

Annex

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/18
Date: 10 July 2024

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

Request by Professor William Schabas to submit *amicus curiae* observations

Source: Professor William Schabas

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I. INTRODUCTION

1. The Applicant seeks leave to make observations on the question of jurisdiction pursuant to the Order of the Chamber of 27 June 2024.

II. SUMMARY OF OBSERVATIONS SHOULD LEAVE BE GRANTED

A. The Pre-Trial Chamber should reconsider its decision to allow amicus curiae submissions at the stage of issuance of an arrest warrant or summons

2. Unusually, the Prosecutor has chosen to make a public announcement of his applications for arrest warrants. The procedure is normally secret and *ex parte*. In the past, Pre-Trial Chambers have refused attempts at intervention during this stage of the proceedings.¹ Article 19 of the Rome Statute provides the legal framework for challenges to jurisdiction. Unless provided by Article 19, no State, be it a State Party or a non-party State, should be permitted to contest jurisdiction of the Court, including in the indirect manner adopted by the United Kingdom.
3. The United Kingdom's application of 10 June 2024 misrepresents the Pre-Trial Chamber Decision of 5 February 2021 in its implication that 'outstanding further questions of jurisdiction' were being reserved for the arrest warrant stage. The Pre-Trial Chamber never used such a phrase. Indeed, the Pre-Trial Chamber pointed to Articles 97 and 98 indicating that 'the drafters expressly sought to accommodate any obligations of a State Party under international law that may conflict with its obligations under the Statute', thereby

¹ *Situation in the Republic of Kenya* (ICC-01/09), Decision on Application for Leave to Submit Amicus Curiae Observations, 18 January 2011, para. 10; *Situation in the Republic of Kenya* (ICC-01/09), Decision on the "Application for Leave to Participate in the Proceedings before the Pre-Trial Chamber relating to the Prosecutor's Application under Article 58(7), 11 February 2011, paras. 9-10.

signalling that the Chamber was unimpressed with the objections based upon the Oslo Accords.² All that the Pre-Trial Chamber did in 2021 was indicate that it did not need to reach a conclusion on the issue. It said that if issues of jurisdiction were to arise subsequently they would be dealt with within the normal framework of the Rome Statute. Borrowing a phrase from the Appeals Chamber,³ it quite specifically pointed to intervention by 'interested States', which the United Kingdom is not. It was certainly no invitation to busybodies allied with Israel to interfere with the normal pace of investigation and prosecution.

4. The 'Oslo Accords issue' was addressed in some detail in the 2021 Decision⁴ and in the Partly Dissenting Opinion of Judge Péter Kovács,⁵ as well as in the submissions of the Prosecutor and those of several amici curiae, some of them States Parties. The United Kingdom was aware of this at the time. It could well have submitted an *amicus curiae* brief in those proceedings raising the very questions that it now seeks to revive. The United Kingdom obviously chose not to do so when given the opportunity in 2020. Its current attempt to intervene is abusive and incompatible with the proper administration of justice.

B. The Oslo Accords actually provide confirmation that the State of Palestine is entitled to exercise unlimited territorial jurisdiction

5. Far from suggesting that the State of Palestine has no jurisdiction over crimes committed on its territory by nationals of Israel, the Oslo Accords actually

² *Situation in Palestine* (ICC-01/18), Decision on the Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine, 5 February 2021, para. 127.

³ *Situation in Afghanistan* (ICC-02/17), Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan, 5 March 2020, para. 44.

⁴ *Situation in Palestine* (ICC-01/18), Decision on the Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine, 5 February 2021, paras. 25, 39, 124-129.

⁵ *Situation in Palestine* (ICC-01/18), Judge Péter Kovács' Partly Dissenting Opinion, 5 February 2021, paras. 282-371.

support the opposite view. According to the Accords, the Palestinian Council may legislate on the basis of territorial and functional jurisdiction 'except for Israelis', as the Pre-Trial Chamber noted in 2021.⁶ In other words, Palestine may enforce criminal justice with respect to nationals of all States 'except for Israelis'.

