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PRE-TRIAL CHAMBER I

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

SITUATION IN THE STATE OF PALESTINE

Public

**Arab Organisation for Human Rights UK (AOHR UK)
Written Observations Pursuant to Rule 103**

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I. Introduction

1. The Oslo Accords are irrelevant to the question of whether the Court can exercise jurisdiction over Israeli nationals, for two reasons.
2. In the first place, the provisions in the Accords purporting to limit the exercise of Palestinian criminal jurisdiction are legally invalid. In international law, the State of Palestine enjoys plenary criminal jurisdiction over Palestinian territory, with no exclusion of Israeli nationals. There is no question of Oslo somehow limiting the present Court's jurisdiction over Israeli nationals in Palestine, then, because there is no legally-valid Oslo-based limitation of this kind in the first place.
3. In the second place, even if there were a legally-valid limitation on the Palestinian exercise of territorial criminal jurisdiction over Israeli nationals, this is irrelevant to the position before the Court. The Court's jurisdiction is not derivative of the jurisdiction of the State or States whose consent, as here, in the case of the State of Palestine, is the basis for meeting the preconditions for the Court's exercise of that jurisdiction. Not only is the contrary view, that States 'delegate' their jurisdictional competence to the Court in such circumstances, manifestly without merit. Applying it in practice would lead to an absurd situation of acute complexity and temporal instability creating a serious risk of jeopardizing the very operation of the Court itself.

II. There is no legally valid limitation on Palestinian territorial jurisdiction based on the Oslo Accords

4. The Oslo Accords purport to provide for certain aspects of Israel's presence in the Palestinian territory it captured in 1967 to continue for an interim period. They also provide for a degree of reduction by Israel of authority in certain areas and, in consequence, enable self-governing Palestinian institutions to operate in these areas. As part of this, they purport to restrict the exercise of criminal jurisdiction by Palestinian institutions over Israeli nationals in Palestinian territory.

5. However, the Palestinian people and their representatives, and the State of Palestine, do not depend on Oslo for their legal entitlement to exercise the prerogatives provided for therein. They enjoy this entitlement anyway, as part of a much broader, general right to exercise exclusive, plenary self-administration, operating throughout the entirety of the Palestinian territory, based on the right of the Palestinian people to self-determination, and the related sovereign entitlements of the State of Palestine, in international law, as affirmed by the International Court of Justice (ICJ) in the *Palestine* Advisory Opinion. This right of self-administration includes plenary criminal jurisdiction over all individuals, regardless of nationality. Equally, Israel's legal obligation to permit, and not prevent, the exercise of this right of Palestinian self-administration is not limited to the prerogatives covered by Oslo. As recently affirmed by the ICJ in the *Palestine* Advisory Opinion, under the law of self-determination, Israel is obliged to permit and not prevent plenary, exclusive Palestinian self-administration throughout the entirety of the West Bank (including East Jerusalem) and Gaza. This necessarily includes the plenary exercise of criminal jurisdiction over all individuals.

6. Oslo amounts, then, to a treaty-based legal obligation on Israel to engage in a partial reduction in its impediment to Palestinian self-administration and, within this, the Palestinian exercise of criminal jurisdiction, in the broader normative context whereby, as the ICJ held in the *Palestine* Advisory Opinion, the international law of self-determination obliges Israel to end the impediment completely by withdrawing, entirely, its control from all the Palestinian territory, and, as part of this, to permit and not exercise any impediment over the Palestinian exercise of criminal jurisdiction there.

7. Insofar as there are contradictions between the broader normative context and the provisions of Oslo, the broader position prevails for the following reasons. In the first place, the Palestinian 'agreement' to Oslo was procured by Israel in the context of an illegal use of force—as held by the ICJ in the *Palestine* Advisory Opinion, the occupation is, in and of itself, an illegal use of force. In the second place, the provisions in Oslo purporting to restrict the exercise of Palestinian jurisdiction over Palestinian territory, generally, and as concerns criminal

jurisdiction in particular, are contrary to peremptory legal norms, notably the right to self-determination, again held by the ICJ in the *Palestine* Advisory Opinion to entitle the Palestinian people to a right of plenary self-administration in all the Palestinian territory. The consequence of these two factors is that those provisions purporting to legalize such restrictions are void (even if, *arguendo*, the Accords as a general matter remain in force).

