Cour Pénale Internationale

International Criminal Court

Original:

No.: ICC-

Date:

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

SITUATION IN

Written Observations Pursuant to Rule 103 (Neve Gordon)

Source: Professor Neve Gordon

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INTRODUCTION

1. The following observations are made under the Pre-Trial Chamber's (PTC) Order of 22 July 2024, whereby it granted leave to submit this application.
2. The question before the PTC is straightforward: whether the Court is constitutionally constrained by the 1995 Oslo II Interim Agreements Article XVII(2)(c)—which stipulates that the "territorial and functional jurisdiction of the [Palestinian Interim Self-Government Authority] will apply to all persons, except for Israelis, unless otherwise provided in this Agreement"[1]—and Article I(1)(a) of Annex IV to Oslo II—which provides that the "Protocol Concerning Legal Affairs," further provides that the "criminal jurisdiction of the [Palestinian Interim Self-Government Authority] covers all offenses committed by Palestinians and/or non-Israelis in the Territory, subject to the provisions of this article."[2]
3. In what follows, I contend that the claim that the Court is constitutionally constrained by Oslo II is flawed for four major reasons. First, the issues under consideration involve inalienable rights and peremptory norms which according to customary law and treaties that Israel itself has signed are non-derogable and therefore a Bi-Lateral Interim Agreement cannot be mobilized to render them void. Second, the view that the Palestinian Authority (PA) must have enforcement jurisdiction over Israeli nationals in order to "[accept] the jurisdiction of the Court with respect to the crimes referred to in article 5" is flawed (art. 12(1)). Third, even if the PTC were to find that Articles within the Oslo Interim Agreement were pertinent to the issue at hand, the Agreements should be interpreted restrictively since they were signed between two fundamentally unequal parties—representatives of a non-self-governing population and the party that has authority over it—and therefore the Agreement and any given article within it must be discounted if it is being invoked to nullify rights and undermine peremptory norms. Fourth, empirical evidence reveals that Israel has been carrying out egregious crimes against the Palestinian people, including war crimes and

[1] See on the United Nations website (document last accessed on 2 February 2021): https://www.un.org/unispal/document/auto-insert-185434/.
[2] ICC-01/18 para. 124.

crimes against humanity,[3] with impunity. While at first glance this might appear to be irrelevant to the question of the Court's jurisdiction, it is actually at the very heart of the matter since the Court's *raison d'etre* is to guarantee the exercise of "jurisdiction over persons for the most serious crimes of international concern" and if States are permitted to create "legal black holes" the Court cannot carry out its duty.[4]

OBSERVATIONS

I. Peremptory Norms and Inalienable Rights *vs.* Special Agreements

4. In essence, an array of actors are asking the Court to give precedence to Articles 97 and 98 of the Statute over Article 1 which formulates the Court's *raison d'etre* as an institution that has "the power to exercise its jurisdiction over persons for the most serious crimes of international concern." These requests are based on the false assumption that the Court's jurisdiction is constituted by an amalgamation of national jurisdictions and laws and, more specifically, a Bi-Lateral Interim Agreement, when in fact it is informed by international criminal law, Human Rights Treaties, the 1949 Geneva Conventions and 1977 Additional Protocols and established by its Statute as a unified regime.

5. Moreover, Articles 7, 8 and 47 of the Fourth Geneva Convention affirm that the occupying power cannot conclude Special Agreements which derogate from or deny to protected persons the safeguards of the Fourth Geneva Convention. In addition, as the Prosecutor argued before the Court, "the Oslo Accords, as a 'special agreement' within the terms of Geneva Convention IV, 'cannot violate peremptory rights nor can they derogate from or deny the rights of 'protected persons' under occupation'."[5] Accepting the request, will in effect permit Special Agreements to trump non-derogable peremptory rights and deny victims' rights to, inter alia, access to justice, effective remedies, and redress. Allowing Oslo II to constrain the Court's personal and

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[3] https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/sessions-regular/session55/advance-versions/a-hrc-55-73-auv.pdf

[4] Andrew Kent, "Disappearing legal black holes and converging domains: Changing individual rights protection in national security and foreign affairs." *Colum. L. Rev.* 115 (2015): 1029.

[5] ICC-01/18 para. 25, 39.

territorial jurisdiction will ultimately undermine the very architecture of the international legal order.

