

**Cour
Pénale
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**International
Criminal
Court**



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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

Amicus Curiae Observations of Guernica 37 Chambers Pursuant to Rule 103

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University; the League of Arab States; L'association des Juristes pour le respect du droit international and la Fédération internationale pour les droits humains; University Network for Human Rights, the International Human Rights Clinic, Boston University School of Law, the International Human Rights Clinic, Cornell Law School and the Lowenstein Human Rights Project, Yale Law School; Professor Richard Falk and Professor Michael Lynk; Professor Adil Ahmad Haque; Open Society Justice Initiative, European Center for Constitutional and Human Rights, REDRESS Trust, Human Rights Watch and Amnesty International; Republic of Colombia; Hostages and Missing Families Forum and the Raoul Wallenberg Centre for Human Rights; Addameer Prisoner Support and Human Rights Association; International Association of Jewish Lawyers and Jurists; Kingdom of Spain; UK Lawyers for Israel, B'nai B'rith UK, the International Legal Forum, the Jerusalem Initiative and the Simon Wiesenthal Centre; International Commission of Jurists (ICJ); The Palestinian Association for Human Rights (Witness); Guernica 37 Chambers; the Federative Republic of Brazil; ALMA – Association for the Promotion of International Humanitarian Law; Ireland; Avocats pour la Justice au Proche-Orient (AJPO); Federal Republic of Germany; Dr Shahd Hammouri; Al-Haq Law in the Service of Mankind (Al-Haq), Al Mezan Center for Human Rights (Al-Mezan) and the Palestinian Center for Human Rights (PCHR); République Démocratique du Congo; Arpit Batra; South Africa, Bangladesh, Bolivia, Comoros, and Djibouti.

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I. INTRODUCTION

1. On 10 June 2024, the United Kingdom filed a request (“Request”) pursuant to Rule 103(1) of the Rules of Procedure and Evidence of the International Criminal Court (“ICC” or “Court”) 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 Accords.”¹ On 27 June 2024, Pre-Trial Chamber I (“Chamber”) of the ICC granted this Request and invited further *amicus* submissions on the matters raised therein.² On 12 July 2024, Guernica 37 Chambers (“G37”) filed for leave to submit observations on the matters raised in the Request (“Request for Leave”).³ This was granted by the Chamber on 22 July 2024.⁴ G37 duly files in this document its *amicus curiae* observations.
2. It is noted at the outset that in the time between the Request for Leave being granted and the deadline for *amicus* submissions, the United Kingdom has withdrawn its Request. This is entirely proper; there is no basis on which to challenge the jurisdiction of the ICC over Israeli nationals on the bases indicated in the Request. Yet, in making that Request, which seemingly remains open for the ICC to opine upon, the United Kingdom has interrupted, disrupted, and distracted from, and thus will only serve to delay the Chamber’s decision on the Prosecution’s request for the issuance of arrest warrants. This is deeply regrettable.

II. OBSERVATIONS

A. Challenging the ICC’s jurisdiction over Israeli nationals on the basis of the purported effect of the Oslo Accords would be *ultra vires*

3. In its Decision on the ‘Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine’ (“Decision on the Prosecution Request”), the Chamber found that “regardless of Palestine’s status under general international law, its

¹ Request by the United Kingdom for Leave to Submit Written Observations Pursuant to Rule 103, ICC-01/18 (10 June 2024), ICC-01/18-171-SECRET-Exp.

² Public Redacted Version of ‘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 (27 June 2024) ICC-01/18-173-Red 27-06-2024 1/5 PT, [6].

³ Request for Leave to Submit Amicus Curiae Observations by Guernica 37 Chambers (Pursuant to Rule 103 of the Rules of Procedure and Evidence), ICC-01/18-237-SECRET-Exp-Anx.

⁴ Decision on Requests for Leave to File Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence, ICC-01/18-249 (22 July 2024) ICC-01/18-249 22-07-2024 1/12 PT, [11].

accession to the Statute followed the correct and ordinary procedure, as provided under article 125(3) of the Statute”⁵ (emphasis added). Of note is that in doing so, the Chamber found that outside of a “settlement of a dispute by the Assembly of States Parties under article 119(2) of the Statute...the outcome of an accession procedure is binding. The Chamber has no jurisdiction to review that procedure and to pronounce itself on the validity of the accession of a particular State Party would be *ultra vires* as regards its authority under the Rome Statute”⁶ (emphasis added). The Chamber further noted that “it would...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...[i]n addition, denying the automatic entry into force for a particular acceding State Party would be tantamount to a reservation in contravention of article 120 of the Statute” (emphasis added).