8. The Oslo Accords do not, then, have any legal effect in limiting the scope of the jurisdictional entitlement of the State of Palestine to exercise criminal jurisdiction over Israeli nationals in Palestinian territory. Even assuming, *arguendo*, that the scope of the jurisdictional entitlements of the State of Palestine over Israeli nationals is somehow relevant to the scope of the Court's jurisdiction with respect to the territory of the State of Palestine when it comes to the same individuals (as will be explained in the next section, actually, it is irrelevant), there is no Palestinian limitation excluding jurisdiction over such individuals in this territory to take account of here.

III. The jurisdictional entitlements of the State of Palestine in the territory of Palestine are irrelevant to the jurisdiction of the present Court

9. It is sometimes suggested that, given that the international law concerning the exercise of national jurisdiction vests entitlements in the territorial State and the State of nationality, and that in some circumstances there is a precondition to the present Court's jurisdiction requiring certain forms of consent by one or other of those two States, there is somehow a direct link between the jurisdictional entitlements of these States, and the jurisdictional entitlement of the Court. According to this view, the consent of these States is required not simply for the general policy objective outlined above. More specifically, it is necessary because the very jurisdictional entitlement of the Court itself is somehow derived from the domestic-law-exercise jurisdictional entitlements of States. Thus at least one of two States with such an entitlement—the territorial State and the State of the nationality of the individual—need to consent because their consent effects a delegation of their jurisdictional entitlements to the Court.

10. This approach, that States ‘delegate’ their domestic jurisdictional entitlements to the Court, leads to the idea that the Court’s jurisdiction in the present Situation, in the light of the precondition to its exercise being the consent given by the State of Palestine as the territorial state, is derivative of Palestine’s jurisdictional entitlements. Those entitlements have been ‘delegated’ to the Court, and, necessarily, the Court’s entitlements therefore have to correspond to, and not go beyond, the State of Palestine’s entitlements, since the State of Palestine cannot delegate to the Court competences which it does not have—*nemo dat quod non habet*. On this basis, if (as is not actually the case), Palestine is legally prohibited by the Oslo accords from exercising its territorial criminal jurisdiction over Israeli nationals, then the Court’s jurisdiction is correspondingly limited.

11. The foregoing ‘delegation’ account fundamentally mischaracterizes the nature of the jurisdiction of the present Court. The Court operates as an institution of the international community, as a means of seeking to reduce impunity for crimes prescribed in international law. When it exercises its jurisdiction, just as when individual States exercise their domestic criminal jurisdiction on the ‘universal’ basis of permitted (and sometimes required) jurisdiction in international law—i.e. not because they have any link of territory or nationality—it does so on the basis of a global-community interest in criminal jurisdiction being exercised. This is entirely different from the other domestic law jurisdictional entitlements of States, which are concerned with the legitimate interests States have in the situation, because of a particular link to it: in the case of the two entitlements being discussed, the situation took place on their territory, and/or the individual suspected of the offense is one of their nationals.

12. It is indeed this legitimate interest that these two States have that also leads to the consent of one or other of them being sometimes required when it comes to the preconditions for jurisdiction before the present Court. But, as indicated earlier, the purpose there is to enable a certain degree of buy-in by at least one key State-stakeholder to the Situation at issue. It is not because somehow the international law entitlement of that State to exercise its domestic criminal law over the situation is needed by the Court for its own jurisdiction to exist, and is somehow delegated to it through that consent for that purpose.

13. If the Court's jurisdiction was derived from the jurisdiction of the State or States who had given their consent, when this was required, and in consequence, only operated to the extent of the domestic criminal law jurisdictional entitlements of the State or States providing such consent, then in every Situation not involving a Security Council referral – i.e. most Situations, including the present one – the following absurd arrangement would operate:

