

Annex

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/18

Date: 12 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

**Request for Leave to submit observations as Amicus curiae pursuant to Rule 103(1)
of the Rules of Procedure and Evidence in respect of 'Order deciding on the
United Kingdom's request to provide observations**

Source: Arpit Batra

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

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[Redacted]

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Legal Representatives of Victims

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I. INTRODUCTION

1. Arpit Batra requests leave to submit amici curiae observations in their personal capacity on the merits of some of the legal questions presented in the Pre-Trial Chamber's order of 27 June 2024 ("Order") and pursuant to Rule 103 of the Rules of Procedure and Evidence ("Rules"). It is further emphasised that the observations presented are based on individual expertise and does not reflect the opinions or views of any nation.

II. EXPERTISE

2. The applicant is a qualified and experienced Legal Practitioner and an Assistant to counsel with the ICC since 2011. The applicant is actively involved in Academic activities of the Court and ICCBA. In the past the applicant has submitted Amicus submission before the Appeals chamber in the case of PROSECUTOR VS. DOMINIC ONGWEN. The applicant further states that he possesses relevant expertise and experience in criminal trials and in managing complex criminal cases. He has been representing clients as Defence Counsel, Victim's Counsel and as an Amicus Curiae in Criminal Trials & Appeals in India since 2008. He is also representing Fugitive Criminals in Extradition proceedings before domestic Courts.

III. SUMMARY OF OBSERVATIONS

3. The Pre-Trial Chamber on 05.02.2021 while passing a Decision on the 'Prosecution request pursuant to Article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine' did not determine the jurisdictional issues relating to the Oslo Accords, instead holding that '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'.

4. The United Kingdom has submitted that the Chamber, pursuant to Article 19(1)

of the Rome Statute is required to make an initial determination of jurisdiction in resolving the application for arrest warrants' of which the Oslo Accords issue necessarily forms part. On a plain reading of the ICC Statute, the crimes alleged fall within the Court's subject matter and temporal jurisdiction (arts. 5 & 11) and the individuals named fall within the Court's personal jurisdiction (arts. 25 & 26). The preconditions to the exercise of the Court's jurisdiction are met, as the conduct in question occurred on the territory of a State Party, namely Palestine (art. 12(2)(a)). Palestine's accession to the Rome Statute on 2 January 2015 was subsequently accepted by the United Nations Secretary-General on 6 January 2015 and, on 1 April 2015, the then President of the Assembly of States Parties to the Rome Statute greeted Palestine in a welcoming ceremony, which marked the entry into force of the Rome Statute for the State of Palestine thereby becoming the 123rd State Party.

5. A significant number of States Parties to the Statute are also States Parties to the League of Arab States and the Organization of Islamic Cooperation, which intervened in support of Palestine's full participation as a State Party and further argued that for the sole purpose of the determination of the scope of the Court's territorial jurisdiction, Palestine has legally transferred its criminal jurisdiction to the Court, allowing it to exercise its territorial jurisdiction on the Occupied Palestinian Territory as a whole. Since its accession, Palestine has contributed to the Court's budget and has participated in the adoption of resolutions by the Assembly of State Parties. Palestine developed an active role in the work of the Assembly of State Parties, as a State Party to the Statute.
6. Palestine shall thus have the right to exercise its prerogatives under the Statute and be treated as any other State Party would. Moreover, Palestine's accession has not been challenged under Article 119(2) of the Statute. Palestine is therefore a State Party to the Statute, and, as a result, a 'State' for the purposes of Article 12(2)(a) of the Rome Statute.
7. Article 12(2)(a) of the Rome Statute requires a determination as to whether or not the relevant conduct occurred on the territory of a State Party, for the sole purpose

of establishing individual criminal responsibility. Such an assessment enables the Prosecutor to discharge his/her obligation to initiate an investigation into the present Situation, which would eventually permit the Court to, in accordance with the Statute, exercise its jurisdiction over persons alleged to have committed crimes falling within its jurisdiction. Article 12(2)(a) of the Rome Statute in conjunction with Articles 125(3) and 126(2) of the Rome Statute, is consistent with internationally recognised human rights. The territorial parameters of the Prosecutor's investigation pursuant to Articles 13(a), 14 and 53(1) of the Statute implicate the right to self-determination. The Court's territorial jurisdiction in the Situation in Palestine extends to the territories occupied by Israel since 1967 on the basis of the relevant indications arising from Palestine's accession to the Statute is consistent with the right to self-determination.

