

**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

Source: University Network for Human Rights
International Human Rights Clinic, Boston University School of Law
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Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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1. These observations are submitted by the University Network for Human Rights, the International Human Rights Clinic at Boston University School of Law, the International Human Rights Clinic at Cornell Law School, and the Yale Law School Lowenstein Human Rights Project (the Applicants) upon the Decision of the Pre-Trial Chamber I (the Chamber) of 22 July 2024, pursuant to Rule 103 of the Rules of Procedure and Evidence.

I. BACKGROUND

2. On 5 February 2021, the Chamber issued a decision, in response to a request by the Prosecution for a ruling on the International Criminal Court (the Court)'s territorial jurisdiction in Palestine,¹ affirming that the Court's territorial jurisdiction "extends to the territories occupied by Israel since 1967, namely Gaza and the West Bank, including East Jerusalem."² The Chamber found that the preconditions for the Court to exercise jurisdiction in Palestine were met,³ and that "arguments regarding the Oslo Agreements in the context of the present proceedings" were "not pertinent" to determining the scope of the Court's territorial jurisdiction in Palestine.⁴
3. The Applicants submit that the Court indeed is able, and obligated by considerations of justice and accountability, to uphold its duty to exercise jurisdiction and issue arrest warrants, based on evidence, for war crimes and crimes against humanity committed in the territory of the State of Palestine, irrespective of the nationality of the alleged perpetrators. Specifically, the Oslo Accords do *not* limit or bar the exercise of the Court's jurisdiction over Israeli citizens, nor may they be used as pretext for selective, discriminatory application of international criminal law.

II. OBSERVATIONS: THE OSLO ACCORDS ARE NO BAR TO THE COURT'S JURISDICTION OVER ISRAELI CITIZENS WITHIN THE TERRITORY OF THE STATE OF PALESTINE.

4. The term "Oslo Accords" refers to a set of agreements signed between Israel and the Palestinian Liberation Organization (PLO). The Declaration of Principles on Palestinian Self-Rule (Oslo I) was signed in 1993 and stipulated a form of Palestinian self-governance authority in the West Bank and Jerusalem through the establishment of a Palestinian Interim Self-Government Authority (the Palestinian Authority or PA).⁵ The 1995 Interim

¹ Office of the Prosecutor, Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine, ICC-01/18-12 (Jan. 22, 2020), and Annex A, ICC-01/18-12-AnxA [hereinafter Prosecution Request 2020].

² 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,'* ICC-01/18-143 (Feb. 5, 2021), para. 118 [hereinafter PTC-I Decision 2021].

³ *Id.* at para. 111-12.

⁴ *Id.* at para. 129. *See also id.* at paras. 85-86, 111-23.

⁵ Declaration of Principles on Interim Self-Government Arrangements (Sept. 13, 1993), U.N. QUESTION OF PALESTINE, <https://www.un.org/unispal/document/auto-insert-180015/> [hereinafter Oslo I].

Agreement on the West Bank and the Gaza Strip (Oslo II) divided the West Bank into three administrative zones, A, B, and C, and transferred limited powers and duties from the Israeli military government and civil administration to the Palestinian Authority.⁶

5. Article XVII(2)(c) of Oslo II stipulated that “[t]he territorial and functional jurisdiction of the [Palestinian Authority] will apply to all persons, except for Israelis, unless otherwise provided in this Agreement.”⁷ In Annex IV to Oslo II, Article I(1)(a) stipulated further that “[t]he criminal jurisdiction of the [Palestinian Authority] covers all offenses committed by Palestinians and/or non-Israelis in the Territory, subject to the provisions of this article. For the purposes of this Annex, ‘Territory’ means West Bank territory except for Area C which, except for the Settlements and the military locations, will be gradually transferred to the Palestinian side in accordance with this Agreement, and Gaza Strip territory except for the Settlements and the Military Installation Area.”⁸
6. The Accords avoided the fundamental issues of Palestinian refugees’ right to return, illegal Israeli settlements, borders, and the status of Jerusalem, leaving them to be determined by subsequent “permanent status”⁹ agreements that never materialized, while Israeli occupation continued to be deeply entrenched and settlements expanded.¹⁰

(a) The Oslo Accords were concluded under continued occupation and coerced consent and violated international humanitarian law.

