

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No. ICC-01/18

6 August 2024

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 by the Al-Quds Human Rights Clinic-
Al-Quds University

Source: Al Quds Human Rights Clinic- Al-Quds University

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

The Office of the Prosecutor

Counsel for the Defence

Mr Karim A. A. Khan KC

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants

(Participation/Reparation)

The Office of Public Counsel for

The Office of Public Counsel for the

Victims

Defence

States Representatives

Amicus Curiae

REGISTRY**Registrar****Counsel Support Section**

Mr Osvaldo Zavala Giler

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations

Section

Other

Introduction

1. On 5 February 2021, the Pre-Trial Chamber I of the International Criminal Court (ICC) decided that the state of Palestine is a “State Party to the statute.”¹ (Emphasis added)
2. The decision of the court ended the legal dispute, at least within the scope of the ICC, on whether Palestine is a state.²
3. The Chamber found that the jurisdiction of the Court extends to the Gaza Strip, as well as the West Bank including East Jerusalem. This has been decided despite the territorial fragmentation of the territory of the State of Palestine as provided in the Oslo accords.³
4. This decision on territorial jurisdiction was made pursuant to a request made by the then Prosecutor of the ICC, which led to the submission of amici curiae by both states and scholars. One of the main arguments utilized by those who consider that the International Criminal Court only has jurisdiction over Palestinians but not Israelis invoke the *nemo dat quod non habet* principle, which literally means “no one gives what they do not have.” This argument is based on the fact that the Palestinian Authority (PA), due to the Oslo Accords, does not exercise criminal jurisdiction over Israelis in light of the administrative classification and associated jurisdictional arrangements made in the Accords.
5. The Chamber briefly examined the potential impact of the Oslo Accords to its jurisdiction in Palestine, and found that the questions were beyond the scope of the issue that the court was examining, namely, the territorial jurisdiction in the State of Palestine, stating in Paragraph 129 “The Chamber finds that the arguments regarding the Oslo Agreements in the context of the present proceedings are not pertinent to the resolution of the issue under consideration, namely the scope of the Court’s territorial jurisdiction in Palestine”.
6. Despite ruling for territorial jurisdiction, the Pre-Trial Chamber of the ICC kept the door open to examine issues of jurisdiction when an arrest warrant or a summons to appear is requested.⁴

¹ Decision on the ‘Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine,’ No. ICC-01/18 (International Criminal Court 2021).

² Decision on the ‘Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine’ at 60.

³ Decision on the ‘Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine’ at 60.

7. In the current Amicus Curiae, we aim at demonstrating to the Pre-Trial Chamber I that the Oslo Accords do not affect the court’s personal jurisdiction over Israelis in the State of Palestine. Specifically, this Amicus Curiae will make three arguments. First, based on the principle of equal sovereignty of states, Palestine has an inherent criminal jurisdiction over its territory. Second, that Palestine, as a state party to the Rome Statute, accepts the jurisdiction of the Court as governed by its Statute and does not delegate jurisdiction to the Court. Third, that it is denying the exercise of jurisdiction contradicts the purpose and object of the Court, particularly when based on a legal principle that is derived from private property law, has a completely different purpose, and relies in its application to the situation of Palestine on illegal matters.

The Principle of Equal Sovereignty of States

8. Beyond the *nemo dat quod non habet* argument, those arguing against the jurisdiction of the ICC stated that they do not recognize Palestinian statehood. This is despite the ruling of the Court that Palestine is a State and enjoys the rights inherent to all states.
9. One of the main basic customary principles of public international law is that all states have sovereignty, and all states are equal in their sovereignty. As stipulated in the statute of the United Nations, “The Organization is based on the principle of the sovereign equality of all its Members.”⁵
10. In 1970, the UN General Assembly adopted a resolution that stressed, among other principles, the principle of sovereign equality. It stated that

*“All states enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature. In particular, sovereign equality includes the following elements: a) States are judicially equal; b) Each state enjoys the rights inherent in full sovereignty; [...]”*⁶

⁴ Decision on the ‘Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine’ paragraph 131.

⁵ United Nations, “Charter of the United Nations,” October 24, 1945, art. 2(1).

⁶ UN General Assembly, “Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, 24 October 1970, A/RES/2625(XXV)” (Adopted by General Assembly resolution 2625 (XXV) of 24 October 1970, 1970).

