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Pénale
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**International
Criminal
Court**

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PRE-TRIAL CHAMBER I

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

SITUATION IN PALESTINE

Public

**Observations with respect to the Situation in Palestine on behalf of the European
Centre for Law & Justice**

Source: **European Centre for Law & Justice (ECLJ)**

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

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1. On 22 July 2024, the Pre-Trial Chamber granted the European Centre for Law and Justice's (ECLJ) request for leave to submit observations on "[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
2. According to the Court's jurisprudence regarding Article 19(1) of the Rome Statute,² particularly its 5 February 2021 Decision on the Prosecution's request for a ruling on the Court's jurisdiction in Palestine,³ the Pre-Trial Chamber is required to determine the Court's jurisdiction in resolving the application for arrest warrants.

Relevance and Validity of the Oslo Accords

3. The relevance and validity of the Oslo Accords is apparent from the Office of the Prosecutor's (OTP) discussion of the Oslo Accords in its request pursuant to Article 19(3) for a ruling on the Court's territorial jurisdiction. The OTP did not question the validity and applicability of the Accords.⁴ In fact, the OTP conceded that "the Oslo Accords have limited the [Palestinian Authority's (PA)] capacity to exercise criminal jurisdiction", albeit only the enforcement jurisdiction.⁵ The Chamber's decision to leave the question of jurisdiction based on the Oslo Accords open for a later stage also leads to the same conclusion.⁶ Moreover, in the Chamber's view, the Oslo Accords are relevant since it requested the Palestinian leadership to provide additional information regarding their statement of 19 May 2020 about ending agreements with the Israeli government.⁷
4. Further, any statements by the Palestinian leaders regarding the validity or revocation of the Oslo Accords cannot provide a legal basis for their exclusion from the proceedings before the Court. This is especially so because, in response to the Court's request for additional information regarding the above-mentioned statement about agreements with

¹ *Situation in the State of Palestine*, ICC-01/18, Decision on Requests for Leave to File Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence, (22 July 2024).

² *Prosecutor v. Harun*, ICC-02/05-01/07-1-Corr, Decision on the Prosecution Application Under Article 58(7) of the Statute, ¶ 13 (27 Apr. 2007). *See also*, *Prosecutor v. Dyilo*, ICC-01/04-01/06-1-Corr-Red, Decision on the Prosecutor's Application for a Warrant of Arrest, Article 58, ¶ 18 (10 Feb. 2006); *Situation in the Libyan Arab Jamahiriya*, ICC-01/11-12, Decision on the "Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah ALSENUSSI", ¶¶ 6-10 (27 June 2011).

³ *Situation in the State of Palestine*, ICC-01/18, Decision on the "Prosecution Request Pursuant to Article 19(3) for a Ruling on the Court's Territorial Jurisdiction in Palestine", ¶¶ 129-131 (5 Feb. 2021) [hereinafter "Jurisdiction Decision"].

⁴ *Situation in the State of Palestine*, ICC-01/18, Prosecution Request Pursuant to Article 19(3) for a Ruling on the Court's Territorial Jurisdiction in Palestine, ¶¶ 183-189 (22 Jan. 2020) [hereinafter "Prosecution Request"].

⁵ *Id.* at ¶ 184.

⁶ Jurisdiction Decision, *supra* note 3, at ¶¶ 129-131.

⁷ *Situation in the State of Palestine*, ICC-01/18, Order Requesting Additional Information, (26 May 2020).

Israel, the Palestinian representatives stated that “the Statement was not made as part of the record of these proceedings and did not in any way purport to, nor does it, legally affect the question presently before the Chamber”.⁸

5. Moreover, despite sporadic conflicting political statements made by Palestinian leaders, which the PA claims have no legal value,⁹ it is evident that the PA itself considers the Oslo Accords to have legal validity. This is manifested, for example, in a petition recently filed by the PA in the Israeli Supreme Court demanding that the State of Israel release funds it was supposed to transfer to the PA under the Interim Agreement signed in 1995 (Oslo II).¹⁰
6. Notably, several international powers were involved in co-sponsoring and signing the Oslo Accords¹¹ and United Nations bodies regularly cite to them.¹² This is indicative of their international legal weight.
7. From the above, there is no reason to call into question the validity and applicability of the Oslo Accords to the determination of the Court’s jurisdiction.

