

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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PRE-TRIAL CHAMBER I

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

SITUATION IN THE STATE OF PALESTINE

Public Document

Amicus Curiae Observations by the International Commission of Jurists
(Pursuant to Rule 103 of the Rules)

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

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I. Introduction

1. Pursuant to rule 103(1) of the Rules of Procedure and Evidence (the “Rules”) and the “Decision on requests for leave to file observations pursuant to rule 103 of the Rules of Procedure and Evidence” by Pre-Trial Chamber I (the “Chamber”) of the International Criminal Court (the “Court”),¹ the International Commission of Jurists (“ICJ”) hereby submits its *amicus curiae* observations on the Court’s jurisdiction over Israeli nationals in relation to the Situation in the State of Palestine. For the reasons outlined below, the ICJ submits that the Chamber should dismiss the challenges to the Court’s jurisdiction over Israeli nationals based on the Oslo Accords.

II. The Court’s jurisdiction is governed by the Rome Statute

2. At the outset, the ICJ submits that, in accordance with article 31(1) of the Vienna Convention on the Law of Treaties,² the Rome Statute, as a treaty, “shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”³
3. Article 1 of the Statute provides that the Court: “shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute”, and the “jurisdiction [...] of the Court shall be governed by the provisions of this Statute.” The ICJ submits that any contention that the Court’s jurisdiction may be modified by any “delegation” or transfer of the same by States Parties is plainly, or at least presumptively, inconsistent with the express terms of the Statute – and “their ordinary meaning.” Such delegation would be contrary to its object and purpose, namely, to establish an “International Criminal Court [...] *with jurisdiction* over the most serious crimes of concern to the international community as a whole”,⁴ a Court that, “shall have the power to exercise *its jurisdiction* over persons for the most serious crimes of international concern.”⁵

¹ ICC-01/18-249.

² Vienna Convention on the Law of Treaties, 1969, United Nations, Treaty Series, vol. 1155, p. 331.

³ See, e.g., ICC-01/18-143, para. 91.

⁴ Statute, Preamble, para. 9 [emphasis added].

⁵ Statute, art. 1 [emphasis added].

4. Ordinarily, the Statute does not contemplate that States Parties and other States would be able to invoke their Constitutions, statutory laws, bilateral or multilateral agreements, or any other arrangements or practices to dictate, modify, or otherwise limit the Court's jurisdiction.⁶ The Court's jurisdiction is established and delineated in accordance with the Statute,⁷ and the exercise of its jurisdiction by the Court may only be subjected to the "preconditions" provided in the Statute, in particular, in this case, in article 12, as interpreted by the Court. Domestic law or bilateral agreements, in and of themselves, they have no bearing on whether the Court has or may exercise jurisdiction, a question that is governed solely by the terms of the Statute.
5. In this regard, the ICJ submits that several other provisions of the Statute run counter to the "delegation of jurisdiction" theory. The Court may exercise jurisdiction over certain State officials suspected of crimes over whom States Parties have no express jurisdiction pursuant to their domestic law, and this exercise of jurisdiction already supersedes some domestic law arrangements.⁸ Under the law of many States Parties, these immunities attached to official capacity are a bar to the exercise of domestic jurisdiction. In the same vein, many States Parties have not fully adopted provisions in their domestic criminal law proscribing the conduct over which the Court has jurisdiction. Conversely, whatever States Parties' legal frameworks may provide with respect to jurisdiction, pursuant to the Statute, the Court *has* jurisdiction over individuals suspected of Rome Statute crimes regardless of official capacity.
6. The ICJ submits that the *nemo dat quod non habet* rule invoked in 2020 – and by the United Kingdom in its initial request in the context of the present proceedings – as

⁶ In accordance with article 21 of the Statute, "[t]he Court shall apply: (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence; (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law [...] (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards [...] The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights" [emphasis added].

⁷ E.g., arts 5, 11, 26, 27.

