

Original: English

Date: 12 July 2024

PRE-TRIAL CHAMBER I

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

SITUATION IN THE STATE OF PALESTINE

Public Request for Leave to File Observations Pursuant to Rule 103

Source: **The Centre for European Legal Studies on Macro-Crime**
 (MACROCRIMES)

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Legal Representatives of the Victims	Legal Representatives of the Applicant
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REGISTRY

Registrar Mr. Osvaldo Zavala Giler	Counsel Support Section
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I. Introduction

1. The Applicant seeks leave to file observations pursuant to Rule 103 of the Rules of Procedure and Evidence (“RPE”) on the issue of whether the International Criminal Court (“Court”) can exercise jurisdiction over Israeli nationals, in circumstances where the Oslo Accords prevent Palestine from exercising criminal jurisdiction over them. This request is submitted in accordance with the instructions provided by the Pre-Trial Chamber in its Decision of 27 June 2024, and in particular paragraph 6 of that Decision.

II. Procedural History

2. On 20 May 2024, the Prosecutor announced that he had made applications for arrest warrants in the Situation in Palestine pursuant to article 58 of the Statute against Yahya Sinwar, Mohammed Diab Ibrahim Al-Masri, Ismail Haniyah, Benjamin Netanyahu and Yoav Gallant.
3. On 10 June 2024, the United Kingdom filed a request for leave to submit written observations pursuant to Rule 103 RPE, to assist Pre-Trial Chamber I in establishing ‘[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. In the view of the requesting State, this issue had not been specifically addressed in the Decision on the ‘Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine’, issued by the Chamber in a previous composition on 5 February 2021².
4. In its Decision of 27 June 2024, the Chamber granted leave to the United Kingdom to submit its observations by 12 July 2024. Acknowledging ‘that the Request, and the Chamber’s decision to grant the United Kingdom leave to file observations, may result in other requests to submit observations’³, the Chamber instructed interested parties to submit any such requests by the same deadline.

¹ ICC-01/18-171,

² ICC-01/18-143.

³ ICC-01/18-173, par. 6.

III. The Applicant

5. The *Centre for European Legal Studies on Macro-Crime* (“MACROCRIMES” or “the Centre”)⁴ was established within the Department of Law of the University of Ferrara in November 2018, as part of a project that led to the Department being acknowledged as one of the best in Italy for research quality (“Dipartimenti di eccellenza”). The Centre develops its teaching, research and outreach activities focusing on the legal aspects relating to the fight against “macro-crime”, a notion encompassing core international crimes as well as grave breaches of fundamental rights, immigration-related crimes and organised, mafia-type, terrorist and transnational crime, economic crime and environmental and food crime. Building on the expertise of the researchers of the Law Department, the Centre has developed a vast network of cooperation with fellows, organisations and institutions involved in the fight against macro-crime and in the protection of fundamental rights at local, national, European and international level. The Centre is currently composed of 54 members and 32 fellows, organised into 4 thematic clusters.
6. In the framework of its outreach activities, MACROCRIMES submitted two *amici curiae*. The first one, in 2019, was addressed to the First Section of the European Court of Human Rights, in the case *Annamaria DI CAPRIO et autres contre l'Italie et 3 autres requêtes* (n° 39742/14), and concerned the situation in the so-called “Land of Fires” (“Terra dei Fuochi”). The written observations focused on the limits of Italian criminal law in providing effective protection against violations of Articles 2 and 8 of the ECHR in situations of environmental and health disasters. In 2020, MACROCRIMES filed a written opinion⁵ to the Italian Constitutional Court on the issue of the constitutionality of life sentences without parole (the so-called “ergastolo ostativo”).
7. MACROCRIMES’ *Core Crimes* cluster comprises 21 members and fellows, among whom are prominent scholars and experts from different fields, including Philosophy of Law, International Law, Criminal Law and Criminal Procedure, thus promoting interdisciplinary reflection. The cluster addresses *crimina iuris gentium*, the most serious violations of international law, which are of concern to the international community as a whole. The activities of the *Core Crimes* cluster include organising research initiatives such as workshops, round tables, and scientific seminars; offering educational programs for

⁴ www.macrocrimes.eu/en.

⁵ The written opinion is available here: <https://www.macrocrimes.eu/media/uploads/allegati/4/amicus-curiae-macrocrimes-convertito.pdf>.

students and for the military and civilian personnel of the Italian Ministry of Defence; and conducting outreach activities, including the preparation of *amici curiae* and the drafting of opinions and studies commissioned by third parties.

8. The Applicant submits that their contribution is ‘desirable for the proper determination of the case’⁶, as they possess the cross-disciplinary legal expertise necessary to address the issue under discussion at this stage of the proceedings. In the event that leave is granted, the drafting of the *amicus curiae* will be entrusted to members specialising in International Criminal Law, the Law of Treaties, Occupation Law, and the Principle of Self-Determination.
9. If leave is granted, MACROCRIMES’ submission will exclusively address the legal matters raised by the Request submitted by the United Kingdom and outlined by the Court in its Decision of 27 June 2024. MACROCRIMES will submit its observations *pro veritate*; fellows of the Centre acting in other capacities in proceedings connected to the situation in the State of Palestine will not be involved in any way in the drafting of the *amicus curiae*.

