

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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PRE-TRIAL CHAMBER I

**Before: Judge Péter Kovács, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Reine Adélaïde Sophie Alapini-Gansou**

SITUATION IN THE STATE OF PALESTINE

Public

Request for Leave to File Submissions Pursuant to Rule 103

Source: Professors Asem Khalil & Halla Shoaibi

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

The Office of the Prosecutor

Ms Fatou Bensouda, Prosecutor
Mr James Stewart, Deputy Prosecutor

Counsel for the Defence

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

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REGISTRY

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Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Mr Philipp Ambach, Chief

Other

I. INTRODUCTION

1. Pursuant to the Order setting the procedure and the schedule for the submission of observations,¹ we, Halla Shoaibi and Asem Khalil, hereby ask leave to submit written observations, in our name alone, on the Prosecution's request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine.²

II. BACKGROUND AND EXPERTISE

2. I am Asem Khalil, a Professor of Public Law at Birzeit University, Palestine. I have been a member of the Faculty of Law and Public Administration since 2006. I teach international law, human rights law, and comparative constitutional law. I have published extensively in these areas of the law. A list of Khalil's publication can be accessed via the University's website:
https://www.birzeit.edu/sites/default/files/staff-attachments/ak_selected_publications_feb_2020.pdf
3. Halla Shoaibi is Assistant Professor of International Law at Birzeit University, Palestine. I have been a member of the Faculty of Law and Public Administration since 2014. I teach international law, international criminal law and human rights law.

III. SUMMARY OF ARGUMENTS

4. We request to make submissions in support of the Prosecutor's conclusion that the Oslo Accords do not bar the exercise of the Court's jurisdiction, especially in Area C. Specifically, we propose to address the following three points: (1) The absence of enforcement jurisdiction does not mean the absence of prescriptive jurisdiction; (2) a

¹ Order setting the procedure and the schedule for the submission of observations, ICC-01/18-14, 28 January 2020 ("Order").

² Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine, ICC-01/18-12, 22 January 2020 ("Request").

special agreement cannot be concluded in violation of a peremptory norm; and (3) that the obligation to prosecute a grave breach under the Geneva Conventions takes priority over other conflicting obligations which arises out of a bilateral treaty.

5. *First*, it is our submission that any determination on the ability of an entity to delegate jurisdiction must be primarily based on an objective assessment of the status of the territory.³ That being said, we aim to explain that where a territory is occupied, it is important to differentiate between *de jure* jurisdiction and *de facto* jurisdiction. The law of occupation is premised on the understanding that while the displaced sovereign loses *de facto* sovereignty, they retain *de jure* sovereignty, and the occupying power serves only as an administrator of the occupied territories.⁴ Sovereignty remains with the occupied state (i.e. state of Palestine). In light of this, an occupied state retains its prescriptive jurisdiction despite being prevented from materially exercising its enforcement jurisdiction. A bilateral agreement giving another state the exclusive enforcement jurisdiction in a certain territory or over their nationals does not imply that the state has given up its prescriptive jurisdiction.
6. Furthermore, given that the Oslo Accords did not deal with the issue of international crimes, the Accords cannot be interpreted as having intended to prevent the State of Palestine from delegating jurisdiction over such crimes to an international court.
7. *Second*, we submit that the Oslo Accords have been concluded in violation of a peremptory norm. The illegal Israeli occupation violates the right of the Palestinian people to self-determination. Specifically, we submit that the continuing existence and expansion of settlements in the West Bank has a detrimental effect on a wide range of Human Rights in Palestine, including on the right to self-determination. In light of this, and the fact that the continued existence of settlements in the West Bank is one

³ Yuval Shany, In Defence of Functional Interpretation of Article 12(3) of the Rome Statute; A Response to Yael Ronen, *Journal of International Criminal Justice* 8 (2010), 329-343.

⁴ Yoram Dinstein, “the main pillar of the law of belligerent occupation is embedded in the maxim that the occupation does not affect sovereignty. The displaced sovereign loses possession over the occupied territory *de facto* but retains title *de jure*.” p.49.

of the main reasons driving the existence of occupation, interpreting the Oslo Accords as preventing the State of Palestine from delegating its criminal jurisdiction in Area C, would inevitably preserve the continued violation of a peremptory norm; the right to self-determination, which would result in the Oslo Accords being concluded in violation of a peremptory norm.⁵

8. *Third*, Palestine has an obligation to prosecute grave breaches under the Geneva Conventions and customary international law (such as settlements),⁶ which in many instances amount to violations of *erga omnes* norms. Given its occupied status, Palestine cannot fulfil this obligation, therefore, it delegated its jurisdiction to the ICC to prosecute. Accordingly, arguing that Oslo Accords prevents Palestine from delegating jurisdiction would create a conflict between Palestine's obligations under the Geneva Conventions and the Oslo Accords. In light of this, we submit that the obligation of Palestine to prosecute grave breaches takes precedence over any conflicting obligation that arises out of a bilateral treaty. Effectively setting aside any argument on the non-ability of Palestine to delegate jurisdiction to the ICC due to its obligations under the Oslo Accords.

9. Notably, the idea that an Occupying State concludes a treaty with the Occupied State restricting the Occupied State from bringing cases and prosecuting the Occupying State's agents, military personnel and/or citizens, is not new in the international legal realm.⁷ For example, the United States restricted Iraqi jurisdiction against its military

⁵ Article 53 of the Vienna Convention on the Law of Treaties 1969.

⁶ Protocols Additional to the Geneva Conventions of 12 August 1949, art. 85(4)(a). *See also* Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Volume 1: Rules, 2009, Rule 158.

⁷ Valentina Azarov & Chantal Melonie, *Disentangling the Knots: A Comment on Ambos' "Palestine, 'Non-Member Observer' Status and ICC Jurisdiction"*, EJIL: TALK! (May 27, 2014), <http://www.ejiltalk.org/disentangling-the-knots-a-comment-on-ambos-palestine-non-member-observer-status-and-icc-jurisdiction/> ("It established the Palestinian Authority (PA) as an interim Palestinian local government, and merely granted the PA limited capacities in specific domains of daily life. It is common practice for the foreign military government of an occupied territory to avail itself of a form of local government by the inhabitants of the occupied territory").

personnel in Iraq.⁸ Hence, the inclusion of such provision in the Oslo Accords is not a novel notion, such limitations in treaties should be viewed as a consequence of occupation, and such consequences shall not go beyond its original purpose that is to prohibit *national* occupied courts from prosecuting occupier's agents, and not to prevent delegation of jurisdiction.

10. We anticipate requiring no more than 30 pages to elaborate on the above submissions.

IV. CONCLUSION

11. For the foregoing reasons, we request that the Chamber grant us leave to make the proposed submissions in accordance with the Chamber's Order and rule 103 of the Court's Rules of Procedure and Evidence. We believe these submissions will assist this Chamber in its deliberation of the Prosecution's Request.



Asem Khalil, Professor of Public Law at Birzeit University

Dated this 13th of February 2020

At Ramallah, Palestine.

⁸ See Article on Jurisdiction in the Agreement Between the United States of America and the Republic of Iraq On the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq, U.S.-Iraq, art. 12, Nov. 17, 2008, *available at* <http://www.state.gov/documents/organization/122074.pdf>; *accord* Treaty of Mutual Cooperation And Security, U.S.-Japan, Jan. 19, 1960, 11 U.S.T. 1633 (entered into force June 23, 1960) (instituting the similar restrictions on Japanese Jurisdiction over United States Nationals).