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**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/18

Date: 2 August 2024

PRE-TRIAL CHAMBER I

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

SITUATION IN THE STATE OF PALESTINE

Public

Observations Pursuant to Rule 103 (Robert Heinsch and Giulia Pinzauti)

Source: Dr Robert Heinsch
Dr Giulia Pinzauti

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

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Counsel for the Defence

Legal Representatives of the Victims

Legal Representatives of the Applicants

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I. INTRODUCTION

1. Dr Robert Heinsch and Dr Giulia Pinzauti (*"Amici"*) submit these observations on the irrelevance of the Oslo Accords to the Court's jurisdiction over Israeli nationals in accordance with the Pre-Trial Chamber's Order of 22 July 2024¹ and Rule 103(1) of the Rules of Procedure and Evidence.

II. OBSERVATIONS

2. A plain reading of the Rome Statute indicates that there are no obstacles to the Court's jurisdiction over Israeli nationals for alleged Rome Statute crimes committed on Palestine's territory because Palestine is a state party to the Statute. The Oslo Accords issue is a red herring to delay the Chamber's decision on the Prosecution's request for the issuance of arrest warrants.² The Accords are irrelevant for the Court's jurisdiction, and the Chamber should dismiss any arguments related to them as similarly irrelevant.

A. The Court's jurisdiction is not affected by the international obligations that a state party may have contracted

3. Palestine's lack of criminal (enforcement) jurisdiction domestically over Israeli nationals, as well as crimes committed in particular geographical areas (such as Area C of the West Bank)³ has no bearing on the Court's jurisdiction. This is because the Court's jurisdiction is regulated by the Rome Statute and not by agreements like the Oslo Accords. The Statute provides a unified regime that applies to all its member states.⁴ As such, the Court's jurisdiction is not affected by the international obligations

¹ ICC-01/18, Decision on requests for leave to file observations pursuant to rule 103 of the Rules of Procedure and Evidence, 22 July 2024.

² The fact that the UK decided not to file observations challenging the Court's jurisdiction in the present proceedings after a change of government took place suggests that such objections were grounded in considerations of a political – rather than legal – nature.

³ Oslo II, art. I, Annex IV.

⁴ Adil A. Haque, 'The International Criminal Court's Jurisdiction in Palestine and the "Oslo Accords Issue"' (Just Security, 9 July 2024), <https://www.justsecurity.org/97584/israel-palestine-icc-oslo-accords/>.

that a state party may have contracted. To hold otherwise would lead to a patchwork of jurisdictions with regard to the different situations before the ICC that would compromise the integrity of the Statute.

4. In the present case, all the statutory requirements for the Court to have jurisdiction are fulfilled. The crimes alleged in the request for the issuance of arrest warrants fall within the material, temporal and personal jurisdiction of the Court.⁵ The preconditions for the exercise of jurisdiction are also met. Article 12 of the Statute provides that the Court may exercise its jurisdiction if the state ‘on the territory of which the conduct in question occurred’ is a party to the Statute. The conduct in question occurred on Palestine’s territory, which has been a state party to the Rome Statute since April 2015. Moreover, in 2018, Palestine referred the situation on its territory to the ICC, with several other state parties later also referring the situation in Palestine to the ICC Prosecutor.⁶ Thus, the Court has jurisdiction over conduct occurring on the territory of a state party such as Palestine regardless of the nationality of the perpetrator.

5. Nowhere does article 12 state that the Court’s jurisdiction is conditional on states parties’ domestic criminal jurisdiction pursuant to the international obligations they may have contracted. Whenever international obligations contracted by a state party are relevant for the law and practice of the ICC, the Statute expressly refers to such obligations.⁷ However, there is no such reference in article 12. Thus, the Oslo Accords are not applicable in relation to the Court’s jurisdiction, even if they may be binding on Palestine.

⁵ Arts 5, 11, 25-26 Rome Statute.

⁶ ICC, ‘Statement of The Prosecutor of The International Criminal Court, Karim A.A. Khan KC, on The Situation In The State of Palestine: Receipt of a Referral From Five States Parties’, 17 November 2023 <https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-karim-aa-khan-kc-situation-state-palestine>; referrals by Chile and Mexico, 18 January 2024, [https://www.icc-cpi.int/sites/default/files/2024-01/2024-01-18-Referral Chile Mexico.pdf](https://www.icc-cpi.int/sites/default/files/2024-01/2024-01-18-Referral%20Chile%20Mexico.pdf).

⁷ See, e.g., art. 98 Rome Statute (referring to a member state’s ‘obligations under international law’).

