Cour
Pénale
Internationale

International
Criminal
Court

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No.: ***ICC-01/18***

Date: **6 August 2024**

PRE-TRIAL CHAMBER I

Before: **Judge Iulia Motoc, Presiding Judge**
Judge Nicolas Guillou, Judge
Judge Reine Alapini-Gansou, Judge

SITUATION IN THE STATE OF PALESTINE

Public

Written observations by South Africa, Bangladesh, Bolivia, Comoros, and Djibouti pursuant to Rule 103

Source: **South Africa, Bangladesh, Bolivia, Comoros, and Djibouti**

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

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I. Introduction and procedural history

1. On 22 July 2024, Pre-Trial Chamber I granted leave to several States, organisations and persons, including South Africa, Bangladesh, Bolivia, Comoros, and Djibouti to submit written observations pursuant to Rule 103(1) of the Rules of Procedure and Evidence of the International Criminal Court in the Situation in the State of Palestine.

II. Submissions

2. At the outset it is underscored that it is for the International Criminal Court ("Court") to satisfy itself that it has jurisdiction in any case before it.[1]

3. The Court has already determined that it has jurisdiction in its 5 February 2021 Decision ("Jurisdiction Decision"), and that it may exercise its criminal jurisdiction in the Situation in the State of Palestine. The territorial scope of this jurisdiction extends to territories occupied by Israel since 1967, namely Gaza and the West Bank, including East Jerusalem.[2] In its Jurisdiction Decision, the Pre-Trial Chamber ("Chamber") held that:

> *[An article 19(3) application] would permit the Prosecutor to request a ruling on a question of jurisdiction for the purposes of determining the scope of the investigation to be conducted following a referral by a State Party, as opposed to unnecessarily delaying judicial scrutiny of matters of jurisdiction until an application under article 58 of the Statute is submitted.*[3]

4. The Prosecutor's 19(3) application and the Jurisdiction Decision were dispositive of the jurisdiction question. While the Chamber noted in its Jurisdiction Decision that examination of further questions of jurisdiction may arise in the context of articles 58 or 19(2) of the Rome Statute, it is submitted that such challenges to the Court's jurisdiction may only be brought in accordance with the Rome Statute, namely by the accused once the arrest warrants have been issued (article 19(2)) or by a State with standing (19(2)(b) and (c)).

[1] Article 19(1) of the Rome Statute
[2] Situation in the State of Palestine: 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)
[3] *Supra* (ICC-01/18-143), para 82

5. Arguments that purport to challenge the Court's jurisdiction are seeking to achieve that which they cannot achieve through an article 19 application, due to a lack of standing. Importantly, these arguments purposively and materially disregard the previous ruling on the matter of territorial jurisdiction by Pre-Trial Chamber I and seek to delay the issuance of arrest warrants, and ultimately have the effect of disregarding States Parties' obligations to prevent and punish crimes under the Court's jurisdiction.

a) The requirements for the issuance of arrest warrants under article 58 are met

6. The Chamber is required to examine whether the requirements for the issuance of arrest warrants under article 58 are met. Article 58 requires the Court in peremptory terms to issue the arrest warrants if:

> […] *having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that:*
>
> *(a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and*
>
> *(b) The arrest of the person appears necessary.*[4]

7. The Chamber emphasised "*that unless it is intimately convinced that the two above-mentioned conditions have been met, it will decline to issue any warrant of arrest*".[5] It has previously held that to fall within the Court's jurisdiction, a crime must meet the following conditions:

> *i. it must be one of the crimes mentioned in article 5 of the Statute, that is to say, the crime of genocide, crimes against humanity and war crimes;*
>
> *ii. the crime must have been committed within the time period laid down in article 11 of the Statute; and*
>
> *iii. the crime must meet one of the two alterative conditions described in article 12 of the Statute.*[6]

[4] Article 58(1)(a) and (b) of the Rome Statute
[5] Situation in the Democratic Republic of the Congo in the case of *The Prosecutor v Thomas Lubanga Dyilo:* Decision on the Prosecutor's Application for a warrant of arrest, Article 58, 10 February 2006, (ICC-01/04-01/06-1-Corr-Red 17-03-2006 1/59 SL PT), para 9
[6] ICC-01/04-01/06-1-Corr-Red 17-03-2006 1/59 SL PT, para 24

8. The Court must determine whether the specific crimes of the case fall within article 5 and that they do not exceed the territorial and temporal jurisdiction of the Court.[7] Following the Court's line of enquiry in the *Dyilo*[8] case on whether jurisdiction is met for purposes of issuing an arrest warrant, it is submitted that the Chamber is required to factor in the following:

   a. On 2 January 2015, the State of Palestine acceded to the Rome Statute which entered into force for the State of Palestine on 1 April 2015.