8. Palestinian right to self-determination within the Occupied Palestinian Territory has been explicitly recognised by different bodies.¹ The International Court of Justice observed that the legitimate rights of the Palestinian people referred to in the Israeli-Palestinian Interim Agreement 'include the right to self-determination, as the General Assembly has moreover recognized on a number of occasions' and that certain measures adopted by Israel in areas of the West Bank 'severely impede the exercise by the Palestinian people of its right to self-determination', while stressing the risk that 'further alterations to the demographic composition of the Occupied Palestinian Territory would result from the construction of the wall'.²

A. OSLO ACCORDS CANNOT LIMIT THE JURISDICTION OF THE COURT

9. The Pre-Trial Chamber can validly decline to rule on the Request made by the United Kingdom. The Chamber should consider that Palestine validly acceded to the Statute and it is entitled, as is every State Party, to refer crimes on its territory for investigation by the Court'. Alternatively, the Chamber ought to apply a

¹ See [ICC-01/18-12](#), paras 147-156, 193-215; [ICC-01/18-99](#), para. 26; [ICC-01/18-102](#), paras 56-61; [ICC-01/18-105](#), paras 42-43; [ICC-01/18-72](#), para. 27.

² ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, I.C.J. Reports 2004, p. 136, paras 118, 122.

treaty-specific definition of the term 'State'.³ The scope of the territory of Palestine has been recognized as encompassing the West Bank, including East Jerusalem, and the Gaza Strip'.⁴ Any interpretation of the Oslo Accords which reduces the protections available to the victims under the Fourth Geneva Convention, or breaches peremptory norms of customary international law, is invalid'.⁵ 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'.

10. It is beyond dispute that special agreements between an occupied State and an occupying power cannot diminish or prejudice the rights of those under occupation.⁶ An agreement that would purportedly qualify or diminish the obligations under the Statute of a State Party to investigate and prosecute crimes within the jurisdiction of the Court would be null and void as the Statute reflects *jus cogens* prohibitions that would prevail over any competing legal obligations not of the same rank'.⁷

11. The limitations in the Oslo Accords are not obstacles to the Court's exercise of jurisdiction. The Oslo Accords have not precluded Palestine from acceding to numerous multilateral treaties, many of them under the auspices of the United Nations, and others with national governments as depositaries and that, as a consequence of the United Nations General Assembly Resolution 67/19, 'the UNOLA expressly recognised Palestine's capacity to accede to treaties bearing the "all States" or "any State" formula'.⁸ Accordingly, the Oslo Accords appear not to have affected Palestine's ability to act internationally.

12. Under the ICC Statute, States Parties do not delegate, transfer, or otherwise give their jurisdiction to the Court. Instead, States Parties accept the jurisdiction of the

³ ICC-01/18-99, para. 48. *See also* paras 47-86.

⁴ ICC-01/18-99, para. 4. *See also* paras 87-105.

⁵ ICC-01/18-99, para. 5. *See also* paras 106-118.

⁶ ICC-01/18-82, para. 64.

⁷ CC-01/18-82, para. 68.

⁸ ICC-01/18-12, para. 184.

Court (art. 12(1)) which is governed by the provisions of its Statute (art. 1).

Palestine is a State Party, and thereby accepts the jurisdiction of the Court. As explained above, the necessary preconditions to the exercise of the Court's jurisdiction are met. Neither the Court's jurisdiction nor its exercise is limited by Oslo II, or by any of Palestine's bilateral agreements or internal laws.

13. By becoming a State Party, Palestine has agreed to subject itself to the terms of the Statute and, as such, all the provisions therein shall be applied to it in the same manner than to any other State Party. Based on the principle of the effectiveness, 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. In 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. The fact that the Statute automatically enters into force for a new State Party additionally confirms that Article 12(2)(a) of the Statute is confined to determining whether or not "the conduct in question" occurred on the territory of a State Party for the purpose of establishing individual criminal responsibility for the crimes within the jurisdiction of the Court. The Oslo Accords cannot limit the Court's personal jurisdiction any more than they can limit the Court's territorial jurisdiction. The legal validity of Oslo II, and its binding force on the State of Palestine, is doubtful. As an agreement between an occupying power and a people under prolonged occupation, it would seem both procured by the use of force and to conflict with the peremptory right of the Palestinian people to self-determination.

14. In resolving the Oslo Accords issue or any other issue, the Court shall apply the Rome Statute" (Art. 21). Under the Statute, the Court has and may exercise jurisdiction over any adult person accused of committing war crimes or crimes against humanity on the territory of a State Party. That includes Israeli Prime Minister Benjamin Netanyahu and Israeli Defense Minister Yoav Gallant. The Chamber should issue warrants for their arrest, based on the evidence presented, without further delay. The Oslo Accords must not be used to grant impunity under international law for the most heinous crimes being committed against

Palestinians. Given the blatant disregard Israel has for Oslo, failing to participate in the process that is meant to lead to Palestinian sovereignty, it is fundamentally absurd to let Israel and its allies use it as a shield to prevent justice for clear and blatant violations in Gaza, as well as in the West Bank and illegally annexed East Jerusalem. The validity of the Oslo Accords as a treaty in and of itself should also be brought into question by the court, as it has been by multiple scholars and academics, both Palestinian and international.⁹ Aside from lack of compliance with the treaty from the Israelis, Oslo also contradicts numerous *Jus Cogens* norms as well as the Geneva Conventions, undermining international legal framework for supposed realpolitik that simply has not borne fruit.¹⁰

