Cour
Pénale
Internationale

International
Criminal
Court

Original: English

No.: **ICC-01/18**
Date: **30 September 2024**

PRE-TRIAL CHAMBER I

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

SITUATION IN THE STATE OF PALESTINE

PUBLIC

Corrigendum and Explanatory Note to correct Observations on (1) Jurisdiction and Complementarity and (2) Inaccuracies and Omissions in the Prosecutor's Applications for Arrest Warrants 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"), the Jerusalemites' Initiative ("JI") and the Simon Wiesenthal Center ("SWC") dated 5 August 2024 registration number ICC-01/18-272

Source: UK Lawyers for Israel ("**UKLFI**"), B'nai B'rith UK ("**BBUK**"), the International Legal Forum ("**ILF**"), the Jerusalemites' Initiative ("**JI**") and Simon Wiesenthal Center ("**SWC**")

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

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Legal Representatives of the Applicants

Unrepresented Victims

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Amici Curiae
Mr Eli M. Rosenbaum; Professor David Chilstein; Professor John Quigley; High Level Military Group; European Centre for Law & Justice; Professor Steven E. Zipperstein; Mr and Mrs Serge and Beate Klarsfeld; Professors Yuval Shany and Amichai Cohen; the State of Palestine; Professor William Schabas; the Jerusalem Center for Public Affairs and the Institute for NGO Research; the Kingdom of Norway; the Organisation of Islamic Cooperation; Hungary; Republic of Argentina; the Touro Institute on Human Rights and the Holocaust; Canadian Union of Jewish Students (CUJS) and the World Union of Jewish Students (WUJS); Arab Organisation for Human Rights UK (AOHR UK); Assistant Professor Halla Shoaibi and Professor Asem Khalil; Centre for Israel and Jewish Affairs; the Palestine Independent Commission for Human Rights (ICHR); Law for Palestine; Professor Sascha Dominik Dov Bachman, Dr Deborah Mayersen, Professor Gregory Rose and Dr Colin Rubenstein; US Senator Lindsey O. Graham; Lawyers for Palestinian Human Rights; Israel Bar Association; Czech Republic; International Centre of Justice for Palestinians and the Centre for Human Rights Law (SOAS University of London); Jerusalem Institute of Justice; Chile and Mexico; Centre for ICC-01/18-260 01-08-2024 2/12 PT No. ICC-01/18 3/12 31 July 2024 European Legal Studies on Macro-Crime (MACROCRIMES); Dr Robert Heinsch and Dr Giulia Pinzauti; The Hague Initiative for International Cooperation; ICJ Norway and Defend International Law; UN Special Rapporteurs and Working Groups; the United States of America; Professor Neve Gordon; Al-Quds Human Rights Clinic and Al-Quds University; the League of Arab States; L'association des Juristes pour le respect du droit international and la Fédération internationale pour les droits humains; University Network for Human Rights, the

International Human Rights Clinic, Boston University School of Law, the International Human Rights Clinic, Cornell Law School and the Lowenstein Human Rights Project, Yale Law School; Professor Richard Falk and Professor Michael Lynk; Professor Adil Ahmad Haque; Open Society Justice Initiative, European Center for Constitutional and Human Rights, REDRESS Trust, Human Rights Watch and Amnesty International; Republic of Colombia; Hostages and Missing Families Forum and the Raoul Wallenberg Centre for Human Rights; Addameer Prisoner Support and Human Rights Association; International Association of Jewish Lawyers and Jurists; Kingdom of Spain; UK Lawyers for Israel, B'nai B'rith UK, the International Legal Forum, the Jerusalem Initiative and the Simon Wiesenthal Centre; International Commission of Jurists (ICJ); The Palestinian Association for Human Rights (Witness); Guernica 37 Chambers; the Federative Republic of Brazil; ALMA – Association for the Promotion of International Humanitarian Law; Ireland; Avocats pour la Justice au Proche-Orient (AJPO); Federal Republic of Germany; Dr Shahd Hammouri; Al-Haq Law in the Service of Mankind (Al-Haq), Al Mezan Center for Human Rights (Al-Mezan) and the Palestinian Center for Human Rights (PCHR); République Démocratique du Congo; Arpit Batra; South Africa, Bangladesh, Bolivia, Comoros, and Djibouti.

REGISTRY

Registrar Mr Osvaldo Zavala Giler	**Counsel Support Section**
Victims and Witnesses Unit	**Detention Section**
Victims Participation and Reparations Section Philipp Ambach	**Other** Mr Khaled Al Shouli and Mr Wael Al Masry; Mr Bradley Parker and Mr Khaled Quzmar; Mr Raji Sourani, Ms Chantal Meloni and Mr Triestino Mariniello; Ms Nada Kiswanson von Hooydonk and Mr Rodney Dixon KC

CORRIGENDUM

On page 1 the Situation name has been changed to “Situation in the State of Palestine” instead of “Situation in the Alleged State of Palestine”

EXPLANATORY NOTE

The above correction is made at the request of the Court to align the name of the Situation with that used by the Court.

