

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 Richard Falk and Professor Michael Lynk to submit *amicus curiae* observations

Source: Professor Richard Falk, Professor Michael Lynk

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Legal Representatives of the Victims	Legal Representatives of the Applicants
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The Office of Public Counsel for Victims	The Office of Public Counsel for the Defence
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I. BACKGROUND AND EXPERTISE

A. Professor Richard Falk

1. I am the Albert G. Milbank Professor of International Law and Practice Emeritus at Princeton University, a Distinguished Research Fellow at Orfalea Centre of Global Studies, UC Santa Barbara, and a current Visiting Professor at Queen Mary's University London. I am also Senior Vice President of the Nuclear Age Peace Foundation, having previously served seven years as Chair of its Board.
2. My expertise on Palestine includes a term as the United Nations Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, served during the period of 2008-2014, as well as the authoring of numerous publications on the subject, including *Palestine: The Legitimacy of Hope* (Just World Books, 2015) and *Palestine's Horizon: Towards a Just Peace* (Pluto Press, 2017). I have further served on the UN Commission on Human Rights commission of inquiry established pursuant to Commission resolution S-5/1 of 19 October 2000, tasked with investigating violations of international human rights and humanitarian law in the occupied Palestinian territory during the second intifada.¹ [I was also co-author with Professor Virginia Q. Tilley of an academic study prepared at the request of the UN Economic & Social Commission for West Asia, "Israeli Practices toward the Palestinian People and the Question of Apartheid," *Palestine and the Israeli Occupation 1*, (Spring 2017): 1-46.]

B. Professor Michael Lynk

3. I am Professor Emeritus of Law at the Faculty of Law, Western University, in London, Ontario, Canada, where I taught international and domestic human rights law, labour law and constitutional law until retirement in December 2022. I have published widely on these topics. In 2015, I was included in the Mayor of London's Honours List for my work on humanitarian issues. In March 2016, I was appointed by the United Nations Human Rights Council as the 7th UN Special Rapporteur for the Situation of Human Rights in the Palestinian Territory Occupied since 1967. During my six years as Special

¹ See Commission on Human Rights, *Question of the violation of human rights in the occupied Arab territories, including Palestine: Report of the human rights inquiry commission established pursuant to Commission resolution S-5/1 of 19 October 2000* (16 March 2001) UN Doc. E/CN.4/2991/121.

Rapporteur, I frequently addressed the United Nations Human Rights Council in Geneva and the 3rd Committee of the United Nations General Assembly in New York on the human rights situation in the occupied Palestinian territory (OPT). My 12 reports have been widely cited, and I have frequently spoken at academic and institutional conferences in North America, Europe and the Middle East on the topic. I served in this position until April 2022.

4. Throughout the course of my academic and professional career, I have authored or edited several books, including most recently *Protecting Human Rights in Occupied Palestine: Working Through the United Nations* (Clarity Press, 2022) (with Professors Richard Falk and John Dugard) and *International Law and the Middle East Conflict* (Routledge, 2011) (with Professor Michael Dumper, Iain Scobbie and Susan Akram). I have regularly published opinion pieces and articles, law review journals and edited book collections on the role of international law as regards to the Israeli occupation of the Palestinian territory and the Middle East.
5. Based on our expertise in international human rights law and experiences within the United Nations human rights mechanisms, with particular reference to the applicable legal framework governing Israel-Palestine relations, we are requesting leave to submit written observations pursuant to Rule 103.

