

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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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

Amicus curiae observations of Professor Adil Ahmad Haque submitted pursuant to the 'Decision on requests for leave to file observations pursuant to rule 103 of the Rules of Procedure and Evidence' of 22 July 2024 (ICC-01/18-249)

Source: Professor Adil Ahmad Haque

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Introduction

1. Under the Rome Statute ('the Statute'), the International Criminal Court ('the Court') both has and may exercise jurisdiction over any person 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 constrain its exercise. No State Party can accept the Court's jurisdiction while selectively exempting certain persons, conduct, or territory. The 'delegation' theory according to which the Court inherits the jurisdictional limitations of a State Party, arising under its internal law or its international agreements, is contrary to the Statute and should be rejected.

A. The Court's Jurisdiction

2. 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 material and temporal jurisdiction (arts. 5 & 11). The individuals for 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 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).
3. The State of Palestine became a Party to the Statute and thereby accepted the jurisdiction of the Court (art. 12(1)). A State Party cannot accept the Court's jurisdiction over some persons, conduct, or territory but not others. It is all or nothing. A State Party cannot make reservations to the Statute (art. 120). A State Party cannot bar the Court from exercising its jurisdiction by granting a person immunity under its national law or pursuant to its international agreements (art. 27(2)). A State Party cannot refer only part of a situation to the Prosecutor (art. 14). A State Party cannot simultaneously accept and limit the Court's jurisdiction, or bar its exercise in any way, through its internal law or its international agreements. It is that simple.

B. The Oslo Accords

4. Several *amici* invite the Court to determine Oslo II's legal status and the 'correct interpretation' of its provisions. The Court should decline such invitations. No matter how Oslo II is understood, it cannot limit the Court's jurisdiction or bar its exercise.
5. The Pre-Trial Chamber's decision on territorial jurisdiction reserved the question of personal jurisdiction, but its reasoning shows how this further question must be answered. The Chamber explained that '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.'¹ Indeed, a State Party cannot exempt certain persons from the Court's jurisdiction by making a reservation to the Statute, or by attaching immunities or special procedural rules to a person's official capacity, or by referring only part of a situation to the Prosecutor. Similarly, Oslo II cannot exempt Israeli nationals from the Court's jurisdiction because this would achieve the same result as a reservation, a grant of immunity, or a partial referral, rendering the relevant provisions of the Statute ineffective. Beyond the situation in Palestine, no State Party can manipulate the Court's jurisdiction by adopting international agreements or internal laws limiting its own national jurisdiction over certain persons, conduct, or territory. The text of the Statute does not allow such circumvention of its object and purpose.
6. The Chamber observed that '[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.'² Plainly, exempting Israeli nationals who commit international crimes on the territory of Palestine from the Court's jurisdiction would fail to apply the provisions of the Statute to Palestine in the same manner as they apply to any other State Party. The Chamber recognized that '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.' Plainly, it would be contradictory to allow Palestine to become a State Party but limit the Statute's inherent effects over it or over crimes committed on its territory. There is no basis in the Statute for such an unequal application of the law.

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.

² *Ibid.*

7. The Chamber concluded 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.’³ There is no need to consult Oslo II—or any other State Party’s international agreements or internal laws—to confirm what the Statute itself provides, namely that the Court may exercise its jurisdiction over any adult person who commits an international crime on the territory of a State Party. The ‘correct interpretation’ of Oslo II is irrelevant to the correct interpretation of the Statute.
8. As the International Court of Justice explains, Oslo II is an agreement between an occupying power and authorities of an occupied territory under the Fourth Geneva Convention.⁴ It transfers some of Israel’s powers and responsibilities under the law of occupation to an interim authority.⁵ It neither expands Israel’s inherent jurisdiction nor limits Palestine’s inherent jurisdiction under general international law. It is not a treaty binding on the State of Palestine, since ‘an occupation involves, by its very nature, a continued use of force in foreign territory’, and a treaty procured by the use of force is void.⁶ It is not an applicable treaty under article 21 or a relevant rule of international law under the VCLT. Its derivative legal status is established and strictly limited by the Fourth Geneva Convention. It is legally binding only in the limited sense that protected persons shall continue to benefit from it until Israel brings its occupation to an end.⁷ It can neither deprive the occupied population of protection nor deny their right to self-determination, including their right to an independent and sovereign State like any other, with plenary jurisdiction over all persons in its territory.
9. Some *amici* conflate the State of Palestine with the Palestinian Authority, which they equate with the interim authority created under Oslo II with limited powers. This is manifest error. The State of Palestine is plainly distinct from its interim government. Were the Palestinian Authority to dissolve, and a new permanent government to arise as envisioned *inter alia* by Palestine’s Basic Law, the State of Palestine would persist. It would remain a State Party to the Statute and the Geneva Conventions, and retain its seat in international organizations and its observer status at the United Nations.

