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**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 Regarding the Prosecutor's Application for Arrest Warrants in Connection with the Gaza/Israel War Pursuant to Rule 103

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

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## I. Introduction

1. These Amicus Curiae observations are respectfully submitted in accordance with the Chamber's Order of 22 July 2024. The observations aim to assist the Chamber in ruling on the Prosecutor's Application for Arrest Warrants against Israeli Nationals: Prime Minister Benjamin Netanyahu and Defense Minister Yoav Gallant.

2. The Amicus Curiae would like to underscore that the goal of worldwide acceptance of the Rome Statute can only be achieved if the Court is seen basing its decisions on well-established principles of international law and state practice. This, in time, will build legitimacy and confidence in the institution. This goal will not be achieved by the Court overextending its jurisdiction on the basis of fragile legal assertions not supported by state practice.

## II. Overall Conclusion and Structure of the Observations:

3. The Amicus Curiae submits that the Chamber should decline the Prosecutor's application for arrest warrants against the Prime Minister and Defense Minister of the State of Israel. These observations are grounded on the following arguments:

A. **The jurisdiction clause in The Oslo Accord II-Protocol Concerning Legal Affairs that reads "Israel has sole criminal jurisdiction over the following offences: "… b. offences committed in the Territory by Israelis" is fully valid and enforceable.**

4. This jurisdiction clause specifically establishes that Israel has sole jurisdiction over offenses committed in the Territory by Israelis.

5. Traditionally, territoriality and nationality have been the principal sources of jurisdiction in international criminal law:

Territoriality Principle: This principle asserts that a state has jurisdiction over crimes committed within its own borders. It is the most widely accepted basis for jurisdiction in international law.

Nationality Principle: This principle allows a state to assert jurisdiction over its own nationals regardless of where the crime was committed. It reflects the idea that a state has a legitimate interest in regulating the conduct of its citizens even when they are abroad.

6. These two principles form the cornerstone of criminal jurisdiction in international criminal law. While other bases for jurisdiction such as the protective principle or universal jurisdiction, do exist, territoriality and nationality remain the most prevalent and widely recognized. This remains unchanged by the establishment of the ICC, as it is clear that the ICC is not a court of universal jurisdiction. Rather, the ICC is a court of last resort.
7. The jurisdiction clause in the Oslo Accords Order is based on the principle of nationality (also known as the "active personality" principle). The historical origins of this principle can be traced back to late-medieval Italian city-states, where efforts were made to reconcile the criminal law of the place where the crime was committed and the criminal law of the offender's domicile. The growth of European nation-states in the sixteenth to eighteenth centuries led to ascendency of nationality over domicile in criminal jurisdiction and public international law. Over time, the nationality principle continued to gain acceptance and became part of customary international law. This principle acknowledges the legitimate interest of states in exercising criminal jurisdiction over their own nationals under certain circumstances.
8. In the well-known *Lotus case* (1927), the Permanent Court of International Justice held that sovereign states are permitted to extend their extraterritorial jurisdiction unless explicitly prohibited. The *Lotus case* played a pivotal role

in shaping the principle of nationality and broadening the understanding of extraterritorial jurisdiction.

9. The jurisdictional situation described in the Oslo Accords, where Israel has sole criminal jurisdiction over offenses committed by Israelis in the Territory, is a clear example of criminal jurisdiction based on nationality. In this case, it is expressly applied to determine jurisdiction.

10. In fact, Israel since 1967, before the Oslo Acords, has lawfully exercised jurisdiction over its IDF members outside its sovereign territory based on the principle of nationality. This specifically refers to IDF members stationed in the West Bank and Gaza. This state of affairs was addressed and endorsed by the Israeli Supreme Court in the well-known *Elon Moreh* case [HCJ 390/79].

11. When the Oslo Accords were signed in 1993, the PLO consented to this pre-existing jurisdictional situation in the Territory, that conformed to customary international law and the principles of extraterritorial jurisdiction laid down in the Lotus case. By signing the Oslo Accords the parties also affirmed the jurisdictional clause under the principle of *pacta sunt servanda*. The clause remains valid and enforceable to date.