II. GROUNDS FOR THE REQUEST

6. Rule 103(1) of the Rules of Procedure and Evidence (RPE) states that '[a]t any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case [...] grant leave to a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate.' While this provides a broad discretion to the Court, it is unprecedented that an external State completely unrelated to the Situation would be granted the opportunity at this stage.
7. The Court treats Article 58 proceedings as *ex parte*,² limited to communications between the Chamber and the Office of the Prosecutor (OTP), in order to avoid initiating

² Situation in the Republic of Kenya, Decision on the "Application for Leave to Participate in the Proceedings before the Pre-Trial Chamber relating to the Prosecutor's Application under Article 58(7)", ICC-01/09, 11 February 2011, Para 10

unwarranted adversarial processes. This classification is based on the wording of Article 58, which provides that an arrest warrant will be issued if, “having examined the application and the evidence or other information *submitted by the Prosecutor*”, it is satisfied that there are reasonable grounds to believe a person has committed a crime within the jurisdiction of the Court: The appropriate position as recognised by the Court is that “[t]he only communication envisaged at the article 58 . . . stage is conducted between the Pre-Trial Chamber and the Prosecutor”.³

8. Article 58(1)(b) outlines that an arrest warrant shall be issued when the arrest of the person appears necessary. The three scenarios in which this is satisfied are: (i) to ensure the person's appearance at trial; (ii) to ensure they do not obstruct or endanger the investigation or the court proceedings; and (iii) to prevent the person from continuing with the commission of that crime or a related crime within the jurisdiction of the ICC.
9. Each of these scenarios is satisfied in the present situation. Describing the request for an arrest warrant as “outrageous” and a “moral outrage of historic proportions”,⁴ Israel's Prime Minister Benjamin Netanyahu has shown no indication that he will comply with the Court. Israeli authorities, as well as long-standing allies of Israel, such as the United States and the United Kingdom, may well continue to shield both him and the Israeli Minister of Defence Yoav Gallant from the reach of the International Criminal Court. Beyond undermining the OTP, additional evidence of the Israeli government capturing the communications of numerous ICC officials, intercepting phone calls, messages, emails and documents over the last nine years has recently emerged.⁵ Israeli intelligence agencies have gone so far as to pressure, denigrate and allegedly threaten ICC staff in its effort to end the investigation into crimes committed by Israeli government in its maintenance of its 57 year old occupation, the longest occupation in the modern world.⁶

³ Situation in the Republic of Kenya, Pre-Trial Chamber II, "Decision on Application for Leave to Submit Amicus Curiae Observations", ICC-01/09-35, 18 January 2011, para. 10.

⁴ Youtube, 'Netanyahu reacts to ICC arrest warrant (20 May 2024, The Times and The Times)

<https://www.youtube.com/watch?v=J59RhNghs9k&ab_channel=TheTimesandTheSundayTimes>

⁵ The Guardian, 'Spying, hacking and intimidation: Israel's nine-year 'war' on the ICC exposed' (28 May 2024)

<[https://www.theguardian.com/world/article/2024/may/28/spying-hacking-intimidation-israel-war-icc-exposed#:~:text=Israeli%20intelligence%20captured%20the%20communications,%2C%20messages%2C%20e-mails%20and%20documents.](https://www.theguardian.com/world/article/2024/may/28/spying-hacking-intimidation-israel-war-icc-exposed#:~:text=Israeli%20intelligence%20captured%20the%20communications,%2C%20messages%2C%20e-mails%20and%20documents.;)>; UN OHCHR, 'Spyware scandal: UN experts call for moratorium on sale of 'life threatening' surveillance tech' (12 August 2021), <https://www.ohchr.org/en/press-releases/2021/08/spyware-scandal-un-experts-call-moratorium-sale-life-threatening>; UN OHCHR, 'Israel/Gaza: Threats against the ICC promote a culture of impunity, say UN experts' (10 May 2024), <https://www.ohchr.org/en/press-releases/2024/05/israelgaza-threats-against-icc-promote-culture-impunity-say-un-experts#>.

⁶ The Guardian, 'Spying, hacking and intimidation: Israel's nine-year 'war' on the ICC exposed' (28 May 2024)

<<https://www.theguardian.com/world/article/2024/may/28/spying-hacking-intimidation-israel-war-icc-exposed#:~:text=Israeli%20intelligence%20captured%20the%20communications,%2C%20messages%2C%20e>

Such acts undoubtedly risk obstructing proceedings, and are arguably the reason for the Prosecutor's delay in requesting warrants of arrest for just two Israeli officials. However, of greater concern is the need to prevent the person from continuing to commit crimes within the jurisdiction of the Court.