11. Similarly, the preamble of the Vienna Convention on the Law of Treaties of 1969 explicitly stresses the principle of sovereign equality among states.⁷
12. According to this principle, every state enjoys the same level of sovereign power, regardless of its economic, military, or political power.
13. The State of Palestine was declared on two historic occasions. First, in 1948, the first declaration of the state of Palestine was made in the Gaza Strip, claiming the whole territory of mandatory Palestine as the territory of the state of Palestine.⁸ On that occasion, a government known as the All Palestine Government assumed its responsibility in the Gaza Strip. In 1988, the State of Palestine was declared for the second time, but this time without determining the final borders, making reference to the UN Partition Resolution of 1947.⁹
14. The Oslo peace process came about after both declarations were made. Through this process, the Palestine Liberation Organization aimed at securing an end of the occupation of the Occupied Palestinian Territory of the Occupied Palestinian Territory at least within the boundaries of the 1967 occupation.
15. As a result of the failure of the peace process to bring about the end of the occupation, Palestine continued to pursue international justice through joining international organizations and acceding to treaties, including the Rome Statute.
16. Indeed, Israel and a number of other countries continue to reject recognizing the State of Palestine. However, it cannot be concluded that Palestine is not a full state only because the state that occupies its territory and its allies refuse to recognize it.
17. Since Palestine is a state recognized by the ICC, then it enjoys the same sovereign powers that any other state party to the ICC enjoys.
18. Any other conclusion will result in an absurd situation where states can lose their sovereignty as a result of an occupation, civil war, or even organized crime. Should the court accept this argument, it will create a precedent for ongoing or future occupations and limit its jurisdiction only in the territory of independent states.

⁷ United Nations, “Vienna Convention on the Law of Treaties” (Vienna, May 23, 1969), United Nations, Treaty Series, vol. 1155, p. 331.

⁸ A. Shlaim, “The Rise and Fall of the All-Palestine Government in Gaza,” *Journal of Palestine Studies* 20, no. 1 (1990): 37–53, <http://www.jstor.org/stable/10.2307/2537321>; Muhammad K. Al-Az’ar, *Hukumat 'Umum Filastin Fi Thikraha Al-Khamseen (The All Palestine Government in its Fiftieth Memory)* (Amman: Dar Al-Shurooq, 1999).

⁹ “Declaration of State of Palestine - Palestine National Council,” *Question of Palestine* (blog), November 15, 1988, <https://www.un.org/unispal/document/auto-insert-178680/>.

19. The power temporarily conferred upon by the State of Palestine through the Oslo process to Israel is a concession made by Palestine, resulting from its inability to exercise its adjudication and enforcement jurisdiction to prosecute Israeli suspects. However, Israel has not only shielded its citizens from Palestinian criminal jurisdiction since the beginning of the temporary 5-year transitional period that was prescribed in the Oslo process, but also has demonstrated its unwillingness to shoulder its responsibility of prosecuting Israelis, particularly vis-a-vis international crimes.
20. The conferring by Palestine of the responsibility on Israel to prosecute Israeli suspects does not suggest in any way that Palestine lacks the inherent jurisdiction over any crime that takes place in its territory. Furthermore, the occupying power is not sovereign in occupied territory, and therefore does not enjoy an inherent criminal jurisdiction in the occupied territory.
21. The conferring of adjudicative and enforcement jurisdiction to the occupying power can only be understood in the context of the inability of the State of Palestine to enforce law over Israeli citizens, whether they were soldiers, colonial settlers transferred illegally into the occupied territory by Israel, or military and political leaders. Moreover, this was intended to be a 5-year temporary transitional period, and not extend indefinitely for over 30 years.
22. Similarly, Israel has consistently demonstrated that it is unwilling to prosecute those in charge of war crimes, crimes against humanity, or genocide, not to mention many other acts criminalized under the laws of the State of Palestine.
23. Hence, the ICC remains to be the only venue for exercising jurisdiction over international crimes.
24. The right of protected persons within the territory of the State of Palestine, as defined by the International Court of Justice (ICJ), to be protected from international crimes is a peremptory norm of international law that overpowers any agreements between the occupying power and the representatives of the population under occupation. As rightly concluded by the ICJ in its recent advisory opinion that examined the legality of the Israeli occupation, apartheid and other practices in Palestine, Article 47 of the Fourth Geneva Convention protects the rights of protected persons in the occupied territory from a number of circumstances,¹⁰ including “any

¹⁰ Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, in, No. 186 (International Court of Justice July 19, 2024).

