

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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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

Written observations Pursuant to Rule 103 (Halla Shoaibi & Asem Khalil)

Source: Dr. Halla Shoaibi & Dr. Asem Khalil

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

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Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
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Victims and Witnesses Unit

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**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. Dr. Halla Shoaibi and Dr. Asem Khalil submit these observations maintaining that the Oslo Accords do not bar the exercise of the Court's jurisdiction against Israeli nationals in the Situation in Palestine. These observations are submitted in accordance with the Pre-Trial Chamber's Order of 22 July 2024.

II. OBSERVATIONS

A. There is no legal basis for the intervention of the United Kingdom in the Ex Parte Article 58 Proceedings

2. The authors recognize that the UK has submitted its request to submit written observations pursuant to Rule 103, since it does not qualify as an "interested state" per Article 19 of the Rome Statute. It is our submission that there is no legal basis for the intervention of the United Kingdom in the Ex Parte Article 58 Proceedings.
3. Article 58 proceedings are recognized as ex parte, with the exclusive participation of the Prosecutor, and accordingly, prior applications to submit written observations on article 58 proceedings have been rejected by the Court. There are no *vital* distinctions between this situation and previous ones in order to allow such observations. The fact that the Prosecutor decided to make public the applications for arrest warrants, should not be interpreted as an invitation to submit jurisdiction challenges, nor as creating a leeway allowing states to interfere in ex parte proceedings. The issue on why the Prosecutor decided to publicize the request of arrest warrants before a determination of the Chamber pursuant to article 58 of the Statute has been made, is *irrelevant* to right of states to interfere in ex parte Article 58 proceedings. The matters

related to Oslo Accords has been significantly discussed within prior observations submitted to the Court in 2020 in relation to the question of jurisdiction, which would have been sufficient to assist the court in its decision on the matter. The request by the UK is delaying a decision on the arrest warrants in the Situation in Palestine in critical times as these for Palestinians, especially in Gaza. Justice delayed is justice denied.

B. The Oslo Accords did not relinquish Palestine’s prescriptive jurisdiction – even if it limited the PA’s ability to exercise criminal jurisdiction over Israeli nationals

4. First, we note that the Rome Statute does not provide that its authority is derived from the act of delegation of jurisdiction from State Parties. The Rome Statute rather utilizes the general term “*accepts* the jurisdiction of the Court” in Article 12; the Statue does not determine the nature or source of a State Party’s jurisdiction required to establish the Court’s jurisdiction.
5. An important question arises: what is the main *theorization/conceptualization* behind the conferring of jurisdiction from a State Party to the ICC? Although the delegation theory is one theory to explain the ICC’s jurisdiction, it is not the only one. Other theories should be considered to correctly understand the ICC’s jurisdiction; theories that are actually more in line with the object and purpose of the ICC. If we are to understand, the ICC’s role as “[a]ffirming that the most serious crimes of concern to the international community as a whole must not go unpunished,” and to “guarantee lasting respect for and the enforcement of international justice,”¹ it becomes pertinent to accept that the Court’s jurisdiction as “grounded in a broader entitlement of states

¹ Preamble, Rome Statute

and the international legal community under international law.”² Basically, State Parties confer authority to the ICC “to exercise that criminal jurisdiction accepted under international law under the Nuremberg and Rome consensuses, which is universal jurisdiction over jus cogens “core” crimes, regardless of national laws” – within the limits of the Rome Statute.³ The result of such theorization is straightforward: states accede to the Rome Statute triggering the court’s jurisdiction, but any jurisdictional limitations faced by the acceding State does not impact the ICC’s jurisdictional authority as it does not depend on a corresponding national jurisdiction of the state.⁴ Hence, the ICC’s jurisdiction is not restricted by the Oslo Accords.

6. Even if the delegation of primary jurisdiction is the legal basis for the ICC’s jurisdiction, it is necessary for the State, in this case, to exercise prescriptive jurisdiction, not the jurisdiction to enforce or to adjudicate.⁵
7. “There are generally three forms of jurisdiction: (i) jurisdiction to prescribe, meaning the ability to make its law applicable to persons and conduct, in other words the right to criminalize conduct, (ii) jurisdiction to adjudicate, meaning the ability to subject natural and legal persons to legal process, (iii) jurisdiction to enforce, that is to induce or compel compliance with a determination reached through executive and/or judicial actions.”⁶ A State is able to delegate its prescriptive jurisdiction irrespective of how it prescribes such jurisdiction internally. Palestine’s agreement to limit its own

² Carsten Stahn, Response: The ICC, Pre-Existing Jurisdictional Treaty Regimes, and the Limits of the Nemo Dat Quod Non Habet Doctrine--A Reply to Michael Newton, 49 *Vanderbilt Law Review* 443 (2021), 447.

