Cour
Pénale
Internationale

International
Criminal
Court

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No.**: ICC-01-18**
Date: **5 August 2024**

PRE-TRIAL CHAMBER I

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

SITUATION IN THE STATE OF PALESTINE

Public Document

Written Observations by ICJ Norway and Defend International Law pursuant to Rule 103

Source: **ICJ Norway and Defend International Law**

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

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1. Introduction

1. ICJ Norway (the Norwegian section of the International Commission of Jurists) and the Norwegian NGO Defend International Law hereby submit *amicus curiae* observations pursuant to Rule 103 of the Rules of Procedure and Evidence. Note that the International Commission of Jurists will make its separate *amicus curiae* observations.

2. Article 58(1) of the Rome Statute sets out the conditions that must be satisfied before the Pre-Trial Chamber shall, on application of the Prosecutor, issue an arrest warrant. It is required that there are "reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court" (Article 58(1)(a)). The Court shall satisfy itself "that is has jurisdiction in any case brought before it" (Article 19(1)).

3. The Prosecutor filed applications for arrest warrants against three Hamas-leaders and two Israeli leaders.[1] Two of the three Hamas-leaders have since been killed by Israel. The following observations concern only the arrest warrants against Israel's Prime Minister Benjamin Netanyahu and Minister of Defence, Yoav Gallant. An important question is whether Israeli nationals should be exempted from investigation and prosecution including arrest warrants in the situation in the State of Palestine.[2]

4. ICJ Norway/Defend International Law will in the following present the main point of view: **There are no legal obstacles to issuing arrest warrants relating to jurisdiction, not even under a broad conception of jurisdiction which may include provisions in the Rome Statute relating to complementarity.**

2. The State of Palestine has never been a party to the Oslo Accords

2.1 The non-party status of the State of Palestine to the Oslo Accords means that the Oslo Accords have no relevance for arrest warrants under the Rome Statute

5. The State of Palestine is formally a State party to the Rome Statute, but not to the Oslo Accords. This legal fact has certain repercussions for the possibility of the Oslo Accords being a bar to proceedings before the Court.

[1] ICC, Statement of the ICC Prosecutor Karim A.A. Khan KC of 20 May 2024.
[2] ICC, State of Palestine, *Situation in the State of Palestine*, ICC-01/18 ("Investigation").

6. The Oslo Accords consist of *a declaration of principles* on interim Palestinian self-government (Oslo I, 1993), and an *interim agreement* on the West Bank and the Gaza Strip (Oslo II, 1995) concluded between the State of Israel and PLO as the representative of the Palestinian people. Oslo II was meant to be a temporary arrangement towards "a just, lasting and comprehensive peace settlement and historic reconciliation through the agreed political process" (see its "Preamble").

7. The first part of the Oslo Accords led to recognition of Israel by the Palestinian Liberation Organization (PLO) in an official letter by PLO chairman Yasser Arafat in 1993, while Israel only recognized PLO as representative of the Palestinian people, not the State of Palestine. Israel has still not recognized the State of Palestine, and its legislative body Knesset has recently declared that Israel will never recognize the State of Palestine.

8. Since Israel did not recognize the State of Palestine, the State of Palestine could not formally be party to Oslo II and the Oslo Accords as such. Furthermore, since Israel has continued to not recognize Palestine, the State of Palestine has also not later become a party to the interim agreement. The PLO, or the Palestinian Authority as recognized by the agreement, may claim to represent the Palestinian people and the State of Palestine, but this does not, in any case, make *the State of Palestine* a *party* to the interim agreement (Oslo II). To the contrary, the State of Palestine has clearly and *explicitly* been excluded from status as party to the Oslo Accords.

9. Thus, the Oslo Accords have no relevance for arrest warrants under the Rome Statute.

2.2. The Oslo Accords are wholly or partly void and not applicable

10. Even assuming that the Oslo Accords are legally binding agreements, they became wholly or partly void or non-operational long before the State of Palestine became a party to the Rome Statute. This is even more clear today, whether considered on the basis of customary international law, the Vienna Convention on the Law of Treaties (VCLT), or general principles of law.

11. The Oslo Accords were meant to be temporary and a step towards a peace treaty and the two-state solution. This required good faith implementation of the agreement (*cf.* the general rule expressed in VCLT Article 26). However, it soon became clear that no common will existed to reach the goals, especially not by new Israeli governments.

