

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 6 August 2024

**Before: Judge Iulia Antoanella Motoc, Presiding Judge
Judge Reine Adélaïde Sophie Alapini-Gansou
Judge Nicolas Guillou**

SITUATION IN THE STATE OF PALESTINE

Public

***Amicus Curiae* Observations Pursuant to Rule 103 of the Rules of Procedure and
Evidence (Shahd Hammouri)**

Source:

Dr. Shahd Hammouri

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I. INTRODUCTION

1. These Observations are submitted under the Pre-Trial Chamber's (PTC) Order of 22 July 2024, and in accordance with Rule 103(1) of the Rules of Procedure and Evidence, in relation to '[w]hether the Court can exercise jurisdiction over Israeli nationals, in circumstances where Palestine cannot exercise criminal jurisdiction over Israeli nationals pursuant to the Oslo Accords'.¹

II. Observations

Relevance and Validity of the Oslo Accords

2. The Oslo Accords are not relevant to the question of the International Criminal Court's jurisdiction in the Situation in the State of Palestine. Separately, the International Court of Justice (ICJ) in an authoritative advisory opinion in *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory* considered '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. With these points in mind, the Court will take the Oslo Accords into account as appropriate'.² With the situation characterised in the occupied Palestinian territory (oPt) by the ICJ as one of unlawful presence of Israel, the Occupying Power,³ the context within which the Oslo Accords were concluded, as agreements between the Occupying Power and the occupied population, raises questions as to the relevance of the Oslo Accords.

The Oslo Accords are irrelevant to the Court's Jurisdiction in light of the fact that Israel has repudiated the Oslo Accords

3. The legal validity of the Oslo Accords can be challenged on grounds including duress, significant breaches, and illegality. The Oslo Accords ceased to be binding

¹ PTC I, Public redacted version of 'Order deciding on the United Kingdom's request to provide observations pursuant to Rule 103(1) of the Rules of Procedure and Evidence, and setting deadlines for any other requests for leave to file amicus curiae observations', ICC-01/18-173-Red, para. 1.

² *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, advisory opinion, 19 July 2024, para. 102.

³ *Ibid*, para. 285.

in 1999, when a permanent settlement was not reached as provided for in the agreement and have as such lapsed.⁴

4. Additionally, as far as the main object and purpose of the Accords concerns, the aim of the Interim Agreement on the West Bank and the Gaza Strip (Oslo II) was set out in its preambular clause, which read: ‘the aim of the Israeli-Palestinian negotiations within the current Middle East Peace process is, among other things, to establish a Palestinian Interim Self-Government Authority,’ to which ‘Israel shall transfer powers and responsibilities as specified in [the] Agreement’,⁵ and which would be established in the ‘Territory’ as defined under Annex IV of the Interim Agreement.⁶ Both parties agreed to refrain from ‘initiat[ing] or tak[ing] any step that will change the status of the West Bank and the Gaza Strip pending the outcome of the permanent status negotiations’.⁷ Further, that the Palestinian Council/Authority would enjoy ‘[a]ll civil powers and responsibilities, including planning and zoning, in Areas A and B.’⁸
5. Israel’s policies and practices in the oPt have included, *inter alia*, the continued construction of the wall in the West Bank and the expansion of its settlement enterprise, imposing a discriminatory planning and zoning regime in the West Bank, including the demolition of Palestinian property in Areas B and C, and transferring decision-making power over civil affairs in the West Bank (Area C) from the military to a civilian minister in the Ministry of Defence, including land

⁴ Palestinian Centre for Human Rights, Al-Haq, Al Mezan Center for Human Rights, AlDameer Association for Human Rights, Submission Pursuant to Rule 103, ICC-01/18-96, 16 March 2020, https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2020_01063.PDF.

⁵ Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, 28 September 1995, A/51/889, S/1997/357 (1997) (Oslo II), Article I(1).

⁶ Annex IV, "Protocol Concerning Legal Affairs," Article I "Criminal Jurisdiction" of the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, 28 September 1995, A/51/889, S/1997/357 (1997), which defined "Territory" as "[f]or 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".