4. It is accepted in this regard that in the Decision on the Prosecution Request, the Chamber did note that its “conclusions pertain to the current stage of the proceedings, namely the initiation of an investigation by the Prosecutor pursuant to articles 13(a), 14 and 53(1) of the Statute. When the Prosecutor submits an application for the issuance of a warrant of arrest or summons to appear under article 58 of the Statute, or if a State or a suspect submits a challenge under article 19(2) of the Statute, the Chamber will be in a position to examine further questions of jurisdiction which may arise at that point in time”⁷ (emphasis added).
5. In doing so, however, the Chamber did not create a straitjacket binding itself to consider these issues further. Indeed, it is submitted that it should not, and cannot do so now, as the conclusions cited above apply to the present situation *mutatis mutandis*. In this sense, were the Chamber to pronounce itself on the purported effect of the Oslo Accords as outlined in the Request, it would be pronouncing itself on the validity of the full accession of Palestine to the Rome Statute, regardless of whether it responded negatively or affirmatively. The Chamber has no jurisdiction to do so; Palestine has acceded to the Rome Statute in full and without reservation. That Statute is of a constitutional nature and effectively provides ‘the rules of the game’ – rules within which the Chamber must operate. The reality, therefore, is that the necessary preconditions for the ICC’s jurisdiction over Palestinian territory are met, in full, and the Chamber has no jurisdiction to challenge or otherwise interfere with, or imply reservations to this. It was never the case that Palestine’s accession to the Rome Statute was

⁵ Decision on the ‘Prosecution Request Pursuant to Article 19(3) for a Ruling on the Court’s Territorial Jurisdiction in Palestine’ ICC-01/18-143 (05 February 2021) ICC-01/18-143 05-02-2021 59/60 EC PT, [102].

⁶ *Ibid.*

⁷ *Ibid.*, [131].

made ‘without prejudice to the effects of the Oslo Accords’. Palestine is a State Party to the Rome Statute and has not bound or constrained its accession in any way, an approach which no other State Party challenged upon its accession. This is a conclusion that binds the Chamber. To pronounce itself on this matter would be *ultra vires*, and improper. The Chamber should therefore decline to opine on the Request.

B. If the delegation theory is accepted, the Oslo Accords are irrelevant to the ICC’s exercise of jurisdiction over Israeli nationals

6. Albeit necessarily posed in the alternative to the above submission, if it is that the Chamber deems its consideration of the Request *intra vires*, it is submitted that the Oslo Accords are entirely irrelevant to the exercise of jurisdiction by the ICC over Israeli nationals implicated in the Situation in Palestine. The arguments in this sub-section rest on an assumption, should the Chamber wish to endorse it, that in acceding to the Rome Statute, a State ‘delegates’ its jurisdiction to the ICC – i.e., – that in doing so it effectively grants its own enforcement jurisdiction to the Court over its territory or nationals in respect of the matters in which the Court has competence.⁸ The position should the delegation theory not be accepted is addressed below in II(C).
7. As a preliminary matter, it must be noted that going beyond the position raised in II(A), above (i.e., that the Chamber need only be satisfied of Palestine’s status as a State Party to the Rome Statute) to address questions of jurisdictional delegation will lead the Chamber into murky waters. Jurisdiction, it is submitted, is inherent in Statehood. To address whether Palestine has jurisdiction to delegate in substance, is therefore to either affirm or deny its Statehood under international law. The Chamber has already said that it has no competence to make any such assessment.⁹ Any engagement with these arguments, which are only made out of an abundance of caution, will again therefore be *ultra vires*.

⁸ In a manner similar to that of the delegation theory, it has been posited that international organisations obtain their powers in three main ways, with States either: conferring powers in an ‘**agency relationship**’, i.e., retaining ultimate control and acting as a principal empowering an agent to act on its behalf, alongside retaining the right to exercise conferred powers concurrently with the international organisation ; ‘**delegating powers**’, i.e., giving powers to an organisation without retaining rights to control the way that those powers are applied, yet retaining the right to exercise delegated powers concurrently with the international organisation ; or ‘**transferring powers**’, i.e., giving an international organisation (independently exercisable) powers permanently and (usually) irrevocably, meaning that there would normally be no ability to exercise transferred powers concurrently with the international organisation - see, Henry Schermes and Niels Blokker, *International Institutional Law* (5th edn., Martinus Nijhoff Publishers, 2011), 159. *See also*, Dan Sarooshi, *International Organisations and their Exercise of Sovereign Powers* (OUP, 2007).

