

Annex

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: ICC-01/18
Date: 11 July 2024

PRE-TRIAL CHAMBER I

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

SITUATION IN THE STATE OF PALESTINE

Public

**Application for leave to file written observations on the question of jurisdiction
pursuant to Rule 103 of the Rules of Procedure and Evidence**

Source: Prof. Yuval Shany
Prof. Amichai Cohen

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 Victims

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Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations
Section

Public Information and Outreach
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I. Introduction

1. We are two professors of international law, who are based in higher education institutions in Israel. We have been conducting research since the 1990s on a variety of legal issues relating to the Israeli-Palestinian conflict, international humanitarian law, international criminal law and the jurisdiction of international courts and tribunals. Much of our work in this regard has been conducted under the auspices of the Israel Democracy Institute (IDI) – an independent think tank committed to advancing democratic values in Israel.

Yuval Shany

2. Prof. Yuval Shany, is the Hersch Lauterpacht Chair of Public International Law and former Dean of the Faculty of Law at the Hebrew University of Jerusalem. He is also an associate member of the *Institut de Droit International* and a senior fellow at the IDI. He has served in the past as a member (2013-2020) and chair (2018-2019) of the Human Rights Committee in Geneva, and has written extensively on a variety of international law themes, including on questions currently pending before the Court. One of his articles - In Defence of Functional Interpretation of Article 12(3) of the Rome Statute, 8 *Journal of International Criminal Justice (JICJ)*(2010) 329–343 – was cited and analysed in the Office of the Prosecutor's (OTP) article 19(3) request from 2020, which gave rise to the 2021 decision by the pre-trial chamber on the question of jurisdiction.

Amichai Cohen

3. Prof. Amichai Cohen is a Professor of Law and the former Dean of the Ono Academic College Faculty of Law. He is also a senior fellow at the IDI. He has served for many years on the public board of the Association for Civil Rights in Israel – the major human rights organization in the country – and has published extensively on questions of international law and national security law. Cohen and Shany have jointly published in the past on the duty to investigate war crimes (Beyond the Grave Breaches Regime: The Duty to Investigate Alleged Violations of International Law Governing Armed Conflicts, 14 *Yearbook of International Humanitarian Law* (2011) 37-84), and have co-authored a number of blog posts on different aspects of the current ICC proceedings, including on questions of jurisdiction and admissibility.¹

¹ See e.g., <https://www.justsecurity.org/96296/icc-article-18-complementarity/>; <https://www.justsecurity.org/96135/the-prosecutors-uphill-legal-battle-the-netanyahu-and-gallant-icc-arrest-warrant-requests/>; <https://www.lawfaremedia.org/article/in-search-of-complementarity--israel-s-possible-responses-to-icc-arrest-warrants>.

II. Summary of Observations to be Submitted if granted Leave

4. In our proposed submission, we shall endeavour to provide the Court with our legal expertise-based views on certain questions of jurisdiction and admissibility relevant to the current proceedings. On the basis of our previous research on the jurisdiction of the International Criminal Court (ICC) and the impact of the Oslo Accords thereupon, we would like to address the Chamber on the following issues:
 - A. The Separate nature of the jurisdictional question which the pre-trial Chamber determined in 2021, pertaining to the jurisdiction conferred upon the Court following the accession of the State of Palestine to the ICC Statute, and the specific question pertaining to the impact of the Oslo Accords on the Court's jurisdiction, which was not determined, at the time, by the pre-trial Chamber, and is the subject-matter of the UK's application for leave to file written observations.
 - B. The question of Palestinian statehood under international law and the concrete implications of the functional approach that was discussed in the 2010 JICJ article, and which was endorsed, we believe, by the pre-trial Chamber in its 2021 decision. We shall argue that given the uncertain legal status *erga omnes* of Palestine and the remaining doubts regarding its satisfaction of conditions for statehood, its legal powers and legal capacities should be carefully evaluated on a functional and case-by-case basis. This is especially so when its powers and capacities are employed in matters implicating the rights and legal interests of ICC non-state parties that do not consider all conditions for statehood to have been met, and are not bound by procedural decisions taken by ICC organs on the legal status *inter partes* of Palestine.
 - C. The Oslo Accords created the Palestinian Authority (which has essentially the same legal personality as the State of Palestine) as a special entity with restricted legal powers and capacities, transferred to it from Israel. These transferred powers and capacities did not include jurisdiction over Israeli nationals. Despite the many permutations that occurred over the years, the Oslo Accords remain the legal framework that actually governs the bilateral relations between Israel and the Palestinian Authority, and they continue to shape the latter's legal status *erga omnes*.
 - D. The *nemo dat quod non habet* principle prevents Palestine from transferring to the Court legal powers it never possessed. We shall

argue, in this regard, that the analysis pertaining to political entities whose legal status is uncertain under international law is fundamentally different from the analysis pertaining to sovereign states whose legal status is not disputed. Since the latter enjoy under international law full capacity to exercise territorial and personal jurisdiction and to transfer it to the Court, conflicting international agreements do not prevent, in principle, the ICC from exercising jurisdiction by virtue of such transfers. By contrast, The Oslo Accords established the Palestinian Authority with severely restricted legal powers and capacities and, as a result, they also restrict its legal ability to transfer jurisdiction.

- E. The objections raised in 2020 by the OTP in its article 19(3) request in respect of the claims regarding the impediment created by the Oslo Accords are not convincing. The distinction between prescriptive and enforcement jurisdiction, which is relevant for immunity claims or Status of Forces Agreements, is irrelevant in the case of the Oslo Accords that created the Palestinian Authority as a special entity with restricted legal powers and capacities, and explicitly excluded from it *all* jurisdiction pertaining to Israeli nationals. In the same vein, the argument pertaining to the alleged inability of Israel and Palestinian Authority to agree to limit jurisdictional transfers under the laws of belligerent occupation is legally unfounded and has no support in state practice.
- F. We would also wish to raise, briefly, in our observations, if granted leave, our concern regarding the admissibility of the request for arrest warrants, in view of the failure of the OTP to comply with the formal requirements of article 18 of the ICC Statute in the particular circumstances underlying the request. We are of the position that this failure has resulted in depriving Israel of a reasonable opportunity to open an investigation that would mirror the OTP investigation before the request for arrest warrants was filed. The OTP's legal interpretation of article 18 in the present case is incompatible with its own policies, which underscore the centrality of the principle of complementarity for the ICC, and with the imperative need for interpreting and applying the principle in ways that would effectively protect the rights and legal interests of relevant states and the legal powers of the pre-trial Chamber itself.

CONCLUSION

For these reasons we request leave to file observations as amicus curiae on the question of jurisdiction in order to assist the Chamber in determining the Prosecutor's Request.

Respectfully submitted:



Yuval Shany and Amichai Cohen

Dated this 10 day of July 2024.

At Modiin, Israel