⁷ Oslo II Accord, Article XXXI (7).

⁸ Oslo II Accord, Article XI(2)(b).

designations, planning and coordination of demolitions.⁹ Particularly, on 18 July 2024, the Israeli Commander of the Central Command signed two orders granting Israel enforcement, planning, and building authorities in territories transferred under the Oslo Accords to the Palestinian Authority, including demolishing Palestinian structures in Area B.¹⁰ Such policies and practices, per the ICJ, 'are designed to remain in place indefinitely and to create irreversible effects on the ground [... and] amount to annexation of large parts of the Occupied Palestinian Territory.'¹¹ Israel's violation of the prohibition of the acquisition of territory through use of force, a *jus cogens* norm, contradicts the object and purpose of the Oslo Accords, and further points to the fact that Israel does not consider itself bound by the agreement.

6. Even if the Chamber were to consider the Accords as a binding 'international treaty', Israel has repudiated the Accords per the provisions of the Vienna Convention on the Law of Treaties (VCLT), particularly the universal principle of *pacta sunt servanda*, which states: '[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.'¹² The requirement of good faith requires translating it into concrete steps by abstaining from creating *faits accomplis* on the ground.¹³ As Israel's above-mentioned policies and practices violate the requirement of good faith performance for the binding force of the treaty, the Oslo Accords hence lose their force. That Israel's annexationist policies and practices in the Palestinian territory constitute a material breach of the Oslo Accords, defeats its very object or purpose. Such annexationist practices constitute a clear repudiation

⁹ Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the occupied Syrian Golan: Report of the United Nations High Commissioner for Human Rights", UN doc. A/HRC/55/72 (1 February 2024), para. 7.

¹⁰ Peace Now, "Israeli Government Assumes Authorities of the Palestinian Authority in Area B", 19 July 2024, at: <https://peacenow.org.il/en/israeli-government-assumes-authorities-of-the-palestinian-authority-in-area-b>.

¹¹ *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion, 19 July 2024, para. 173.

¹² Vienna Convention on the Law of Treaties, adopted 27 Jan. 1980, 1155 U.N.T.S. 331 ("VCLT"), Article 26.

¹³ Separate opinion of Judge Al-Khasawneh in ICJ Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, para. 13.

of the agreement, as stipulated under Article 60 of VCLT.¹⁴ For these reasons, the Chamber should not exclude the Court's jurisdiction in the Situation in Palestine based on the Oslo Accords, which Israel has clearly repudiated and does not regard itself as bound by.

7. Regardless, the Oslo Accords, *prima facie* are neither relevant to the prescriptive jurisdiction of the State of Palestine, nor the exercise of the jurisdiction of the Court over Israeli individuals or individuals of any nationality, for crimes committed on the territory of the State of Palestine. Notably Article 12 of the Rome Statute does not provide any exception to the acceptance of the Courts jurisdiction for crimes committed on the territory of a State party to the Rome Statute. As such, Article 12 does not exempt the nationals of the Occupying Power from the criminal jurisdiction of the Court for crimes committed in the occupied territory of a State Party. Therefore, Article XVII(2)(c) and Annex IV, Article I(2)(2) of Oslo II, which states: 'Israel has sole criminal jurisdiction over [...] offenses committed in the Territory by Israelis,'¹⁵ could never have had the legal effect of excluding individuals of any given nationality from the jurisdiction of the ICC.
8. Even if the Chamber were to consider the Accords as binding, the Oslo Accords cannot exclude the Court's jurisdiction for the following reasons: (a) the Oslo Accords are special agreements that violate the Geneva Conventions; (b) occupation does not transfer sovereign powers, hence prescriptive jurisdiction, to the Occupying Power; and (c) the limitation of prescriptive jurisdiction of the State of Palestine breaches the right of self-determination of the Palestinian people.

The Oslo Accords cannot exclude ICC jurisdiction over Israeli Nationals as this would violate the Law of Occupation

(i) The Oslo Accords are special agreements that violate the Geneva Conventions

9. PTC I noted in its territorial jurisdiction decision that '[b]y becoming a State Party, Palestine has agreed to subject itself to the terms of the Statute and, as such, all the

¹⁴ VCLT, Article 60(1) and (3)(a) and (b).