The ICC may not exercise jurisdiction over Israeli nationals because Palestine—considered to be a state for the strict purposes of the Rome Statute only—could transfer neither prescriptive nor enforcement jurisdiction over Israeli nationals to the ICC

8. The OTP requested, and the Pre-Trial Chamber allowed, Palestine to be considered a state for the “*strict purpose of the Statute only*”, despite the fact that the question of Palestinian statehood is not settled under international law.¹³ However, to argue that the Oslo Accords’ limitation on criminal jurisdiction only applies to the PA’s enforcement jurisdiction and not to its prescriptive jurisdiction¹⁴ requires going outside the scope of considering

⁸ *Situation in the State of Palestine*, ICC-01/18, The State of Palestine’s Response to the Pre-Trial Chamber’s Order Requesting Additional Information, ¶ 6 (4 June 2020).

⁹ *Id.*

¹⁰ H CJ 4395/24, *The Palestinian Authority v. The Knesset, Government of Israel & Attorney* (stating that “these monies must be transferred by the GOI to the PA after setting-off various expense payments, this in accordance with the agreed arrangements in the framework of the Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip, signed in Washington between the State of Israel and the Palestine Liberation Organization . . . on 28.9.1995” and “the Paris Economic Agreement”, which was incorporated into Oslo II as an annex). A copy of the original petition and a translation of its relevant portions are enclosed as an annexure.

¹¹ Co-sponsored by the United States and the Russian Federation; signed by the parties at Washington D.C.; witnessed by the United States, the Russian Federation, Egypt, Jordan, Norway, and the European Union; and submitted to the UN Secretary-General by the Permanent Observer of Palestine to the United Nations. *Israeli-Palestine Interim Agreement on the West Bank and the Gaza Strip*, Isr.-PLO., 28 Sept. 1995, [hereinafter *Oslo II*],

https://peacemaker.un.org/sites/peacemaker.un.org/files/IL%20PS_950928_InterimAgreementWestBankGazaStrip%28OsloII%29.pdf.

¹² See G.A. Res. 50/21, ¶ 5, 10 (12 Dec. 1995); G.A. Res. 59/121, ¶ 9 (10 Dec. 2004); G.A. Res. 64/125, ¶¶ 2, 49 (16 Dec. 2009); S.C. Res. 904, ¶ 11 (18 Mar. 1994); S.C. Pres. Statement 1996/3, ¶ 3 (22 Jan. 1996).

¹³ Jurisdiction Decision, *supra* note 3, at ¶ 24 (emphasis added).

¹⁴ Prosecution Request, *supra* note 4, at ¶ 184.

Palestine a state for the *strict purposes of the Rome Statute only*, something absolutely against the OTP's initial assertion regarding Palestine's limited, presumed status.

9. The very idea of considering Palestine a state for the strict purposes of the Statute only inherently limits extending the prerogatives of a sovereign state to a presumed state of Palestine. Prescriptive jurisdiction is an inherent power of an actual, sovereign state¹⁵ and, thus, cannot be applied to the presumed state of Palestine. In other words, the powers of the governing entity presumed to be a state for a specific purpose cannot be logically traced from the inherent powers generally ascribed to a sovereign state. The powers of the entity presumed to be a state must be traced from the source of that entity's creation.
10. The PA (i.e., the governing entity that attempted to accept ICC jurisdiction) was created by the Oslo Accords as an *interim governing entity* and not as a sovereign state. The bilateral agreements between Palestinian and Israeli leaders granted the PA specific powers to govern specific people in specific areas of the disputed territories, which may or may not become part of a future sovereign state of Palestine. At no stage prior to the Oslo Accords has there ever been a self-governing Palestinian entity. As such, the sole origin of the powers accorded to the PA is the Oslo framework and that alone.
11. Following the signing of Oslo II, Israel transferred some of its authority in the West Bank and the Gaza Strip to the PA in various matters for Areas A, B, and C.¹⁶ All the powers and responsibilities, including the exercise of jurisdiction (prescriptive or enforcement), transferred to the PA were granted by Israel through the Oslo Accords and Israel retained all powers not explicitly granted to the PA.¹⁷
12. Specifically, Israel did not transfer criminal jurisdiction over Israeli nationals to the PA. Oslo II explicitly retained jurisdiction over Israeli nationals in Israel's hands, stating that "Israel has *sole* criminal jurisdiction over . . . offenses committed in the Territory by Israelis".¹⁸ In fact, the PA's jurisdiction over Palestinians in certain matters is

¹⁵ "[J]urisdiction to make [prescriptive jurisdiction] and enforce [enforcement jurisdiction] criminal law is indisputably one of the quintessential aspects of state sovereignty". Michael A. Newton, *How the International Criminal Court Threatens Treaty Norms*, 49 VAND. J. OF TRANSNAT'L L. 371, 374 (2016), <https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=1162&context=vjtl>. See also Prosecution Request, *supra* note 4, at ¶ 184 n.580.