- i. The question of whether the Court could exercise jurisdiction, in terms of the precondition rules, would become an acutely complex and highly varied situation, depending, within the overall frames of the territorial State and/or the State of nationality, on the particular jurisdictional entitlements of the State or States whose consent was at issue.
- ii. Each and every such Situation would therefore have a *sui generis* jurisdictional regime corresponding to whatever the applicable normative picture was taken from the entitlements of the consenting State or States.
- iii. In order to determine what this basis was, including its scope, it would be necessary to engage in a detailed appraisal of the domestic criminal jurisdictional entitlements of the consenting State/States, to clarify whether these covered the Situation and, if so, to what extent. This would potentially require an extraordinarily complex analysis of both domestic and international law, the latter potentially encompassing both general international law and then any specific arrangements applicable to the State or States at issue. All relevant aspects of the jurisdictional regime would potentially have to be addressed, from elements of crimes to temporal, personal and territorial application. If consent came from more than one State (e.g. where the territorial State and the State of nationality are different and both have consented), it would presumably be necessary to engage in a comparative analysis of different normative regimes and have some sort of method for determining what, from each, is 'delegated' to the Court, and how mutual divergencies are to be

addressed where these exist. All of the foregoing would involve legal matters on which expert views would likely be in considerable disagreement. Resolving things to arrive at the supposed scope of the jurisdictional entitlement would likely be hugely time-consuming and protracted.

- iv. At present, the Court's preconditions to its exercise of jurisdiction are a matter of which (if any) States are parties to the Statute, which (if any) referrals have been made, and, potentially, what changes take place in territorial status and nationality when these things are relevant. This is already complex and dynamic set of factors to have to account for. However, the 'delegation' approach to jurisdiction would introduce a degree of complexity allied to an acute likelihood of instability and inconsistency caused by changes over time that would render the entire system precariously unstable. Under this approach, any changes to national and/or international law impacting on the domestic jurisdictional entitlements of the State or States whose consent was at issue would potentially have a direct consequence in altering the Court's jurisdictional entitlement. An unsustainably broad set of processes, open to influence by an unacceptably wide set of actors, could therefore potentially affect that entitlement. Given the protracted temporal nature of proceedings before the Court, there would be a serious likelihood of important changes taking place over the course of the treatment of any given Situation and, within this, any given case, with a consequential risk of a negative effect on the stability and certainty of the Court's jurisdiction, thereby placing Court's ability to function at all into serious jeopardy.

- 14. The 'delegation' approach is not, therefore, simply erroneous. The foregoing absurd jurisdictional arrangement it would bring about would frustrate the object and purpose of the Rome Statute in its most essential sense, since the very functioning of the Court would be put at risk.

15. Given that the erroneous nature of the ‘delegation’ approach is so manifest, it can be speculated that those who have sought to advance the approach are doing so for a reason other than its merit: their objective is precisely to achieve what the adoption of it would bring about—the absurd situation, which risks threatening the continued existence of the Court. Although they may be motivated by a desire to frustrate the Court in addressing the Situation in Palestine in particular, their arguments are of general application. Whether they intend this or not, the effect of the arguments they are making is to bring about the end to the effective functioning of the Court. The continued existence of the Court as a general matter is under threat, and a rejection of the ‘delegation’ approach in this particular Situation is therefore vital not only for the Court’s effective treatment of the Situation in Palestine but also for the future survival of the Court as a general matter.

IV. Conclusion

16. The Oslo Accords are irrelevant to the scope of the jurisdiction of the present Court when it comes to the Court’s exercise over Israeli nationals in the context of the situation in the territory of the State of Palestine.
17. The Accords themselves do not have any legal effect in limiting the scope of the jurisdictional entitlement of the State of Palestine to exercise criminal jurisdiction over Israeli nationals in Palestinian territory. Even if the scope of the jurisdictional entitlements of the State of Palestine over Israeli nationals is somehow relevant to the scope of the Court’s jurisdiction with respect to the territory of the State of Palestine when it comes to the same individuals (actually, there is no such relevance), there is no Palestinian limitation excluding jurisdiction over such individuals in this territory to take account of here.
18. But in any case, limitations to the exercise of criminal jurisdiction by the State of Palestine in the territory of Palestine are irrelevant to the scope of the Court’s jurisdiction over Palestine, when Palestine’s acceptance, as the territorial state, is the basis for the preconditions to the Court’s exercise of jurisdiction being met. The Court’s jurisdiction is not somehow ‘delegated’ to it by the State or States whose agreement is sometimes the basis, as here, for the preconditions to the

exercise of jurisdiction being met. There could not be, then, any exclusion of Israeli nationals from the Court's exercise of jurisdiction over the territory of the State of Palestine based on a supposed (actually non-existent) Oslo-based exclusion of these individuals from Palestine's own jurisdictional entitlements, since the scope of the Court's jurisdiction is not determined in this fashion to begin with.

Respectfully submitted,



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