   b. On 22 May 2018, pursuant to articles 13(a) and 14 of the Rome Statute, the State of Palestine referred to the Prosecutor the Situation since 13 June 2014 with no end date. Pursuant to articles 13(a) and 14 of the Rome Statute, on 17 November 2023, five States Parties including South Africa, Bangladesh, Bolivia, Comoros, and Djibouti referred the Situation in the State of Palestine for the crimes of genocide, crimes against humanity and war crimes being committed in the Situation in Palestine which fall within the jurisdictional scope of the Court (articles 5, 6, 7 and 8).[9] On 18 January 2024, the Republic of Chile and the United Mexican States submitted a joint referral in terms of article 14 of the Rome Statute.[10]

   c. The Court has clearly defined its criminal jurisdiction in the Situation in the State of Palestine and that the territorial scope of this jurisdiction extends to Gaza and the West Bank, including East Jerusalem.[11]

   d. On 20 May 2024, the Prosecutor announced that arrest warrants are being sought for crimes falling within the scope of article 5, namely war crimes and crimes against humanity (articles 7 and 8), on both the territory of Israel and the State of Palestine (in the Gaza strip) from at least 7 October 2023.[12]

9. The Chamber has held that article 12 of the Rome Statute contains the alternative preconditions under which the Court may exercise jurisdiction: the Court's *ratione loci*

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[7] *Supra* (ICC-01/04-01/06-1-Corr-Red 17-03-2006 1/59 SL PT), para 21
[8] Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, 14 December 2006, (ICC-01/04-01/06-772)
[9] Referral by South Africa, Bangladesh, Bolivia, Comoros and Djibouti pursuant to articles 13(a0 and 14 of the Rome Statute, 17 November 2023: https://www.icc-cpi.int/sites/default/files/2023-11/ICC-Referral-Palestine-Final-17-November-2023.pdf
[10] Referral from Mexico and Chile, 18 January 2024: https://www.icc-cpi.int/sites/default/files/2024-01/2024-01-18-Referral_Chile__Mexico.pdf
[11] ICC-01/18-143
[12] 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 https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-karim-aa-khan-kc-situation-state-palestine

jurisdiction under article 12(2)(a) or its *ratione personae* jurisdiction under article 12(2)(b). Regarding the former, the Court may exercise its jurisdiction in relation to "[t]he State on the territory of which the conduct in question occurred." The Court has already determined that Palestine is a 'State' for the purposes of article 12(2)(a) of the Rome Statute.[13]

10. The arrest warrants are necessary to ensure the appearance of the accused at the trial, that they do not obstruct or endanger or the court proceedings and to prevent them from continuing with the commission of the crimes which fall within the jurisdiction of the Court, and which arise out of the same circumstances (article 58(1)(b).

11. The Rome Statute is exhaustive on the preconditions necessary for the Court to exercise its jurisdiction which is met with respect to the application of arrest warrants. All of the requirements in articles 12 and 58 have been met and it is now for the Court to exercise its jurisdiction in accordance with the provisions of the *Rome Statute* alone.

b) The need for the consistent application of the Court's jurisdiction for crimes committed within its territorial jurisdiction regardless of nationality

12. It is submitted that the exercise of the Court's jurisdiction in the Situation in Palestine is analogous to its decision to issue arrest warrants in the Situation of Ukraine.

13. On 2 March 2022, the Prosecutor announced an investigation into the Situation in Ukraine on the basis of the referrals received.[14] On 7 March 2023, Pre-Trial Chamber II issued warrants of arrest for two individuals in the context of the Situation in Ukraine.[15] The Russian Federation has not accepted the Court's jurisdiction by means of an article 12(3) declaration, nor has it acceded to the Rome Statute.

14. In issuing the arrest warrants in the Situation in Ukraine (the content of which remain secret), the Pre-Trial Chamber evidently concluded that the Court may exercise its

[13] ICC-01/18-143, para 112
[14] Jurisdiction in the general situation in Ukraine: https://www.icc-cpi.int/situations/ukraine
[15] Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova: https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and

territorial jurisdiction pursuant to article 12(2)(a) on the basis of Ukraine's second article 12(3) declaration which extended the initial declaration's time period on an open-ended basis to encompass ongoing alleged crimes committed throughout the territory of Ukraine from 20 February 2014. In so doing, the Pre-Trial Chamber confirmed in that Situation that the Court may exercise its jurisdiction regardless of the nationality of the accused. The Court may therefore exercise jurisdiction over conduct which occurred on the territory of a State Party, regardless of whether the accused is a citizen of that State or of a non-State Party.

15. It is submitted that the Court's pre-condition to jurisdiction is equally met with respect to article 5 crimes being committed on the territory of the State of Palestine. The State of Palestine is a *State the territory on which the conduct in question* has and continues to occur pursuant to article 12(2)(a). The Court may accordingly exercise its jurisdiction over Israeli nationals, despite Israel being a non-State Party to the Rome Statute. The Court must therefore act consistently in the application of its jurisdiction.

