that jurisdiction is one of the issues presently before the Pre-Trial Chamber pursuant to Articles 19 and 58 of the Statute and that, in the unique circumstances of this situation, it would be desirable to receive written observations from the United Kingdom on the jurisdictional issue arising from the Oslo Accords.
17. As the majority of the Pre-Trial Chamber clearly considered in the Jurisdiction Decision, the Oslo Accords issue is a live matter before the Pre-Trial Chamber on the Prosecutor's application for arrest warrants. Article 19(1) of the Statute provides, in part, that "[t]he Court shall satisfy itself that it has jurisdiction in any case brought before it". Pre-Trial Chambers have consistently relied upon Article 19(1) to hold that an initial determination as to whether the case falls within the jurisdiction of the Court is a pre-requisite for the issuance of warrants of arrest.²³ As a result, the Pre-Trial Chamber is required to make an initial determination of jurisdiction in resolving the application for arrest warrants.
18. The Oslo Accords issue necessarily forms part of that initial determination. This is because the Oslo Accords issue concerns whether Palestine could delegate

²³ ICC-02/05-01/07-1-Corr, Pre-Trial Chamber I, Decision on the Prosecution Application under Article 58(7) of the Statute, 27 April 2007, public, para. 13. See, amongst many others, ICC-01/04-01/06-1-Corr-Red, Pre-Trial Chamber I, Decision on the Prosecutor's Application for a warrant of arrest, Article 58, 10 February 2006, reclassified as public, para. 18; ICC-01/11-12, Pre-Trial Chamber I, Decision on the "Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah ALSENUSSI", 27 June 2011, public, paras. 6-10.

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criminal jurisdiction over Israeli nationals to the Court, in circumstances where the Oslo Accords themselves make it clear that Palestine itself does not have criminal jurisdiction over Israeli nationals. The Pre-Trial Chamber did not need to resolve this issue in the Jurisdiction Decision since it was only called upon to adjudicate territorial jurisdiction.²⁴ However, since the Prosecutor's Statement confirms that the arrest warrants have been applied for in relation to two Israeli nationals, an initial determination on the Oslo Accords issue does now need to be made.

19. Furthermore, it is submitted that addressing the Oslo Accords issue now is the only approach consistent with the Jurisdiction Decision. The majority of Pre-Trial Chamber I, in holding that the Oslo Accords were not pertinent to territorial jurisdiction, expressly stated that it "will be in a position to examine further questions of jurisdiction" either on an application for an arrest warrant or on an Article 19 challenge. That pre-condition has now occurred; an application for an arrest warrant has been made. The majority of the Pre-Trial Chamber has therefore already indicated that it will "examine further questions of jurisdiction" at this stage. Not to give proper attention to the Oslo Accords issue would thus be inconsistent with the Jurisdiction Decision.
20. The United Kingdom notes that prior applications to submit written observations on article 58 proceedings have been rejected, in part on the basis that article 58 proceedings are *ex parte*.²⁵ There are vital distinctions between these prior cases and the instant application which justify the Pre-Trial Chamber in permitting Rule

²⁴ See, Prosecution Request, para. 18 requesting a ruling on the scope of "the Court's territorial jurisdiction".

²⁵ ICC-01/09-35, Pre-Trial Chamber II, Decision on Application for Leave to Submit Amicus Curiae Observations, 18 January 2011, para. 10; ICC-01/09-42, Pre-Trial Chamber II, Decision on the "Application for Leave to Participate in the Proceedings before the Pre-Trial Chamber relating to the Prosecutor's Application under Article 58(7)", 11 February 2011, paras. 6-10; ICC-01/09-47, Pre-Trial Chamber II, Decision on Application for Leave to Participate under Articles 58,42(5), (7)-(8)(a) of the Rome Statute and Rule 34(1)(d) and (2) of the Rules of Procedure and Evidence, 18 February 2011.