7. The Oslo negotiation process was deeply flawed. The negotiations were conducted, and interim agreements were concluded, in the context of an oppressive military occupation. The Israeli occupation of Palestinian territories constitutes an illegal use of force that deprives Palestinians of their most basic rights, including the right to self-determination, and an ongoing coercive threat of the perpetuation of this use of force.¹¹ In such a context of severe power imbalance and coercion, consent cannot be legitimately granted.

⁶ Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (Oslo II) (Sept. 28, 1995), U.N. QUESTION OF PALESTINE, <https://peacemaker.un.org/israelopt-osloII95> [hereinafter Oslo II] (‘a. “Area A” means the populated areas delineated by a red line and shaded in brown on attached map No. 1; b. “Area B” means the populated areas delineated by a red line and shaded in yellow on attached map No. 1, and the built-up area of the hamlets listed in Appendix 6 to Annex I; and c. “Area C” means areas of the West Bank outside Areas A and B, which, except for the issues that will be negotiated in the permanent status negotiations, will be gradually transferred to Palestinian jurisdiction in accordance with this Agreement.’).

⁷ Oslo II, art. XVII(2)(c).

⁸ Annex, Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (Oslo II) (Sept. 28, 1995), U.N. QUESTION OF PALESTINE, <https://www.un.org/unispal/document/auto-insert-185434/>.

⁹ Oslo I, art. I.

¹⁰ See, e.g., EUROPEAN UNION, SIX-MONTH REPORT ON ISRAELI SETTLEMENTS IN THE OCCUPIED WEST BANK, INCLUDING EAST JERUSALEM: REPORTING PERIOD JANUARY-JULY (Mar. 8, 2021), https://www.eeas.europa.eu/delegations/palestine-occupied-palestinian-territory-west-bank-and-gaza-strip/six-month-report-israeli-settlements-occupied-west-bank-including-east-jerusalem-reporting-period-0_en.

¹¹ Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion, 2024 I.C.J., para. 261 (Jul. 19) [hereinafter *Occupation* Advisory Opinion].

8. The International Court of Justice (ICJ) counsels in the *Chagos* Advisory Opinion that “heightened scrutiny” should be employed when examining any agreement made by a State concerning a non-self-governing territory.¹² The Chamber should therefore examine the Oslo Accords, signed when the entirety of Palestinian territory was under Israeli occupation and full control, in the same light.
9. The Oslo Accords were imposed, through a flawed coercive process, by an occupying power on an occupied people, in contravention of the Fourth Geneva Convention (GCIV). GCIV Article 47 categorically prohibits the deprivation of protected persons of their rights under the Convention through “any change introduced, as the result of the occupation of a territory, into the institutions or government of said territory, nor by any agreement concluded between the authorities of the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.”¹³ Under Article 47, any agreement that purports to change or restrict the State of Palestine’s rights in and to all of its territory, including provisions that restrict the right to prosecute Israeli citizens for criminal acts committed in Palestinian territory against protected persons, are null and void *ab initio*.¹⁴

(b) *The Oslo Accords violate the jus cogens norm of Palestinian self-determination.*

10. Under the Vienna Convention on the Law of Treaties (VCLT), a treaty is void if “it conflicts with a peremptory norm of general international law.”¹⁵
11. It is well established in international law that Israel’s prolonged military occupation violates the Palestinian people’s right to self-determination and exercise of sovereignty.¹⁶ The Oslo Accords include provisions that enable and preserve the continuation of Israeli military occupation and settlement of Palestinian territory and other violations of *jus cogens* norms, including the prohibition of apartheid.¹⁷ For instance, Oslo II provides for Israeli control of

¹² Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 I.C.J. 95, para. 172 (Feb. 25) [hereinafter *Chagos* Advisory Opinion].

¹³ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, art. 47 [hereinafter GC IV].