Respectfully submitted by

Jonathan Turner, Chief Executive, on behalf of UK Lawyers for Israel (“**UKLFI**”) and as agent for B’nai B’rith UK (“**BBUK**”), the International Legal Forum (“**ILF**“), the Jerusalemites’ Initiative (“**JI**”) and Simon Wiesenthal Center (“**SWC**”)

Dated 30 September 2024

At London, UK

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SITUATION IN THE STATE OF PALESTINE

PUBLIC

Corrected version of Observations on
(1) Jurisdiction and Complementarity and
(2) Inaccuracies and Omissions in the Prosecutor's Applications for Arrest Warrants
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"), the Jerusalemites' Initiative ("JI") and the
Simon Wiesenthal Center ("SWC")
dated 5 August 2024 registration number ICC-01/18-272

Source: UK Lawyers for Israel ("**UKLFI**"), B'nai B'rith UK ("**BBUK**"), the International Legal Forum ("**ILF**"), the Jerusalemites' Initiative ("**JI**") and Simon Wiesenthal Center ("**SWC**")

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Introduction

1. UKLFI, BBUK, ILF and JI join in all of these observations. SWC joins in the observations on inaccuracy and omissions in the Prosecutor's applications for arrest warrants.

2. 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 total inaccuracy of the grounds on which arrest warrants have been sought against Benjamin Netanyahu and Yoav Gallant, according to the summary in the Prosecutor's public statement,[1] Israelis cannot assume that their innocence will avoid the risk of arrest under warrants issued on the basis of false information. Nor can they assume that they will avoid this risk if they are not senior commanders or leaders.[2] 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, given the disproportionate contribution made by Israelis to technological innovation.

Jurisdiction

3. References in the footnotes of this section to "Annex" refer to the previously filed Annex to our Request for leave to file observations.[3]

4. The majority Decision of the Chamber of 5 February 2021 ("**the majority Decision**")[4] was based on the Secretary General's acceptance of the deposit of an instrument of accession of Palestine to the Rome Statute. That Decision 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.[5] On this view, the existence, content and circulation of the instrument were surely important.

5. Subsequently, the following information came to light:

[1] https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state
[2] See Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation ICC-01/13-34 https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2015_13139.PDF at §23
[3] We suspect that this document has been given the reference ICC-01/18-234-SECRET-Exp-AnxII.1 but the Court has not clarified this.
[4] ICC-01/18-143 https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_01165.PDF
[5] ICC-01/18-143 https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_01165.PDF paras 95-103

(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.[6] 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.[7]

(c) Neither the Court[8] nor the UK[9] 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.[10] 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.

6. Although the supposed 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

[6] 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)
[7] Ibid.
[8] Email from Irinka Dolidze on behalf of Peter Lewis (ICC Registrar) to Jonathan Turner of 18 February 2021 (Annex p.4)
[9] Letter from UK Foreign, Commonwealth & Development Office to Jonathan Turner, 15 March 2021 (Annex p.6)
[10] Emails from David Nanopoulos to Jonathan Turner of 22 and 24 March 2021 (Annex pp.8-9)

Strip and did not represent the people of the Gaza Strip, where there had been no elections since 2006.

7. In light of the above information:

   (a) The conclusion of the majority Decision, that the States Parties agreed to Palestine's accession to the Rome Statute, is not sound; and

   (b) Even on the basis of the framework adopted in the majority Decision, and even if it is assumed that an instrument of accession was provided to the UN Secretary General by proper representatives of Palestinian authorities in the West Bank, and even if all the States Parties to the Rome Statute must be taken to have agreed to the accession of Palestine, it still does not follow that the accession covered the territory of the Gaza Strip.

8. In any case, we respectfully submit that the whole framework of the majority Decision is erroneous and should be reconsidered. As Judge Kovacs stated in his dissenting judgment, the majority Decision was based on an abridgment of the terms of Art. 12(2) of the Rome Statute that distorted its meaning[11] and did not comply with Arts. 31 and 32 of the Vienna Convention on the Law of Treaties.[12] On any reasonable interpretation of the full text of Art. 12(2) of the Rome Statute in accordance with Art. 31 of the Vienna Convention, the precondition in the first part of its Art. 12(2)(a) is only satisfied where the conduct in question occurred on the territory of a State which is a Party to the Statute. Where these are disputed, 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. We note that a number of States Parties to the Rome Statute do not accept that Palestine is a State or qualified for membership of the UN.[13]

9. Furthermore, 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.[14] Palestine could not delegate criminal jurisdiction over Israeli

[11] Partly Dissenting Opinion of Judge Kovacs ICC-01/18-143-Anx1 https://www.icc-cpi.int/sites/default/files/RelatedRecords/CR2021_01167.PDF, paras 55-58
[12] Ibid. paras 59-85
[13] See e.g. the comments of the UK and Switzerland at the 9609th meeting of the UN Security Council S/PV.9609 https://www.un.org/unispal/document/security-council-9609th-meeting-the-situation-in-the-middle-east-including-the-palestinian-question-s-pv-9609/ pp6-8, referring to a future Palestinian State; and the voting record for UNGA Resolution ES-10/23 where 4 States Parties voted against and 23 abstained.
[14] 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

citizens that it did not have, because this jurisdiction was expressly allocated solely to Israel by Art. XVII(2)c and Annex IV, Art. I(2) of the Oslo II Accord.[15] These provisions do not merely constitute a non-exercise of a supposed criminal jurisdiction of Palestine over Israelis in the West Bank and Gaza Strip, as some have suggested. Annex IV, Art. I(2) expressly provides that *"Israel has sole criminal jurisdiction over the following offenses …"*. The categories of offenses which follow cover any offenses committed by Israelis in the West Bank and Gaza Strip.

