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Date: **16 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 STATE OF PALESTINE

Public

OPCD Rule 103 Observations on Defence Rights at this Stage of the Proceedings

Source: **Office of Public Counsel for the Defence**

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

The Office of the Prosecutor
Mr Karim A.A. Khan KC

Counsel for the Defence

Legal Representatives of the Victims
Ms Katherine Gallagher
Mr Khaled Al Shouli, Mr Wael Al Masry
Mr Bradley Parker, Mr Khaled Quzmar
Mr Raji Sourani, Ms Chantal Meloni and
Mr Triestino Mariniello
Ms Nada Kiswanson von Hooydonk and
Mr Rodney Dixon KC
Ms Liesbeth Zegveld
Ms Dominique Cochain Assi
Mr Gilles Devers
Ms Yael Vias Gvirsman
Mr Juan Branco
Mr Yasser Hassan, Ms Lamia Mobada
[others REDACTED]

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants (Participation/Reparation)

The Office of Public Counsel for Victims
Ms Paolina Massida

The Office of Public Counsel for the Defence
Ms Marie O'Leary

States Representatives
All *Amici Curiae* States
as authorised by Pre- Trial Chamber I

Amicus Curiae
All other *Amici Curiae*
as authorised by Pre- Trial Chamber I

REGISTRY

Registrar
Mr Osvaldo Zavala Giler

Counsel Support Section

Victims and Witnesses Unit

Detention Section

I. INTRODUCTION

1. The scene in which the Office of Public Counsel for the Defence ("OPCD" or "Office") intervenes is this: hundreds of pages of submissions from scores of States, NGOs, international bodies, student and professional organisations, applicant victims, and other individuals are before Pre-Trial Chamber I on innumerable issues. In this fray, the named persons in these proceedings – known by the public pronouncement of the Prosecutor – have no standing before the ICC. What fair trial rights such individuals may possess, or can exercise, is the question at hand.
2. This massive yarn of litigation is being threaded through a small needle of time – a time when *ex parte* Article 58 applications for arrest warrants are before Pre-Trial Chamber I. While the *ex parte* nature of the arrest warrants is routine, the public announcement of them is not. The OPCD submits that this act of revealing the existence of the Article 58 *applications*, in advance of any Article 58 *decision*, necessarily impacts the fair trial rights of those named. First, publicly announcing their identities opens the door for 'prejudicial publicity' against any person named and implicates their presumption on innocence in public fora. Second, it has the potential to attract litigation of third parties, especially jurisdictional or admissibility litigation, in which the named person will have no standing to intervene, undermining the individual's right to be heard. Finally, the inconsistent practice of revealing the existence of some arrest warrant applications, and not others, at the discretion of the Prosecutor creates conditions for potential suspects to receive unequal treatment before the law.
3. To assess the fair trial impact of this extraordinary litigation thus far, the OPCD will provide an interpretation of the fair trial guarantees applicable at the pre-arrest warrant stage. Thereafter, it will contemplate how the Prosecutor's public announcement of seemingly confidential allegations, which have not yet been scrutinised by the Pre-Trial Chamber, impacts those rights. The final section will provide other fair trial safeguards which are likely necessary at this stage to preserve future rights.[1]

[1] *Situation in the DRC*, Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 24 July 2006, para. 11: "[b]reach or deviation from the rules of a fair trial at the pre-trial stage of the proceedings may have implications on the proceedings and may affect the outcome of the trial."