12. As confirmed by the International Court of Justice (ICJ) in its *Advisory Opinion* of 19 July 2024,[3] and in *"Wall Case" Advisory Opinion* of 2004,[4] Israel has instead illegally annexed large parts of Palestinian territories; unlawfully exploited Palestinian natural resources; continued the policy of illegal settler-colonialism; and committed grave violations of human rights in the occupied Palestinian territories – including of the Palestinian people's right to self-determination. The occupation of Palestine has now been considered clearly unlawful by the ICJ and thus must end as rapidly as possible.[5]

13. The factual and legal developments since Oslo II was enacted almost 30 years ago, have repercussions for what might be left of the Oslo Accords regardless of the interpretation of specific provisions relating to prescriptive and enforcement jurisdiction. Consider, e.g., the principles expressed in VCLT Articles 52 (*Coercion of a State by the threat or use of force*), 53 (*Treaties conflicting with a peremptory norm of general international law*), Article 60 (*Termination or suspension of the operation of a treaty as a consequence of its breach*), and 62 (*Fundamental change of circumstance*). It is however not necessary to provide any detailed analyses as to which parts might possibly remain intact for the present purpose. If still legally relevant, Article XVII of Oslo II did not mean, firstly, that jurisdiction was transferred permanently. Secondly, Palestinian prescriptive jurisdiction was notably preserved. Thirdly, it would be an afront to international law and justice if the broken promises of the Oslo Accords, intended to facilitate the two-state solution encouraged by the UN Security Council, the General Assembly, the ICJ, and almost all States of the world except Israel, should bar the exercise of the Court's jurisdiction over Israeli nationals.

14. Finally, there is currently no active Palestinian investigation or prosecution of alleged Israeli crimes committed in Palestine under the Rome Statute by the Palestinian Authority or other Palestinian legal organs under the arrangements of Oslo II, or, in breach of it. Palestinian authorities are not able to initiate effective investigations and prosecutions and will not be able to do so in the foreseeable future. None of the two Israelis of which the current arrest warrants concern, are being held in custody in Palestine, so there is also no current issue of conflicting obligations relating to enforcement and cooperation under the Rome Statute (*cf.* Articles 86-87 and 97-98).

[3] ICJ, Advisory Opinion, *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, 19 July 2024.
[4] ICJ, Advisory Opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004.
[5] See ICJ, Advisory Opinion, 2024., *supra* note 3.

3. The Court has jurisdiction and may currently issue arrest warrants for all conduct that has occurred on the territory of the State of Palestine

3.1 *The Rome Statute's jurisdictional system is based on acceptance of jurisdiction and is as such not limited by bilateral agreements, internal law, or the nationality of the alleged perpetrators*

15. In this section it is argued that the Court's jurisdiction in this instance, like in all other cases, follows from the fact that the State of Palestine, as State party, has *accepted* the jurisdiction of the Court. The Court's jurisdiction does not follow from any fictional theory of delegated powers and inherent limitations. Thus, the Oslo Accords cannot provide any exception from the common Rome Statute system, regardless of the specific nationality of the alleged perpetrator.

16. The Rome Statute is an international autonomous treaty which sets forth binding rules and institutional mechanisms. When a State becomes a State Party, it thereby "accepts the jurisdiction of the Court" with respect to the crimes referred to in article 5 (the crime of genocide, crimes against humanity, war crimes, and the crime of aggression), see Article 12(1). This rule of acceptance of jurisdiction is reinforced and clarified in Article 12(2) and (3). A State Party has always accepted the jurisdiction of the Court with respect to conduct on its territory and its nationals, while a State which is not a Party may lodge a declaration in accordance with Article 12(3). This system applies equally to all State parties, without exception. Article 120 makes clear that no reservations "may be made to this Statute". Furthermore, Article 21(1)(a) provides that the Court shall apply, in the first place, "this Statute, Elements of Crimes and its Rules of Procedure". In this case, the Rome Statute itself is relevant and clear.

