

**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 Document

**Written Observations
by Colombia Pursuant to Rule 103**

Source: The Republic of Colombia

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

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I. INTRODUCTION

1. Pursuant to Rule 103(1) of the Rules of Procedure and Evidence (the “Rules”) and the Decision of 22 July 2024 by Pre-Trial Chamber I (the “Chamber”) of the International Criminal Court (hereinafter “ICC” or “the Court”), the Republic of Colombia hereby submits its observations in relation to the “Situation in the State of Palestine”.

2. Colombia, as a State Party to the Rome Statute – having signed it on 10 December 1998 and deposited its instrument of ratification on 5 August 2002, submits these observations as it is convinced that the Court has jurisdiction with regard to the situation in the State of Palestine, and it is entitled to exercise such jurisdiction with regard to crimes against humanity and war crimes committed in the territory of Palestine, a State Party to the Rome Statute. In Colombia’s view the Oslo Accords do not present a bar for the exercise of this jurisdiction, as will be further explained below.

II. HISTORY OF THE PROCEEDINGS

3. On 22 January 2020 the Prosecutor filed a request pursuant to Article 19(3) of the Rome Statute for a ruling on the Court’s territorial jurisdiction in Palestine, specifically whether the Court has territorial jurisdiction over the Occupied Palestinian Territory comprising Gaza, the West Bank, including East Jerusalem.¹

4. On 5 February 2021, Pre-Trial Chamber I issued the “Jurisdiction Decision”, determining that Palestine qualifies as “[t]he State on the Territory of which the conduct in question occurred for the purposes of Article 12(2) (a) of the Statute”, and “that the Court’s territorial jurisdiction in the *Situation in Palestine* extends to the territories occupied by Israel

¹ ICC-01/18-12, together with Public Annex A.

since 1967, namely Gaza and the West Bank, including East Jerusalem”.² Nevertheless, Pre-Trial Chamber I did not address all jurisdictional issues relating to the Oslo Accords, concluding that “when the Prosecutor submits an application for the issuance of a warrant of arrest or summons to appear under article 58 of the Statute, or if a State or a suspect submits a challenge under article 19(2) of the Statute, the Chamber will be in a position to examine further questions of jurisdiction which may arise at that point in time”.³

5. On 20 May 2024, the Prosecutor announced that applications for arrest warrants had been made in the *Situation in Palestine* pursuant to Article 58 of the Statute.⁴

6. On 10 June 2024, the United Kingdom filed a request for leave to provide written *amicus curiae* observations on “whether the Court can exercise jurisdiction over Israeli nationals, in circumstances where Palestine cannot exercise criminal jurisdiction over Israeli nationals pursuant to the Oslo Accords”.⁵

7. On 27 June 2024, Pre-Trial Chamber I issued a decision on the United Kingdom’s request, authorizing that government to submit written observations by 12 July 2024. By means of a decision dated 27 June 2024, this time-limit was later extended until 26 July 2024. The same decision also set “the deadline for any other requests for leave to make observations under Rule 103 of the Rules for 12 July 2024”.⁶

8. On 12 July 2024, Colombia requested the Pre-Trial Chamber, pursuant to Rule 103, for leave to submit written observations on this issue in the *Situation in Palestine*. On 22 July 2024, the Chamber authorized Colombia to submit such observations.

9. On 26 July 2024 it was reported that the United Kingdom had withdrawn its request.

III. SUBMISSIONS

A. The ICC has jurisdiction over acts committed in the territory of Palestine, including the occupied territories

² ICC-01/18-143.

³ ICC-01/18-143, para. 131.

⁴ Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for arrest warrants in the situation in the State of Palestine.

⁵ ICC-01/18-171, para. 27.

⁶ ICC-01/18-173-Red, para. 6.