¹⁵ Oslo II, Article XVII(2)(c) and Annex IV, Article I(2)(2).

provisions therein shall be applied to it in the same manner than to any other State Party.’¹⁶ With regard to the question at hand, Palestine should not be treated differently than other states parties. The particularity in the situation in Palestine that merits consideration is the unlawful presence by the Occupying Power in its territory — wherein the law of occupation applies — which does not bar the Court from exercising its jurisdiction, as explained below.

10. Under the law of occupation, the Oslo Accords constitute ‘special agreements’ that adversely affect the situation of protected persons, and restrict the rights which the Fourth Geneva Convention confers upon them.¹⁷ Article 7 of the Fourth Geneva Convention prohibits ‘special agreements’ between the Occupying Power and the representatives of the occupied population from restricting the rights conferred under the Geneva Conventions.¹⁸ Article 47 of the Fourth Geneva Convention states that: ‘Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any [...] agreement concluded between the authorities of the occupied territories and the Occupying Power.’¹⁹
11. The protected population under belligerent occupation have a right to seek justice before a national tribunal, which under the law of occupation, should be allowed to continue to function.²⁰ In addition, High Contracting parties to the Geneva Conventions, including the occupied State, are obliged ‘to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts.’²¹ The right to seek justice for international crimes is also an internationally recognised

¹⁶ 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, 5 February 2021, para. 102.

¹⁷ Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 42 United Nations Treaty Series 287 (“Fourth Geneva Convention”), Articles 7 and 8.

¹⁸ Fourth Geneva Convention, Article 7.

¹⁹ Fourth Geneva Convention, Article 47.

²⁰ Fourth Geneva Convention, Article 64;

Jean S. Pictet, *The Geneva Conventions of 12 August 1949 Commentary - IV Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 1958, Commentary on Article 64.

²¹ Fourth Geneva Convention, Article 146.

human right,²² which the Court should consider per Article 21(3) of the Rome Statute. Denying Palestine its criminal jurisdiction undoubtedly adversely affects the protected population. The Israeli judicial system has deprived Palestinians from seeking justice, even before their own courts,²³ and the structure of the Israeli investigative system precludes effective, independent and impartial investigations, and does not operate in accordance with the requirements of international law.²⁴ The result is that Israel is unable and unwilling to conduct genuine investigations and prosecutions.²⁵ This must be regarded as a factor that further necessitates the Court's exercise of jurisdiction in the Situation in the State of Palestine. Therefore, the Oslo Accords as special agreements that adversely affect the situation of protected persons should not be read to exclude the Court's jurisdiction.

(ii) Occupation does not transfer sovereign powers, hence prescriptive jurisdiction, to the Occupying Power

12. Since prescriptive jurisdiction lies with the sovereign power, an occupation cannot transfer sovereignty to the Occupying Power.²⁶ Interpreting the Oslo Accords as providing Israel with jurisdiction is tantamount to conferring upon it sovereign powers. As noted by James Crawford: '[i]n light of the principle of self-

²² The 1948 Universal Declaration of Human Rights, Article 8; The International Covenant on Civil and Political Rights, Article 2; UN General Assembly, "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious

Violations of International Humanitarian Law" (A/RES/60/147), adopted 15 December 2005.

²³ UN OHCHR, "Israel/Gaza: UN experts condemn destruction of judicial infrastructure, call for protection of justice operators", 16 April 2024.

²⁴ Al-Haq, "Four Palestinian Human Rights Organizations Submit File to the ICC Prosecutor: Israel is Unable and Unwilling to Conduct Genuine Investigations and Prosecutions", 23 December 2017; Al-Haq *et al.*, "Joint Submission to the United Nations Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967, Mr Michael Lynk, on Accountability", 31 May 2020.

²⁵ Adalah, "Gaza 2 Years On: Impunity Over Accountability

Israel's unwillingness to investigate violations of international law in the Gaza Strip", issued 28 August 2016; updated 14 March 2017, at: <https://www.adalah.org/en/content/view/9082>.