II. RELEVANT PROCEDURAL HISTORY

4. In 2021, Pre-Trial Chamber I (in its previous composition) issued a "Decision on the 'Prosecution request pursuant to Article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine'.[2] The OPCD, alongside numerous *amici curiae*, made submissions on the fair trial impact of rendering any determinative jurisdictional findings in advance of an Article 58 decision.[3]
5. On 27 June 2024, Pre-Trial Chamber I granted the United Kingdom's Rule 103(1) Request[4] without prejudice to any further decision on this matter.[5] Noting that this should not be understood as an open call for *amicus curiae* submissions, a deadline of 12 July 2024 was set for any other requests for leave to make observations.[6]
6. On 12 July 2024, the Office of the Public Counsel for Defence filed that it "can provide a necessary defence rights-focused perspective that would otherwise be lacking in the range of submissions to be heard by the Pre-Trial Chamber".[7]
7. On 22 July 2024, the Pre-Trial Chamber issued a decision granting numerous States, organisations, and persons leave to file *amicus curiae* observations pursuant to RPE Rule 103(1) by 6 August 2024.[8]
8. On 30 July 2024, the Pre-Trial Chamber authorised observations on the Article 68(3) views, concerns, and general interests of victim applicants.[9]
9. On 9 August 2024, the Pre-Trial Chamber invited the OPCD to submit observations under Rule 103 on the general defendant's rights at this stage of the proceedings by 16 August 2024.[10]

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[2] ICC-01/18-143, 5 February 2021.
[3] OPCD Submissions on Prosecution Request for an Article 19(3) ruling, ICC-01/18-90, 16 March 2020.
[4] Request by the United Kingdom for Leave to Submit Written Observations Pursuant to Rule 103, ICC-01/18-171-Anx, 10 June 2024.
[5] Public redacted version of '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-Red, 27 June 2024, para. 5. On 4 July 2024, an extension of time was granted for these UK submissions (until 26 July). ICC-01/18-178.
[6] *Ibid*, para. 6.
[7] OPCD Submission on *Amicus Curiae* Observations, ICC-01/18-201, 12 July 2024, para. 4.
[8] Decision on requests for leave to file observations pursuant to rule 103 of the Rules of Procedure and Evidence, ICC-01/18-249, 22 July 2024.
[9] *Situation in the State of Palestine*, Decision concerning the views, concerns and general interests of victims, ICC-01/18-256-Conf, 30 July 2024 (PRV issued on 7 August 2024, ICC-01/18-256-Red).
[10] Order in relation to the OPCD's submissions on *amicus curiae* observations and the Prosecution's request to file a consolidated response, ICC-01/18-325, 9 August 2024.

III. OPCD MANDATE

10. The OPCD files these submissions under Rule 103 of the Rules as authorised by the Pre-Trial Chamber. In preparing these submissions, the Office is guided by Regulation 77(4)(a) of the Regulations of the Court which mandates the OPCD to represent and protect the rights of the defence during the initial stages of the investigation. These submissions seek to respectfully advise the Chamber on the rights of defendants in light of these unique proceedings, so that it may take any next steps in a way that is consistent with the full rights enshrined in the Rome Statute. These submissions are not meant, however, to directly represent any specific person or persons in these proceedings, or supplant any argument they may wish to make now or in the future.

IV. OBSERVATIONS

Existing Law: Fair Trial Rights in the Investigation Stage and Standing

11. The Appeals Chamber has held that "the principles of a fair trial are not confined to trial proceedings but extend to pre-trial proceedings as well as the investigation of a crime".[11] The Pre-Trial Chamber has similarly held that fair trial rights apply to "all stages of proceedings", including the "preliminary phase" and "investigation stage".[12] Therefore, it can be extrapolated that relevant fair trial rights under Articles 55, 66, and 67 are afforded to any named person in this unique stage of the proceedings. Furthermore, any decision will necessarily be subject to the overarching Article 21(3), which dictates that all application and interpretation of the law must be interpreted consistently with internationally recognised human rights.
12. Despite enjoying these rights, the ICC Pre-Trial Chambers have held that persons named in an Article 58 application are not permitted to intervene or seek enforcement of these rights at this time. It has held that "*[n]o role, actual or potential, is provided or anticipated for the person named in the Prosecutor's application under article 58 of the Statute*".[13] The Pre-Trial Chamber has equally held that persons named in an

[11] *Situation in the DRC*, Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 24 July 2006, para. 11.
[12] *Situation in the DRC*, Decision on the Prosecution's Application for Leave to Appeal the Chamber's Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04-135-tENG, 31 March 2006, para. 35.
[13] *Situation in the Republic of Kenya*, Decision on Application for leave to participate in article 58(7) proceedings, ICC-01/09-42, 11 February 2011, para. 18.