10. A preliminary point that deserves mention is that Rule 103 is not to be deemed as the appropriate route to submit under consideration of the Court allegations such as those made by the United Kingdom. The Rome Statute and the Court's Rules of Procedure duly provide for the possibility that the Court's jurisdiction or the admissibility of an individual case are questioned, and this normally would be made in the fashion of formal objections raised by a party with a direct legal interest, such as the State involved or the suspect, under Article 19 (2) of the Statute.

11. While the United Kingdom is intending to make a case against the exercise of the jurisdiction of the Court in these proceedings basing itself entirely on the import of the Oslo Accords, that State is not in any manner involved in the case and is not even a party to the Oslo Accords. However, the death toll in the current conflict in Gaza imposes that no efforts should be spared in ensuring that the ICC acts swiftly in regard to this situation. Therefore, and despite the unusual route which the United Kingdom decided to take in relation to the exercise of jurisdiction of the Court, Colombia has deemed it appropriate to respond to the questions raised in the request and thus furnish the Court with its own perspective. It is also what the State of Palestine has chosen to do, and this is enough guidance as far as Colombia is concerned.

12. In this vein, Colombia submits that the question before the Court concerns only certain aspects of the *ratione materiae* jurisdiction of the Court, its *ratione personae* jurisdiction being fully established on the basis of three mutually reinforcing propositions, namely:

First, that Palestine is a sovereign State that has been recognized as such by a large number of States. The UN Security Council has failed to recognize this situation and has refrained from exercising its responsibilities under the UN Charter in a manner that allows Palestine to become a full-fledged member of the Organization. Nevertheless, under UNGA Resolutions 67/19 and 58/292, Palestine has unequivocally been recognized as a State and has been granted virtually the same prerogatives that other Member States possess.

Second, that Palestine is a full-fledged State Party to the Rome Statute, having ratified it on 2 January 2015. The UN Secretary-General, acting as depositary, has produced the necessary notifications in due time and all States Parties to the Rome Statute have been put on notice that they now are in a treaty-relationship with the State of Palestine with regard to the functioning of the ICC.

Third, that the ICC territorial jurisdiction over conducts occurring in Gaza and the West Bank, including East Jerusalem, is well established. The Court’s decision of 5 February 2021 is crystal clear on this matter and it has the force of *res judicata*. The only aspect not decided then was what the Chamber called “jurisdictional issues relating to the Oslo Accords”. These issues, and only these, are what is before the Court at the present stage of the proceedings.

B. The Oslo Accords do not exclude or limit in any manner the Court’s jurisdiction over the Situation in Palestine

13. The 1993 Declaration of Principles on Interim Self-Government Arrangements (“Oslo I Accord”) and the 1995 Interim Agreement on the West Bank and the Gaza Strip (“Oslo II Accord”), between Israel and the Palestine Liberation Organization (PLO) did not prevent or limit in any way, the involvement or exercise of jurisdiction of international courts. Indeed, Oslo I and Oslo II entail a set of agreements between Israel and the PLO that established a peace process for the Israeli-Palestinian conflict through a mutually negotiated two-State solution.

14. Annex IV of Oslo II, known as “the Protocol Concerning Legal Affairs”, regulates issues of criminal jurisdiction between the two States, Israel and Palestine, making specific references to their own criminal judicial systems. Furthermore, Annex IV does not contain a mention or a list of international crimes but refers generally to the domestic criminal jurisdiction of both States, without enlisting the types of conducts that those jurisdictions would be able to prosecute. Indeed, numerals 1 and 2 of Annex IV include references to general terms labelled as “offences”. Annex IV does not contain any limitation for referrals to international tribunals.

15. It is therefore clear that the parties to the Oslo Accords did not intend to regulate nor limit issues relating to accountability for international crimes by means of these instruments. Therefore, they cannot be interpreted as having intended to prevent the State of Palestine from accepting the jurisdiction of an international court as pertains to serious crimes of international concern.