³ *Ibid.*

⁴ Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion, 19 July 2024, para. 102.

⁵ *Id.* para. 140.

⁶ *Id.* para. 253; Vienna Convention on the Law of Treaties (23 May 1969), art. 52.

⁷ Geneva Convention Relative to the Protection of Civilian Persons in Time of War (12 August 1949), art. 7. Nationals of the occupying power are not protected persons. *Id.* art. 4.

10. Even if Oslo II was a treaty binding on the State of Palestine, as some *amici* suppose, or a constitutional law establishing and limiting the powers of its government, as other *amici* suggest, it cannot prevent the Court from exercising *its* jurisdiction over persons who commit crimes on the territory of Palestine.
11. A State Party's international agreements and internal laws cannot limit the Court's jurisdiction or bar its exercise. 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'. Importantly, this provision 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.
12. It follows that 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.

C. The 'Delegation' Theory

13. In its request, the United Kingdom wrote that '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'.⁸ As explained above, Oslo II transfers some of Israel's responsibilities under the law of occupation and cannot deprive Palestine of its rights under general international law. But the quoted passage reflects a more fundamental error shared by other *amici*.
14. 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* (art. 12(1)) which is governed by the provisions of its Statute (art. 1). The Court's exercise of its own jurisdiction is constrained by requirements of State acceptance (art.

⁸ 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.

12(2)-(3)), State referral (arts. 13 & 14), and complementarity (art. 17). These statutory constraints on the Court's exercise of its own jurisdiction ensure that an independent permanent international court can coexist and cooperate with sovereign States, but they should not be mischaracterized as delegations of national jurisdiction.

15. In its jurisdictional ruling in the Bangladesh/Myanmar situation, the Pre-Trial Chamber interpreted the text of article 12(2)(a) in light of relevant rules of international law regarding the scope of national territorial jurisdiction.⁹ It did not rewrite the text of article 12(2)(a) to require a legal determination of national territorial jurisdiction over alleged crimes. If States Parties intended to require such a legal determination, then the text would say so. It does not. The text calls for a simple factual determination of where an alleged crime was committed. That is all.
16. The Chamber noted that Bangladesh's national law permits the exercise of jurisdiction over transboundary crimes, but it did not suggest that the Court's own jurisdiction depends on the contingencies of Bangladesh's national law. Similarly, when the Chamber wrote that 'the drafters of the Statute intended to allow the Court to exercise its jurisdiction pursuant to article 12(2)(a) of the Statute in the same circumstances in which States Parties would be allowed to assert jurisdiction over such crimes under their legal systems', it meant that the scope of the Court's jurisdiction under 12(2)(a) mirrors the scope of national jurisdiction under the territoriality principle. It did not mean that the Court's jurisdiction in a particular case depends upon, or requires a determination of, the national jurisdiction of a State Party over that same case.
17. Talk of 'delegation' is often harmless. But taken too seriously, it threatens to rewrite the Statute and subvert its design. The Court is not an instrument of States Parties, and it does not exercise their jurisdiction on their behalf. The Court is an independent institution with international legal personality which exercises *its* jurisdiction—the jurisdiction *of the Court*—within the constraints provided for by the Statute.¹⁰
18. The 'delegation' theory would shatter the Court's jurisdiction into 124 fragments, irregularly shaped by thousands of national laws and international agreements. To 'satisfy itself that it has jurisdiction in any case brought before it' (art. 19), the Court

⁹ Pre-Trial Chamber I, Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute," 6 September 2018, ICC-RoC46(3)-01/18.

¹⁰ Leila Nadya Sadat, *The Conferred Jurisdiction of the International Criminal Court*, 99 *Notre Dame L. Rev.* 549 (2024).

would have to determine the legal validity and correct interpretation of each State Party's national laws and international treaties. Any constitutional provision that limits the prescriptive jurisdiction of national legislatures or the adjudicative jurisdiction of national courts would limit the Court's jurisdiction as well. Any treaty provision that bars a State Party's exercise of national criminal jurisdiction would bar the Court's exercise of its own jurisdiction. This chaotic 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 read the Statute or respect its design.