10. Despite three orders on provisional measures from the International Court of Justice and a United Nations Security Council resolution ordering an immediate ceasefire, Israel's military operations in Gaza – which, in the words of both the International Court of Justice and the United Nations Secretary General has created a “catastrophic humanitarian situation”⁷ – has continued unabated. Over 38, 295 Palestinians have been killed as of 10 July 2024, with thousands more bodies likely trapped under the rubble across the Gaza Strip.⁸ The number of internally displaced persons has risen to 1.9 million, and half a million Palestinians now face the highest levels of food insecurity due to Israel's targeting of farmland, crops, greenhouses, and market squares, combined with its siege of the enclave and attacks on humanitarian workers which cannot effectively distribute aid.⁹
11. Avoiding any delay in the Chamber's Decision on the Prosecution's application under Article 58 is paramount in the present case, as the death toll, number of recorded injuries, and figures of Palestinians suffering from man-made starvation and preventable diseases continues to mount.
12. On these grounds alone, the threshold for granting authorisation for submissions in the present case ought to have been heavily restricted and of an exceptional nature.

[mails%20and%20documents](#).>; UN OHCHR, 'Israel's 55-year occupation of Palestinian Territory is apartheid – UN human rights expert' (25 March 2022), < <https://www.ohchr.org/en/press-releases/2022/03/israels-55-year-occupation-palestinian-territory-apartheid-un-human-rights>>; Al-Haq et al., 'Israeli Apartheid: Tool of Zionist Settler Colonialism' (22 November 2022), <https://www.alhaq.org/cached_uploads/download/2022/12/22/israeli-apartheid-web-final-1-page-view-1671712165.pdf>; Human Rights Watch, 'A Threshold Crossed Israeli Authorities and the Crimes of Apartheid and Persecution', (27 April 2021), <https://www.hrw.org/report/2021/04/27/threshold-crossed/israeli-authorities-and-crimes-apartheid-and-persecution>; Amnesty International, 'Israel's apartheid against Palestinians: a cruel system of domination and a crime against humanity' (1 February 2022), <https://www.amnesty.org/en/latest/news/2022/02/israels-apartheid-against-palestinians-a-cruel-system-of-domination-and-a-crime-against-humanity/>; State of Palestine, 'It Is Apartheid: The Reality of Israel's Colonial Occupation of Palestine' (8 June 2021), <https://www.nad.ps/sites/default/files/20201230.pdf>

⁷ International Court of Justice, *Application on the Convention on the Prevention and Punishment of the Crime of Apartheid in the Gaza Strip (South Africa v Israel)*, (28 March 2024), at paras. 18, 30, 36, 38 and 46.

⁸ United Nations Office for the Coordination of Humanitarian Affairs, 'Reported impact snapshot | Gaza Strip (10 July 2024)' <<https://www.ochaopt.org/content/reported-impact-snapshot-gaza-strip-10-july-2024>>

⁹ United Nations Office for the Coordination of Humanitarian Affairs, 'Reported impact snapshot | Gaza Strip (10 July 2024)' <<https://www.ochaopt.org/content/reported-impact-snapshot-gaza-strip-10-july-2024>>

However, since the United Kingdom has been granted leave to submit a written observation it is now imperative that the Court is respectfully made aware of the lack of merit to their arguments.

III. SUMMARY OF PROPOSED SUBMISSIONS

A. Palestine accepted the Court's jurisdiction when becoming a State Party

13. The question posed by the United Kingdom, as to 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" is easily answered.

