

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/18
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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

Written observations by Brazil pursuant to Rule 103

Source: The Federative Republic of Brazil

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

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Mr Karim A. A. Khan KC

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[2 names per team maximum]

Legal Representatives of the Victims
[1 name per team maximum]

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Unrepresented Victims

Unrepresented Applicants
(Participation/Reparation)

**The Office of Public Counsel for
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States' Representatives

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Other

I. Introduction

On 10 June 2024, the United Kingdom filed a request for leave to submit written observations pursuant to rule 103 of the Rules of Procedure and Evidence, in the context of the investigation of the situation in the State of Palestine. In short, the United Kingdom desires to bring to the attention of the Court an issue of jurisdiction that it believes was not decided in 2021, when the Pre-Trial Chamber I issued its decision on the scope of its jurisdiction over the State of Palestine.

2. On 27 June 2024, Pre-Trial Chamber I of the Court decided on the United Kingdom's request and set the deadline of 12 July 2024 for any other requests for leave to file *amicus curiae* observations pursuant to rule 103(1) of the Rules. On 12 July 2024, Brazil presented its application for leave to file *amicus curiae* observations. On 22 July 2024, Pre-Trial Chamber I granted leave to Brazil to submit its observations by no later than 6 August 2024.

3. In accordance with this decision, Brazil submits written observations to assist Pre-Trial Chamber I in examining the question of its jurisdiction over the situation in Palestine, especially the alleged effect of the Oslo Accords on the jurisdiction of Court.

II. Submissions

4. The argument brought forth by the United Kingdom and already elaborated by other *amici curiae* in 2020 can be broadly summarized as follows:

(A) The jurisdiction of the International Criminal Court relies on the delegation by State Parties of their own domestic jurisdiction to the Court;

(B) Limitations on the jurisdiction of State Parties stemming from other obligations under international law, such as bilateral agreements, directly affect the scope of the jurisdictional titles they delegated or can delegate to the ICC, since a State cannot delegate powers that it does not have (*nemo dat quod non habet*);

(C) Under the Oslo Accords, concluded in 1995 between the Palestine Liberation Organization and Israel, the State of Palestine cannot exercise its jurisdiction over Israeli nationals within its own territory;

(D) Therefore, the State of Palestine could not have delegated its jurisdiction over Israeli nationals to the Court, since it does not dispose of such jurisdiction itself.

5. In order to assist the Court in determining the correctness of this argument, Brazil will address each of its premises in the order presented above.

A. The jurisdiction of the ICC and the principle of delegation

6. As Brazil affirmed in its observations on the territorial jurisdiction of the ICC in Palestine, dated 16 March 2020, the jurisdiction of the Court is not based on the principle of universal jurisdiction. Instead, the Court has a limited jurisdictional regime based on the principle of delegation and circumscribed to the provisions of the Rome Statute, as a treaty-based tribunal. As already stated by the Prosecutor, “Article 12(2)(a) itself functions to delegate to the Court the State Parties’ own ‘sovereign ability to prosecute’ article 5 crimes” (ICC-RoC46(3)-01/18-1, para. 49).

B. The principle of delegation and the different types of jurisdiction

7. However, the principle of delegation is not absolute: rather, it is mediated by the norms of the Rome Statute and must be interpreted within their framework. First, jurisdiction itself is not a monolith. The distinction between *prescriptive* and *enforcement* jurisdiction comes into play.

8. As stated by the Permanent Court of International Justice in the *S.S. Lotus* case, “the title to exercise jurisdiction rests in [State] sovereignty” (PCIJ Rep Series A N010, p. 19). However, jurisdiction can be exercised in different ways, under different

limitations. In the *Lotus* Case, the PCIJ stated that “the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State.” The Court noted, however, that it did not “follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad” (PCIJ Rep Series A N010, pp. 18-19). By so reasoning, the PCIJ clearly adopted a distinction between *prescriptive jurisdiction*, that is, the power to legislate, and *enforcement jurisdiction*, that is, the power to enforce legislation. As stated by the PCIJ, different limitations apply to either type.

