

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/18
Date: 11 July 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

Request for Leave to File Submissions Pursuant to Rule 103

Source: Professors Halla Shoaibi & Asem Khalil

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I. INTRODUCTION

1. Pursuant to the Order setting the procedure and the schedule for the submission of observations, we, Halla Shoaibi and Asem Khalil, hereby ask leave to submit written observations, in our name alone, on the ICC's Pre-Trial Chamber requests for leave to file amicus curiae observations regarding the jurisdictional issues relating to the Oslo Accords, as stated in the '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'.¹

II. BACKGROUND AND EXPERTISE

2. Halla Shoaibi, Assistant Professor of International Law at Birzeit University, Palestine. I have been a member of the Faculty of Law and Public Administration since 2014. I teach international law, international criminal law and human rights law; and have published on matters of international law.
3. I am Asem Khalil, a Professor of Public Law at Birzeit University, Palestine. I have been a member of the Faculty of Law and Public Administration since 2006. I teach international law, human rights law, and comparative constitutional law. I have published extensively in these areas of the law. A list of Khalil's publication can be accessed via the University's website: <https://www.birzeit.edu/en/faculty-staff/asem-khalil>

¹ '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, 27 June 2024 ("Order").

III. SUMMARY OF ARGUMENTS

4. We request to make submissions on the fact that the Oslo Accords do not bar the exercise of the Court's jurisdiction. Specifically, we propose to address the following four points: (1) There is no legal basis for the intervention of the United Kingdom in the ex parte Article 58 proceedings (2) Palestine's agreement to limit its own adjudication and enforcement jurisdiction through the Oslo Accords does not negate its prescriptive jurisdiction; (3) the Oslo Accords have been concluded in violation of a peremptory norm – which is the right of the Palestinian people to self-determination; and (4) Palestine's obligation, as a High Contracting Party to the Geneva Conventions, to prosecute grave breaches, takes precedence over any conflicting obligation that arises out of the Oslo Accords.
5. *First*, the authors recognize that the UK has submitted its request to submit written observations pursuant to Rule 103, since it does not qualify as an “interested state” per Article 19 of the Rome Statute. It is our submission that there is no legal basis for the intervention of the United Kingdom in the Ex Parte Article 58 Proceedings.
6. Article 58 proceedings are recognized as ex parte, with the exclusive participation of the Prosecutor, and accordingly, prior applications to submit written observations on article 58 proceedings have been rejected by the Court. There are no *vital* distinctions between this situation and previous ones in order to allow such observations. The fact that the Prosecutor decided to make public the applications for arrest warrants, should not be interpreted as an invitation to submit jurisdiction challenges, nor as creating a leeway allowing states to interfere in ex parte proceedings. The issue on why the Prosecutor decided to publicize the request of arrest warrants before a determination of the Chamber pursuant to article 58 of the Statute has even been made, is *irrelevant* to right of states to interfere in ex parte Article 58 proceedings. However, why such decision was made by the Prosecutor remains unclear, and does raise concerns on the gains and drawbacks of such act.

7. *Second*, it is our submission that although the delegation theory is one concept to explain the ICC jurisdiction, it is not the only one. Other theories should be considered to correctly understand the ICC's jurisdiction. Some scholars argue for the realization of other theories, such as a universalistic approach "grounded in a broader entitlement of states and the international legal community under international law,"² or that State Parties *confer* authority to the ICC "to exercise that criminal jurisdiction accepted under international law under the Nuremberg and Rome consensuses, which is universal jurisdiction over jus cogens "core" crimes, regardless of national laws."³
8. Even if a persuasive argument can be made, that it is the delegation of primary jurisdiction that provides the legal basis for the ICC's jurisdiction, it is necessary for the State, in this case, to exercise prescriptive jurisdiction, not the jurisdiction to enforce or to adjudicate. A State is able to delegate its prescriptive jurisdiction irrespective of how it prescribes such jurisdiction internally. Palestine's agreement to limit its own adjudication and enforcement jurisdiction through the Oslo Accords does not negate its prescriptive jurisdiction. The Oslo Accords only limited the Palestinian Authority's ability to exercise criminal jurisdiction over Israeli nationals, but they did not relinquish Palestine's prescriptive jurisdiction. States, including those occupied, maintain the power to delegate authority, even if they relinquish their enforcement and adjudication jurisdictions, as jurisdiction stems from their *de jure* sovereignty.⁴

² Carsten Stahn, Response: The ICC, Pre-Existing Jurisdictional Treaty Regimes, and the Limits of the Nemo Dat Quod Non Habet Doctrine--A Reply to Michael Newton, 49 *Vanderbilt Law Review* 443 (2021)

Available at: <https://scholarship.law.vanderbilt.edu/vjtl/vol49/iss2/5>

³ Leila Nadya Sadat, The Conferred Jurisdiction of the International Criminal Court, 99 *Notre Dame L. Rev.* 549 (2024). Available at: <https://scholarship.law.nd.edu/ndlr/vol99/iss2/3>

⁴ See Asem Khalil and Halla Shoaibi. "Criminal Jurisdiction under Occupation: The Oslo Accords and the ICC." In *Prolonged Occupation and International Law*, edited by Nada Kiswanson and Susan Power, 330-347. International Humanitarian Law Series, vol. 66. Leiden: Brill Nijhoff, 2023

9. *Third*, we submit that the Oslo Accords have been concluded in violation of the right of the Palestinian people to self-determination – which is a peremptory norm under international law. Where a conflict exists between a peremptory norm (*jus cogens*) and another rule of international law, the Rome Statute provisions establishing the court's jurisdiction states that it must be "interpreted and applied" as to be consistent with the peremptory norm.⁵ If the Rome Statute restricts its own jurisdiction based on the Oslo Accords, it will create a violation of the right to self-determination of the Palestinian people. The impact of the Oslo Accords on the ICC jurisdiction should be interpreted in a way to uphold Palestinian self-determination.
10. *Fourth*, Palestine has an obligation to prosecute grave breaches under the Geneva Conventions and customary international law, such as settlements and extensive destruction and appropriation of property. Such grave breaches are codified as war crimes within the Rome Statutes, and at times overlap with other crimes within the ICC's jurisdiction. Palestine's obligation as a High Contracting Party to prosecute such grave breaches, including when needed delegating such duty to international tribunals, takes precedence over any conflicting obligation that arises from the Oslo Accords.
11. We anticipate requiring no more than 30 pages to elaborate on the above submissions.

IV. CONCLUSION

12. For the foregoing reasons, we request that the Chamber grant us leave to make the proposed submissions in accordance with the Chamber's Order and rule 103 of the

⁵ See ILC, 'Report of the International Law Commission on the Work of its Seventy-First Session', 2(2) Yearbook of the International Law Commission (2019), pages 146, 198–199; Asem Khalil and Halla Shoaibi. "Criminal Jurisdiction under Occupation: The Oslo Accords and the ICC." In *Prolonged Occupation and International Law*, edited by Nada Kiswanson and Susan Power, 330-347. International Humanitarian Law Series, vol. 66. Leiden: Brill Nijhoff, 2023, 343-344.

Court's Rules of Procedure and Evidence. We believe these submissions will assist this Chamber in its deliberation of the matter.



Halla Shoaibi, Assistant Professor of International Law at Birzeit University



Asem Khalil, Professor of Public Law at Birzeit University

Dated this 11th of July 2024

At Ramallah, Palestine.