

**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 (John Quigley)

Source: Professor John Quigley

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I. INTRODUCTION

1. These Observations are made under the Chamber’s Order of 22 July 2024, in which it granted leave. The question raised originally by the Government of the United Kingdom did not involve any challenge to the Court’s jurisdiction over acts committed in the territory of the Gaza Strip. The question, rather, was the exercise of that jurisdiction with respect to nationals of Israel. This question is said to arise under the Interim Agreement on the West Bank and the Gaza Strip, of 28 September 1995.¹ As these Observations will show, no reason arises from the Interim Agreement to forgo issuance of arrest warrants for nationals of Israel for acts committed in Palestine, including in the Gaza Strip. Nine considerations are key. First, Israel did not consider the Interim Agreement binding. Second, the Interim Agreement has been repudiated by Israel. Third, the Interim Agreement's provision on nationals of Israel (Annex IV) has no purpose, given the illegality of Israel's occupation. Fourth, Rome Statute Article 12 is not premised on delegation from a state party. Fifth, Annex IV limited only adjudicatory authority, not the prescriptive jurisdiction over crime of the State of Palestine.

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

Sixth, the Interim Agreement limited only the Palestinian Council, not the State of Palestine as such. Seventh, Annex IV actually recognized the jurisdiction of Palestine to prescribe norms of criminal law. Eighth, Annex IV could not nullify the Geneva Convention obligation to prosecute "grave breaches." Ninth, in the Situation in Afghanistan, another chamber found an agreement that similarly protected foreign nationals to be irrelevant.

2. By way of preface, the relevant portions of the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip are found in its Annex IV, "Protocol Concerning Legal Affairs," Article I "Criminal Jurisdiction."

1.

a. The criminal jurisdiction of the Council 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.

b. In addition, the Council has criminal jurisdiction over Palestinians and their visitors who have committed offenses against Palestinians or their visitors in the West Bank and the Gaza Strip in areas outside the Territory, provided that the offense is not related to Israel's security interests.

c. Notwithstanding the provisions of subparagraph a. above, the criminal jurisdiction of each side over offenses committed in Area B shall be in accordance with the provisions of paragraph 2.a of Article XIII of this Agreement.

d. Individuals arrested by the Palestinian Police in Area B for public order and other reasons shall be tried before the Palestinian courts, provided that these courts have criminal jurisdiction.

2. Israel has sole criminal jurisdiction over the following offenses:

1. offenses committed outside the Territory, except for the offenses detailed in subparagraph 1. b above; and

2. offenses committed in the Territory by Israelis.

3. In exercising the criminal jurisdiction of their courts, each side shall have the power, inter alia, to investigate, arrest, bring to trial and punish offenders.

The argument for an ICC exclusion for crimes in Palestine by nationals of Israel was based on section 2: "Israel has sole criminal jurisdiction over the following offenses . . . offenses committed in the Territory by Israelis." The "Council" was the Palestinian Council created by

the Palestine Liberation Organization under the Interim Agreement to exercise authority in sectors of the Palestine territory during an "interim" period leading to a peace treaty. Under a final clause, negotiations for a peace treaty "will commence as soon as possible, but not later than May 4, 1996." The Interim Agreement thus was to be of short duration.

II. OBSERVATIONS

A. The Interim Agreement was not deemed binding by Israel

3. Even though the Interim Agreement was a valid treaty, it was not so considered by Israel. As a result, the Chamber should not allow it to be invoked to exclude liability for nationals of Israel. The full title of the Interim Agreement was "Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip." This was the title given to the document by the parties. No names of states appear in the heading, because Israel would not use the term "Palestine." Israel did not regard Palestine as a state, hence would not make an agreement with Palestine. That reluctance left it unclear with whom Israel conceived it was agreeing.

4. Israel failed to register the Interim Agreement. Treaties entered into by UN members must be registered, under UN Charter Article 102.

1. Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.
2. No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations.

Had Israel, as a UN member, considered the Interim Agreement to be a treaty, it would have been required to register it with the UN Secretariat. The Government of Israel and the PLO did send the text of the Interim Agreement to the Secretariat, where it was given a General Assembly document number (A/51/889) and a Security Council document number (S/1997/357). But it was not registered, and as a result was not published by the Secretariat in the United Nations Treaty Series. The fact that Israel did not register the document an additional indication that Israel did not regard it as a treaty.

5. A further indication that Israel did not regard the Interim Agreement as a treaty is provided by Israel's reaction when Palestine accedes to multilateral treaties to which Israel is a party. In these situations, Israel routinely informs the depositary agency that it deems Palestine's adherence invalid on grounds that Palestine lacks legal capacity to enter into treaties. Israel files depositary notifications, in which it recites: "'Palestine' does not satisfy the criteria for statehood under international law and lacks the legal capacity to join the aforesaid Convention both under general international law and the terms of bilateral Israeli-Palestinian agreements."² Israel places the word "Palestine" in quote marks to show that it does not regard Palestine as a state.