Article 58 application do not have standing as *amicus curiae*.[14] This lack of standing is now noted in the current Chambers Practice Manual which states that: *"[e]ven if the proceedings are public (which is however not recommended), the person whose arrest/appearance is sought does not have standing to make submissions on the merits of the application"*.[15]

13. Given no role for a named person in this procedure the Pre-Trial Chamber has concluded: "*Thus, the proceedings triggered by the Prosecutor's application for a warrant of arrest or a summons to appear are to be conducted on an* ex parte *basis.*"[16]

The Triggering Event: The Prosecutor's announcement

14. On 20 May 2024, the Prosecution took this typically *ex parte* process into the public, announcing that he had applied for arrest warrants against five persons in the *Situation in the State of Palestine*; notably, named these persons.[17] The OPCD is not aware of any judicial authorisation permitting him to reveal this information. While communications of the ICC Prosecutor to the press are not barred, such pronouncement runs afoul of the aforementioned jurisprudence, is outside of usual OTP practice,[18] and runs contrary to advice of the Chambers Practice Manual which advises that the "application of the Prosecutor under Article 58 of the Statute and the decision of the Pre-Trial Chamber are submitted and issued *ex parte*".[19] This highly publicised move by the OTP renewed litigation on territorial jurisdiction, and *alter*, from States, organsiations, and individuals, as well as from victim representatives.
15. At minimum, the OPCD submits that this press release is likely in contravention of the classification given to the arrest warrant application itself. As not available to the public, the filing discussed by the Prosecution in this pronouncement was 'confidential' (at least); 'under seal' (more likely); or possibly 'secret' (the designation ordered by the Pre-Trial Chamber for the subsequent applications to interene). With

[14] *Situation in the Republic of Kenya*, Decision on Application for Leave to Submit *Amicus Curiae* Observations", ICC-01/09-35, 19 January 2011, para. 6: "*A plain reading of rule 103(2) of the Rules clearly excludes a person, subject to the Court's investigation, from submitting an application pursuant to the said rule.*"
[15] Chambers Practice Manual, para. 3.
[16] *Situation in the Republic of Kenya,* Decision on Application for Leave to Submit *Amicus Curiae* Observations", ICC-01/09-35, 19 January 2011, para. 10. *See also Situation in the Republic of Kenya*, Decision on Application for leave to participate in article 58(7) proceedings, ICC-01/09-42, 11 February 2011, para. 6.
[17] Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for arrest warrants in the situation in the State of Palestine, 20 May 2024.
[18] Such announcements are often made by the Prosecution only following an Article 58 Decision, *see, e.g.* Statement by Prosecutor Karim A.A. Khan KC on the issuance of arrest warrants in the Situation in Ukraine, 25 June 2024.
[19] Chambers Practice Manual, para. 3.

regard to an arrest warrant or application for one, the Pre-Trial Chamber has treated the act of "reveal[ing] its existence" as requiring judicial authorisation.[20] Thus, without express Pre-Trial Chamber permission, any of these classifications would prevent dissemination of the contents to the public.[21] This is dictated by ICC Rules[22], but also emphasised in the Prosecutor's own Regulations[23] and its Code of Conduct.[24] The sole power of the Chamber to control any subsequent dissemination or reclassification can also be shown previous decisions.[25]

The implications of the Prosecutor's announcement on the present fair trial rights

16. Regardless if such press release was made outside the filing's classification, this announcement is made in advance of the Pre-Trial Chamber's evaluation of the merits. Providing this information prior to any Article 58 decision puts the named individuals in the same place as the defendants in the *Situation in the Republic of Kenya* found themselves over a decade ago – invoked, but unable to intervene. Any due process that may be granted to the current named persons in the texts cannot be enforced for lack of standing. At the same time, scores of *amici curiae* have been permitted to submit – some sticking to the distinct issue raised in the Pre-Trial Chamber Order, others submitting on the merits, some raising new matters altogether. Thus, this public pronouncement before a Pre-Trial Chamber decision has created exactly the "*curious and unfair process*" that the Prosecutor hypothicised in a previous case.[26]