6. The Chamber has already ruled that the Oslo Accords do not affect the Court's territorial jurisdiction.⁸ Nor do they limit its personal jurisdiction either. The Court exercises a full jurisdiction of its own, grounded in the Statute, which states can accept by becoming parties to it or making a declaration under article 12(3).⁹ They cannot modify the Court's jurisdiction by reference to their domestic criminal jurisdiction and/or other agreements. The Rome Statute is not an '*à la carte menu*' from which member states can pick and choose.

7. In any event, the Oslo Accords are not relevant 'applicable treaties' to determine the scope of the Court's territorial jurisdiction under article 21(1)(b) of the Statute.¹⁰ This provision refers to those treaties of general application that form the basis for the definitions of crimes over which the Court has jurisdiction, such as the Geneva Conventions, the Genocide Convention, and the Convention on the Rights of the Child.¹¹ The Vienna Convention on the Law of Treaties, the UN Charter, and treaties to which the Court is a party are also relevant 'applicable treaties' under article 21(1)(b). The provision should not be understood to include international agreements binding on the states that would normally have jurisdiction in given situations. According to DeGuzman, given 'the ICC's wide-ranging jurisdiction ... this could

⁸ ICC-01/18-63, Decision on Applications for Leave to File Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence, 20 February 2020, para. 129.

⁹ See, *mutatis mutandis*, ICC-02/11-01/11-212, *Prosecutor v. Gbagbo*, Decision on the "Corrigendum of the Challenge to the Jurisdiction of the International Criminal Court on the Basis of Articles 12(3), 19(2), 21(3), 55 and 59 of the Rome Statute filed by the Defence for President Gbagbo (ICC-02/11-01/11-129)", 15 August 2012, para. 59 (holding that non-Parties who accept the Court's jurisdiction on an *ad hoc* basis under article 12(3) accept the applicable framework of the Rome Statute in full). See also Alice Riccardi, 'The Palestine decision and the territorial jurisdiction of the ICC: Is the Court finding its inner voice?' (2021) 78 *Questions of International Law* 23, 33-34, 40.

¹⁰ *Contra*: ICC-01/18-143-Anx1, Decision on the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine', Judge Péter Kovács' Partly Dissenting Opinion, 5 February 2021 (Kovács Partly Dissenting Opinion), paras 284-285, 308.

¹¹ Margaret deGuzman, 'Article 21', in Kai Ambos (ed), *Rome Statute of the International Criminal Court, Article by Article Commentary* (4th ed., Beck 2022) 1129, mn 26; William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd ed., OUP 2016), 519-520; Dapo Akande, 'Sources of International Criminal Law' in Antonio Cassese et al. (eds), *The Oxford Companion to International Criminal Justice* (OUP 2009) 41, 48-49; Alain Pellet, 'Applicable Law' in Antonio Cassese, Paola Gaeta, and John R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court* (OUP 2002) Vol. II, 1051, 1069-70.

contribute unnecessarily to the fragmentation of international criminal law'.¹² Following this line of reasoning, bilateral agreements such as the Oslo Accords, do not form part of the applicable law under article 21(1)(b). They are also not relevant to interpreting article 12 of the Statute.

B. The Court's jurisdiction is not dependent on the existence of a parallel domestic jurisdictional title in the state concerned

8. Arguments that the Oslo Accords bar ICC jurisdiction over Israeli nationals because Palestine is not in a position to delegate to the Court a competence that it does not have domestically (*nemo dat quod non habet*) rest on the assumption that the Court's jurisdiction derives from a bundle of delegated national jurisdiction titles. However, in our view this interpretation is inconsistent with the Rome Statute. There is a more compelling conceptualisation that argues that the basis of ICC jurisdiction is independent of any delegation by states, but rather reflects a 'the *ius puniendi* of the international community with respect to the core crimes falling within its jurisdiction'.¹³

9. First, a plain reading of the Statute indicates that states parties do not 'delegate' or 'transfer' their criminal jurisdiction to the Court but 'accept' it with respect to the crimes referred to in article 5 of the Statute (article 12(1) Rome Statute).¹⁴ The Rome Statute (article 1) establishes the Court as an international organisation with international legal personality and automatic jurisdiction over certain categories of crimes enumerated in article 5. Article 12 itself concerns the *preconditions* to the exercise of the Court's jurisdiction, that is the procedural conditions that need to be satisfied

¹² DeGuzman (n 11) mn 26.