agreement concluded between the authorities of the said [i.e. occupied] territories and the Occupying Power.”¹¹

25. This is consistent with the practice of the ICC in other situations where states are unable to exercise their enforcement jurisdiction. For example, the ICC exercises its jurisdiction over members of the Lord Resistance Army in Uganda, despite the inability of the Ugandan government to enforce its jurisdiction in the territory controlled by the militia.¹²
26. Furthermore, even within the context of peace agreements and transitional justice, the United Nations incorporated a disclaimer into peace agreements that provided amnesties to persons accused of international crimes stating: “The United Nation does not recognize Amnesty for genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law.”¹³ Even with peace treaties leading to end conflicts permanently, the UN refrained from recognizing the instruments that shielded perpetrators of serious crimes from accountability.

Deriving of Jurisdiction under Rome Statute of the International Criminal Court

27. There are three statutory restrictions that determine the jurisdiction of the International Criminal Court. The first is subject-matter jurisdiction, as determined by Article 5 of the Rome Statute. The second is temporal jurisdiction, as determined by Article 11 of the Rome Statute. The third is personal jurisdiction, as determined by Articles 25 and 26 on individual criminal responsibility. The preconditions to exercise jurisdiction are met since the conduct in question occurred on the territory of a state party to the Rome Statute of the International Criminal Court, as per Article 12(2)(a).
28. The argument based on the *nemo dat quod non habet* principle, which argues that the ICC cannot prosecute Israelis because Palestine does not have jurisdiction over them to delegate to the Court is erroneous as it is based on a theory that the Court gains only the jurisdiction held by the State Party. In fact, State Parties do not delegate their jurisdiction to the Court, but rather accept the jurisdiction of the International Criminal Court, as per Article 12(1),

¹¹ “Convention (IV) Relative to the Protection of Civilian Persons in the Times of War” (Geneva, August 12, 1949), art. 47.

¹² ICC, “Situation in Uganda,” accessed August 6, 2024, <https://www.icc-cpi.int/situations/uganda>.

¹³ United Nations General Assembly, “Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General: Analytical Study on Human Rights and Transitional Justice” (A/HRC/12/18, August 6, 2009), para. 53.

which states “A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5”.

29. Palestine is a State Party to the Court and accepts its jurisdiction. This jurisdiction is not restricted by the Oslo Accords or any bilateral agreements or domestic legislation. Indeed, a State party cannot fragment the acceptance of the jurisdiction of the Court over some individuals and crimes over others. This is confirmed by the Pre-Trial Chamber of the Court, which stated in paragraph 102 in its ruling on February 5, 2023 “By becoming a State Party, Palestine has agreed to subject itself to the terms of the Statute and, as such, as the provisions therein shall be applied to it in the same manner than to any other State Party. Based on the principle of the 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 inherent effects over it.”
30. The use of the term “delegation” is both problematic and in fact dangerous. If the jurisdiction of the Court was derived from delegations by State Parties, this means that these States are amending and rewriting the Rome Statute without adhering to the followed procedures. The ICC is an independent body that is governed only by its Statute, as clearly captured in Article 1, which states “The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute”.
31. The Office of the Prosecutor of the Court has already argued on January 20, 2020, in paragraph 183 in her submission to the Pre-Trial Chamber, that she does not consider the limitations imposed by invoking the *nemo dat quod non habet* principle on prosecuting Israelis or crimes committed in Area “C” an obstacle to the Court’s exercise of jurisdiction.

The Purpose and the Object of the Rome Statute of the International Criminal Court

32. The purpose and the object of the ICC can be deduced from the preamble of the Rome Statute, which states “Affirming 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” and “Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes...”.

