

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: **6 August 2024**

**PRE-TRIAL CHAMBER I**

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

**SITUATION IN THE STATE OF PALESTINE**

**Public**

**Palestine Independent Commission for Human Rights (ICHR)  
Written Observations Pursuant to Rule 103**

**Source: Palestine Independent Commission for Human Rights (ICHR)**

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

**The Office of the Prosecutor**

Mr Karim A. A. Khan KC

**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**

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**Victims Participation and Reparations  
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## **I. Introduction and summary**

1. As is set out in the Written Observations of the League of Arab States, which the Palestine Independent Commission for Human Rights (ICHR) endorses, there is no legally-operative limitation to the exercise of criminal jurisdiction by the State of Palestine over Israeli nationals in the territory of the State of Palestine based on the Oslo Accords.<sup>1</sup> Assuming, *arguendo*, the contrary position, such a limitation does not effect a corresponding limitation on the jurisdiction of the present Court with respect to that territory. As will be explained, the Court's jurisdiction is not derivative of the jurisdiction of the State or States whose agreement, as here, in the case of the State of Palestine, is the basis for meeting the preconditions for the Court's exercise of that jurisdiction. Not only is the contrary approach, that States 'delegate' their jurisdictional competence to the Court in such circumstances, manifestly without merit. Also, as will be explained, applying this approach in practice would lead to an absurd situation of acute complexity and temporal instability creating a serious risk of jeopardizing the very operation of the Court itself.

## **II. The reason for States being involved in the creation of the Court, and sometimes needing to consent as a precondition to the exercise of the Court's jurisdiction**

2. The present Court was created by States through the Rome Statute. In some circumstances, but not all (i.e., when there is a Security Council referral), the Court's ability to exercise its jurisdiction depends on whether or not particular types of agreements (being party to the Statute and/or giving consent in relation to a given situation) have been given by either the State of the territory on which the conduct in question occurred, or the State of which the person accused of the crime is a national (in the case of the crime of aggression in particular, additional requirements operate). So, the present Situation is before the Court because the State in the former category, the territorial state, the State of Palestine, has given its agreement.

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<sup>1</sup> See the Written Observations of the League of Arab States, dated 6 August 2024, submitted to the present Court in the Situation in the State of Palestine, ICC-01/18.

3. In the case of the creation of the Court, the involvement of States reflects the fact that the Court is an institution of public international law and, as such, needed to be created by the law-makers of the international legal system, States. In the case of the requirement, sometimes, of certain forms of agreement by certain States before jurisdiction can be exercised, this reflects a policy preference for incorporating a degree of buy-in by at least one of the States with important connections to, and legitimate interests in, the situation.

### **III. The ‘delegation’ approach to the Court’s jurisdiction**

4. The international law of jurisdiction stipulates when States are entitled to apply and enforce their national, including criminal, law. Those rules include, in the case of criminal matters, such entitlements for the State in whose territory the acts in question took place, and the State of the nationality of the alleged offender. States can and do sometimes limit their exercise of these entitlements, doing so in various ways and on various bases, including through treaties with other States. The supposed limitations, stipulated in the Oslo accords, on the exercise by the State of Palestine of its territorial enforcement jurisdiction over Israelis, would fall into this category, were they to be legally operative (which, as indicated, they are not).
5. It is sometimes suggested that, given that the international law of jurisdiction operates in the aforementioned way, including, notably, with the entitlements vested in the territorial State and the State of nationality, and that in some circumstances there is a precondition to the present Court’s jurisdiction requiring certain forms of consent by one or other of these two States, there is somehow a direct link between the jurisdictional entitlements of these States, and the jurisdictional entitlement of the Court. According to this view, the consent of these States is required not simply for the general policy objective outlined in Section II above. More specifically, it is necessary because the very jurisdictional entitlement of the Court itself is somehow derived from the domestic-law-exercise jurisdictional entitlements of States. Thus at least one of two States with such an entitlement—the territorial State and the State of the nationality of the individual—need to consent because their consent effects a delegation of their jurisdictional entitlements to the Court.