10. The Oslo II Accord is an international agreement between Israel and the PLO as the representative of the Palestinian people. Even if there exists a State of Palestine (which we respectfully dispute), it is the successor of the PLO and is bound by the Oslo II Accord in the place of the PLO. The Accord was the product of hard-fought negotiations[16] and was a package deal for both sides. Although both Israel and Palestinians have alleged breaches by the other, neither has withdrawn from the accord and it remains in force. Palestine's response of 4 June 2020 to the Chamber's Order requesting additional information about a statement made by Mahmoud Abbas on 19 May 2020 rejected the suggestion that this statement declared that the Accord had been annulled.[17] As long as the Accord remains in force, Israel has sole jurisdiction over alleged criminal acts by Israelis in the West Bank and Gaza Strip, and this jurisdiction cannot be delegated to the ICC by the Palestinian Authority, the PLO or any successor State or deemed State.

11. 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 Art. 21(1)(b) of the Rome Statute requires the Court to apply applicable treaties where appropriate. The Rome Statute must be considered in the first place under Art. 21(1)(a), but in determining the application of Art. 12(2) of the Statute in this case it is appropriate to apply the provisions on jurisdiction of the Oslo II Accord.

12. Nor should the jurisdiction provisions of the Oslo II Accord be dismissed on the basis of Art. 47 of the 4th Geneva Convention. These provisions do not deprive protected persons

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

[15] 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

[16] See the Amicus Curiae Observations of Ambassador Dennis Ross ICC-01/18-94 https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2020_01060.PDF at §23

[17] ICC-01/18-135 https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2020_02277.PDF

of the benefits of that Convention, which do not include any requirement that alleged criminal offences of nationals of an Occupying Power be tried by an international court.

13. Thus, even if the interpretation of Art. 12(2) of the Rome Statute resulting from the application of Art. 31 of the Vienna Convention leaves the meaning ambiguous or obscure, the application of Art. 32 of the Vienna Convention confirms that the Court does not have jurisdiction over Israeli citizens in respect of conduct in the Gaza Strip.

14. The suggestion in the majority Decision that the conflict between its conclusion and the Oslo II Accord can be addressed by consultations under Art. 97 of the Rome Statute[18] is manifestly unsatisfactory. In the first place, it does not in any way cure the lack of jurisdiction if the preconditions of jurisdiction in Art. 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 arrest warrants may have been sought, or may be sought, without public disclosure, as mentioned in §2 above.

Complementarity

15. The Prosecutor failed to take properly into account one of the most foundational principles upon which the Court is governed, that of complementarity.[19] 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."*[20] 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.

16. We submit that, in accordance with §10 of the Preamble and Art. 1 of the Rome Statute, this principle applies not only to specific provisions of the Statute on admissibility and initiation of investigations, but also to the exercise of powers such as the extension of an investigation to fundamentally different circumstances and allegations, and the issuance of arrest warrants under Art. 58 of the Statute. The lacuna identified by Profs Yuval Shany and Amichai Cohen[21] surely cannot have been intended by those who framed the Statute.

[18] ICC-01/18-143 https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_01165.PDF para 127
[19] Rome Statute, Preamble §10 and Arts. 1, 17, 18 and 53
[20] https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state
[21] Shany, Yuval & Cohen, Amichai, *"The Prosecutor's Circumvention of Article 18 Complementarity? A Flaw in the ICC's Palestine Investigation"*, Just Security, 1 June 2024 https://www.justsecurity.org/96296/icc-article-18-complementarity/

17. 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 President[22] and a former Prime Minister.[23]

18. Underscoring the IDF's Military Advocate General's robust independence and willingness to conduct bona fide investigations, 74 criminal 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 other Iranian proxies, and evidence continues to be gathered in a highly challenging and complex urban warfare environment.[24]

19. Indeed, the Prosecutor himself stated on 29 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 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."*[25]

20. Furthermore, a central tenet of the principle of complementarity is that this 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."*[26] 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."*[27]

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[22] https://www.bbc.co.uk/news/world-middle-east-12815941
[23] https://www.theguardian.com/world/2016/feb/15/ehud-olmert-israeli-ex-pm-19-month-prison-bribery
[24] Military Advocate General's Corps Statement, 24 February 2024, updated 3 August 2024 https://www.idf.il/en/mini-sites/military-advocate-general-s-corps/addressing-alleged-misconduct-in-the-context-of-the-war-in-gaza/
[25] ICC Prosecutor speaks in Cairo on the situation in Israel and Palestine, 29 October 2023 https://www.youtube.com/watch?v=DHyxpHiM1KA
[26] 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
[27] https://www.icc-cpi.int/sites/default/files/2024-04/2024-comp-policy-eng.pdf

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.[28] 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 Art. 58(1)(b) of the Rome Statute. This raises some deeply troubling procedural questions[29] and concerns regarding violation of Art. 18 of the Rome Statute. The Prosecutor's decision to seek arrest warrants, and the manner in which he chose to do so, grossly violate the principle of complementarity; this should also be taken into account in the Court's consideration of the Applications.

Inaccuracy and omissions in the Prosecutor's applications for arrest warrants

22. The Prosecutor's Applications for warrants for the arrest of Netanyahu and Gallant ("**the Applications**") have not been published, but the Prosecutor made a public statement on 20 May 2024 ("**the Statement**")[30] that purported to summarise and justify them. We assume that the Statement provided a fair and accurate summary of the Applications; if not, this raises additional concerns regarding the reliability of statements by the Prosecutor. These concerns are particularly serious in view of the propensity of false allegations against Israelis to stir up racial and religious hatred throughout the world[31] and to undermine confidence in international institutions on the part of Israelis, Jews and fair-minded people generally.

