

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/18

Date: 2 August 2024

PRE-TRIAL CHAMBER I

Before:

**Judge Iulia Motoc, Presiding Judge
Judge Reine Adélaï de Sophie Alapini-Gansou
Judge Nicolas Guillou**

SITUATION IN THE STATE OF PALESTINE

Public Document

**Written amicus curiae observations by the Argentine Republic
(Pursuant to Rule 103)**

Source: Argentina

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

Mr. Karim A.A. Khan KC

Nazhat Shameen Khan

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants

(Participation/ Reparation)

The Office of Public Counsel for
Victims

The Office of Public Counsel for the
Defence

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Osvaldo Zavala Giler

Counsel Support Section**Victims and Witnesses Unit****Detention Section****Victims Participation and Reparations
Section****Public Information and Outreach
Section**

I. Introduction

1. On 5 February 2021, Pre-Trial Chamber I issued a Jurisdiction Decision in which it 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’.

2. On 20 May 2024, the Prosecutor submitted applications for the issuance of warrants of arrest under article 58 of the Statute¹, including in relation to Israeli nationals who would be directly affected by the outstanding “Oslo Accords issue”. This circumstance marks the need for the Chamber to examine the impact of the Oslo Accords on this matter.

3. On 27 June 2024, Pre Trial Chamber I (the “Chamber”) issued an Order granting the United Kingdom authorization to provide amicus curiae observations under Rule 103 (1) of the Rules of Procedure and Evidence and set to that end a deadline by 12 July 2024. It also decided that any other request for leave to file amicus curiae observations pursuant to Rule 103 (1) must also be received by that date.

4. On 11 July 2024, Argentina submitted before the Chamber a request for leave to submit written observations pursuant to Rule 103, which was granted by it on 22 July 2024² Argentina was instructed to submit its observations by 6 August 2024.

¹ 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, ICC-01/18-173-SECRET (a public redacted version was issued on the same date, ICC-01/18-173-Red)

² ICC-01/18 Pre Trial Chamber I Decision on requests for leave to file observations pursuant to Rule 103 of the Rules of procedures and Evidence, 22 July 2024

5. Argentina respectfully submits the following observations to assist the Chamber in the proper determination of the matter under consideration.

II. The Courts should determine the legal consequences of the Oslo Accords in its jurisdiction.

6. As the Pre-Trial Chamber stated in the Jurisdictional Decision³, further questions of jurisdiction, and particularly those related to the Oslo Accords, constitutes a key element that the Chamber must address at this procedural stage. The question of jurisdiction becomes even more relevant as the Chamber endeavors to resolve the application for arrest warrants of Israeli nationals, since the Oslo Accords explicitly stipulates that Palestine has no criminal jurisdiction over them. The significance of the Oslo Accords for the question of jurisdiction now pending before the Pre-Trial Chamber derives from the fundamental principle that the exercise of jurisdiction by the Court requires the delegation of criminal jurisdiction by a sovereign State.

7. Argentina believes that the decision of the Court on the issuance of arrest warrants as requested by the Prosecutor on 20 May 2024⁴ has to be made on the most solid jurisdictional basis, and that this necessarily implies taking into account the potential effects of the Oslo Accords on this matter, that were not considered by the Chamber in its Jurisdiction Decision of 2021. The Chamber made it clear that its decision did not foreclose future arguments on the Oslo Accords at the appropriate time. In this sense, the Jurisdiction Decision also clarified 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

³ 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

⁴ 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

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”⁵

8. The jurisdictional issue raised by the Oslo Accords needs to be resolved at this stage of procedure, where a submission of arrest warrant applications has been made, in particular with respect to those related to Israeli nationals. Argentina considers that it is of the outmost importance to remove any jurisdictional ambiguity before deciding on such grave measures that would affect the liberty of the individuals concerned.

9. Argentina wants to highlight that the Oslo Accords have an impact on the jurisdictional basis of any arrest warrants that target Israeli nationals. The Oslo Accords, as an applicable treaty to both Palestine and Israel, constitute applicable law in the matter under analysis by the Chamber⁶.