6. This approach, that States ‘delegate’ their domestic jurisdictional entitlements to the Court, leads to the idea that the Court’s jurisdiction in the present Situation, in the light of the precondition to its exercise being the consent given by the State of Palestine as the territorial State, is derivative of Palestine’s jurisdictional entitlements. Those entitlements have been ‘delegated’ to the Court, and, necessarily, the Court’s entitlements therefore have to correspond to, and not go beyond, the State of Palestine’s entitlements, since the State of Palestine cannot delegate to the Court competences which it does not have—*nemo dat quod non habet*. On this basis, if (as is not actually the case), Palestine is legally prohibited by the Oslo accords from exercising its territorial criminal jurisdiction over Israeli nationals, then the Court’s jurisdiction is correspondingly limited.

#### **IV. Why the ‘delegation’ approach is wrong**

7. The foregoing ‘delegation’ account fundamentally mischaracterizes the nature of the jurisdiction of the present Court. The Court operates as an institution of the international community, as a means of seeking to reduce impunity for crimes prescribed in international law. When it exercises its jurisdiction, just as when individual States exercise their domestic criminal jurisdiction on the ‘universal’ basis of permitted (and sometimes required) jurisdiction in international law—i.e. not because they have any link of territory or nationality—it does so on the basis of a global-community interest in criminal jurisdiction being exercised. This is entirely different from the other domestic law jurisdictional entitlements of States, which are concerned with the legitimate interests States have in the situation, because of a particular link to it: in the case of the two entitlements being discussed, the situation took place on their territory, and/or the individual suspected of the offense is one of their nationals.
8. It is indeed this legitimate interest that these two States have that also leads to the agreement of one or other of them being sometimes required when it comes to the preconditions for jurisdiction before the present Court. But, as indicated earlier, the purpose there is to enable a certain degree of buy-in by at least one key State-stakeholder to the situation at issue. It is not because somehow the international law entitlement of that State to exercise its domestic criminal law over the situation is

needed by the Court for its own jurisdiction to exist, and is, therefore, somehow delegated to the Court through that consent for that purpose.

9. The fact that the Court's jurisdiction does not operate in this 'delegated' way is reflected in the following:
  - a. The requirement, in certain circumstances, of the consent of the territorial State or the State of nationality, is as a 'precondition' for the Court's exercise of jurisdiction. It is not the basis for the Court's jurisdiction itself. The Court already has a jurisdictional entitlement with respect to the crimes stipulated in the Statute. The requirements of the agreement of one or other of these two States in certain circumstances is, rather, a determinant of whether this already-existing jurisdiction can be exercised. Moreover, it is not the only determinant: in the alternative, this already-existing jurisdiction can be exercised if the Situation is referred to the Court by the UN Security Council. Here, then, jurisdiction can be exercised without there being any consent by any State that would have a domestic criminal jurisdictional entitlement over the situation as a matter of international law. If the Court's jurisdiction was derived from the domestic-law-exercise jurisdictional entitlement of States, and therefore required a delegation from at least one such State with such an entitlement, Security Council referrals constituting an exclusive precondition for the exercise of the Court's jurisdiction would be impossible.
  - b. Unsurprisingly, then, in the provisions stipulating that consent from the territorial State or the State of nationality operate as preconditions to the exercise of jurisdiction, there is no language characterizing this consent as involving a 'transfer' or 'delegation' of these States' own jurisdictional entitlements.
  - c. Equally, the characterization of these two States in the Rome Statute is in terms of the factual links of territory and nationality only, not also that these links give rise to jurisdictional entitlements over the situation in question. This is not language indicating that such entitlements in particular, rather than the link itself

as a general matter (which is, of course, the basis for these entitlements in the international law of jurisdiction) are the reason for requiring their consent.