23. We have shown in detail in our Request for Leave to Make Observations on Inaccuracies and Omissions in the Prosecutor's Applications for Arrest Warrants ("**the UKLFI et al Request**"), filed with the Court on 12 July 2024,[32] that every phrase of every sentence of the Prosecutor's Statement summarising the allegations against Netanyahu and Gallant is

[28] *"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/
[29] Statement by Antony J. Blinken, US Secretary of State, 20 May 2024, https://www.state.gov/warrant-applications-by-the-international-criminal-court/
[30] https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state
[31] See e.g. https://www.dailymail.co.uk/news/article-13067355/Jewish-university-chaplain-forced-hiding-receiving-hundreds-death-threats-against-family-role-IDF-reservist.html
[32] ICC-01/18-234-SECRETExp-Anx https://www.uklfi.com/wp-content/uploads/2024/07/Request-for-leave-to-make-observations-on-accuracy-.pdf, §§12-47. One minor correction should be made to the last line of §43 of that Request: "in the course of a year" should be inserted after "Gaza".

untrue. Israel has not *"intentionally and systematically deprived the civilian population in all parts of Gaza of objects indispensable to human survival".* The allegation that a *"total siege"* was imposed by Israel over Gaza *"for extended periods"* is false, as is the assertion that this *"involved completely closing the three border crossing points ... for extended periods".* Israel did not arbitrarily restrict the transfer of food and medicine through the border crossings after they were reopened. Cross-border water pipelines from Israel to Gaza were not *"Gazans' principal source of clean water"* and Israel did not cut them off *"for a prolonged period".* Two of the three pipelines were damaged in the Hamas attack of 7 October 2023. Supply was resumed through the third after a few days and through the other two after they were repaired. The allegation that Israel cut off and hindered electricity supplies is misleading. 9 out of the 10 electricity lines into Gaza were damaged in the Hamas attack. Israel ceased to supply electricity through the remaining line to prevent it being used by Hamas for military purposes, but fuel was available in Gaza to generate electricity for essential purposes and Israel permitted further fuel to enter Gaza for these purposes. Israel did not attack civilians *"queuing for food"*, it did not obstruct aid delivery by humanitarian agencies, and it did not force *"many agencies to cease or limit their operations in Gaza"* by attacks on aid workers.

24. UKLFI has also published a detailed review ("**the UKLFI Review**")[33] of reports of alleged famine in the Gaza Strip, including those on which the Prosecutor appears to have relied in the Applications. The UKLFI Review shows that the reports on which the Prosecutor appears to have relied were based on incomplete information and their conclusions were subsequently officially categorised as "implausible". Famine was not *"present in some areas of Gaza"* nor *"imminent in other areas".* The comment of the UN Secretary General cited by the Prosecutor appears to have been based on the same misinformation. There is also reason to suspect that the Prosecutor has omitted to include material that casts doubt on the reliability of media and anecdotal accounts that he invokes.[34]

25. There is clearly insufficient space to include the matters set out in the UKLFI et al Request and the UKLFI Review, and substantiated by the references cited in them, within the page limit permitted by the Chamber in its Decision of 22 July 2024.[35] Nevertheless, we

[33] https://www.uklfi.com/wp-content/uploads/2024/07/Review-of-Famine-Reports-for-Publication.pdf
[34] UKLFI et al Request §§45-47
[35] ICC-01/18-249 https://www.icc-cpi.int/sites/default/files/CourtRecords/0902ebd1809006d1.pdf §§11-13

respectfully ask the Chamber and the Prosecutor to consider them in full. We submit that it would be a disgraceful dereliction of duty if the Court and the Prosecutor were to ignore them. It would call into question the integrity of the Court, its processes and its Prosecutor.

26. The wholesale inaccuracy of the Prosecutor's allegations against Netanyahu and Gallant, demonstrated by the UKLFI et al Request, is not controverted by the advice given to the Prosecutor by a "panel of experts in international law". It is not clear what status, if any, they have or on what legal basis or authority their advice has been provided.[36] In any event, it appears that they were asked to form and did form the views they expressed on the basis of the same material provided to them by the Office of the Prosecutor as that on which the Applications were also based. Since that material was evidently inaccurate and omitted relevant information, their Report is equally unfounded and cannot validate the Applications.

27. Since the factual allegations summarised in the Statement (and presumably relied upon in the Applications) are completely false, they do not provide *"reasonable grounds to believe that [Netanyahu or Gallant] has committed a crime within the jurisdiction of the Court"* as required by Art. 58(1)(a) of the Rome Statute, even if the Court has the required territorial jurisdiction and if the issuance of the warrants is compatible with the principle of complementarity (both of which are disputed by UKLFI, BBUK, LFI and JI).

28. As well as negating the alleged crimes, the true facts also show that it is not *necessary* at the present time to arrest Netanyahu or Gallant for any of the purposes specified in Art. 58(1)(b) of the Rome Statute.

29. It is highly undesirable to restrict the liberty of any person who, in accordance with Art. 66 of the Rome Statute, is presumed innocent until proved guilty, without proper cause and need. In all cases, the Court has a high responsibility to scrutinise applications for arrest warrants stringently and to examine with utmost care whether the criteria in Art. 58(1) of the Rome Statute are fully met.

30. This responsibility is even graver where applications are made to arrest a democratically elected Prime Minister and Defence Minister, when they are currently leading their

[36] The legality and propriety of this engagement are disputed by Adv. Norman Menachem Feder, *ICC Prosecutor Tapped External Panel to Review Evidence: Is That Even Allowed?*, Lawfare, 9/7/2024: https://www.lawfaremedia.org/article/icc-prosecutor-tapped-external-panel-to-review-evidence--is-that-even-allowed

country in highly complex wars against genocidal enemies, that expressly seek the extermination of their people – a people that suffered, and has not yet recovered from, a genocide less than a century ago. The arrest of its key leaders, and even the disruption of their work by forcing them to take steps to avoid arrest, would be liable to prejudice the conduct of the wars and could even jeopardise the survival of the country and its people.