⁸ Under article 27(2) of the Statute, "[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person."

the purported basis of the “delegation of jurisdiction” theory, to contend that Palestine could not have delegated to the Court jurisdiction over Israeli nationals, has no bearing on whether the Court has and may exercise jurisdiction over them. To hold otherwise would clearly be contrary to the Statute, pursuant to which the Court has and may exercise jurisdiction even in circumstances where States Parties’ domestic law does not provide effective exercise of jurisdiction and, therefore, could not, as a practical matter, effectively “delegate” such jurisdiction to the Court. Indeed, if certain States Parties have not provided effective exercise of jurisdiction in their domestic laws over certain States officials or some of the Rome Statute crimes, how are they supposed to “delegate” such jurisdiction to the Court?

7. Pursuant to the clear terms of the Statute, States, including the State of Palestine, do not “delegate” their jurisdiction to the Court, rather they “accept” its jurisdiction. Under article 12 of the Statute, such “acceptance” may be effected either by becoming a Party to the Statute or by “accepting” the Court’s jurisdiction under article 12(3). The Statute makes no reference to any additional requirements for the Court to exercise its jurisdiction, such as a formal “delegation” of jurisdiction by the concerned States or a formal determination of the scope of, and parameters for the exercise of such a “delegation”.
8. Even when States have not accepted it, the Court’s jurisdiction may still be triggered pursuant to a Security Council’s referral of “a situation in which one or more crimes appears to have been committed” to the Prosecutor pursuant to article 13(b). The Security Council itself is not vested under the UN Charter with express jurisdiction over Rome Statute crimes. Such Security Council’s referral triggers the jurisdiction of the Court, whether the State on the territory of which crimes have allegedly been committed or whose nationals have allegedly committed crimes is a State Party to the Statute or not.⁹ As the Appeals Chamber held in its Judgment in the *Jordan re al Bashir*

⁹ Indeed, the Security Council referred two situations involving two non-States Parties to the Prosecutor: the situation in Darfur on 31 March 2005, and the situation in Libya on 26 February 2011. In both cases, arrest warrants were issued, notably against Omar Al-Bashir and Muammar Mohammed Gaddafi, the then Presidents of Sudan and Libya, respectively.

Appeal, “[t]he chapeau of article 13 stipulates that, regardless of how the Court’s jurisdiction is triggered, it must be exercised ‘in accordance with [the] Statute.’ This means that, also in case of a referral by the UN Security Council, the Court is bound by the provisions of the Statute”.¹⁰

9. The Court’s jurisdiction was established as an independent, autonomous jurisdiction to address “the most serious crimes of concern to the international community as a whole,” as expressly stated in the Statute’s Preamble.¹¹ As such, it was not based on a delegation of jurisdiction by States Parties or by the UN Security Council for that matter. As affirmed by this Chamber (in a different composition), “more than 120 States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity called the ‘International Criminal Court’, possessing objective international personality, and not merely personality recognized by them alone, together with the capacity to act against impunity for the most serious crimes of concern to the international community as a whole and which is complementary to national criminal jurisdictions.”¹² Further, the Appeals Chamber has held that: “[International courts] when adjudicating international crimes, do not act on behalf of a particular State or States. Rather, international courts act on behalf of the international community as a whole.”¹³
10. The Chamber should therefore dismiss the “delegation of jurisdiction” theory. It should do so both because it runs counter to the Statute’s plain wording and the Court’s jurisprudence and because adopting this conceptual framing would be contrary to the Statute’s object and purpose and would frustrate the objective underlying the Court’s very *raison d’être*, namely, to “put an end to impunity for the perpetrators of these crimes.”¹⁴

¹⁰ ICC-02/05-01/09-397-Corr (OA2), para. 135. See also ICC-02/05-01/20-503, para. 80.

¹¹ Statute, Preamble, para. 9.

¹² ICC-RoC46(3)-01/18-37, para. 48.