- d. Likewise, nowhere in the Statute is there a requirement that, when the consent of one or more of certain stipulated States is required, the State or States in question also have to possess a jurisdictional entitlement with respect to the situation that the Court would exercise jurisdiction over. It is notable that, by contrast, when it comes to the particular issue of the Court making a request for surrender or assistance to a State party, the Statute (in Article 98) makes express reference to that State's legal position under general international law as being relevant to the provisions stipulated in relation to that issue.
- e. The Rome Statute provisions on admissibility provide that a case will be inadmissible before the Court if a State with jurisdiction over it is investigating or prosecuting it, or has investigated it and decided not to prosecute, unless, in the case of investigation and prosecution, the State is "unwilling or unable genuinely to carry out the investigation or prosecution", and, in the case of the decision not to prosecute, this decision "resulted from the unwillingness or inability of the State genuinely to prosecute" (Art. 17 para. 1). The Statute further determines that:

In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings. (Art. 17 para. 3).

When it comes to the "unavailability of its national judicial system" which results in the State being "unable to carry out its proceedings", a group of some of the most distinguished experts on the Rome Statute, including individuals involved at a high level in its negotiation and adoption, convened by the Court to provide guidance on complementarity, suggested that one relevant cause of

this may be the “lack of substantive or procedural penal legislation”.<sup>2</sup> Given that in many situations the State with jurisdiction over the case will be the territorial State and/or the state of the nationality of the alleged offender (and often these two States will be one and the same), the implication of including this cause in the context of defining this particular form of inability is as follows. In such situations, a lack of jurisdictional entitlement to prosecute, caused by an absence of the relevant applicable national law on the part of a State whose consent might be the basis for the preconditions for the Court’s exercise of jurisdiction to be met, is not viewed as a bar to the Court exercising jurisdiction. It would make no sense to cover such a situation as an example of when the admissibility requirement concerning inability would be met, if, more fundamentally, the situation would mean that the Court did not have jurisdiction.

**V. The absurd arrangement that applying the ‘delegation’ approach would lead to**

10. If the Court’s jurisdiction was derived from the jurisdiction of the State or States who had given their agreement, when this was required as a matter of the preconditions for the exercise of jurisdiction, and, in consequence, only operated to the extent of the domestic criminal law jurisdictional entitlements of the State or States providing such consent, then in every situation not involving a Security Council referral – i.e. most situations, including the present one – the following absurd arrangement would operate:

- a. The question of whether the Court could exercise jurisdiction, in terms of the precondition rules, would not be simply a matter of nationality or territory— matters which, as the Court’s treatment of the Situation in Palestine indicate, are themselves sometimes far from straightforward.

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<sup>2</sup> Xabier Agirre, Antonio Cassese, Rolf Einar Fife, Håkan Friman, Christopher K. Hall, John T. Holmes, Jann Kleffner, Hector Olasolo, Norul H. Rashid, Darryl Robinson, Elizabeth Wilmshurst, Andreas Zimmermann, ‘Informal Expert Paper: The Principle of Complementarity in Practice’, International Criminal Court (2003), obtainable from [https://www.icc-cpi.int/sites/default/files/RelatedRecords/CR2009\\_02250.PDF](https://www.icc-cpi.int/sites/default/files/RelatedRecords/CR2009_02250.PDF), para. 50