31. In these circumstances, if there is any risk that the Applications might be inaccurate or might omit material information or evidence, the Court should ensure that these deficiencies are corrected before making any decision on whether to grant them. Since we have filed and drawn the Court's attention to information and evidence demonstrating that every phrase of every sentence of the Prosecutor's Statement summarising his allegations against Netanyahu and Gallant is untrue, this responsibility requires the Court to address these materials fully.

Respectfully submitted by

Jonathan Turner, Chief Executive, on behalf of UK Lawyers for Israel ("**UKLFI**") and as agent for B'nai B'rith UK ("**BBUK**"), the International Legal Forum ("**ILF**"), the Jerusalemites' Initiative ("**JI**") and Simon Wiesenthal Center ("**SWC**")

Dated 30 September 2024
At London, UK

Cour
Pénale
Internationale

International
Criminal
Court

Original: English

No.: **ICC-01/18**
Date: **5 August 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

PUBLIC

Observations on (1) Jurisdiction and Complementarity and (2) Inaccuracies and Omissions in the Prosecutor's Applications for Arrest Warrants 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"), the Jerusalemites' Initiative ("JI") and the Simon Wiesenthal Center ("SWC")

Source: UK Lawyers for Israel ("**UKLFI**"), B'nai B'rith UK ("**BBUK**"), the International Legal Forum ("**ILF**"), the Jerusalemites' Initiative ("**JI**") and Simon Wiesenthal Center ("**SWC**")

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

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Mr Mame Mandiaye Niang
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Unrepresented Applicants

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Mr Eli M. Rosenbaum; Professor David Chilstein; Professor John Quigley; High Level Military Group; European Centre for Law & Justice; Professor Steven E. Zipperstein; Mr and Mrs Serge and Beate Klarsfeld; Professors Yuval Shany and Amichai Cohen; the State of Palestine; Professor William Schabas; the Jerusalem Center for Public Affairs and the Institute for NGO Research; the Kingdom of Norway; the Organisation of Islamic Cooperation; Hungary; Republic of Argentina; the Touro Institute on Human Rights and the Holocaust; Canadian Union of Jewish Students (CUJS) and the World Union of Jewish Students (WUJS); Arab Organisation for Human Rights UK (AOHR UK); Assistant Professor Halla Shoaibi and Professor Asem Khalil; Centre for Israel and Jewish Affairs; the Palestine Independent Commission for Human Rights (ICHR); Law for Palestine; Professor Sascha Dominik Dov Bachman, Dr Deborah Mayersen, Professor Gregory Rose and Dr Colin Rubenstein; US Senator Lindsey O. Graham; Lawyers for Palestinian Human Rights; Israel Bar Association; Czech Republic; International Centre of Justice for Palestinians and the Centre for Human Rights Law (SOAS University of London); Jerusalem Institute of Justice; Chile and Mexico; Centre for ICC-01/18-260 01-08-2024 2/12 PT No. ICC-01/18 3/12 31 July 2024 European Legal Studies on Macro-Crime (MACROCRIMES); Dr Robert Heinsch and Dr Giulia Pinzauti; The Hague Initiative for International Cooperation; ICJ Norway and Defend International Law; UN Special Rapporteurs and Working Groups; the United States of America; Professor Neve Gordon; Al-Quds Human Rights Clinic and Al-Quds University; the League of Arab States; L'association des Juristes pour le respect du droit international and la Fédération internationale pour les droits humains; University Network for Human Rights, the International Human Rights Clinic, Boston University School of Law, the International Human Rights Clinic, Cornell Law School and the Lowenstein Human Rights Project, Yale Law School; Professor Richard Falk and Professor Michael Lynk; Professor Adil Ahmad Haque; Open Society Justice Initiative, European Center for Constitutional and Human Rights, REDRESS Trust, Human Rights Watch and Amnesty International; Republic of Colombia; Hostages and Missing Families Forum and the Raoul Wallenberg Centre for

Human Rights; Addameer Prisoner Support and Human Rights Association; International Association of Jewish Lawyers and Jurists; Kingdom of Spain; UK Lawyers for Israel, B'nai B'rith UK, the International Legal Forum, the Jerusalem Initiative and the Simon Wiesenthal Centre; International Commission of Jurists (ICJ); The Palestinian Association for Human Rights (Witness); Guernica 37 Chambers; the Federative Republic of Brazil; ALMA – Association for the Promotion of International Humanitarian Law; Ireland; Avocats pour la Justice au Proche-Orient (AJPO); Federal Republic of Germany; Dr Shahd Hammouri; Al-Haq Law in the Service of Mankind (Al-Haq), Al Mezan Center for Human Rights (Al-Mezan) and the Palestinian Center for Human Rights (PCHR); République Démocratique du Congo; Arpit Batra; South Africa, Bangladesh, Bolivia, Comoros, and Djibouti.

REGISTRY

Registrar
Mr Osvaldo Zavala Giler

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section
Philipp Ambach

Other

Introduction

1. UKLFI, BBUK, ILF and JI join in all of these observations. SWC joins in the observations on inaccuracy and omissions in the Prosecutor's applications for arrest warrants.

2. 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 total inaccuracy of the grounds on which arrest warrants have been sought against Benjamin Netanyahu and Yoav Gallant, according to the summary in the Prosecutor's public statement,[1] Israelis cannot assume that their innocence will avoid the risk of arrest under warrants issued on the basis of false information. Nor can they assume that they will avoid this risk if they are not senior commanders or leaders.[2] 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, given the disproportionate contribution made by Israelis to technological innovation.