16. Contrary to the proposition that the Oslo Accords would exclude the jurisdiction of the ICC, Colombia is of the view that they do not contradict such jurisdiction. Indeed, the principle of complementarity, embodied in and cornerstone of the Rome Statute, dictates that the ICC would not exercise jurisdiction in those cases in which the State having jurisdiction over one or more of the crimes under the jurisdiction of the Court is willing or able to exercise jurisdiction.

Therefore, if it is to be understood, *quod non*, that by signing the Oslo Accords at the time, Palestine would be prevented from its sovereign entitlement to exercise judicial functions by means of agreeing to a temporary compromise whereunder it would be unable to exercise criminal jurisdiction over nationals of Israel, then it would follow that, precisely, after becoming a party to the Rome Statute, such alleged inability of Palestine to prosecute Israeli nationals would necessarily trigger the operation of the ICC's complementary jurisdiction.

17. Furthermore, accepting that a State can impede the ICC's jurisdiction, merely by entering into bilateral agreements, would render futile the provisions of the Rome Statute. Colombia is of the view that if Palestine's inability to exercise its full competence over crimes committed by Israel nationals in its territory as a result of the Oslo Accords were considered to preclude the ICC from dealing with those offences, it would encourage the commission of international crimes in the occupied territory. This would be plainly contrary to the letter and spirit of the Rome Statute.

18. It is also relevant to mention that this is not the first time that the ICC has initiated proceedings while a situation of armed conflict is ongoing, as attested by cases such as those of Uganda and the DRC. Indeed, the existence or non-existence of an armed conflict is not prescribed as valid grounds for inadmissibility or more generally as a bar for the ICC to be able to act over a specific situation.

19. As for the fact that an ongoing armed conflict would require extra care in activating the jurisdiction of the ICC, as to allow more time for the judiciary to exercise the proper procedures, the Prosecutor has been clear in that "any complementarity objection would require that the Israeli judiciary actually investigates the crimes for which the Prosecutor has sought arrest warrants"⁷.

20. Unlike instances in which the ICC might be considered as prompted to "take 'considered decisions' that [would] entail selecting cases that do not significantly destabilize the social and political situations in the states concerned"⁸, in Colombia's view the situation in the Occupied

⁷ Stefan Talmon, Israel-Hamas 2024 Symposium – Pro-Israel Lawfare, Symbolism, or Genuine Legal Concern?, <https://lieber.westpoint.edu/pro-israel-lawfare-symbolism-or-genuine-legal-concern/>. This was stressed by the Prosecutor in his statement of 20 May 2024. ICC-OTP, Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for arrest warrants in the situation in the State of Palestine, 20 May 2024, <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state>

⁸ Clark, referring to Office of the Prosecutor. Remarks by the ICC Prosecutor Luis Moreno-Ocampo at the 27th Meeting of the Committee of Legal Advisers on Public International Law (CADHI), Held in Strasbourg, on 18–19 March 2004, 19 March 2004, The Hague: ICC, 4.p. 1185.

Palestine Territory has reached such a heightened status of social and political unrest and disruption that an ICC investigation could only but help appease the dire state of things in the region.

21. For its part, if the contention by the United Kingdom that the Oslo Accords prevent the Court from assuming jurisdiction were to be deemed as correct, it would imply the possibility for the exemption or reduction, by means of an agreement, of a State Party's obligations, under the Statute, to investigate and prosecute crimes falling within the jurisdiction of the ICC. In Colombia's view such an agreement would be invalid, as the Statute embodies fundamental prohibitions that reflect *ius cogens* rules. Without a doubt, international norms governing accountability for war crimes, crimes against humanity and genocide, embody peremptory norms of international law accepted as such by the international community as a whole. Because of this high normative statute, States cannot be dispensed from the obligation to comply with these norms based on a bilateral agreement.