¹⁴ GC IV, art. 47 (Inviolability of Rights). See also *Occupation* Advisory Opinion (2024), para. 102. Israel holds a longstanding position that the Geneva Convention does not apply to the occupied Palestinian territories, despite this position having been discredited by the international consensus for decades. See UNITED NATIONS – QUESTION OF PALESTINE, THE QUESTION OF THE OBSERVANCE OF THE FOURTH GENEVA CONVENTION OF 1949 IN GAZA AND THE WEST BANK INCLUDING EAST JERUSALEM OCCUPIED BY ISRAEL IN 1967 (1979), <https://www.un.org/unispal/document/auto-insert-200116/>. See also *Occupation* Advisory Opinion (2024), paras. 96, 102, 104-110 (Jul. 19); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, paras. 90-101 (July 9) [hereinafter *Wall* Advisory Opinion]. The Geneva Conventions are also considered customary international law, binding on all States. See Yoram Dinstein, *The ICRC Customary International Humanitarian Law Study*, in THE LAW OF WAR IN THE 21ST CENTURY: WEAPONRY AND THE USE OF FORCE 100, 100-1 (2006).

¹⁵ Vienna Convention on the Law of Treaties, 22 May 1969, 1155 U.N.T.S. 119, art. 53 [hereinafter VCLT].

¹⁶ *Occupation* Advisory Opinion (2024), paras. 230-43.

¹⁷ See *Occupation* Advisory Opinion (2024), paras. 225-29. For analysis of Israeli practices of apartheid in Palestine, see, e.g., Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967, S. Michael Lynk, paras. 51-56 (Conclusions), U.N. Doc. A/HRC/49/87 (Mar.

60% of the area of the West Bank, comprising Area C,¹⁸ and Annex II of the Agreement preserves Israeli authority over settlements, removes the exercise of sovereign authority from Palestinian governance, and requires Palestinians to negotiate rights to their own territory.¹⁹ Such acts are in clear violation of international humanitarian law and constitute a denial of Palestinian self-determination,²⁰ a peremptory norm of which any breach is impermissible and may not be legislated through any agreement or negotiation.

12. Similarly, Article X(4) of Oslo II preserves Israeli military authority over the borders of the State of Palestine, as well as unlawful settlements within Palestinian territories.²¹ The very presence of settlements and settlers in occupied territory is unlawful in the first place, pursuant to GCIV Article 49.²² Article XII(1) of Oslo II defines Israel's powers to include "the responsibility for overall security of Israelis and Settlements, for the purpose of safeguarding their internal security and public order," in breach of the prohibitions of Article 64 of the GCIV.²³ Furthermore, the Oslo Accords impose concessions on the State of Palestine that fragment its territory into separate enclaves between and within which Israel restricts movement in a manner that deeply infringes on a wide range of Palestinian people's fundamental rights, including freedom of movement, access to food, water, and natural resources, and, more broadly, "the right to pursue its economic, social, and cultural development."²⁴ The ICJ has affirmed that these conditions frustrate the Palestinian people's *jus cogens* right to self-determination.²⁵
13. Israel's purported attempt in Oslo II to exercise its own jurisdiction over settlement areas and external security, as well as jurisdiction over Israeli citizens, violates the Palestinian right to self-determination. As VCLT Article 53 is ambiguous on whether it voids the *entire* treaty or only individual provisions, and its *travaux préparatoires* lack clarity on the matter,²⁶ at minimum, parts of the Oslo Accords that breach *jus cogens* norms by limiting

21, 2022), <https://www.ohchr.org/en/documents/country-reports/ahrc4987-report-special-rapporteur-situation-human-rights-palestinian>; Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967, Francesca P. Albanese, paras. 40, 70, 74, U.N. Doc. A/77/356 (Sept. 21, 2022), <https://www.ohchr.org/en/documents/country-reports/a77356-situation-human-rights-palestinian-territories-occupied-1967>.

¹⁸ Oslo II, art. XI, map 1.

¹⁹ Oslo I, Annex II, para. 3(b).

²⁰ *Occupation* Advisory Opinion (2024), para. 261.

²¹ Oslo II, art. X(4).

²² GC IV, art. 49 (affirmed by the ICJ in the *Wall Opinion* (2004), para. 120).

²³ Oslo II, art. XII(1); GC IV, art. 64.

²⁴ *Occupation* Advisory Opinion (2024), paras. 230-243, 256.

²⁵ *Wall* Advisory Opinion (2004), para. 134; *Occupation* Advisory Opinion (2024), paras 164, 230-243, 256. *See also Chagos* Advisory Opinion (2019), para.160 (affirming that territorial integrity is a fundamental component of self-determination).