12. The establishment of the ICC and the Rome Statute does not invalidate or restrict the application of the jurisdiction clause in the Oslo Accords. The ICC is <u>not</u> a court with universal jurisdiction. The Oslo Accords contain a genuine jurisdiction clause rather than an immunity agreement. This issue strictly pertains to jurisdiction, rather than complementarity or cooperation. Therefore, the Chamber should (i) uphold the validity and enforceability of the jurisdiction clause in the Oslo Accords that provides that Israel has sole jurisdiction over offenses committed in the Territory by Israelis, and (ii) decline the Prosecutor's application for arrest warrants against the Prime Minister and the Defense Minister of the State of Israel.

B. **Palestine does not qualify as a state under Article 12 (1) and (2) (a) of the Rome Statute.**

13. The reality is that Palestine can only be conceived as a "nasciturus" state that never existed before. It does not have a defined territory recognized under international law. While it is true that the Palestinian people enjoy a right to self-determination, this does not necessarily lead to statehood and full sovereign powers. Besides, the existence of a potential State of Palestine is contingent on recognized and secure borders with Israel (UNSC Res. 242/1967). The fact that Palestine's request to accede to the Rome Treaty was granted should not be overemphasized, as it is essentially a matter of registration and does not change the reality on the ground.

14. In its ruling of 5 February 2021, the Chamber accepted territorial jurisdiction, but this was based on the context of "the initiation of the investigation by the Prosecutor" as the Chamber noted.[1] As the proceedings have now evolved from a "situation" into a "case", the Chamber must reassess its findings on jurisdiction.[2]

15. We submit that the Chamber should be aware that the Prosecutor's justification of Palestinian statehood to qualify under Article 12 (1) and (2) (a), based on self-determination, is artificial and lacks substance. It has not gained traction and is far from being considered state practice.

16. Even if the Chamber affirms its territorial jurisdiction, it will still face an unsurmountable impediment to exercise jurisdiction over Israeli nationals. This obstacle is not merely that Israel is not a party to the Rome Treaty, but rather the previously discussed valid and enforceable jurisdiction clause in the Oslo Accords, which establishes that Israel has sole jurisdiction over

[1] Para. 131.
[2] *ibid*

offenses in the territories by Israelis. Again, this issue strictly pertains to jurisdiction rather than complementarity and cooperation.

**C. The distinction between "jurisdiction to prescribe" and "jurisdiction to adjudicate" advanced by the Prosecutor does not support the proposition that Palestine could delegate its criminal jurisdiction to the ICC.**

17. The previous Prosecutor misled the Chamber with her arguments regarding the distinction between "jurisdiction to prescribe" and "jurisdiction to adjudicate".[3] This theory, originating in the United States, basically focused on US statutes of extraterritorial application applicable to regulate conduct of US nationals or others outside the territory of the United States. According to this theory, "jurisdiction to prescribe" is a sovereign's capacity to enact extraterritorial laws, while "jurisdiction to adjudicate" refers to the same sovereign's capacity to ensure compliance with those laws outside the territory of the United States.

18. This matter regarding extraterritorial jurisdiction has developed within the contours of the *Lotus case*. For example, Congress passed the Foreign Corruption Practices Act (FCPA) with the intention that US courts will ensure its compliance outside the United States. Contrary to the Prosecutor's assertions, this theory does not support the proposition that (the State of) Palestine had jurisdiction to prescribe and delegated it to the ICC. Jurisdiction to prescribe is a power vested exclusively with sovereign states that effectively perform their legislative functions, not with a "nasciturus" state that never existed before. The Prosecutor's assertions are not grounded in established principles of international law and may be driven by other

[3] Prosecutor's Request for a Ruling on Territorial Jurisdiction of 22 January 2020, paragraphs 183-184 including footnotes 580 to 583.

considerations. Ultimately, in this specific case, Palestine is prohibited from delegating jurisdiction over Israeli nationals in virtue of the previously discussed jurisdiction clause in the Oslo Accords.