16. The only distinguishing feature between arrest warrants issued in the Situation of Palestine versus those of Ukraine, is the presence of the Oslo Accords.

c) Implications of the Oslo Accords

17. The Rome Statute requires the Court, in determining its jurisdiction, to apply the Rome Statute (article 13 and 21(1)(a)).

18. Article 13 concerns the exercise of jurisdiction and provides that the Court may exercise its jurisdiction in accordance with the provisions of the *Rome Statute*.[16] The Rome Statute is the *lex specialis*, and the Court is bound by its application in the first instance.

19. The Appeals Chamber has determined that if an issue is comprehensively addressed by the Rome Statute or the Rules of Procedure and Evidence, there is no need to resort to the secondary or tertiary sources of law as outlined in article 21(1) of the Rome Statute to ascertain the existence or non-existence of a relevant rule.[17] The Chamber has held

[16] Article 13 of the Rome Statute
[17] ICC-01/04-01/06-772, para 34

that, "in keeping with article 21(1)(a) of the Rome Statute, which stipulates that the Court shall apply '[i]n the first place, [the] Statute', that the issues under consideration primarily rest on, and are resolved by, a proper construction of the relevant provisions of the Statute".[18] The hierarchy of sources of law as established by article 21 of the Rome Statute is binding on the Chamber.

20. As to when the Court may resort to other sources enumerated in articles 21(1)(b) and (c), the Court has held that this is restricted to:

> *[…] when the following two conditions are met: (i) there is a lacuna in the written law contained in the Statute, the Elements of Crimes and the Rules; and (ii) such lacuna cannot be filled by the application of the criteria of interpretation provided in articles 31 and 32 of the Vienna Convention on the Law of the Treaties and article 21(3) of the Statute*.[19]

21. With respect to the Court's exercise of its jurisdiction, there is no lacuna in the written law contained in the Rome Statute which would require the Court to consider whether the application of the Oslo Accords would be a bar to the exercise of its jurisdiction. It is submitted that the Court's jurisdiction is to be decided on the basis of articles 11, 12 and 13 of the Rome Statute.

22. The Declaration of Principles on Interim Self-Government Arrangements (hereinafter referred to as the Oslo I Accord) and the Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip (hereinafter referred to as the Oslo II Accord) (both being referred to as the "Oslo Accords") are a set of interim agreements concluded by the Government of Israeli and the Palestine Liberation Organisation and were intended to establish a peace process for the Israel-Palestinian conflict through negotiated solution. The arrangement was a temporary one until a final settlement of the conflict is reached. Whilst the Oslo Accords may be binding on the parties thereto, they are not treaties as defined in the Vienna Convention on the Law of Treaties,[20] and therefore they should not be considered as falling within the ambit of "applicable law" to be applied by the Court as stipulated in Article 21(1)(b) of the Rome Statute.

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[18] ICC-01/18-143, para 88
[19] Situation in Darfur, Sudan *Prosecutor v. Al Bashir*, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, (ICC-02/05-01/09-3), para 44
[20] Watson, G (2000) *The Oslo Accords: International Law and the Israeli-Palestinian Peace Agreements*

23. The Oslo Accords are bilateral instruments concluded between Palestine and Israel. The rights and obligations arising therefrom are between those two States and cannot be used as a basis upon which to limit the jurisdiction of an international court, which is independent and impartial, possessing its own international legal personality.[21] Through the Rome Statute, States created the Court and established its jurisdiction over crimes listed in article 5, and in relation to persons that committed crimes on the territory of a State Party or by a national of State Party (article 12(2)(a) and (b)). By becoming Parties to the Rome Statute, States ***accept*** the Court's jurisdiction over the most serious crimes; jurisdiction which had already been conferred upon the Court when it was established.[22]

24. The Oslo Accords cannot limit the rights of victims of international crimes to accountability for crimes committed under the Rome Statute and neither can they affect the obligation of any State Party, including the State of Palestine and the [five countries] that are [jointly] submitting these observations, to ensure prosecution for crimes committed by Israeli officials and their subordinates.

25. Whilst references have been made to the jurisdiction of international courts/tribunals emanating from the delegation of jurisdiction by States, this cannot be interpreted literally as it will result in an absurdity.

