



Original: English

No.: ICC-01/18

Date: 05 August 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

**AMICUS CURIAE OBSERVATIONS OF ARPIT BATRA PURSUANT TO
RULE 103**

Source: Arpit Batra

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Mr Eli M. Rosenbaum; Professor David Chilstein; Professor John Quigley; High Level Military Group; European Centre for Law & Justice; Professor Steven E. Zipperstein; Mr and Mrs Serge and Beate Klarsfeld; Professors Yuval Shany and Amichai Cohen; the State of Palestine; Professor William Schabas; the Jerusalem Center for Public Affairs and the Institute for NGO Research; the Kingdom of Norway; the Organisation of Islamic Cooperation; Hungary; Republic of Argentina; the Touro Institute on Human Rights and the Holocaust; Canadian Union of Jewish Students (CUJS) and the World Union of Jewish Students (WUJS); Arab Organisation for Human Rights UK (AOHR UK); Assistant Professor Halla Shoaibi and Professor Asem Khalil; Centre for Israel and Jewish Affairs; the Palestine Independent Commission for Human Rights (ICHR); Law for Palestine; Professor Sascha Dominik Dov Bachman, Dr Deborah Mayersen, Professor Gregory Rose and Dr Colin Rubenstein; US Senator Lindsey O. Graham; Lawyers for Palestinian Human Rights; Israel Bar Association; Czech Republic; International Centre of Justice for Palestinians and the Centre for Human Rights Law (SOAS University of London); Jerusalem Institute of Justice; Chile and Mexico; Centre for European Legal Studies on Macro-Crime (MACROCRIMES); Dr. Robert Heinsch and Dr Giulia Pinzauti; The Hague Initiative for International Cooperation; ICJ Norway and Defend International Law; UN Special Rapporteurs and Working Groups; the United States of America; Professor Neve Gordon; Al-Quds Human Rights Clinic and Al-Quds University; the League of Arab States;

L'association des Juristes pour le respect du droit international and la Federation internationale pour les droits humains; University Network for Human Rights, the International Human Rights Clinic, Boston University School of Law, the International Human Rights Clinic, Cornell Law School and the Lowenstein Human Rights Project, Yale Law School; Professor Richard Falk and

Professor Michael Lynk; Professor Adil Ahmad Hague; Open Society Justice Initiative, European Center for Constitutional and Human Rights, REDRESS Trust, Human Rights Watch and Amnesty International; Republic of Colombia; Hostages and Missing Families Forum and the Raoul Wallenberg Centre for Human Rights; Addameer Prisoner Support and Human Rights Association; International Association of Jewish Lawyers and Jurists; Kingdom of Spain; UK Lawyers for Israel, B'nai B'rith UK, the International Legal Forum, the Jerusalem Initiative and the Simon Wiesenthal Centre; International Commission of Jurists (ICJ); The Palestinian Association for Human Rights (Witness); Guernica 37 Chambers; the Federative Republic of Brazil; ALMA — Association for the Promotion of International Humanitarian Law; Ireland; Avocats pour la Justice au Proche-Orient (AJPO); Federal Republic of Germany; Dr Shand Hammouri; Al-Haq Law in the Service of Mankind (Al-Haq), AlMezan Center for Human Rights (Al-Mezan) and the Palestinian Center for Human Rights (PCHR); Republique Democratique du Congo; Arpit Batra; South Africa, Bangladesh, Bolivia, Comoros, and Djibouti

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I. INTRODUCTION

1. Arpit Batra, Independent Attorney hereby submits Amicus Curiae observations in his personal capacity pursuant to order of 22 July 2024 and pursuant to Rule 103 of the Rules of Procedure and Evidence. It is further emphasized that the observations presented are based on individual expertise and does not reflect the opinion or views of any nation or organization/ group/association.

II. EXPERTISE

2. The applicant is a qualified and experienced Legal Practitioner and admitted to the List of Assistant to Counsel practicing with the ICC. The applicant is actively involved in 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 & Appeals and 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 in India.

III. KEY OBSERVATIONS

3. It is submitted that several landmark documents were signed between Israel and Palestine after robust negotiations, known as the Oslo Accords with a purpose to put an end to a conflict which lasted several decades.
4. 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.

