

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original:

*No.: ICC-
Date: 6 August 2024*

PRE-

Before:

SITUATION IN

Public
Amicus Curiae Observations of the Kingdom of Spain
Pursuant to Rule 103 of the Rules of Procedure and Evidence

Source: Kingdom of Spain

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A) Procedural history

1. On 10 June 2024, the United Kingdom (UK) filed a request to provide written *amicus curiae* observations on '[w]hether the Court can exercise jurisdiction over Israeli nationals, in circumstances where Palestine cannot exercise criminal jurisdiction over Israeli nationals pursuant to the Oslo Accords¹. By Order of 27 June 2024, the Pre-trial Chamber I (PTC I) of the International Criminal Court (the "Court") authorized the UK to file written observations pursuant to Rule 103 of the Rules of Procedure & Evidence (para. 5)². Additionally, the Chamber authorised other States, organizations or persons to request for leave to file *amicus curiae* observations, stating that these observations shall be filed by 12 July 2024 (para. 6).

2. On the basis of this authorisation, Spain requested for leave to submit written observations pursuant to Rule 103(1)³. By its Decision of 22 July 2024⁴, the Chamber permitted Spain (and some other States, organisations, and persons) to provide *amicus curiae* observations (para. 11). According to the Court, "the observations shall not be more than ten pages and must be filed no later than 6 August 2024" (para. 12).

B) On the jurisdiction of the Court

3. According to Article 19(1) of the Rome Statute, "the Court shall satisfy itself that it has jurisdiction over any case submitted to it". In this way, the Rome Statute embodies a fundamental procedural principle according to which a judicial body must satisfy itself that it has jurisdiction over any case brought before it before taking any action in respect of that case. Ensuring that it has jurisdiction is therefore a real obligation for the Court.

4. In the context of the Situation in Palestine, the issues of the jurisdiction of the Court and the existence of reasonable basis to proceed under the Statute have been considered repeatedly by both the Prosecutor and the Chamber, in particular with regard to the requirements of Articles 12 and 13.

Indeed, on 16 January 2015, the Prosecutor opened an investigation into the Situation in the State of Palestine to determine whether there is a 'reasonable basis to proceed' (art. 53)⁵.

On that basis, on 20 December 2019⁶, the Prosecutor concluded that the requirements of the Rome Statute to open such an investigation were met. Notwithstanding this, considering the complexity of the legal and factual issues linked to the Situation, and in accordance with article 19.3 of the Statute, the Prosecutor requested PTC to

¹ Request by the United Kingdom for Leave to Submit Written Observations Pursuant to Rule 103, ICC-01/18-171-SECRET-Exp-Anx, para. 27 (reclassified as public on 27 June 2024, ICC-01/18-171-Anx).

² Order deciding on the United Kingdom's request to provide observations pursuant to Rule 103(1) of the Rules of Procedure and Evidence, and setting deadlines for any other requests for leave to file *amicus curiae* observations, ICC-01/18-173-SECRET ('Order') (public redacted version issued on the same date, ICC-01/18-173-Red).

³ ICC-01/18-233-SECRET-Exp-Anx.

⁴ Decision of the Court on requests for leave to file observations pursuant to rule 103 of the Rules of Procedure and Evidence ICC-01/18, 22 July 2024.

⁵ ICC-OTP, Statement of ICC Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination of the Situation in Palestine, and seeking a ruling on the scope of the Court's territorial jurisdiction, 20 December 2019.

⁶ ICC-01/18-12, together with Public Annex A.

rule on the jurisdiction to hear the case and, more specifically, to affirm its view that Palestine is a State Party to the Statute and that the Occupied Palestinian Territories (comprising the West Bank, East Jerusalem and Gaza), constitute the territory of Palestine over which the Court may exercise jurisdiction in accordance with Article 12(2)(a) of the Statute (para. 220).

The Chamber rendered its Decision on 5 February 2021, affirming that Palestine is a State Party to the Statute, that it is «the State on whose territory the conduct in question took place referred to in Art. 12(2)(a) of the Statute, and that the territorial jurisdiction of the Court in the Situation extends to the territories occupied by Israel since 1967, namely Gaza and the West Bank, including East Jerusalem».