6. This exception is contained in the Oslo Agreement because in the normal course of affairs the State of Palestine has unlimited territorial jurisdiction over criminal justice, like all other States. The claim that Israel somehow conferred a limited criminal law jurisdiction upon the State of Palestine reflects a colonialist vision. But as the International Court of Justice has recognized, Palestine is an occupied territory.⁷ It is not a colony of Israel. International humanitarian law recognizes the predominant and enduring status of the criminal justice system of the occupied State.⁸
7. Many States do not exercise criminal justice to the full extent that is permitted under international law. In that sense, the State of Palestine is hardly alone. For example, many States, including the United Kingdom, have chosen not to allow for prosecution on the basis of universal jurisdiction with respect to certain international crimes. Some States do not exercise jurisdiction on the basis of nationality, be it 'active' or 'passive'. However, their decision not to do so does not mean that they cannot do so. Furthermore, it has never been suggested that States that lack legislation providing for unrestricted prosecution of international crimes are prevented from 'delegation' of territorial jurisdiction over such crimes to an international tribunal.

⁶ *Situation in Palestine* (ICC-01/18), Decision on the Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine, 5 February 2021, para. 125.

⁷ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, I.C.J. Reports 2004, p. 136.

⁸ Hague Convention respecting the laws and customs of war on land, 1907, Regulations, art. 43; Convention relative to the protection of civilian persons in time of war, (1949) 75 UNTS 287, art. 64.

8. In my 2020 *amicus curiae* submission to the Pre-Trial Chamber, I challenged the theory of 'delegation' for the purposes of interpreting article 12 of the Rome Statute.⁹ Nevertheless, it may be helpful to view the Oslo Accords as a form of delegation by Palestine to Israel of criminal law jurisdiction over Israeli nationals. If Palestine lacked the right to exercise criminal law jurisdiction over its territory, why would Israel have insisted on including the exception for Israeli nationals in the Oslo Accords?
9. Regardless of the Oslo Accords, Palestine is required by international law to enforce criminal justice with respect, for example, to genocide, torture, enforced disappearance and grave breaches of the Geneva Conventions. The obligations imposed by these treaties do not contemplate any exceptions for nationals of a particular State. No State can absolve itself of its international legal obligations to prosecute such crimes by means of a bilateral transfer of jurisdiction.

C. Observations on the United Kingdom's peculiar understanding of territorial jurisdiction

10. The United Kingdom has a theory about the territorial jurisdiction of the International Criminal Court that is inconsistent with the Rome Statute. This manifests itself in a series of declarations by which the application of article 12 of the Rome Statute has been 'delegated' to various non-self-governing territories. For example, only in 2010, nearly a decade after it ratified the Statute, did the United Kingdom purport to recognize the Court's jurisdiction over its military bases in Cyprus.¹⁰ Didn't the Court already have jurisdiction over these bases by virtue of ratification of the Rome Statute by Cyprus, on 7

⁹ *Situation in Palestine* (ICC-01/18), Opinion in Accordance with Article 103 of the Rules of Procedure and Evidence, 15 March 2020, para. 26. See also Leila Nadya Sadat, 'The Conferred Jurisdiction of the International Criminal Court', (2023) 99 *Notre Dame Law Review* 549.

¹⁰ C.N.161.2010.TREATIES-1.

March 2002? The British territorial declarations are not contemplated by the Rome Statute, however, and their use amounts to a form of reservation that is forbidden by Article 120 of the Rome Statute.

11. Judge Kovács briefly referred to such territorial declarations in his Partly Dissenting Opinion.¹¹ He suggested that they had been made out of respect for the autonomy of minority groups and peoples. In the case of the United Kingdom, however, evidence of respect for the will of the indigenous populations of non-self-governing territories is not necessarily present. The United Kingdom has yet to 'delegate' jurisdiction under Article 12 of the Rome Statute to the so-called British Indian Ocean Territory, which houses a large American military base. Consideration for the views of the indigenous population of the Chagos Islands does not appear to explain the refusal of the United Kingdom to acknowledge the Court's jurisdiction over that territory.¹²
12. Judge Kovács's theory of divided or overlapping territorial jurisdiction creates great risks for the integrity of the Rome Statute system. It could encourage the proliferation of bi-lateral impunity agreements along the lines of those promoted by the United States in 2002 and 2003. The consequences of such theories for the exercise of jurisdiction by the Court in other territories subject to foreign occupation, such as the enclaves in Georgia, and occupied territories like Crimea, the Donbas and northern Cyprus, might also be borne in mind by the Pre-Trial Chamber.
13. A proper construction of Article 12 should leave no exceptions, however they may be created. The Court may exercise jurisdiction over 'the territory' of a State Party, *point finale*. It may well be that obligations imposed by the Rome