9. Because jurisdiction is premised on State sovereignty, limits thereupon are exceptional. Save for a small number of substantive restrictions on *prescriptive jurisdiction*, such as those established by *jus cogens*, those limits mostly restrict *enforcement jurisdiction*, or, as the PCIJ put it, “the exercise of [State] power”, for instance, in the case of diplomatic immunities. Exceptions of this nature bar States from enforcing their legislation, but they do not abrogate such legislation in respect of the persons or facts covered by the exceptions. A crime committed by a person enjoying personal immunity is still a crime, even if a State may be prevented from exercising its enforcement jurisdiction over it.

10. These concepts must also be taken into view when considering the delegation of criminal jurisdiction by State Parties to the ICC. As the Office of the Prosecutor understands it, “[t]he right to delegate jurisdiction is reflective of an internationally recognized legal authority, and not of the material ability of actually exercising jurisdiction over either the territory in question or over certain individuals within or outside that territory” (ICC-01/18-12, para 184). This is an important distinction: when State Parties delegate their criminal jurisdiction to the ICC, they do so in the *prescriptive* aspect of it. No such delegation occurs, however, on the *enforcement* side.

11. There was no delegation of enforcement jurisdiction to the ICC, as the Court depends on the cooperation of States to arrest and surrender suspects, as provided for

by the Rome Statute. Therefore, when interpreting the principle of delegation in light of the Statute, such delegation must be conceptualized as a transfer of *prescriptive* jurisdiction, but not of *enforcement* jurisdiction.

C. The international jurisdiction of the ICC and the domestic jurisdiction of the State Parties: distinctions

12. The Rome Statute did not create a regime of strict symmetry or parallelism between the State Parties' jurisdictional titles and those of the ICC. The principle of delegation does not equate the exercise of domestic and international jurisdiction. It is essential to distinguish between the domestic jurisdiction of States and the international jurisdiction of the ICC. Although complementary, they are not symmetrical images of one another. Domestic rules that govern the exercise of criminal jurisdiction by a State do not automatically allow the Court to exercise its jurisdiction in a matter not in accordance with the Rome Statute.

13. Conversely, limits to the domestic jurisdiction of a State inside its own territory do not automatically limit the jurisdiction of the ICC. For instance, international treaties, including the so-called "article 98 Agreements", may limit the exercise of domestic jurisdiction over nationals of a particular state. However, these agreements do not affect the jurisdiction of the ICC itself. As the Appeals Chamber recognized in its judgment on the appeal against the decision on the authorization of an investigation into the situation in the Islamic Republic of Afghanistan, these agreements may affect requests for cooperation, but "the effect of these agreements is not a matter for consideration in relation to the authorisation of an investigation" (ICC-02/17-138, para 44). The Office of the Prosecutor also maintains that bilateral agreements limiting the enforcement jurisdiction of a state party domestically do not affect the Court's jurisdiction. "Rather, it may become an issue of cooperation or complementarity during the investigation and prosecution stages" (ICC-01/18-12, para 185).

14. As set out by Pre-Trial Chamber I, in its decision on the territorial jurisdiction of the ICC over the State of Palestine, “Pursuant to article 98, the Court may not proceed with requests for surrender and/or assistance which would require a requested State to act inconsistently with its obligations under either 'international law with respect to the State or diplomatic immunity of a person or property of a third State' or 'international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court'” (ICC-01/18, para 127). This is why Pre-Trial Chamber I noted, in this same decision, that issues related to limitations on enforcement jurisdiction that may affect the ability to cooperate with the Court “may be raised by interested States based on article 19 of the Statute”, but “they are not pertinent to the resolution of the issue under consideration, namely the scope of the Court’s territorial jurisdiction in Palestine” (ICC-01-18, para 129).

15. As has been made clear by Pre-Trial Chamber I, this reasoning can be inferred from the terms of the Rome Statute itself. When Article 98 of the Statute provides that the Court cannot compel a State Party to act inconsistently with its obligations under international law, it draws a distinction between the prescriptive jurisdiction of the Court and the enforcement jurisdiction of its State Parties. The hypothesis of this norm – that is, a situation in which a State Party may not exercise its enforcement jurisdiction over a person – rests on the premise that the Court *does* have jurisdiction over said person according to the preconditions laid out in Article 12, and is only prevented from enforcing this jurisdiction because the State Party in whose territory this individual is located cannot surrender them without breaching other obligations under international law. In this hypothesis, a State Party may not exercise its jurisdiction over a person, but the Court still may. This is clear evidence that the principle of *nemo dat quod non habet* cannot be used as a standard of interpretation in the effort of determining the scope of the Court’s jurisdiction.