D. The Question of Statehood

19. The Court does not need to determine that the State of Palestine is a State under general international law in order to determine the scope of its own jurisdiction. As the Chamber observed in its decision on territorial jurisdiction,

Palestine acceded to the Statute in accordance with the procedure defined by the Statute and, in addition, the Assembly of States Parties has acted in accordance with Palestine's accession. In view of its accession, Palestine shall thus have the right to exercise its prerogatives under the Statute *and be treated as any other State Party would*.¹¹

No other State Party can limit the jurisdiction of the Court or bar its exercise by means of its internal law, its international agreements, or otherwise. Nor can the State of Palestine. The Statute applies equally to them all.

20. Some *amici* argue that the State of Palestine cannot delegate its jurisdiction to the Court because it is not a State under general international law and therefore has no jurisdiction of its own to delegate. As explained above, States Parties do not delegate their own jurisdiction to the Court, but instead accept the Court's jurisdiction. By its unchallenged accession to the Statute and its acceptance by the Assembly of States Parties, Palestine became a State Party and accepted the jurisdiction of the Court over crimes committed on its territory. As the Chamber emphasized, '[t]hese issues have been settled by Palestine's accession to the Statute'.¹²

21. Similarly, the Court does not need to determine that the State of Palestine is a State under general international law in order to determine that the alleged conduct falls within its material jurisdiction under article 8(2)(a)-(b). The alleged conduct was

¹¹ Pre-Trial Chamber I, Decision (n. 1) para. 102 (emphasis added).

¹² Pre-Trial Chamber I, Decision (n. 1) para. 112.

committed by an occupying power against civilians under occupation and therefore took place in the context of and was associated with an international armed conflict.¹³ The nexus between the alleged conduct and the occupation endures, and the law of international armed conflict applies, even though the occupying power is engaged in hostilities with organized armed groups.¹⁴

22. In *Prosecutor v. Bosco Ntaganda*, the Chamber recognized that an occupying power remains bound by the law of occupation when it fights with an organized armed group, writing that ‘had the fighting taken place within the area considered as occupied by the UPDF, the law of occupation would only apply to the UPDF’.¹⁵ The Chamber also wrote that, ‘given that it cannot be established that said fighting took place within the area of the DRC under effective control of the UPDF, the fighting constituted a non-international armed conflict’.¹⁶ By negative implication, if fighting takes place within an area under an occupying power’s effective control, then its conduct is governed by the law of international armed conflict.
23. Here, the alleged conduct was not directed against armed groups, but against civilians under occupation. When an occupying power directs a precise attack exclusively against members of an organized armed group, with minimal effects on nearby civilians, it is not entirely implausible to argue that the act falls under the law of non-international armed conflict. But when an occupying power kills, maims, attacks, or starves civilians under occupation, abusing its effective control over them, its conduct plainly falls under the law of international armed conflict. The law of non-international armed conflict was originally designed to regulate the relationship between a State and its own population. It cannot be transposed to the fundamentally different relationship between an occupying power and an occupied population.

¹³ Elements of Crimes, fn. 34 (‘The term “international armed conflict” includes military occupation’); *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, 14 March 2012, ICC-01/04-01/06, para. 542 (‘for the purposes of Article 8(2)(b)(xxvi) of the Statute, “international armed conflict” includes a military occupation’).

¹⁴ Dapo Akande, ‘Classification of Armed Conflicts: Relevant Legal Concepts’, in Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts* 47 (2012) (‘it is the law of occupation and other rules of international armed conflict (including the law of targeting) that conditions how the occupier may respond to an uprising in the foreign territory of which it has temporary occupation’); Antonio Cassese, *International Law* 420–3 (2005); *The Public Committee against Torture in Israel v. The Government of Israel*, High Court of Justice, HCJ 769/02 (13 December 2006) paras. 16–23.

¹⁵ Pre-Trial Chamber I, *The Prosecutor v. Bosco Ntaganda*, Judgment, 8 July 2019, ICC-01/04-02/06, para. 728.

¹⁶ *Ibid.* (emphasis added).