²⁶ VCLT, Commentary to art. 53; Resolution 2166 (XXI) of the General Assembly convening the Conference on the Law of Treaties, (26 March 1968); *See also* Villiger, M.E. *Article 53: Treaties Conflicting With A*

the full exercise of Palestinian sovereignty and right to self-determination must be rendered void and without legal effect. With regard to each of the abovementioned violations, at a minimum, the Accords are null and void.²⁷

14. Moreover, the Oslo Accords have been materially breached, primarily by Israel, providing further evidence that the Accords are invalid under Article 60 of the VCLT.²⁸ Well-documented material breaches by Israel include the wide range of actions Israel has taken since the Accords were signed that significantly undermine or abrogate their object, purpose, and stated commitments. The Accords were intended as interim agreements pending final status negotiations, and no unilateral steps were to be taken concerning the major issues of contention particularly with regard to refugees, settlements, borders, and the status of East Jerusalem.²⁹ Israel's actions that have materially altered the *status quo* represent a clear breach of the Accords.
15. For example, Israel has built a 708-kilometer separation wall, much of it up to nine meters high, 85% of which is inside the Green Line within Palestinian territory.³⁰ The wall has isolated almost 12% of Palestinian land, separated over 20,000 Palestinians from the rest of Palestinian territory, and denied Palestinians access to their own homes, fields, and lands.³¹ In its 2004 Advisory Opinion, the ICJ declared the construction of the wall illegal and required it to be dismantled, including the regime of passes and permits that accompany it.³² Israel has ignored this mandate.
16. In addition, since the Oslo Accords, Israel's unlawful settlements have doubled in size, today comprising over 700,000 settlers in the West Bank and East Jerusalem.³³ Settlement expansion has been accompanied by constant settler violence against Palestinians and their property, uprooting and burning of trees and crops, and ongoing house demolitions, often

Peremptory Norm Of General International Law (Jus Cogens), COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES (2009).

²⁷ For a discussion of the Oslo Accords' voidability under the VCLT, see LEAGUE OF ARAB STATES, *Written Comments on the Written Statements Made by States and Organizations, Legal Consequences arising from the Policies and Practice of Israel in the Occupied Palestinian Territory (Request for Advisory Opinion)*, Sec. 3.c.iv, paras. 35-46, <https://www.icj-cij.org/sites/default/files/case-related/186/186-20231025-wri-08-00-en.pdf>.

²⁸ VCLT, art. 60(1).

²⁹ Oslo I, art. V.

³⁰ U.N. OFFICE FOR THE COORDINATION OF THE HUMANITARIAN AFFAIRS (OCHA), *Occupied Palestinian Territory, The Barrier Route in the West Bank* (Jul. 2011), https://www.ochaopt.org/sites/default/files/ocha_opt_west_bank_barrier_route_update_july_2011.pdf.

³¹ IMEU, EXPLAINER: ISRAEL'S WEST BANK WALL (Jul. 3, 2024), <http://imeu.org/article/israels-west-bank-wall>.

³² *Wall Advisory Opinion* (2004), para. 145.

³³ OFFICE OF THE U.N. HIGH COMMISSIONER FOR HUMAN RIGHTS, STATE OF PALESTINE: ISRAELI SETTLEMENTS IN THE OCCUPIED PALESTINIAN TERRITORY, INCLUDING EAST JERUSALEM, AND IN THE OCCUPIED SYRIAN GOLAN (Mar. 2024), <https://www.ohchr.org/sites/default/files/2024-03/Palestine-March2024.pdf>

in support of the settlement project.³⁴ Most recently, Israel’s plan for full annexation, promulgated by Minister Bezalel Smotrich in June 2024, encompasses about 60% of the West Bank.³⁵ This plan seeks to accelerate the expansion of Israeli settlements in the West Bank, which, as the ICJ has noted in its most recent Advisory Opinion in 2024, has already led to the expropriation of one-third of the land in the West Bank.³⁶

(c) *A discriminatory system of international criminal jurisdiction in Palestine would contravene international law principles and core objectives of the Rome Statute.*

17. There can be no serious dispute as to whether the Court may exercise territorial jurisdiction over acts committed in the State of Palestine. Rather, the challenge to this Court’s jurisdiction asks it to discriminate in its application of jurisdiction based on the nationality of the alleged perpetrators of crimes, thus creating impunity for war crimes and crimes against humanity committed by Israeli citizens against Palestinians.