17. There is simply no scope within the Rome Statute system for limitations of the jurisdictional regime, for example based upon bilateral agreements, internal law, or the nationality of the alleged perpetrator, for acts committed on the territory of a State Party. Furthermore, there is no scope for a contradictory theory of 'delegation' or 'delegated powers', in the sense that the Court's jurisdiction would be *dependent upon limitations* which may exist for or at the domestic level of the territorial State, or for the State of nationality of the alleged responsible individual, regarding investigating and prosecuting of

relevant crimes.[6] This is legally true no matter whether such limitations are a result of restricted criminal law jurisdiction, lacking criminalization, particular domestic rules on individual criminal responsibility, immunity, statute of limitations, particular rules for excluding criminal responsibility, or else, and regardless of why such limitations may apply – for instance because of insufficient political will, ignorance, or an agreement with another State and/or diplomatic pressure from such a State to exempt its nationals from prosecution of conduct that may constitute crimes under the Rome Statute, or for any other reason.

18. This interpretation is supported also by "applicable treaties and the principles and rules of international law", see Article 21(1)(b) of the Rome Statute. For instance, it is an established principle of treaty law that internal law does not limit treaty obligations (*cf*. VCLT Article 27).

19. Furthermore, the ICJ has in its *Advisory Opinion* of 19 July 2024 (AO) commented upon the relationship between obligations under international law, inter alia Article 47 of the Fourth Geneva Convention, and the Oslo Accords. In this respect it should be noted that the Oslo Accords was not the primary subject matter of the Advisory Opinion but was nevertheless considered by the ICJ to some extent, because "[s]ome participants [in the proceedings before ICJ] have contended that the Court should decline to reply to the questions put to it because an advisory opinion from the Court would interfere with the Israeli-Palestinian negotiation process laid out by the framework established [by the Oslo Accords]" (see AO, para. 38). The Court did not agree with this proposition (AO, para. 40).

20. The ICJ did not rule on the legal nature of the Oslo Accords in the AO, i.e., determined whether this agreement should be considered an international treaty, an agreement governed by customary international law, or an agreement that was not legally binding. It is anyway quite striking that Oslo II did not have any provision on the international law status of the agreement, not even in its preamble. The concept of "treaty" is not being used, and not expressions like "international agreement" or "legally binding agreement". The expression used; "interim agreement", is ambiguous. This seems to imply that the parties, or Israel, did not consider the Oslo Accords to be legally binding and governed by international law. This is supported by the fact that Israel, a State party to the United Nations Charter, did not register the agreement as a "treaty" or "international agreement" with the UN Secretariat in

[6] See also, in particular, Leila Sadat, The Conferred Jurisdiction of the International Criminal Court, *Notre Dame Law Review*, Vol. 99, 2024, pp. 549–609.

accordance with the UN Charter Article 102. The ICJ rather only considered the content of the Oslo Accords and made references to it.[7]

21. Importantly, however, the ICJ stated that,

> "from a legal standpoint, the Occupied Palestinian Territory [the West Bank, East Jerusalem and the Gaza Strip] constitutes a single territorial unit, the unity, contiguity and integrity of which are to be preserved and respected".[8]

Although the ICJ did not explicitly rule on the statehood of Palestine under general international law since this question was not put before it, the statement above (AO, para. 78) is as close as it comes to a statement that Palestine indeed is "a State" under general international law. Furthermore, ICJ confirmed that Gaza is part of the said territorial unit.[9] It is also clear that it is only the use of and threats of using the veto power by USA, seemingly in contravention of Article 4(1) of the UN Charter on the conditions for membership, that has prevented the State of Palestine from becoming a full member of the United Nations.[10]

22. The ICJ noted that several participants in the proceedings had expressed diverging views as to the relevance of the Oslo Accords in general (AO, para. 102, *cf*. para. 65). The ICJ did, however, observe "that in interpreting the Oslo Accords, it is necessary to take into account Article 47 of the Fourth Geneva Convention", which provides that the protected population "shall not be deprived" of the benefits of the Convention "by any agreement concluded between authorities of the occupied territories and the Occupying Power".[11] The ICJ concluded more broadly that the Oslo Accords "cannot be understood to distract from Israel's obligations under pertinent rules of international law applicable in the Occupied Palestinian Territories".[12]

23. The latter ICJ statement is a noteworthy manifestation of a more general principle under international law, namely that certain rules of international law have the character of universal peremptory norms which are *lex superior* to other conflicting norms, even assuming that the other norms have status as international law. The Rome Statute concerns peremptory norms, namely norms of a *jus cogens* character expressing core international

