

Annex

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/18
Date: 12 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: Dr Robert Heinsch
Dr Giulia Pinzauti

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I. INTRODUCTION

1. Dr Robert Heinsch and Dr Giulia Pinzauti (the “Applicants”) request leave to submit *amici curiae* observations in their own personal capacity on whether the Oslo Accords have a bearing on the Court’s jurisdiction over Israeli nationals in accordance with the Pre-Trial Chamber’s Order of 27 June 2024¹ and Rule 103(1) of the Rules of Procedure and Evidence.

II. EXPERTISE

2. Dr Robert Heinsch is an Associate Professor of Public International Law at the Grotius Centre for International Legal Studies at Leiden University and the Director of its Kalshoven-Gieskes Forum on International Humanitarian Law as well as its International Humanitarian Law Clinic (“IHL Clinic”). From April 2018 to February 2019, he held the DAAD Guest Chair for International Humanitarian Law, International Criminal Law, and Applied Legal Theory at the Institute of Peace and Armed Conflict of Ruhr-University Bochum, where he was also the founder and director of the Bochum IHL Clinic. Furthermore, he is also one of the three editors-in-chief of the Journal of International Law of Peace and Armed Conflict / Humanitäres Völkerrecht (JILPAC / HuV).

3. He has extensive experience in the areas of international humanitarian law (IHL), international criminal law (ICL), general public international law, and the law and practice of international courts and tribunals. This is reflected by his activities both in academia as well as in practice. He served as co-rapporteur of the International Law Association’s Study Group on the “The Conduct of Hostilities under International Humanitarian Law – Challenges from 21st Century Warfare” between 2012 and 2017. He is member of the German National IHL Committee and held the position of Federal Dissemination Officer for International Humanitarian Law from 2011 to 2014.

¹ ICC-01/18, 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’, 27 June 2024.

4. Previously, he served as a legal advisor in the IHL Department of the Red Cross Headquarters in Berlin (2007-2009), and as an associate legal officer in the Trial Chamber of the International Criminal Court (2005-2007). In addition, he worked as a senior research fellow at the Chair for International Law and European Law, Cologne University (1999-2004), and as a visiting lecturer at Ruhr-University Bochum (2008), respectively.

5. Dr Robert Heinsch has published extensively in the field of IHL and ICL. This includes a monograph on the jurisprudence of the ICTY and ICTR and its impact on the development of IHL, various contributions regarding the application of IHL in modern conflict scenarios, the relationship between international criminal jurisdictions and the application of IHL, as well as aspects of the (trial) procedure before the ICC.²

6. Since 2013, he coordinated and supervised various IHL clinic research projects on matters relating to the application of IHL and international human rights law in Palestine, as well as select jurisdictional questions regarding the state of Palestine and the ICC.³ Moreover, as Director of the Kalshoven-Gieskes Forum, he organized and participated in a number of field and study trips to Israel and Palestine, upon invitations from both an Israeli law school and from a Palestinian human rights NGO, respectively.

7. He holds a Dr jur (PhD in Law) degree from the University of Cologne, an LLM degree from University College London, and the First and Second Legal State Exam, which qualifies him for all juridical posts in his home country Germany.

8. Dr Giulia Pinzauti is an Assistant Professor of Public International Law at the Grotius Centre for International Legal Studies at Leiden University, and Deputy

² A list of Dr Heinsch's publications is available at <https://www.universiteitleiden.nl/en/staffmembers/robert-heinsch/publications#tab-4>. His professional and academic affiliations can be accessed at <https://www.universiteitleiden.nl/en/staffmembers/robert-heinsch#tab-2>.

³ A list of the topics of the IHL Clinic reports is available at <http://kalshovengieskesforum.com/ihl-clinic/>.

Director of the IHL Clinic of the Kalshoven-Gieskes Forum on International Humanitarian Law.

9. She has broad experience in public international law, IHL, ICL, and the law and practice of international courts and tribunals. Prior to joining Leiden Law School, she served as an associate legal officer at the International Court of Justice (2015-2016), and the Office of the Prosecutor of the International Criminal Tribunal for the former Yugoslavia (2012-2014). She also worked in Chambers at the Special Tribunal for Lebanon (2011-2012).

10. She holds a PhD in international law from the European University Institute, as well as a BA and MA from the University of Florence.