16. The principle of delegation must also be construed in light of the principle of complementarity. This principle, at the heart of the Rome Statute, ensures that the most serious crimes under international law do not go unpunished due to the unwillingness

or inability of States to prosecute them. This inability, according to article 17 of the Rome Statute, exists *inter alia* when certain circumstances prevent a State from exercising enforcement jurisdiction over certain persons or carrying out its proceedings. Those circumstances, however, in no way affect that State's *prescriptive jurisdiction*, which stems directly from its own nature as a sovereign State, nor does it curtail the jurisdiction of the ICC. If that were to be the case, the principle of complementarity would be rendered ineffective. As has been decided by the ICC, however, "in interpreting a provision of the founding texts, the bench must dismiss any solution that could result in the violation or nullity of any of its other provisions" (ICC-01/04-01/07-3426-tENG, para. 46).

17. In sum, the principle of delegation does not treat the exercise of domestic and international jurisdiction as equivalent or interchangeable.

D. The jurisdiction of the ICC: exhaustive parameters

18. Additionally, the jurisdiction of the Court, although premised on a delegation by State Parties of their own prescriptive jurisdiction, is not only separate and independent from the latter: it is also subject to its own exhaustive set of preconditions set forth by the Rome Statute. Once these preconditions are met and jurisdiction is established, no other considerations are pertinent in order to establish the scope and the outreach of the ICC's jurisdiction. Article 12 of the Rome Statute sets out the exhaustive preconditions for the Court to exercise its jurisdiction: namely, the principle of territoriality and the principle of active nationality. Should one or both of these preconditions be met and jurisdiction established – as was already decided by the Court regarding the situation in the State of Palestine –, no further conditions must be satisfied for the existence of the Court's jurisdiction.

E. The Oslo Accords and the Palestinian jurisdiction over Israeli nationals

19. Brazil is of the view that the provisions of the Interim Agreement on the West Bank and the Gaza Strip, signed in Egypt in 1995, do not affect the jurisdiction of the Court. Brazil contends that, analogous to the cases mentioned before, its provisions may eventually restrict the exercise of Palestine's *enforcement* jurisdiction, but they do not affect its *prescriptive* jurisdiction, much less the jurisdiction that was delegated by Palestine to the ICC. As aforementioned, the jurisdiction of the ICC is not only separate from the domestic jurisdiction of its State Parties, but also subject to its own limited set of preconditions, which, in the context of the investigation on the situation in Palestine, have already been met.

20. In this context, Brazil agrees with the Office of the Prosecutor, which "does not consider these limitations in the Oslo Accords to be obstacles to the Court's exercise of jurisdiction" (ICC-01/18-12, para 183). Likewise, Brazil also agrees with Pre-Trial Chamber I's conclusion that the Oslo Accords "are not pertinent to the resolution of the issue under consideration, namely the scope of the Court's territorial jurisdiction in Palestine" (ICC-01/18, para 129).

21. Bilateral agreements in the vein of the Oslo Accords may eventually impair a State Party's ability to enforce decisions taken by the Court. However, they in no way curtail the Court's jurisdiction to issue any such decisions, including warrants of arrest. Accordingly, the Oslo Accords do not prevent the Court from exercising its jurisdiction over the situation in Palestine, as decided by Pre-Trial Chamber I in 2021, including over Israeli nationals that allegedly committed crimes in the occupied Palestinian territory.

III. Conclusions

22. Brazil respectfully submits that:

- The jurisdiction of the ICC is strictly governed by the Rome Statute and cannot be equated to the domestic jurisdiction of the State Parties;
- Limitations laid upon the exercise of the domestic jurisdiction of State Parties may impair their enforcement jurisdiction, but they do not curtail the Court's own jurisdiction;
- The Oslo Accords do not affect the jurisdiction of the Court regarding the situation in Palestine, regardless of alleged restrictions they may impose on the exercise of domestic criminal jurisdiction by Palestine.

Respectfully submitted,



Juliano Rojas Maia
Chargé d'affaires, a.i.

Federative Republic of Brazil

Dated this 6 August 2024

The Hague, The Netherlands

At [place, country]