¹⁶ Oslo II, art. XI, *supra* note 11.

¹⁷ "Israel shall transfer powers and responsibilities as specified in this Agreement from the Israeli military government and its Civil Administration to the Council in accordance with this Agreement. Israel shall continue to exercise powers and responsibilities not so transferred". *Id.* art. I(1).

¹⁸ Oslo II, Annex IV – Protocol Concerning Legal Affairs, art. I, Isr.-PLO., 28 Sept. 1995 (emphasis added), <https://www.incore.ulster.ac.uk/services/cds/agreements/pdf/is18.pdf>.

circumscribed by the provisions of the Oslo Accords and, like the PA itself, did not exist beforehand.

13. Under the principle of *nemo dat quod non habet*, since no Palestinian governing entity having any form of inherent territorial jurisdiction existed prior to the Oslo Accords and the Oslo Accords did not transfer any form of criminal jurisdiction over Israeli nationals to the newly created governing entity (i.e., PA), the PA could not delegate or transfer that jurisdiction to the ICC.

Oslo II's jurisdictional limitation is not a matter of Article 98 cooperation and complementarity

14. The OTP's argument that the PA's conferral of "jurisdiction" to the Court does not affect the Court's "jurisdiction" but will only become an issue of cooperation (i.e., for the purposes of Article 98 of the Statute) or complementarity during the investigation and prosecution stages¹⁹ not only defies logic but also stems from the incorrect presumption of the PA's having inherent "prescriptive jurisdiction" and fails for the same reasons mentioned above.
15. Further, reading Oslo Accords' jurisdictional limitation to apply only in Article 98 situations conflates Article 98's non-jurisdictional state cooperation with Article 12's territorial jurisdiction. Article 12 deals with *territorial jurisdiction* ("State on the territory of which the conduct in question occurred"),²⁰ which the state must have in order to delegate or transfer to the Court. Article 98 deals with "cooperation" of a state in arrest and surrender when the Court's properly delegated jurisdiction already exists but the surrendering state may or may not have criminal jurisdiction.²¹ Under the Oslo Accords, the PA has no jurisdiction to prosecute Israeli nationals for committing alleged crimes "on the territory of" the presumed state of Palestine and, therefore, cannot delegate such jurisdiction to the Court under Article 12's transferred territoriality.²² Confusing Oslo II's language about "sole criminal jurisdiction" with Article 98 state cooperation is a misreading of the clear terms of Oslo II as well as the Rome Statute's Articles 12 and 98.
16. Moreover, to concede, on the one hand, that Oslo II's jurisdictional limitation does concern enforcement "jurisdiction"²³ (strictly a matter of Article 12 territorial jurisdiction), and, at

¹⁹ Prosecution Request, *supra* note 4, at ¶ 185.

²⁰ Rome Statute of the International Criminal Court art. 12(2)(a), *adopted* 17 July 1998, 2187 U.N.T.S. 3 (emphasis added).

²¹ *Id.* art. 98.

²² Newton, *supra* note 15, at 408.

²³ Prosecution Request, *supra* note 4, at ¶ 184.

the same time, claim that it is only relevant for the issues of cooperation (strictly a matter of Article 98) and complementarity²⁴ are illogical and contradictory positions and, thus, mutually exclusive. A state complying with Article 98 is not required to have territorial jurisdiction and, thus, the question of proper delegation of jurisdiction does not arise. But a state delegating jurisdiction to the Court under Article 12 must have territorial jurisdiction in the first place.²⁵

17. Finally, the Oslo Accords were signed by the parties in 1993 and 1995 and the Rome Statute was adopted in 1998 and came into force in 2002. Contrary to the OTP's implied assertion that the Oslo Accords *intended* to only cover Article 98 and complementarity situations, the comprehensive nature, explicit language, and timing of the Oslo Accords clearly show that their jurisdictional limitation cannot be viewed as only applicable in Article 98 and complementarity situations. The Oslo Accords' jurisdictional limitation must be read in accordance with the text, context, and object and purpose of the Oslo Accords, not the text, context, and object and purpose of the Rome Statute.

