

Annex

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/18
Date: 12 July 2024

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 Document

Request by Professor Neve Gordon to submit *amicus curiae* observations

Source: Professor Neve Gordon

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The Office of Public Counsel for Victims	The Office of Public Counsel for the Defence
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A. The Applicant

1. The Applicant Neve Gordon (hereafter 'The Applicant'), is a Professor of Human Rights and International Humanitarian Law in the School of Law at Queen Mary University of London.

2. Professor Gordon is an international expert on Israel's occupation of the Palestinian territory,¹ and has written book chapters and refereed academic articles on the Oslo Accords,² the violation of human rights in the West Bank, Gaza Strip and East Jerusalem (hereafter oPt) and the way these violations have been dealt with by the Israeli courts.³ He has also researched and written about Israel's breaches of the laws of armed conflict in the Gaza Strip.⁴ Before becoming an academic Professor Gordon was the director of Physicians for Human Rights-Israel and wrote several reports on the occupied healthcare system.⁵ The views set out in this Application are based on Professor Gordon's expertise on these issues.

3. Professor Gordon has initiated this petition requesting the Pre-Trial Chamber (hereafter PTC) to accept the jurisdiction claims made by the ICC Prosecutor Karim Khan KC in his 20 May 2024 petition to the PTC to issue arrest warrants for Yahya SINWAR, Head of the Islamic Resistance Movement "Hamas" in the Gaza Strip,

¹ Neve Gordon, *Israel's Occupation*, University of California Press, 2008.

² Neve Gordon, "From Colonization to Separation: Exploring the Structure of Israel's Occupation," *Third World Quarterly*, 29(1) 2008: 25-44 ; Neve Gordon and Yinon Cohen, "Western Interests, Israeli Unilateralism, and the Two-State Solution," *Journal of Palestine Studies*, Vol. XLI, No. 3 Spring 2012: 1-13.

³ Nicola Perugini and Neve Gordon, *The Human Right to Dominate*, Oxford University Press, 2015 (equal contribution); Neve Gordon, "Human Rights as a Security Threat: Lawfare and the Campaign Against Rights NGOs," *Law and Society Review*. Vol. 48:2, 2014: 311-344 ; Neve Gordon, "Human Rights, Social Space and Power: Why do some NGOs Exert More Influence than Others?" *International Journal of Human Rights*, 12(1) 2008: 23-39; Neve Gordon and Ruchama Marton. *TORTURE: Human Rights, Medical Ethics and the Case of Israel*, London: Zed Books, 1995.

⁴ Neve Gordon and Nicola Perugini, *Human Shields: A History of People in the Line of Fire*, (University of California Press, 2020). Neve Gordon and Nicola Perugini, "[Proximate 'human shields' and the challenge for humanitarian organizations](#)," *ICRC Humanitarian Law and Policy Blog*, November 18, 2021; Neve Gordon and Nicola Perugini, "'Hospital Shields' and the Limits of International Law," *European Journal of International Law* Vol. 30.2, 2019: 439-463 ; "Military Attacks on 'Hospitals Shields': The Law Itself is Partly to Blame," *Just Security*, October 20, 2016 online at <https://www.justsecurity.org/33712/military-attacks-hospitals-shields-law-partly-blame/>; "Human Shields: The Weapon of the Strong," *Just Security*, October 22, 2015 online at <https://www.justsecurity.org/27005/human-shields-weapon-strong/>; Neve Gordon and Muna Haddad, "[The Road to Famine in Gaza](#)," *New York Review of Books*, March 30, 2024.

⁵ Intifada Related Head Injuries, Tel-Aviv: PHR, 1995: 1-42; The Transfer of Health Services to a Palestinian Authority, Tel-Aviv: PHR, 1994: 1-44 (with Jon Neufeld); The Occupied Health Care System, Tel-Aviv: PHR, 1993, 1-39. (with Rela Mazali and Nogah Ofer); Torture in Israel, Tel-Aviv: PHR, 1992, 1-24. (with Rela Mazali).