Jurisdiction

3. References in the footnotes of this section to "Annex" refer to the previously filed Annex to our Request for leave to file observations.[3]

4. The majority Decision of the Chamber of 5 February 2021 ("**the majority Decision**")[4] was based on the Secretary General's acceptance of the deposit of an instrument of accession of Palestine to the Rome Statute. That Decision 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.[5] On this view, the existence, content and circulation of the instrument were surely important.

5. Subsequently, the following information came to light:

[1] https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state
[2] See Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation ICC-01/13-34 https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2015_13139.PDF at §23
[3] We suspect that this document has been given the reference ICC-01/18-234-SECRET-Exp-AnxII.1 but the Court has not clarified this.
[4] ICC-01/18-143 https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_01165.PDF
[5] ICC-01/18-143 https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_01165.PDF paras 95-103

(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.[6] 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.[7]

(c) Neither the Court[8] nor the UK[9] 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.[10] 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.

6. Although the supposed 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

[6] 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)
[7] Ibid.
[8] Email from Irinka Dolidze on behalf of Peter Lewis (ICC Registrar) to Jonathan Turner of 18 February 2021 (Annex p.4)
[9] Letter from UK Foreign, Commonwealth & Development Office to Jonathan Turner, 15 March 2021 (Annex p.6)
[10] Emails from David Nanopoulos to Jonathan Turner of 22 and 24 March 2021 (Annex pp.8-9)

Strip and did not represent the people of the Gaza Strip, where there had been no elections since 2006.

7. In light of the above information:

   (a) The conclusion of the majority Decision, that the States Parties agreed to Palestine's accession to the Rome Statute, is not sound; and

   (b) Even on the basis of the framework adopted in the majority Decision, and even if it is assumed that an instrument of accession was provided to the UN Secretary General by proper representatives of Palestinian authorities in the West Bank, and even if all the States Parties to the Rome Statute must be taken to have agreed to the accession of Palestine, it still does not follow that the accession covered the territory of the Gaza Strip.

8. In any case, we respectfully submit that the whole framework of the majority Decision is erroneous and should be reconsidered. As Judge Kovacs stated in his dissenting judgment, the majority Decision was based on an abridgment of the terms of Art. 12(2) of the Rome Statute that distorted its meaning[11] and did not comply with Arts. 31 and 32 of the Vienna Convention on the Law of Treaties.[12] On any reasonable interpretation of the full text of Art. 12(2) of the Rome Statute in accordance with Art. 31 of the Vienna Convention, the precondition in the first part of its Art. 12(2)(a) is only satisfied where the conduct in question occurred on the territory of a State which is a Party to the Statute. Where these are disputed, 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. We note that a number of States Parties to the Rome Statute do not accept that Palestine is a State or qualified for membership of the UN.[13]

9. Furthermore, 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.[14] Palestine could not delegate criminal jurisdiction over Israeli

[11] Partly Dissenting Opinion of Judge Kovacs ICC-01/18-143-Anx1 https://www.icc-cpi.int/sites/default/files/RelatedRecords/CR2021_01167.PDF, paras 55-58
[12] Ibid. paras 59-85
[13] See e.g. the comments of the UK and Switzerland at the 9609th meeting of the UN Security Council S/PV.9609 https://www.un.org/unispal/document/security-council-9609th-meeting-the-situation-in-the-middle-east-including-the-palestinian-question-s-pv-9609/ pp6-8, referring to a future Palestinian State; and the voting record for UNGA Resolution ES-10/23 where 4 States Parties voted against and 23 abstained.
[14] 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

citizens that it did not have, because this jurisdiction was expressly allocated solely to Israel by Art. XVII(2)c and Annex IV, Art. I(2) of the Oslo II Accord.[15] These provisions do not merely constitute a non-exercise of a supposed criminal jurisdiction of Palestine over Israelis in the West Bank and Gaza Strip, as some have suggested. Annex IV, Art. I(2) expressly provides that *"Israel has sole criminal jurisdiction over the following offenses …"*. The categories of offenses which follow cover any offenses committed by Israelis in the West Bank and Gaza Strip.

10. The Oslo II Accord is an international agreement between Israel and the PLO as the representative of the Palestinian people. Even if there exists a State of Palestine (which we respectfully dispute), it is the successor of the PLO and is bound by the Oslo II Accord in the place of the PLO. The Accord was the product of hard-fought negotiations[16] and was a package deal for both sides. Although both Israel and Palestinians have alleged breaches by the other, neither has withdrawn from the accord and it remains in force. Palestine's response of 4 June 2020 to the Chamber's Order requesting additional information about a statement made by Mahmoud Abbas on 19 May 2020 rejected the suggestion that this statement declared that the Accord had been annulled.[17] As long as the Accord remains in force, Israel has sole jurisdiction over alleged criminal acts by Israelis in the West Bank and Gaza Strip, and this jurisdiction cannot be delegated to the ICC by the Palestinian Authority, the PLO or any successor State or deemed State.

11. 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 Art. 21(1)(b) of the Rome Statute requires the Court to apply applicable treaties where appropriate. The Rome Statute must be considered in the first place under Art. 21(1)(a), but in determining the application of Art. 12(2) of the Statute in this case it is appropriate to apply the provisions on jurisdiction of the Oslo II Accord.