³ Leila Nadya Sadat, *The Conferred Jurisdiction of the International Criminal Court*, 99 *Notre Dame L. Rev.* 549, 597.

⁴ Carsten Stahn, Response: The ICC, Pre-Existing Jurisdictional Treaty Regimes, and the Limits of the Nemo Dat Quod Non Habet Doctrine--A Reply to Michael Newton, 49 *Vanderbilt Law Review* 443 (2021), 448

⁵ Salvatore Fabio Nicolosi, ‘The Law of Military Occupation and the Role of De Jure and De Facto Sovereignty’, 31 *Polish Yearbook of International Law* (2011); Roger O’Keefe, ‘Response: “Quid,” Not “Quantum”: A Comment on “How the International Criminal Court Threatens Treaty Norms”’, 49(1) *Vanderbilt Law Review* (2016) 4.

⁶ Asem Khalil and Halla Shoaibi. "Criminal Jurisdiction under Occupation: The Oslo Accords and the ICC." In *Prolonged Occupation and International Law*, edited by Nada Kiswanson and Susan Power, 330-347. International Humanitarian Law Series, vol. 66. Leiden: Brill Nijhoff, 2023, 331.

adjudication and enforcement jurisdiction through the Oslo Accords does not negate its prescriptive jurisdiction. The Oslo Accords only limited the Palestinian Authority's ability to exercise criminal jurisdiction over Israeli nationals, but they did not relinquish Palestine's prescriptive jurisdiction. States, including those occupied, maintain the power to delegate authority, even if they relinquish their enforcement and adjudication jurisdictions, as jurisdiction stems from their *de jure* sovereignty.⁷

8. Mechanical formulas originating in private property law such as *the maxim nemo dat quod non habet* has been used to argue that an entity lacking enforcement and prescription jurisdiction cannot delegate jurisdiction to the ICC, as one cannot give what one does not have in the first place. This argument first, does not take into account the aim of the ICC which is to achieve justice, end immunity and guarantee a lasting respect for international justice, and second, assumes a false equivalence between domestic criminal jurisdiction and the ICC's jurisdiction.⁸ It presumes that the ICC can extend its jurisdiction only to situations where the entity in question has an identical jurisdiction to that of the ICC. Such conclusion is incorrect. Although the Oslo Accords limited the Palestinian Authority's ability to exercise criminal jurisdiction over Israeli nationals, they did not relinquish Palestine's prescriptive jurisdiction nor have they impeded Palestine's ability to accede to numerous multilateral treaties. Rather – the fact that the Palestinians agreed to limit their adjudication jurisdiction in relation to Israeli citizens, confirms that Palestine maintains prescriptive jurisdiction. How can Palestine agree to limit its adjudication

⁷ Salvatore Fabio Nicolosi, 'The Law of Military Occupation and the Role of De Jure and De Facto Sovereignty', 31 Polish Yearbook of International Law (2011); John Quigley, *The Statehood of Palestine: International Law in The Middle East Conflict* (cup 2010) 220; Morris Greenspan, *The Modern Law of Land Warfare* (University of California Press 1959) 217; See Asem Khalil and Halla Shoaibi, "Criminal Jurisdiction under Occupation: The Oslo Accords and the ICC." In *Prolonged Occupation and International Law*, edited by Nada Kiswanson and Susan Power, 330-347. International Humanitarian Law Series, vol. 66. Leiden: Brill Nijhoff, 2023;

⁸ Carsten Stahn, 'Response: The icc, Pre-Existing Jurisdictional Treaty Regimes, and the Limits of the Nemo Dat Quod Non Habet Doctrine – A Reply to Michael Newton', 49 Vanderbilt Journal of Transnational Law (2016) 448

jurisdiction towards Israeli citizens, through an international agreement, if it does not have and maintain its prescriptive jurisdiction?⁹