6. Since Israel did not consider that it was contracting with a state, it could not have considered that it was undertaking any obligation at the international level. Israel, moreover, gave no indication in the document itself, or outside the document, that it regarded it as falling under the law of any domestic jurisdiction, as can be done in an agreement between a state and a non-state entity. As a result, from Israel's standpoint, the Interim Agreement fell under no system of law. Agreements depend for their validity on either international law or the law of some domestic jurisdiction. Israel did not recognize any system of law under which the Interim Agreement might fall for its validity.

B. The Interim Agreement has been repudiated by Israel

7. The Interim Agreement, as indicated, was in any event time limited. As its title implied, the Interim Agreement was in the nature of a *modus vivendi* pending negotiations for a peace treaty. It was a set of confidence-building measures to facilitate a peace treaty that was soon to follow. A preamble clause explained this purpose and the time limit: The clause read: "Reaffirming their understanding that the interim self-government arrangements contained in this Agreement are an integral part of the whole peace process, that the negotiations on the permanent status, that will start as soon as possible but not later than May 4, 1996, will lead to the implementation of Security Council Resolutions 242 and 338, . . ."

² See, e.g., C.N.617.2019.TREATIES-XI.B.19 (Depositary Notification, 11 December 2019) Convention on Road Traffic.

8. To date, now nearly thirty years later, no peace treaty has been concluded. What is more, there is no prospect that a peace treaty will be concluded. Negotiations were held in 2000 but ended in failure.³ Israel's Government, moreover, has publicly stated that it does not plan to negotiate the anticipated peace treaty.⁴ It has taken action to put the West Bank sector of Palestine under its administrative structure.⁵ Israel's Knesset has enacted legislation opposing Palestine statehood. It passed the following language: "The Knesset of Israel firmly opposes the establishment of a Palestinian state west of the Jordan (river). The establishment of a Palestinian state in the heart of the Land of Israel would pose an existential danger to the State of Israel and its citizens, perpetuate the Israeli-Palestinian conflict and destabilize the region."⁶

9. The Interim Agreement was concluded on the premise that peace negotiations would follow. As result of the actions of Israel as one of the two parties, the rationale for an interim agreement no longer exists. When the reason for a treaty vanishes, the treaty itself loses force. Several doctrines of law explain how a treaty in such a situation can lose legal force. One is referred to as "desuetude"⁷ The underlying purpose no longer obtains. Where a situation changes such as to deprive a treaty of its purpose, it loses force under a doctrine titled "obsolescence."⁸ This doctrine is sometimes described as a change of circumstances, in the Latin "rebus sic stantibus."⁹

10. This Chamber need not determine whether the Interim Agreement does or does not bear present legal force. That is not the issue before the Chamber. It is, however, a document that one cannot say with confidence that both parties regarded as legally binding. Palestine regarded it as an agreement between two states. Israel did not, and then retracted any intent it may have had to conclude peace. It would not be legally tenable to base a denial of arrest warrants against nationals of Israel on an agreement that Israel never regarded as binding and has since repudiated.

³ Institute for Middle East Understanding, What Happened at Camp David in 2000?, 28 October 2005.

⁴ Netanyahu vows no Palestinian state, *Times of Israel*, 18 January 2024.

⁵ Smotrich recorded telling supporters of secret government plan to change way Israel governs West Bank, *Times of Israel*, 21 June 2024.

⁶ Andrew Carey, CNN, Israeli lawmakers vote overwhelmingly against Palestinian statehood, challenging US policy, 18 July 2024.

⁷ Arnold McNair, *Law of Treaties* 516-518 (1961)

⁸ Id. 746-749.

⁹ Id. 746.

C. Annex IV has no purpose, given the illegality of Israel's occupation

11. Annex IV in any event has no purpose, because Israel's presence in Palestine territory is unlawful. The International Court of Justice has found that Israel's presence in Palestine is in violation of *jus ad bellum*, hence unlawful. It has said, specifically, that

that the State of Israel's continued presence in the Occupied Palestinian Territory is unlawful;

that the State of Israel is under an obligation to bring to an end its unlawful presence in the Occupied Palestinian Territory as rapidly as possible;

that the State of Israel is under an obligation to cease immediately all new settlement activities, and to evacuate all settlers from the Occupied Palestinian Territory.¹⁰

While an advisory opinion does not require compliance in the sense of UN Charter Article 94 since no state is a "party," the statement of legal consequences is authoritative. The very presence of the nationals of Israel who were the subject of Annex IV is unlawful.