5. 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. 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.

6. 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. Palestinian right to self-determination within the Occupied Palestinian Territory has been explicitly recognized by different bodies.¹ The

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.

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

7. On the other hand, the Oslo Accords are legally binding international agreements and are subject to rules of Vienna Convention and are binding international agreements and cannot be reversed. There have been breaches in the past and that does not mean that the Accords have become void in any manner. Israel or Palestine have not renounced Oslo Accords and they still continue to fulfil its terms.
8. The State of Palestine lacks jurisdiction over Israeli nationals for acts alleged to have been committed over the Gaza strip as they had waived off their territorial and functional jurisdiction over Israeli nationals by way of the Oslo Accords. Further delegation of jurisdiction to the ICC or any other organization to try individuals cannot be permissible in Criminal Law. The only mechanism could be a referral by the United Nations Security Council.
9. That armies from both sides are fighting a war and the allegations of using civilians as human shields is a contention from both sides. Also there will be enough evidence to prove that Crimes against Humanity and War Crimes are being committed from both sides. It is unfortunate that thousands of civilians and combatants have died in the ongoing conflict.

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.

10. There are cross arguments regarding availability of food and civil supplies in the Gaza strip.
11. There are reasonable grounds to believe and to disbelieve the allegations of commission of crimes in the Gaza Strip.

A . OSLO ACCORDS CANNOT LIMIT THE JURISDICTION OF THE COURT

12. 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.³An 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'.⁴ 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 Accordingly, the Oslo Accords appear not to have affected Palestine's ability to act internationally. 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 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. Neither the Court's jurisdiction nor its exercise is limited by Oslo II, or by any of Palestine's bilateral agreements or internal laws. 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.

³ [ICC-01/18-82](#), para. 64.

⁴ [CC-01/18-82](#), para. 68

13. 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. The Oslo Accords must not be used to grant impunity under international law for the most heinous crimes being committed against Palestinians. 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.

B. OSLO ACCORDS CAN LIMIT THE JURISDICTION OF THE COURT

14. Even if one were to accept that there is some form of Palestinian State for the purposes of the ICC despite the fact that this issue is yet to be settled under international law. Oslo Accords created a Palestinian authority (the PA) as an interim self- government authority⁵, 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.

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, 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

⁵ 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/>

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.

15. 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 remains a highly contested issue. Both sides present compelling arguments, highlighting the need for careful consideration of all legal perspectives.

19. The Oslo Accords do not explicitly prevent the enforcement of international law by either side within their respective jurisdictions, including prosecuting those responsible for alleged crimes if required by international law. However, some argue that the Accords created a framework where certain jurisdictions are reserved, potentially limiting Palestine's authority to delegate criminal jurisdiction to the ICC, especially regarding Israeli nationals.

20. Proponents of the ICC's jurisdiction argue that the relevant provisions of Oslo II may at most constitute an agreement by Palestine not to exercise its enforcement

jurisdiction over Israeli nationals on its territory. This does not bind the Court or limit its prescriptive jurisdiction. Additionally, they contend that the Oslo Accords cannot be interpreted as denying the protection of the Fourth Geneva Convention, which includes ensuring accountability for individuals committing grave breaches.

21. On the other hand, opponents argue that the Oslo Accords established a specific allocation of jurisdictional responsibilities that must be respected. They suggest that the Accords limit Palestine's ability to extend ICC's jurisdiction over crimes involving Israeli nationals and that any jurisdiction Palestine holds is derived from and confined by these agreements. They also point out that the ICC should not override bilateral agreements endorsed by the international community as a framework for peace.

23. In light of these considerations, the Court should carefully deliberate on its jurisdiction and the implications of its decisions. Ensuring that justice and accountability are maintained in accordance with international legal standards is paramount. The Court's determination will have significant implications for the enforcement of International humanitarian law and the upholding of human rights in the region.

V. RELIEF SOUGHT

16. For the submissions stated above, the Applicants respectfully submit before this Hon'ble Court, his Amicus Curiae brief for consideration.



(ARPIT BATRA)