**D. The principle *nemo dat quod non habet***

19. The principle of *nemo dat quo non habet* asserts that no one can transfer what he does not have. While traditionally associated with property law, this rule is also applicable in other legal contexts, like international public law. Under this principle, Palestine cannot delegate or transfer criminal jurisdiction over Israeli nationals in the Territory, as it never possessed such jurisdiction. Indeed, Israel has lawfully exercised it since 1967.

20. In the *Myanmar* case, this Chamber held that it exercises jurisdiction under Article 12 (2) (a) of the Rome Treaty "in the same circumstances in which State Parties would be allowed to assert jurisdiction over such crimes under their legal systems".[4]

21. As discussed above, the Prosecutor's arguments to justify valid delegation of Palestine's "jurisdiction to prescribe" to the ICC are not applicable in this situation.

22. Even if jurisdiction to prescribe were admitted, Palestine would still be precluded from delegating or transferring it to the ICC due to the previously discussed valid and enforceable jurisdiction clause in the Oslo Accords, according to which Israel has sole jurisdiction over offenses in the Territory committed by Israeli nationals. The infringement of this jurisdiction clause would therefore constitute a violation of *pacta sunt servanda.*

[4] Bangladesh/Myanmar. Decision on the « Prosecutor's Request for a Ruling on Jurisdiction under Article 19 (3) of the Statute » 6 September 2018 para 70.

23. Absent jurisdiction based on valid delegation or referral by the UN Security Council under Article 13 (b), no other provision of the Rome Treaty bestows jurisdiction to the ICC in this situation.

**E. The Oslo Accords are valid instruments under international public law, and remain the only agreed, legal source of authority for the division of control, powers and responsibilities between Palestinians and Israelis in the Territory.**

24. The Oslo Accords were negotiated at arm's length between Israel and the PLO. They represent the culmination of a process that began with the Madrid Conference in 1991. The King of Spain, Juan Carlos I, had the ability to convene Yaser Arafat and Yitzhak Rabin face-to-face to the negotiating table. Norway played a key role as a mediator. The United States and Russia witnessed the signature of Oslo I in Washington DC in 1993. The United States, the Russian Federation, the European Union, Egypt, and Norway formally witnessed Oslo II. The UNSC endorsed the peace process under the Oslo Accords on several occasions.[5] Although the PLO was not formally a state, the Accords can be assimilated to an international treaty to all relevant effects.

25. Against this background, the Prosecutor, disingenuously characterized the Oslo Accords as an "occupier-occupied" special agreement under the Geneva Convention, and also contended that Israel coerced the PLO to sign them, by taking advantage of an alleged PLO's negotiators weakness referring to them as "protected persons under occupation are not in a sufficiently independent state of mind to fully appreciate the implications of a renunciation of their

[5] For example, Resolutions 904/1994 and 1073/1996.

right under the Convention [the Geneva Convention]".[6] She went further to state that the Oslo Accord infringed *ius cogens*.[7]

26. This gross misrepresentation of the facts and the law by the Prosecutor not only affront the dignity of all those individuals and states that participated and facilitated the Oslo Accords but also means a reputational damage for the ICC itself.

27. As discussed above, although it is true that Palestinians have a right to self-determination, this right does not necessarily lead to statehood and full sovereign powers. Self-determination is not an absolute right either. The existence of a potential State of Palestine is contingent on recognized and secure borders with Israel (UNSC Res. 242/1967).

28. Regarding the recent ICJ Advisory Opinion, even if we were to accept that Israel occupies the Territory—which we do not—the law of occupation does not confer sovereign rights on the Palestinian people, including the right to exercise criminal jurisdiction over Israeli nationals. Similarly, in the absence of a State of Palestine exercising effective sovereignty, the right to self-determination does not grant them criminal jurisdiction over Israeli nationals in the Territory. As discussed, this jurisdiction has been lawfully exercised by the State of Israel since 1967 based on the principle of nationality. Accordingly, the Court's recent Advisory Opinion does not alter the analysis presented in these Observations.