14. The principle of *nemo dat quod non habet*, the argument upon which the United Kingdom's request appears to rest, is not new before the ICC. Concerns regarding jurisdictional applicability, specifically as it relates to territoriality, have already been addressed by the PTC in February 2021.¹⁰ With regard to the ICC's jurisdiction over nationals, reference to the Oslo Accords represent a last-ditch attempt to preserve Israeli impunity in the face of global outrage. pressure. The primary reasons that the Oslo Accords do not provide impunity for Israelis responsible for the Rome Statute crimes of War Crime, Crimes Against Humanity, and the Crime of Genocide are twofold.

15. First, the United Kingdom seeks to argue that Palestine cannot delegate jurisdiction – territorial, temporal, or national – that it does not have. This view is inherently flawed. Under the Rome Statute, States Parties do not delegate or transfer their jurisdiction to the Court. Instead, pursuant to Article 12(1), they accept the jurisdiction of the Court which is governed by the provisions of its Statute. When Palestine became a State Party, it accepted the jurisdictional scope and powers of the ICC. This has been made expressly clear by the PTC in its February 2021 ruling, which stated:

[I]t 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. This is further confirmed by the fact that, on the basis of article 124 of the Statute, the only exemption to the jurisdiction of the Court relates to a particular category of crimes, namely war crimes,

¹⁰ Situation in the State of Palestine, Decision on the "Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine", ICC-01/18, 5 February 2021

for a limited period of time, which entails that the Statute is automatically activated in respect of all other matters.¹¹

Hence, whether the terms of the Oslo Accords sought to limit how or when Palestine could exercise jurisdiction over Israeli nationals is entirely irrelevant. The jurisdiction of the Court is not equivalent to nor dictated by the jurisdiction of a State Party.

B. The Oslo Accords do not impact Palestine's prescriptive jurisdiction

16. Second, even if one were to cast aside the obvious reasons as to why the delegation of individual jurisdiction flies in the face of the Rome Statute and the Court's object and purpose in order to find that national legal frameworks dictate the relevant jurisdiction of the Court in any given situation, the Oslo Accords cannot block the Court from prosecuting Israeli nationals.

17. Even if the Interim Agreement, established for a transitional period that ended in 1999, between Israel and the Palestine Liberation Organization, which provided that "[t]he territorial and functional jurisdiction of the Council will apply to all persons, except for Israelis, unless otherwise provided" was still in effect and respected, the Court could proceed with issuing arrest warrants for Prime Minister Netanyahu and Defence Minister Gallant. Bilateral agreements such as the Oslo Accords only affect a State's enforcement jurisdiction. Palestine did not forgo its prescriptive jurisdiction, but rather, and only for a limited period, its choice to *enforce* jurisdiction over acts committed by Israelis in Palestinian territory.¹²

18. The ability to delegate jurisdiction does not derive from the ability to enforce jurisdiction, but from an internationally recognized legal authority over a territory or individuals within that territory. This perspective has been adopted by the PTC in the *Situation in Georgia*, when Georgia was unable to exercise jurisdiction over parts of its territory due to Russian military presence.¹³ Any other understanding would create

¹¹ Situation in the State of Palestine, Decision on the "Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine", ICC-01/18, 5 February 2021, para 102

¹² See Yassir Al-Khudayri, 'Are the Oslo Accords Still Valid? For the ICC and Palestine, It Should Not Matter' (OpinioJuris, 10 June 2020) <<https://opiniojuris.org/2020/06/10/are-the-oslo-accords-still-valid-for-the-icc-and-palestine-it-should-not-matter/>>; Kai Ambos, 'Palestine, UN Non-Member Observer Status and ICC Jurisdiction' (Ejil: Talk!, 6 May 2014) <<https://www.ejiltalk.org/palestine-un-non-member-observer-status-and-icc-jurisdiction/>>; Roger O'Keefe, 'Response: "Quid," Not "Quantum": A Comment on "How the International Criminal Court Threatens Treaty Norms"' (2021) 49:1 Vanderbilt Journal of Transnational Law

