

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/18
Date: 5 August 2024

PRE-TRIAL CHAMBER I

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

SITUATION IN PALESTINE

Public Document

Article 19.3

**Victims' Observations regarding the jurisdiction of the International Criminal
Court towards Israeli Citizens in the situation of Palestine**

Source: Dr. Adv. Juan Branco

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

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Karim KHAN

Counsel for the Defence

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
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States' Representatives
The legal representatives of the State of
Palestine
The legal representatives of the United
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Amicus Curiae

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ADMISSIBILITY OF THE AMICUS CURIAE OF THE UNITED KINGDOM AND OF ARTICLE 19.3 VICTIMS' OBSERVATIONS

1. Article 19.3 of the Rome Statute provides that Victims are allowed to participate in any Court proceeding that is related to jurisdictional issues. Although Rule 103.2 of the Regulations of the Court ("Regulations") does not explicitly mention Victims as potential respondents to *Amicus Curiae*, it is uncontested that Rule 103 has been invoked in the current case by United Kingdom representatives in order to challenge the jurisdiction of the Court.
2. This is an eventuality that had not been forecast by the authors of the Rome Statute, and that appears inconsistent with its provisions.
3. Whichever the position of the Pre-Trial Chamber over this matter, the wording of Article 19.3 is clear and, in the current circumstances, overcomes the potential insufficiencies of the Regulations, doubtlessly allowing for the Victims to submit their observations.
4. Articles 19.2 and 19.4 of the Rome Statute exclusively establish which parties to the proceedings are authorized to challenge the jurisdiction of the Court in a specific case.
5. Articles 19.2 and 19.4 are worded in such fashion that no doubt arises over the fact no other actor than those explicitly mentioned by the Statute in those articles have grounds to challenge the jurisdiction of the Court.
6. The United Kingdom does not fit into any of the categories listed in Articles 19.2, 19.4 or any other article of the Statute that might provide grounds to challenge the jurisdiction of the court.
7. The hierarchy of norms of the Rome System does not allow for Regulations to overcome or supersede articles of the Rome Statute in any circumstances.
8. United Kingdom representatives have not claimed that the United Kingdom has any jurisdiction whatsoever over the Israeli nationals for which the Office of the Prosecutor of the ICC has requested an arrest warrant.
9. Thus, in view of the limitative conditions established by Articles 19.2 and 19.4 of the Rome Statute, Rule 103 of the Regulations cannot and does not open grounds for the United Kingdom to challenge, directly or indirectly, the jurisdiction of the Court regarding Israeli citizens.

10. Deciding otherwise would open the way to a general bypassing of Rome Statute provisions through abusive interpretations and exploitation of loopholes found in lower-level texts of the Rome System.

THE IMPOSSIBILITY OF DETERMINING THE FRAME IN WHICH THE CURRENT OBSERVATIONS ARE BEING SUBMITTED

11. The question of the admissibility of the case brought upon the Pre-Trial Chamber was raised by the United Kingdom representatives and not *proprio mutuo* by the judges of the Pre-Trial Chamber.
12. Had the Pre-Trial Chamber decided, to, *proprio mutuo*, pronounce itself over the admissibility of the case, this decision would have opened the way for the United Kingdom Representatives to make a submission, under the combined authority of Articles 17 and 19.1 of the Rome Statute; and Rule 103 of the Regulations.
13. It was not the case. The Pre-Trial Chamber did not announce its intention to pronounce itself over the admissibility of the Case and *subsequently* announce its intention to accept *Amicus Curiae* and State observations, based on Rule 103 of the Regulations.
14. It solely satisfied itself by accepting the request of the United Kingdom representatives to submit observations on the basis of Rule 103.
15. The limitations established by Articles 19.2 and 19.4 of the Rome Statute should have, therefore, compelled the Court to reject the United Kingdom representative's request to submit observations on the admissibility of the case.
16. The United Kingdom representatives having announced their intention to withdraw their request to submit observations, the Pre-Trial Chamber has nonetheless maintained its authorization to other parties to submit observations and *Amicus Curiae* over the admissibility of the cases brought before it by the Prosecutor.
17. The Court has not clarified under what grounds the call for submissions and observations survives despite the United Kingdom's announcement of its intention to withdraw their request.
18. If the Court is considering to pronounce itself, *proprio mutuo*, over the admissibility of the cases brought before it by the Prosecutor, the Court must take note that it can only pronounce itself on the admissibility of the cases on the basis of Article 17 criteria, as established by Article 19.1.