12. Nor should the jurisdiction provisions of the Oslo II Accord be dismissed on the basis of Art. 47 of the 4th Geneva Convention. These provisions do not deprive protected persons

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

[15] 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

[16] See the Amicus Curiae Observations of Ambassador Dennis Ross ICC-01/18-94 https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2020_01060.PDF at §23

[17] ICC-01/18-135 https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2020_02277.PDF

of the benefits of that Convention, which do not include any requirement that alleged criminal offences of nationals of an Occupying Power be tried by an international court.

13. Thus, even if the interpretation of Art. 12(2) of the Rome Statute resulting from the application of Art. 31 of the Vienna Convention leaves the meaning ambiguous or obscure, the application of Art. 32 of the Vienna Convention confirms that the Court does not have jurisdiction over Israeli citizens in respect of conduct in the Gaza Strip.

14. The suggestion in the majority Decision that the conflict between its conclusion and the Oslo II Accord can be addressed by consultations under Art. 97 of the Rome Statute[18] is manifestly unsatisfactory. In the first place, it does not in any way cure the lack of jurisdiction if the preconditions of jurisdiction in Art. 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 arrest warrants may have been sought, or may be sought, without public disclosure, as mentioned in §2 above.

Complementarity

15. The Prosecutor failed to take properly into account one of the most foundational principles upon which the Court is governed, that of complementarity.[19] 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."*[20] 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.

16. We submit that, in accordance with §10 of the Preamble and Art. 1 of the Rome Statute, this principle applies not only to specific provisions of the Statute on admissibility and initiation of investigations, but also to the exercise of powers such as the extension of an investigation to fundamentally different circumstances and allegations, and the issuance of arrest warrants under Art. 58 of the Statute. The lacuna identified by Profs Yuval Shany and Amichai Cohen[21] surely cannot have been intended by those who framed the Statute.

[18] ICC-01/18-143 https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_01165.PDF para 127
[19] Rome Statute, Preamble §10 and Arts. 1, 17, 18 and 53
[20] https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state
[21] Shany, Yuval & Cohen, Amichai, *"The Prosecutor's Circumvention of Article 18 Complementarity? A Flaw in the ICC's Palestine Investigation"*, Just Security, 1 June 2024 https://www.justsecurity.org/96296/icc-article-18-complementarity/

17. 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 President[22] and a former Prime Minister.[23]

18. Underscoring the IDF's Military Advocate General's robust independence and willingness to conduct bona fide investigations, 74 criminal 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 other Iranian proxies, and evidence continues to be gathered in a highly challenging and complex urban warfare environment.[24]

19. Indeed, the Prosecutor himself stated on 29 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 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."*[25]

20. Furthermore, a central tenet of the principle of complementarity is that this 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."*[26] 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."*[27]

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[22] https://www.bbc.co.uk/news/world-middle-east-12815941
[23] https://www.theguardian.com/world/2016/feb/15/ehud-olmert-israeli-ex-pm-19-month-prison-bribery
[24] Military Advocate General's Corps Statement, 24 February 2024, updated 3 August 2024 https://www.idf.il/en/mini-sites/military-advocate-general-s-corps/addressing-alleged-misconduct-in-the-context-of-the-war-in-gaza/
[25] ICC Prosecutor speaks in Cairo on the situation in Israel and Palestine, 29 October 2023 https://www.youtube.com/watch?v=DHyxpHiM1KA
[26] 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
[27] https://www.icc-cpi.int/sites/default/files/2024-04/2024-comp-policy-eng.pdf

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.[28] 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 Art. 58(1)(b) of the Rome Statute. This raises some deeply troubling procedural questions[29] and concerns regarding violation of Art. 18 of the Rome Statute. The Prosecutor's decision to seek arrest warrants, and the manner in which he chose to do so, grossly violate the principle of complementarity; this should also be taken into account in the Court's consideration of the Applications.

Inaccuracy and omissions in the Prosecutor's applications for arrest warrants

22. The Prosecutor's Applications for warrants for the arrest of Netanyahu and Gallant ("**the Applications**") have not been published, but the Prosecutor made a public statement on 20 May 2024 ("**the Statement**")[30] that purported to summarise and justify them. We assume that the Statement provided a fair and accurate summary of the Applications; if not, this raises additional concerns regarding the reliability of statements by the Prosecutor. These concerns are particularly serious in view of the propensity of false allegations against Israelis to stir up racial and religious hatred throughout the world[31] and to undermine confidence in international institutions on the part of Israelis, Jews and fair-minded people generally.

23. We have shown in detail in our Request for Leave to Make Observations on Inaccuracies and Omissions in the Prosecutor's Applications for Arrest Warrants ("**the UKLFI et al Request**"), filed with the Court on 12 July 2024,[32] that every phrase of every sentence of the Prosecutor's Statement summarising the allegations against Netanyahu and Gallant is

[28] *"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/
[29] Statement by Antony J. Blinken, US Secretary of State, 20 May 2024, https://www.state.gov/warrant-applications-by-the-international-criminal-court/
[30] https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state
[31] See e.g. https://www.dailymail.co.uk/news/article-13067355/Jewish-university-chaplain-forced-hiding-receiving-hundreds-death-threats-against-family-role-IDF-reservist.html
[32] ICC-01/18-234-SECRETExp-Anx https://www.uklfi.com/wp-content/uploads/2024/07/Request-for-leave-to-make-observations-on-accuracy-.pdf, §§12-47. One minor correction should be made to the last line of §43 of that Request: "in the course of a year" should be inserted after "Gaza".