9. Further, the ICC Appeals Chamber in the Situation in Afghanistan did not find the bilateral agreements between Afghanistan and the United States (which basically waives Afghanistan's criminal jurisdiction over US forces) relevant to the question of jurisdiction.¹⁰ A State waving or restricting its jurisdiction to adjudicate and enforce the law does not preclude the ICC from extending its jurisdiction. The same conclusion should be reached in relation to the Oslo Accords – they do not bar the ICC from exercising its jurisdiction on Israeli nationals committing crimes on Palestinian territory.
10. Additionally, the ICJ in its Advisory Opinion on the *Legal Consequences arising from the policies and practices of Israel in the Occupied Palestinian Territory including East Jerusalem*, stated that the Oslo Accords do not suggest adding to the powers invested in Israel within the law of occupation, and further Israel may not rely on the Oslo Accords to bypass the established rules of international law governing occupation.¹¹ Hence, any reading on whether Palestine maintains prescriptive jurisdiction in the Occupied Palestinian territory should be analyzed within this background. The sovereignty of an occupied state is not terminated nor suspended, even if the act of occupation weakens and reduces the sovereign State's control, the de jure sovereignty remains vested with the occupied population.¹² Accordingly, Palestinians maintain their

⁹ See Asem Khalil and Halla Shoaibi. "Criminal Jurisdiction under Occupation: The Oslo Accords and the ICC." In *Prolonged Occupation and International Law*, edited by Nada Kiswanson and Susan Power, 330-347. International Humanitarian Law Series, vol. 66. Leiden: Brill Nijhoff, 2023.

¹⁰ ICC, Situation in The Islamic Republic of Afghanistan, Judgment on the 'Appeal Against the Decision on the Authorization of an Investigation into the Situation in the Islamic Republic of Afghanistan', icc-02/17-138, 5 March 2020, para 44.

¹¹ Legal Consequences Arising from The Policies And Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem, 19 July 2024, para 140.

¹² Salvatore Fabio Nicolosi, 'The Law of Military Occupation and the Role of De Jure and De Facto Sovereignty', 31 Polish Yearbook of International Law (2011); John Quigley, The Statehood of Palestine: International Law in The Middle East Conflict (cup 2010) 220;

prescriptive jurisdiction; Israel, as an occupying power, does not maintain prescriptive jurisdiction in Palestinian territory, as it goes beyond the parameters of the law of occupation.

11. Stemming from the nature of international criminal law and the role of the ICC, the court has the power to adjudicate individuals that commit a crime within the territory of a signatory state - regardless of what the states have decided bilaterally. Furthermore, in cases where a state party itself, or third concerned states, do not adjudicate the concerned crimes, then the ICC should be able to act within its jurisdiction to hold people accountable - any interpretation or application of the delegation theory to give immunity to certain category of people based on their citizenship, is contrary to the terms and spirit of Rome Statute.

C. The Oslo Accords have been concluded in violation of self-determination (a peremptory norm)

12. Caselaw and other supporting material establish that the right to self-determination is a peremptory norm (jus cogen).¹³
13. Pursuant to Article 21(3) of the Rome Statute, the ICC must interpret and apply the applicable law consistently with internationally recognized human rights.¹⁴ Article 21(3) is part of the process of interpreting the provisions of the Rome Statute, as it has

Morris Greenspan, *The Modern Law of Land Warfare* (University of California Press 1959) 217; Yoram Dinstein, *The International Law of Belligerent Occupation* (cup 2009) 49;

¹³ See Asem Khalil and Halla Shoaibi. "Criminal Jurisdiction under Occupation: The Oslo Accords and the ICC." In *Prolonged Occupation and International Law*, edited by Nada Kiswanson and Susan Power, 330-347. International Humanitarian Law Series, vol. 66. Leiden: Brill Nijhoff, 2023, 341-343.

¹⁴ Rome Statute, Article 21(3); icc, *Prosecutor v Saif Al-Islam Gaddafi*, Pre-Trial Chamber i, Decision on the 'Admissibility Challenge by Dr Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute', Judge Perrin de Brichambaut Separate Concurring Opinion, para 112.

been recalled by the ICC in several cases.¹⁵ When analyzing whether the ICC has jurisdiction, it is important that the Court does not apply a treaty that violates peremptory norms. Hence, when considering the effect of the Oslo Accords on the Court's jurisdiction in the Situation in Palestine, it is pivotal to examine whether limiting the Court's jurisdiction vis-à-vis the Oslo Accords from prosecuting Israeli nationals violates the right to self-determination. In the case a conflict exists between a peremptory norm and another rule of international law, the Rome Statute provisions establishing the court's jurisdiction, must be "interpreted and applied" as to be consistent with the peremptory norm.¹⁶

14. As indicated, even if a treaty does not create a direct obligation to violate the peremptory norm of self-determination, but the application of the treaty, in one way or another, does create a violation of the norm, then such application would be unlawful. In this case, interpreting or applying the Oslo Accords in a manner that limits Palestinian perspective jurisdiction and its ability to confer or delegate jurisdiction to the ICC risks negating Palestinians' right to self-determination. If Israeli crimes on Palestinian territory, such as the transfer of Israeli citizens into the occupied territory, are not conferred to the ICC as a result of the Oslo Accords, then Palestinians are precluded from exercising their right to self-determination. If the Rome Statute restricts its own jurisdiction based on the Oslo Accords, it will create a violation of the right to self-determination of the Palestinian people – which is in fact contrary to the aim and purpose of the Statute.