- b. Instead, this question would become acutely complex and highly varied, depending, within the overall frames of the territorial State and/or the State of nationality, on the particular jurisdictional entitlements of the State or States whose consent was at issue.
- c. Each and every such situation and associated case or cases would therefore have a *sui generis* jurisdictional regime, corresponding to whatever the applicable normative picture was, taken from the particular entitlements of the consenting State or States.
- d. In order to determine what this basis was, including its scope, it would be necessary to engage in a detailed appraisal of the domestic criminal jurisdictional entitlements of the consenting State/States, to clarify whether these covered the particular situation and, if so, to what extent. This would potentially require an extraordinarily complex analysis of both domestic and international law, the latter potentially encompassing both general international law and then any specific arrangements applicable to the State or States at issue. All relevant aspects of the jurisdictional regime would potentially have to be addressed, from elements of crimes to temporal, personal and territorial application. If consent came from more than one State (e.g. where the territorial State and the State of nationality are different and both have consented), it would presumably be necessary to engage in a comparative analysis of different normative regimes and have some sort of method for determining what, from each, is 'delegated' to the Court, and how mutual divergencies are to be addressed where these exist. All of the foregoing would involve legal matters on which expert views would likely be in considerable disagreement. Resolving things to arrive at the supposed scope of the jurisdictional entitlement would likely be hugely time-consuming and protracted.
- e. At present, the Court's preconditions to its exercise of jurisdiction are a matter of which (if any) States are parties to the Statute, which (if any) referrals have been made, and, potentially, what changes take place in territorial status and nationality when these things are relevant. This is already a complex and dynamic set of factors to have to account for. However, the 'delegation'

approach to jurisdiction would introduce a degree of complexity allied to an acute likelihood of instability and inconsistency caused by changes over time that would render the entire system precariously unstable. Under this approach, any changes to national and/or international law impacting on the domestic jurisdictional entitlements of the State or States whose consent was at issue would potentially have a direct consequence in altering the Court's jurisdictional entitlement. An unsustainably broad set of processes, open to influence by an unacceptably wide set of actors, could therefore potentially affect that entitlement. Given the protracted temporal nature of proceedings before the Court, there would be a serious likelihood of important changes taking place over the course of the treatment of any given Situation and, within this, any given case, with a consequential risk of a negative effect on the stability and certainty of the Court's jurisdiction, thereby placing Court's ability to function at all into serious jeopardy.

11. The 'delegation' approach is not, therefore, simply erroneous. The foregoing absurd jurisdictional arrangement it would bring about would frustrate the object and purpose of the Rome Statute in its most essential sense, since the very functioning of the Court would be put at risk.

**VI. Conclusion: no limitation to the Court's jurisdiction based on supposed limitations in the jurisdictional entitlements of the State of Palestine; adopting the contrary position places the continued existence of the Court under threat**

12. Even if, as is not the case, there is a legally-valid limitation, derived from the Oslo Accords, to the exercise of criminal jurisdiction by the State of Palestine in the territory of Palestine excluding Israeli nationals, this is irrelevant to the scope of the Court's jurisdiction over Palestine, when Palestine's acceptance, as the territorial state, is the basis for the preconditions to the Court's exercise of jurisdiction being met. The Court's jurisdiction is not somehow 'delegated' to it by the State or States whose agreement is sometimes the basis, as here, for the preconditions to the exercise of jurisdiction being met. There could not be, then, any exclusion of Israeli nationals from the Court's exercise of jurisdiction over the territory of the State of Palestine based on a supposed (actually non-existent) Oslo-based exclusion of these individuals from Palestine's own

jurisdictional entitlements, since the scope of the Court's jurisdiction is not determined in this fashion to begin with.

13. Given that the erroneous nature of the 'delegation' approach is so manifest, it can be speculated that those who have sought to advance the approach are doing so for a reason other than its merit: their objective is to achieve what the adoption of it would bring about—the absurd situation, which risks threatening the continued existence of the Court, outlined above. Although they may be motivated by a desire to frustrate the Court in addressing the Situation in Palestine in particular, their arguments are of general application. Whether they intend this or not, the effect of the arguments they are making is to risk bringing about the end to the effective functioning of the Court. The continued existence of the Court as a general matter is under threat, and a rejection of the 'delegation' approach in this particular Situation is therefore vital, not only for the Court's effective treatment of the Situation in Palestine, but also for the future survival of the Court as a general matter.

Respectfully submitted,



Ralph Wilde

Senior Counsel

Palestine Independent Commission for Human Rights (ICHR)

6 August 2024

Ramallah, State of Palestine