

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 Document

Request by Professor Adil Ahmad Haque for leave to file observations on the merits of the legal question presented in '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' of 27 June 2024 (ICC-01/18-173-Red)

Source: Professor Adil Ahmad Haque
Rutgers Law School
123 Washington Street
Newark, N.J., U.S.A.

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

The Office of the Prosecutor 	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 Victims	The Office of Public Counsel for the Defence
States' Representatives	Amicus Curiae
REGISTRY	
Registrar Mr. Osvaldo Zavala Giler	Counsel Support Section
Victims and Witnesses Unit	Detention Section
Victims Participation and Reparations Section	Other

Request for Leave to File Observations on the Merits of the Legal Question Presented Regarding the Court's Jurisdiction in the Situation in Palestine

1. This is a request by Professor Adil Ahmad Haque, pursuant to the order of the Pre-Trial Chamber entitled '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' of 27 June 2024 (ICC-01/18-173-Red), for leave to file observations on the merits of the legal question presented therein, namely '[w]hether the Court can exercise jurisdiction over Israeli nationals, in circumstances where Palestine cannot exercise criminal jurisdiction over Israeli nationals pursuant to the Oslo Accords' (para. 1).

Particular Expertise of Professor Haque in the Legal Question Presented

2. Professor Haque is Professor of Law and Judge Jon O. Newman Scholar at Rutgers Law School. He is an Executive Editor of *Just Security* and serves on the Board of Advisors of *International Law Studies*. He is the author of *Law and Morality at War* (Oxford University Press, 2017) as well as many articles, book chapters, and essays examining various topics in international law, most recently 'The International Criminal Court's Jurisdiction in Palestine and the Oslo Accords Issue', *Just Security*, 9 July 2024.

Summary Conclusion and Initial Observations

3. Under the Rome Statute ('the Statute'), the International Criminal Court ('the Court') both has and may exercise jurisdiction over Israeli nationals who commit war crimes, crimes against humanity, or genocide on the territory of the State of Palestine. The 1995 Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip ('Oslo II') does not limit the Court's jurisdiction or its exercise in any way. The theory of jurisdictional 'delegation' on which the United Kingdom relies is contrary to the Statute and should be rejected.

A. The Court's Jurisdiction

4. The jurisdiction of the Court is governed by the Statute (art. 1). By the plain terms of the Statute, the war crimes and crimes against humanity alleged by the Prosecutor fall

within the Court's subject matter and temporal jurisdiction (arts. 5 & 11). The individuals against whom the Prosecutor requests arrest warrants fall within the Court's personal jurisdiction (arts. 25 & 26). The preconditions to the exercise of the Court's jurisdiction are met, as the alleged conduct in question occurred on the territory of a State Party, namely the State of Palestine (art. 12(2)(a)). The situation in the State of Palestine was also referred to the Prosecutor by several States Parties, including by the State of Palestine in 2018, by Bangladesh, Bolivia, Comoros, Djibouti, and South Africa in November 2023, and by Chile and Mexico in January 2024 (arts. 13 & 14).

5. Oslo II cannot limit the Court's jurisdiction or bar its exercise at the expense of the Statute. The State of Palestine became a State Party to the Statute and thereby accepted the jurisdiction of the Court (art. 12(1)) without any reservation (art. 120). A State Party cannot accept the Court's jurisdiction over some individuals, territory, or crimes but not others. It is all or nothing.
6. As the Pre-Trial Chamber made clear,
[b]y becoming a State Party, Palestine has agreed to subject itself to the terms of the Statute and, as such, all the provisions therein shall be applied to it in the same manner than to any other State Party. Based on the principle of the effectiveness, it would indeed be contradictory to allow an entity to accede to the Statute and become a State Party, but to limit the Statute's inherent effects over it. ... In addition, denying the automatic entry into force for a particular acceding State Party would be tantamount to a reservation in contravention of article 120 of the Statute. ... The fact that the Statute automatically enters into force for a new State Party additionally confirms that article 12(2)(a) of the Statute is confined to determining whether or not "the conduct in question" occurred on the territory of a State Party for the purpose of establishing individual criminal responsibility for the crimes within the jurisdiction of the Court.¹

¹ Pre-Trial Chamber I, Decision on the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine', 5 February 2021, ICC-01/18-143, para. 102.

7. Neither a State Party's international agreements nor its internal laws limit the Court's jurisdiction or bar its exercise. This explains why '[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' (art. 27(2)). Similarly, even if Oslo II prevented the State of Palestine from exercising jurisdiction over an Israeli national, it still could not prevent the Court from exercising *its* jurisdiction over such a person.
8. A narrow qualification arises under Article 98(2) of the Statute, which limits the Court's ability to proceed with a request for surrender 'which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court'. Oslo II is not such an agreement. More importantly, Article 98(2) confirms that the Court *has* jurisdiction over the *person* in question. If that person appears on the territory of another State Party which is not bound by such an agreement, then the Court may request that other State Party to surrender the person. Even if Oslo II fell under Article 98(2) and limited the Court's ability to request the State of Palestine to surrender Israeli nationals, this still would leave the Court's jurisdiction over such *persons* fully intact. The Court may issue warrants for their arrest and request any other State Party to surrender them to the Court.

B. The 'Delegation' Theory

9. According to the United Kingdom, 'the Oslo Accords issue concerns whether Palestine could delegate criminal jurisdiction over Israeli nationals to the Court, in circumstances where the Oslo Accords themselves make it clear that Palestine itself does not have criminal jurisdiction over Israeli nationals'.² This passage indicates that the United Kingdom's argument rests on a dangerous mistake.
10. Under the ICC Statute, States Parties do not delegate, transfer, or otherwise give their jurisdiction to the Court. Instead, States Parties accept the jurisdiction of the Court

² Request by the United Kingdom for Leave to Submit Written Observations Pursuant to Rule 103, 10 June 2024, ICC-01/18-171-Anx 27-06-2024, para. 18.

(art. 12(1)) which is governed by the provisions of its Statute (art. 1). The Court's jurisdiction and its exercise are constrained by requirements of State acceptance (art. 12(2)-(3)), State referral (arts. 13 & 14), and complementarity (art. 17). These statutory constraints on the Court's jurisdiction ensure that an independent permanent international court can coexist and cooperate with sovereign States, but they should not be reinterpreted as delegations of national jurisdiction.

11. The 'delegation' theory would shatter the Court's jurisdiction into 124 fragments, irregularly shaped by hundreds of national laws and international agreements. To 'satisfy itself that it has jurisdiction in any case brought before it' (art. 19), the Court would have to determine the legal validity and legal content of each State Party's constitutional law and treaty arrangements. Any constitutional or treaty provision that limits the jurisdiction of national courts would control the Court's jurisdiction as well. This result would be manifestly absurd or unreasonable if it followed from a preliminary interpretation of the Statute. But it does not. It follows from a refusal to interpret the Statute or respect its design.
12. The United Kingdom asks the Court to determine Oslo II's legal validity under international law and under the internal law of the State of Palestine, and to determine the 'correct interpretation' of its provisions. The Court should decline. Such bilateral and internal matters are irrelevant to the Court's jurisdiction.
13. It would be manifestly unjust to enable an occupying power to immunize its officials and ensure impunity for international crimes through an agreement procured by the use of force and extracted from representatives of a population under prolonged occupation. The Statute allows no such thing, and neither should the Court.

Adil Haque

Professor Adil Ahmad Haque

Dated this Friday, 12 July 2024

At New York City, United States of America