Thereafter, on 3 March 2021, the Office of the Prosecutor confirmed the opening of the investigation⁷. Later, on 20 May 2024, the Prosecutor announced that he had filed applications for arrest warrants in the Situation in Palestine pursuant to article 58 of the Statute. The Prosecutor's statement indicated that he had applied for arrest warrants against, on the one hand, Yahya Sinwar, Mohammed Diab Ibrahim Al-Masri, and Ismail Haniyah, and, on the other hand, Benjamin Netanyahu and Yoav Gallant. It provided further details, including identifying the charges, the relevant time period and locations, and the alleged modes of responsibility⁸.

The Prosecutor underlined that, « in presenting these applications for arrest warrants, my Office is acting pursuant to its mandate under the Rome Statute ». In this sense, after considering the PTC I Decision of 5 February 2021, the Prosecutor stated that his Office «also has jurisdiction over crimes committed by nationals of States Parties and by the nationals of non-States Parties on the territory of a State Party»⁹.

The Prosecutor reached this conclusion on the advice of a Panel of Experts in International Law. Paragraphs 9 and 10 of the Panel's Report of 20 May 2024, deal with the jurisdiction of the Court. In the Experts' opinion, the ICC has jurisdiction: 1) in relation to crimes committed on the territory of Palestine, including Gaza, since 13 June 2014, under article 12(2) (a) of the ICC Statute, and 2) over crimes committed by Palestinian nationals inside or outside Palestinian territory under article 12(2) (b) of the Statute. The ICC therefore has jurisdiction over Israeli, Palestinian or other nationals who committed crimes in Gaza or the West Bank. It also has jurisdiction over Palestinian nationals who committed crimes on the territory of Israel, even though Israel is not an ICC State Party. The basis for the Court's jurisdiction is that Palestine, including Gaza, is a State for the purpose of the ICC Statute¹⁰.

5. Thus, it can be concluded that the Prosecutor has no doubt as to the jurisdiction of the Court, taken as a whole in this situation. In fact, his only doubt related to the determination of the territory over which the Court's jurisdiction should be exercised, which motivated the above-mentioned request. Having resolved this question, the Prosecutor has developed his functions on the basis that the Court has full jurisdiction over the situation of the State of Palestine and also over the specific cases of individuals that may be submitted to the Court for consideration.

⁷ <https://www.icc-cpi.int/news/statement-icc-prosecutor-fatou-bensouda-respecting-investigationsituation-palestine>

⁸ <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state>

⁹ Ibid.

¹⁰ PANEL OF EXPERTS IN INTERNATIONAL LAW convened by the Prosecutor of the International Criminal Court, *Report of the Panel of Experts in International Law*, 20 May 2024, page 3.

With regard to the Court, the PTC I only expressly ruled on the Court's jurisdiction in a partial manner, by concluding on the status of the State Party Palestine and by determining the territorial scope of jurisdiction, namely the territory of Palestine as defined in the Decision of 5 February 2021. However, it did not expressly rule on the qualification of the facts investigated by the Prosecutor as crimes within the jurisdiction of the Court, on the nationality of the persons alleged to have committed these crimes, or on the temporal dimension of the jurisdiction established by Article 10 of the Statute.

The silence of the PTC I's Decision on these issues is a consequence of the manner in which the Prosecutor formulated his request, which refers "namely [to] the scope of the territorial jurisdiction of the Court in Palestine". (para. 129 of the Decision of 5 February 2021). And while it does not seem possible to conclude that the Court ignored the elements defining its material and subjective jurisdiction in the Palestinian situation, it is no less true that the PTC I decided not to rule on other issues that were not relevant to the determination of territorial jurisdiction for the purposes of the investigation, in particular issues related to the Oslo Accords that could affect jurisdiction *ratione personae*. It added that "(...) the Chamber's findings relate to the current stage of the proceedings, namely the opening of an investigation by the Prosecutor pursuant to Articles 13(a), 14 and 53(1) of the Statute. If the Prosecutor files an application for the issuance of an arrest warrant or a summons to appear pursuant to Article 58 of the Statute, or if a State or an accused files a challenge pursuant to Article 19(2) of the Statute, the Chamber will be in a position to consider other jurisdictional issues that may arise at that time".