6. While the Vienna Convention on the Law of Treaties does not refer to Special Agreements, Article 26 of the Vienna Convention on the Law of Treaties provides that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith."[6] However, Articles 53 qualifies this provision by providing that a "treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law." Article 64 adds a further qualification when it provides that "[i]f a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates." Nowhere in the Vienna Convention does it say that a Treaty, Special Agreement, or any part of a Special Agreement can trump peremptory norms. And even though Articles 53 and 64 do not address the precise circumstances at hand (provisions of general international law rarely, if ever, do), the spirit of the Vienna Convention is clear: Treaties are binding upon State Parties *except* when they conflict with peremptory norms.

7. The idea that Special Agreements cannot be used to trump peremptory norms was also spelled-out in the Interim Agreements themselves. Precisely because Special Agreements cannot be used to constrain peremptory norms nor derogate from or deny the rights of "protected persons" under occupation, Article XXXI(6) of Oslo II specifically provides that: "[n]either Party [would] be deemed, by virtue of having entered into [the Special Agreement], to have renounced or waived any of its existing rights, claims or positions." "Existing rights" in this article refers, inter alia, to the inventory of inalienable rights set out in Human Rights Treaties and peremptory norms enshrined in the 1949 Geneva Conventions and 1977 Additional Protocols. Hence, the Agreements themselves established an exception to the constraints put in place in Articles XVII(2)(c) and Article I(1)(a) of Annex IV, stating that these articles or any other articles within the Agreement cannot be invoked to undermine "existing rights." Therefore, any attempt to limit the Court's jurisdiction to try war crimes and

[6] Vienna Convention on the Law of Treaties, art. 26, *adopted* 27 Jan. 1980, 1155 U.N.T.S. 331.

crimes against humanity by invoking articles within the Interim Agreements contradicts the exception set out in Oslo II's Article XXXI(6).

8. Furthermore, a number of Israeli Supreme Court rulings have claimed that the interim agreements have no effect on the applicability of legal norms in the oPt. For example, in *Wafa v. The Defence Minister* (1996), the Israeli Supreme Court determined that:

> "[t]he interim agreement does not have a higher status or greater validity than the agreement concluded between the State of Israel and another. In other words, the interim agreement does not, in itself, constitute part of the law applicable in Israel or part of the law applicable in Judea and Samaria […] in order to give effect to the Interim Agreement as part of the law applicable in Judea and Samaria, an order by the military commander in the area is required."[7]

9. In *Wafa v. The Defence Minister* the Israeli Supreme Court raises three issues that are relevant to the case at hand. First, the Court recognizes that after the Oslo II Interim Agreements were signed the situation continues to be one of belligerent occupation, where the rules of occupation apply.

10. Second, the fact that a military commander needs to issue an order to give effect to the Oslo II Interim Agreements, highlights that the PA has full prescriptive jurisdiction and that Israel is the de facto temporary military administrator in the territory. It thus reveals, as I further show in paragraphs 14 and 15, that the Interim Agreements affect Palestine's enforcement jurisdiction in the territory, but not its prescriptive jurisdiction. As such, the situation should be considered as no different than other situations of occupation currently before the Court, such as occupied areas in Ukraine, for example.

11. Third, if, according to Israel, the Interim Agreements do not have a higher status or greater validity than other agreements and do not constitute part of the legal norms applicable in Israel or part of the legal norms applicable in the oPt, it would be

[7] HCJ 2717/96 Wafa v. The Defence Minister (1996), para. 3.

untenable to claim that the same Interim Agreements supersede the legal norms laid out in Human Rights Treaties, the Geneva Conventions and/or the Rome Statute.

II. Misinterpretation of Article 12

12. Under the Rome Statute, a State Party does not *transfer* or *delegate* authority to the Court but "*accepts* the jurisdiction of the Court with respect to the crimes referred to in Article 5" (art. 12(1)). The Court, in other words, is not constrained by the jurisdiction of its State Parties and in this case by the PA's ability or lack thereof to exercise enforcement jurisdiction over Israeli nationals. Indeed, any constraints imposed on the PA by the 1995 Interim Agreements is immaterial to the Court's jurisdiction since according to Article 12 the Court's jurisdiction is being *accepted* by the PA and not vice versa. If anything, the PA's lack of enforcement jurisdiction over Israeli nationals serves to strengthen the Court's jurisdiction over war crimes and crimes against humanity allegedly carried out by Israeli nationals in the oPt, which would otherwise be met with impunity (see para. 21-26 below).