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[20] *See Prosecutor v. Mokom*, Public Redacted Vesion of 'Warrant of Arrest for Maxime Jeoffroy Eli Mokom Gawaka' (ICC-01/14-01/22-2-US-Exp), ICC-01/14-01/22-2-Red2, date of original 10 December 2018 (PRV issued 22 March 2022), para. 21; *Situation in CAR II*, Public Redacted Version of 'Warrant of Arrest for Mahamat Said Abdel Kani', 7 January 2019, ICC-01/14-01/21-2-US-Exp, date of public redacted version 17 February 2021, para. 27.

[21] *See* Regulations of the Registry ("RoR"), Regulation 14.

[22] Regulations of the Court ("RoC"), Regulation 23*bis*(1): "*Any document filed by the Registrar or a participant and marked "ex parte", "under seal" or "confidential", shall state the factual and legal basis for the chosen classification and, unless otherwise ordered by a Chamber, shall be treated according to that classification throughout the proceedings.*" Reclassification can be made by application to the relevant Chamber. *See* RoC 23*bis*(3).

[23] Regulations of the Prosecutor ("RoP"), Regulation 15(1): "*in public information and outreach activities, the prosecutor must "at all times ensure compliance with its statutory obligations and the decisions of the Chambers regarding confidentiality […].*"

[24] Code of Conduct for the Office of the Prosecutor, para. 33: "*shall not disclose […] any material deemed confidential by the Court, unless authorised to do so*".

[25] *Prosecutor v. Lubanga*, Decision on the Press Interview with Ms Le Fraper du Hellen, ICC-01/04-01/06-2433, 12 May 2010, para. 40: "*In our judgment, respecting the Chamber, the judicial process and the other participants involves speaking publicly about the proceedings in a fair and accurate way, and avoiding any comment about issues that are for the Chamber to determine.*" *See also* ICC-01/14-41-Red2, para. 26 and p. 23; ICC-01/04-169, para. 21.

[26] *On the one hand, if victims and referring entities are permitted to submit observations, but the suspect is not, then this would seem a curious and unfair process […]. On the other hand, if the suspect is permitted to submit*

17. More specifically, the OPCD submits that, in the present circumstances, the following rights can be impacted in this scenario, and without recourse:

    a. *The presumption of innocence and "prejudicial publicity"*

18. Even with the great care the OTP appears to have taken in staging this particular press foray, it nevertheless created some confusion in the public sphere. This is evidenced by reputable news outlets creating dedicated content to clarify the status of the application in their reporting – that there were no arrest warrants at this time, only the applications for them.[27]

19. The ICC Chambers have consistently invoked the need to accord respect for the presumption of innocence defined by human rights courts and institutions in not only the proceedings, but in the public.[28] With regard to the Prosecution's press interactions, the Appeals Chamber has highlighted the importance of providing public information about the Court's activities due to the "high-profile nature of cases" and types of crimes, but cautioned the potential danger: "*As the Prosecutor is a public face of the Court, there is a risk that public statements of the Prosecutor will be imputed to the Court as a whole."*[29]

20. In this instance, it is not so much the words the Prosecution has chosen that are at issue, but the timing of naming these persons, as done in advance of a Pre-Trial Chamber's determination validating or dismissing the applications. For this, Pre-Trial Chambers have additionally expressed concern about the potential for reputational harm.[30] Such decisions examine the distinct function of presumption of innocence serving "to 'protect the good reputation' of persons against perceptions of guilt created by the State."[31] In the *Situation in the Republic of Kenya*, the Pre-Trial Chamber

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observations, then the ICC would have a very curious system wherein supects are permitted to comment on their own arrest warrants before they are issued. ICC-01/04-169, para. 29.