¹³ Situation in Georgia, Decision on the "Prosecutor's request for authorization of an investigation", ICC-01/15, 27 January 2016

accountability gaps, suggesting that a State unable to exercise jurisdiction over certain parts of its territory would no longer be able to investigate or prosecute perpetrators, or have resort to a permanent international court of which it is a State Party.¹⁴

C. Palestine's obligations under international law, and the protection this provides preclude the Oslo Accords from barring jurisdiction over Israeli nationals

19. Mindful of the immense pressure faced by protected persons under the control of an Occupying Power, and the stark power imbalance between them, Articles 7, 8, and 47 of the Fourth Geneva Convention affirm that belligerents cannot conclude agreements which derogate from or deny protected persons the safeguards of the Fourth Geneva Convention. In the same vein, any renunciation of rights by protected persons will have no legal effect. It follows that a bilateral agreement such as the Oslo Accords, reached between Israel as the occupying power and the representatives of the protected population subject to occupation, cannot legally deprive Palestine from exercising its rights and responsibilities to investigate and prosecute grave breaches of the Geneva Conventions, regardless of a perpetrator's nationality.

IV. CONCLUSION

20. At the time of the present request, the situation in Gaza and the West Bank continues to deteriorate. Words are no longer sufficient to describe the horrors experienced by Palestinians across the OPT.

21. A request to submit an *amicus curiae* during *ex parte* proceedings is unprecedented, just like Israel's genocidal war. One of the deadliest conflict in modern history for children, journalists, humanitarian workers, and medical personnel, is being waged by a settler-colonial regime that has been shielded from accountability for nearly eight decades.

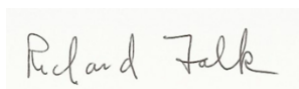
22. The dangers posed by the argument of *nemo dat quod non habet* in this Situation cannot be understated. The idea that any State party can delegate a boutique jurisdiction to the Court, is to effectively rewrite the Statute and fatally subvert its object and purpose. If bilateral agreements, foreseen and condemned by the drafters of the Geneva

¹⁴ See Yassir Al-Khudayri, 'Are the Oslo Accords Still Valid? For the ICC and Palestine, It Should Not Matter' (OpinioJuris, 10 June 2020) <<https://opiniojuris.org/2020/06/10/are-the-oslo-accords-still-valid-for-the-icc-and-palestine-it-should-not-matter/>>; Ahmed Abofoul, 'The Oslo Accords and the International Criminal Court's Jurisdiction in the Situation in the State of Palestine' (28 July 2020), <https://opiniojuris.org/2020/07/28/the-oslo-accords-and-the-international-criminal-courts-jurisdiction-in-the-situation-in-the-state-of-palestine/>.

Conventions, are to be recognised as lawful despite directly contradicting provisions of customary international law and depriving people of their fundamental human rights, we have surely entered a dark and worrying new era.

23. Instead of working towards ensuring the self-determination of the Palestinian people and ending Israel's illegal occupation,ⁱ the Oslo Accords have been revived as a tool to maintain Israel's impunity and its oppressive settler colonial regime across the OPT and to block the ICC's ability to finally achieve accountability for just some of Israel's war crimes, crimes against humanity, and genocide by the ICC.

24. For these reasons, we respectfully request leave to file the proposed submissions in accordance with the PTC's Order dated 27 June and with Rule 103 of the Court's Rules of Procedure and Evidence.



Professor Richard Falk



Professor Michael Lynk

Dated this Friday, 12 July 2024
At New York, United States

Dated this Friday, 12 July 2024
At London, Ontario, Canada

ⁱ UNGA, Situation of human rights in the Palestinian territories occupied since 1967, A/72/43106 (23 October 2017); Michael Lynk, 'Prolonged Occupation or Illegal Occupant?' EJIL Talk (16 May 2018), <https://www.ejiltalk.org/prolonged-occupation-or-illegal-occupant/>; United Nations, 'Study on the Legality of the Israeli Occupation of the Occupied Palestinian Territory, Including East Jerusalem' (2023), <https://www.un.org/unispal/document/ceirpp-legal-study2023/>.