12. No nationals of Israel can lawfully be present in Palestine territory if they are there under the auspices of the Government of Israel as part of the occupation, whether as military personnel, administrators, settlers or otherwise. Annex IV was aimed at the situation of such nationals of Israel. As a result of the fact that their presence is unlawful, there is no longer any purpose to the provision of Annex IV that deals with criminal offenses they might commit. Adjudicatory criminal jurisdiction for crimes such persons might commit lies with Palestine.

D. Rome Statute Article 12 is not premised on conferral from a state party

13. Even if Annex IV were presently valid, it does not support an exception for nationals of Israel for crimes in Palestine. To repeat the key provision of Annex IV, it is Article 1, section 2, which reads:

Israel has sole criminal jurisdiction over the following offenses; . . . (b) offenses committed in the Territory by Israelis.

¹⁰ Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, adv. op., 19 July 2024.

The argument against issuance of arrest warrants for nationals of Israel is based on a theory that the Court, under Rome Statute Article 12, gains only the jurisdiction held by the state party. Article 12, however, is not based on such a theory.¹¹ All that matters under Article 12(2) is that the territory in question is that of a state party. Under Article 12(3), it is sometimes said that the state thereby “confers” jurisdiction on the ICC. However, Article 12(3) reads that a state “accept[s] the exercise of jurisdiction by the Court with respect to the crime in question. By its Article 12(3) declaration, Palestine was putting the situation on a par with what would obtain under Article 12(2)(a) had it been at the time a party to the Rome Statute. Article 12(2)(a) provides for jurisdiction if “the State on the territory of which the conduct in question occurred” is a party. Any limitations on a state’s criminal law jurisdiction are not relevant.

E. The Interim Agreement impacted only adjudicatory authority

14. Even on a theory of conferral, however, the Interim Agreement did not limit Palestine in a way that would impact the authority of the Court. In the Interim Agreement, the limits applied only to adjudication. Palestine did not forgo its capacity to prescribe criminal law rules applicable in its territory. Palestine retained full prescriptive powers. The only limitation it accepted in the Interim Agreement was from adjudicating the guilt of nationals of Israel in courts operating under the auspices of the Palestinian Council. The distinction is between prescriptive power and adjudicatory authority. The former remains “even where the state undertakes not to exercise it in certain circumstances.”¹² Hence, even if one takes Article 12 as a devolution of power from a state party, Palestine retained a prescriptive power that could be taken by the Court. Limitations on enforcement authority undertaken by bilateral treaty do not derogate from the prescriptive power of a state. A state may agree by bilateral treaty not to enforce its criminal laws in a particular locality, e.g., inside a military base operated by another state under a Status of Forces agreement. Such an arrangement, it has been rightly said, “limits the exercise of jurisdiction” by the territorial state, but without “extinguish[ing] the prescriptive jurisdiction.”¹³ The territorial state would not thereby prevent the Court from prosecuting nationals of the state operating the military base. If an Article 5 act is committed

¹¹ Leila Nadya Sadat, *The Conferred Jurisdiction of the International Criminal Court*, 99 *Notre Dame Law Review* 548 (2023).

¹² Roger O’Keefe, ‘Quid,’ not ‘Quantum’: A Comment on ‘How the International Criminal Court Threatens Treaty Norms,’ 49 *Vanderbilt Journal of Transnational Law* 433, at 437 (2021).

¹³ Carsten Stahn, Response: The ICC, Pre-Existing Jurisdictional Treaty Regimes, and the Limits of the *Nemo Non Dat Quod Non Habet* Doctrine, 49 *Vanderbilt Journal of Transnational Law* 443, at 446 (2021).

inside a military base by a national of a foreign army, the Court would have jurisdiction under Article 12.

F. The Interim Agreement limited only the Palestinian Council.

15. Annex IV cannot in any event be taken to limit the prescriptive authority of Palestine over crime in its territory, given that the Interim Agreement applied only to the Palestinian Council. Annex IV did not relate to the prescriptive or adjudicatory power of Palestine as a state. The Council was an entity set up by the PLO, in the capacity of the latter as Government of Palestine, for the limited purpose of administering a portion of Palestine territory for an interim period to be followed by negotiations for a peace treaty. The limitation on adjudicating crimes committed by nationals of Israel applied only to the Council and to the courts operating under its auspices. Annex IV, therefore, did not purport to remove the adjudicatory authority of Palestine. Article XXXI, para. 6, of the Interim Agreement in fact accepted Palestine's position that it is a state with all the powers held by states. Palestine's powers derive from its statehood, not from the Interim Agreement. It is only the Council for which agreement was made that its judicial institutions would not adjudicate crimes by nationals of Israel. Palestine as a state was not so constrained. The political parties that make up the PLO re-confirmed on 23 July 2024 that the PLO is the Government of the State of Palestine, signing in China a document titled "Beijing Declaration."¹⁴ Palestine's obligation, in particular, as a party to the Geneva Convention relative to the Protection of Civilian Persons in Time of War, to prosecute "grave breaches" fell outside Annex IV.