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103 observations on this occasion. First, the Pre-Trial Chamber's obligation to satisfy itself that it has jurisdiction is triggered by Article 19(1). Where this Article applies, Rule 58(2) of the Rules of Procedure and Evidence provides that the Chamber "shall decide on the procedure to be followed and may take appropriate measures for the proper conduct of the proceedings", including holding a hearing. It is for the Chamber to define the procedure which should be followed on the issue of jurisdiction.²⁶ Although the Article 58 procedure is normally *ex parte*, Rule 58(2) gives the Chamber the discretion to allow written observations to be made (limited, of course, to the jurisdiction issue).

21. Second, whilst Chambers have previously exercised this discretion to maintain an *ex parte* proceeding, the circumstances of this case are different.²⁷ The Prosecutor has made it public that applications for arrest warrants have been made. The Prosecutor's Statement includes a significant amount of factual detail about the identity of the suspects, the charges, the modes of responsibility and the circumstances alleged in support of them. There is no need for confidentiality or secrecy on the jurisdiction issue. The United Kingdom's observations, if permitted, would be limited to this legal issue and would not touch on the substantive evidence in support of the charges. Hence no concern regarding the protection of victims or witnesses would arise from granting this application.²⁸ Further, the detail contained in the Prosecutor's Statement will enable Rule 103 observations to make a meaningful contribution to the relevant issues, even though the Prosecutor's actual application remains confidential.

²⁶ ICC-01/04-01/06-1-Corr-Red, Pre-Trial Chamber I, Decision on the Prosecutor's Application for a warrant of arrest, Article 58, 10 February 2006, reclassified as public, para. 19.

²⁷ ICC-01/04-01/06-1-Corr-Red, Pre-Trial Chamber I, Decision on the Prosecutor's Application for a warrant of arrest, Article 58, 10 February 2006, reclassified as public, para. 20.

²⁸ Article 67(1).

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22. Third, the Oslo Accords issue is already known, having been identified in the Prosecution Request,²⁹ multiple previous Rule 103 observations³⁰ and the Jurisdiction Decision.³¹ The dissenting opinion alone makes it clear that the Oslo Accords issue is a substantial one, which is capable of affecting the Pre-Trial Chamber's initial determination of jurisdiction.³² The issuance of an arrest warrant pursuant to Article 58(1) is a serious step because it affects the liberty of the individual concerned. The significance of the Oslo Accords issue thus makes it desirable, even on an initial determination of jurisdiction, that the Pre-Trial Chamber receives observations from a range of participants rather than proceeding only on the basis of the Prosecutor's application.

23. Additional compelling factors support the grant of leave to the United Kingdom to make written observations on this issue. The Pre-Trial Chamber previously permitted written observations to be submitted pursuant to Rule 103 including on the Oslo Accords issue.³³ The same reasons which previously led the Pre-Trial Chamber to conclude that it was desirable to permit Rule 103 observations, continue to support the grant of permission to make Rule 103 observations now. At the same time, it is not sufficient to rely upon those prior observations since the factual position has moved on since those prior observations were submitted. In order to assist the Pre-Trial Chamber, any observations on the Oslo Accords issue would need to address the current factual matrix, as outlined in the Prosecutor's Statement.

24. Further, the Prosecution Request highlighted both the "unique history and circumstances of the Occupied Palestinian Territory" and that "complex legal and

²⁹ Prosecution Request, paras. 183-189.

³⁰ Jurisdiction Decision, para. 126.

³¹ Jurisdiction Decision, paras 124-131.

³² Jurisdiction Decision, Annex 1, paras. 372-374.

³³ See, ICC-01/18-63, Pre-Trial Chamber I, Decision on Applications for Leave to File Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence, 20 February 2020, paras. 53-56.

factual issues” are involved.³⁴ The complexity of the issues is further demonstrated by the volume of Rule 103 observations previously submitted. The unique nature of the situation and the complexity of the legal and factual issues are both factors which militate in favour of allowing Rule 103 observations.³⁵ The United Kingdom understands that the unique circumstances and complexity of the issue may mean that other States would also wish to file observations in order to assist the Court.