²⁶ Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion, 19 July 2024, para. 105.

determination, sovereignty and title in an occupied territory are not vested in the occupying power but remain with the population under occupation.’²⁷

13. Interpreting the Oslo Accords in a manner as to deprive Palestine of its prescriptive jurisdiction mistakenly presumes that the Occupying Power acts as the sovereign in the occupied territory. The misreading of the Oslo Accords, including Article I(1) of Oslo II, which reads: ‘Israel shall continue to exercise powers and responsibilities not so transferred [under the Agreement]’,²⁸ so as to confer Israel with the authority to exclusively exercise absolute prescriptive jurisdiction in the oPt,²⁹ is contrary to international law. Such an interpretation effectively misuses a special agreement in order to confer additional powers upon the Occupying Power, by assuming that the Occupying Power can grant or deny powers which it does not enjoy in the first place. In this regard, the doctrine *Nemo Dat Quo Non Habet* is central to understanding the ‘transfer of powers and responsibilities’ under the Oslo Accords. Additionally, the ICJ noted in its recent advisory opinion in relation to Article XVII, paragraph 4 (b), of the Oslo II Accord, that the terms of this provision ‘expressly state that Israel only retains the powers “necessary”, and at any rate “in accordance with international law”, including the law of occupation. It follows that Israel may not rely on the Oslo Accords to exercise its jurisdiction in the Occupied Palestinian Territory in a manner that is at variance with its obligations under the law of occupation’.³⁰
14. The sovereignty, and thus right to prescriptive jurisdiction, over the oPt has never vested in Israel, but with the Palestinian people, represented through the Palestinian

²⁷ James Crawford, “Opinion: Third Party Obligations with respect to Israeli Settlements in the Occupied Palestinian Territories”, 25 January 2012, para 29, at:

<https://www.tuc.org.uk/sites/default/files/tucfiles/LegalOpinionIsraeliSettlements.pdf>.

²⁸ Article 1(1), Oslo II.

²⁹ Malcolm N Shaw, Submission of Observations to the Pre-Trial Chamber Pursuant to Rule 103 (16 March 2020) ICC-01/18-75, para. 6.

³⁰ *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion, 19 July 2024, para. 140.

Liberation Organisation and State of Palestine.³¹ Failing to view the Oslo Accords through this lens/logic conforms with a colonialist vision.³²

15. While the Chamber is not asked to issue a determination on sovereignty in the oPt, the application of the law of occupation on this matter renders it clear that the Occupying Power has no sovereign power in the occupied territory.³³ Therefore, in relation to the Oslo Accords, prescriptive jurisdiction must be understood as always having been vested in the State of Palestine.

The limitation of prescriptive jurisdiction of the State of Palestine, by the (illegally present) Occupying Power breaches the right of self-determination of the Palestinian people

16. When deciding on the Prosecutor's request for a ruling on the Court's territorial jurisdiction in Palestine, PTC I held that '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.'³⁴ The Oslo Accords temporarily limited the (territorial) jurisdiction of the Palestinian Council (later Palestinian Authority) to the 'West Bank territory except for Area C which, except for the Settlements and the military locations, [...], and Gaza Strip territory except for the Settlements and the Military Installation Area' which 'will be gradually transferred to the Palestinian side in accordance with this Agreement'.³⁵ Despite this, PTC I, in its territorial jurisdiction decision, found that 'the Court's territorial jurisdiction in the Situation in Palestine extends to the territories occupied by Israel since 1967, namely Gaza and the West Bank, including East Jerusalem'. PTC I did not find the Oslo Accords binding to it in that matter. In

³¹ Al-Haq et al. "Review Paper: Arguments Raised in Amici Curiae Submissions in the Situation in the State of Palestine Before the International Criminal Court", 2020, para. 86, at: https://www.alhaq.org/cached_uploads/download/2020/05/07/response-to-amici-curiae-submissions-interactive-1588842475.pdf.