19. If this the framing now adopted by the Pre-Trial Chamber, the Pre-Trial Chamber must take note that none of the provisions of Article 17, in combination with Article 19.1, allow for the Court to decide the admissibility of a case due to an alleged conflict of norms between the Rome System and a bilateral Treaty or international agreement, which was the challenge initially brought up by the United Kingdom Representatives.
20. Article 17 establishes exclusive and restrictive reasons for the Court to render a case inadmissible, none of which correspond to the arguments brought up by the United Kingdom representatives.
21. Thus, if the Pre-Trial Chamber 1 envisions, *proprio motu*, pronouncing itself over the admissibility of the case, thereby exerting its powers in the restrictive combined frames of Articles 17 and 19.1, it should express so.
22. It would otherwise create a situation in which observations and *Amicus Curiae* are being submitted in response to the arguments of United Kingdom's representatives, whilst the Pre-Trial Chamber knows it will be pronouncing itself on different grounds.
23. Therefore, if the Pre Trial-Chamber envisions exerting its powers in the combined frames of Articles 17 and 19.1 – the sole articles through which it has the power to pronounce itself over the admissibility of a case – it should explicitly state so.
24. The sole parties naturally authorized by the Statute to provide the Pre-Trial Chamber with observations would be the the State of Palestine and the Victims, as envisioned by Articles 19.2 and 3 of the Statute.
25. The Pre-trial Chamber could only **subsequently** launch a call for *Amicus Curiae* and observations to other parties, including third-states, members of the civil society, *inter alia*, based on Rule 103 of the Regulations.
26. Any decision of the Court authorizing any party to provide observations or *Amicus Curiae* should in any circumstance explicitly state which dispositions of Article 17 the Pre-trial Chamber envisions to apply, so that the parties to the proceedings are put in a position to provide the Court with accurate observations.

THE NATURE OF THE ROME SYSTEM AND WHETHER IT RELIES ON A SOVEREIGN'S DELEGATION OF CRIMINAL LAW JURISDICTION

27. In order to actively participate to the collective intellectually enjoyable debates we have seemingly all decided to abide to whilst people are getting slaughtered,

I wish to take the opportunity to voice my strong disagreement with William Schabas position, established in two *Amicus Curiae* transmitted to the Court.

28. As do many lawyers, William Schabas wrongly adopts a Kantian and cosmopolitan perspective over the Court, which is a purely Westphalian and Hobbesian creation, relying on a series of delegations of the *droit de punir* that any citizen retains as part of its inalienable sovereign rights. The sovereign (Head of State) is immune because he is the only member of the social contract not to have delegated to anyone his *droit de punir*. He is the main magistrate of his State because he has received the delegated capacity to exert *droit de punir* from all the members of the social contract. This delegation can be withdrawn at any moment by citizens (which would exclude them from the social contract and hence expose them to the risks of being considered outlaws).
29. The ICC was created by sovereigns, which have decided to partially, and under specific circumstances, delegate the exercise of their *droit de punir*. This delegation is strictly limited to acts that are the consequence of the exercise of their powers as sovereigns, hence, the gravity threshold established by the Rome System.
30. Thus, the ICC is established as a sovereign by delegation, whose exerting members are elected by representatives of the sovereigns, in the same fashion as sovereigns are themselves elected by assemblies of citizens' representatives or citizens themselves. The detailed explanation of this perspective has been developed in the book *De l'affaire Katanga au contrat social global : un regard sur la Cour pénale internationale* (Institut Varennes – LGDJ 2015)
31. It is, thus, absurd to pretend that the very foundation of the Court would not be to rely on delegations of the sovereign's capacities to exert criminal jurisdiction, whether prescriptive or acquisitive.
32. Nonetheless, it is of no impact on the current matter. The Palestinian Authority delegated its criminal jurisdiction over Israeli citizens to the State of Israel in 1993 and 1995. This delegation was, by nature, whether adopting a temporal or hierarchy of norms perspective, superseded by the repeated delegation provided by the State of Palestine to the International Criminal Court 2009 onwards, through two declarations of competence, and later on the ratification of the Treaty.
33. To our knowledge, the State of Israel never challenged nor denounced, in any forum, the alleged conflict of norms brought by the United Kingdom.