[27] *See, e.g.* Reuters, Fact Check: ICC has requested, not issued arrest warrants for Netanyanu and Hamas leaders, 21 May 2024, Fact Check: ICC has requested, not issued arrest warrants for Netanyahu and Hamas leaders | Reuters [last accessed: 16 August 2024]; Associated Press, A warrant for Netanyahu's arrest was requested. But no decision was made about whether to issue it | AP News [last accessed: 16 August 2024].

[28] *Prosecutor v. Gaddafi & Al-Senussi*, Decision on the Request for Disqualification of the Prosecutor, ICC-01/11-01/11-175, 12 June 2012, para. 26. *See also Prosecutor v. Mbarushimana*, Decision on the Defence Request for an Order to Preserve the Impartiality of the Proceedings, ICC-01/04-01/10-51, 31 January 2011, para. 10.

[29] *Ibid.*, para. 30.

[30] *See, e.g. Prosecutor v. Mbarushimana*, Decision on the Defence Request for an Order to Preserve the Impartiality of the Proceedings, ICC-01/04-01/10-51, 31 January 2011, para. 10.

[31] *Prosecutor v. Gaddafi & Al-Senussi*, Decision on the Request for Disqualification of the Prosecutor, ICC-01/11-01/11-175, 12 June 2012. *See also* ECtHR, *Daktaras v. Lithuania*, App. no 42095/9810, Oct 2000, para. 42, available at: https://www.legal-tools.org/doc/370331/; Recommendation Rec (2003) 13 of the Committee of Ministers to member states on the provision of information through the media in relation to criminal proceedings adopted on 10 July 2003, available at:

deprecated the Prosecution for attracting 'prejudicial publicity' against Mr Mohammed Hussein Ali in Kenya where he held no avenue for litigation in this stage of proceedings. This is even more significant, in hindsight, now knowing that the announced charges against him were never confirmed by the Pre-Trial Chamber.[32]

b. "Full equality"

21. Despite the Prosecutor's announcement that his move was to "demonstrate our willingness to apply the law equally",[33] his departure from the typically *ex parte* nature of these proceedings shows exactly an exception to procedural equality of all ICC defendants. Such practice does not "*promote consistency in its jurisprudence and ensure that like cases are treated alike*".[34] Article 67(1) of the Rome Statute assures full equality of all those appearing before it as a part of its fair trial guarantees.[35]

22. Furthermore, allowing the Prosecution to reveal *ex parte* procedures, if done without express permission of the Chamber, creates inequality with all others appearing before it and otherwise bound by the filings classification system of the Court.

c. Undue Delay

23. Arguably, the Prosecution's press statement also contributed to protracted proceedings by directing public attention to matters that would normally remain between the Prosecutor and Pre-Trial Chamber. This is shown in the jurisdictional issues that have arisen in the course of the last three months. Article 67(1)(c) is the guarantor of expeditious proceedings.

d. Reversal of burden

24. Suspects have the right to challenge jurisdiction under Article 19(2) of the Statute after the issuance of an Article 58 decision. Nevertheless, to issue an Article 58 decision, the Pre-Trial Chamber is required to determine in the first place that the Court has jurisdiction. To resolve this potential contradiction, Chambers have qualified any

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[32] *Prosecutor v. Muthaura, Kenyatta & Ali*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-02/11-382-Red, 23 January 2012, para. 430 and relief.

[33] Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for arrest warrants in the situation in the State of Palestine, 20 May 2024.

[34] *Prosecutor v. Muthaura, Kenyatta & Ali*, Application for Order to the Prosecutor Regarding Extra-Judicial Comments to the Press, ICC-01/09-02/11-20, 30 March 2011, para. 16.

[35] *See also* Universal Declaration of Human Rights, Article 7: "All are equal before the law and are entitled without any discrinaltion to equal protectin of the law."

jurisdictional finding in Article 58 decisions as an "*initial* determination".[36] This helps ensure that an ICC suspect remains able to challenge it under Article 19(2).

25. This right, however, appears all but extinguished in these proceedings. The question of jurisdiction was extensively litigated leading up to the Article 19(3) preliminary ruling in 2021, and is now being extensively litigated again before the Article 58 decision without the involvement of any potential suspect. Should there be suspects in the future, the question of jurisdiction may be rendered *res judicata*.