¹³ ICC-02/05-01/09-397-Corr (OA2), para. 115.

¹⁴ Statute, Preamble, para. 5.

11. While some passages of the decisions in the Situation of Bangladesh/Myanmar by Pre-Trial Chamber I and Pre-Trial Chamber III appear to point to, or be based on the “delegation” theory,¹⁵ the ICJ submits that, on close scrutiny, neither Pre-Trial Chamber’s ruling actually supports the theory that the Court’s jurisdiction would be dependent on *each* concerned State Party’s territorial jurisdiction. In fact, both Chambers interpreted the Court’s exercise of its jurisdiction *ratione loci* pursuant to article 12(2)(a) in light of the way States Parties *generally* are allowed to assert territorial jurisdiction so as to determine what the drafters of the Statute intended when vesting the Court with territorial jurisdiction, and what customary international law provides in this regard. In any event, these decisions concluded that the Court may exercise its established territorial jurisdiction over non-States Parties nationals, as the ICJ submits below. Moreover, the ICJ contends that, in any event, Palestine has jurisdiction over Israeli nationals with respect to Rome Statute crimes.

III. The Court can and must exercise jurisdiction over Israeli nationals for Rome Statute crimes committed on the territory of the State of Palestine

12. On 5 February 2021, the Chamber held that, “the Court’s territorial jurisdiction in the *Situation in Palestine* extends to the territories occupied by Israel since 1967, namely Gaza and the West Bank, including East Jerusalem.”¹⁶

13. Based on the Statute’s plain wording, including article 12, the Court’s consistent jurisprudence has been to hold that, once the Court’s jurisdiction is established over a territory, its exercise may extend, *ratione loci*, to all those suspected of being responsible for Rome Statute crimes¹⁷ alleged to have been committed in that territory, irrespective of the nationality of the alleged perpetrators. This is confirmed, *a contrario*, by the fact that States Parties deemed it necessary to exclude the

¹⁵ See, ICC-RoC46(3)-01/18-37, para. 70, and ICC-01/19-27, para. 60.

¹⁶ ICC-01/18-143, para. 118.

¹⁷ With the explicit exception of the crime of aggression: see, Statute, art. 15 bis(5).

possibility of the Court exercising jurisdiction over non-States Parties' nationals in article 15 *bis* (5) of the Statute in relation to the crime of aggression.

14. The Prosecutor requested judicial authorization to commence an investigation into the crimes alleged to have been committed on the territory of Afghanistan, including alleged war crimes by members of the United States armed forces on the territory of Afghanistan, and by members of the US Central Intelligence Agency in secret detention facilities in Afghanistan and on the territory of other States Parties.¹⁸ The Appeals Chamber unanimously authorized the Prosecutor to investigate, within the parameters identified in the Prosecutor's request.¹⁹
15. The Prosecutor requested authorization to proceed with an investigation into the *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, specifically in respect of crimes within the Court's jurisdiction in which at least one element occurred on the territory of Bangladesh (a State Party), and which took place within the context of two waves of violence in Rakhine state on the territory of neighbouring Myanmar (a non-State Party), as well as any other crimes that were sufficiently linked to those events.²⁰ In authorizing the Prosecutor's request, Pre-Trial Chamber III held that the Court may exercise jurisdiction over crimes when part of the criminal conduct takes place on the territory of a State Party, including with respect to crimes against humanity alleged to have been committed by nationals of Myanmar.²¹
16. Pursuant to the Statute's plain wording, reaffirmed by the Court in its jurisprudence, the fact that neither the United States nor Myanmar – or Israel for present purposes – is a State Party, or have otherwise accepted the Court's jurisdiction, has no bearing over whether the Court has and may exercise its jurisdiction, *ratione loci*, over all those suspected of being responsible for the Rome Statute crimes alleged to have been committed in the territory of a State Party, irrespective of their nationality.

¹⁸ See, ICC-02/17-138, para. 4.