C) The Oslo II Accords and the jurisdiction of the ICC

6. In this context, the UK submits in its application of 10 June 2024 that "in accordance with the Judicial Decision, and pursuant to Articles 19(1) and 58 of the Statute, the outstanding further questions of jurisdiction must now be addressed in determining the request for arrest warrants" (para. 3). The UK also submits that PTC have consistently relied on Art. 19(1) to hold that an initial determination as to whether the case falls within the jurisdiction of the Court is a prerequisite for the issuance of arrest warrants" (para. 17).

The UK's request places particular emphasis on the need to determine whether the Court's subject-matter jurisdiction is affected by the provisions of the above-mentioned Oslo II Agreements.

For all the above, Spain considers that, before issuing an arrest warrant, the Court must be fully satisfied that it has jurisdiction to examine the cases referred to it by the Prosecutor. It must therefore rule on those elements of its jurisdiction on which it has not previously ruled, in particular jurisdiction *ratione personae* and jurisdiction *ratione temporis*. In any event, such a decision must be taken in accordance with the rules laid down in the Rome Statute, which must be interpreted in the light of its object and purpose.

7. With respect to the determination of the Court's jurisdiction *ratione personae*, some States, victims and *amici curiae* participating in the proceedings leading to the PTC's Decision of 5 February 2021 have expressed the view that the Oslo II Agreements have the effect of limiting the subject-matter jurisdiction of the Court. A similar issue was raised by the UK in its application for leave to file an *amicus curiae* brief.

For the proponents of this view, the main argument revolves around Article XVII of the Oslo II Accords. This article deals with jurisdiction and states, among other things, that "the territorial and functional jurisdiction of the Palestinian Council shall apply to all persons, except Israelis, except as otherwise provided in this Agreement"

[(2)(c)]. From this perspective, since Palestine would not be competent to exercise criminal jurisdiction over Israeli nationals, it could not "delegate" to the Court a jurisdiction that it does not possess. Therefore, the Court's jurisdiction *ratione personae* should be exercised only over Palestinian nationals and persons of another nationality who commit crimes within the jurisdiction of the Court on the territory of Palestine, excluding Israeli nationals.

8. From the document filed on 10 June 2024 by the UK to PTC I requesting leave to submit further observations on this matter – even if the U. K. has now changed its position, having renounced its intention to make any observations at this stage -- it transpires that the main question raised was put in these terms: ‘the Oslo Accords issue concerns whether Palestine could delegate (sic) 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’ (para. 28).

It is here submitted that this approach shows a serious misconception of the nature and scope of the jurisdiction of the ICC under the Rome Statute. The ICC jurisdiction is not merely the result of a “delegation” by States Parties of their own national systems of criminal jurisdiction (which, on the other hand, may be quite different from each other in many instances). On the contrary, it must be understood as the collective endowment by States Parties of jurisdictional powers, as defined in the Statute, to investigate and try « the most serious crimes of serious concern to the International community »¹¹. This grant of jurisdictional authority is an expression of the *ius puniendi* inherent in the international community of States for that special category of grave crimes of international concern, which started from the London Charter of 8 August 1945 and is now part of customary international law¹². That this jurisdiction is not merely a “delegation” of States Parties is shown by the fact that the ICC, according to article 27 of its Statute, is not constrained in the exercise of its jurisdiction by any consideration of ‘official capacity’ of persons, unlike national criminal judicial systems which are obliged to respect certain immunities under international law¹³. In this case at least, the ICC jurisdiction must be deemed as encompassing more than the sum total of the jurisdictional reach represented by the national criminal systems of States Parties.

As rightly ruled by PTC I¹⁴ in its decision on jurisdiction in the *Bangladesh/Myanmar* situation, “more than 120 States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity called the ‘International Criminal Court’, possessing objective international personality, and not merely by them alone, together with the capacity to act against impunity for the most serious crimes of concern to the international community”¹⁵.