22. In addition, such norms embody *erga omnes* obligations, in the observance of which all members of the international community have a legal interest. There is also the circumstance that all States Parties to the Rome Statute bear among themselves *erga omnes partes* =obligations, as recognized in the case-law of the International Court of Justice.⁹

23. The International Court of Justice also referred to the Oslo Accords in its Advisory Opinion concerning the *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, rendered on 19 July 2024. The Court stated that "...the Oslo Accords cannot be understood to detract from Israel's obligations under the pertinent rules of international law applicable in the Occupied Palestinian Territory".¹⁰

24. Colombia entirely shares the view that the Oslo Accords cannot be used as an excuse to detract from obligations under international law, and much less so detract from obligations *erga omnes partes* such as the ones contained in the Rome Statute.

⁹ ICJ, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, 20 July 2012, I.C.J. Reports 2012, p. 449, para 68; ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Preliminary Objections, Judgment, 22 July 2022, I.C.J. Reports 2022, pp. 515-516, paras 107-108.

¹⁰ ICJ, *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion, 19 July 2024, par. 102.

25. For its part, the United Kingdom has pointed out in its request that, in circumstances where Palestine cannot exercise criminal jurisdiction over Israeli nationals pursuant to the Oslo Accords, there is an effect on the jurisdiction of the Court, specifically on the present application for arrest warrants. However, as Colombia stated in its request dated 12 July 2024, the Statute already contains provisions to address the issue at hand, in particular Articles 97 and 98.

26. Article 97 is not intended to exclude *ipso facto* the jurisdiction of the Court since it lays down a procedure whose primary purpose is to promptly resolve possible problems posed by competing requests, so as to render the requests executable and ensure good faith cooperation between State Parties and the Court.

27. In this context, Colombia is of the view that there are no existing obligations under international agreements that would limit the exercise of the Court's powers in the present case. An interpretation in good faith, consistent with Article 31 of the Vienna Convention on the Law of Treaties, makes it particularly clear that while the Oslo Accords provide for a range of political and administrative frameworks, they are not international agreements "pursuant to which the consent of a sending State is required to surrender a person of that State to the Court", to follow the precise wording of Article 98 (2) of the Statute.

28. On the other hand, while Article 98 (2) contains references to the term *international agreements*, it is worth noting that the State of Palestine did not make any reservation in this regard. This further confirms that the Oslo Accords were never considered as containing any relevant legal obligations that would trigger the restrictions contained in Article 98 (2).

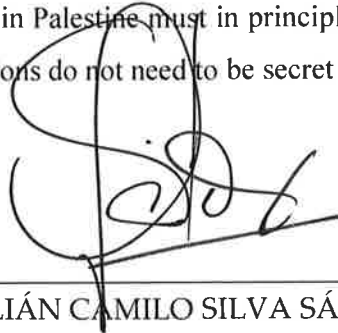
IV. CONCLUDING REMARKS

29. For the above reasons, Colombia respectfully submits that the Court should not decline jurisdiction in the present circumstances.

30. As the ICTY Appeals Chamber did in the *Blaskić* Decision, the Court must duly take into account and be mindful of considerations of sovereignty in pursuing the object and purpose of the Rome Statute. In the present proceedings, it is the sovereignty of the State of Palestine, the country in which territory the crimes in question have been committed, that must be factored in by the Court when ruling upon the request by the United Kingdom. As put forward by the

Court's Prosecutor in its request for arrest warrants, evidence attests to the fact that nationals of the State of Israel bear criminal responsibility for horrific crimes ordered or committed by them in the territory of Palestine, a State that has consented to the ICC's jurisdiction. The conditions for the exercise of the Court's jurisdiction are thus satisfied and the Court must act.

31. Finally, while Colombia is cognizant of the fact that Pre-Trial Chamber I has stipulated that all filings in the situation in Palestine must in principle be classified as secret, it is of the view that the present observations do not need to be secret or confidential.



JULIÁN CAMILO SILVA SÁNCHEZ

Chargé d'Affaires A.I. Embassy of Colombia to the Kingdom of The Netherlands

Dated this 6 August 2024

At The Hague, Netherlands