Finding of ICC jurisdiction would violate several fundamental principles of treaty interpretation

18. Holding that the PA is allowed to delegate jurisdiction over Israeli nationals to the ICC, while its founding instrument (Oslo II) states that the PA will not have criminal jurisdiction over Israeli nationals, would violate several basic international law principles of treaty interpretation.
19. First, this outcome violates *pacta sunt servanda*—the universal principle that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith”.²⁶ This principle is violated if parties are allowed to disregard bilateral treaty obligations by doing through a surrogate something they are not allowed to do themselves, or by simply entering into contrary agreements.
20. Second, such interpretation is contrary to the explicit terms, context, and object and purpose of the Oslo Accords.²⁷ The plain text of Oslo II clearly states that Israel retained *sole* criminal jurisdiction over Israelis. In addition to its plain meaning, the context and the

²⁴ *Id.* at ¶ 185.

²⁵ *See Situation in the Islamic Republic of Afghanistan*, ICC-02/17, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, ¶ 59 (12 Apr. 2019).

²⁶ Vienna Convention on the Law of Treaties, art. 26, *adopted* 27 Jan. 1980, 1155 U.N.T.S. 331 [hereinafter VCLT].

²⁷ *Id.* art. 31.

object and purpose of Oslo II also support that the word “sole” here would mean “entire”, i.e., the entire scope of criminal jurisdiction, which includes both prescriptive and enforcement jurisdiction. As such, the Chamber cannot bifurcate *sole* jurisdiction into prescriptive and enforcement jurisdiction and do what Oslo II did not intend to do.

21. Third, when interpreting a treaty, “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation” shall also be taken into account.²⁸ Here, the parties’ post-Oslo conduct supports that “sole” meant retaining jurisdiction in its entirety. See examples in footnotes.²⁹
22. Fourth, such an interpretation is also contrary to Article 30 of the Vienna Convention on the Law of Treaties (VCLT), which requires that “[w]hen the parties to the later treaty do not include all the parties to the earlier one, . . . as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations”.³⁰ Here, Israel is not a party to the Rome Statute and, thus, the Oslo Accords and not the Rome Statute are determinative. The Chamber would have to disregard Article 30 of the VCLT in order to find jurisdiction.
23. Moreover, the OTP’s argument that the PA may enter into contrary agreements with other entities because the Oslo Accords do not bar the PA from acceding to multilateral treaties³¹ as a general matter also violates basic rules of interpretation. The fact that a general term in the Oslo Accords allows the PA to accede to multilateral treaties does not obviate a specific provision limiting criminal jurisdiction. To accept the above argument, the

²⁸ *Id.*

²⁹ In February of 2016, several high-ranking members of Palestinian police forces met in Pasadena, CA, as part of a US State Department program to discuss difficulties in law enforcement. In attendance were Colonel Mohammad Sawalmeh (Palestinian Civil Police), Brigadier General Khaled Hammad (Palestinian Presidential Guard), Issam Alzir (Palestinian Presidential Guard), Lt Colonel Ghaleb Mosen (Palestinian Presidential Guard), Nasser Abuhanani (Palestinian Civil Police), and Lt Colonel Monhammad Yasin (Palestinian Presidential Guard). The group members expressed their frustrations regarding their inability to arrest Israelis in the West Bank, illustrating the Palestinian Authority’s complete lack of jurisdiction over Israelis. Eddie Rivera, *Palestinian Law Enforcement Officials Confer with Pasadena Police Oversight Group*, PASADENA NOW (18 Feb. 2016), <https://www.pasadenanow.com/main/palestine-law-enforcement-officials-confer-with-pasadena-police-group>. In May 2020, PA Police officers detained two Israeli archeologists after they refused to depart from their vehicles at a checkpoint. The Israelis were released to the IDF as the PA officers had no jurisdiction over them. David Israel, *PA Police Arrest Israeli Archeologists Investigating Arab Robberies in Northern Samaria Site*, JEWISH PRESS (4 May 2020), <https://www.jewishpress.com/news/eye-on-palestine/palestinian-authority/pa-police-arrest-israeli-archaeologists-investigating-arab-robberies-in-northern-samaria-site/2020/05/04/>. In December 2023, five residents of East Jerusalem were charged with robbing a police department in a West Bank settlement. The men, dressed in clothing similar to IDF soldiers and carrying fake guns and radios, stole firearms, vests, and other equipment. Despite the location and victims of the crime, the men were indicted in Jerusalem District Court, as the PA does not have jurisdiction over Israelis per the Oslo Accords. Shlomi Heller/Walla, *5 Fake IDF Soldiers Charged with Robbing Palestinian Police Station*, THE JERUSALEM POST (12 Dec. 2023), <https://www.jpost.com/israel-news/crime-in-israel/article-777662>.