9. Secondly, it should be stressed that the jurisdiction of the Court is an autonomous and non-delegated jurisdiction, the exercise of which is governed by the provisions of the Statute. This jurisdiction is voluntarily accepted by the States Parties in accordance with the provisions of Article 12 of the Statute, and it is exercised in

¹¹ Preamble, para. 4 and Art. 1 of the Rome statute.

¹² As endorsed by Resolution 95(I) of 9 December 1946 (Affirmation of the Principles of International Law recognized by the Charter of the Nuremberg Tribunal).

¹³ See ICJ, judgment of 14 February 2002 in the case of the *Arrest Warrant, D. R. Congo v. Belgium*, ICJ Reports 2002, paras. 58 and 61.

¹⁴ Echoing the ICJ in its advisory opinion of *Reparation for injuries in the service of the UN*, ICJ Reports 1949, at p. 174 and 185.

¹⁵ Decision on the Prosecutor’s request for a ruling on jurisdiction under Article 19 (3) of the Statute, 6 September 2018, paras. 48-49.

accordance with the model of the relationship between national courts and the ICC, that revolves around the principle of complementarity, which is relevant in assessing the impact that the Oslo Accords may have on the jurisdiction of the Court.

In this regard, it should be recalled that in its recent Advisory Opinion on the *Legal Consequences of Israel's Policies and Practices in the Occupied Palestinian Territory, including East Jerusalem*, of 19 July 2024, the International Court of Justice (ICJ) considered the Oslo II Accords, highlighting Article XIX thereof: "Israel and the Council shall exercise their powers and responsibilities under this Agreement with due regard for internationally recognized norms and principles of human rights and the rule of law" (para. 102).

The ICJ includes international humanitarian law (paras. 96 and 102) and the right to self-determination as an expression of these rules and principles (para. 102)¹⁶. It is certainly appropriate to include also among these internationally recognized norms and principles of human rights and the rule of law the duty of each State to exercise its criminal jurisdiction over those responsible for international crimes, as an instrument to ensure the respect of the principle of accountability, which is a cardinal component of international criminal law. This obligation, which is present in many international treaties and can be said to be of a customary nature, requires that the prosecution of such grave crimes be carried out through measures taken both at the national level and through international cooperation.

This obligation is also at the basis of the model of shared jurisdiction designed in the Rome Statute, built on the principle of complementarity, according to which it is primarily the responsibility of States to investigate and prosecute crimes under Article 5. This explains that when States accept the jurisdiction of the Court (either by ratifying or acceding to the Statute, they do not "delegate" their jurisdiction to the ICC but "accept" it under the rules established in the Rome Statute (Art. 12. para. 1). Actually, the principle of complementarity is an instrument to distribute the exercise of jurisdiction between the domestic criminal courts and the ICC, according to which the States Parties recognise that, under Article 17, the ICC will have jurisdiction when a State is "unwilling or unable genuinely to carry out the investigation or prosecution".

From that approach, even if Palestine could not exercise jurisdiction on the crimes committed by Israeli citizens in its territory because of the application of the Oslo II Agreement, that limitation of the Palestine jurisdiction should not lead to limit the jurisdiction of the Court. On the contrary, this circumstance must be understood as a case for Palestine to be "unable genuinely to carry out the investigation or prosecution" of such

¹⁶ « 102. Several participants in the present proceedings expressed diverging views as to the relevance of the Oslo Accords in general (see paragraph 65 above). The parties to the Oslo Accords agreed to "exercise their powers and responsibilities pursuant to" the Accords "with due regard to internationally-accepted norms and principles of human rights and the rule of law" (Oslo II Accord, Art. XIX). The Court recalls that the "legitimate rights" of the Palestinian people recognized in the Oslo Accords includes the right to self-determination (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004 (I), p. 183, para. 118). The Oslo Accords further precluded the parties from "initiat[ing] or tak[ing] any step that will change the status of the West Bank and the Gaza Strip pending the outcome of the permanent status negotiations" (Oslo II Accord, Art. XXXI (7)). The Court observes that, in interpreting the Oslo Accords, it is necessary to take into account Article 47 of the Fourth Geneva Convention, which provides that the protected population "shall not be deprived" of the benefits of the Convention "by any agreement concluded between the authorities of the occupied territories and the Occupying Power". For all these reasons, the Court considers 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. With these points in mind, the Court will take the Oslo Accords into account as appropriate ».

crimes (Art. 17, paras. 1 and 3). And, as a result, the jurisdiction of the Court would be undisputably recognised with regard to the crimes committed by Israeli citizens in Palestinian territory.

