

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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PRE-TRIAL CHAMBER I

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

SITUATION IN THE STATE OF PALESTINE

Public Document

***Amicus curiae* observations of Prof. William Schabas pursuant to Rule 103**

Source: Professor William Schabas

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

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1. In my application for leave in the present proceedings,¹ I urged the Pre-Trial Chamber to revisit its decision to admit submissions by various third parties at the stage of issuance of an arrest warrant. The United Kingdom had sought to bypass the provisions of the Rome Statute governing challenges to jurisdiction. Despite the wise decision of the United Kingdom not to pursue its meddling, the Pandora's box has been opened. Now, the scope of the submissions is unclear. The applications for leave to intervene remain secret and it is therefore impossible for intervenors to know the issues that others will raise. I am concerned that some who intervene will seek to revisit matters that were settled by the Pre-Trial Chamber in its 5 February 2021 decision. For this reason, my observations may go beyond the Oslo Accords issue that had been initially raised by the United Kingdom and that appeared to be its only concern.

A. Palestine's status as a State Party to the Rome Statute

2. In his Partly Dissenting Opinion of 5 February 2021, Judge Kovács expressed doubts about Palestine's status as a State Party. If the Pre-Trial Chamber is invited to return to this issue by some of the intervenors, it should be aware of relevant recent developments.
3. On 18 April 2024, twelve Members of the United Nations Security Council voted to recommend that the State of Palestine be admitted to membership in the United Nations. Of those voting in favour, eight are States Parties to the Rome Statute and two others are signatories. Two States Parties, Switzerland and the United Kingdom, abstained. In explaining their position, neither Switzerland nor the United Kingdom indicated that they had abstained because they had any doubts about the State of Palestine's fulfilment of the

¹ Request by Professor William Schabas to submit amicus curiae observations, ICC-01/18-186-SECRET-ExpAnx.

conditions for membership set out in the Charter of the United Nations.²

Currently, the only obstacle to United Nations membership of the State of Palestine is the Security Council veto of the United States, a country distinguished by its hostility to the International Criminal Court in general and to the investigation in the *Situation in Palestine* in particular.

4. In the Advisory Opinion issued by the International Court of Justice on 19 July 2024, Judge Gómez Robledo discussed the Security Council vote and the veto of the United States. He noted that the United States had imposed conditions for its consent to admit Palestine that are incompatible with the Charter of the United Nations. He cited an earlier Advisory Opinion declaring that a Member State was ‘not juridically entitled to make its consent to the admission dependent on conditions not expressly provided’ in Article 4(1) of the Charter.³ He said that the State of Palestine ‘fully meets’ the conditions for membership in the United Nations according to the Charter.⁴
5. Judge Gómez Robledo noted that on 10 May 2024, following the American veto, the General Assembly ‘adopted resolution ES-10/23 with 143 votes in favour, that is two thirds of Member States. Under this resolution, the General Assembly decides to extend the rights of Palestine as an observer State and stresses “its conviction that the State of Palestine is fully qualified for membership in the United Nations in accordance with Article 4 of the Charter”’.⁵ He invoked the Pre-Trial Chamber’s decision of 5 February 2021 as confirmation ‘that Palestine cannot be treated otherwise than as a State under international law’.⁶

² S/PV.9609, pp. 6-7 (United Kingdom), pp. 7-8 (Switzerland).

³ *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, Advisory Opinion, [1948] I.C.J. Reports 65, operative clause, para. 1.

⁴ *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion, 19 July 2024, Separate Opinion of Judge Gómez Robledo, para. 9.

⁵ *Ibid.*, para. 10.

⁶ *Ibid.*, para. 11.