¹³ Leila N. Sadat, 'The Confered Jurisdiction of the International Criminal Court' (2023) 99 *Notre Dame Law Review* 549, 582, referring to Claus Kreß, 'Article 98: Cooperation with Respect to Waiver of Immunity and Consent to Surrender' in Ambos (n 11) 2585, mnn 126–27; Carsten Stahn, 'Response: The ICC, Pre-Existing Jurisdictional Treaty Regimes, and the Limits of the *Nemo Dat Quod Non Habet* Doctrine—A Reply to Michael Newton' (2016) 49 *Vanderbilt Journal of Transnational Law* 443, 447.

¹⁴ Sadat (n 13) 582; Paola Gaeta and Patryk I. Labuda, 'Trying Sitting Heads of State: The African Union versus the ICC in the *Al Bashir* and *Kenyatta* Cases' in Charles C. Jalloh and Ilias Bantekas (eds), *The International Criminal Court and Africa* (OUP 2017) 138, 152–53; Hans-Peter Kaul, 'Preconditions to the Exercise of Jurisdiction', in Cassese, Gaeta, and Jones (eds) (n 11) Vol. I, 583, 591; Haque, (n 4).

for the Court to be able to exercise its jurisdiction rather than governing the granting of jurisdiction itself.¹⁵

10. Following this line of reasoning, the Court's jurisdiction is premised on the right to punish of the international community,¹⁶ and is thus entirely independent of any delegation by individual states parties. Consequently, any bilateral agreements on the exercise of domestic criminal jurisdiction are irrelevant for the Court's jurisdiction. The Appeals Chamber concluded as such in the *Situation in Afghanistan*, finding that while Afghanistan may have limited its enforcement jurisdiction over US nationals *vis-à-vis* a bilateral agreement, this could not affect the Court's jurisdiction over US nationals in Afghanistan.¹⁷ The same applies *mutatis mutandis* to the Court's jurisdiction over Israeli nationals for crimes allegedly committed in Palestine.

11. Even if one accepted the delegation theory as the source of the Court's jurisdiction, the Oslo argument fails. The theoretical construction whereby states can only delegate to the Court the competence over certain crimes if they have such competence domestically leads to absurd results that stand in contrast to the Court's power 'to exercise its jurisdiction over persons for the most serious crimes of international concern' under article 1 of the Statute. If the Court's jurisdiction was conditional on the existence of a parallel domestic jurisdictional title, the Court's jurisdiction would vary depending on the domestic law of its member states, creating much volatility as domestic laws change over time.¹⁸ The Court's function and independence would be seriously undermined.

¹⁵ Kaul (n 14) 606.

¹⁶ ICC-02/05-01/09-397, *Prosecutor v. Al Bashir*, Judgment in the Jordan Referral re Al-Bashir Appeal, 6 May 2019, para. 115; ICC-02/05-01/09-397-Anx1, *ibid*, Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa, 6 May 2019, para. 53; Kai Ambos, 'Punishment without a Sovereign? The *Ius Puniendi* Issue of International Criminal Law: A First Contribution towards a Consistent Theory of International Criminal Law' (2013) 33 *Oxford Journal of Legal Studies* 293; Kreß (n 13) mn 27.

¹⁷ ICC-02/17-138, *Situation in the Islamic Republic of Afghanistan*, Judgment on the Appeal against the Decision on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, 5 March 2020, para. 44.

¹⁸ Stahn (n 13) 449. See also Sadat (n 13) 582.

12. Moreover, the principle of complementarity presupposes situations where a state party may be unable to prosecute due to a 'lack of substantive or procedural penal legislation'.¹⁹ This too suggests that the Court can exercise jurisdiction independently of a parallel jurisdictional title in the state concerned.²⁰ Similarly, a situation of occupation will (by definition) usually undermine the affected state's ability to exercise its sovereignty and prosecute certain war crimes enshrined in article 8.

13. A better interpretation would be that states parties confer the same (plenary) territorial jurisdiction that they have under international law, independently of whether they exercise it to the full extent domestically.²¹ Accordingly, if the Court were to allow its jurisdiction to be limited by the Oslo Accords, this would mean that Palestine is treated differently than other ICC member states. There are many states (including states parties to the Rome Statute, such as the UK) that do not exercise their criminal jurisdiction to the full extent that is permitted by international law. Common examples concern limits states place on their enforcement jurisdiction over the crimes of nationals committed abroad, despite the universal recognition of the active nationality principle of prescriptive jurisdiction. Yet, there has been no suggestion that these limitations would modify the Court's active nationality jurisdiction under Article 12(2)(b) of the Rome Statute with respect to such states. Similarly, there are many states with legislation allowing them to exercise jurisdiction over acts committed extraterritorially, which cannot 'delegate' to the Court jurisdiction over territory that is not theirs.