[7] See for instance, Advisory Opinion, 2024, *supra* note 3, para. 78.
[8] *Ibid*.
[9] *Ibid*.
[10] See, also, Separate Opinion by Judge Gómez Robledo, ICJ Advisory Opinion, *supra*, note 3.
[11] Advisory Opinion, 2024, *supra* note 3, para. 102.
[12] *Ibid*.

crimes with the aim of protecting civilian populations, groups and individuals from being exposed to genocide, crimes against humanity, war crimes, and the crime of aggression. Thus, the Oslo Accords cannot exempt Israelis from responsibility for international crimes committed on the territory of a State Party, such as the State of Palestine (*cf.* Rome Statute Article 21(1)(b)). This line of reasoning is also strongly supported by the principle of effectiveness.[13]

24. If this had not been the current jurisdictional system of the Rome Statute, i.e., a system *not* based upon *acceptance of jurisdiction on an equal footing for all State parties* (the *sui generis* jurisdictional regime relating to the crime of aggression is another matter, see, especially, Article 15 *bis*), the Rome Statute could easily be undermined and would soon fall apart as grossly unfair and indeed contrary to "internationally recognized human rights", which do not tolerate adverse distinctions based on, e.g., "race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status", see Article 21(3) of the Rome Statute.[14]

25. The State of Palestine in 2015 lodged a relevant declaration under Article 12(3) of the Statute,[15] and, as a State Party,[16] referred the situation in the State of Palestine to the Prosecutor pursuant to Articles 13(a) and 14 of the Statute in 2018.[17] Some other State parties have also made referrals in accordance with Articles 13(a) and 14. This means that the Court *has jurisdiction* in relation to the alleged conduct committed on Palestinian territory or by its nationals in accordance with the provisions of the Statute, including Article 13 ("Exercise of jurisdiction").

26. Regarding arrest warrants against Netanyahu and Gallant, the alleged war crimes and crimes against humanity forming the material basis for the applications of arrests warrants have been committed in Gaza. It is not necessary that Netanyahu and Gallant were present

[13] See also, ICC, Pre-Trial Chamber I, *Decision on the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine*, 5 February 2021, No. ICC-01/18, para. 123 [with further analysis and references to ICC case-law]: «Based on the principle of 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 effects over it».
[14] *Ibid*.: «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. »
[15] ICC, Presidency, Decision assigning the situation in the State of Palestine to Pre-Trial Chamber I ('Assignment Decision'), Annex I, 24 May 2018, ICC-01/18-1-Annex I, p. 2.
[16] Secretary-General of the United Nations, 'Rome Statute of the International Criminal Court, Rome, 17 July 1998, State of Palestine: Accession', 6 January 2015, Reference: C.N.13.2015.TreatiesXVIII.10 (Depositary Notification).
[17] ICC, Assignment Decision, Annex I, ICC-01/18-1-AnxI.

in Gaza when the alleged crimes within the meaning of the Rome Statute were committed, see Article 25 on individual criminal responsibility.

27. Pre-Trial Chamber I has also earlier confirmed that the Court has territorial jurisdiction in the situation of Palestine, which includes all relevant crimes committed on the territory of the State of Palestine as State party, including Gaza, with the possible caveat for what might follow from the Oslo Accords.[18] The Oslo Accords do not constitute a possible *exception* from the Court's jurisdiction, for the reasons set forth in this *Amicus*.

28. It is thus fully in line with the Rome Statute that the Prosecutor and his office have investigated individuals for the alleged crimes and applied for arrest warrants. Impunity for specific nations or nationals is not something independent and impartial judges at the ICC, under strong political pressure or not, should consent to.

3.2 Complementarity is no bar to arrest warrants

29. Challenges to the jurisdiction of the Court or admissibility of a case might in principle also be made under Article 19(2). However, none of the provisions in letters (a), (b) or (c) are applicable in this instance. This brings us back again to Article 19(1), under which the Court may also "determine the admissibility of a case in accordance with article 17".