B. The Oslo Accords issue

6. Far from suggesting that the State of Palestine has no jurisdiction over crimes committed on its territory by nationals of Israel, the Oslo Accords actually support the opposite view. According to the Accords, the Palestinian Council may legislate on the basis of territorial and functional jurisdiction 'except for Israelis', as the Pre-Trial Chamber noted in 2021.⁷ In other words, Palestine may enforce criminal justice with respect to nationals of all States 'except for Israelis'.
7. This exception is contained in the Oslo Agreement because in the normal course of affairs the State of Palestine has unlimited territorial jurisdiction over criminal justice, like all other States. Actually, it has obligations to exercise this jurisdiction without exception pursuant to the Genocide Convention and other human rights and humanitarian law instruments.
8. The claim that Israel somehow conferred a limited criminal law jurisdiction upon the State of Palestine reflects a colonialist vision. But as the International Court of Justice has recognized, Palestine is an occupied territory.⁸ Earlier this month the Court explained that 'occupation is a temporary situation to respond to military necessity, and it cannot transfer title of sovereignty to the occupying Power'.⁹ Palestine is not a colony of Israel. Israel cannot give it jurisdiction and it cannot take it away. International humanitarian law

⁷ *Situation in Palestine* (ICC-01/18), Decision on the Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine, 5 February 2021, para. 125.

⁸ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, I.C.J. Reports 2004, p. 136.

⁹ *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion*, 19 July 2024, para. 105.

recognizes the predominant and enduring status of the criminal justice system of the occupied State.¹⁰

9. Many States do not exercise criminal justice to the full extent that is permitted under international law. In that sense, the State of Palestine is hardly alone. For example, some have chosen not to allow for prosecution on the basis of universal jurisdiction with respect to certain international crimes. Some States do not exercise jurisdiction on the basis of nationality, be it 'active' or 'passive'. However, their decision not to do so does not mean that they cannot do so. Furthermore, it has never been suggested that States that lack legislation providing for unrestricted prosecution of international crimes are prevented from 'delegation' of territorial jurisdiction over such crimes to an international tribunal.

10. In my 2020 *amicus curiae* submission to the Pre-Trial Chamber, I challenged the theory of 'delegation' for the purposes of interpreting article 12 of the Rome Statute.¹¹ Nevertheless, it may be helpful to view the Oslo Accords as a form of delegation by Palestine to Israel of criminal law jurisdiction over Israeli nationals. If Palestine lacked the right to exercise criminal law jurisdiction over its territory, why would Israel have insisted on including the exception for Israeli nationals in the Oslo Accords?

11. The 'Oslo Accords issue' was addressed in some detail in the 2021 Decision¹² and in the Partly Dissenting Opinion of Judge Péter Kovács,¹³ as well as in the

¹⁰ Hague Convention respecting the laws and customs of war on land, 1907, Regulations, art. 43; Convention relative to the protection of civilian persons in time of war, (1949) 75 UNTS 287, art. 64.

¹¹ *Situation in Palestine* (ICC-01/18), Opinion in Accordance with Article 103 of the Rules of Procedure and Evidence, 15 March 2020, para. 26. See also Leila Nadya Sadat, 'The Conferred Jurisdiction of the International Criminal Court', (2023) 99 *Notre Dame Law Review* 549.

¹² *Situation in Palestine* (ICC-01/18), Decision on the Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine, 5 February 2021, paras. 25, 39, 124-129.

¹³ *Situation in Palestine* (ICC-01/18), Judge Péter Kovács' Partly Dissenting Opinion, 5 February 2021, paras. 282-371.

submissions of the Prosecutor and those of several *amici curiae*, some of them States Parties. Three States Parties in the 2020-2021 proceedings, the Czech Republic, Germany, and Hungary, have applied to intervene once again. They will probably revive the claims about the significance of the Oslo Accords that they made four years ago. For this reason I focus my observations on the dissent of Juge Kovács and the earlier submissions of the Czech Republic, Germany, and Hungary.