¹⁹ Antonio Cassese et al., 'Informal Expert Paper: The Principle of Complementarity in Practice' (ICC 2003) para. 50. See also Stahn (n 13) 449; Sadat (n 13) 582.

²⁰ Stahn (n 13) 449; Sadat (n 13) 582.

²¹ See ICC-01/19, *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, 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, para. 60. The theoretical underpinning of the decision is somewhat confusing as the Chamber relies on the concept of delegation by states parties and also uses the word 'transferred'. See Sadat (n 13) 597.

C. The Oslo Accords limit Palestine's enforcement jurisdiction but not its prescriptive jurisdiction

14. The arguments that the Oslo Accords bar ICC jurisdiction over Israeli nationals also overlook the distinction between prescriptive jurisdiction and enforcement jurisdiction. The capacity of a state, such as Palestine, to accept the jurisdiction of the ICC is a manifestation of its capacity to make the law, that is its *prescriptive* jurisdiction.²² O'Keefe describes a state's jurisdiction to prescribe as 'a state's right under international law to assert the applicability of its law to given circumstances, whether by means of primary or subordinate legislation, executive decree, or judicial action'.²³ A state's prescriptive jurisdiction is plenary under customary international law, meaning that it is unqualified and absolute, with no limitations.²⁴

15. The Oslo Accords do not regulate Palestine's prescriptive jurisdiction (nor could they do so), but rather its ability to exercise its *enforcement* jurisdiction through criminal proceedings over certain categories of persons (Israeli citizens) and over parts of its territory. Enforcement jurisdiction 'refers to a state's right under international law to deploy investigative, coercive or custodial powers, whether through police or other executive action or through its courts'.²⁵

16. That a state cannot exercise its criminal (enforcement) jurisdiction by virtue of a bilateral agreement (or other international obligation) cannot displace the state's possession of the underlying (prescriptive) jurisdiction under international law.²⁶ The Oslo Accords demonstrate, rather than negate, Palestine's pre-existing jurisdiction to

²² Ahmed Abofoul, 'The Oslo Accords and the International Criminal Court's Jurisdiction in the Situation in the State of Palestine' (*OpinioJuris*, 28 July 2020) <<http://opiniojuris.org/2020/07/28/the-oslo-accords-and-the-international-criminal-courts-jurisdiction-in-the-situation-in-the-state-of-palestine/>>.

²³ Roger O'Keefe, 'Response: "Quid," Not "Quantum": A Comment on "How the International Criminal Court Threatens Treaty Norms"', (2016) 49 *Vanderbilt Journal of Transnational Law* 433, 436.

²⁴ *SS Lotus (France v Turkey)* 1927 PCIJ Ser A No 10, 19.

²⁵ O'Keefe (n 23) 436.

²⁶ *Ibid*, 437.

delegate the exercise of its criminal jurisdiction to other entities.²⁷ Indeed, if Palestine did not possess this jurisdiction in the first place, it could not have concluded the Oslo Accords. Any arguments that the references to ‘criminal jurisdiction’ (of the Palestinian Council and of Israel, respectively) in the Oslo Accords refer to the jurisdiction to prescribe, misapprehend the notion of prescriptive jurisdiction. Furthermore, when the Accords state that Israel has ‘sole’ jurisdiction over offenses committed by Israelis and in Area C,²⁸ that does not mean that they grant Israel exclusive jurisdiction over its nationals. While the Oslo Accords may be binding on Israel and Palestine, they do not bind other subjects of international law, and cannot withdraw Israelis from the jurisdiction of other courts, whether domestic or international.²⁹

17. In conclusion, any prior agreements potentially limiting the enforcement of a state’s criminal jurisdiction domestically do not affect the Court’s territorial jurisdiction, which is regulated by the Statute and not by bilateral (or other) agreements. For this reason, the Oslo Accords have no bearing on the Court’s jurisdiction in the situation in Palestine. Palestine retains the competence to make the law, accept the jurisdiction of the ICC with respect to conduct occurring on its territory or by its nationals, and make a referral to the ICC. This is irrespective of whether it lacks full de facto control over its territory that is under belligerent occupation.³⁰

²⁷ Stahn (n 13) 451; Halla Shoaibi and Asem Khali, ‘Criminal Jurisdiction under Occupation: The Oslo Accords and the ICC’ in Nada Kiswanson and Susan Power (eds), *Prolonged Occupation and International Law: Israel and Palestine* (Brill Nijhoff 2023) 330, 339.

²⁸ Oslo II, Annex IV, Art I(2).