18. VCLT Article 31(3)(c) requires that “any relevant rules of international law applicable in the relations between the parties”³⁷ be taken into account when interpreting treaties.

19. The ICJ affirmed in its 2024 Advisory Opinion on the Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory that “the Oslo Accords cannot be understood to detract from Israel’s obligations under the pertinent rules of international law applicable in the Occupied Palestinian Territory.”³⁸ In other words, any bilateral agreement must conform to binding rules of international law. One such rule is non-discrimination based on any protected ground, including race and nationality, in the application of international criminal law.³⁹

20. The State of Palestine, by becoming a State Party, “accepts the jurisdiction of the Court with respect to crimes referred to it in Article 5.”⁴⁰ This was argued by the Prosecution in

³⁴ THE PLATFORM – ISRAELI NGOS FOR HUMAN RIGHTS, STATE OF THE OCCUPATION, YEAR 57: A JOINT SITUATION REPORT (Jun. 2024), <https://www.phr.org.il/wp-content/uploads/2024/07/State-of-the-Occupation-Report-2024.pdf>.

³⁵ Peter Beaumont, *Israeli far-right minister speaks of effort to annex West Bank*, THE GUARDIAN (Jun. 24, 2024) <https://www.theguardian.com/world/article/2024/jun/24/israeli-far-right-minister-bezalel-smotrich-annex-west-bank>; Qassam Muaddi, *Israel’s leaked plan for annexing the West Bank, explained*, MONDOWEISS (Jun. 27, 2024) <https://mondoweiss.net/2024/06/israels-leaked-plan-for-annexing-the-west-bank-explained/>.

³⁶ *Occupation* Advisory Opinion (2024), para. 120 (*see also* paras. 162-173 discussing Israel’s acts of annexation). The ICJ had earlier found Israel’s construction of the separation Wall and policy of settlement in Palestine to constitute annexation. *Wall* Advisory Opinion (2004), paras. 121-22.

³⁷ VCLT, art. 31(3)(c); *Oil Platforms (Islamic Republic of Iran v. United States of America)*, para. 41, Judgment, 2003 I.C.J. 161 (Nov. 6). *See also* Antonio Cassese, *INTERNATIONAL LAW* (2005), p. 206 (“A court may be led to *construe* a treaty provision possessing a dubious scope in a sense consistent with a peremptory norm on the matter, rather than in any other sense.”); Alexander Orakhelashvili, *PEREMPTORY NORMS IN INTERNATIONAL LAW* (2006), p. 168 (“States cannot disregard peremptory norms through treaty interpretation...”).

³⁸ *Occupation* Advisory Opinion (2024), paras. 40, 102, 133, 263.

³⁹ Gregor Maučec, *Law Development by the International Criminal Court as a Way to Enhance the Protection of Minorities—the Case for Intersectional Consideration of Mass Atrocities*, 12 J. INT’L DISP. SETTL. 42 (2021).

⁴⁰ Rome Statute, art. 12(1).

2020⁴¹ and affirmed by the Chamber in 2021, which stated that “[o]nce the conditions for accession pursuant to article 125 of the Statute have been fulfilled, the effect of articles 12(1), 125(3) and 126(2) of the Statute, taken together, is that the Statute automatically enters into force for a new State Party. 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.”⁴²

21. The automatic enactment of article 12(1) upon joining the Court is necessary to uphold the fair and universal application of international criminal law;⁴³ and there can be no discrimination in its application on the basis of a protected ground, such as race or nationality, as affirmed by the Rome Statute.⁴⁴ The Court’s jurisdiction, in a similar manner to the function and purpose of other international tribunals and institutions, is not simply a transfer of jurisdiction and powers of States to the international tribunals or institutions.⁴⁵ Rather, States seek international bodies to protect them in precisely those instances in which they lack the power to do so in their national systems.⁴⁶ Indeed, most countries in the process of the negotiations of the Rome Statute have accepted the concept of automatic jurisdiction of the Court.⁴⁷ Such jurisdiction must be exercised in a non-discriminatory manner, and the Court cannot limit or withhold jurisdiction on the basis of the nationality of the accused.