13. The Court itself has claimed that once the conditions for accession were satisfied the Statute automatically enters into force and "*it would indeed be contradictory to allow an entity to accede to the Statute and become a State Party, but to limit the Statute's inherent effects over it.*"[8]

14. Moreover, as the Prosecutor noted, the constraints set out in the Interim Agreement involve *enforcement* jurisdiction rather than *prescriptive* jurisdiction,[9] since, as mentioned, the relevant article states that "territorial and functional jurisdiction of the [Palestinian Interim Self-Government Authority] will apply to all persons, except for Israelis." Hence, the Palestinians never agreed to relinquish prescriptive jurisdiction in relation to any aspect of criminal law but only to restrict its enforcement, and indeed for almost three decades the PA's legislative body introduced a plethora of new laws, including criminal laws. Thus, even if the PTC were to reject the claim set forth in paragraphs 12 and 13 that per article 12(1) the PA "accepts" the Court's jurisdiction *tout court* and maintain instead that PA delegates or transfers jurisdiction to the Court,

[8] ICC-01/18 para. 102 (emphasis added).
[9] ICC-01/18 para. 185.

this would not jeopardize the PA's ability to vest the ICC with prescriptive jurisdiction over grave violations of human rights, war crimes and crimes against humanity perpetrated in the West Bank, Gaza Strip and East Jerusalem, *regardless of the perpetrator's identity*.

15. This is precisely the claim also made by Professor Yuval Shany, who notes that "The 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. In fact, situations in which states (or quasi-states) lose control over parts of their territory represent a paradigmatic case for self-referral of situations to the ICC in so far as they reflect the 'inability of the State genuinely to prosecute'."[10] In sum, the PA's inability to enforce its jurisdiction on Israeli nationals is immaterial to its ability to delegate or transfer jurisdiction to the ICC.

III. Fundamental Inequality Projects on the notion of Consent

16. The Fourth Geneva Convention affirms that an Occupying Power cannot conclude agreements which derogate from or deny "protected persons" the safeguards of the Convention (Articles 7, 8 and 47). Furthermore, the ICJ's 2019 Chagos Advisory Opinion drew a parallel between the agreement signed between the United Kingdom and its former colony Mauritius and the Oslo Accords, claiming that "heightened scrutiny" is needed when discussing the impact of such agreements, and particularly the issue of establishing *consent* in a situation where a non-self-governing territory signs an agreement with the party that has authority over it. Such agreements, the Judges deduced, do not need to be determinative for the Court.[11]

17. The Palestinian delegation signed the Interim Agreements, yet whether they did so with full consent is questionable given that the negotiations were carried out between parties that were fundamentally unequal and the Agreements were perceived as the

[10] Shany, Yuval. "In Defence of Functional Interpretation of Article 12 (3) of the Rome Statute: A Response to Yaël Ronen." Journal of International Criminal Justice 8, no. 2 (2010): 329-343.

[11] Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 25 February 2019, para. 172.

only non-violent avenue to achieve self-determination, as well as an end to Israel's belligerent occupation and to the daily violation of basic rights perpetrated by the Occupying Power.[12]

18. In my book, *Israel's Occupation*, I examined the Oslo II negotiations also known as the Paris Protocols, observing that:

> The fact that the Palestinian economy was dependent on laborers who commuted to Israel and that these laborers, in turn, were dependent on the Occupying Power's readiness to allow them to enter Israel was exploited by Israel during the early 1990s to advance numerous objectives. During Oslo, the restriction of movement, and particularly Israel's control over the flow of Palestinian labor, became its most prominent form of control, overshadowing, as it were, the torture, beatings, and incarceration. Israel used its ability to restrict the flow of laborers to collectively punish the Palestinian public, hoping that such measures would turn the public against the armed resistance…. It also exploited its capacity to regulate the flow of laborers into Israel as a way of bending the PA's arm during negotiations so that the PA would comply with numerous Israeli demands, like signing the Paris Protocol, which was inimical to Palestinian interests.[13]

19. In a similar vein, Israeli journalist Amira Hass, who had direct contact with negotiators and other stakeholders, maintains in her book *Drinking the Sea at Gaza* that "…Palestinians saw the hermetic closure, and the economic and mental anguish that came with it, as a form of political pressure applied by the Labor coalition—their negotiating partner—intended to weaken their demands."[14] And in her autopsy of the failure of the Oslo Process, Sara Roy from Harvard University writes:

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[12] Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion, 19 July 2024.
[13] Neve Gordon, *Israel's Occupation*, University of California Press, 2008, p. 185.
[14] Amira Hass, *Drinking the sea at Gaza: days and nights in a land under siege*. Metropolitan Books, 2014, pp. 276-277.