34. If Israel or any other State were to be dissatisfied with this concurrent delegation of Palestinian Statehood powers, it would in any case not be a matter of interest for the ICC.
35. Whatever intentions the State of Palestine has, and whatever its position over the actuality of the Oslo Agreements, the content of its delegation to the ICC, from the ICC perspective, is solely determined by the Rome Treaty, and cannot be affected by any bilateral treaty or agreement.
36. No margin of interpretation is offered to the States that sign and ratify the Rome Treaty. All the ratifying States of the Rome Statute are perfectly equal members of the Rome System, with the same obligations and rights.
37. Regarding its jurisdiction, the Court has been willingly blind to any other instrument exterior to the Rome System, the same way a sovereign is blind to the concurring obligations one of its subjects may have subscribed to a third State (hence the *erga omnes* rule that binationals, when authorized to have a double nationality, cannot claim, in the respective territories of the States they are nationals of, the rights arising from their belonging to another State).
38. It is the sole responsibility of the sovereign State of Palestine to solve any consequence arising from its ratification of the Rome Statute and the potential conflict of obligations it might have triggered in its bilateral relations, including with the State of Israel.
39. This question is in any circumstances of no interest for the ICC.

ON THE MERITS

40. It is yet to be understood what conclusions the United Kingdom meant to draw regarding the alleged lack of implementation by the Palestinian Authority of the Oslo Agreements or the existence of potentially conflicting norms between the Oslo Agreements and the ICC delegation of jurisdiction that was the result of the ratification of the Rome Statute by the sovereign State of Palestine.
41. This might be nonetheless a good opportunity to remind the United Kingdom that its mandate over Palestine was withdrawn a few decades ago, and that its attempts to interfere with a jurisdictional issue which is of no concern to it might be interpreted as subsisting colonial overreach in its diplomatic practice.
42. The question brought by the United Kingdom upon the International Criminal Court seems to be the following: can the Palestinian authority concurrently limit its jurisdiction towards Israeli citizens and delegate the same jurisdictional

power to the International Criminal Court, without generating a conflict that would make the subsequent delegation void ?

43. This would mean that the Palestinian Authority would have, through the Oslo Agreements, definitively and irrevocably renounced what is a sovereign attribution of any State – the *droit de punir*, a possibility not only contradicted by the transitory nature of the Oslo Agreements, but merely rendered impossible by the nature of Statehood as contemplated by international laws and political theory since the XVIIth century and the birth of the Westphalian World.
44. The subsidiary question would be the following: isn't the Palestinian Authority breaching its engagements towards Israel by delegating a jurisdictional power to the ICC, a jurisdictional power it had already delegated to Israel ?
45. Even if the answer were positive, it would be for Israel and Israel alone to denounce it, whether to the International Court of Justice or within the frame of its bilateral relations with the Palestinian Authority.
46. This potential breach of the Palestinian Authorities' willingly subscribed bilateral obligations towards Israel would in any case be indifferent to the Court, which was willfully blind to these questions by the Rome System.
47. On the merits, the solution would have been in any case pretty self-explanatory. Oslo Agreements were signed by an authority that was not recognized by its counterpart nor the international community as having the characteristics of a State.
48. It has been argued in different *Amicus Curiae* that the change of circumstances (*rebus stic standibus*) makes the obligations born from the Oslo Agreements obsolete. It has also been argued that the dispositions of said Treaty – if it can be called as such – or rather international agreement regarding the renunciation of the Palestinian Authority to criminal jurisdiction over Israeli nationals were void. This argument relies on the fact those obligations would conflict with *erga omnes* obligations, or at least international conventions fully applicable in the current circumstances, such as the Article 47 of the Geneva Convention relative to the protection of Civilian Persons in times of War.
49. It has also been reminded that national laws and the jurisdictional limitations they edict do not affect the jurisdiction of the court, whether they are the result of bilateral treaties (such as the ISAF/Afghanistan example), amnesty agreements or other.