10. The delegation of criminal jurisdiction in favor of Israel, especially when Israeli citizens are involved, as established in the Oslo Accords, cannot be disregarded by the Chamber. Even though some jurisdictional powers could be delegated by Palestine to the ICC, the provisions regarding criminal jurisdiction in which Israeli citizen are involved cannot be delegated. If Palestine has no criminal jurisdiction with respect to Israeli nationals, it is therefore legally impossible for it to delegate any such jurisdiction to the Court, in accordance with the principle “*nemo plus iuris transferre potest quam ipse habet*”.

⁵ICC-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.

⁶ Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion of 19 July 2024, para. 102 (“... the Court will take the Oslo Accords into account as appropriate”), and para. 140 (“The arrangements agreed upon between Israel and the PLO in the Oslo Accords point in the same direction”). See also the Joint Opinion of Judges Tomka, Abraham and Aurescu, para. 7 (“These Accords, along with the relevant resolutions of the Security Council, define the fundamental framework of a peaceful resolution of the conflict aiming at implementing the ‘two-State solution’”).

11. It is relevant to highlight that the delegation of criminal jurisdiction by Palestine to Israel agreed in the Oslo Accords gave Israel the possibility to exercise criminal jurisdiction on the basis of nationality, in accordance with applicable law. Consequently it is critical for the Chamber to thoroughly explore and verify the scope and extension of the activities of Israeli national investigative authorities with respect to the set of facts and criminal charges quoted in the arrest warrants, especially those jurisdictional activities that occurred after the facts considered in the warrants.

12. Notwithstanding the aforementioned, in the case that the Chamber reaffirms its jurisdiction on the case, Argentina believes that a new admissibility assessment is required.

III. The Court should order a new complementarity test in order to assess the exercise of its jurisdiction.

13. Argentina stresses the importance of proper application of the complementarity principle in accordance with the Rome Statute. The complementarity test is a key element in the mandate of the ICC. This test seeks to determine whether the national authorities are active in relation to the same case and whether this activity is vitiated by unwillingness or inability of the authorities concerned to carry out the proceeding genuinely⁷. In this vein, Argentina is of the view that further examination must be undertaken on the complementarity principle, so as to verify if proper opportunity has been given to judicial authorities at a national level to intervene.

14. Argentina is convinced that the principle of complementarity must be strictly applied in the investigations carried out by the Prosecutor, since it does not only preserve the Court's mandate under the Rome Statute, but it also legitimizes its activities by promoting close cooperation with national jurisdictions. Moreover, a

⁷ ICC-OTP, Situation in Iraq/UK –Final Report, 9 December 2020.

diligent application of the principle helps to fulfill the mandate of the ICC as it offers a cost-effective way to conduct investigations into alleged international crimes and foster technical cooperation between the ICC and national legal systems⁸.

15. The test of complementarity should be sufficiently specific to enable the State concerned to provide information in relation to its domestic investigations and prosecutions and to demonstrate the degree of mirroring⁹ at the national level of the scope of the Prosecutor's intended investigation. Furthermore, Argentina respectfully points out that a reasonable and timely opportunity to invoke complementarity before the application for and the issuance of arrest warrants would be an adequate application of such a principle in a manner fully consistent with the spirit and relevant provisions of the Statute.

16. It is worth highlighting that the circumstances, situations and individuals involved at the current stage of procedure are significantly different from those analyzed in the complementarity test made by the Pre-Trial Chamber in 2021. On this matter, Argentina recalls that "the Statute assumes that the factual situation on the basis of which the admissibility of a case is established is not necessarily static, but ambulatory"¹⁰. We are of the view that not only this procedural stage demands a new complementary test but also that the arrest warrants announced by the

⁸ OTP, 'Policy on Complementarity and Cooperation' (2024), para. 2, available at <https://www.iccpi.int/news/policy-complementarity-and-cooperation-2024> ("The complementarity regime serves as a mechanism to encourage and facilitate the compliance of States with their primary responsibility to investigate and prosecute core crimes"); para. 3 ("[T]he Office will seek to engage in partnership with States to promote cooperation and complementary action wherever possible")

⁹ ICC-01/18-12, Prosecution's request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine, 20 January 2020.