¹¹ *Situation in Palestine* (ICC-01/18), Judge Péter Kovács' Partly Dissenting Opinion, 5 February 2021, para. 325.

¹² See *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, I.C.J. Reports 2019, p. 95.

Statute make it difficult or even impossible for a State to honour other international obligations. It should not be the task of the Pre-Trial Chamber to contribute to the weakening the Statute by in some way deferring to such other obligations.

D. The Resolution 67/19 issue

14. In his Partly Dissenting Opinion, Judge Péter Kovács devoted considerable attention to what he labelled 'The Issue of Resolution 67/19'. This question is quite separate from that of the Oslo Accords, which is the focus of the United Kingdom's *amicus curiae* intervention. The Oslo Accords issue would exist even if the State of Palestine were a Member State of the United Nations. Nevertheless, because of Judge Kovács's attention to this matter it may be helpful to the Pre-Trial Chamber to consider changes in the situation since 2021.
15. On 14 April 2024, twelve Members of the United Nations Security Council voted to recommend that the State of Palestine be admitted to membership in the United Nations. Of those voting in favour, eight are States Parties to the Rome Statute and two others are signatories. Two States Parties, Switzerland and the United Kingdom, abstained. In explaining their position, neither Switzerland nor the United Kingdom indicated that they had abstained because they had any doubts about the State of Palestine's fulfilment of the conditions for membership set out in the Charter of the United Nations. Currently, the only obstacle to United Nations membership of the State of Palestine is the Security Council veto of the United States, a country distinguished by its hostility to the International Criminal Court in general and to the investigation in the *Situation in Palestine* in particular.

E. Exceptions to territorial jurisdiction based on nationality

16. The two Security Council resolutions triggering the jurisdiction of the International Criminal Court, dealing with the situations in Darfur, Sudan and in Libya, contain provisions that exclude persons from the jurisdiction of the Court based upon nationality. These clauses were apparently incorporated in the resolutions at the insistence of the United States. States Parties to the Rome Statute have objected to these provisions which, in my opinion, are incompatible with the Rome Statute. When the Libya resolution was adopted, Brazil condemned this feature of the resolution, declaring that the exclusion of nationals of non-party States was 'not helpful to advancing the cause of justice and accountability and will not contribute to strengthening the role of the Court'.¹³

III. DETAILS ON THE APPLICANT'S AFFILIATION AND EXPERTISE

17. The Applicant is Professor of International Law at Middlesex University London, Professor emeritus of International Criminal Law and Human Rights at Leiden University and Professor emeritus of Human Rights Law at the University of Galway. He holds an LLD degree from the Université de Montréal and has been awarded several honorary doctorates. He is a Member of the Royal Irish Academy and an Officer of the Order of Canada.

18. The Applicant is the author of numerous publications dealing with the International Criminal Court, the Rome Statute and international criminal law more generally. These include *Introduction to the International Criminal Court* (Cambridge University Press, 2020 – 6th ed.) and *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press, 2015 – 2nd

¹³ S/PV.6491 (26 February 2011), p. 7.

ed.). His writings have been cited frequently by Chambers of the International Criminal Court. His 2020 *amicus curiae* submission was helpful to the Pre-Trial Chamber as can be seen in references to it in the judgment of 5 February 2021.¹⁴

Respectfully submitted.



Professor William Schabas

Dated this 10th day of July 2024 at Paris, France

¹⁴ *Situation in Palestine* (ICC-01/18), Decision on the Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine, 5 February 2021, paras. 61 (fn. 230), 97 (fn. 268), 98 (fn. 269), 99 (fn. 274), 126 (fn. 326).