24. As the International Court of Justice explains, ‘Israel’s withdrawal from the Gaza Strip [in 2005] has not entirely released it of its obligations under the law of occupation. Israel’s obligations have remained commensurate with the degree of its effective control over the Gaza Strip’ under both the Fourth Geneva Convention and customary international law.¹⁷ As the Court emphasizes, ‘[t]his is even more so since 7 October 2023’, as Israel’s means of effective control have multiplied.¹⁸
25. The Prosecutor alleges that the war crime of intentionally using starvation of civilians as a method of warfare was committed by closing border crossing points, arbitrarily restricting humanitarian supplies through these border crossing points, and cutting off the flow of water and electricity. As the International Court of Justice explains, Israel’s ‘control of the land, sea, and air borders’ and ‘restrictions on movement of people and goods’ are ‘key elements of authority’ that establish Israel’s ongoing obligations under the law of occupation.¹⁹ These obligations include ‘the duty “to ensur[e] the food and medical supplies of the population” under Article 55 of the Fourth Geneva Convention, as well as the duty to facilitate humanitarian relief under Article 59 of that Convention’.²⁰ Abuse of these key elements of authority and breach of these legal obligations to starve civilians establishes a clear nexus between the alleged conduct and the occupation. It follows that the alleged conduct directed against civilians constitutes a serious violation of the laws and customs applicable in international armed conflict and falls under article 8(2)(b)(xxv).
26. The Prosecutor alleges that Israeli ground forces engaged in wilful killing and wilful causing of great suffering and serious injury against aid workers and civilians waiting for food. The presence of ground forces of the occupying power, not actively engaged in intense hostilities, establishes effective control over an area and triggers obligations to protected persons in that area under the law of occupation. It follows that the alleged conduct directed against civilians involves grave breaches of the Fourth Geneva Convention and falls under articles 8(2)(a)(i) and 8(2)(a)(iii).
27. Finally, the Prosecutor alleges that attacks against a civilian population, including aid workers, were committed as part of a common plan to collectively punish the civilian population of Gaza. Collective punishment by an occupying power of an occupied

¹⁷ Legal Consequences (n. 4) para. 94.

¹⁸ Id. para. 93.

¹⁹ Legal Consequences (n. 4), para. 93.

²⁰ Id. Separate Opinion of Judge Cleveland, para. 24.

population violates the law of occupation.²¹ Acts of collective punishment necessarily share a nexus with the occupation they enforce. It follows that the alleged conduct directed against civilians constitutes a serious violation of the laws and customs applicable in international armed conflict and falls under article 8(2)(b)(i).

28. The Court does not need to determine that Palestine is a State under general international law in order to establish the Court's jurisdiction over the persons and conduct at issue in this proceeding. But Palestine is a State. It has a permanent population, a defined territory, a government, and the capacity to enter into relations with other States and with international organizations. Limitations on the effectiveness of its government are the result of Israel's unlawful policies, practices, and continued presence which may not be recognized as lawful or as entailing legal effects.²²
29. The State of Palestine is recognized as a State by the overwhelming majority of States, including by the overwhelming majority of States Parties. The General Assembly determined 'that the State of Palestine is qualified for membership in the United Nations in accordance with Article 4 of the Charter of the United Nations and should therefore be admitted to membership in the United Nations'.²³ Only States are qualified for U.N. membership. The State of Palestine would be a full member of the United Nations today, but for a single negative vote of a permanent member in the Security Council.²⁴ The Court should reject any request to apply the customary criteria of statehood in a manner contrary to the actual practice of the majority of States.
30. As a State, Palestine plainly has the legal competence to become a State Party to the Statute and accept the jurisdiction of the Court. It possesses inherent, inalienable, and plenary jurisdiction over its territory. Any limits on the exercise of its jurisdiction by its government, arising from its internal law or international agreements, do not bind the Court. In addition, any use of armed force by Israel against Palestine, its territory, or its population, falls under the law of international armed conflict.²⁵ Israel is engaged in hostilities with organized armed groups. But killing, wounding, attacking, and starving Palestinian civilians necessarily takes place in the context of and is associated with an international armed conflict between Israel and Palestine and falls within the

²¹ Geneva Convention IV (n. 7) art. 33.

²² Legal Consequences (n. 4), para. 285.

²³ U.N. Doc. A/RES/ES-10/23. 143 members voted in favor, 9 voted against, and 25 abstained.

²⁴ U.N. Doc. S/PV.9609. 12 members voted in favor, 1 voted against, and 2 abstained.

²⁵ Int'l Committee of the Red Cross, Commentary on the First Geneva Convention, paras. 260-262 (2016).

Court's material jurisdiction under article 8(2)(a)-(b). Again, the Court does not need to determine that Palestine is a State to reach these conclusions on narrower grounds.

Conclusion

31. The Court has and may exercise jurisdiction over any person who commits war crimes, crimes against humanity, or genocide on the territory of a State Party. This includes Israeli nationals who commit such crimes on the territory of the State of Palestine. The Court's jurisdiction is not limited by Oslo II, is not 'delegated' to it by the State of Palestine, and does not require a judicial determination that Palestine is a State. The principle extends beyond the situation in Palestine. No occupying power can immunize its officials and ensure impunity for international crimes through an agreement procured by the use of force and extracted from representatives of an occupied population. The Statute allows no such thing, and neither should the Court.

Adil Haque

Professor Adil Ahmad Haque

Dated this Tuesday, 6 August 2024

At New York City, United States of America