¹⁰ Prosecutor v. Katanga, "Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case" ICC-01/04-01/07 OA 8, 25 September 2009, para. 56

Prosecutor relate to a very different set of events and even to a completely different temporal framework from those introduced by the Prosecutor in 2021¹¹.

17. Argentina firmly believes that the role of the Court is crucial for achieving justice at the international level regarding the most serious crimes of concern to the international community as a whole, and the need to ensure that those crimes do not go unpunished. In order to achieve justice, an adequate implementation of the principle of complementarity is necessary, as enshrined in the Rome Statute, in order to assure a due implementation of the mandate of the ICC.

18. It is not only pertinent and relevant to avoid overlooking the sovereign right of all States to exercise their own investigatory powers with respect to events in which they have jurisdiction, but it is also essential to take the necessary procedural steps to determine whether a national legal system is taking actions in order to exercise its jurisdiction over the crimes under investigation. For this reason, we are of the view that exploring whether proceedings are being conducted at the national level since 2023 would be necessary for an adequate application of the principle of complementarity.

19. We are of the view that the Article 18 notification issued in 2021 referred to a set of parameter that substantially differs from the set of facts, circumstances and criminal charges contained in the arrest warrants applications. Argentina considers that, in light of this substantial change, a new request of information on national proceedings is necessary so as to allow States concerned to assess appropriately the new facts and circumstances and respond accordingly.

20. We are of the view that an open exchange between the Prosecutor and relevant States must be undertaken when the investigation proceeds beyond the expressly

stated parameters covered by the initial notice or when new patterns of fact and forms of criminality are investigated by the Prosecutor¹².

21. For the reasons stated above, we believe that even though the arrest warrants application has a link with the Palestine Situation as defined in 2021, the circumstances, facts and alleged crimes invoked in the application are substantially different. Indeed, it is important to highlight that they did not even exist in 2021.

22. The circumstances, facts and alleged crimes invoked differs in such a substantial manner from those defined in 2021, that a number of States Parties to the ICC saw fit to submit a new referral to the Court with regard to the October 7 attacks¹³

23. Therefore, Argentina believes that at this procedural stage an update of the notification by the Prosecutor under Article 18 of the Statute is needed, so as to provide relevant States with the possibility to exercise its rights under this provision in light of the new facts and circumstances. We are of the view that affording them this opportunity before the issuance of arrest warrants is necessary and fully consistent with the spirit and relevant provisions of the complementarity regime.

IV. Conclusions

1. In the light of all these considerations, Argentina respectfully recommends that the Chamber examine and determine the legal consequences of the Oslo Accords

¹² Situation in the Bolivarian Republic of Venezuela I, Judgment on the appeal of the Bolivarian Republic of Venezuela against Pre-Trial Chamber I's "Decision authorising the resumption of the investigation pursuant to article 18(2) of the Statute", ICC-02/18-89, 1 March 2024, para. 246 ("the Appeals Chamber reiterates that, in order for a State to be able to assert its jurisdiction in proceedings under article 18(2) of the Statute, the Prosecutor's article 18(1) notification must be sufficiently specific, providing the general parameters of the situation and sufficient detail with respect to the groups or categories of individuals in relation to the relevant criminality, including the patterns and forms of criminality that the Prosecutor intends to investigate")

¹³ Referral by South Africa, Bangladesh, Bolivia, Comoros, Djibouti, 17 November 2023, available at <https://www.icc-cpi.int/sites/default/files/2023-11/ICC-Referral-Palestine-Final-17-November-2023.pdf>

in the Court's jurisdiction, in order to remove any jurisdictional ambiguity before issuing arrest warrants against Israeli nationals.

2. In the alternative, Argentina recommends that given the substantial change in circumstances the Prosecutor engages in a new dialogue with Israel in order to properly apply the complementarity principle.

Respectfully submitted:



Diana Elena MONDINO

Minister of Foreign Relations, International Trade and Worship of Argentina

Dated this 2 of August 2024.

At Buenos Aires, Argentina.