10. Finally, it should also be born in mind that the acceptance by the States Parties of the jurisdiction of the Court over the crimes listed in Articles 6, 7 and 8 of the Statute is full and does not allow for any reservation, since this option is expressly prohibited by Article 120 of the Statute. This applies both to the crimes within the jurisdiction of the Court (which cannot be excluded or limited by the will of a State Party) and to the persons who may be investigated and tried (which include both nationals of a State Party - wherever they may have committed the crime - and any person of another nationality who has committed a crime within the jurisdiction of the Court on the territory of a State Party).

From this perspective, to claim that Article XVII.2.c of the Oslo II Accords excludes the exercise of the Court's jurisdiction over Israeli nationals would be tantamount to introducing a limitation on the Court's jurisdiction unilaterally imposed by a State Party (Palestine), contrary to the obligation it freely and voluntarily assumed to accept the Court's jurisdiction as a whole, without the possibility of making reservations to it. Moreover, this would lead to the conclusion that persons who have committed a crime within the jurisdiction of the Court on the territory of the same State Party (Palestine) would be subject to different rules solely on the basis of their nationality. Such a conclusion would be incompatible with the provisions of article 12, para. 2, of the Statute.

11. Consequently, Spain considers that the ICC's jurisdiction *ratione personae* over crimes committed in the territory of Palestine cannot be limited by the application of the Oslo II Accords. This does not mean, however, that the provisions of the said Agreements cannot be taken into account by the Court for the purposes of the cooperation and mutual legal assistance mechanisms provided for in the Statute, which are only applicable when the Court is exercising jurisdiction over a case.

Conclusions

12. The Chamber must satisfy itself that it has jurisdiction in any case brought before it. Therefore, it is obliged to examine its own jurisdiction when deciding on an application for an arrest warrant if, as in the present case, it has not previously ruled on all the issues related to its own jurisdiction.

The ICC has jurisdiction in relation to crimes included in the Statute committed on the territory of Palestine, including the West Bank, East Jerusalem and Gaza, since 13 June 2014, under article 12(2)(a) of the ICC Statute, and over crimes committed by Palestinian nationals inside or outside Palestinian territory under article 12(2)(b) of the Statute. The ICC therefore has jurisdiction over Israeli, Palestinian or other nationals who committed Statute crimes in Gaza, the West Bank or East Jerusalem.

Article XVII of the Oslo II Agreement, which excludes Israelis from Palestinian territorial and functional jurisdiction, does not alter the Chamber's jurisdiction to decide on the arrest warrants requested by the Prosecutor in the context of this Situation.

The duty of each State to exercise its criminal jurisdiction over those responsible for international crimes, which is at the basis of the ICC, corresponds to one of the internationally recognised norms and principles of human rights and the rule of law which, according to Article XIX of the Oslo II Agreement, Israel and Palestine must follow

in implementing the Agreement. Any provision contained in the Oslo II Agreement must be interpreted under these principles, having in mind the object and purpose of the Rome Statute which is, undoubtedly, to ensure the respect of the principle of accountability regarding the "most serious crimes of international concern".

This obligation is also the basis for the ICC, whose jurisdiction to prosecute these crimes is distinct from and complementary to national criminal jurisdictions, and is exercised on behalf of the international community as a whole.

Respectfully submitted:

Consuelo Femenía Guardiola

Ambassador of the Kingdom of Spain to the Kingdom of the Netherlands



Dated this Tuesday, 6 August 2024.

At The Hague, The Netherlands