G. The Interim Agreement accentuated Palestine's prescriptive power

16. Annex IV shows the opposite from what is being claimed. There would have been no need for it if nationals of Israel did not fall under the prescriptive jurisdiction of Palestine. Israel needed the exemption from adjudication of cases of nationals of Israel precisely because those cases did fall under the both the prescriptive and adjudicatory jurisdiction of Palestine. The Annex IV provision in fact highlighted the fact that acts committed by Israel nationals fell under the criminal jurisdiction of Palestine. By this provision, it was agreed that

¹⁴ Laurie Chen and Nidal Al-Mughrabi, China brokers Palestinian unity deal, but doubts persist, Reuters, 23 July 2024. Beatrice Farhat, 'The Beijing Declaration,' China brokers Hamas-Fatah unity deal: What we know, Al-Monitor, 23 July 2024.

cases arising from such acts would not be adjudicated in courts operating under the Council. Far from showing that Palestine lacked prescriptive jurisdiction, Annex IV affirmed Palestine's prescriptive jurisdiction.

H. The Interim Agreement could not nullify Geneva Convention obligations

17. Any cession of adjudicatory authority for criminal prosecutions would violate *jus in bello* obligations. Under Article 47 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, "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."¹⁵ One of the "benefits" of the Geneva Convention is that "protected persons" have national courts to protect them from crime. Under Article 64 of the Geneva Convention, "The penal laws of the occupied territory shall remain in force," and "the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws." Inhabitants of Gaza are thus entitled, as "protected persons," to the continued functioning of the courts of Palestine. The cession of adjudicatory authority to Israel for crimes was thus inconsistent with humanitarian law. Israel, moreover, has impeded the operation of the courts of Gaza, in particular, by destroying, in a controlled demolition, the Justice Palace, which housed the Supreme Court in Gaza.¹⁶ This demolition was carried out by the Israel Defense Force, which operates under the authority of the two nationals of Israel who are the subject of the instant requests for arrest warrants. Any reading of Annex IV that would prevent Palestine from carrying out its obligations under the Geneva Convention is invalid. Annex IV cannot be read to nullify Geneva Convention obligations.

I. In the Situation in Afghanistan, PTC II found such an agreement irrelevant

18. Another chamber has already found authority to entertain charges against persons who were covered by an agreement similar to Annex IV. In 2019, the Prosecutor sought to investigate "members of the US armed forces" for war crimes allegedly committed in

¹⁵ Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 42 United Nations Treaty Series 287 (Palestine accession 2 April 2014).

¹⁶ Emanuel Fabian, Footage shows IDF demolishing main Hamas courthouse in Gaza, Times of Israel, 4 December 2023 Watch the moment when Gaza Supreme Court was blown to smithereens, Hindustan Times, 4 December 2023 (both include video of demolition).

Afghanistan; the Prosecutor sought authorization under Article 15 from Pre-Trial Chamber II.¹⁷ She did so despite the fact that at the time of the crimes in question, US forces operated in Afghanistan as part of an International Security Assistance Force (ISAF), established by the UN Security Council.¹⁸ ISAF had an agreement with the Interim Administration of Afghanistan providing, “The ISAF and supporting personnel, including associated liaison personnel, will under all circumstances and at all times be subject to the exclusive jurisdiction of their respective national elements in respect of any criminal or disciplinary offences which may be committed by them on the territory of Afghanistan.”¹⁹ This agreement was noticed to the United Nations as a Security Council document (S/2002/117). Pre-Trial Chamber II did not find the ISAF agreement a bar to proceedings against US personnel. It found “a reasonable basis to believe that the contextual elements of both crimes against humanity and war crimes are satisfied in respect of the alleged events.”²⁰ Appeal was taken when that Chamber denied authorization on other grounds, but the Appeals Chamber did not question the Chamber's finding that the ISAF agreement was no bar.²¹

III. CONCLUSION

19. In light of the above considerations, no reason arises under the Israeli-Palestinian Interim Agreement to refuse arrest warrants for nationals of Israel for crimes in Palestine.



John Quigley

Dated this 29th day of July 2024
At Columbus, Ohio

¹⁷ 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, para. 24, 12 April 2019

¹⁸ UNSC Res. 1386, 20 December 2001. Congressional Research Service, U.S. and Coalition Military Forces in Afghanistan: Issues for Congress, updated 27 March 2007

¹⁹ ISAF-Afghanistan, Military Technical Agreement, annex A, para. 3, 14 January 2002.

²⁰ 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, para. 66, 12 April 2019.

²¹ Judgment on the appeal against the decision on the authorization of an investigation into the situation in the Islamic Republic of Afghanistan, ICC-02/17-138, para. 44, 5 March 2020.