Mohammed Diab Ibrahim AL-MASRI, Commander-in-Chief of the military wing of Hamas, known as the Al-Qassam Brigades, and Ismail HANIYEH, Head of Hamas Political Bureau, alongside arrest warrants for Benjamin NETANYAHU, the Prime Minister of Israel, and Yoav GALLANT, the Minister of Defence of Israel. This would entail denying the 10 June, 2024, UK request filed with the PTC.

B. The Applicants' request

7. The Applicant request that this filing be considered by the PTC dealing with any and all applications for arrest warrants by the ICC Prosecutor that relate to the violation of international human rights and humanitarian law in Israel, the Gaza Strip, West Bank, and East Jerusalem.

8. On 20 May it was made public that the Prosecutor has applied for arrest warrants for the above-mentioned officials based, *inter alia*, on Article 12(2)(a) and comprises the West Bank, Gaza Strip and East Jerusalem. On 10 June the UK requested that the Court rule on whether "the Court can exercise jurisdiction over Israeli nationals, in circumstances where Palestine cannot exercise criminal jurisdiction over Israeli nationals pursuant to the Oslo Accords."⁶ The United Kingdom (UK) 10 June request and any other similar requests are misguided on the following grounds:

9. In its request, the UK maintains that the Court lacks jurisdiction because the Palestinian Authority (hereafter PA) cannot exercise criminal jurisdiction over Israeli nationals pursuant to the 1995 Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (Oslo II), and as a consequence it cannot transfer or delegate judicial authority over Israeli nationals to the Court. The UK's claim is that the Court is constitutionally constrained by the limits set by Oslo II, most noticeably, that Article XVII(2)(c) stipulates that the "territorial and functional jurisdiction of the [Palestinian Interim Self-Government Authority] will apply to all persons, except for Israelis,

⁶ Situation in the State of Palestine, Request by the United Kingdom for Leave to Submit Written Observations Pursuant to Rule 103, ICC-01/18, 10 June 2024.

unless otherwise provided in this Agreement.”⁷ In addition, Article I(1)(a) of Annex IV to Oslo II notes 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.”⁸ The UK is essentially repeating Israel’s argument presented in ICC-01/18. At the time Israel argued that the Court should be “constitutionally constrained by the limits of delegation and unable to exercise jurisdiction where the delegating entity has no jurisdiction to the extent required.”⁹ Israel maintained that because “the Palestinian entity has no criminal jurisdiction over either Israeli nationals or over Area C and Jerusalem [pursuant to the Israeli-Palestinian Interim Agreement of 1995], it is therefore legally impossible for it to delegate any such jurisdiction to the Court.”¹⁰

10. In its ruling on the Court’s jurisdiction over the *Situation in the State of Palestine* and its extent the Chamber briefly addressed the issue of the Oslo Accords, citing the *Situation in the Islamic Republic of Afghanistan* to claim that “the arguments are not pertinent to the issue of the authorisation of an investigation.”¹¹

11. The UK’s request, based on the claim that the Court is constitutionally constrained by Oslo II, is flawed for seven main reasons: First, under the Rome Statute, a States Party—in this case the State of Palestine—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)). Therefore, whether or not the PA can exercise criminal jurisdiction over Israeli nationals pursuant to the 1995 Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (Oslo II) is immaterial to the Court’s jurisdiction over Israeli nationals. If anything, the PA’s lack of authority over Israeli nationals serves to strengthen the Court’s jurisdiction over war crimes and crimes

⁷ See on the United Nations website (document last accessed on 2 February 2021):

<https://www.un.org/unispal/document/auto-insert-185434/>.

⁸ ICC-01/18 para. 124.

⁹ ICC-01/18 para. 30.

¹⁰ ICC-01/18 para. 126. [Israel Attorney General Memorandum](#), para. 60; *see also* paras 56-59; [Israel Ministry of Foreign Affairs Memorandum](#), para. 30.