¹⁹ ICC-02/17-138, paras 64, 77.

²⁰ ICC-01/19-7 04-07.

²¹ ICC-01/19-27, in particular para. 43.

17. The ICC's jurisprudence is crystal clear. Its jurisdiction, *ratione loci*, may extend to nationals of non-State parties as long as at least one element of the Rome Statute crimes alleged occurred on the territory of a State Party or on the territory of a State that accepted the Court's jurisdiction. Israeli nationals are no exception.

IV. The Oslo Accords are neither a bar to the State of Palestine's jurisdiction nor to the exercise of the Court's jurisdiction

18. Contrary to the arguments made before the Chamber in the context of present and the 2020 proceedings, the Oslo Accords are not a bar to Palestine's jurisdiction over Israeli nationals for Rome Statute crimes.

19. The ICJ submits that the provisions of the Oslo Accords do not limit Palestine's prescriptive jurisdiction on its territory, including over Israelis. While the PLO may have accepted a limitation of Palestine's enforcement jurisdiction over Israelis,²² such acceptance could not have constituted a limitation on the State of Palestine's prescriptive jurisdiction. The ICJ concurs with the Prosecutor's conclusion in this regard.²³ The ICJ further notes that the Oslo Accords are interim agreements by their very nature and in their plain wording.²⁴ They were not and cannot be construed as to determine the scope of the jurisdiction of the Palestinian State. Since their adoption and the breakdown of the Oslo process, the State of Palestine, as a State, has acted on its prerogative and demonstrated its capacity to enter into relations with other sovereign States and exercise treaty-making powers.

20. In addition to the Rome Statute, the State of Palestine has acceded to at least 11 human rights²⁵ and international humanitarian law treaties,²⁶ including the 1948

²² The Accords provide that "Israel has sole criminal jurisdiction over [...] offenses committed in the Territory by Israelis;" and that "the Palestinian authorities shall not arrest Israelis or place them in custody". See, art. I(2)(b) and art. II(2)(c) of Annex IV.

²³ ICC-01/18-12 22-01-2020, para. 184.

²⁴ See,

https://peacemaker.un.org/sites/peacemaker.un.org/files/IL%20PS_950928_InterimAgreementWestBankGazaStrip%28OsloII%29.pdf.

²⁵ For a full list, see, UN OHCHR, UN Treaty Body Database: State of Palestine; Committee on the Elimination of Racial Discrimination, Concluding Observations: State of Palestine, UN Doc. CERD/C/PSE/CO/1-2, 20 September 2019, para. 4.

Geneva Conventions and 1977 Additional Protocols, the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Palestine's obligations under these treaties, as well as under international customary law, are subsequent to the Oslo Accords and involve *jus cogens* obligations that are peremptory and, as such, cannot be overridden or modified by the Oslo Accords.

21. Rome Statute crimes are *jus cogens* norms.²⁷ Taking among other *jus cogens* norms, the prohibition of torture, as example, the International Court of Justice has held that the obligations to investigate and prosecute acts of torture, regardless of the nationality of the offender or the victims, or of the place where the alleged offences occurred, are “‘obligations erga omnes partes’ in the sense that each State party has an interest in compliance with them in any given case.”²⁸ The same would apply to other *jus cogens* prohibitions (e.g., genocide, slavery, enforced disappearances, etc.).
22. The ICJ submits that, under international law, Palestine's *erga omnes partes* obligations to assert criminal jurisdiction over Israeli nationals allegedly responsible for conduct in violation of *jus cogens* prohibitions are triggered by their mere presence on Palestinian territory.
23. Conversely, the Oslo Accords cannot be invoked to challenge Palestine's obligations – or Israel's for that matter – under the Fourth Geneva Convention, being in most part constitutive of “intransgressible principles of international customary law” and incorporating “obligations which are essentially of an *erga omnes* character”.²⁹ This Convention requires Palestine to search for, try or extradite persons suspected of

²⁶ For a full list, see,

https://ihldatabases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=PS&nv= .