¹⁵ See for example ICC, Prosecutor v Lubanga Dyilo, Pre-Trial Chamber I, Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Statute, ICC-01/04-01/06-108, 19 May 2006, para 7. See also Rebecca Young, "Internationally Recognized Human Rights' Before the International Criminal Court", 60(1), The International and Comparative Law Quarterly (2011) 189.

¹⁶ See ILC, 'Report of the International Law Commission on the Work of its Seventy-First Session', 2(2) Yearbook of the International Law Commission (2019), pages 146, 198–199.

D. The Oslo Accords should not apply in cases of contradiction to the Geneva Conventions

15. Palestine has an obligation to prosecute grave breaches under the Geneva Conventions and customary international law. Such grave breaches are codified as war crimes within the Rome Statutes, and at times overlap with other crimes within the ICC's jurisdiction like genocide, crimes against humanity, and torture.¹⁷

16. According to the Fourth Geneva Convention, special agreements between the Occupying Power and the authorities of the occupied territories shall not deprive protected persons in the occupied territory of the benefits of the Convention, nor shall any special agreement deny protected persons their rights, even if they choose to renounce such rights.¹⁸ Palestine's obligation as a High Contracting Party to prosecute such grave breaches, including when needed delegating such duty to international tribunals, takes precedence over any conflicting obligation that arises from the Oslo Accords.

17. The International Court of Justice held in its advisory opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, that Israel violates the erga omnes obligation to respect the right of the Palestinian people to self-determination, along with other of its obligations under international humanitarian law.¹⁹ Further, the ICJ recalled the advisory opinion on the Legality of the Threat or Use of Nuclear Weapons, in which "a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and

¹⁷ Ward Ferdinandusse, 'The Prosecution of Grave Breaches in National Courts', 7(4) Journal of International Criminal Justice, (2009) 723, pages 724–725

¹⁸ Fourth Geneva Convention, Articles 7, 8 and 47

¹⁹ ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) ICJ Reports 136 (2004), para 155.

'elementary considerations of humanity. . .[i]n the Court's view, these rules incorporate obligations which are essentially of an erga omnes character."²⁰ Such obligations are owed by states towards the international community as a whole, and all states can be held to have a legal interest in their protection; meaning Palestine has an obligation to prosecute such grave breaches.

18. Further, the Fourth Geneva Convention, as an instrument to protect civilians in armed conflict and in times of occupation, should be interpreted so as to make its safeguards *effective*. The ECtHR had previously maintained that "the object and purpose of the [European Convention on Human Rights] as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective."²¹ Hence, interpreting the Oslo Accords as an instrument limiting the ability of Palestine to confer or delegate its jurisdiction to the ICC over grave breaches of the Geneva Conventions and the Rome Statute of the ICC, would render the safeguards in the Geneva Conventions and the Rome Statute ineffective and nonpractical.²² Such application would defy the object and purpose of the Geneva Conventions as well as the object and purpose of the Rome Statute.

III. Conclusion

19. In conclusion, the Oslo Accords do not bar the ICC from exercising its jurisdiction against Israeli nationals in the Situation in Palestine.

²⁰ ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) ICJ Reports 136 (2004), para 157

²¹ ECtHR, *Soering v The United Kingdom*, Judgement, 7 July 1989, para 87

²² See also, Jure Vidmar, 'Rethinking Jus Cogens after Germany v. Italy: Back to Article 53?', 60 *Netherlands International Law Review* (2013), page 11

20. Understanding the Oslo Accords as an impediment to the Court's ability to exercise its jurisdiction against Israeli nationals, would contribute to the apartheid regime that the Oslo Accords has actually put in place. The court would approve applying different norms on individuals committing crimes on the same territory based on their citizenship – this goes against the understanding of territorial jurisdiction within the Rome Statute. If states bilaterally agreed on rules that may be interpreted or applied contrary to preemptory norms - it is unacceptable and unexpected that the ICC would make part of such a role.



Halla Shoaibi



Asem Khalil

Dated this Monday August 6, 2024 at Ramallah, Palestine