11. She is a member of the editorial board of the *Leiden Journal of International Law* and of the editorial committee of the *Journal of International Criminal Justice*. She has published extensively in the fields of IHL and ICL, including on the irrelevance of the Oslo Accords for the Court's jurisdiction in the situation in Palestine.⁴

12. In 2020, this Pre-Trial Chamber sitting in a different composition granted the Applicants leave to file observations on the scope of the Court's territorial jurisdiction in the situation in Palestine.⁵

III. SUMMARY OF OBSERVATIONS

13. The Applicants wish to express their views on the use of Rule 103 by the United Kingdom⁶ ("the UK Request") in the context of the Prosecutor's application for the issuance of arrest warrants. The Applicants believe that the UK's intervention in the

⁴ Giulia Pinzauti, 'The Irrelevance of the Oslo Accords for ICC Jurisdiction Over (Alleged) Crimes Committed Against the Palestinian Bedouin Community' in A Panepinto *et al* (eds), *Ending Impunity for International Law Violations: Palestinian Bedouins and the Risk of Forced Displacement* (Hart, 2025 - forthcoming). A list of Dr Pinzauti's publications is available at <https://www.universiteitleiden.nl/en/staffmembers/giulia-pinzauti/publications#tab-4>.

⁵ ICC-01/18-63, Decision on Applications for Leave to File Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence, 20 February 2020, paras 55-56.

⁶ ICC-01/18-171-Anx, Request by the United Kingdom for Leave to Submit Written Observations Pursuant to Rule 103, 27 June 2024 (henceforth 'UK Request').

context of the current article 58 proceedings amounts in essence to a jurisdictional challenge before the Pre-Trial Chamber which was originally not foreseen by the drafters of the Rome Statute. This approach has the potential effect of circumventing the requirements set forth in article 19 of the Rome Statute for raising challenges to the jurisdiction of the Court or the admissibility of a case.

14. Moreover, the Applicants note that the UK Request calls for the application of select provisions of the Oslo Accords on the repartition of competencies in criminal matters between Israel and the Palestinian Council, but not others. The Accords also envisaged a gradual withdrawal of Israeli military forces and a gradual transfer of powers to the Palestinian Council over a period of five years.⁷ Given this situation, there are commentators who doubt the validity of the Oslo Accords at the current day and age.⁸ Assuming that the Accords are still valid, they should be applied in their entirety; if one comes to the conclusion that they are not valid, they should not be applied at all. They cannot be applied selectively.

15. On the substantive questions raised by the UK Request, the Applicants propose to assist the Pre-Trial Chamber as *amici curiae* by offering focused observations on the following issues: (A) the Court's jurisdiction is not affected by the international obligations that a state party may have contracted; (B) ICC jurisdiction is not dependent on states parties' domestic criminal jurisdiction; (C) the Oslo Accords limit Palestine's enforcement jurisdiction but do not affect its prescriptive jurisdiction; and (D) the law of occupation confirms the interpretation that the Oslo Accords only concern the transfer of enforcement jurisdiction and not prescriptive jurisdiction.

⁷ Oslo II, Arts I, X, XIII and Annex I.

⁸ For an overview, see Yassir Al-Khudayri, 'Are the Oslo Accords Still Valid? For the ICC and Palestine, It Should Not Matter' (OpinioJuris, 10 June 2020), <https://opiniojuris.org/2020/06/10/are-the-oslo-accords-still-valid-for-the-icc-and-palestine-it-should-not-matter/>; Jeff Handmaker, 'ICC and Palestine Symposium: The (Non) Effects of Oslo on Rights and Status' (OpinioJuris, 6 February 2020), <https://opiniojuris.org/2020/02/06/icc-and-palestine-symposium-the-non-effects-of-oslo-on-rights-and-status/>.

16. By so doing, the Applicants would refute the arguments raised in the United Kingdom's Request and in Judge Kovács' Partly Dissenting Opinion.⁹ In the Applicants' submission, those arguments misconstrue the principle *nemo dat quod non habet*, conflate the distinct notions of a state's jurisdiction to prescribe and its enforcement jurisdiction, and disregard the law of occupation.

17. The Applicants will ensure that their proposed submissions would complement and elaborate on, without replicating, arguments already advanced in their 2020 submission.

A. The Court's jurisdiction is not affected by the international obligations that a state party may have contracted

18. The Applicants do not dispute that by virtue of the Oslo Accords and related Annexes, Palestine lacks enforcement jurisdiction over Israeli nationals, as well as crimes committed in particular geographical areas such as Area C of the West Bank.¹⁰ However, in our view, Palestine's lack of criminal (enforcement) jurisdiction domestically has no bearing on the Court's jurisdiction. This is because the Court's jurisdiction is regulated by the Rome Statute and not by an agreement like the Oslo Accords. The Statute provides a unified regime that applies to all its member states.¹¹ As such, the Court's jurisdiction is not affected by the international obligations that a state party may have contracted, otherwise this could lead to a patchwork of jurisdictions with regard to the different situations before the ICC.

19. In the present case, all the statutory requirements for the Court to have jurisdiction are met. The crimes alleged in the request for the issuance of arrest warrants fall within the material, temporal and personal jurisdiction of the Court.¹²

⁹ ICC-01/18-143-Anx1, Decision on the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine', Judge Péter Kovács' Partly Dissenting Opinion, 5 February 2021 ('Judge Kovács' Partly Dissenting Opinion').