26. In the *Situation in the DRC*, the Appeals Chamber held that admissibility determinations in Article 58 decisions must take into account the interests of the suspect.[37] It held that even if the Pre-Trial Chamber asserted that such findings are "*without prejudice to subsequent determinations on jurisdiction or admissibility*", this caveat was unable to sufficiently protect the interests of suspect,[38] whose interests are better served by allowing them to initiate a challenge under Article 19(2)(a) from a blank slate after the Article 58 decision is issued.[39]

27. The OPCD submits that risks of predetermination are even more heightened in this case, given the unprecedented level of litigation that the question of jurisdiction has attracted – twice, and given that jurisdiction involves circumstances which are not liable to change unlike admissibility. Following the appellate case law, it therefore appears in the best interests of any potential suspect that any thorough or comprehensive assessment of jurisdiction be conducted after a Article 58 decision, should a challenge be raised, and that the Pre-Trial Chamber confines itself to what is strictly necessary – an *initial* determination, only, in this forthcoming decision.

e. Public Proceedings

28. Finally – and only because the Prosecution has put this discussion in the public – there may be a need for additional *ex parte* processes to be made in public redacted form to ensure continued information in the case. In particular, where certain of the named persons are reported to be deceased, any measures taken by the Prosecution to terminate proceedings as lacking Article 25(1) jurisdiction should be made in public. This need for public information on what would normally be *ex parte* proceedings is a

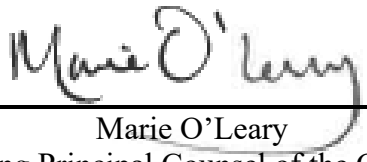
[36] *See, e.g., Prosecutor v Harun and Abd-Al-Rahman,* Decision on the Prosecution Application under Article 58(7) of the Statute, ICC-02/05-01/07-01-Corr, 27 April 2007, para. 13.
[37] *Situation in the DRC*, Judgment on the Prosecutor's Appeal against the decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58", ICC-01/04-169, 13 July 2006, paras 46-53.
[38] *Ibid.*, para. 50.
[39] *Ibid.*, para. 51.

continuing consequence of the Prosecution announcement. This risk could arise whenever such public information on *ex parte* proceedings is given.

V. CONCLUSION

29. There is no remedy which would fully address these issues at this stage since that which has been made public cannot be made confidential again. The OPCD respectfully suggests, however, that measures can be taken to ensure the fairness of the process in these proceedings moving forward. Therefore, the OPCD respectfully requests that the Pre-Trial Chamber:
    - accept these observations;
    - disregard *in limine* any argument by *amici curiae* and victims representatives that fall outside the narrow scope of the initial issue for which leave was granted under Rule 103,[40] or otherwise permit the persons named in the arrest warrant applications the right to intervene and invite them to do so;
    - direct the Prosecutor to refrain from publicly announcing the existence of Article 58 applications and naming individuals subject to them in the future, unless expressly authorised by the Pre-Trial Chamber to do so, if such authorisation had not been received in this instance;
    - direct the Prosecutor to amend his statement issued on the Court's website on 20 May 2024 related to the arrest warrant applications discussed herein by adding a caveat regarding the presumption of innocence and the rights afforded to any person named in the arrest warrant applications;
    - when issuing any decision under Article 58 in this situation, to assess only what is strictly necessary at this stage in order to make an *initial* determination on jurisdiction, so that the ability of any future potential suspects to challenge jurisdiction under Article 19(2)(a) of the Statute is preserved as best as possible; and,
    - require the Prosecutor to provide public redacted versions of any submissions filed to terminate the proceedings in relation to persons who may be deceased, should such submissions exist or be forthcoming.

[40] *See* Public redacted version of '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-Red, 27 June 2024, paras 4–5.



Marie O'Leary
Acting Principal Counsel of the OPCD

dated this 16 of August 2024
at The Hague, The Netherlands