²⁹ See *mutatis mutandis* Beth van Schaak, ‘Can the Int’l Criminal Court Try US Officials?—The Theory of “Delegated Jurisdiction” and Its Discontents (Part II)’ (*Just Security*, 9 April 2018) <<https://www.justsecurity.org/54620/intl-criminal-court-officials-the-theory-delegated-jurisdiction-discontents-part-ii/>> (discussing how the SOFA between the US and Afghanistan is only binding on the parties and does not bind other domestic courts or the ICC).

³⁰ Cf. *Situation in Georgia*, ICC-01/15-12, Decision on the Prosecutor’s Request for Authorization of an Investigation, 27 January 2016, para. 6 (affirming Georgia’s sovereign title and thus the Court’s territorial jurisdiction over areas of the former’s territory under partial belligerent occupation by Russia).

D. The law of occupation confirms the interpretation that the Oslo Accords concern the transfer of enforcement jurisdiction

18. The Oslo Accords are best interpreted in their proper context: an agreement on the gradual transfer of power from Israel, the occupying power, to the occupied population, represented by the Council. Such transfer of power, and the ensuing distribution of jurisdiction between Israel and Palestine, occurred within the constraints imposed by the law of occupation.³¹ The International Court of Justice authoritatively confirmed that the Oslo Accords do not add to the powers and competences invested in Israel under the law of occupation.³² Nor can they ‘be understood to detract from Israel’s obligations under the pertinent rules of international law applicable in the Occupied Palestinian Territory.’³³

19. Under the law of occupation, an occupying power has very limited prescriptive jurisdiction over the occupied state’s territory, as the latter retains its sovereign prerogative and the occupying power is only a temporary administrator.³⁴ The occupying power can only issue military orders when the need arises for the maintenance of security and public order, but without transforming ‘the laws in force in the country’.³⁵ Other than that, the domestic jurisdiction of the occupying power does not and shall not apply in the occupied territory.³⁶

20. Plenary prescriptive jurisdiction over the occupied territory, which is an attribute of sovereignty, rests with the representatives of the occupied people, namely, in this case, the Palestinian people.³⁷ Such prescriptive jurisdiction is unaffected by

³¹ ICC-01/18-107, *Situation in the State of Palestine*, Submissions Pursuant to Rule 103 - Robert Heinsch & Giulia Pinzauti, 16 March 2020, paras 63-67.

³² *Legal Consequences Arising from The Policies And Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem*, 19 July 2024 (*Israel’s Policies and Practices AO*), para. 140.

³³ *Ibid*, para. 102

³⁴ Art. 55 Hague Regulations; *Israel’s Policies and Practices AO*, para. 105. See also *Ukraine v. Russia (re Crimea)* [GC], App. Nos. 20958/14 and 38334/18 (ECtHR, 25 June 2024) paras. 938–42.

³⁵ Art 43 Hague Regulations.

³⁶ Arts 54, 64 and 66 GC IV and art 43 Hague Regulations.

³⁷ Yoram Dinstein, *The International Law of Belligerent Occupation* (CUP 2009) 113.

belligerent occupation.³⁸ In contrast, the occupying power retains enforcement jurisdiction over the occupied territory for the duration of the occupation. Any other interpretation would effectively recognize the transfer of a sovereign title to an occupying power. This is neither foreseen by the 1949 Geneva Conventions, nor is it consistent with the illegality of annexation under public international law.³⁹

21. Against this backdrop, it is apparent that the Accords concern the gradual transfer of responsibilities and authority from Israel, as an occupying power, to the Palestinian Council. Thus, where Oslo II refers to a 'transfer' of jurisdiction from Israel to the Council during the redeployment phases,⁴⁰ this term truly indicates 'a restoration of the full exercise of jurisdiction to the sovereign state, namely Palestine'.⁴¹ It does not indicate that Israel has the sovereign prerogative of prescriptive jurisdiction over Palestine's territory. Arguments that the Oslo Accords limit Palestine's jurisdiction to prescribe would give Israel competences that it cannot actually exercise under the law of occupation.

III. CONCLUSION

22. In conclusion, the *Amici* submit that the Oslo Accords do not bar the Court from exercising jurisdiction over Israeli nationals for conduct that occurred on Palestine's territory.



Robert Heinsch



Giulia Pinzauti

Dated this Friday, 2 August 2024

At the Hague, Netherlands

³⁸ Hannes Jöbstl, 'An Unlikely Day in Court? Legal Challenges for The Prosecution of Israeli Settlements under The Rome Statute' (2018) 51 *Israel Law Review* 339, 351-352.

³⁹ *Israel's Policies and Practices* AO, para. 179.

⁴⁰ Oslo II, arts. XI(2)(e) and XVII.

⁴¹ Heinsch and Pinzauti submission (n 31) para. 66.