⁹ See, Decision on the Prosecution Request, [103]: “It follows that the absence of such a power conferred upon the Chamber confirms the exclusion of an interpretation of ‘[t]he State on the territory of which the conduct in question occurred’ in article 12(2)(a) of the Statute as referring to a State within the meaning of general international law. Such

8. Nonetheless, entertaining for a moment the issues raised in the Request and turning to the purported relevance of the Oslo Accords for the purposes of the Court's jurisdiction over Palestine, and Israeli nationals therein.
9. If the Court accepts that Palestine is a State under international law (which, again, would be a surprisingly stark divergence from the nature of its limited mandate), it would necessarily accept that Palestine has an inherent right to prescribe, enforce, or adjudicate upon the breach of legal rules *inter alia* within its territory or over its nationals. In this scenario, Palestine would, and does, retain this right, in full, regardless of whether it chooses to apply it restrictively domestically. Indeed, "national legislation reflects the circumstances in which a State provides in its own law the ability to exercise jurisdiction. But a State is not required to legislate up to the full scope of jurisdiction allowed by international law"¹⁰ (emphasis added). Under the delegation theory, States thus can and do delegate their right to enforcement jurisdiction regardless of whether they choose to exercise that enforcement jurisdiction domestically.
10. This divergence between domestic and international applications of jurisdiction is demonstrated particularly well by examples of States having delegated their jurisdiction to the ICC over crimes which they were unable to prosecute domestically, due to legislative restrictions or omissions. France, for example, ratified the Rome Statute on 09 June 2000. However, it was not until 09 August 2010 that domestic legislation was introduced to "extend the jurisdiction of French courts to include genocide, crimes against humanity, and war crimes committed after that date."¹¹ In the intervening period between France's ratification of the Rome Statute and its extension of its own domestic legislative competence to prosecute crimes over which the ICC has competence, France had therefore delegated to the ICC jurisdiction over crimes that it could not itself prosecute domestically. The same is true, for example, of The Gambia, which, despite ratifying the Rome Statute on 22 September 2004 (and withdrawn any instruments of withdrawal in the meantime), has no domestic legislation capable of prosecuting the crimes over which the ICC has jurisdiction. The only way to explain the uncontested relationships of these States with the ICC is that they are

an interpretation would allow a chamber to review the outcome of an accession procedure through the backdoor on the basis of its view that an entity does not fulfil the requirements for statehood under general international law".

¹⁰ Arrest Warrant of 11 April 2000 (Congo v. Belgium) [2002] ICJ Rep 2001 at [45] (Joint Separate Opinion of Judges Higgins, Kooijmans and Buerghenthal).

¹¹ Human Rights Watch, 'Human Rights Watch Concerns and Recommendations on France' (HRW, 22 June 2015) <<https://www.hrw.org/news/2015/06/22/human-rights-watch-concerns-and-recommendations-france>> (accessed 5 August 2024).

able to delegate their right to enforcement jurisdiction, regardless of how they choose to exercise it domestically. Were this not the case, and the ICC was bound by the manner in which enforcement jurisdiction was implemented domestically, its jurisdiction would become a patchwork of independent, context specific arrangements, undermining the effectiveness of the Court and effectively rendering moot its permanently uniform jurisdiction over its States Parties.

11. With this in mind, it is accepted that Palestine acceded to the Oslo Accords (the continued validity/applicability of which will be addressed below), which may (in principle) limit Palestine's domestic enforcement jurisdiction over Israeli nationals. However, this is irrelevant for the ICC's purposes. Under the delegation theory, in ratifying the Rome Statute, Palestine has delegated its right to enforcement jurisdiction, rather than the way in which it implements that right domestically. The Oslo Accords (which are effectively domestic in nature) may therefore have restricted the way in which Palestine interprets domestic jurisdictional rights and entitlements, but they do not affect its ability to delegate those rights and entitlements, in full, to the Court.
12. Accordingly, it is again submitted that the Court need only satisfy itself that Palestine is a State Party for the purposes of the Rome Statute. This question has been asked of and answered by the Chamber in the Decision on the Prosecution Request. There is therefore no basis on which to now query the ICC's jurisdiction on the basis of notional domestic restrictions on enforcement jurisdiction.