26. In the first instance, it would have the effect that States Parties to the Rome Statute which have themselves not domestically criminalised the most serious crimes could effectively argue that the Court cannot exercise jurisdiction over crimes committed within the territory over which the Court has jurisdiction due to the fact that those States themselves do not have jurisdiction to investigate or prosecute said crimes, and thus cannot delegate such jurisdiction to the Court.[23]

27. Secondly, it would mean that an anomaly would exist whereby States that have universal jurisdiction to investigate and to prosecute the most serious crimes would have

[21] Article 4(1) of the Rome Statute
[22] Article 12(1) of the Rome Statute
[23] Sadat, LN, "The Conferred Jurisdiction of the International Criminal Court", *Notre Dame Law Review* vol. 99, p. 582

jurisdiction over the crimes committed in the State of Palestine, but the international court created with the view to exercising such jurisdiction does not.[24]

28. Even if it is determined that jurisdiction is delegated to the Court, it must be borne in mind that there are different forms of jurisdiction – prescriptive, adjudicative and enforcement.[25] The Oslo Accords place a limitation only on enforcement jurisdiction. To limit prescriptive jurisdiction would be in violation of sovereignty (and right to self-determination). It should be underscored that the International Court of Justice in its recent advisory opinion stated that: "[…] occupation […] cannot transfer title of sovereignty to the occupying Power".[26] Moreover, the occupying Power, by virtue of the illegality of the occupation, cannot subject the Palestinian people to conditions that deprive them of their right to self-determination.[27] The Oslo Accords cannot be interpreted in such a manner as limit the Court's jurisdiction, thereby detracting from the rights of Palestine or the international community as a whole to whom accountability for atrocity crimes is owed as an obligation *erga omnes*.[28]

29. The limitation by a State of its jurisdiction through the conclusion of a treaty (as is often done, for example, in Status of Forces Agreements) does not amount to a relinquishment of that fundamental right, rather it is an undertaking merely not to exercise that right.[29]

30. At most, therefore, the impact of the Oslo Accords would arise in relation to Palestine's[30] cooperation with the Court in terms of article 98 of the Rome Statute. A factor that has not yet come into play.

31. Complementarity is one of the important pillars of the Rome Statute; it is contained in paragraph 10 of the Preamble as well as article 1. This principle emphasises that the

[24] See for example South Africa's universal jurisdiction to investigate and prosecute crimes defined in the Rome Statute, as decided in the case of *National Commissioner of The South African Police Service v Southern African Human Rights Litigation Centre and Another* 2015 (1) SA 315 (CC)
[25] Roger O'Keefe, "Response: 'Quid,' Not 'Quantum': A Comment on 'How the International Criminal Court Threatens Treaty Norms', 49 *Vanderbilt Law Review* 433 (2021), p. 436
[26] *Legal Consequences arising from the policies and practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, 19 July 2024, para 105
[27] *Supra* (*Legal Consequences arising from the policies and practices of Israel*), para 257
[28] *Supra (Legal Consequences arising from the policies and practices of Israel*), para 102
[29] *Supra* (O'Keefe), page 439
[30] States other than Israel and Palestine could at most raise concerns with complying with a request to surrender as per Art 98. However, the Oslo Accords have no binding effect on third states.

Court enhances rather than replaces national criminal justice systems, and in cases where a State is unable or unwilling to take action, the Court has jurisdiction.[31] Insofar as the Oslo II Accord renders Palestine unable to exercise its jurisdiction over Israeli nationals, the Court may exercise its jurisdiction in order to close any accountability gaps.

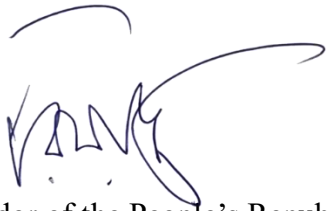
Conclusion

32. The Court has duly defined the territorial scope of its jurisdiction in the Situation in Palestine. The matter is therefore *res judicata*. To the extent that renewed challenges to the Court's jurisdiction are made, these must be undertaken in conformity with the Rome Statute.

33. The Court at present is only required to determine whether arrest warrants may be issued in terms of article 58, the requirements of which have been met. The Oslo Accords are not a bar to the Court exercising its jurisdiction. Any challenge to jurisdiction in individual cases may only be raised in accordance with article 19.

34. For the reasons outlined above, the Parties are of the view that the Court has jurisdiction to issue warrants of arrest in terms of article 58 and the Oslo Accords have no bearing on the Court's jurisdiction.

Vusimuzi Philemon Madonsela, Ambassador of South Africa to the Kingdom of the Netherlands

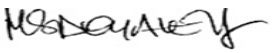


M Riaz Hamidullah, Ambassador of the People's Republic of Bangladesh to the Kingdom of the Netherlands

[31] Article 17(2) of the Rome Statute

Roberto Calzadilla Sarmiento, Ambassador of The Plurinational State of Bolivia in The Netherlands

Issimail Chanfi, Ambassasdor and Permanent Representative of the Union of the Comoros to the United Nations in New York



Mohamed Siad Doualeh, Ambassador and Permanent Representative of the Republic of Djibouti to the United Nations in New York

Dated this 6 August 2024

At The Hague, Netherlands
New York, USA