29. As a matter of limitation of space, we hereby subscribe to and adhere to the arguments put forward in other amicus observations that will be simultaneously submitted to the Chamber on this occasion.[8]

[6] Prosecutor's Request Pursuant to Article 19 (3) for a Ruling on the Court's Territorial Jurisdiction in Palestine of 22 January 2020, para 188.
[7] *Ibid* para. 147.
[8] See especially the Amicus Curiae by Prof. Steve Zipperstein, paras 3 to 17.

### F. The Prosecutor's failure to initiate complementarity communications with the State of Israel under Article 18 of the Rome Treaty for alleged crimes committed after 8 October 2023

30. Even if the Chamber asserts its jurisdiction over Israeli nationals, Israel will still retain primary jurisdiction over its nationals under the ICC complementarity framework.

31. From the Prosecutor's public statement announcing his intention to request arrest warrants against Prime Minister Netanyahu and Defense Minister Gallant, one may well conclude that he initiated a new investigation into the October 7 attacks and resulting hostilities.[9] Although no formal "situation" has been opened nor a new file number assigned, it is evident that a new investigation is effectively underway. Despite this, the Office of the Prosecutor has publicly stated that it would not seek communications with the State of Israel under Article 18 of the Rome Statute for alleged crimes committed after that date.[10] In our view, this omission is a serious violation of the complementarity principle, around which the entire ICC legal framework has been built. The Prosecutor cannot exercise with such broad discretion in regard to his complementarity obligations.

32. Under the circumstances, the Chamber should determine that it would be **premature** to issue arrest warrants against Prime Minister Netanyahu and Defense Minister Gallant unless and until the Prosecutor engages in the communications provided for in Article 18 and completes at least a

[9] Prosecutor's Statement of 24 May 2014. https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state

[10] (2) Kevin Jon Heller on X: "@eliavl @djag2 @RalphJanik @MarkKersten @AdHaque110 @sevslv @Heidi_Matthews @DanyaChaikel @OwenJones84 @mehdirhasan @AlexNeve24 @JaninaDill @Alonso_GD @Barrie_Sander @juliettemm @tobycadman @liz_evenson There was no need for an additional notification in #Palestine b/c the investigation opened in 2021 was prospective from 2014 and included Gaza. By contrast, a second notification was required in CAR II b/c that was a new investigation pursuant to a second CAR self-referral." / X

reasonable preliminary complementary assessment. This assessment should determine whether the State of Israel is unwilling or unable to carry out genuine national investigations into potential misconduct by IDF members and government officials from 8 October onwards in the context of the Gaza war. Proceeding otherwise would be contrary to the law and spirit of complementarity, resulting in a blatant violation of Israel's sovereignty.

**G. Lack of reasonable grounds to believe that Prime Minister Netanyahu and Defense Minister Gallant committed the crimes alleged by the Prosecutor.**

33. Even if the Chamber asserts jurisdiction over Israeli nationals and rejects our arguments about the Prosecutor's failure to initiate complementarity communications under Article 18, the Chamber should still decline the issuance of arrest warrants against Prime Minister Netanyahu and Defense Minister Gallant because there are no reasonable grounds to believe they committed the crimes alleged by the Prosecutor.

34. As a matter of limitation of space, we hereby subscribe to and adhere to the arguments put forward in other amicus observations that will be simultaneously submitted to the Chamber on this occasion.[11]

III. **Conclusion.**

**35.** Based on the foregoing, the Amicus Curiae respectfully submits that the Chamber should decline the Prosecutor's application for arrest warrants against the Prime Minister and Defense Minister of Israel.

[11] Amicus Curiae by Prof. Steve Zipperstein, paras. 24 to 31.

**Respectfully submitted:**

Andrew Tucker, on behalf of *thinc.*

Dated this 6th day of August 2024.

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