¹¹ [Situation in Afghanistan Appeals Chamber Judgment](#), para. 44. ICC-01/18 para. 128.

against humanity allegedly carried out by Israeli nationals in the oPt, which would otherwise be met with impunity (see para. 17 below).

12. Second, the Court claimed that “once the conditions for accession pursuant to Article 125 of the Statute have been fulfilled, the effect of Articles 12(1), 125(3) and 126(2) of the Statute, taken together, is that the Statute automatically enters into force for a new State Party. By becoming a State Party, Palestine has agreed to subject itself to the terms of the Statute 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.*”¹²

13. Third, 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’.”¹³ In essence, the UK is asking the Court to give precedence to Articles 97 and 98 of the Statute over Article 1 which formulates the Court's *raison d'être* as an institution that has “the power to exercise its jurisdiction over persons for the most serious crimes of international concern.” The UK request is thus based on the false assumption that the Court's jurisdiction is determined 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. Moreover, Articles 7, 8 and 47 of the Fourth Geneva Convention affirm that belligerents cannot conclude agreements which derogate from or deny to protected persons the safeguards of the Fourth Geneva Convention. Accepting the request, will in effect permit a bi-lateral interim agreement to trump non-derogable peremptory rights and deny victims' rights to *inter alia* access to justice, effective remedies, and redress. Allowing Oslo II to restrict the Court's personal and territorial jurisdiction will ultimately undermine the very architecture of the international legal order.

¹² [ICC-01/18](#) para. 102 (emphasis added).

¹³ [ICC-01/18](#) para. 25, 39.

14. Fourth, in Israel's Attorney General's memorandum about the Oslo Accords signed between the PLO and Israel and in a number of Israeli Supreme Court rulings it has been 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."¹⁴ If, according to Israel, the interim agreements does not have a higher status or greater validity than other agreements and does not constitute part of the legal norms applicable in Israel or part of the legal norms applicable in the oPt, it would be untenable to claim that the same interim agreements supersede the legal norms layed out in Geneva Conventions and/or the Rome Statute.

15. Fifth, the vast asymmetry of power between Israel and the Palestinians is reflected in the Oslo Accords. This, as I and numerous other scholars have shown, not only perpetuates the unequal power relations between the two parties, but has been, in many respects, detrimental to the Palestinians. The 2019 Advisory Opinion by the International Court of Justice 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 to the issue of consent in a situation where a non-self-governing territory (in our case the Palestinians) signs an agreement with the part that has authority over it (in our case Israel). The free and genuine expression of the will of the people concerned should, for example, be assessed when considering that Oslo II Article XVII(2)(c) introduces an exception with respect to criminal offences

¹⁴ HCJ 2717/96 *Wafa v. The Defence Minister* (1996), para. 3.

carried out by Israeli nationals in the oPt but offers no such exception in cases of criminal offences carried out by Palestinian nationals.

16. Sixth, the Oslo Accords indicated that a permanent settlement will be reached by May 1999 (end of 5 year interim period) and would be superseded by a peace treaty. The UK request thus seeks to amplify a single Article from Oslo II but ignores the temporal dimension of the agreements, which cease to be binding beyond the interim period.

17. Seventh, pertinent to the UK's request is Israel's failure to investigate egregious violations, including alleged war crimes and crimes against humanity, taking place in the Palestinian territory.¹⁵ Indeed, a staggering 98% of complaints regarding soldiers' offenses against Palestinians conclude without any indictment.¹⁶ 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."

¹⁵ B'Tselem, "[The Occupation's Fig Leaf: Israel's Military Law Enforcement System as a Whitewash Mechanism](#)."

¹⁶ Yesh Din, "[Data sheet: Law enforcement against Israeli soldiers suspected of harming Palestinians, 2019-2020 summary](#)."

Neve Gordon

Professor Neve Gordon

Dated this 12 June 2024

At London, United