B. OSLO ACCORDS CAN LIMIT THE JURISDICTION OF THE COURT

15. Even if one were to accept the Prosecutor's position that there is some form of Palestinian State for the purposes of the ICC despite the fact that this issue has yet to be settled under international law. Oslo Accords created a Palestinian authority (the PA) as an interim self- government authority,⁹ and comprehensively enumerated the nascent entity's powers and authority. Any powers the PA therefore holds are the result of these agreements, as they did not exist prior to them.
16. Therefore, the Oslo Accords cannot be seen simply as placing limitations on the Palestinians' ability to exercise jurisdiction, but rather they are those which created and defined the existence of any jurisdiction to begin with. It was explicitly determined, and agreed to by the Parties, that the PA's legislative, executive and judicial functions are only those transferred to it in the Oslo Accords, thereby covering all possible aspects of jurisdiction, whether it is considered jurisdiction to prescribe, adjudicate, or enforce. As a matter of fact,

⁹ Ralph Wilde, 'Israel's War in Gaza is Not a Valid Act of Self-defence in International Law' *Opinio Juris* (9 November 2020) available at: <https://opiniojuris.org/2023/11/09/israels-war-in-gaza-is-not-a-valid-act-of-self-defence-in-international-law/>; Yassir Al-Khudayri, 'Are the Oslo Accords Still Valid? For the ICC and Palestine, It Should Not Matter' *Opinio Juris* (10 June 2020) available at: <https://opiniojuris.org/2020/06/10/are-the-oslo-accords-still-valid-for-the-icc-and-palestine-it-should-not-matter/>.

¹⁰ *ibid.*

there was no Palestinian entity exercising any kind of jurisdiction before the Oslo Accords. Any jurisdiction that the Palestinians have, and can arguably delegate to the Court, assuming the other preconditions for jurisdiction are met, can therefore only be derived from the terms of these agreements. Accordingly, since Palestine has criminal jurisdiction only over Palestinians and non-Israelis in Areas A and B. Israel has full criminal jurisdiction over Area C, and criminal jurisdiction over Israelis in the entire territory. Hence, crimes committed by Israelis anywhere in the West Bank are, under Oslo Accords, are solely for Israel to investigate and try, and hence, as per principle of *nemo dat quod non habet*, Palestine has no authority to accede to the criminal jurisdiction of ICC concerning alleged crimes committed by Israelis.

17. The Oslo process was, at the time, and continues to be, to this day, endorsed by the international community as providing the framework for peace. The Oslo Accords adopted UN Security Council Resolutions 242(1967) and 338(1973) as the agreed-upon terms of reference for the Israeli-Palestinian peace process. This mutual undertaking sets out the bilateral framework for settling the parties competing claims and reaching a negotiated resolution to this complex and longstanding conflict, as noted above. This framework continues to govern the peace process.

IV. CONCLUSION

18. Given the complexities of the Israeli-Palestinian conflict and the legal ambiguities surrounding the Oslo Accords, determining the jurisdiction of the ICC is a highly contested issue. Both sides present compelling arguments. However, considering the significance of the current dispute, the prior decision by the ICC, and the strength of the legal arguments favoring Palestine, the jurisdiction can be appropriately determined.
19. The Oslo Accords are not meant to, and do not, prevent the enforcement of international law by each side, within the bounds of their respective jurisdiction, including by prosecuting those responsible for alleged crimes, and especially if international law so requires. The relevant provisions of Oslo II at most constitute

an agreement by Palestine not to exercise its enforcement jurisdiction over Israeli nationals on its territory. Such an agreement does not bind the Court or limit its prescriptive jurisdiction in any way. Further, the Oslo Accords may not be interpreted as denying the protection of the 4th Geneva Convention which would include the ability to ensure the accountability of individuals committing grave breaches thereof i.e. even if the Oslo Accords may be interpreted to exclude from the Palestinian Authority's jurisdiction the ability to prosecute Israelis for grave breaches of the 4th Geneva Convention or to delegate such a duty to an international tribunal, they cannot bar the exercise of the Court's jurisdiction over such crimes. Finally, the Chamber emphasized that they will be better positioned to examine any additional questions of jurisdiction that may arise in the future. This clearly limits the scope of further examination to new questions, rather than reconsidering previously decided jurisdictional issues. In the amicus brief submitted by UK, no new questions regarding the court's jurisdiction have been raised; therefore, there is no basis for reconsidering this matter.

20. In light of these considerations, it is imperative for the Court to uphold its jurisdiction and proceed with issuance of arrest warrants. This approach respects the principles of the Rome Statute and reaffirms the commitment to addressing breaches of international humanitarian law. By doing so, the Court contributes to upholding human rights and the rule of law in the region, ensuring that justice and accountability are maintained in accordance with international legal standards.

V. RELIEF SOUGHT

21. For the reasons stated above, the Applicants respectfully seek leave to file an Amicus Curiae brief expanding on these issues.



Arpit Batra