22. Moreover, a system wherein Israelis cannot be held accountable for war crimes in Palestine would fundamentally risk the rights of protected people, in violation of the GCIV.⁴⁸

(d) Recognition of Palestine’s status as a State Party confers jurisdiction on the Court over Palestinian territory regardless of the allocation of internal enforcement power.

23. The exercise of jurisdiction at the national level is not required to establish jurisdiction at the international level.⁴⁹ It is important to distinguish between prescriptive jurisdiction, which refers to the capacity of a State to make law, and enforcement (specifically, adjudicatory) jurisdiction, which denotes the specific power to adjudicate within a

⁴¹ Prosecution Request 2020, paras. 103-106.

⁴² PTC-I Decision 2021, para. 102.

⁴³ William A. Schabas, *THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE* 351 (2016). *See also* Yassir Al-Khudayri, *Procedural Haze: The ICC’s Jurisdiction over the Situation in Palestine*, 20 *PALESTINE Y.B. INT’L L.* 117, (2020) [hereinafter Al-Khudayri 2020]; 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 *VAND. J. TRANSNAT’L L.* 443, 449 (2016) [hereinafter Stahn 2016].

⁴⁴ *See* Rome Statute, art. 21(3).

⁴⁵ Leila Nadya Sadat, *The Conferred Jurisdiction of the International Criminal Court*, 99 *NOTRE DAME L. REV.* 549, 572-77 (2024).

⁴⁶ *Id.* at pp. 605-606 (2024). On the universal nature of the ICC, *see* Carsten Stahn 2016, p. 447.

⁴⁷ William Schabas, *Article 12: Preconditions to the Exercise of Jurisdiction*, *THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE* 277, 280–82 (2010).

⁴⁸ GC IV, art. 47.

⁴⁹ Stahn 2016, p. 449; Rod Rastan, *The Jurisdictional Scope of Situations Before the International Criminal Court*, 23 *CRIM. L. F.* 1, 20 (2012).

territory.⁵⁰ While a bilateral agreement can affect adjudicatory jurisdiction, it does not alter prescriptive jurisdiction, which is based on international recognition of a State's authority over a territory or individuals within this territory.⁵¹

24. Even if a bilateral agreement restricts adjudicatory jurisdiction, such as the Oslo Accords purport to do, it does not imply a limitation on prescriptive authority.⁵² Palestine continues to retain its prescriptive jurisdiction, including the power to confer jurisdiction upon the Court. The Chamber endorsed this principle in its assertion of jurisdiction in Georgia, despite the presence of Russian military forces and Georgia's consequent inability to exercise jurisdiction over parts of its territory.⁵³ Similarly, the Appeals Chamber held in 2020 that the agreements entered into between Afghanistan and the United States "do not affect the question of jurisdiction in connection with the initiation of an investigation."⁵⁴

(e) The Court's exercise of jurisdiction over Israeli citizens meets the objectives of the Rome Statute and the principles of justice and accountability.

25. The Rome Statute affirms "that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation."⁵⁵ It is therefore imperative for the Court to "put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes."⁵⁶

26. The purpose of the Court's complementarity principle is to intervene in cases in which the exercise of a State Party's jurisdiction over any alleged perpetrators of international crimes is prevented, restricted, or circumscribed, as in the Palestinian territory.⁵⁷

27. The Preamble of the Rome Statute affirms that the Court shall exercise its functions in a manner that is "complementary to national criminal jurisdiction."⁵⁸ Any restriction or impediment to the full exercise of Palestinian jurisdiction over Israeli citizens suspected of committing war crimes or crimes against humanity, under the complementarity doctrine, is

⁵⁰ See Prosecution Request 2020, para. 184; Stahn 2016, p. 450.

⁵¹ Kai Ambos, Palestine, *UN Non-Member Observer Status and ICC Jurisdiction*, EJIL: TALK! (May 6, 2014); Stahn (2016), pp. 450-52; Al-Khudayri 2020, p. 130 (2020); Roger O'Keefe, *Response: "Quid," Not "Quantum": A Comment on "How the International Criminal Court Threatens Treaty Norms"*, 49 VAND. J. TRANSNAT'L L. 437-39 (2016).