IV. Specific Issues to be Addressed

10. MACROCRIMES interprets the instructions provided by the Chamber in paragraph 6 of its Decision dated 27 June 2024 as limiting the scope of *amici curiae* submissions at the current stage of the proceedings to the issue raised in the Request filed by the United Kingdom on 10 June 2024. However, the Centre stands ready to respectfully offer its observations on any other legal issue that the Chamber may deem appropriate for it to address, at this or further stages of the proceedings.
11. In the event that leave is granted, MACROCRIMES will argue that the Declaration of Principles on Interim Self-Government Arrangements (“Oslo I”) in 1993, the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (“Oslo II”) of 1995, and the subsequent agreements between the Palestinian Liberation Organization (“PLO”) and Israel (hereinafter jointly referred to as the Oslo Accords) do not bar the exercise of the ICC’s jurisdiction over Israeli nationals.
12. Specifically, we propose to address the following two points: (1) whether the scope of the Court's jurisdiction *ratione loci* and *ratione personae*, as identified in Article 12 of the Statute, could be restricted by way of a bilateral agreement concluded between the

⁶ Rule 103 RPE.

territorial State and the State of nationality of the alleged perpetrator; (2) whether the Oslo Accords prevent Palestine from exercising criminal jurisdiction over Israeli nationals.

13. Under point (1), we will address the relevance of the principle *nemo dat quod non habet*. *Firstly*, we will question the commonly held assumption that Article 12 referrals imply a delegation of competence and that, as a consequence thereof, the Court may only exercise its jurisdiction under Article 12(2)(a) of the Statute in respect of cases that effectively come within the jurisdiction of the domestic courts of the State Party. In this context, we will also address the difference between the State's *sovereign right to adjudicate crimes* perpetrated on its territory and its *ability to exercise such a right*. We will argue that, while a State's ability to exercise its criminal jurisdiction could be limited under international law by an international customary rule (i.e. the rules on sovereign immunity), due to a *de facto* situation (i.e. a belligerent occupation), or by way of an international agreement, any such limitations would leave the State's sovereign right to adjudicate crimes perpetrated on its territory unaffected. As a consequence thereof, the State would still be in a position to ratify the ICC Statute, allowing the Court to exercise its jurisdiction over international crimes perpetrated on its territory. Far from representing an obstacle to the Court's action, the State's inability to exercise its jurisdiction in these situations would constitute the very basis for criminal proceedings in The Hague, based on the principle of complementarity. *Secondly*, we will argue that any bilateral agreement concluded by a State party, before or after it ratified the ICC Statute, would not be opposable to the other Parties to the Statute unless they were parties also to the agreement⁷. Thus, even if the Oslo Accords were found to be binding on Palestine and incompatible with Article 12 ICC Statute, this would not deprive Article 12 of its legal effect.
14. Under point (2) we will argue, *firstly*, that any limitation to the ability of Palestinian Courts to exercise jurisdiction over crimes perpetrated by Israeli nationals on Palestinian territory is a direct effect of the occupation, rather than of the Oslo Accords. The latter do not involve any transfer of jurisdiction from Palestine to Israel, but rather govern the progressive and partial transfer of powers and responsibilities from the Israeli military government and its Civil Administration to the Palestinian Council, the Interim Self-Government Authority which was established on the basis of Oslo II, pending the outcome of the permanent status negotiations. *Secondly*, we will argue that since the Oslo Accords were concluded between Israel, as the Occupying Power, and the PLO, as the authority representing the population

⁷ See the rule enshrined in Article 30(4)(b), of the Vienna Convention on the Law of Treaties.

of the occupied territory, they are subject to the limits set by Article 47 of the IV Geneva Convention; hence, they cannot deprive Palestinians of the benefits of the said Convention, including by unduly preventing the prosecution of international crimes perpetrated against them. *Thirdly*, we will submit that an interpretation of the Oslo Accords which prevents Palestine from exercising its criminal jurisdiction over Israeli nationals accused of international crimes, and from allowing the ICC to adjudicate such cases, would make it impossible for Palestine to fulfil its international obligation to make every effort to ensure accountability for international crimes. Arguably, this latter obligation is part of international *jus cogens*. As the International Law Commission recently made clear, when there is a conflict between a peremptory norm of general international law and another rule of international law, the latter is, as far as possible, to be interpreted and applied in a manner consistent with the former⁸. *Finally*, we may consider whether material breaches by either party have resulted in the termination of the Oslo Accords.

V. Conclusion

15. In light of the foregoing, MACROCRIMES respectfully requests that the Chamber grant it leave to file *pro veritate* observations on the above identified matters pursuant to Rule 103 of the RPE.

Respectfully submitted,



Donato Castronuovo

Director of MACROCRIMES

Dated this 12 July 2024

In Ferrara, Italy

⁸ International Law Commission, Draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), 2022, conclusion 20.