C. Germany's reference to the Pre-Trial Chamber's decision in Bangladesh/Myanmar

12. In its 2020 submission to the Pre-Trial Chamber, Germany referred to the Pre-Trial Chamber's decision of 6 September 2018 concerning territorial jurisdiction in the Bangladesh/Myanmar situation. As confirmation that jurisdiction 'in the absence of a Security Council referral – can only be delegated by States', Germany quoted the Pre-Trial Chamber: '[T]he 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'.¹⁴ Germany truncated the citation, apparently because the phrase following 'their legal systems' was not helpful to its position. The full statement reads: '[T]he 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, *within the confines imposed by international law and the Statute*' (emphasis added). Moreover, the sentence that

¹⁴ *Situation in Palestine* (ICC-01/18), Observations by the Federal Republic of Germany, 16 March 2020, para. 26, citing *Request under Regulation 46(3) of the Regulations of the Court* (ICC-RoC46(3)-01/18), Decision on the 'Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute', 6 September 2018, para. 70.

followed, also ignored by Germany, warned against ‘a restrictive reading of article 12(2)(a) of the Statute’.

13. The phrase cited by Germany in 2020, taken as a whole and without the omission, and read in context, together with the subsequent ruling by the Pre-Trial Chamber authorizing the opening of an investigation, confirms that the words ‘would be allowed’ mean ‘would be allowed under international law and the Rome Statute’ and not ‘would be allowed under their own domestic law’.
14. In its 14 November 2019 decision in the Bangladesh/Myanmar situation, to which Germany did not refer, the Pre-Trial Chamber examined the practice of States in general in order to determine the limits imposed upon territorial jurisdiction by international law.¹⁵ It referred to the scope of territorial jurisdiction in a large number of States but in no place, interestingly, did it consider the law in effect in either Bangladesh or Myanmar. The Chamber was assessing State practice in a general sense in order to identify the limits of territorial jurisdiction imposed by international law for the purposes of interpreting the reference to territorial jurisdiction in article 12(2)(a).
15. Germany’s misleading reference to the Chamber’s case law was meant to suggest that territorial jurisdiction in the sense of article 12(2)(a) will vary from one State to another. This is obviously wrong. The territorial jurisdiction that results from the State of Palestine’s accession to the Rome Statute is defined by international law, not by the law of the State of Palestine or by bilateral agreements that may apply. It is the same territorial jurisdiction that

¹⁵ *Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar* (ICC-01/19), Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar, 14 November 2019, paras. 54-57.

applies with respect to the ratification by Germany and to that of the other States Parties.

16. There is another problem with the so-called 'delegation' approach.

Troublesome enough with respect to territorial jurisdiction, it may lead to even more problems for active personality jurisdiction, which is governed by article 12(2)(b). Although all States exercise territorial jurisdiction in much the same way, many do not provide for active personality jurisdiction in their domestic law or use it in only limited circumstances. If the delegation theory is adopted, is article 12(2)(b) inapplicable to such States?

D. Judge Kovács's 'harmonized approach'

17. Judge Kovács proposed a 'harmonized approach' by which article 12(2)(a) of the Rome Statute would be somehow reconciled with the exclusion of Israeli nationals effected by the Oslo Accords.¹⁶ He suggested two routes to achieve this.

18. Judge Kovács contended that the Oslo Accords should be applied by the Pre-Trial Chamber in accordance with article 21(1)(b) of the Rome Statute.¹⁷ His suggestion that the meaning of 'applicable treaties' contemplated by the provision goes beyond widely ratified multilateral instruments in areas like human rights and humanitarian law and includes highly contested bilateral instruments is novel, to say the least. It is unsupported by the Court's case law and by academic commentary.¹⁸

¹⁶ *Situation in Palestine* (ICC-01/18), Judge Péter Kovács' Partly Dissenting Opinion, 5 February 2021, para. 366.

¹⁷ *Ibid.*, paras. 284-285.

¹⁸ Margaret deGuzman, 'Article 21', in Kai Ambos, ed., *Rome Statute of the International Criminal Court, Article by Article Commentary*, 4th ed., Munich: Beck, 2021, pp. 1128-1147, pp. 1136-1137.