⁵² Stahn 2016, pp. 450-52.

⁵³ Pre-Trial Chamber I, Decision on the Prosecutor's request for authorization of an investigation, ICC-01/15-12, paras. 544-63 (Jan. 27, 2016).

⁵⁴ Appeals Chamber, Judgment on the appeal against the decision on the authorization of an investigation in the Islamic Republic of Afghanistan, ICC-02/17-138, para. 44 (Mar. 5, 2020). See also, PTC-I Decision 2021, paras. 128-9.

⁵⁵ Rome Statute, Preamble.

⁵⁶ *Id.*

⁵⁷ See, generally, *Informal Expert Paper: The Principle of Complementarity in Practice (2003)*, ICC Legal Tools Database (Aug. 30, 2021), <https://www.legal-tools.org/doc/8mksx9/>.

⁵⁸ Rome Statute, Preamble.

precisely a condition that requires the Court's intervention. In 2020, the Prosecution recognized this, referencing Stahn's assertion that "[a]ny other conception would have detrimental consequences for international law."⁵⁹

28. Israel has consistently demonstrated unwillingness or inability to hold accountable Israeli citizens accused of committing crimes against Palestinians.⁶⁰ Successive Israeli governments have failed to investigate seriously the vast majority of documented incidents of grave crimes committed by Israeli forces in Palestinian territory. When investigations have been opened, prosecutions have often been delayed or resulted in inadequate sanctions, as documented extensively by Israeli, Palestinian, and international human rights organizations.⁶¹ No serving President, Prime Minister, or Minister has been indicted in Israel for serious crimes committed against Palestinians, despite ample evidence.⁶²
29. For decades, Palestinians have submitted complaints and requests for investigations to Israeli authorities in relation to crimes committed by Israeli forces against Palestinian

⁵⁹ Prosecution Request 2020, n. 582 (citing Stahn 2016, p. 450).

⁶⁰ The Israeli Civil Wrongs (Liability of the State) Law of 1952 exempts Israel from the responsibility of paying compensation for physical harms and property damages caused to Palestinians under certain circumstances. In 2009, Amendment No. 7 to the Law was passed exempting the State from providing compensation for damages that occurred in a conflict zone as a result of a combat operation, even if the harmed Palestinians did not participate in hostile activities against Israeli forces. For an English translation of the law, *see* <http://www.adalah.org/features/compensation/law-e.pdf>. *See also* Fady Khoury, *No Right to Compensation*, 87 ADALAH NEWSLETTER (2011), <https://www.adalah.org/uploads/oldfiles/newsletter/eng/nov11/Fadi%20no%20right%20to%20compensation%20English%2025.11.11.pdf>. In 2023, the Israeli Knesset (parliament) deliberated a proposed bill granting immunity to Israeli soldiers from prosecution for actions taken during military operation, but the bill was postponed. Carrie Keller-Lynn, *Security Forces' Immunity Bill Paused after AG Warns of Potential Prosecution Abroad*, TIMES OF ISRAEL (Mar. 12, 2023), <https://www.timesofisrael.com/security-forces-immunity-bill-frozen-after-ag-warns-of-potential-prosecution-abroad/>. Another bill was proposed and is in consideration at present, to grant immunity to soldiers for actions taken on October 7, 2024. Sam Sokol, *Otzma Yehudit Submits Bill to Grant Soldiers, Civilians Immunity for Actions Taken on Oct. 7*, TIME OF ISRAEL (Jul. 21, 2024), https://www.timesofisrael.com/liveblog_entry/otzma-yehudit-submits-bill-to-grant-soldiers-civilians-immunity-for-actions-taken-on-oct-7/.