¹⁰ Oslo II, Art. I Annex IV.

¹¹ Adil A. Haque, 'The International Criminal Court's Jurisdiction in Palestine and the "Oslo Accords Issue"' (Just Security, 9 July 2024) <https://www.justsecurity.org/97584/israel-palestine-icc-oslo-accords/>.

¹² Arts 5, 11, 25-26 Rome Statute.

The preconditions for the exercise of jurisdiction are also met. The conduct in question occurred on Palestine's territory which has been a state party to the Rome Statute since April 2015. Moreover, in 2018, Palestine has referred the situation on its territory to the ICC in accordance with the Statute. Several other state parties also referred the situation in Palestine to the ICC Prosecutor.¹³ As such, the Court has jurisdiction over alleged crimes committed on Palestine's territory - a state party to its Statute - irrespective of the nationality of the perpetrator.

20. This Chamber has already ruled that the Oslo Accords do not affect the Court's territorial jurisdiction.¹⁴ Similarly, they do not affect its personal jurisdiction either.

B. The Court's jurisdiction is not dependent on the existence of a parallel domestic jurisdictional title in the state concerned

21. The Applicants submit that states parties to the Rome Statute do not delegate or transfer their criminal jurisdiction to the Court but 'accept' it with respect to the crimes referred to in article 5 of the Statute (Article 12(1) Rome Statute).¹⁵

22. Even if one accepted the delegation theory as the source of the Court's jurisdiction, the Oslo argument fails. If the Court's jurisdiction was conditional on the existence of a parallel domestic jurisdictional title, the Court's jurisdiction would vary depending on the domestic law of its member states. This would create a very volatile situation for the Court, as domestic law can change over time. The Court's function and independence would be seriously undermined.

22. Moreover, such an interpretation would be at odds with the rationale of the principle of complementarity, according to which the Court can step in when a state

¹³ ICC, 'Statement of The Prosecutor of The International Criminal Court, Karim A.A. Khan KC, on The Situation In The State of Palestine: Receipt of a Referral From Five States Parties', 17 November 2023 <https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-karim-aa-khan-kc-situation-state-palestine>; referrals by Chile and Mexico, 18 January 2024, https://www.icc-cpi.int/sites/default/files/2024-01/2024-01-18-Referral_Chile_Mexico.pdf.

¹⁴ ICC-01/18-63, Decision on Applications for Leave to File Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence, 20 February 2020, para. 129.

¹⁵ Adil A. Haque, 'The International Criminal Court's Jurisdiction in Palestine and the "Oslo Accords Issue"' (Just Security, 9 July 2024) <https://www.justsecurity.org/97584/israel-palestine-icc-oslo-accords/>.

party is unable to prosecute because it lacks the necessary domestic legislation.¹⁶ This too suggests that the Court can exercise jurisdiction independently of a parallel jurisdictional title in the state concerned.

C. The Oslo Accords limit Palestine's enforcement jurisdiction but not its prescriptive jurisdiction

23. Notwithstanding the Oslo Accords, Palestine retains the competence to make the law, accept the jurisdiction of the ICC with respect to conduct occurring on its territory or by its nationals, and make a referral to the ICC. This is irrespective of whether it lacks full de facto control over its territory that is under belligerent occupation. Any other conclusion would lead to a status in which a belligerent occupation is equated to a de facto annexation where the occupied state effectively loses all its powers as a sovereign state. This is neither foreseen by the 1949 Geneva Conventions, nor is it in coherence with the fact that annexation is seen as illegal under public international law.

D. The law of occupation confirms the interpretation that the Oslo Accords concern the transfer of enforcement jurisdiction

24. Under the law of occupation, an occupying power has very limited prescriptive jurisdiction over the occupied territory, as the latter is a sovereign prerogative and the occupying power is only a temporary administrator.¹⁷ Arguments that the Oslo Accords limit Palestine's jurisdiction to prescribe would give Israel competencies that it actually cannot exercise under the law of occupation.

25. In conclusion, the Applicant would submit that the Oslo Accords do not bar the Court from exercising jurisdiction over Israeli nationals for conduct that occurred on Palestine's territory.

¹⁶ 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,' *Vanderbilt Journal of Transnational Law* 49 (2016) 449.

¹⁷ Art. 55 Hague Regulations; Yoram Dinstein, *The International Law of Belligerent Occupation* (CUP 2009) 113.

IV. RELIEF SOUGHT

26. For the reasons stated above, the Applicants respectfully seek leave to file an *amicus* brief expanding on these issues.



Robert Heinsch



Giulia Pinzauti

Dated this Friday, 12 July 2024

At the Hague, Netherlands