untrue. Israel has not *"intentionally and systematically deprived the civilian population in all parts of Gaza of objects indispensable to human survival".* The allegation that a *"total siege"* was imposed by Israel over Gaza *"for extended periods"* is false, as is the assertion that this *"involved completely closing the three border crossing points ... for extended periods".* Israel did not arbitrarily restrict the transfer of food and medicine through the border crossings after they were reopened. Cross-border water pipelines from Israel to Gaza were not *"Gazans' principal source of clean water"* and Israel did not cut them off *"for a prolonged period".* Two of the three pipelines were damaged in the Hamas attack of 7 October 2023. Supply was resumed through the third after a few days and through the other two after they were repaired. The allegation that Israel cut off and hindered electricity supplies is misleading. 9 out of the 10 electricity lines into Gaza were damaged in the Hamas attack. Israel ceased to supply electricity through the remaining line to prevent it being used by Hamas for military purposes, but fuel was available in Gaza to generate electricity for essential purposes and Israel permitted further fuel to enter Gaza for these purposes. Israel did not attack civilians *"queuing for food"*, it did not obstruct aid delivery by humanitarian agencies, and it did not force *"many agencies to cease or limit their operations in Gaza"* by attacks on aid workers.

24. UKLFI has also published a detailed review ("**the UKLFI Review**")[33] of reports of alleged famine in the Gaza Strip, including those on which the Prosecutor appears to have relied in the Applications. The UKLFI Review shows that the reports on which the Prosecutor appears to have relied were based on incomplete information and their conclusions were subsequently officially categorised as "implausible". Famine was not *"present in some areas of Gaza"* nor *"imminent in other areas".* The comment of the UN Secretary General cited by the Prosecutor appears to have been based on the same misinformation. There is also reason to suspect that the Prosecutor has omitted to include material that casts doubt on the reliability of media and anecdotal accounts that he invokes.[34]

25. There is clearly insufficient space to include the matters set out in the UKLFI et al Request and the UKLFI Review, and substantiated by the references cited in them, within the page limit permitted by the Chamber in its Decision of 22 July 2024.[35] Nevertheless, we

[33] https://www.uklfi.com/wp-content/uploads/2024/07/Review-of-Famine-Reports-for-Publication.pdf
[34] UKLFI et al Request §§45-47
[35] ICC-01/18-249 https://www.icc-cpi.int/sites/default/files/CourtRecords/0902ebd1809006d1.pdf §§11-13

respectfully ask the Chamber and the Prosecutor to consider them in full. We submit that it would be a disgraceful dereliction of duty if the Court and the Prosecutor were to ignore them. It would call into question the integrity of the Court, its processes and its Prosecutor.

26. The wholesale inaccuracy of the Prosecutor's allegations against Netanyahu and Gallant, demonstrated by the UKLFI et al Request, is not controverted by the advice given to the Prosecutor by a "panel of experts in international law". It is not clear what status, if any, they have or on what legal basis or authority their advice has been provided.[36] In any event, it appears that they were asked to form and did form the views they expressed on the basis of the same material provided to them by the Office of the Prosecutor as that on which the Applications were also based. Since that material was evidently inaccurate and omitted relevant information, their Report is equally unfounded and cannot validate the Applications.

27. Since the factual allegations summarised in the Statement (and presumably relied upon in the Applications) are completely false, they do not provide *"reasonable grounds to believe that [Netanyahu or Gallant] has committed a crime within the jurisdiction of the Court"* as required by Art. 58(1)(a) of the Rome Statute, even if the Court has the required territorial jurisdiction and if the issuance of the warrants is compatible with the principle of complementarity (both of which are disputed by UKLFI, BBUK, LFI and JI).

28. As well as negating the alleged crimes, the true facts also show that it is not *necessary* at the present time to arrest Netanyahu or Gallant for any of the purposes specified in Art. 58(1)(b) of the Rome Statute.

29. It is highly undesirable to restrict the liberty of any person who, in accordance with Art. 66 of the Rome Statute, is presumed innocent until proved guilty, without proper cause and need. In all cases, the Court has a high responsibility to scrutinise applications for arrest warrants stringently and to examine with utmost care whether the criteria in Art. 58(1) of the Rome Statute are fully met.

30. This responsibility is even graver where applications are made to arrest a democratically elected Prime Minister and Defence Minister, when they are currently leading their

[36] The legality and propriety of this engagement are disputed by Adv. Norman Menachem Feder, *ICC Prosecutor Tapped External Panel to Review Evidence: Is That Even Allowed?*, Lawfare, 9/7/2024: https://www.lawfaremedia.org/article/icc-prosecutor-tapped-external-panel-to-review-evidence--is-that-even-allowed

country in highly complex wars against genocidal enemies, that expressly seek the extermination of their people – a people that suffered, and has not yet recovered from, a genocide less than a century ago. The arrest of its key leaders, and even the disruption of their work by forcing them to take steps to avoid arrest, would be liable to prejudice the conduct of the wars and could even jeopardise the survival of the country and its people.

31. In these circumstances, if there is any risk that the Applications might be inaccurate or might omit material information or evidence, the Court should ensure that these deficiencies are corrected before making any decision on whether to grant them. Since we have filed and drawn the Court's attention to information and evidence demonstrating that every phrase of every sentence of the Prosecutor's Statement summarising his allegations against Netanyahu and Gallant is untrue, this responsibility requires the Court to address these materials fully.

Respectfully submitted by

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Dr 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 Jerusalemites' Initiative ("**JI**") and

Rabbi Abraham Cooper, Associate Dean and Global Social Action Director, on behalf of Simon Wiesenthal Centre ("**SWC**")

Dated this 5th day of August 2024

At Netanya, Tel Aviv, Jerusalem and Los Angeles