C. If the delegation theory is not accepted, the Oslo Accords remain irrelevant to the ICC's exercise of jurisdiction over Israeli nationals

13. Having made the above arguments, it is accepted that the delegation theory remains contentious, and some have instead argued that the relationship between the ICC and its State Parties in fact works in the reverse – i.e., – that in ratifying the Rome Statute, States Parties are not delegating their jurisdiction to, but accepting the jurisdiction of, the ICC.¹²

¹² See, e.g., Adil Ahmad Haque, 'The International Criminal Court's Jurisdiction in Palestine and the 'Oslo Accords Issue' (Just Security, 09 July 2024) <<https://www.justsecurity.org/97584/israel-palestine-icc-oslo-accords/>> (accessed 05 August 2024). See also, Situation in Palestine ICC-01/18, Opinion in Accordance with Article 103 of the Rules of Procedure and Evidence (15 March 2020), [26]; Leila Nadya Sadat, 'The Conferred Jurisdiction of the International Criminal Court', (2023) 99 Notre Dame Law Review 549.

14. International organisations “are subjects of international law that do not, unlike states, possess a general competence.”¹³ Unlike States, they do not therefore have an inherent entitlement to jurisdictional rights under international law. The argument that the ICC can confer its own powers on its States Parties is therefore a difficult one to subscribe to. That said, it is accepted that article 12(1) of the Rome Statute reads that: “[a] State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5” and article 12(3) reads that: “ [i]f the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9” (emphases added).
15. Regardless of the personal views of the authors in this regard, it is nonetheless noted that even if the Court does endorse this theory, the Oslo Accords would remain irrelevant to the question of its ability to exercise jurisdiction over Israeli nationals.
16. Under this theory, the reality would be that Palestine has accepted the jurisdiction of the Court, rather than the Court having Palestinian jurisdiction delegated to it. The Oslo Accords would therefore be irrelevant for two reasons. Firstly, if it is that Palestine has accepted the jurisdiction of the Court, rather than granting the Court its own jurisdiction, then it remains the case that under the *lex specialis* of the Rome Statute, there is no specific provision (outside of article 98, which is not at issue here) that allows for the limitation of its jurisdiction by domestic legislation or other restrictions. Put differently, it must be the case that if Palestine accepts the jurisdiction of the Court, which it has, it will operate within its bounds, and those bounds do not envisage limitations on the basis of national legislation or other agreements. This argument is also supported by a second point, namely that even aside from the *lex specialis* of the Rome Statute, even the *lex generalis* would not afford the Oslo Accords relevance, as, if those Accords are not an international treaty between States – which remains unclear (although this would no doubt be a view shared by Israel) – pursuant to Article 27 of the Vienna Convention on the Law of Treaties¹⁴ (which reflects customary international law)¹⁵ the provisions of the Rome Statute would not be overridden by what are in effect provisions of internal law – or at best bilateral agreements. Both points

¹³ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) [1996] ICJ Rep 66, at [25].

¹⁴ Vienna Convention on the Law of Treaties, signed 23 May 1969, in force 27 January 1980, 1155 UNTS 331.

¹⁵ *Questions Relating to the Obligation to Prosecute or Extradite* (Belgium v. Senegal) (Merits) (2012) ICJ Rep. 422, [113].

go to one overriding truth: that the ICC is not concerned with, nor bound by the internal or bilateral agreements of States; once its jurisdiction is established, it, at least for its purposes, simply takes precedence over and above those internal or bilateral obligations.

17. Regardless of their characterisation, the Oslo Accords are thus not an international treaty capable of overriding the provisions of the Rome Statute. As regards the mandate and competence of the ICC, the provisions of the Rome Statute take precedence, and do not envisage its competence being hampered by what are in effect provisions of internal law. Accordingly, even without reference to the theory of delegation, the Oslo Accords remain irrelevant and should not be deemed to have any bearing on the ICC's jurisdiction over Israeli nationals.