³⁰ VCLT, art. 30, *supra* note 26.

³¹ Prosecution Request, *supra* note 4, at ¶ 184.

Chamber would have to hold that a general provision of a bilateral agreement allows breach of a specific term. The fundamental rules of treaty interpretation do not allow such inconsistent and absurd results. The correct interpretation of Oslo II's general provision is that the PA can enter into multilateral agreements as long as such agreements do not contradict specific provisions of Oslo II. The multilateral agreements the PA is allowed to enter into involve economic agreements; agreements with donor countries; cultural, scientific and educational agreements; and the like.³² To include agreements delegating (non-existent) criminal jurisdiction amounts to subverting key provisions in the Oslo Accords, which the fundamental rules of treaty interpretation do not allow.

The Oslo Accords do not contradict Article 7 of the Fourth Geneva Convention

24. The OTP argued that the Oslo Accords constitute “special agreements” prohibited under Article 7 of the Fourth Geneva Convention and, therefore, should not affect the Court’s jurisdiction.³³ To support this argument, the OTP stated that the Oslo Accords violate the Palestinian people’s right to self-determination.³⁴ Article 7 of the Fourth Geneva Convention states that “[n]o special agreement shall adversely affect the situation of protected persons . . . nor restrict the rights which [the Convention] confers upon them”.³⁵ Contrary to the OTP’s claim, by establishing the interim Palestinian self-government, the Oslo Accords, in fact, promote the Palestinian people’s right to self-determination.
25. Further, considering that the Oslo Accords were supported by the international community, have been endorsed by United Nations bodies,³⁶ and provide the only lawful route to conflict resolution (i.e., negotiations between the parties), they cannot be viewed as adversely affecting the situation of protected persons or restricting their rights conferred by the Geneva Conventions. Precluding the PA’s criminal jurisdiction (and the delegation thereof to the Court) over Israeli nationals does not adversely affect the situation of protected persons. Israel’s robust legal system already provides a remedy for potential violations of the Geneva Conventions. Furthermore, the UN Security Council may at any time refer the matter to the ICC when no jurisdiction exists under Article 12 of the Rome

³² Oslo II, art. IX(5)(a)-(b), *supra* note 11.

³³ Prosecution Request, *supra* note 4, at ¶¶ 186-188.

³⁴ *Id.* at ¶ 187.

³⁵ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 7, *adopted* 12 Aug. 1949, 75 U.N.T.S. 287.

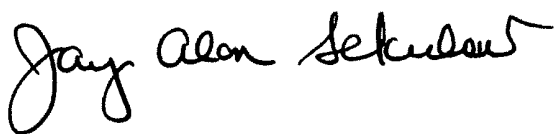
³⁶ *See* G.A. Res. 50/21, ¶ 5, 10 (12 Dec. 1995); G.A. Res. 59/121, ¶ 9 (10 Dec. 2004); G.A. Res. 64/125, ¶ 2, 49 (16 Dec. 2009); S.C. Res. 904, ¶ 11 (18 Mar. 1994); S.C. Pres. Statement 1996/3, ¶ 3 (22 Jan. 1996).

Statute. Jurisdiction may not be exercised, however, by misinterpreting bilateral agreements between the parties.

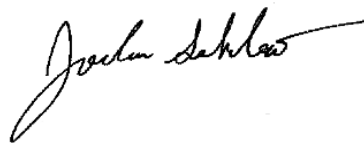
Conclusion

26. The PA had no authority to delegate jurisdiction over Israeli nationals to the ICC for alleged acts committed in the Gaza Strip or the West Bank because the PA had no inherent legal jurisdiction in any part of the territory of the Mandate for Palestine, and the Oslo Accords explicitly preclude any form of criminal jurisdiction to the PA over Israeli nationals. To interpret the Oslo Accords any other way would result in the violation of multiple international law rules of treaty interpretation.
27. For this reason, and because Israel is not a State Party to the Rome Statute, the ICC has no jurisdiction over Israeli nationals.
28. Should the Chamber allow oral submissions on this issue, the ECLJ respectfully requests leave to participate.

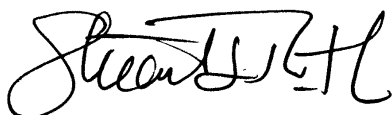
Respectfully submitted this 31st day of July 2024.



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