30. The existence of "a case" before Pre-Trial Chamber I at the present stage, within the meaning of Articles 17 and 19, is rather doubtful, cf. Article 19(2)(a) which presumes that an arrest warrant or summons to appear has *already* been issued. The ICC Appeals Chamber has in the same direction ruled that "article 19 of the Statute relates to the admissibility of concrete cases", and that "cases are defined by the warrant of arrest or summons to appear issued under article 58, or the charges […] confirmed by the Pre-Trial Chamber under article 61".[19]

31. Furthermore, according to Article 17(1)(a), a case is inadmissible where the case "is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution". A "case" for the purpose of Article 17 is determined by the following parameters: (i) the accused *person*, and (ii) *the alleged crime*, defined by the legal basis for the charges under Articles 6-8 *bis*

[18] ICC, Pre-Trial Chamber I, *Decision on the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine*, 5 February 2021, No. ICC-01/18, paras. 124–129.
[19] ICC, Appeals Chamber, *Judgment on the appeal of the Republic of Kenya […]*, 30 August 2011, No. ICC-01/09/09-02/11 OA, para. 39.

(the applicable material provisions) and the alleged facts relevant to the charges. This is also reflected in Article 58(2)(a)-(c). Thus, "the defining elements of a concrete case before the Court are the individual and the alleged conduct".[20]

32. If the same person is not *being* investigated or prosecuted for the same crime, Article 17(1)(a) is not applicable. There is no known information that any of *the persons* charged by the Prosecutor in the Situation of Palestine is currently "being" investigated or prosecuted, and in addition no information that they are being investigated for the same crimes or conduct by a State which has jurisdiction over it, notably Palestine or Israel.

33. Article 17(1)(b) and (c) are clearly not applicable. This is also true for Article 17(1)(d), because all five (now three) cases are each of sufficient gravity to justify further action by the Court. The reasons for inadmissibility according to Article 17 are exhaustive. For example, the fact that an armed conflict is taking place, is no bar to admissibility under the Rome Statute.

34. Regarding *notification* in accordance with Article 18(1), States have been notified of investigations into the Palestine situation. This notification is still legally sufficient, since it covers future crimes. The situation is characterized by armed conflict, unlawful occupation of Palestine, and acts committed by the same armed Palestinian groups and the same Israeli military and security forces.[21] The attack on Israel 7 October 2023 constituted a significant event but individuals could still be lawfully investigated without new notifications to States. This also applies to the events in Gaza from 7 October onwards.

35. Consequently, the provisions on complementarity cannot be a bar to the requested arrest warrants.

4. Concluding remarks

36. **The Court has jurisdiction to issue the requested arrest warrants. The Oslo Accords do not limit or bar the exercise of the Court's jurisdiction over Israeli nationals. No admissibility issue occurs at the present stage.**

[20] *Ibid*.
[21] The analysis of the ICJ regarding the unlawful occupation of the Occupied Palestinian Territory (OPT) and the continuous violations by Israel of international humanitarian law and human rights law in the OPT, support this conclusion, see *Advisory Opinion* (2024), *supra* note 3. See also the reports published by the UN *Independent Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel*.

37. If there are reasonable grounds to believe that an Israeli national has committed a crime under the provisions invoked by the Prosecutor, Pre-Trial Chamber I should underline that the conduct is committed in the *context of aggression* against the State of Palestine. East Jerusalem, and large parts of the West Bank, have been subjected to annexation, in addition to unlawful occupation, while Gaza has been unlawfully occupied both before and after 7 October 2023 (ICJ *Advisory Opinion*, 2024, *op.cit*., paras. 78, 88-94) and exposed to further aggressive acts. Arrest warrants against Israeli leaders should be no different, in this respect, from the arrest warrants against Russian leaders in the Ukraine situation.

38. In light of the ongoing *genocide* in Gaza, Pre-Trial Chamber I should also consider mentioning Article 58(3)(6) in its arrest warrant decision, namely, that the Prosecutor may request the Chamber of "adding to the crimes specified therein".

39. Finally, ICJ Norway and Defend International Law urge Pre-Trial Chamber I to issue the arrest warrant decision rapidly and, hopefully, put an end to the impunity in the Palestine situation, thus contributing to international justice and the prevention of new atrocity crimes in line with the purpose of the Rome Statute.

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Respectfully submitted:

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On behalf of and as chairpersons of
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Dated this 5 of August 2024
At Bergen/Oslo, Norway