25. Third, early resolution of the Oslo Accords issue is desirable. The Prosecution Request submitted that it would not be in the interests of judicial economy to carry out investigations in a judicially untested jurisdictional context only to find too late that relevant legal bases were lacking.³⁶ Exactly the same reasoning supports addressing the Oslo Accords issue in the course of determining the application for arrest warrants. That the Oslo Accords issue was not resolved in the Jurisdiction Decision has preserved a risk of an arrest warrant being issued when relevant legal bases may be lacking. It would be wrong to resolve the article 58 applications and hence trigger further proceedings, potentially including the arrest and deprivation of liberty of individuals, without addressing this fundamental issue.

c. The Nature and Content of the Rule 103 Observations

26. The United Kingdom respects the consistent guidance of the Court that leave is required before making substantive observations pursuant to Rule 103 and therefore the substantive observations may not be set out in the request for permission.³⁷

³⁴ Prosecution Request, para. 5.

³⁵ ICC-02/17-43, Pre-Trial Chamber II, Decision on the ‘Request for Leave to File Amicus Curiae Submissions on Behalf of Human Rights Organizations in Afghanistan’ (ICC-02/17-35) and on the ‘Request to appear before the Chamber pursuant to regulation 81(4)(b) of the Regulations of the Court’ (ICC-02/17-39), 12 June 2019, para. 7.

³⁶ Prosecution Request, para. 6.

³⁷ See, ICC-02/05-185, Pre-Trial Chamber I, Decision on Application under Rule 103, 4 February 2009, para. 6.

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27. Nonetheless, in order to assist the Court in determining this application, the United Kingdom indicates that, if permission is granted, at this stage of the proceedings its observations would seek to assist the Court in the proper determination of the following issues:-

i. 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. Specifically, the observations would address:

i. The correct interpretation of provisions regarding criminal jurisdiction in the Oslo II Accord and the Protocol Concerning Legal Affairs, which leads to the conclusion that Palestine lacks criminal jurisdiction over Israeli nationals;

ii. Whether there is any other basis on which Palestine could assert criminal jurisdiction over Israeli nationals;

iii. The effect that Palestine's lack of criminal jurisdiction over Israeli nationals has on the jurisdiction of the Court, more precisely on the present applications for arrest warrants.

28. The United Kingdom reserves the right to seek permission to file observations pursuant to Rule 103 on other issues, at the appropriate stage in the proceedings.

V. Request for Reclassification

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29. On 7 June 2024, the United Kingdom was advised by the Registry that Pre-Trial Chamber I has stipulated that *all* filings in the situation in Palestine must be classified as secret. The United Kingdom is cognisant of the sensitive nature of the situation, the need for careful handling of confidential information and the general nature of the threats to the Court. This specific Request, however, does not need to be secret or confidential and it should therefore be reclassified as public.

30. This Request primarily addresses the legal threshold defined in Rule 103 in the context of arrest warrant proceedings. Rule 103 requests and written observations are normally filed publicly, including in this situation.³⁸ The underlying jurisdiction issue concerning the Oslo Accords was previously addressed in the Jurisdiction Decision, which is publicly available. Accordingly, the submissions in this Request do not need to be secret or confidential.

31. Importantly, this Request does not make submissions about victims, witnesses, substantive evidence, or any other matter which would require secrecy or confidentiality. It can be resolved without disclosing the content of the Prosecutor's Application or any other secret or confidential information. There is a strong public interest in open justice. The sensitivity of the situation and the need for secrecy in certain aspects do not mean that this particular Request needs to be secret or confidential. It should be reclassified as public.

VI. Relief Requested

³⁸ See, ICC-01/18-63, Pre-Trial Chamber I, Decision on Applications for Leave to File Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence, 20 February 2020, paras. 53-56.

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32. The United Kingdom therefore respectfully requests permission to submit written observations pursuant to Rule 103 on the issues identified above. The United Kingdom further requests that this filing be reclassified as public.

Respectfully submitted,



Sally Langrish
Legal Adviser to the Foreign, Commonwealth and Development Office of the United Kingdom

Dated this 10 June 2024

At London, United Kingdom