³² William Schabas, ICC-01/18-257, *Amicus curiae* observations of Prof. William Schabas pursuant to Rule 103, 30 July 2024, para. 8.

³³ *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion, 19 July 2024, para. 105.

³⁴ 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, 5 February 2021, para. 129.

³⁵ Annex IV, "Protocol Concerning Legal Affairs," Article I "Criminal Jurisdiction", Oslo II.

its determination, PTC I considered the right of self-determination when ruling on the territorial parameters of the Prosecutor's investigation.³⁶ PTC I was of the view that the right to self-determination amounts to an 'internationally recognized human [right]' within the meaning of Article 21(3) of the Statute,³⁷ as a source of applicable law before the ICC, which provides that '[t]he application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights'. In the same manner, the Court cannot curtail the exercise of its jurisdiction over Israeli nationals in the State of Palestine based on the provisions of the Oslo Accords, as this too, would serve to deny the right of the Palestinian people to self-determination and the prerogative of the State of Palestine to its unlimited prescriptive jurisdiction.

Complementarity

17. On a final note, the Chamber should not decline issuing arrest warrants per the application of the Prosecutor on the basis that an armed conflict is still ongoing in the State of Palestine, particularly in the Gaza Strip, on claims that the question of complementarity cannot be decided during an ongoing armed conflict given that investigations require time and care.³⁸ The fact that an armed conflict is ongoing in a situation before the Court does not preclude the Pre-Trial Chamber from exercising its powers to issue arrest warrants on the application of the Prosecutor. Article 58 of the Rome Statute does not provide for such grounds. Moreover, the practice of the Pre-Trial Chambers has seen arrest warrants issued in the Situation in Ukraine for example, where an armed conflict between the Russian Federation and Ukraine is ongoing. There, the Pre-Trial Chamber II issued warrants of arrest against four individuals on two different occasions.³⁹

³⁶ 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, 5 February 2021, para. 123.

³⁷ 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, 5 February 2021, para. 122.

³⁸ Stefan Talmon, @StefanTalmon (6:58 pm, July 17, 2024), at: <https://x.com/StefanTalmon/status/1813634369778512209>

³⁹ ICC, "Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova", 17 March 2023, at: <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and>; ICC, "Situation in

18. Given the gravity of the situation in Palestine, particularly in the Gaza Strip, in which the ICJ has found that Palestinians have a plausible right to be protected against genocide by Israel,⁴⁰ it is exactly at such times that the ICC must intervene and issue arrest warrants and proceed immediately to preserve the *raison d'être* of the Rome Statute — that is to put an end to impunity for the perpetrators of the most serious crimes of concern to the international community as a whole.⁴¹ This includes ending apartheid and genocide in the State of Palestine. In this vein the ‘Chamber could propose that the Prosecutor add charges of genocide and of the crime against humanity of apartheid’ and crimes underpinning the construction of settlements in the West Bank, including East Jerusalem to the arrest warrants against Prime Minister Benjamin Netanyahu and Minister of Defence Yoav Gallant.⁴²

III. Conclusion

19. In conclusion, the Oslo Accords do not exclude the Court’s jurisdiction over Israeli nationals for conduct that occurred on the territory of the State of Palestine. These observations stress on the futility of the current proceedings in light of the urgency and gravity of the situation in Palestine and the need to expedite proceedings to issue arrest warrants.

شهر الحموري

Respectfully Submitted,

Dr Shahd Hammouri

Dated this Tuesday, 6 August 2024

At Melbourne, Australia

Ukraine: ICC judges issue arrest warrants against Sergei Ivanovich Kobylash and Viktor Nikolayevich Sokolov”, 5 March 2024, at: <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-sergei-ivanovich-kobylash-and>.

⁴⁰ ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, 26 January 2024.

⁴¹ Rome Statute of the International Criminal Court (adopted 17 July 1998), Preamble.

⁴² William Schabas, ICC-01/18-257, *Amicus curiae* observations of Prof. William Schabas pursuant to Rule 103, 30 July 2024, para. 27; ICC-01/19-27, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar, 14 November 2014, paras. 126-130.