19. If Article 21(1)(b) had been intended to apply to all treaties, bilateral as well as multilateral, which seems to be the assumption of Judge Kovács, surely the terms of the provision would have been worded differently. As Judge deGuzman explains in her commentary on the provision, applying bilateral treaties in this way contributes unnecessarily to fragmentation of international criminal law.¹⁹
20. Judge Kovács also considered that article 31(3)(c) of the Vienna Convention on the Law of Treaties would permit the Oslo Accords to influence the interpretation of article 12(2)(a) of the Rome Statute.²⁰ A similar point was made by Hungary in its submission to the Pre-Trial Chamber in 2020.²¹ However, the same difficulty of fragmentation arises. It is one thing to use widely ratified multilateral treaties to interpret another widely ratified multilateral treaty and quite another to suggest that a treaty with 124 States Parties be interpreted in light of a questionable bilateral agreement.
21. The European Court of Human Rights, which has frequently applied article 31(3)(c) of the Vienna Convention in the interpretation of the European Convention on Human Rights, provides assistance here. Ruling on admissibility in a case where the respondent State invoked a treaty obligation it had incurred prior to becoming a party to the European Convention, the Grand Chamber considered that the existing bilateral obligation posed no obstacle. The Grand Chamber noted that some States had formulated reservations to the European Convention at the time of ratification in order to ensure they could comply with existing bilateral treaties.²²

¹⁹ *Ibid.*, p. 1136.

²⁰ *Situation in Palestine* (ICC-01/18), Judge Péter Kovács' Partly Dissenting Opinion, 5 February 2021, para. 63.

²¹ *Situation in Palestine* (ICC-01/18), Public written observations by Hungary pursuant to Rule 103, 16 March 2020, para. 49

²² *Slivenko et al. v. Latvia* [GC] (dec), No. 48321/99, 23 January 2002, para. 61.

22. Reservations to the European Convention are permitted by the treaty.

However, they are forbidden by article 120 of the Rome Statute. Article 120 provides further confirmation of the intent of the drafters to avoid fragmentation.

23. Judge Kovács's theory of divided or overlapping territorial jurisdiction creates great risks for the integrity of the Rome Statute system. It could encourage the proliferation of bi-lateral impunity agreements along the lines of those promoted by the United States in 2002 and 2003. The consequences of such theories for the exercise of jurisdiction by the Court in other territories subject to foreign occupation, such as the enclaves in Georgia, and occupied territories like Crimea, the Donbas and northern Cyprus, might also be borne in mind by the Pre-Trial Chamber.

E. Complementarity

24. The issue of complementarity has also been raised, for example by the Czech Republic in its 2020 submission.²³ Jurisdiction of the International Criminal Court has never been contingent on a State being in a position to investigate and prosecute the crimes itself. For example, several States Parties that have ratified the aggression amendments have no domestic provisions governing prosecution of the crime.

F. Conclusions

25. These issues cannot be adequately addressed in ten pages. My application for leave addressed some additional points that may assist the Pre-Trial Chamber, including the territorial declarations of a few States and the exclusions *rationae*

²³ *Situation in Palestine* (ICC-01/18), Submission of Observations Pursuant to Rule 103 [Czech Republic], 12 March 2020, para. 13.

personae that result from the two Security Council referrals, as well as my qualifications to provide this submission.

26. A proper construction of Article 12(2)(a) should leave no exceptions, however they may be created. The Court may exercise jurisdiction over 'the territory' of a State Party, *point finale*. It may well be that obligations imposed by the Rome Statute make it difficult or even impossible for a State to honour other international obligations. It should not be the task of the Pre-Trial Chamber to contribute to the weakening of the Statute by in some way deferring to such other obligations.

27. One final thought. In light of the information before it, the Pre-Trial Chamber may propose that the Prosecutor consider charges that are additional to those in the request. The Pre-Trial Chamber is referred to the submissions by South Africa and Nicaragua at the International Court of Justice, and those of the intervening States, as well as the report of the Special Rapporteur on occupied Palestine entitled 'Anatomy of a genocide'.²⁴ The Chamber could propose that the Prosecutor add charges of genocide and of the crime against humanity of apartheid to the arrest warrants directed at the two Israeli leaders.

Respectfully submitted.



Professor William Schabas

Dated this 30th day of July 2024 at Paris, France

²⁴ 'Anatomy of a Genocide', Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Francesca Albanese, A/HRC/55/73.