²⁷ See, among others, Fourth report on peremptory norms of general international law (*jus cogens*) by Dire Tladi, Special Rapporteur, A/CN.4/727.

²⁸ International Court of Justice, *Belgium v. Senegal*, Judgment, 20 July 2012, para. 68.

²⁹ International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory opinion of 9 July 2004, para. 157.

committing grave breaches, regardless of their nationality.³⁰ Furthermore, the Convention prevents belligerents from concluding agreements that deprive protected persons of the benefits of the Convention.³¹ The International Court of Justice has recently addressed obligations under article 47 of the Fourth Geneva Convention, which provides that the protected population “shall not be deprived” of the benefits of the Convention “by any agreement concluded between the authorities of the occupied territories and the Occupying Power,” and concluded that the Oslo Accords cannot be “understood to detract from Israel’s obligations under the pertinent rules of international law applicable in the Occupied Palestinian Territory”.³²

24. Contending that Palestine’s *erga omnes partes* obligations under the Geneva Conventions, the Convention against Torture or the Rome Statute itself may be trumped by an interim political agreement that was signed by the PLO some 20 years before Palestine’s accession to these treaties runs counter to logic and the letter and spirit of international law and of the Statute, which is grounded on “the *duty* of every State to exercise its criminal jurisdiction over those responsible for international crimes”.³³ The Court should thus dismiss any such submissions.
25. Accordingly, the ICJ notes that, while article XVII(2)(c) of the Oslo Accords may grant Israeli nationals what is effectively a jurisdictional immunity before Palestinian courts,³⁴ the International Criminal Court has consistently rejected immunities,

³⁰ Article 146(2): “Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party.”

³¹ Article 8 and article 47 add: “Protected persons may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention [...]”; and “Protected persons who are in occupied territory *shall not be deprived* [...] *of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, [...] nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.*” [emphasis added].

³² International Court of Justice, *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory opinion of 19 July 2024, para. 102.

³³ Statute, Preamble, para. 6 [emphasis added].

³⁴ See also, article I(1)(a) of Annex IV of the Accord, “The criminal jurisdiction of the [Palestinian Interim Self-Government Authority] covers all offenses committed by Palestinians and/or non-Israelis in the Territory, subject to the provisions of this article.”

amnesties or any other measures that aim to shield alleged perpetrators from accountability as a bar to the exercise of the Court's jurisdiction, whether such immunities are provided for under treaties, customary international law, domestic legislation or bilateral agreements.

26. In this regard and in reference to the horizontal relationship between States when a State is requested by an international court to arrest and surrender the Head of State of another State, the Appeals Chamber found that, "no immunities under customary international law operate in such a situation to bar an international court in its exercise of its own jurisdiction".³⁵ Pre-Trial Chamber II, in the same context, had found that article 27(2) of the Statute also applies to treaty-based immunities.³⁶ The Appeals Chamber further clarified that article 98 of the Statute "does not itself stipulate, recognize or preserve any immunities", and that "the existence of immunities must be established on the basis of the Court's sources of law".³⁷
27. The ICJ submits that, consistent with its jurisprudence rejecting immunity claims based on treaties or customary international law, the Court should also reject immunity claims based on the Oslo Accords and any other bilateral agreements.
28. In conclusion, the ICJ submits that the Chamber should dismiss any challenge to the Court's exercise of jurisdiction over Israeli nationals based on the Oslo Accords and the "delegated jurisdiction" theory.



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On behalf of the International Commission of Jurists

Dated this 6 August 2024

At Geneva, Switzerland

³⁵ ICC-02/05-01/09-397-Corr, para. 114.

³⁶ ICC-02/05-01/09-309, paras 32-33.

³⁷ ICC-02/05-01/09-397-Corr, paras 5 and 130; see also, para. 131.