> Perhaps the most critical feature of the Oslo process was the abandonment of the entire body of international law and resolutions pertaining to the conflict that had evolved over the last 53 years in favor of bilateral negotiations between two actors of grossly unequal power... By reducing the conflict to power negotiations between two such unequal parties, the Oslo agreements reflected Israeli strength and Palestinian weakness, and not the application of accepted international law or universal standards of justice."[15]

20. These researchers alongside several others[16] further underscored how the power differential between Israel and the PA structured the Interim Agreements to the detriment of the latter. Therefore, any limitations to the PA's jurisdiction agreed upon in the Agreements cannot and should not be used to bar the exercise of the Court's jurisdiction over Israeli nationals who have allegedly perpetrated egregious war crimes, including grave breaches of international humanitarian law, and crimes against humanity in the oPt.

IV. Impunity and Jurisdiction

21. A whole archive of empirical evidence gathered by United Nations agencies and human rights organisations reveals that for over five decades Israel has failed to render accountable actors who carry out egregious violations, including alleged war crimes and crimes against humanity, against Palestinians in the oPt.[17] Indeed, a staggering 98% of complaints regarding soldiers' offenses against Palestinians have concluded without any indictment.[18] Moreover, since 1995, when the Interim Agreements were signed, not a single high-ranking Israeli officer or politician with executive powers has ever been indicted and imprisoned for carrying out war crimes and crimes against

[15] Sara Roy, "Why peace failed: An Oslo autopsy." *Current History* 101, no. 651 (2002): 8-16
[16] For example, Edward W. Said, *The End of the Peace Process: Oslo and After*. Vintage, 2007; Raja Shehadeh, *From Occupation to Interim Accords: Israel and the Palestinian Territories*. Vol. 4. Brill, 1997 ; Rashid Khalidi, *Brokers of Deceit: How the US has Undermined Peace in the Middle East*. Beacon Press, 2013.
[17] B'Tselem, "The Occupation's Fig Leaf: Israel's Military Law Enforcement System as a Whitewash Mechanism."
[18] Yesh Din, "Data sheet: Law enforcement against Israeli soldiers suspected of harming Palestinians, 2019-2020 summary."

humanity against Palestinians, even as UN agencies and the most prominent human rights organizations have continuously documented such crimes. Empirical evidence indeed indicates that the oPt are in effect a "legal black hole" when it comes to "the most serious crimes of international concern."

22. In this respect it is crucial to highlight the Statute's preamble which emphasizes that the States Parties are "determined to put an end to impunity for the perpetrators of these crimes and thus contribute to the prevention of such crimes." The preamble has been recognized as an integral part of the Court's *raison d'etre*, and any interpretation of the Statute's provisions must align with this goal.[19] Additionally, Article 31(1) of the Vienna Convention on the Law of Treaties requires that treaties be interpreted in light of their object and purpose, while Article 31(2) includes the preamble as part of the treaty's context for interpretation.

23. That the purpose of ending impunity is central to the Court's role was also highlighted in the Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels on 19 September 2012. In this declaration, states and governments recognized "the role of the International Criminal Court in a multilateral system that aims to end impunity and establish the rule of law."[20]

24. Moreover, in the Bangladesh/Myanmar case, the PTC I concluded that "a restrictive reading of article 12(2)(a) of the Statute, which would deny the Court's jurisdiction on the basis that one or more elements of a crime within the jurisdiction of the Court or part of such a crime was committed on the territory of a State not Party to the Statute, would not be in keeping with such an object and purpose."[21]

25. Therefore, the basic purpose of ending impunity is crucial to the contextual interpretation of Article 12 of the Statute and the scope of the Court's jurisdiction. A restrictive interpretation of Article 12 based on a Bi-Lateral Agreement signed between an Occupying Power and the representatives of the occupied population would enable ongoing impunity and would not align with the Court's object and purpose.

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[19] William A. Schabas, 'Preamble' in William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd Edition).

[20] Assembly, General. "67/1. Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels." (2012).

[21] ICC-RoC46(3)-01/18 6 September 2018, para. 70.

26. Interpreted in accordance with relevant rules of international law and in light of the object and purpose of the Statute, including the basic purpose of ending impunity, the Court may exercise jurisdiction if at least one element of a crime within the Court's jurisdiction is perpetrated on the territory of a State Party to the Statute. The Oslo II Interim Agreements, or any other similar agreements, cannot be mobilized to obstruct the Court's jurisdiction or its purpose of ending impunity.

Professor Neve Gordon

Dated this 5 August 2024

At Cape Cod, Massachusetts, USA