50. It is of established law of this Court that the limitations of jurisdiction self inflicted by a State to its own judicial authorities – whether they are fruit of laws, bilateral or multilateral treaties – cannot, by definition, affect the jurisdiction of Court. The only limitations of jurisdiction envisioned by the Statute to its jurisdiction over the territory and the nationals of its member States are the dispositions related to UN Security Council Resolutions (Article 16 of the Statute) ; the provisions related to the Crime of Aggression (Article 15 ter) ; the transitory dispositions related to War Crimes (Article 124) ; and finally, the dispositions related to the withdrawal of the Rome System by the legal representative of the said State (Article 127) - none of which are applicable.

THE APPARENT SOURCE OF AN ENDLESS CONFUSION

51. The persistent confusion over the ICC's jurisdiction in Palestine seems to have been born from the moment the Prosecutor, and subsequently the Chambers, decided that it was within their respective powers to decide if a State was or was not a State, *a fortiori* a State which had the capacity to ratify the Rome Statute, when such powers of recognition should resided as they have historically resided in the Assemblies that generate those international institutions, in this case, the Assembly of State Parties, which is and should remain the sole source of legitimacy for any actor of the judicial chain of the Rome System.

52. The Chambers and the Prosecutors are mere emanations of the Assembly of the State Parties, and the frame which limits their scope of action should be strictly and solely determined by the political body that created them.

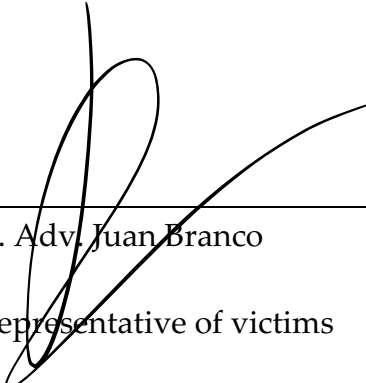
CONCLUSION

53. The Preliminary Chamber has reminded the parties, in its decision, that the liberty of three men is at stake.

54. The Victims hereby represented respectfully remind the Court that the lives of more than a million persons are at stake.

55. By admitting, in violation of its own dispositions, the request of the United Kingdom to challenge the admissibility of the Cases presented by the Prosecutor, the Court has unleashed an orgy of words spilling over a mountain of cadavers, and thus *de facto* authorized a continuing orgy of corpses it was its mandate to sanction.

56. Aside from the ICC, there seems to be no other example of a jurisdiction that, when confronted with a flagrant criminal situation, which is day after day giving birth to massacres of all sorts, decides not to immediately address it, and rather jesuitically busies itself with an infinity of subordinate refined minor legal questions.
57. Crimes are being committed as the Court comfortably sits on the bodies of its Victims.
58. This has been the case now for fifteen years, since the first declaration of competence of the Palestinian Authority.
59. The Prosecutors, judges, Registrars and further employees of the Court have been enjoying their comfort, resources, immunities not to identify, pursue, judge and condemn criminals, but to explore all the corners of intelligence and wisdom the human being could elaborate to ensure not any action would be taken.
60. Day after day, for fifteen years, Prosecutors and judges have swallowed the bodies of Victims and transformed them into legal, digestible meat.
61. It might be time for the Court to realize how it has ridiculed itself, and how this new manoeuver exposes it to moral reprobation.



Dr. Adv. Juan Branco

Legal Representative of victims

Dated this August 5th 2024

At Port-au-Prince, HAÏTI