⁶¹ *See, e.g.*, YESH DIN, THE GENERAL STAFF WHITEWASHING MECHANISM: THE ISRAELI LAW ENFORCEMENT SYSTEM AND BREACHES OF INTERNATIONAL LAW AND WAR CRIMES IN GAZA (May 2024), <https://s3.eu-west-1.amazonaws.com/files.yesh-din.org/FFAmechanism/YeshDin+Mechanism.pdf> [hereinafter YESH DIN 2024]; HUMAN RIGHTS WATCH, West Bank: Israeli Forces' Unlawful Killings of Palestinians (May 8, 2024), <https://www.hrw.org/news/2024/05/08/west-bank-israeli-forces-unlawful-killings-palestinians>; AL-MEZAN CENTER FOR HUMAN RIGHTS, 15 Years Since 'Operation Cast Lead': Israel's Perpetual Impunity Persists in the Face of Ongoing Genocide in Gaza (Oct. 19, 2022); B'TSELEM, FAKE JUSTICE: THE RESPONSIBILITY ISRAEL'S HIGH COURT JUSTICES BEAR FOR THE DEMOLITION OF PALESTINIAN HOMES AND THE DISPOSSESSION OF PALESTINIANS (Feb. 2019), https://www.btselem.org/sites/default/files/publications/201902_fake_justice_eng.pdf.

⁶² Only two serving Israeli officials – Benjamin Netanyahu and Moshe Katsav – were placed under criminal indictment on charges of corruption and sexual violence, respectively, unrelated to crimes in Palestine. (Stephanie Halasz and Tamar Michaelis, *Netanyahu Corruption Trial Resumes, as War Rages On*, CNN (Dec. 4, 2023), <https://edition.cnn.com/2023/12/04/world/netanyahu-corruption-trial-resumes/index.html>; Linda Gradstein, *Israeli President Faces Indictment on Charges*, NPR (Jan. 23, 2007), <https://www.npr.org/2007/01/23/6963951/israeli-president-faces-indictment-on-charges>).

civilians, with minimal or no success.⁶³ Specifically, the vast majority of complaints filed with the Israeli Attorney General and Military Attorney General alleging unlawful killings, targeting of civilians, and massive destruction of civilian objects during Israel's military operations in Gaza since 2014 (554 out of 664, or 81% of all complaints) were closed without criminal investigation.⁶⁴ Only three investigations produced indictments.⁶⁵

30. The UN High Commissioner of Human Rights drew attention to this accountability gap in his March 2016 report, emphasizing that no criminal indictments were issued against Israelis based on any filed complaints, including all of the cases submitted by human rights organizations concerning the Gaza War of 2014, except in one case of looting.⁶⁶
31. The Court has already found that it has jurisdiction over Palestine as a State Party, over several situations in Palestinian territory, and over perpetrators of crimes carried out in Palestine. A challenge to the exercise of this jurisdiction with respect to Israeli citizens cannot be considered by the Chamber at this stage. Under Article 19(2) of the Rome Statute, unless made by a State that has jurisdiction over the case, which here does not include the United Kingdom, a challenge can only be raised by a suspect and only after the issuance of an arrest warrant.⁶⁷ Even if the Oslo Accords could be invoked, neither they nor other restrictions on Palestine's ability to adjudicate civil or criminal matters in its territory is any impediment to the Court's issuance of arrest warrants against alleged perpetrators of international crimes in the territory of Palestine. The Court's intervention in Palestine could not be more compelling and urgent, as without it, perpetrators of serious war crimes and crimes against humanity would never be held accountable.

Salma Waheedi

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on behalf of the Applicants

Dated Monday, 5 August 2024
At London, United Kingdom

⁶³ For a list of complaints submitted to the Military Advocate General and the Attorney General regarding the 2014 Gaza War, along with their status, *see* ADALAH, ADALAH'S WORK ON 2014 GAZA WAR COMPLAINTS (March 2017), https://www.adalah.org/uploads/uploads/Gaza_Case_List_Updated_14_Mar_2017.pdf.

⁶⁴ Complaints are transferred to a mechanism for the investigations, officially known as the General Staff Mechanism for Fact-Finding Assessments (FFA), established in 2014. YESH DIN 2024, p. 6.

⁶⁵ Two were opened without the intervention of the FFA Mechanism. *Id.* at p. 34.

⁶⁶ U.N. HIGH COMMISSIONER FOR HUMAN RIGHTS, REPORT OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS ON THE IMPLEMENTATION OF HUMAN RIGHTS COUNCIL RESOLUTIONS S-9/1 AND S-12/1, U.N. DOC. A/HRC/31/40/ADD.1, para. 38 (Mar. 7, 2016), <https://unispal.un.org/pdfs/MBMarch2016.pdf>.

⁶⁷ Rome Statute, art. 19(2).