D. The Oslo Accords are not relevant because they have been repudiated and are no longer in force

18. Finally, it is submitted that the Oslo Accords cannot limit the ICC's jurisdiction in respect of Palestine as they were never, and are no longer operative. It is noted that whilst important and not in any way subordinated to the issues raised above, submissions here have been truncated given that they are addressed in far more detail elsewhere.¹⁶ Nonetheless, two basic points must be raised here.
19. First, the Oslo Accords are not and were never binding, as they were concluded within the context of a prolonged period of occupation (the International Court of Justice having recently reaffirmed Israel's position as an occupying power in Palestinian Territories¹⁷). The submissions of the former ICC Prosecutor, whilst not binding on the Chamber, bear highlighting once again in this regard, namely that: "the Fourth Geneva Convention affirms that an Occupying Power cannot conclude agreements which derogate from or deny 'protected persons' the safeguards of the Convention. 'Protected persons' are "those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals". In the Occupied Palestinian Territory, the 'protected persons' are the Palestinian people. This principle of 'non- renunciation' of rights reflects the view that protected persons under occupation are not in a sufficiently independent and objective state

¹⁶ Situation in the State of Palestine, ICC-01/18, Written Observations Pursuant to Rule 103 (John Quigley) (29 July 2024) ICC-01/18-254 29-07-2024 1/12 PT.

¹⁷ *Legal Consequences Arising From The Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem* (Advisory Opinion) (2024) [104].

of mind to fully appreciate the implications of a renunciation of their rights under the Convention. As the ICRC Commentary has noted, it would be a “misnomer” to use the term liberty to describe their situation. Indeed, the position of the Occupying Power and the people under occupation is not one of equals. Accordingly, and to the extent that provisions of the Oslo Accords could be interpreted as excluding from the PA’s jurisdiction the obligation to prosecute individuals allegedly responsible for grave breaches under article 146(2) (or to delegate such duty to an international tribunal), those provisions could not be determinative for the Court.”¹⁸

20. Second, and in any event the Oslo Accords are no longer in force. Those Accords, which entered into force nearly 30 years ago, were only ever meant as an interim solution in order to procure a longer-term peace agreement. Since Israel’s invasion of Gaza, and in the absence of any meaningful progress between the parties to follow through on the Oslo Accords and procure a peace agreement, it cannot be said with certainty that either party considers them to be legally binding. In fact, Palestinian authorities have emphatically stated that they do not.¹⁹
21. Thus, building on the previous submission in III(C), above, even if it is the case that the Oslo Accords have any bearing on the ICC’s jurisdiction over Israeli nationals in principle – which they do not – it is strongly arguable that they do not have any such bearing in fact. In this sense, it may be that it is not only ‘not the ICC’s problem’ that the Oslo Accords exist, it may not even be a problem for the parties to that agreement themselves, at least one of whom considers that “The Palestine Liberation Organization and the State of Palestine are absolved...of all agreements and understandings with the American and Israeli governments.”²⁰

III. CONCLUSION

22. In conclusion, it is stressed again that the Chamber should decline to opine on the Request. To do so would be *ultra vires*, and would lead to Court into murky waters that are entirely avoidable, and inappropriate. Without any reservation, the matter is clear: the Court can

¹⁸ Prosecution Request Pursuant to Article 19(3) for a Ruling on the Court’s Territorial Jurisdiction in Palestine ICC-01/18 (22 January 2020) ICC-01/18-12 22-01-2020 1/112 RH PT, [188].

¹⁹ David M. Halbfinger and Adam Rasgon, ‘Abbas Says Security Cooperation Will End, Raising Stakes for Israeli Annexation’ (NYT, 19 June 2020) <<https://www.nytimes.com/2020/05/19/world/middleeast/abbas-palestinians-israel-west-bank.html>> (accessed 05 August 2024).

²⁰ *Ibid.*

exercise jurisdiction over the territory of a State Party *per se*. Palestine is a State Party. The Chamber therefore cannot challenge the fact that the Court is empowered to exercise jurisdiction over that territory, including over Israeli nationals. Those are the rules of the game, and those are the rules by which the Chamber must play. Should the Chamber exceed its limited jurisdiction in this regard, it risks furthering institutional fragmentation and entering a legal melee which it is not required to enter, and indeed is prohibited from entering.

23. Further, or in the alternative, should the Court choose to engage with this matter, the answer is clear: the Oslo Accords are irrelevant to the question of the Court's jurisdiction over Israeli nationals. They are irrelevant because the Court's authority overrides them. Alternatively, they are irrelevant because they never did, or in any case have ceased to have effect.
24. It is once again stressed that it is deeply regrettable that the United Kingdom has initiated – and subsequently resiled from – these proceedings, which have given rise to a question that will needlessly take time and resources from the Court. However, it is hoped that the above submissions are of some assistance in finding a speedy and proper resolution to this matter.



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Dated this: 06 August 2024
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