33. The reliance on the *nemo dat quod non habet* principle in determining the jurisdiction of the Court is erroneous on two main levels. First, the principle originates from private property law, which has a completely different purpose than public international law and particularly international criminal law. Second, and relatedly, the principle presupposes complete symmetry between domestic criminal jurisdiction and that of the Court,¹⁴ which is illogical and contravenes the purpose and the object of the Court. This is captured in that in situations of symmetry, the Court will be unable to prosecute perpetrators of international crimes if their domestic jurisdictions do not criminalize those crimes. For instance, transfer of civilian population of the occupying power to occupied territory, which is commonly referred to in the case of Palestine as settlement expansion, constitutes a war crime under Article 8(b)(viii). However, not only is this action not criminalized under Israeli law, but also is considered a national value that the state will encourage and promote.¹⁵ This supposition of symmetry negates the whole purpose and object of the Court of filling in accountability gaps and ending impunity.
34. The interpretation of the *nemo dat quod non habet* principle contravenes the principle *ex injuria jus non oritur*, which means “illegal acts do not create law”, a principle of high relevance and applicability to the mandate and purpose of the court. This is based on that the interpretation of the *nemo dat quod non habet* principle argues against jurisdiction of the Court over Israeli nationals because of the Oslo Accords, which gave criminal jurisdiction over Israelis to Israel instead of the PA. These arrangements were intended to be temporary, extending for a period of 5 years. The persistence of these arrangements continued due to Israeli occupation, colonization, and aggression, all of which are illegal. Colonization is prohibited under international law. Furthermore, law of armed conflict imposes strict obligations on the occupying power, which include prohibition of annexation of occupied territory, the temporary nature of an occupation, and the restriction of the role of the occupying power to the management of public order and civil life and doing so in good faith,

¹⁴ 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,” *Vanderbilt Journal of Transnational Law* 49 (2016): 443–454

¹⁵ Basic Law: Israel as the Nation-State of the Jewish People, Article 7.

and acting in the best interest of the people under occupation.¹⁶ The Israeli occupation's lack of adherence to these principles is evidenced in settlement expansion, land expropriation, deprivation of natural resources, home demolitions, residency revocation, and other measures of forced displacement, to name a few. The illegality of the occupation is corroborated by the recent ruling by the International Court of Justice.¹⁷ Hence, in determining that the Court does not have jurisdiction over Israelis based on the *nemo dat quod non habet* principle, the Court would not only be contravening the principle *ex injuria jus non oritur*, but also would be legalizing an illegal matter.

Conclusion

35. This Amicus Curiae presents arguments against the proclamation that the International Criminal Court does not have jurisdiction over Israeli nationals for crimes committed on the territory of the State of Palestine, based on the *nemo dat quod non habet* principle. Overall, it argues that the Oslo Accords do not restrict the jurisdiction of the State of Palestine nor the International Criminal Court in prosecuting Israelis for war crimes, crimes against humanity, and genocide, in Palestine.
36. Palestine is recognized as a State Party by the ICC, and thus enjoys the inherent equal sovereignty of States. Accordingly, Palestine has a right to accept the jurisdiction of the Court and request the prosecution of Israelis for war crimes, crimes against humanity, and genocide committed on the territory of the State of Palestine. The fact that it is unable to exercise its own jurisdiction over Israeli nationals as a result of the Oslo Accords should not be interpreted in a way that questions its right to full sovereignty over its territory or the inherent rights derived from this, including its full criminal jurisdiction over its territory.
37. Palestine conferring criminal jurisdiction to Israel over Israelis through the Oslo Accords was intended to be temporary, extending for a period of 5 years. While this arrangement and the persistence of the Israeli occupation limited Palestinian jurisdiction, it did not at any single point impact sovereignty of Palestine. Since 1) Israel was unwilling and continues to be unwilling to prosecute Israelis who commit international crimes and 2) the State of Palestine

¹⁶ Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, in, No. 186 (International Court of Justice July 19, 2024).

¹⁷ Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, in paragraph 285.

is unable to prosecute Israeli nationals, this leaves only the ICC as a pathway for international criminal justice for Palestinians.

38. Palestine accepts the jurisdiction of the ICC and does not delegate jurisdiction to the Court. The ICC is an international independent body that exercises its mandate, which is derived from the Rome Statute itself. The qualification of ICC jurisdiction is derived from its own Statute. The Oslo Accords do not restrict the jurisdiction of the Court, as determined by the Office of the Prosecutor of the ICC.
39. Based on the principle *ex injuria jus non oritur* and the illegality of the Israeli military occupation, it would be inconceivable to deny the exercise of jurisdiction based on a legal principle that is derived from private property law, has a completely different purpose and object than international criminal law, and relies in its application to the situation of Palestine on the persistence of occupation, colonization, and aggression, all of which are illegal.

Respectfully submitted this 6th day of August 2024.

Al-Quds Human Rights Clinic, Al-Quds University

Jerusalem, Palestine

Dr. Munir Nuseibah
Director, Al-Quds Human
Rights Clinic, Al-Quds
University

Osama Rishq
Legal Supervisor, Al-Quds
Human Rights Clinic, Al-
Quds University

Tamara Tamimi
Legal Researcher Volunteer,
Al-Quds Human Rights
Clinic, Al-Quds University